

violating the Commission's rules governing disclosure. The matter was filed with the Commission after the King County Superior Court referred certain issues of fact and law to the Commission under the doctrine of primary jurisdiction.

- 4 **PROCEDURAL HISTORY.** The Complainants initiated this proceeding on November 17, 2004, requesting the Commission resolve the issues referred by the King County Superior Court. On December 15, 2005, AT&T filed a Motion for Summary Determination, and on December 16, 2004, AT&T filed a response to the formal complaint.
- 5 In Order No. 01 in this proceeding, entered on February 22, 2005, the Commission adopted a procedural schedule to address AT&T's motion, including a schedule for discovery. On March 18, 2005, the Commission entered Order No. 02, a protective order governing both confidential and highly confidential information.
- 6 On April 21, 2005, T-Netix filed with the Commission a Motion for Summary Determination and a Motion to Stay Discovery, requesting the Commission dismiss the Complainants' claims against T-Netix for lack of standing. AT&T joined in T-Netix's motions.
- 7 After the parties filed numerous responsive pleadings, additional motions, affidavits and declarations, Administrative Law Judge Ann E. Rendahl heard oral argument on June 28, 2005, on T-Netix's motions and other motions pending in the proceeding. Following oral argument, Judge Rendahl issued an oral ruling denying T-Netix's motions. On July 18, 2005, Judge Rendahl entered Order No. 05, denying T-Netix's motions.
- 8 On July 27, 2005, T-Netix filed with the King County Superior Court a Motion to Lift the Stay of Proceedings to allow the court to address certain issues of fact and law, and a Motion for Summary Judgment concerning the issue of Complainants' standing. Judge Ramsdell of the King County Superior Court entered an Order Lifting Stay on August 16, 2005, and will hear argument on the Motion for Summary Determination on August 26, 2005.

- 9 On July 28, 2005, T-Netix filed a Petition for Administrative Review and Motion for Stay, seeking interlocutory review of Order No. 05 and requesting the Commission stay further proceedings in the docket, including discovery, until the Commission resolves T-Netix's petition.
- 10 On July 28, 2005, T-Netix also filed with the Commission a Motion for Summary Determination.
- 11 During a scheduling conference held on July 29, 2005, the parties agreed to a revised procedural schedule, including a schedule allowing for additional discovery on AT&T's motion for summary determination, and discovery on T-Netix's motion for summary determination.
- 12 On August 15, 2005, Complainants filed with the Commission a response to T-Netix's petition and motion.
- 13 **APPEARANCES.** Jonathan P. Meier, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Sandra Judd and Tara Herivel (Complainants). Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters and David C. Scott, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Glenn B. Manishin and Stephanie Joyce, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

MEMORANDUM

- 14 **A. T-Netix's Petition for Interlocutory Review.** T-Netix seeks review of Judge Rendahl's decision in Order No. 05 denying T-Netix's motion for summary determination. Specifically, T-Netix objects to conclusions of law in Order No. 05 finding that the Commission lacks independent jurisdiction to address issues of standing when reviewing issues referred by a court under the primary jurisdiction doctrine. T-Netix requests the Commission vacate Order No. 05 and direct Judge Rendahl to address the merits of T-Netix's motion for summary determination.

- 15 T-Netix seeks interlocutory review pursuant to WAC 480-07-810(2)(c) asserting that review is necessary “to avoid the substantial effort and expense of continuing to adjudicate a claim for which Complainants have no standing.” *T-Netix’s Petition*, ¶ 3. T-Netix also asserts that review is necessary to address a fundamental question regarding the Commission’s authority. *Id.*
- 16 T-Netix asserts that persons must have standing before bringing a complaint before the Commission. T-Netix relies on two Commission decisions addressing standing, *Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Supplemental Order (July 12, 2002), and *United & Informed Citizen Advocates Network v. US West*, WUTC Docket No. UT-960659, Second Supplemental Order (Sept. 17, 1997). T-Netix asserts that “the Commission has no obligation to review complaints of those to whom no remedy is owed.” *T-Netix Petition*, ¶ 24. T-Netix objects to Conclusions of Law No. 3, 5 and 6, of Order No. 05, which address the nature of Commission authority in a primary jurisdiction referral. T-Netix asserts that the Commission should not treat cases initiated by primary jurisdiction referral differently than other types of complaints.
- 17 T-Netix also objects to Conclusion of Law No. 2, which finds that the Complainants’ affidavits and pleadings raise questions of material fact about the role of T-Netix and AT&T in connecting the calls in question. T-Netix asserts that Judge Rendahl erred in not addressing or deciding the issue of standing. *Id.*, ¶¶ 26-28. T-Netix further asserts that Judge Rendahl erred in finding material issues of fact on the role of T-Netix and AT&T, a core issue on the merits, rather than addressing or deciding the issue of Complainants’ standing. *Id.*, ¶¶ 29-31. T-Netix requests the Commission direct Judge Rendahl to consider the substantive issues in T-Netix’s motion for summary determination. *Id.*, ¶ 32.
- 18 Complainants request the Commission deny interlocutory review, asserting that it would be wasteful for the Commission to address on appeal an issue that T-Netix has also raised in King County Superior Court. *Complainants’ Response*, ¶ 29. Complainants assert that T-Netix invites the possibility of inconsistent results by asking the Commission and Superior Court to decide the same issue. *Id.*, ¶ 25.

19 Complainants assert that Judge Rendahl correctly decided the extent of the Commission's jurisdiction in a primary jurisdiction referral, *i.e.*, a primary jurisdiction referral does not invoke the independent jurisdiction of an agency. *Id.*, ¶¶ 30-35, citing *International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.*, 483 F.2d 384, 401 (3d Cir. 1973).

20 Although Complainants assert that the Commission need not consider the merits of the standing issue to deny T-Netix's petition, the Complainants assert they have presented facts demonstrating standing to pursue their claims. *Id.*, ¶¶ 36-49. Complainants also dispute T-Netix's claim that Judge Rendahl did not reach the standing issue. Complainants assert that Judge Rendahl held that questions of material fact exist with respect to the role of T-Netix and AT&T in connecting inmate calls that Complainants received. *Id.*, ¶¶ 3, 14-16.

21 **Discussion and Decision.** The Commission retains discretion whether to accept interlocutory review of its decisions. *See WAC 480-07-810(2)*. Pursuant to WAC 480-07-810(2), the Commission may accept review of interlocutory orders if it finds that:

(a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;

(b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or

(c) A review could save the commission and the parties substantial effort or expense or some other factor is present that outweighs the costs in time and delay of exercising review.

We find interlocutory review appropriate under WAC 480-07-810(2)(c) and accept interlocutory review of Order No. 05. The extent of the Commission's jurisdiction under a primary jurisdiction referral is an issue of first impression before the Commission. Resolving the issue outweighs the costs in time and

delay and will provide additional information to the Superior Court as it addresses the issues the parties have raised in that forum. Further, the parties and the Commission may save substantial effort or expense if discovery is rendered unnecessary by a decision on Complainants' standing.

- 22 As to the merits of T-Netix's petition for interlocutory review, we deny T-Netix petition for review of conclusions of law relating to the nature of Commission jurisdiction in a primary jurisdiction referral, and whether Order No. 05 erred in not resolving the issue of Complainants' standing.
- 23 This proceeding was originally filed with the King County Superior Court, not the Commission. King County Superior Court Judge Learned referred several discrete issues of fact and law to the Commission under the doctrine of primary jurisdiction, given the Commission's expertise in regulating Operator Service Providers, or OSPs. The Superior Court retained jurisdiction over the remainder of the proceeding.
- 24 The doctrine of primary jurisdiction arises when a court determines an issue in dispute before the court is within the special competence of an administrative body, and the integrity of a regulatory scheme requires that the court refer the issue to the administrative agency administering the scheme. *See In re Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d 297, 301-302, 622 P.2d 1185 (1980); *see also United Contractors Ass'n*, 483 F.2d at 400. A court will stay the proceedings before it and refer the issue to the agency, while retaining jurisdiction over the dispute itself and all other issues in dispute. *See* 2 R. Pierce, *Administrative Law Treatise*, § 14.1.
- 25 A primary jurisdiction referral does not invoke the agency's independent jurisdiction: The agency's jurisdiction is derivative of the court's. *United Contractors Ass'n*, 483 F.2d at 401. The doctrine of primary jurisdiction "'does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will initially decide a particular issue, not the question whether court or agency will finally decide the issue.'" *In re Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d at 301-302, *quoting* 3 K. Davis, *Administrative Law*, § 19.01 (1958). Thus, an agency does not have authority to

enter a binding or final order against the parties in a primary jurisdiction referral. *United Contractors Ass'n*, 483 F.2d at 401.

- 26 The primary jurisdiction referral from the King County Superior Court does not invoke the independent jurisdiction of the Commission. While the Commission may have statutory authority to decide the issues referred by the court, the Commission lacks independent jurisdiction to determine other issues retained by the court, including the issue of Complainants' standing. Whether Complainants have standing to bring the complaint should be addressed by the Superior Court, the court with jurisdiction to decide the issue. Before the Commission and the parties expend further resources in this matter, it is appropriate for the court to decide the standing issue.
- 27 We uphold Conclusions of Law No. 3, 5 and 6 in Order No. 05 concerning the issue of the nature of Commission authority in a primary jurisdiction referral. Because we find the Superior Court, not this Commission, must decide the issue of standing, we also find that Order No. 05 did not err in failing to resolve the issue of Complainants' standing.
- 28 **B. T-Netix's Motion to Stay Proceedings.** T-Netix joins with its petition for interlocutory review a motion to stay further proceedings in this docket. T-Netix asserts that the Commission may suspend the procedural schedule for good cause under WAC 480-07-385. *T-Netix Petition*, ¶ 41. T-Netix asserts that an order staying further proceedings is warranted as discovery is burdensome and may lead to disclosure of "highly-sensitive commercial and security information." *Id.*, ¶ 42. T-Netix asserts that the disclosure and dissemination of confidential information "carries risks," even though the Commission has entered a protective order in the proceeding. *Id.* T-Netix asserts that there is no deadline for resolving matters in this proceeding, and that no party will be prejudiced by holding discovery in abeyance while the Commission considers the petition. *Id.* T-Netix asserts that "there is no good reason ... to continue to engage in burdensome, expensive and potentially risky discovery" while the Commission considers the petition. *Id.*

29 Complainants oppose the request to stay all proceedings pending review of
T-Netix's petition, asserting that a stay would shut down pending discovery and
prejudice Complainants. *Complainants' Response*, ¶ 52.

30 **Discussion and Decision.** T-Netix fashioned its request for a stay of the
proceeding as a motion joined with its petition for interlocutory review. We
interpret T-Netix's pleading as a petition for interlocutory review of the decision
in paragraphs 45 and 78 of Order No. 05 denying T-Netix's Motion to Stay
Discovery. We grant T-Netix's petition for interlocutory review on the issue of
the stay of discovery and stay further proceedings in this docket until the King
County Superior Court resolves the standing issue.

31 We agree with T-Netix and AT&T that it would be burdensome, expensive, and a
waste of the parties' and Commission's resources to continue with discovery and
other procedural deadlines in this docket until the issue of standing is resolved.
The July 29, 2005, revised procedural schedule is stayed pending the King
County Superior Court's decision on Complainants' standing.

32 No party will be prejudiced by staying these proceedings until the court decides
the standing issue. It appears the standing issue may be decided relatively soon
and there is no pressing need to continue with the procedural schedule in this
docket. This matter was pending for over four years before it was referred to the
Commission.

FINDINGS OF FACT

33 (1) Complainants Sandra Judd and Tara Herivel received inmate-initiated
collect calls and allege in a complaint filed in King County Superior Court
that they did not receive the rate disclosures for those calls required by the
Commission's rules.

34 (2) T-Netix, Inc., and AT&T of the Pacific Northwest, Inc., are classified as
competitive telecommunications companies under RCW 80.36.310-330.

- 35 (3) King County Superior Court Judge Learned ordered several issues of fact and law to be considered by the Washington Utilities and Transportation Commission through a primary jurisdiction referral.
- 36 (4) Order No. 05 entered in this proceeding on July 18, 2005, denied T-Netix's motions for summary determination and to stay discovery.
- 37 (5) On July 27, 2005, T-Netix filed with the King County Superior Court a Motion to Lift Stay and Motion for Summary Judgment on the issue of Complainants' standing. Judge Ramsdell entered an Order Lifting Stay on August 16, 2005, and will hear argument on the Motion for Summary Determination on August 26, 2005.
- 38 (6) On July 28, 2005, T-Netix filed with the Commission a Petition for Administrative Review and Motion to Stay Further Proceedings.
- 39 (7) On July 29, 2005, the Commission issued a notice of revised procedural schedule in the proceeding.
- 40 (8) On August 15, 2005, Complainants filed with the Commission a response to T-Netix's petition and motion.

CONCLUSIONS OF LAW

- 41 (1) The Commission retains discretion whether to allow interlocutory review of its decisions. *See WAC 480-07-810(2)*.
- 42 (2) Interlocutory review is appropriate under WAC 480-07-810(2)(c) to determine the extent of the Commission's jurisdiction under a primary jurisdiction referral, an issue of first impression before the Commission. Granting interlocutory review to reconsider the issue of a stay of discovery may also save the parties and the Commission substantial effort and expense.
- 43 (3) Where a court refers specific issues to an administrative agency under the doctrine of primary jurisdiction, the court will stay the proceedings before

it and refer the issue to the agency, while retaining jurisdiction over the dispute itself and all other issues in dispute. *See 2 R. Pierce, Administrative Law Treatise, § 14.1.*

- 44 (4) A primary jurisdiction referral does not invoke an agency's independent jurisdiction: The agency's jurisdiction is derivative of that of the court in which the matter is pending. *United Contractors Ass'n*, 483 F.2d 384, 401.
- 45 (6) The Commission lacks independent jurisdiction to determine whether the Complainants' have standing to bring their complaint: The King County Superior Court has jurisdiction and should decide that issue.
- 46 (7) Order No. 05 correctly states the law governing agency jurisdiction and authority in a primary jurisdiction referral.
- 47 (8) Order No. 05 did not err in failing to resolve the issues of Complainant's standing.
- 48 (9) Given the Complainants' claim has been pending for more than four years and the King County Superior Court has scheduled argument on the issue of Complainants' standing, no party will be prejudiced if the proceedings in this docket are stayed pending the court's decision on standing.

ORDER

THE COMMISSION ORDERS:

- 49 (1) T-Netix, Inc.'s, Petition for Interlocutory Review of Order No. 05 is accepted.
- 50 (2) T-Netix, Inc.'s Petition for Interlocutory Review of Conclusions of Law No. 2, 3, 5, and 6 of Order No. 05 is denied.

- 51 (3) T-Netix, Inc.'s, petition for interlocutory review of the decision in paragraphs 45 and 78 of Order No. 05, denying T-Netix, Inc.'s Motion for Stay, is granted. The procedural schedule in this docket is stayed pending the King County Superior Court decision on T-Netix, Inc.'s Motion for Summary Judgment.

Dated at Olympia, Washington, and effective this 18th day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner