

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

Network Essentials, LTD.

Complainant,

vs.

Grant County Public Utility District 2

Respondent.

Docket No.: UT-051602

Prehearing Conference Issues Proposal

The purpose of this Proposal is to assist the Commission and parties in formulating the issues in this case. Public Utility District No. 2 of Grant County Washington, proposes that the issues in this matter may be formulated as follows:

- 1) Whether the District's rate schedule is unduly or unreasonably discriminatory or preferential because the District does not charge its service provider customers for data transferred wholly within the District's own system?
- 2) Did the District provide SONET at Ethernet pricing only to certain and not to all ISPs?
- 3) Even though the rates charged NoaNet are the same as those charged to other District wholesale customers, are they unreasonably discriminatory or preferential in relation to NoaNet because of the District's membership in NoaNet or as a result of the August, 2003, agreement between the District and NoaNet?

4) If the District's rates are determined to be unduly or unreasonably discriminatory or preferential, is the sole remedy an order finding noncompliance with RCW 54.16.340 and setting forth the specific areas of apparent noncompliance?

The issues must generally be limited to whether the Public Utility District No. 2 of Grant County's rates, terms, and conditions are unduly or unreasonably preferential. The legislature has set forth very specific requirements related to Public Utility District's ("Districts") requirements allowing and related to provision of wholesale telecommunications services and facilities. In 2000, the state legislature expressly gave the Districts the authority to operate and maintain telecommunications facilities. The statute provides that

A public utility district . . . may construct, purchase, acquire, develop, finance, lease, license, handle, provide, add to, contract for, interconnect, alter, improve, repair, operate, and maintain any telecommunications facilities within or without the district's limits for the following purposes:

- (a) For the district's internal telecommunications needs; and
- (b) For the provision of wholesale telecommunications services within the district and by contract with another public utility district.

Nothing in this subsection shall be construed to authorize public utility districts to provide telecommunications services to end users.

RCW 54.16.330(1) This is limited authority only to provide wholesale telecommunications services within the District boundaries or by contract with another public utility district. Under no circumstances are public utility district's to provide telecommunications facilities or services to end users. See AGO 2001 no. 3.

Further, the legislature has instructed the District that:

A public utility district providing wholesale telecommunications services shall ensure that rates, terms, and conditions for such services are not unduly or unreasonably discriminatory or preferential. Rates, terms, and conditions are discriminatory or preferential when a public utility district offering rates, terms, and conditions to an entity for wholesale telecommunications services does not offer substantially similar rates, terms, and conditions to all other entities seeking substantially similar services.

RCW 54.16.330(2).

The legislature has expressly stated that the District shall ensure that its rates are not unduly or unreasonably discriminatory or preferential. No provision is made for regulation by the Utilities and Transportation Commission ("UTC") of the Districts' rates or involvement in District rate setting.

The legislature has expressly provided that Districts are "free from the jurisdiction and control of the utilities and transportation commission" RCW 54.16.040 in relation to its generation and distribution of electricity. In relation to its provision of wholesale telecommunications services and facilities, the legislature has expressly provided for a specific complaint process to the UTC. The statute provides that

(1) A person or entity that has requested wholesale telecommunications services from a public utility district providing wholesale telecommunications services under this chapter may petition the commission under the procedures set forth in RCW 80.04.110(1) through (3) if it believes the district's rates, terms, and conditions are unduly or unreasonably discriminatory or preferential.

RCW 54.16.330(1).

RCW 80.04.110 is the statute providing for a complaint process before the UTC relating to claims that a public service corporation is in violation of any provision of law or UTC rule. It states:

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, or by the public counsel section of the office of the attorney general, or its successor, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or

claimed to be in violation, of any provision of law or of any order or rule of the commission

RCW 80.04.110.

In relation to the relief granted in response to a claim, the legislature was again very specific.

If the commission, after notice and hearing, determines that a public utility district's rates, terms, and conditions are unduly or unreasonably discriminatory or preferential, it shall issue a final order finding noncompliance with this section and setting forth the specific areas of apparent noncompliance. An order imposed under this section shall be enforceable in any court of competent jurisdiction.

RCW 54.16.340.

Generally, an administrative agency's authority and power is limited.

Administrative agencies are "creatures of the legislature without inherent or common-law powers", and they may exercise only those powers conferred on them "either expressly or by necessary implication". Human Rights Comm'n v. Cheney Sch. Dist. 30, 97 Wn.2d 118, 125, 641 P.2d 163 (1982) (quoting State v. Munson, 23 Wn.App. 522, 524, 597 P.2d 440 (1979)); see Woolery v. Department of Social & Health Servs., 25 Wn.App. 762, 764, 612 P.2d 1, review denied, 94 Wn.2d 1009 (1980). We recently opined that "[t]he power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein." McGuire v. State, 58 Wn. App. 195, 198, 791 P.2d 929, review denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 906 (1991).

Telephone Ass'n v. Ratepayers Ass'n, 75 Wn.App. 356, 363, 880 P.2d 50 (1994). The legislature in this instance has expressly granted the UTC the power to hear claims from persons or entities who believe that a District's rates are unduly or unreasonably preferential. Per the legislative directive of RCW 54.16.340, if, after notice and a hearing, the UTC determines that the District's rates, terms or conditions are unduly or unreasonably discriminatory or preferential, the UTC may issue an order finding noncompliance.

In interpreting a statute, an unambiguous statute is interpreted according to its plain meaning, the courts assume the Legislature means exactly what it says. Also, under the “expressio unius est exclusion alterius” canon of statutory construction the expression of one thing in a statute implies the exclusion of others. State v. Delgado, 148 Wn.2d 723 (2003). See also Silver Firs v. Silver Lk. Water Dist., 103 Wn.App. 411, 12 P.3d 1022 (2000). Here, the legislature has clearly laid out the matters on which a complaint to the UTC may be made. The legislature has gone so far as to express the parameters of the complaint and ruling of the Commission. Namely, if the Commission determines that a public utility district's rates, terms, and conditions are unduly or unreasonably discriminatory or preferential it may issue an order finding such. Additionally, rather than reference the Commission’s general powers to regulate rates, services, facilities, and practices found in RCW 80.01.040, the legislature specifically provided in RCW 80.01.110 that the Commission is authorized to perform the duties required by RCW 54.16.340. This demonstrates that the authority of the Commission in relation to the rates, terms and conditions of the Public Utility District’s provision of wholesale telecommunications services or facilities is limited to the complaint provisions laid out in RCW 54.16.340.

The legislature has not made any provision for retroactive adjustment of rates by the UTC, finding by the commission of improper use of public funds, etc., in complaints against Public Utility Districts. As such, the statute clearly provides that the UTC may only review whether a District’s rates, terms, and conditions are unduly or unreasonably discriminatory or preferential as expressly defined in the statute, namely where a District does not offer substantially similar rates, terms, and conditions to all other entities

seeking substantially similar services. RCW 54.16.330(2). Thus only those issues related and relevant to the issue of unduly or unreasonably discriminatory may properly be before the UTC. Network Essentials request for a retroactive adjustment of rates is beyond the review allowed by the statute. Network Essentials allegation of improper use of public funds in relation to the District's dealings with Benton REA and VIB are irrelevant to the issue of whether rates, terms, and conditions are unreasonably or unduly discriminatory.

Therefore the issues are limited to whether the District's rates, terms, and conditions are unduly or unreasonably discriminatory or preferential meaning the district is offering rates, terms, and conditions to an entity for wholesale telecommunications services while it does not offer substantially similar rates, terms, and conditions to all other entities seeking substantially similar services

Submitted this 3^d day of January 2006.

Public Utility District No. 2 of Grant County

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