BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NETWORK ESSENTIALS, LTD., Complainant, v. GRANT COUNTY PUBLIC UTILITY DISTRICT 2, Respondent.	DOCKET NO. UT-051602
BIGDAM.NET, Complainant, v. GRANT COUNTY PUBLIC UTILITY DISTRICT NO. 2, Respondent.	DOCKET NO. UT-051742 BRIEF OF COMMISSION STAFF ON JURISDICTIONAL ISSUES

I. INTRODUCTION

1 Commission staff files this brief to address the jurisdictional issues raised by the complaints filed in *Network Essentials, LTD v. Grant County Public Utility District No. 2* (Docket No. UT-051602), and *Bigdam.net v. Grant County Public Utility District No. 2* (Docket No. UT-051742).

2 As set forth more fully in the analysis below, Staff believes that the Washington Utilities and Transportation Commission ("the commission") has the authority, under RCW

54.16.340, to adjudicate and determine whether the rates charged by Grant County Public Utility District No. 2 ("the district") for wholesale telecommunications services are unduly or unreasonably discriminatory and preferential. The commission further has the authority to enter an order requiring the district to take remedial action, if the commission finds that discriminatory or preferential pricing exists, and to enforce such an order by seeking injunctive relief in court.

3 Staff believes, however, that the commission does not have the authority to fix the wholesale telecommunications rates to be charged by the district, or to otherwise engage in economic regulation of the district's rates. The commission, likewise, does not have the authority to order a retroactive adjustment of the district's rates, or to determine whether expenditures by the district constitute a gift or improper use of public funds. These latter issues, raised by the Network Essentials complaint, are not within the jurisdiction of the commission.

II. ARGUMENT

A. The commission has jurisdiction under RCW 54.16.340 to determine whether the rates charged by public utility districts for wholesale telecommunications services are unduly or unreasonably discriminatory or preferential.

4 In 2000, the legislature provided public utility districts with a limited grant of authority to own and develop telecommunications facilities:

> A public utility district in existence on June 8, 2000, may construct, 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). The legislature further provided:

> A public utility district providing wholesale telecommunications services shall ensure that the 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).

5 Grant County Public Utility District No. 2 provides wholesale telecommunications services to both Bigdam.net and Network Essentials, LLD. Both entities have filed complaints contending that the district has implemented unduly or unreasonably discriminatory pricing regarding these services.

6 RCW 54.16.340 clearly gives the commission jurisdiction to adjudicate the complaints and make a determination regarding this issue. That statute permits a person or entity that has requested wholesale telecommunications services from a public utility district to 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 54.16.340(1) further provides:

> In determining whether a district is providing discriminatory or preferential rates, terms, and conditions, the commission may consider such matters as service quality, cost of service, technical feasibility of connection points on the district's facilities, time of response to service requests, system capacity, and other matters reasonably related to the provision of wholesale telecommunications services. 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 noncompliance. An order imposed under this section shall be enforceable in any court of competent jurisdiction.

The commission thus has jurisdiction to hear the rate discrimination claims presented in these complaints. *Accord,* RCW 80.01.110. ("The commission is authorized to perform the duties required by RCW 53.08.380[regarding port districts] and 54.16.340[regarding public utility districts].")

B. If the commission finds that a public utility district's rates, terms, and conditions for wholesale telecommunications service are unduly or unreasonably discriminatory or preferential, the commission has the authority to enter remedial orders, enforceable in court, directing the district to bring its rates into compliance with the law. The commission does not, however, have the authority to fix the district's wholesale telecommunications rates, or to otherwise engage in economic regulation of such rates.

7 As set forth above, RCW 54.16.340(1) authorizes the commission to enter final orders "finding noncompliance with this section," and setting forth specific areas of noncompliance. Such orders are then enforceable in court. *See also* RCW 54.16.340(3) ("Without limiting other remedies at law or equity, the commission and prevailing party may also seek injunctive relief to compel compliance with an order.") These statutory provisions clearly imply that the commission may do more than simply enter an order stating that a district has failed to comply with the law, should the facts so dictate. For if the commission's order is "enforceable" through injunctive relief, then the legislature must have envisioned that the order may contain provisions directing the district to remedy whatever illegal discrimination or preference exists. To read the statute otherwise would lead to a strained, unlikely, and absurd result, and such readings are to be avoided. *State v. Stannard,* 109 Wn.

2d 29, 36, 742 P.2d 1244 (1987). Furthermore, one must not presume that the legislature engages in meaningless acts. *Aviation West Corp. v. Department of Labor and Indus.,* 138 Wn. 2d 413, 421, 980 P.2d 701 (1999). This reading of the statute is also consistent with the legislative history. *See* Final Bill Report, SSB 6675, Laws of 2000, ch. 81, at 2, ("The WUTC may, after notice and a hearing, *issue remedial orders* that are enforceable in court.") (Emphasis added.)

8 The question remains, however, whether the commission, in a remedial order, may actually fix the district's rates to be charged in the future. Staff believes that the answer to this question is no. Hypothetically, for example, if a public utility district were to charge customer A $50.00 for a wholesale telecommunications service, but charged customer B $40.00 dollars for the same or substantially similar service, and the commission found illegal discrimination, the problem could be remedied by lowering the rate charged to customer A, or by raising the rate charged to customer B, or by changing both rates in some fashion to make them equal.

9 RCW 54.16.340 authorizes the commission to direct the district to remedy the noncompliance with the statutory ban against illegal rate discrimination. It does not, however, authorize the commission to fix the rates. This reading of the statute comports with RCW 54.16.330, quoted previously, which states that "*a public utility district . . . shall ensure* that the rates, terms, and conditions" for wholesale telecommunications services are not unduly discriminatory or preferential—that is, the rate-setting authority remains with the district, but this must be done in conformance with statutory requirements. (Emphasis added.)

10 The commission generally does not have the authority to regulate the rates or services of public utility districts. Although the definition of "telecommunications company" in RCW 80.04.010 includes "persons" and "corporations," it does not include municipal corporations such as public utility districts. Hence, they are not subject to the general rate regulation provided for in RCW 80.36.140 (providing that the commission, after a hearing, may fix the rates of "telecommunications companies"). *See Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn. App. 411, 421, 12 P.3d 1022 (2000) (a water district, which is a municipal corporation, is not a "water company" under RCW 80.04.010, and thus is not subject to regulation under Title 80 RCW). Public utility district wholesale telecommunications rates and services are subject only to the nondiscrimination provisions of RCW 54.16.330-340, as set forth above.

C. The commission does not have jurisdiction to order retroactive adjustment of the district's wholesale telecommunications rates, or to determine whether certain district expenditures are an impermissible gift of public funds, or otherwise illegal.

10 Portions of the complaint filed by Network Essentials, LTD, against Grant County Public Utility District No. 2 ask for the commission to "retroactively" adjust the district's wholesale telecommunications rates. *See* Complaint of Network Essentials at ¶¶ 16(f), 20, 23(c). Staff believes that the commission does not have the statutory authority to provide such relief. RCW 54.16.340 does not grant any express authority to provide retroactive relief. Nor should such authority be implied. Even in instances where the commission has authority to fix the rates of telecommunications companies, that authority is to "determine the just and reasonable rates. . . *to be thereafter observed and in force*, and to fix the same by

order." RCW 80.36.140. (Emphasis added). Moreover, since public utility districts are not "public service companies," as defined by RCW 80.04.010, they are not subject to the provisions of RCW 80.04.220 or 80.04.230 pertaining to reparations or overcharges.

11 The Network Essentials, LTD, complaint also asks the commission to find that certain district expenditures constitute an impermissible use or gift of public monies. *See* Complaint of Network Essentials at ¶¶ 21, 24(a). Staff believes that this relief is also beyond the authority granted to the commission to review wholesale telecommunications rates under RCW 54.16.340. Nor is such authority conferred by any other statute

D. The commission's authority to grant relief under RCW 54.16.340 is not preempted by any federal law.

12 The wholesale telecommunications services which are the subject of the Bigdam.net and Network Essentials, LTD, complaints in this proceeding concern Internet- or broadband-related services. Because of this, staff has reviewed whether any federal law might preempt the provisions of RCW 54.16.340 as applied to those services. Staff concludes that there is no such preemption. Although the Federal Communications Commission has ruled that wireline broadband Internet access service is an "information service," rather than a "telecommunications service," and thus is subject to generally lighter regulation and a minimal regulatory environment, (*see In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150 (August 5, 2005), at ¶¶ 1-5), this ruling does not

apply to telecommunications services provided by state political subdivisions or municipal corporations, such as public utility districts.

13 Furthermore, the United States Supreme Court, in *Nixon v. Missouri Municipal League,* 541 U.S. 125, 124 S. Ct. 1555, 158 L.Ed. 2d 291 (2004), has expressly held that the authorization, in 47 U.S.C. § 253, of federal preemption of state and local laws prohibiting the ability of "any entity" to provide telecommunications services, does not include entities that are state's own municipal subdivisions. The Court noted that:

> [A State's] municipal subdivisions. . . are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion. Hence the need to invoke our working assumption that federal legislation threatening to entrench on the States' own arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement [of Congress to the contrary].

Id., 158 L.Ed. 2d at 305. (Internal quotation marks and citations omitted.) Thus, the provisions of RCW 54.16.340 are not preempted by federal law.

Respectfully submitted this 1st day of May, 2006.

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