

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

NETWORK ESSENTIALS, LTD.,	)	
	)	DOCKET NO. UT-051602
Complainant,	)	(consolidated)
v.	)	
	)	
GRANT COUNTY PUBLIC UTILITY	)	PREHEARING BRIEF ON LEGAL
DISTRICT 2,	)	ISSUES
	)	
Respondent.	)	
	)	
	)	
BIGDAM.NET,	)	
	)	DOCKET NO. UT-051742
Complainant,	)	(consolidated)
v.	)	
	)	
	)	
GRANT COUNTY PUBLIC UTILITY	)	
DISTRICT NO. 2,	)	
	)	
Respondent.	)	
	)	

Pursuant to the request of Administrative Law Judge Dennis J. Moss, this brief reviews the extent and nature of the Washington Utilities and Transportation Commission's ("WUTC") power and obligations as provided under RCW 54.16.340 to review the rates, terms, and conditions of Public Utility District No.2 of Grant County, Washington's ("District") telecommunications services.

Network Essentials has made numerous and various accusations in its complaint and calls upon the WUTC for various potential remedies. However, the clear, unambiguous, and specific statutory provisions of RCW 54.16.340 spell out the specifics

of the adjudicatory review and order to be provided by the WUTC in response to a complaint regarding the District's rates, terms and conditions relative to telecommunications services. Network Essentials calls upon the WUTC to retroactively adjust or set the District's rates and find that certain acts constitute subsidies or gifting of public funds. However, as discussed herein, the statute limits the WUTC to making a determination as to whether the District's rates, terms, and conditions are unduly or unreasonably discriminatory or preferential. If the District's rates are determined to be unduly or unreasonably discriminatory or preferential, the statute directs that the remedy is an order finding noncompliance with RCW 54.16.340 and setting forth the specific areas of apparent noncompliance.

#### **Public Utility District Authority to Provide Telecommunication Services**

In 2000, the legislature enacted Senate Bill 6675 authorizing Public Utility Districts to provide wholesale telecommunications services. The Legislature found that, particularly in rural areas, access to telecommunications services and facilities was limited. See Notes following RCW 53.08.005. The Legislature also found that such access was "essential for the economic well-being of both rural and urban areas," RCW 53.08.005, and that public utility districts "may be well-positioned to construct and operate telecommunications facilities." Notes following RCW 53.08.005.

The legislature granted public utility district's (PUDs) the express authority to operate and maintain telecommunications facilities and provide wholesale telecommunications services under RCW 54.16.330:

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 grants PUDs express authority to provide wholesale telecommunications services within their respective boundaries or by contract with another public utility district.

#### **District Authority and Obligation to Establish Rates**

The statute also expressly provides that PUDs may exercise any of its powers in carrying out the specific powers of RCW 54.16.330. The statute provides:

Except as otherwise specifically provided, **a public utility district may exercise any of the powers granted to it under this title and other applicable laws in carrying out the powers authorized under this section.** Nothing in chapter 81, Laws of 2000 limits any existing authority of a public utility district under this title.

RCW 54.16.330(6) (Emphasis added). One of the express powers granted to the District is the power to establish and collect rates or charges for any services or facilities it provides. RCW 54.24.080(1) states:

The commission of each district which shall have revenue obligations outstanding shall have the power and shall be required to establish, maintain, and collect rates or charges for electric energy and water and other services, facilities, and commodities sold, furnished, or supplied by the district.

The District has outstanding revenue bonds and it therefore has the power and obligation to set rates for services and facilities supplied by the District.

In relation to the rates, terms and conditions for wholesale telecommunications services, the legislature has expressly provided the District direction on setting those rates, terms and conditions. The legislature instructed 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). Thus, the legislature has specified that PUDs have authority to establish and maintain rates for services and facilities, and that they shall ensure that rates, terms, and conditions for wholesale telecommunications services are not unduly or unreasonably discriminatory or preferential. Accordingly, the only requirement is that PUDs “offer substantially similar rates, terms, and conditions to all other entities seeking substantially similar services.”

### **WUTC Adjudicative Role Related to Districts**

The legislature has also expressly provided that PUDs are “free from the jurisdiction and control of the utilities and transportation commission” in relation to its generation and distribution of electricity. See RCW 54.16.040. Title 80 RCW does not govern municipal corporations as they are not included within the parameters of that statute. See *Silver Firs Town Homes v. Silver Lk. Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000).

Thus, while PUDs are locally controlled by elected Commissioners who set rates without WUTC oversight, the legislature has created a limited adjudicatory role for the

WUTC in relation to the rates established by the Public Utility Districts. 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 WUTC relating to claims that a public service corporation is in violation of any provision of law. 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. RCW 54.16.340 provides:

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. The legislature in this instance has expressly directed that the WUTC may hear claims from persons or entities who believe that a Districts' rates are unduly or unreasonably preferential. Per the legislative directive of RCW 54.16.340, if, after notice and a hearing, the WUTC determines that the District's rates, terms or conditions are

unduly or unreasonably discriminatory or preferential, the WUTC may issue an order finding noncompliance.

### Scope of WUTC Review

Generally, statutory language should be interpreted according to its plain meaning. According to the state Supreme Court:

This court's primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature. *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983). The intent must be determined primarily from the language of the statute itself; however, if the intent is not clear from the language of the statute, the court may resort to statutory construction. *Department of Transp. v. State Employees Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982). But "where the language of a statute is clear and unambiguous, there is no room for judicial interpretation." *PUD No. 1 v. Public Empl. Relations Comm'n.*, 110 Wn.2d 114, 118, 750 P.2d 1240 (1988) (citing *Roza Irrg. Dist. v. State*, 80 Wn.2d 633, 635, 497 P.2d 166 (1972)). Ultimately, the court should strive to

determine what the statute means. That usually means ascribing to the words of the statute their plain and ordinary meaning. Intent, if ascertainable, may be of assistance, but cannot override an otherwise discernible, plain meaning.

*North Coast Air Servs., LTD v. Grumman Corp.*, 111 Wn.2d 315, 321, 759 P.2d 405 (1988).

In construing a statute, courts may glean legislative intent from a consideration of the legislative history of the statute, as well as from an examination of other statutes dealing with the same subject. *Department of Transp. v. State Employees' Ins. Bd.*, *Supra* at 458.

*Washington Public Utility District's Utilities System v. PUD 1*, 112 Wn.2d 1, 6-7, 771

P.2d 701 (1989). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v.*

*Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The "plain meaning"

of a statute "is to be discerned from the ordinary meaning of the language at issue, as well

as from the context of the statute in which that provision is found, related provisions, and

the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281

(2005). Finally, “[l]egislative definitions include in the statute are controlling. However, in the absence of a statutory definition, we [the court] give the term its plain and ordinary meaning ascertained from a standard dictionary.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

Here, the language of the statute is clear on its face and the intent of the legislature may be determined from the ordinary meaning of the statutory language. RCW 80.01.110 provides that “the commission is authorized to perform the duties required by RCW . . . 54.16.340.” Thus the WUTC has the express and limited authority to perform the duties required by 54.16.340. As discussed above, RCW 54.16.340 gives the WUTC an adjudicative role in hearing rate disputes over rates set by the District. The WUTC’s review is limited by the statute to determining whether the District’s “rates, terms, and conditions are unduly or unreasonably discriminatory or preferential.” RCW 54.16.340(1).

What constitutes discriminatory or preferential rates is precisely defined by the legislature as 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). Thus, based on the definition provided in the statute, the WUTC’s review is to determine whether or not a District is offering substantially similar rates, terms, and conditions to other entities seeking substantially similar services as the complainant. The language of the statute is clear and unambiguous.

### Scope of Relief Obtainable from WUTC

The relief obtainable by a complainant from the WUTC is provided in RCW 54.16.330(1) and is also spelled out with unambiguous precision. According to the statute, if the WUTC finds that rates are discriminatory 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. The statute provides for an order of noncompliance setting forth the areas of noncompliance, the order is enforceable in any court of competent jurisdiction.

As discussed above, the District is given express authority to establish and collect rates or charges for any services or facilities it provides. See RCW 54.24.080(1). As also discussed, the WUTC's review is limited to determining whether or not a District is offering substantially similar rates, terms, and conditions to other entities seeking substantially similar services as the complainant and if so entering an order setting forth areas of noncompliance. Per its authority to set its rates, the District will then need to bring its rates into compliance with the order.

Generally, under the canon of statutory construction, *expressio unius est exclusio alterius*, the expression of one thing in a statute implies the exclusion of the other. See *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). See also *Lyzanchuk v. Yakima Ranches*, 73 Wn.App. 1, 8, 866 P.2d 695 (1994) (Where the court held: “. . .the Legislature did not intend to grant courts the equitable power to remove directors and officers from nonprofit corporations. This conclusion is reinforced by the maxim of statutory construction “*expressio unius est exclusio alterius*” – a specific provision for removal inferentially implies exclusion of alternate methods of removal.”). Here the



statute makes no mention of other actions, orders, remedies or judgments to be issued by the WUTC other than the order expressly listed and described. The statute fails to mention any right or obligation of the WUTC to set or fix nonconforming rates or enter an order setting rates. The legislature, by not mentioning any other actions and limiting the statute to a requirement that an order finding noncompliance be entered, shows, via the maxim of *expressio unius est exclusio alterius*, that the legislature clearly intended this to be the sole remedy attainable from the WUTC for a person or entity bringing a complaint.

Once an order has been entered, the WUTC or complainant may turn to the courts for enforcement of the order. See RCW 54.16.340(1) & (3). RCW 54.16.340(3) provides for injunctive relief. The statute states:

Without limiting other remedies at law or equity the commission and prevailing party may also seek injunctive relief to compel compliance with an order.

RCW 54.16.340(3). Injunctive relief is available to compel compliance with an order however the commission and prevailing party is not limited to seeking injunctive relief to compel compliance.

#### **Provisions of Title 80 RCW not Applicable to Districts**

Additionally, neither title 80 RCW nor its various remedial provisions are available for any complaints brought under RCW 54.16.340. The appeals court has held that municipal corporations are not subject to regulation of the WUTC under Title 80 RCW. See *Silver Firs Town Homes v. Silver Lk. Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000). In *Silver Firs*, the appellate court addressed appellants argument that Silver

Lake Water District was subject to regulation of the WUTC. The court reviewed the definition of “person,” “corporation,” and “water company.” The court pointed out that:

where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* – specific inclusions exclude implication.” *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). The statute defining “water company” makes no mention of municipal corporations. The District is a municipal corporation, not a “water company,” and is not subject to the WUTC’s jurisdiction.

Silver Firs also argues the District is subject to Title 80 RCW as a public service corporation because the District acknowledges that it renders services to the general public...under Title 80 RCW as a public service company “includes every gas company, electrical company, telecommunications company, and water company.” RCW 80.40.010. The District is not a water company, and therefore it is not a public services company.

*Id.* at 421.

The District provides electrical energy and distribution as well as telecommunications facilities and services pursuant to Chapter 54.16 RCW. Pursuant to RCW 54.16.040 the District is exempt from WUTC regulation. Additionally, per the holding of *Silver Firs*, the District is not subject to WUTC regulation under title 80 RCW as “municipal corporations” are not named in any applicable definitions of the statute. RCW 80.04.010 defines “electrical company” as

Any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever . . . and every city or town owning, operating or managing any electric plant for hire within this state. “Electrical company” does not include a company or person employing a cogeneration facility solely for the generation of electricity for its own use or the use of its tenants or for sale to an electrical company, state or local public agency, municipal corporation, or quasi municipal corporation engaged in the sale or distribution of electrical energy, but not for sale to others, unless such company or person is otherwise an electrical company.

RCW 80.04.010. Telecommunications company is defined as including:

Every corporation, company, association, joint stock association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, and every city or town owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state.

RCW 80.04.010. Corporation “includes a corporation, company, association or joint stock association. RCW 80.04.010. Thus, per the holding of *Silver Firs* and the maxim: *expressio unius est exclusio alterius*, Title 80 RCW and its provisions does not regulate municipal corporations like the District because the definitions of “electrical company” and “telecommunications company” make no mention of municipal corporations. By failing to list municipal corporations, the legislature has expressly exempted municipal corporations such as the District from regulation under those Titles.

### **Conclusion**

The legislature has clearly specified the matters on which the WUTC may determine. In the case of PUDs and their telecommunication rates, the WUTC’s role is very limited . The provisions of RCW 54.16.340 are very specific and unambiguous, Title 80 does not apply to the District, and thus the scope of the Commission’s adjudicatory review in relation to the rates, terms and conditions of the Public Utility District’s provision of wholesale telecommunications services is limited to the provisions contained in RCW 54.16.340.

Network Essentials calls upon the WUTC to retroactively adjust the District’s rates and find that alleged activities violated prohibition against lending public moneys or credit. However, the legislature has not made any provision for retroactive adjustment of rates by the WUTC nor for the adjudication of matters unrelated to rates and terms and conditions of service. As discussed, the WUTC review is limited to determining whether

or not a District is offering substantially similar rates, terms, and conditions to other entities seeking substantially similar services as the complainant. If the WUTC makes a determination that similar rates, terms, and conditions are not being offered to complainant, the WUTC may enter an order setting forth areas of noncompliance. The District must comply or otherwise face an injunction or other remedy obtained from a court.

Based on the discussion above the District respectfully requests that the issues to be decided in the case be stated as follows:

In relation to the Network Essentials Claim

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?

In relation to the Bigdam.net Claim:

1) Whether the District's rate schedule is unduly or unreasonably discriminatory or preferential to the extent that the rate is based on whether the retail service provider is serving a commercial or residential customer?

Submitted this 28<sup>th</sup> day of April 2006.

Public Utility District No. 2 of Grant County  
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