

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

NETWORK ESSENTIALS, LTD.,)	DOCKET UT-051602
)	
Complainant,)	and
)	
v.)	DOCKET UT-051742
)	(consolidated)
GRANT COUNTY PUBLIC UTILITY)	
DISTRICT 2,)	
)	ORDER 03
Respondent.)	
.....)	
)	SCOPE OF COMMISSION
BIGDAM.NET,)	JURISDICTION UNDER RCW 54.16
)	
Complainant,)	
)	
v.)	
)	
GRANT COUNTY PUBLIC UTILITY)	
DISTRICT NO. 2,)	
)	
Respondent.)	
.....)	

SUMMARY

1 **PROCEEDINGS:** Docket UT-051602 is a formal Complaint filed by Network Essentials, Ltd. (Network Essentials) against Grant County Public Utility District No. 2 (Grant County PUD), and Docket No. UT-051742 is a formal Complaint filed by bigdam.net (Bigdam) against Grant County PUD. Both Complaints ask the Commission to review Grant County PUD’s rate policies pertaining to wholesale telecommunications services pursuant to RCW 54.16.340, which became effective during 2000.

2 The Commission entered Order 01—Prehearing Conference Order on January 10, 2006, and consolidated these dockets for purposes of hearing. One basis for

consolidation was that the cases present common legal issues. It is apparent from the pleadings that the scope of the Commission's jurisdiction under a previously untested statute is at issue. The procedural schedule provided an early date for prehearing briefs concerning the scope of the Commission's jurisdiction. Following two continuances granted at the parties' request, Grant County PUD and the Commission's regulatory staff filed prehearing briefs on May 1, 2006. Neither Complainant briefed the jurisdictional issues.

3 **PARTY REPRESENTATIVES:** Craig R. Jungers, President, Network Essentials, Moses Lake, Washington, represents his company as Complainant in Docket UT-051602. Alan Cain, owner of Bigdam, Grand Coulee, Washington, represents his company as Complainant in Docket No. UT-051742. Michael W. Smith, Foianini Law Offices, Ephrata, Washington, represents Grant County PUD in both proceedings. Ray A. Foianini, of the same firm, entered an appearance. Gregory Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").¹

4 **COMMISSION DETERMINATIONS:** The Commission has authority to investigate and determine whether Grant County PUD's wholesale communications rates are unduly discriminatory or preferential, and to enter an order, enforceable via judicial action, requiring Grant County PUD to take remedial action.

5 The Commission does not have authority to fix Grant County PUD's wholesale telecommunications rates or to otherwise engage in economic regulation of such rates, to order retroactive adjustment of the PUD's wholesale telecommunications rates, or to determine whether certain Grant County PUD expenditures are an impermissible gift of public funds.

¹ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding ALJ, and the Commissioners' policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

MEMORANDUM

I. Background.

6 In 2000, the legislature provided public utility districts a limited grant of authority under RCW 54.16.330(1) to own and develop telecommunications facilities, as follows:

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.

The legislature further provided in RCW 54.16.330(2) that:

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.

7 Grant County PUD provides wholesale telecommunications services to both Network Essentials and Bigdam. Both entities contend the PUD has implemented unduly or unreasonably discriminatory pricing regarding these services.

8 RCW 54.16.340 gives the Commission jurisdiction to adjudicate these Complaints and make a determination regarding this issue. The 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 non-compliance with this section and setting forth the specific areas of non-compliance. An order imposed under this section shall be enforceable in any court of competent jurisdiction.

9 While it is undisputed that the Commission has jurisdiction to hear the rate discrimination claims presented by the Complaints in these dockets, Grant County PUD's Answer and a prehearing filing it styled an "Issues Proposal" question whether the Commission has authority to fix the district's wholesale telecommunications rates, or to otherwise engage in economic regulation of such rates as Network Essential's Complaint contends.² Also in question is whether the Commission can order retroactive adjustment of Grant County PUD's wholesale telecommunications rates, or determine whether certain expenditures by Grant County PUD are an impermissible gift of public funds, or otherwise illegal, as Network Essentials argues.

II. Discussion and Determinations.

10 The parties' prehearing briefs address the issues identified above in terms of what the relevant provisions of chapter 54.16 RCW, read together with title 80 RCW, plainly

² Network Essential's Complaint is fairly detailed in its allegations against Grant County PUD and requests specific forms of relief. Bigdam's Complaint is more general and does not include a detailed prayer for relief. Nevertheless, the Commission's determinations concerning the scope of its jurisdiction and its power to grant relief govern both Complaints in terms of what relief the Complainants can hope to achieve if they prove their allegations of discrimination or preference.

and unambiguously require. In addition, the briefs discuss the parties' perspectives on what certain provisions in chapter 54.16 RCW imply. Although Grant County PUD and Staff fundamentally agree on several key points, there are some differences in their arguments and perspectives concerning the extent of the Commission's power and obligations under chapter 54.16 RCW. As discussed below, we find no reason to disagree with the parties' positions on those points where they agree. We also discuss below and resolve the disputed issues.

A. Has the Commission authority to fix the district's wholesale telecommunications rates, or to otherwise engage in economic regulation of such rates?

11 The short answer is no. The Commission agrees with the briefing parties that it lacks statutory authority to fix Grant County PUD's wholesale rates for telecommunications services or to otherwise engage in economic regulation of such rates. The legislature has not delegated to the Commission any specific authority to regulate Grant County PUD's rates for telecommunications services. Indeed, reading together relevant provisions in RCW 54.16 and RCW 54.24, it is clear that this rate setting authority rests with Grant County PUD.

12 RCW 54.16.330(6) 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.

Grant County PUD states that one of its express powers is the power to establish and collect rates or charges for any services or facilities it provides. Indeed, RCW 54.24.080(1) (emphasis added) provides:

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.*

There is no dispute that Grant County PUD has revenue obligations in the form of outstanding revenue bonds. It follows that the power and obligation to set rates for services and facilities Grant County PUD supplies, including wholesale communications services and facilities, resides with Grant County PUD.

- 13 Nor does the Commission possess concurrent jurisdiction over such rates. The definition of “telecommunications company” in RCW 80.04.010 includes “persons” and “corporations,” but 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).

B. Can the Commission order retroactive adjustment of the Grant County PUD’s wholesale telecommunications rates?

- 14 The short answer, again, is no. Although the Commission can order Grant County PUD to adjust its rates to eliminate any rate discrimination that may be found, it may do so only on a prospective basis absent express authority to act retroactively. Nothing in chapter 54.16 RCW grants express authority to the Commission to order 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.

C. Is the Commission empowered to determine whether certain District expenditures are impermissible gifts of public funds?

15 The Commission has no power to determine whether certain expenditures by Grant County PUD are impermissible gifts of public funds. The extent of the Commission's authority under RCW 54.16, as discussed below, is limited to making determinations concerning whether Grant County PUD's rates are unduly discriminatory or preferential and, if so, to order remediation. There is nothing in RCW 54.16, or in any other statute of which the Commission is aware that gives the Commission power to determine whether Grant County PUD has made, or is making an impermissible gift of public funds as alleged by Network Essentials. The question is simply beyond the Commission's jurisdiction to determine.

D. What is the extent of the Commission's power and obligations under chapter 54.16 RCW?

16 Grant County PUD contends that the Commission's role insofar as PUD telecommunications rates are concerned is very limited. Staff takes a somewhat broader view.

17 Grant County PUD argues the Commission's review is limited by the language of RCW 53.16.340 to determining whether the PUD's wholesale telecommunications "rates, terms, and conditions of service are unduly or unreasonably discriminatory or preferential." Grant County PUD goes on to argue that the Commission's scope of review is further limited to consideration of a single fact pattern described in RCW 54.16.340(2), which states:

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.

The second sentence of this provision describes a sufficient, but not a necessary condition to support a determination that Grant County PUD's rates, terms or conditions of service are unduly or unreasonably discriminatory or preferential. There are other fact patterns upon which the Commission might determine that undue discrimination or preference exists. Indeed, RCW 54.16.340(1) lists "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" as factors the Commission may consider in making its determination.

- 18 On the question of remedies, Grant County PUD seems to argue that the Commission cannot offer a petitioner effective relief under chapter 54.16 RCW. Grant County PUD contends that the only action the Commission may take in an order following a hearing under RCW 54.16.330 and .340 is to make a finding of non-compliance with the statute, setting forth the specific areas of apparent non-compliance.
- 19 Staff, by contrast, argues that in addition to finding non-compliance the Commission has the authority to enter an order requiring Grant County PUD to take remedial action. While Staff agrees with Grant County PUD that the Commission does not have the power to order specific rates or other forms of economic relief, Staff argues that the terms of the statute imply that the Commission is authorized to enter remedial orders, enforceable in court, directing Grant County PUD to bring its rates into compliance with the law. The statute also authorizes the Commission and the prevailing party to seek injunctive relief to compel compliance. This is without limitation of other remedies at law or in equity.
- 20 We are persuaded by Staff's analysis. If the Commission lacked the authority to order Grant County PUD to change its rates to bring them within the requirement that they not be unduly discriminatory or preferential, there would be nothing for the Commission or a prevailing party to take to a court to be enforced. To accept Grant County PUD's narrow reading of the statute would effectively strip a portion of the legislature's handiwork of meaning. In construing statutes a fundamental tenet is that the reviewing tribunal must not presume the legislature to have engaged in a

meaningless act. All parts of the statute must be read together so as to give meaning to all of its provisions.

21 Following these principles, we conclude that the Commission is authorized to enter remedial orders, enforceable in court, directing Grant County PUD to bring its rates into compliance with the law if they are found on the basis of an evidentiary record to be unduly discriminatory or preferential.

CONCLUSIONS OF LAW

22 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 23 (1) The Commission does not have the statutory authority to fix Grant County PUD's wholesale telecommunications rates or to otherwise engage in economic regulation of such rates.
- 24 (2) The Commission does not have the statutory authority to order retroactive adjustment of the Grant County PUD's wholesale telecommunications rates.
- 25 (3) The Commission does not have the statutory authority to determine whether certain Grant County PUD expenditures are an impermissible gift of public funds.
- 26 (4) The Commission has statutory authority to investigate and determine whether Grant County PUD's wholesale communications rates are unduly discriminatory or preferential considering such factors as the Commission determines in its expertise are relevant to the issues of whether rates are discriminatory or preferential.

- 27 (5) The Commission has authority to enter an order, enforceable via judicial action, requiring Grant County PUD to take remedial action upon a finding that Grant County PUD's rates are unduly discriminatory or preferential.

DATED at Olympia, Washington, and effective June 8, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge