



United & Informed Citizen Advocates Network v. Washington Utilities & Transportation Commission

97 Wash.App. 1032 (1999) | Cited 0 times | Court of Appeals of Washington | September 13, 1999

UNPUBLISHED OPINION

US West disconnected the call forwarding transfer capabilities of three residential customers after learning that each resident used a computer switching system belonging to United & Informed Citizen Advocates Network (U&ICAN) to avoid paying long-distance tolls. U&ICAN filed a complaint with the Washington Utilities & Transportation Commission (WUTC) requesting that the WUTC order US West to reinstate the U&ICAN members' phone service. After the WUTC dismissed its complaint for lack of standing, U&ICAN petitioned for review in King County Superior Court. U&ICAN now appeals from the superior court's order dismissing the petition for lack of subject matter jurisdiction. Because the petition sought review of an interlocutory order without exhaustion of administrative remedies and WUTC has primary jurisdiction in this case, we affirm.

FACTS

US West provides telephone services to King and Pierce counties. Typically, when a US West subscriber makes a call from one county to another, the subscriber must pay a long-distance toll. However, if the subscriber lives near an adjacent county, they are not charged the toll for calls to nearby areas in that county. US West refers to this billing scheme as its Extended Area Service (EAS). It is possible to transfer calls between two or more EAS's in a practice called "bridging." Bridging lets a person make a call that is billed as a local call but connects to someone in a long-distance area, thus allowing the caller to avoid paying long-distance charges.

In October 1995, US West learned that U&ICAN might be bridging in King and Pierce counties. Joseph Thayer, a US West employee, became a U&ICAN member and after making various long-distance phone calls, confirmed that U&ICAN was in fact bridging and shut off the transfer capabilities of three U&ICAN members' phone lines in King County. This disabled those members' ability to bridge between EAS's.

U&ICAN brought a complaint before the WUTC requesting a declaration that interrupting transfer service was unlawful, demanding the restoration of the three members' transfer capability, and requesting damages, penalties, and attorney fees. US West filed a counterclaim for unpaid toll fees. Both parties moved for summary adjudication and after a hearing, the administrative law Judge (ALJ) dismissed U&ICAN's complaint, ruling inter alia that U&ICAN did not have standing to represent the individuals whose transfer service was terminated.



United & Informed Citizen Advocates Network v. Washington Utilities & Transportation Commission

97 Wash.App. 1032 (1999) | Cited 0 times | Court of Appeals of Washington | September 13, 1999

US West's counterclaim against U&ICAN was still pending when U&ICAN appealed to the full Commission.¹ After accepting the matter for review,² the Commission affirmed the decision that U&ICAN did not have standing: The ruling of the Administrative Law Judge was based upon the rationale that residential customers of a telecommunications company could not give an interest in their telephone lines to a non-profit corporation that would confer standing on the non-profit corporation. As the Order states: U & I CAN is not the customer of U S West, and U S West does not owe it a duty in connection with these lines. To hold otherwise would be to reward a subterfuge that attempts to avoid payment of a fair share of costs as required by the legislature. The Order, p. 5.

This is a complaint proceeding brought by U & I CAN against U S West. The theory of the complaint is that U S West owed a duty to U & I CAN which it did not meet. The Order correctly concludes that U & I CAN is not owed any duty by U S West because U & I CAN is not a customer of U S West. . . . {I}t was not improper for U S West to disable the call transfer features of the individual customer's lines, because they were being used for an illegal purpose: to provide interexchange telephone service without payment of access charges.

U&ICAN filed its petition for review in King County Superior Court. The superior court Judge granted WUTC's motion to dismiss, entering the following findings of fact and Conclusions of law:

FINDINGS OF FACT

1. United and Informed Citizen Advocates Network (U&I CAN) did not serve its Petition for Review on the Washington Utilities and Transportation Commission ("WUTC").
2. The WUTC's Orders, of which U&I CAN seeks judicial review, are not final orders of the WUTC.
3. The WUTC has the authority to decide the issues pending before it in WUTC Docket Nos. UT-960659 and UT-971515.

CONCLUSIONS OF LAW

4. A petitioner must serve its Petition for Review on the agency as required by RCW 34.05.542.
5. A petitioner who fails to serve the agency with its Petition for Review fails to invoke the Court's jurisdiction to exercise judicial review set forth in chapter 34.05 RCW.
6. Service of a Petition for Review on the Office of the Attorney General does not comply, nor constitute substantial compliance, with the requirement to serve the agency set forth in RCW 34.05.542.
7. The Court lacks jurisdiction over U&I CAN's Petition for Review.
8. The Court does not have jurisdiction to review orders of the WUTC that are not final orders for



United & Informed Citizen Advocates Network v. Washington Utilities & Transportation Commission

97 Wash.App. 1032 (1999) | Cited 0 times | Court of Appeals of Washington | September 13, 1999

purposes of RCW 34.05.542.

9. Even if the Court had jurisdiction over the Petition for Review, under the doctrine of primary jurisdiction the Court should dismiss the Petition for Review and allow the WUTC the opportunity to conclude the issues that are pending before it.

The court also denied U&ICAN's motion for sanctions against the assistant attorney general who responded to their petition. This timely appeal followed. US West's counterclaim for toll charges is still pending.

DISCUSSION

U&ICAN argues that the superior court Judge erred by dismissing its petition for review, alleging that the superior court had subject matter jurisdiction and the WUTC does not have jurisdiction to regulate U&ICAN. U&ICAN also requests reversal of the superior court order denying its request for sanctions. The State responds that because the Commission has primary jurisdiction over this case and its orders are interlocutory, the superior court properly dismissed the petition for review. We agree. Appellate review of WUTC adjudicative decisions is governed by statute.³

"In reviewing an administrative decision, the appellate court sits in the same position as the superior court and applies the standards of the Act directly to the record before the agency."⁴ The party challenging an agency order bears the burden of proof.⁵ Orders are "written statement{s} of particular applicability that finally determine} the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons."⁶ The threshold issue is whether the Commission's decision is a final order. We conclude that it is not.

After U&ICAN brought its complaint before the WUTC, US West crossclaimed. The ALJ expressly noted in its order that the proceeding did not address US West's cross-claim for access charges. Thus, a justiciable controversy was still pending. Furthermore, the ALJ specifically referred to its ruling as an interlocutory order, one which does not finally adjudicate the rights of the parties. In the interim, WUTC brought a separate action seeking a determination of whether U&ICAN was a public telecommunications provider. Both this and the counterclaim were pending at the time U&ICAN brought its action in superior court.

Under these facts, it is clear that the Commission's order was not final because the first matter before the WUTC would not be concluded until US West's counterclaim was resolved.⁷ Second, a determination of U&ICAN's status as a public telecommunications company could change the Commission's interlocutory standing decision. If U&ICAN is a telecommunications provider, it might have standing to request reconnection of its customers' phone service.⁸ The superior court correctly dismissed U&ICAN's petition for review. It may seek full judicial review once the WUTC issues a final decision



United & Informed Citizen Advocates Network v. Washington Utilities & Transportation Commission

97 Wash.App. 1032 (1999) | Cited 0 times | Court of Appeals of Washington | September 13, 1999

U&ICAN also argues that the superior court erred when it dismissed the petition for review on primary jurisdiction grounds. At oral argument, it expanded on this argument, asserting that further participation in WUTC's adjudication process would be futile because the WUTC does not have jurisdiction over U&ICAN. We reject this argument.

First, it submitted to WUTC jurisdiction when it filed a complaint requesting relief from the Commission. Second, the trial court properly held that the WUTC has primary jurisdiction over the dispute.

The primary jurisdiction doctrine requires that issues within an agency's special expertise be decided by the appropriate agency. Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court involves issues that fall within the scope of a pervasive regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.^{9}

The WUTC has regulatory authority over the telecommunications industry, and has special competence to decide the issues U&ICAN and US West have raised.¹⁰ It also has express statutory authority to determine whether a "person or corporation is conducting business subject to" WUTC regulation.¹¹ This case involves issues that fall squarely within the scope of RCW title 80, one of those "pervasive regulatory schemes" into which we will not venture before the WUTC has made a final decision based on its expertise.¹²

Finally, U&ICAN asked for sanctions against the assistant attorney general involved in this case. We review a trial court's denial of a sanctions motion for abuse of discretion.¹³ U&ICAN's sanctions request alleged that the assistant attorney general had initially accepted service of the petition for review but then moved to dismiss based on U&ICAN's failure to serve the WUTC. But U&ICAN did not serve the WUTC as required by statute.¹⁴ The assistant attorney general was not at fault for U&ICAN's failure to comply with the law, and the court correctly denied the motion for sanctions.

Affirmed.

WE CONCUR:

1. In *In re the Classification of U & I CAN*, Docket No. UT-971515, a separate contemporaneous action, the WUTC has brought a classification hearing to determine whether U&ICAN is a telecommunications company subject to WUTC regulation.

2. The Commission characterized the appeal as interlocutory because the issue of access fees was not resolved at the time U&ICAN sought review of the ALJ's order.



United & Informed Citizen Advocates Network v. Washington Utilities & Transportation Commission

97 Wash.App. 1032 (1999) | Cited 0 times | Court of Appeals of Washington | September 13, 1999

3. RCW 34.05.570(3); US West Communications, Inc. v. Washington Util. & Transp. Comm'n, 86 Wn. App. 719, 722, 937 P.2d 1326 (1997).

4. US West, 86 Wn. App. at 722.

5. RCW 34.05.570(1)(a).

6. RCW 34.05.010(11)(a).

7. Cf. CR 54(b).

8. See RCW 80.36.160 (Commission authorized to "prescribe the routing of toll messages and conversations").

9. Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 345, 962 P.2d 104 (1998), cert. denied, 119 S. Ct. 1096 (1999) (citations omitted).

10. RCW 80.01.040(3).

11. RCW 80.04.015.

12. The trial court also correctly determined that, when U&ICAN failed to serve WUTC with its petition for review within the statutory period, it failed to establish the superior court's subject matter jurisdiction.

13. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 383, 858 P.2d 1054 (1993).

14. RCW 34.05.542(2).

