BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General, Complainant, vs. CASCADE NATURAL GAS CORPORATION; PACIFICORP dba PACIFIC POWER & LIGHT COMPANY, Respondents.	Docket No. U-30744 **CASCADE NATURAL GAS CORPORATION'S OPPOSITION TO CITY OF TOPPENISH'S MOTION FOR SUMMARY DETERMINATION**

I. INTRODUCTION

Intervenor City of Toppenish ("Toppenish") asks the Commission to reverse its prior determination that allowed Cascade to collect the Yakama Nation exaction from ratepayers within the Yakama Reservation boundaries as a municipal tax. Toppenish provides no compelling reason for the Commission to reverse completely its prior decision. It remains an undisputed fact that the Yakama Nation Ordinance requires utilities to pay the three percent exaction regardless of whether they enter a franchise agreement with the Nation or derive any franchise rights. Under Washington law, including the *Pacific Tel. & Tel.* case cited by Toppenish, this places the Yakama Nation exaction squarely within the definition of a tax.

Toppenish also raises an argument regarding the Yakama Nation's jurisdiction and the territorial boundaries of the Yakama's Reservation. The Commission is not the proper forum in which to litigate questions of tribal jurisdiction. As discussed in Cascade's Motion for Summary Determination, the Commission's existing policy of permitting utilities to recover

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municipal or tribal exactions from ratepayers when such exactions are not clearly unlawful is a reasonable exercise of the Commission's discretion. For the reasons stated herein and in Cascade's Motion for Summary Determination, Toppenish's Motion for Summary Determination should be denied.

II. FACTS

Cascade previously recounted the facts relevant to summary determination in this case in its motion for summary determination. Cascade's Motion for Summary Determination at 2–3. One key fact relating to summary determination in this case is that under the terms of the Yakama Nation Ordinance, a utility company is subject to the three percent exaction to the Yakama Nation regardless of whether it enters a franchise agreement with the Yakama Nation. As the Ordinance states, "Such franchise fee shall be owed by such Utility to the Yakama Nation not withstanding that such Utility may not have entered in to a franchise with the Yakama Nation as of the effective date of this Ordinance." Yakama Ordinance, § 5.3. It is undisputed that at this time, Cascade has not entered a franchise agreement with the Nation.

III. DISCUSSION

A. The Yakama Nation Exaction was Properly Characterized as a Tax for Ratemaking Purposes.

The Commission has already considered and rejected the arguments made by the City of Toppenish and concluded that the Yakama Nation exaction should be treated as a tax for ratemaking purposes. Both Toppenish and Intervenor Elaine Willman, et al., made these same arguments during the public hearings on Cascade's proposed tariff revision. *See* AR 104–118.[1] This Commission has already considered the arguments asserted by the Yakama Nation on which Toppenish also relies. AR 126–133 (Dec. 6, 2002 letter to Commission from Yakama Nation counsel, attached as an exhibit to Toppenish's motion).

[1] Citations to the Administrative Record refer to the record compiled by the Commission during its review of the Cascade and PacifiCorp tariffs and consecutively numbered for the Yakima Superior Court proceedings. Cascade will provide an appendix containing copies of the cited portions of the Administrative Record to the Commission or any party upon request.

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In its current motion, Toppenish spends seven pages describing the difference between a fee and a tax, but fails to highlight the key distinction. As Washington courts have recognized, a tax is "an enforced contribution of money, assessed or charged by authority of sovereign government for the benefit of the state or the legal taxing authorities. It is not a debt or contract in the ordinary sense, but is an exaction in the strictest sense of the word." *State ex rel. City of Seattle v. Dep't of Pub. Util.*, 33 Wn.2d 896, 920, 207 P.2d 712 (1949). In contrast, a franchise "is a contract between a municipal corporation and a person who has applied for leave to engage in certain business operations of a public nature within the limits of the municipality." *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 278, 142 P.2d 498 (1943). Thus, the key feature of a franchise fee is that it arises from a contractual relationship.[2]

There is nothing consensual or contractual about the imposition of the Yakama Nation exaction on Cascade. As the Commission noted in its memorandum to the Yakima Superior Court, "the 3% charge is not subject to negotiation or consent of the utility. Instead, the charge is imposed unilaterally and unconditionally by the Nation upon every utility serving the Reservation." *Willman v. WUTC, Cascade and PacifiCorp*, No. 03-2-00086-7, Memorandum of the Washington Utilities and Transportation Commission in Opposition to Plaintiffs' Motion for Summary Judgment on Alternative Claim at 7 (May 1, 2003 Yakima Super. Ct.). The Commission also noted "the charge is imposed on the utility even when the Nation does not grant the utility the right to use tribal lands where utility facilities are located. (AR 12 at ¶ 5.3; AR 73.) In fact, the charge has been assessed against the defendant utilities, without condition, even though neither utility has been granted a 'franchise' by the Nation. (AR 94.)" *Id*. at 8.

None of the cases cited by Toppenish alter this conclusion. Toppenish claims that *Pacific Tel. and Tel.* stands for the proposition that a franchise fee based on a percentage of

[2] Cascade discussed the other distinguishing features between taxes and franchise fees in its Motion for Summary Determination at 9–11.

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gross receipts must be treated as a general operating expense. Toppenish Motion for Summary Determination at 11–12. In fact, in *Pacific Tel. and Tel.* the court considered both municipal taxes and franchise fees. In permitting taxes to be collected from ratepayers within a specified community, the Court noted:

> Taxes, whether denominated occupation taxes, business taxes, or taxes for the privilege of using public streets, are imposed by a legislative authority, which, **unless the imposition is held unlawful by the courts**, has the right to enforce the collection.

Pacific Tel. & Tel., 19 Wn.2d at 277 (emphasis added). The court also noted that the franchise fees at issue were based on agreements between municipal entities and utilities. *Id.* at 278. The *Pacific Tel. and Tel*. Court did not consider a situation where, as in the present case before the Commission, an exaction is imposed regardless of whether a franchise agreement exists. Because it is undisputed that a utility is subject to the Yakama Nation exaction without entering a franchise agreement, even under the law cited by Toppenish there is no basis for this Commission to alter its previous conclusion that the Yakama Nation exaction is properly treated as a tax for ratemaking purposes.

Even if Cascade and the Yakama Nation had signed a contractual agreement that purported to be a franchise, the Yakama Nation exaction would nonetheless be a tax. As previously discussed, payment of the exaction is compelled regardless of whether a franchise agreement exists. In addition, as Cascade previously informed the Commission, as a tribal entity the Yakama Nation lacks complete authority over its lands. Because Cascade would still need to obtain additional authority from the Bureau of Indian Affairs before any interest affecting land would be valid, the Yakama Nation exaction remains a tax. AR 82–83, 85, 162–163.

The Commission's proper treatment of the Yakama Nation exaction for ratemaking purposes was upheld by the Yakima County Superior Court. In its final decision, the court stated, "the Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the 3% charge should be treated as a tax for rate making

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purposes." Order Denying Plaintiffs' Motion for Summary Judgment at 3 (Aug. 21, 2003, Yakima Super. Ct.).

Toppenish also claims that this Commission lacks the authority to characterize the exaction labeled as a franchise fee by the Yakama Nation. Although municipal taxes are presumed valid, the Commission is not bound by an entity's characterization of its exaction as a tax or a fee. *See, e.g.*, *Covell v. City of Seattle*, 127 Wn.2d 874, 886, 905 P.2d 324 (1995) (noting that a governmental entity's characterization of its own charges is not dispositive). The Commission is not making a decision regarding the validity of the Yakama Nation exaction, but is merely responding to a request by regulated utilities to allocate the charges imposed on the utilities for ratemaking purposes. This is within the Commission's statutory mandate and discretion.

The Yakama Nation exaction has not changed since the Commission considered this issue last year. It continues to exhibit all the hallmarks of a tax. The Commission properly allocated that tax for ratemaking purposes and should not alter its previous decision.

B. The Commission Is Not the Proper Forum to Determine Yakama Nation's Jurisdiction.

Toppenish concedes that the Nation arguably has the authority to tax utilities, and that utilities can pass the tax on to non-Indian residents on fee lands within the Reservation. Toppenish Motion for Summary Determination at 19. Toppenish then argues that residents of Toppenish are no longer within the boundaries of the Reservation. This argument directly challenges the jurisdiction of the Yakama Nation and is inappropriate for determination in this forum. As the Yakima County Superior Court noted, the Commission lacks jurisdiction to decide whether the Yakama Nation has the legal authority to impose a tax. Memorandum Opinion at 4.

Even if the Commission had jurisdiction to determine the boundaries of a Reservation or an Indian nation's authority, that issue is not subject to summary determination on this record. The U.S. Supreme Court has "repeatedly stated that not every surplus land Act diminished the affected Reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329,

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356 (1998). Determining whether an Indian reservation's boundaries have been changed by an act of Congress is not a simple question. It involves not only an analysis of the language used by Congress, but also the historical context surrounding passage of the Congressional act, and events after the passage of the act, including "Congress's treatment of the affected areas, the manner of treatment by Bureau of Indian Affairs and local jurisdictional authorities, as well as who settled in the area and subsequent demographic history." *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000) (citing *Solem v. Barlett*, 465 U.S. 463 (1984)). For example, *South Dakota v. Yankton Sioux Tribe*, cited by Toppenish, the court considered the entire history of the land in question, including the original treaty negotiations, subsequent negotiations with the United States regarding ceding of tribal lands, and the subsequent history of the property. *Yankton Sioux Tribe*, 522 U.S. at 343–358. Even if this Commission was the proper forum to litigate the question of the Yakama Nation's jurisdiction, Toppenish has not provided evidence to allow the Commission to decide this issue and its motion for summary determination should be denied.

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IV. CONCLUSION

The Commission thoroughly analyzed the tax-or-fee issue during public hearings last year. Toppenish has presented no new evidence or argument to compel the Commission to alter its position that it is reasonable for Cascade to recover the Yakama Nation exaction from ratepayers as a municipal tax. For the reasons stated herein and in Cascade's Motion for Summary Determination, Toppenish's motion should be dismissed and summary determination should be granted in favor of Cascade.

DATED this _____ day of September, 2003.

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By_____
Mary E. Crego, WSBA #31593
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Cascade Natural Gas Corporation

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be electronic mailed and hand delivered to Simon ffitch, James M. Van Nostrand, Eric Richter, Lynn F. Logan, P. Stephen DiJulio, Jeffery A. Richard, Judith A. Endejan, and Adam L. Sherr and also via electronic mailed, facsimile and U.S. Mail to Mark P. Trinchero and William (Tre) E. Hendricks III.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 29th day of September, 2003, at Seattle, Washington.

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Brenda K. Partridge

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