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STATE OF WASH.
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June 11, 2003

Carole J. Washburn
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket No. U-030744

Dear Ms. Washburn:

Enclosed for filing in the above proceeding is an original and 19 copies of PacifiCorp's Answer and Affirmative Defenses to Public Counsel's Complaint.

Thank you for your assistance in this matter. If you have any questions regarding this filing, please contact Kendall Fisher at (206) 386-7526.

Very truly yours,

A handwritten signature in cursive script that reads "Anna Stewart".

Anna Y. Stewart

AYS/as
Enclosures

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office
of the Washington Attorney General

Docket No. U-030744

Complainant,

**PACIFICORP'S ANSWER AND
AFFIRMATIVE DEFENSES TO PUBLIC
COUNSEL'S COMPLAINT**

v.

CASCADE NATURAL GAS
CORPORATION; PacifiCorp dba PACIFIC
POWER & LIGHT COMPANY

Respondents.

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SUMMARY STATEMENT

A. Respondent PacifiCorp distributes electrical power to the Yakama Indian Nation ("Nation"), individual Indians, and non-Indians within the Yakama Indian Reservation ("Reservation") on a non-discriminatory, non-preference basis. PacifiCorp facilities within the Reservation are located on trust and fee lands owned by the Nation and individual Indians and fee lands owned by non-members of the Nation. PacifiCorp facilities on the Reservation are physically and electrically interconnected without reference to the tribal, Indian or non-member status or the jurisdictional status of the land on which facilities are located. PacifiCorp provides service to some non-members on the Nation's land.

B. The Nation's Franchise Ordinance imposes a fee on utilities providing utility service within the Reservation regardless of whether the utility has entered a franchise agreement with the Nation, the jurisdictional status of the persons served, or the jurisdictional status of land on which such service is provided. The Nation's Ordinance threatens forfeiture of utility property for non-compliance. Some PacifiCorp facilities are on land owned by the Nation and individual Indians.

C. No court has determined that the Nation's Ordinance is clearly unlawful. Public Counsel's Complaint admits, at 2, that issues raised by the Ordinance are complex and very fact-specific. Litigating those issues in federal, state, and tribal courts and administrative forums could take many years and cost ratepayers millions of dollars. Even then, the outcome is uncertain in practical, legal and economic benefits to ratepayers, if any or at a level proportionate to cost, time, and effort.

D. Public Counsel's complaint flies in the face of previous Commission precedent and, as a practical matter, seeks reversal of the Commission policy regarding tribal taxes. It is well established that until a court of competent jurisdiction rules that the tribal utility tax is clearly illegal, the Commission will not reject the pass-through of the tribal tax. *Brannan v. Qwest Corporation*, Docket Nos. UT-010988, TG-010989, UE-010990, UE-010995, UT-010966, TG-011084, Order Granting Motion for Summary Determination (WUTC Jan. 11, 2002) at ¶ 52; *WUTC v. US WEST Communications*, Docket NO. UT-911306, First Supplemental Order (WUTC Aug. 25, 1992). The Commission does not have jurisdiction to determine the legality of tribal taxes. *Brannan*, Docket No. UT-010988 et al., Order Granting Motion for Summary Determination at ¶ 19. The Commission has made it clear that it will not require a utility to challenge every tax that comes its way. An allegation of imprudence on PacifiCorp's part is completely at odds with this policy. Rather, the utility should not waste ratepayer resources challenging tribal taxes or other tribal governmental enactments amounting to taxes. Public Counsel's claim that PacifiCorp has been collecting charges from ratepayers without making payments mandated by the Nation's Ordinance is false. Since no court has determined that the Nation's Ordinance is unlawful, Public Counsel improperly claims that it was imprudent for PacifiCorp to pay franchise fees assessed by the Nation's Ordinance. *US WEST*, Docket No. UT-911306, First Supplemental Order at 5-6. Public Counsel's claim that the Commission should penalize PacifiCorp for not initiating complex, very fact-specific, uncertain, lengthy, and

litigation costly to ratepayers to test Counsel's theories about the Nation's Franchise Ordinance should be rejected as fundamentally bad policy.

E. The complaint incorrectly presumes that some basis may be shown to treat the Yakama Ordinance as assessing a franchise fee. The Commission addressed this same issue in Docket Nos. UG-021502 and UE-021637 at which time the Yakama Nation was given ample opportunity to demonstrate support for this point. There is no reason to believe that this Complaint will result in any more evidence being developed on this point, as the Yakama Nation holds all the information pertinent to the tax vs. fee issue. The Yakama Nation is an indispensable party to this proceeding but is not subject to Commission jurisdiction, and its participation would be entirely voluntary. Public Counsel's statement in paragraph 4 about access to the "detailed factual information necessary to resolve these issues" is wrong. No party to this complaint proceeding will have access to it.

ANSWER

Respondent PacifiCorp answers Public Counsel's Complaint as follows:

1. Paragraph 1 of the Complaint alleges the legal basis upon which the Public Counsel Office of the Washington Attorney General ("Public Counsel") claims the Complaint is filed. No response to this claim is required. Should an answer be required, PacifiCorp denies the same.

2. PacifiCorp admits that Public Counsel filed the Complaint. PacifiCorp is without knowledge or information as to the reasons why Public Counsel filed the Complaint as alleged in the first sentence of Paragraph 2 and therefore denies the same. With reference to the second sentence in Paragraph 2, PacifiCorp admits on the basis of information and belief that the Yakama Nation adopted a Franchise Ordinance in August of 2002, admits that the Franchise Ordinance imposes a three percent charge on utilities to which the Ordinance applies and that the Ordinance applies to "all utilities operating on the reservation," and denies all other averments in that sentence. With regard to the third sentence in Paragraph 2, PacifiCorp admits that the "charge was designated by the Ordinance as a franchise fee," that PacifiCorp filed a tariff

revision with the Commission on December 13, 2002, and that Cascade Natural Gas Corporation (“Cascade”) filed a tariff revision with the Commission. PacifiCorp’s and Cascade’s tariff filings each speaks for itself; PacifiCorp filed its tariff revision consistent with the Commission’s determination that the Yakama Ordinance is a tax. PacifiCorp denies the fourth sentence of paragraph 2. With regard to the fifth sentence of Paragraph 2, PacifiCorp admits that bills sent to ratepayers for meter readings made after the effective date of the tariff revision have shown the proportionate cost of PacifiCorp’s payment of the Nation’s franchise fee that is being recovered from the ratepayer in accordance with the revised tariff; and PacifiCorp denies the balance of the sentence. With regard to the sixth sentence of Paragraph 2, PacifiCorp admits that it is recovering its franchise fee costs from ratepayers solely within the Reservation; PacifiCorp admits that it collects its costs of certain taxes and charges listed on revised Schedule 101 from ratepayers some of whom receive service within and some who receive service outside the Yakama Reservation; and PacifiCorp is without knowledge or information on which to form a belief whether any ratepayers pay other municipal taxes and therefore denies the same. PacifiCorp denies the seventh sentence of Paragraph 2. With regard to the eighth sentence of Paragraph 2, PacifiCorp admits that it paid franchise fees charged by the Nation beginning in February 2003 and denies the balance of that sentence and has been paying all fees collected on a monthly basis. Except as expressly admitted herein, PacifiCorp denies the remaining allegations in Paragraph 2.

3. PacifiCorp is without knowledge or information on which to form a belief as to any agreements between the Nation and Cascade and therefore denies allegations in this Paragraph relating to Cascade. With reference to the first sentence of Paragraph 3, PacifiCorp admits that it has not entered a franchise agreement with the Nation and denies that there is any uncertainty whether the Nation will approve the temporary franchise agreement, as PacifiCorp offered to execute a temporary agreement and the Nation rejected such agreement. With regard to the

second sentence of Paragraph 3, PacifiCorp is without knowledge or information on which to form a belief as to matters stated therein and therefore denies the same.

4. Paragraph 4 makes legal arguments and does not allege facts to which an admission or a denial is possible. Should an answer be required, PacifiCorp denies the same.

5. PacifiCorp admits that the Commission took no action on the tariff revisions filed with the Commission by PacifiCorp and Cascade in response to the Yakama Nation's Franchise Ordinance, that no evidentiary record was created in connection with those filings, and that the Commission did not issue orders in connection with those filings. The Commission decisions referenced in the second sentence of Paragraph 2 speak for themselves and require no response. The balance of Paragraph 5 makes legal argument to which no response is required. Should a response be required to any portion of Paragraph 5 not expressly admitted, PacifiCorp denies the same.

6. PacifiCorp admits that Public Counsel previously requested that the Commission establish a collaborative process and that the Commission issued an order denying the request. The Commission's order speaks for itself and requires no further answer from PacifiCorp.

7. PacifiCorp admits the allegations of Paragraph 7.

8. PacifiCorp lacks sufficient knowledge or information to form a belief as to allegations in Paragraph 8 and therefore denies the same.

9. PacifiCorp admits Paragraph 9.

10. PacifiCorp admits Paragraph 10.

11. On information and belief, PacifiCorp admits Paragraph 11.

12. PacifiCorp lacks knowledge or information on which to form a belief as to utility service provided by Cascade or other regulated utilities within the Yakama Reservation and therefore denies allegations in Paragraph 12 relating to entities other than PacifiCorp. PacifiCorp admits allegations in Paragraph 12 describing utility service provided by PacifiCorp within the Reservation.

13. On information and belief, PacifiCorp admits that the Nation adopted the Franchise Ordinance on August 6, 2002, which imposes a charge with or without a franchise agreement. The Franchise Ordinance speaks for itself and no further response is required to allegations characterizing the Ordinance. Should any further response be required to any matter relating to Paragraph 13 other than those expressly admitted, PacifiCorp denies the same.

14. PacifiCorp is without knowledge or information as to what Cascade did before filing tariff revisions with the Commission and therefore denies allegations in the first sentence of Paragraph 14 relating to Cascade. PacifiCorp admits that it did not enter a franchise agreement with the Nation before filing its tariff revision with the Commission. The tariff revisions described in the first sentence of Paragraph 14 as filed by Cascade and PacifiCorp speak for themselves and require no further response by PacifiCorp; should any further response to the allegations in the first sentence be required, PacifiCorp denies the same. PacifiCorp admits the second and third sentences of Paragraph 14. The fourth sentence of Paragraph 14 amounts to rhetorical characterization rather than an allegation to which a response is required; should a response be required, PacifiCorp denies the same.

15. PacifiCorp is without knowledge or information on which to form a belief as to allegations made regarding Cascade in Paragraph 15 and therefore denies the same. PacifiCorp admits that costs imposed on PacifiCorp by the Nation's three percent franchise fee are currently being recovered under the municipal tax addition schedule of PacifiCorp's revised tariff from all PacifiCorp ratepayers who receive retail electrical service within the Reservation and that such recovery is indicated on bills sent to such ratepayers. With respect to the second and third sentences of Paragraph 15, PacifiCorp admits that it signed and submitted a temporary franchise agreement to the Yakama Nation and that the Nation rejected PacifiCorp's offer to enter an agreement. PacifiCorp denies all allegations in Paragraph 15 not expressly admitted.

16. PacifiCorp admits that the last sentence of Paragraph 16. The balance of Paragraph 16 constitutes legal argument to which no response is required. Should any response be required, PacifiCorp denies all allegations in Paragraph 16 not expressly admitted.

17. PacifiCorp is without knowledge or information on which to form a belief as to allegations made regarding Cascade in Paragraph 17 and therefore denies the same. PacifiCorp admits that it has not sought a judicial determination of the validity of the Yakama Nation charge but denies it has any legal duty to do so. PacifiCorp does not know what is meant by the allegation that PacifiCorp has not otherwise challenged the validity of the Nation's franchise fee and therefore denies the same.

18. PacifiCorp admits Paragraph 18.

19. PacifiCorp admits Paragraph 19.

20 through 29. PacifiCorp is without knowledge or information on which to form a belief as to allegations made regarding Cascade in Paragraphs 20 through 29 and therefore denies the same.

30. PacifiCorp admits that it has not had a franchise agreement with the Nation during the period it has recovered costs of the Nation's fee in accordance with PacifiCorp's revised tariff but alleges that the Nation's Ordinance imposes a fee regardless of whether a franchise agreement is in place. PacifiCorp denies all allegations of Paragraph 30 not expressly admitted.

31. PacifiCorp denies Paragraph 31.

32. PacifiCorp denies Paragraph 32. Moreover, Paragraph 32 constitutes legal argument to which no answer is required.

33. PacifiCorp denies the first sentence in Paragraph 33. Whether a franchise fee or other charge imposed by a government is recovered from ratepayers statewide depends on complex and very specific facts. PacifiCorp denies that it has any affirmative legal duty to initiate a formal challenge, which PacifiCorp understands Public Counsel to mean litigation, to challenge the Yakama Franchise Ordinance that could take years to conclude, that might involve

litigation in federal, state, and tribal courts and administrative forums, that could cost millions of dollars at ratepayer expense before such litigation concluded, and where the legal, economic, and other practical effects and benefits of such litigation for ratepayers, if any, is unclear. Any allegation in Paragraph 33 not specifically admitted is denied.

34. PacifiCorp denies that it imposed the Yakama Nation franchise fee as a tax. PacifiCorp denies the remaining allegations of Paragraph 34.

35. PacifiCorp denies Paragraph 35.

36. Paragraph 36 makes legal arguments to which no response is required. Should an answer be required, PacifiCorp denies the same.

37. No court has determined that the Yakama Franchise Ordinance is clearly unlawful. PacifiCorp denies that it has an affirmative legal duty to initiate complex and very fact specific litigation through federal, state, and tribal courts and administrative forums that could cost ratepayers millions of dollars, that could take years to conclude with no certainty as to the legal, economic or practical effects and benefits, if any, to ratepayers to challenge the Yakama Nation's Franchise Ordinance as a condition of recovering costs imposed by that law. Paragraph 37 makes legal arguments to which no response is required. Should any further response be required, PacifiCorp denies the same.

38. PacifiCorp denies Paragraph 38.

39. PacifiCorp denies Paragraph 39.

AFFIRMATIVE DEFENSES

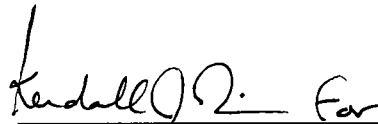
1. The Complaint fails to state a claim upon which relief may be granted.
2. To the extent that the Complaint does not include all persons affected by the Yakama Ordinance and/or the alleged action complained of, there are other necessary parties not before the Commission.

3. The Complaint fails to include the Yakama Nation, which is an indispensable party that is not within the jurisdiction of the Commission which cannot be joined without its consent under principles of sovereign immunity, and in whose absence this case cannot proceed.

4. The matters alleged in the Complaint, in whole or in part, are preempted by federal law and are within the exclusive jurisdiction of federal adjudicative or regulatory bodies.

WHEREFORE, PacifiCorp respectfully requests that the Commission dismiss the Complaint with prejudice.

DATED: June 11, 2003.



James M. Van Nostrand
Michael P. O'Connell
Of Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the parties of record in Docket No. U-030744, on the following individuals in the manner indicated below:

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Via Hand Delivery

DATED June 11, 2003, at Seattle, Washington.



Anna Stewart, Legal Secretary to Kendall J. Fisher