BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General Complainant, v. CASCADE NATURAL GAS CORPORATION; PACIFICORP dba PACIFIC POWER & LIGHT COMPANY Respondents.	DOCKET NO. U-030744 PUBLIC COUNSEL RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION (Yakama Nation Franchise Ordinance)

I. INTRODUCTION

Public Counsel files this memorandum in opposition to the motions for summary determination filed by Cascade Natural Gas Corporation (Cascade) and Pacificorp dba Pacific Power & Light Company (Pacificorp). Respondents' motions should be denied. Genuine issues of material fact remain to resolved in this case. Even if the Commission concludes that no factual issues remain, Cascade and Pacificorp are not entitled to prevail as a matter of law.

This memorandum also responds to the motion filed by the City of Toppenish.

II. FACTS

The Confederated Tribes and Bands of the Yakama Indian Nation is a federally recognized Indian Tribe, signatory to the Treaty of June 9, 1855 (12 Stat. 951). The Yakama Reservation lies within Yakima and Klickitat Counties. The Yakama Reservation is composed of land in multiple ownerships, including Trust lands, and lands owned in fee (by both Nation members and non-Indians). Towns within reservation boundaries include Toppenish and Wapato.

Respondents Cascade Natural Gas Corporation (Cascade), PacifiCorp dba Pacific Power & Light Company (PacifiCorp), and other regulated utilities provide utility service within the

external boundaries of the Yakama Reservation to both tribal members and non-members residing on both fee and non-fee land.

On August 6, 2002, the Nation adopted the Yakama Nation Franchise Ordinance (Franchise Ordinance) T-177-02. The Franchise Ordinance required Cascade, PacifiCorp and other utilities operating on the reservation to enter into franchise agreements with the Nation in order to continue providing service on the Reservation. Under the proposed Franchise Agreement, utilities are required to pay a monthly franchise fee based on 3 % (three percent) of gross operating revenues rather than upon actual costs. For Cascade, the annual amount is estimated at $120,000. For Pacificorp, the annual amount is estimated at $500,000.

The Yakama Franchise Ordinance originated as a way to address the concern on the part of the Yakama Nation that utility companies were trespassing on tribal lands in that utility company facilities were placed upon tribal lands without permission. The respondent utilities maintain that their facilities are exclusively or primarily located on lawful rights of way and are not trespassing on tribal lands.

Cascade and PacifiCorp did not initially enter into franchise agreements with the Nation, and instead, filed tariffs with the Commission to recover the charges from their ratepayers by means of municipal tax additions to be collected from all their customers living within the Yakama Reservation boundaries.[1] The Cascade and PacifiCorp tariffs came on before the Commission at open meetings in November, December 2002, and January 2003. After receiving written and oral comment from the companies, the Nation, and other interested persons, the Commission took no action to suspend the tariffs and they were allowed to go into effect.

As a result of this treatment, the full burden of these charges falls upon customers living within the reservation boundaries. As noted, for respondents the amount totals approximately $620,000 per year.

[1] Cascade's initial tariff was filed November 14, 2002, by Advice No. CNG/W02-11-01, docketed UG-021502. Cascade filed a related petition for an accounting order on December 2, 2002, docketed as UG-021576. PacifiCorp's tariff was filed December 16, 2002, as Advice No. 02-011, and docketed as UE-021637. PacifiCorp also filed a petition for an accounting order.

Pursuant to the approved tariffs, Cascade and PacifiCorp are currently authorized to impose a 3 % (three percent) surcharge on all of their customers who live within the boundaries of the Yakama Reservation, as a municipal tax addition to their bills. Notwithstanding their collection of the Yakama charge as a municipal tax, Cascade and PacifiCorp have signed proposed franchise agreements and submitted them to the Yakama Nation. The Nation, however, has not approved these agreements.

Cascade is collecting the 3 percent charge from its customers but is not remitting the funds to the tribe. Cascade continues to negotiate with the tribe regarding the franchise agreement and the company operations within the reservation boundary.

Neither Cascade nor PacifiCorp have sought a judicial determination of the validity of the Yakama Nation charge or otherwise challenged the validity of the franchise fee.

Both Cascade and PacifiCorp have pending before the Commission petitions for accounting orders regarding the Franchise fee.

III. APPLICABLE LAW

The Commission's administrative rules permit motions for summary determination. WAC 480-09-426(2) provides:

> (2) Motion for summary determination. A party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under this subsection, the Commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.

On a summary judgment motion, the facts and reasonable inferences from the facts are considered in the light most favorable to the non-moving party. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

IV. PUBLIC COUNSEL'S FIRST CLAIM SHOULD NOT BE DISMISSED

Cascade admits that it has not remitted any payments to the Yakama Nation to date. Motion, p. 5. The company has already collected over $88,000 since early 2003 from its

approximately 1800 customers on the Yakama reservation.[2] Cascade makes clear that it is not remitting the funds because it is continuing to negotiate with the Nation. It plans to make no payments unless a franchise agreement is reached. It states that negotiations may actually result in an alternative to the current charge, rather than execution of franchise agreement. Cascade Motion, p. 5, n. 5.[3] Cascade also continues to keep its petition for deferred accounting pending.

As a practical matter, Cascade is therefore treating the Yakama charge as a contingent liability. As a general proposition, in ratemaking, contingent liabilities are excluded from recoverable costs of service. Goodman, *The Process of Ratemaking* (1998), p. 318. Expenses are contingent when they are speculative, or have no effective date and no reasonable basis for estimating their amount in dollars, or are otherwise neither known nor measurable with reasonable accuracy. *Id.*, 318-319. Here, by Cascade's own admission the expenses are speculative. Cascade may never remit funds if no franchise agreement executed. Alternatively, an "alternative" may be negotiated that involves a smaller payment, or no payment whatever.

> The inclusion of contingent liabilities in the rates is unfair, because such a practice would shift the risk associated with the contingent event wholly to the ratepayer.

Goodman, p. 319.

While the Commission permitted recovery as a tax, Cascade appears to be keeping its options open, by collecting the funds from its customers, but maintaining the possibility that the charge could be modified, treated as franchise fee recoverable in rates or go away. In effect, the assessment on Cascade ratepayers amounts to single issue ratemaking, on the company's own motion, to impermissibly recover a contingent liability.

For the foregoing reasons, Cascade is not entitled to prevail as a matter of law on Public Counsel's First Claim.

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[2] Cascade Response to PC Data Request No. 2 (attached).

[3] As argued below, this conduct cast serious doubt on the reasonableness of Cascade's decision not to challenge the tribal charge and to obtain recovery from ratepayers. If Cascade enters into a franchise agreement with the Nation, this is difficult to square with its position that the charge should be treated as a tax.

The foregoing arguments also apply to the First Claim against Pacificorp. While Pacificorp's Affidavit of Clark Satre establishes that funds are being remitted to the tribe, the fact that the company maintains the pendency of its deferred accounting petition, and has no signed franchise agreement with the Nation, shows that the company is in effect treating the liability as contingent.

V. PUBLIC COUNSEL'S PRUDENCE CLAIMS AGAINST PACIFICORP AND CASCADE SHOULD NOT BE DISMISSED (SECOND AND THIRD CLAIMS)

Both the Second and Third Claims in Public Counsel's complaint address prudence with respect to both respondents. The claims are discussed together in respondents briefs and will be here also, since there are overlapping legal and factual issues. The Second Claim relates to state law issues. The Third relates to federal Indian law.

The prudence issue in this case can be stated as follows:

> Would a reasonable prudent utility board of directors and management have acquiesced in the payment of the Yakama tribal exaction, and sought to collect it from ratepayers, if they knew, or reasonably should have known that:
>
> - The charges was presumptively invalid under federal law;
> - The tribal charges was based on trespass claims which they disputed;
> - The utility did not believe the charge constituted a valid franchise fee under state law because:
>
> 1. State law prohibits franchise fees except to recover administrative costs;
> 2. The amount of the charge was not tied to actual administrative costs;
> 3. The amount of the charge was not tied to execution of a franchise agreement; and
> 4. The franchise agreement did not confer sufficient benefits on the company to constitute a franchise.

It is Public Counsel's position that prudent utility management would have and should have sought a judicial determination of the validity of the tribal exaction prior to collecting it from customers.

A. Prudence.

1. The prudence standard in utility regulation is one of reasonableness.

"Prudent" management implies reasonable management. Goodman, *The Process of Ratemaking*, p. 856. Prudence is often likened to a negligence inquiry; in other words, the question is what would a reasonable person have done under like circumstances. *Id.* Often times, the "reasonable man" standard commonly used in negligence actions is employed as the general standard by which the prudence of utility management is judged. *Id.* Under the "reasonable man" standard, the fundamental question is whether management acted reasonably in the public interest, not merely in the interest of the company or an interested group of companies. *Id.* at 857. The overriding issue is not the reasonableness of the cost in abstract terms but whether the cost is "a reasonable and prudent business expense, *which the consuming public may reasonably be required to bear*." *Id.* (emphasis added). The basic authority for an agency's insistence on prudent investment rests on the just and reasonable standard. *Id* at 858.

2. The WUTC applies the "prudence" standard consistent with the general trend of authority.

The general prudence test applied by this Commission was stated ten years ago in the 1992 Puget Sound Power & Light rate case. There the Commission said:

> The test this Commission applies to measure prudence is what would a reasonable board of directors and company management have decided, given what they knew or reasonably should have known to be true at the time they made a decision. This test applies to both the question of need and the appropriateness of the expenditures.

WUTC v. Puget Sound Power & Light Co., *Eleventh Supplemental Order*, Docket Nos. UE-920433, UE-920499, and UE-921262, p. 20. The Commission ruled that the burden of proof to demonstrate prudence was on Puget, pursuant to RCW 80.04.130(2), and rejected the company's arguments that it was entitled to a rebuttable presumption of prudence. Nineteenth Supplemental Order, pp. 8-9.

3. The Commission's has applied a "clear invalidity" standard of prudence in tribal tax cases.

The Commission has also applied the prudence standard in the context of challenges to tribal taxation of by utility services. In *Brannan v. Qwest Corporation, Puget Sound Energy et al.*, Docket Nos. UT-010988 *et al.*, Order Granting Motion for Summary Determination, the Commission described its prudence analysis in such cases as follows:

> The Commission agrees with those parties who argue that the Commission does not have jurisdiction to determine whether the Lummi or Swinomish utility tax is legal. However, the Commission has jurisdiction to decide whether the rates of a utility subject to regulation under title 80 or 81 RCW are fair, just, reasonable, and sufficient. *See RCW 80.01.040, 80.04.020, 80.28.010, 80.28.020, 80.36.080, 81.04.020, 81.22.030.* Thus, the Commission has jurisdiction to determine whether the expenses incurred by a regulated utility are prudent.
>
> In deciding whether a utility can pass through a tax to ratepayers, the Commission must determine whether a utility's payment of that tax is prudent. Where a utility attempts to pass through a tax that his clearly invalid, the Commission has jurisdiction to disallow that pass-through. *WUTC v. U.S. West, Docket No. UT-911306, First Supplemental Order, at 4-5.*

Brannan, ¶¶ 19-20. As this discussion shows, the Commission's prudence analysis turned on a determination of whether the tax at issue was clearly illegal. The Commission's analysis also included findings about the nature of the tribal taxes.

The Commission also applied a prudence standard to an earlier challenge to Lummi tribal taxes in *WUTC v. U.S. West Communications, Inc.*, Docket No. UT-911306, First Supplemental Order. [4] In that case, the Commission found, as it did in *Brannan*, that it was not empowered to

[4] The First Supplemental Order of the Administrative Law Judge was affirmed and adopted by the Commission in the Second Supplemental Order in the docket.

decide the validity of the Lummi tax, but that it could inquire into the prudency of the company's payment of the tax, *Id.*, at 4, and disallow imprudent operating expenses.

4. Application of the prudence standard in this case must include examination of the reasonableness of the respondents' decisionmaking.

The respondents in this docket base their motions for summary determination on the prudence test in the *Brannan* case – the "clear invalidity" test – but they construe the test too narrowly. While Public Counsel argues below that respondents fail even a narrow standard of "clear invalidity", we also urge the Commission to retain and apply the "reasonableness" component in its analysis of this case.

The reasonable person test is the core of prudence. The question to be asked is "what would reasonable utility management have done under like circumstances?" The respondents, by contrast, read the prudence inquiry as limited to the pure legal question of whether the tax was clearly invalid. Certainly, it is true that if a tax is invalid on its face, particularly if a court of competent jurisdiction has held it invalid, it is unreasonable and imprudent for the utility to pay the tax and pass it on to customers. This is the easy case. The reasonableness inquiry does not stop at that point, however, as respondents suggest.

Regulators have never taken the view that all costs incurred by management are reasonable and prudent unless there is a previous court ruling or similar "black and white" indicator to the contrary. This would amount to a rebuttable presumption of prudence, a standard which the Commission itself rejected as incorrect in the Puget prudence case, as noted above. *WUTC v. Puget Sound Power &Light*, Nineteenth Supplemental Order, pp. 8-9. Instead, prudence review contemplates that in addition to "clear invalidity," a decision maker must review all relevant facts and circumstances to determine if it is reasonable for the utility to incur a cost. Thus, in the prudence phase of the *WUTC v. Puget Sound Power & Light*, the Commission carefully reviewed not only the company's technical analysis, its data, and methods, but also held:

> The parties and the Commission therefore should be able to follow the company's decision-making process, knowing what elements the company used, and the manner in which the company valued those elements. Such a process should certainly be documented. *Id.*, p. 16.[5]

In this case, therefore, under the reasonableness standard of prudence, it is not enough for respondents to argue that the tax was not clearly invalid. Instead, the Commission must evaluate the case to determine if, given all the facts and law, it was unreasonable for respondent utilities to acquiesce in this charge and pass it on to customers. As the Goodman treatise observes, there is an important public interest component to prudence. The fundamental question is "whether management acted reasonably in the public interest, not merely in the interest of the company…." Goodman, p. 857. The overriding issue is whether the expense is one "which the consuming pubic may reasonably be required to bear." *Id.*

Public Counsel suggests that there is ample basis to conclude that both Cascade and Pacificorp acted unreasonably in acquiescing to this tribal exaction.

B. Respondents Are Not Entitled To Prevail As A Matter of Law On The Second And Third Claims.

1. The Yakama Nation's exaction is presumptively invalid. (Third Claim – Federal Indian Law).

Both Cascade and Pacificorp base their prudence arguments on a fundamental initial premise – that taxes imposed on a utility are presumed valid for ratemaking purposes unless the taxes appear clearly unlawful.[6] Therefore, they argue, unless a tax is "clearly invalid" or "clearly unlawful," pass through of the tax to customers is reasonable for ratemaking purposes. Neither company's memorandum devotes any significant attention to an analysis of the legal authorities in this area, instead simply pointing to the earlier decisions of the Commission and the Superior Court.

[5] Respondents provide virtually no evidence of the companies' decision making in this case. Pacificorp's Affidavit of Carol Hunter simply provides a conclusionary statement that legal advice was taken, and a determination made that the charge was not clearly invalid. Public Counsel's efforts through discovery to obtain documentation of the decision making process have, for the most part, been met with privilege objections.

[6] Cascade Motion, p. 6; Pacificorp Motion, p. 12.

Respondents' starting premise, however, is incorrect. While the presumption of validity may be applicable to charges imposed by jurisdictions such as cities and towns, no such presumption applies to tribal exactions upon nonmembers. In fact, the presumption is reversed. As the United States Supreme Court made clear two years ago, tribal taxes imposed upon non-members on non-Indian fee lands are presumptively invalid. *Atkinson Trading Company v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1835 (2001).

Atkinson is an application, in the tax context, of the general principle announced in *Montana v. United States*, 450 U.S. 544, 565-566 (1981), that a tribe cannot regulate activity of non-Indians on fee lands within a tribe's reservation absent express Congressional delegation or application of one of the two enunciated *Montana* exceptions. In this case, neither respondent is a tribal member. Their utility operations occur, as they allege, on lawfully acquired rights of way.[7] Utility rights of way are equivalent to non-Indian fee land. *Big Horn County Electric Cooperative v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997).

Under *Montana* and *Atkinson*, absent a Congressional delegation of authority, Indian tribes may tax non-Indians on non-Indian fee land only if (1) the tax has a nexus with a consensual relationship between the non-Indian and the tribe, or (2) the non-Indian conduct threatens the political integrity, economic security, or health and welfare of the tribe. *Atkinson*, 532 U.S. at 650-654; *Montana v. United States*, 450 U.S. 544, 565-566 (1981).

The correct starting point which the utilities in this case should have employed, therefore, was the presumption that the Yakama Nation does not have authority to impose the exaction established by the Franchise Ordinance. The burden of proof is on the utility to rebut this presumption. *See Atkinson*, 532 U.S. at 654, 659.

[7] AR 92 (Stoltz, Cascade); Pacificorp Response to PC Data Request No. 8 (attached). The Temporary Franchise Agreement tendered by Pacificorp was tendered "under protest and with full reservation of rights." Section 3 of the proposed agreement states: "If information provided by the Grantor [Yakama Nation]…demonstrates to Grantee's [Pacificorp's] satisfaction that any of Grantee's Facilities are ourside any currently valid right-of-way or other authorized location on Yakama Lands" negotiations would commence to remedy the situation.

Congressional authorization. The Yakama Nation has not asserted Congressional authorization as a basis for the charge in this case. In general, Public Counsel is not aware of any general Congressional authorization for tribes to tax utility services. *Cf. Devils Lake Sious Indian Tribe v. North Dakota Public Service Commission*, 898 F. Supp. 955, 960 (D.N.D. 1995)(no treaty or statute authorized tribe to regulate electric service). Respondents have cited no authorization.

Non-Indian Fee Lands For purposes of the prudence determination, and the motions, there can be no dispute that the utility activities at issue take place either entirely or at least partially on non-Indian feeland. The respondents do not concede that their operations within the boundaries of the Yakama reservation occur outside lawful utility rights of way.[8] While the Yakama Nation raises trespass issues, neither of the respondent utilities in this case concedes that trespass is occurring.

First *Montana* exception: Nexus with consensual relationship. The moving parties have not shown that a consensual relationship exists between the respondent utility companies and the Yakama Nation. While the Ninth Circuit has held that the *voluntary* provision of utility service within an Indian reservation does create a "consensual relationship," *Big Horn*, 219 F.3d at 951, *Big Horn* is distinguishable because it does not involve a state regulated utility of the type involved here. This was recognized in the *Brannan* case. The Commission had based its conclusion that the Lummi tax was presumptively valid on the consensual relationship holding in the *Big Horn* case, stating:

> However, we believe the better argument is that *Big Horn* suggests a consensual relationship between the tribes and the non-member utilities, *which precludes us from holding that the taxes plainly fall outside the first Montana exception.*[9]

Verizon and Puget Sound Energy, however, filed for clarification, arguing that "due to the nature of each utility's statutory obligation to serve, it would be inappropriate to characterize each utility's relationship with the tribe and tribal members as strictly consensual." *Brannan*

[8] See footnote 7.

[9] *Brannan v. Qwest et al.*, Order Clarifying Order Granting Motion for Summary Determination (*Brannan Clarification Order).*

Clarification Order, ¶ 11. They argued that this was "not the type of voluntary relationship described by the United States Supreme Court in *Montana*." *Id.* The Commission granted the requested clarification and withdrew its characterization of the relationship as consensual.[10]

A recent federal court decision in North Dakota confirms that a utility with an obligation to serve on a reservation does not have a consensual relationship with the tribe. In *Reservation Telephone Cooperative v. Henry*, ___ F. Supp. 2d ___, Case No. A4-02-121 (D. N.D. August 26, 2003)(copy attached), the federal district court found impermissible a tax on a telephone company serving the Fort Berthhold Indian Reservation. The court held that neither the rights of way obtained from the tribe, nor the provision of service by a utility under a certificate of public convenience and necessity and pursuant to state regulation, satisfied the first *Montana* exception. *Reservation Telephone*, Slip Op., p. 15. *See also, In re Application of Otter Tail Power v. Public Service Commission, et al.*, 451 N.W.2d 95, 105 (N.D. 1990)(*Montana* consensual relationship exception not applicable to Otter Tail as state regulated utility serving reservation).

Moreover, the Yakama Nation's entire Franchise Ordinance approach is based upon its concerns that utilities' activities on the reservation constitute trespass. It appears investigations of trespass could continue even after a franchise agreement is entered into. To the extent that trespass claims have been and will be made, it is inherently contradictory for the tribe and the utilities to claim that a consensual relationship exists under *Montana*.

Even if a consensual relationship exists between the utilities and the Yakama Nation, there must be a nexus between the relationship and the tribal charge in order to satisfy the first *Montana* exception. *Atkinson*, 532 U.S. at 656; 121 S. Ct. at 1833. The tribe, or the proponent of the tribal tax, has the burden of proof to show that such a nexus is present. *Atkinson*, 532 U.S. at 654,659, 121 S. Ct. at 1832.

[10] In the Commission's earlier Lummi tax case, *WUTC v. USWC*, the Stipulated Issues and Record upon which the decision was based stated: "Neither USWC, Contel or Puget has ever entered into any consensual agreements with the Lummi Indian Tribe to provide service to customers within the reservation." First Supplemental Order, Attachment A, ¶ 31.

Respondents cannot show a rational connection or nexus here because the tax is on gross revenues from all operations within the reservation, some of which are generated through the provision of utility services to non-Indians on fee lands.

The nexus between the tax and the consensual relationship must be based on a connection between the activity being taxed and the services the tribe is providing in connection with that activity. This test is analogous to the test applied by courts when determining whether a state has authority to collect taxes from non-Indians doing business with Indians within a reservation. *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996*); Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp.2d 1295, 1307-09 & n.94 (D. Kan. 2003). The nexus here is tenuous at best. The "services" the Yakama Nation has said it is funding with this tax are services to itself (researching right-of-way grants), not services to the utilities or their customers. By arguing to the Commission that this charge is not a franchise fee, and questioning the connection between the charge and actual costs and benefits, the utilities in this case effectively undermined any claim they would have of a nexus between the tax and any alleged consensual relationship. As in *Big Horn*, the lack of connection between the ad valorem tax and the activity is fatal to the application of the first exception. *Big Horn*, 291 F.3d at 951.

Second *Montana* exception: Political Integrity/Economic Security/Health and Welfare

The second main exception announced in *Montana* that can support a valid tribal tax on non-Indians is tribal authority to tax non-Indian activity that threatens tribal political integrity, economic security or health or welfare. This exists only in exceptional circumstances. *Atkinson*, 532 U.S. at 658-659.

> *Montana*'s second exception "can be misperceived." The exception is only triggered by *nonmember conduct* that threatens the Indian tribe[;] it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self government. Thus, unless the drain of nonmember's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

Atkinson, 532 U.S. at 657, n. 12 *quoted in Burlington Northern Santa Fe. R.R Co. v. Assiniboine and Sioux Tribes*, 323 F.3d 767, 773(9th Cir. 2003)(emphasis in original) . There is no suggestion here that the tribe is actually imperiled by the provision by respondents of valuable utility services to residents of the reservation, nor of any drain on tribal resources. Neither utility asserts that the tribe's fundamental political integrity or economic security is at stake.[11]

To demonstrate their prudence, the respondent companies have relied on an inapplicable general presumption of validity of taxes imposed by local governments, subdivisions of the state. They argue that until a court of competent jurisdiction strikes down the tax, they must be allowed to collect if from customers. This is a somewhat circular argument. The tribal charge in this case has not been challenged by the utilities, so there can be no such decision. The companies have effectively shifted the burden of challenging the tax to their own customers, avoiding their own responsibility to charge only just and reasonable rates based on prudently incurred costs.

Given the case law recited above, based on the law and facts which were known to, or reasonably should have been known to the utilities at the time the charge was imposed, the charge was presumptively invalid and it was therefore imprudent for the companies to shift the charge to customers. There is ample legal authority to not only establish presumptive invalidity of the charge, but also resolve every element of the exceptions to that rule in favor of a potential challenger. The proper way to view the prudence test in this case is that case law is clear - the tribal charge is presumed invalid. The respondent utilities have not presented any case to the contrary. They have made no real attempt to carry the burden of proof to show the tax is valid.

2. Respondent utilities' conduct reflects their conclusion that the charge was not a valid franchise fee (Second Claim – State Law).

Separate and apart from the presumptive invalidity of the charge under federal Indian law, it was not reasonable, and therefore not prudent, for Cascade and Pacificorp to acquiesce in the charges imposed under the franchise ordinance, given their clear and substantial doubts about its validity under state law.

[11] Cascade Responses to PC Data Requests 27, 28 (attached) ; Pacificorp Response to PC Data Requests 28A,B.

Both utilities' advocacy at the Commission focused on identifying the ways in which the charge did not properly constitute a franchise fee. Questions raised included (1) the fact that state law no longer permits imposition of percentage based franchise fees, (a reference to RCW 35.21.860), AR 95 (2) that fees had no demonstrable relation to administrative costs, as required by RCW 35.21.860; AR 83, (3) that the tribe could not grant via the franchise ordinance the rights necessary for the utility to operate, as a city could in a municipal franchise. AR 82-83l

It appears that both utilities gave consideration to the possibility of challenging the exaction, but ultimately chose to simply collect the tax from customers. As John Stoltz of Cascade stated at the Commission open meeting on November 27, 2002:

> We have not concluded that the tax included in the ordinance by the Nation is a legal tax but we know it would be very costly to challenge it in a federal court. We have not determined that that such a challenge would be a prudent expenditure at this time.

At the same hearing, Pacificorp's counsel noted that the Cascade approach of filing for recovery as a tax is "the course of action that involves the least exposure to the utility as far as non-recovery of cost." AR 83.

No respondent, however, has submitted a specific estimate of the cost of challenging the tax in tribal and federal court to support an assertion that costs of a challenge would outweigh the amount of tax at issue. This case is different on its face than the Lummi case, where the Commission found that the legal costs would far outweigh the amount of tax at issue. *WUTC v. USWC,* First Supplemental Order, p. 5. Here, however, no such assumption can be made. Collections under the franchise ordinance from respondents, for one year alone, are projected to exceed $600,000.[12] The most reasonable assumption may well be that the tax amounts paid by ratepayers could exceed legal costs within a period of one or two years. Because of the number of utilities involved, moreover, the legal costs for any one utility would be ameliorated. Some

[12] Pacificorp counsel stated at the November 27, 2002, Open Meeting: "The number I have seen would suggest that the fee would generate about $1,000,000 per year in revenue to the Nation when applied to all the utilities operating in the reservation." AR 82.

evidence obtained through discovery indicates that, indeed, initial discussions were held between some of the utilities about a joint challenge to the rules.[13]

It is also relevant to the prudence determination that, as noted earlier, Cascade continues to withhold funds from the Tribe, continues to negotiate with the Tribe, may not ever enter into a franchise agreement, and may even arrive at an alternative arrangement with the tribe. Cascade Memorandum, p. 5, n.7. Indeed, Cascade even concedes that:

> It would not be prudent for Cascade to make a payment to any entity without first receiving the proper documentation. Motion, p. 5.

Cascade thus argues simultaneously that it is prudent to charge customers the tax, but not prudent to pay the tax. The tax has now not been paid for the best part of a year. While Cascade attempts to justify this on the basis that it simply awaits "paperwork," *Id*. the absence of an executed franchise agreement is more than mere missing paperwork. It reflects the fundamental disagreement between the parties, and the fundamental doubts of the company about the validity of the charge. Public Counsel agrees it is not prudent for Cascade to remit payments to the tribe, but would suggest it is likewise not prudent to collect the tax in the first instance.

Both utilities have also made the decision to keep in place their petitions for deferred accounting so as to be able to recover their costs in the event that the treatment of the charge changes, or to recover the costs of legal challenge. These are the actions of parties who have serious and continuing doubts that the charges with which they are faced lawful.

Finally, in evaluating the reasonableness of the respondents conduct here, the Commission should take note that the largest telecommunications provider serving the reservation decided not to pay the tribal charges, and therefore filed no tariff with the Commission and collects no funds from its customers. Sprint now faces a trespass claim from the tribe.[14] From the customer and utility perspective, this a far more reasonable approach to this issue, than acquiescence in a questionable assessment and shifting the burden to customers. The

[13] Sprint Response to PC Data Request No. 8 (attached).

[14] Sprint Response to PC Data Request No. 34 (Yakama First Supplemental Notice of Trespass)

company is in a position, and has an incentive, to resolve the trespass issues with the tribe, without burdening customers. This option was equally available to Cascade and Pacificorp but they chose otherwise.

It is important to recall in this case that the Yakama Nation has not formally adopted a business and occupation tax, an ad valorem tax, or any other form of excise tax. It adopted a franchise ordinance and a related fee. The respondent utilities in this case have chosen to proceed on the belief that the franchise fee was clearly invalid. Having reached that conclusion, the prudent course of action was to challenge the charge, not to redefine it as a tax as a way to recover it from customers. In effect, the utilities have sought to have this Commission indirectly invalidate the franchise fee, even though the Commission has clearly stated it has no jurisdiction to rule directly on the validity of the tribal charge. The result is that the same charge, imposed by the same entity, is treated as "clearly invalid" for franchise fee purposes, and not "clearly invalid" when redefined as a tax. The respondents should not be permitted to have it both ways.

C. Factual Issues.

Summary determination of claims in this case is not appropriate because either there are a material facts which remain to be resolved, or the inferences that can be drawn from the facts do not support summary judgment. These include:

Prudence/Utility Decision-making as to Validity.

Hunter Affidavit (attached to Pacificorp Motion) (After requesting legal advice, "Pacificorp determined that the Franchise Ordinance was not clearly invalid or illegal"). The affidavit does not state what legal advice was provided, when or to whom it was provided, other than Ms. Hunter, nor does the affidavit provide other information about Pacificorp management decision-making.

Pacificorp's payments to the tribe are not consensual (Pacificorp Response to Public Counsel Data Request No. 27, attached).

Cascade: Statement of John Stolz, Open Meeting, November 27, 2002, AR 93 ("We have not concluded that the tax included in the ordinance by the Nation is a legal tax, but we know that it would be very costly to challenge it in a federal court."

Cascade: Statement of John West, Open Meeting , November 27, 2002, AR 95 (questioning validity of charge as franchise fee).

Cascade: Statement of John Stoltz, Open Meeting, December 11, 2002, AR 212 (re accounting for cost of counsel to determine "whether this tax is truly a legal tax or not"; "[w]e would like to retain counsel that we could continue our review of the legality of the proposed tax.").

Cascade: Letter, John West to Thomas Nelson, November 18, 2002, p. 2 (Cascade Response to Public Counsel Data Request No. 8, attached)("Cascade remains unsure whether the Nation has the underlying authority to charge Cascade as proposed. Please let us know what precedent the Nation relies on for such authority. We would like to review it in light of the requested franchise fee. Our readings of the *Montana* and *Atkinson* cases do not support the conclusion that the Nation possesses its proposed power.").

Cascade: Letter, John West to Thomas Nelson, November 25, 2002 (Cascade Response to Public Counsel Data Request No. 8, attached)("Our review of Washington State law led us to conclude that a new franchise fee based upon a percentage of gross revenues has not been legal since 1982. Therefore, Cascade felt the only choice it had was to file it as a pass through to the customers located within the reservation as a business and occupation tax."

Benefits conferred by Franchise Ordinance.

James Van Nostrand (Pacificorp counsel), Nov. 27, 2002, Open Meeting statement. AR 82. ("utility has not secured all necessary operating rights" under tribal ordinance)

Letter, Thomas Nelson to Carole Washburn, Dec. 6, 2002, pp. 3-5 (responding to question "Does The Nation's Franchise Provide Sufficient Rights")(attachment to Toppenish Motion).

Trespass Claims.

Yakama Nation Franchise Ordinance, p. 1 (Preamble, ¶ 3)(copy attached to Toppenish Motion)(The basis of the franchise fee exaction is an assertion by the Yakama Nation that utilities are engaging in trespass because they "have placed Utility facilities on lands owned or controlled by the Yakama Nation without authorization.")

Letter, Thomas Nelson to Carole Washburn, December 6, 2002, p. 2 ("serious continuing trespasses")(copy attached to Toppenish Motion).

See footnote 7 for evidence that respondents dispute the trespass claims.

D. The Yakima Superior Court Decision Is Not Preclusive.

Pacificorp asserts, under the doctrine of collateral estoppel, that the findings in the Yakima County Superior Court case should conclusively act as a bar to relitigating the franchise fee issues in this proceeding before the Commission. The doctrine, however, does not act as a bar in this case.

Collateral estoppel, or issue preclusion, prevents relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. *Spahi v. Hughes-Northwest, Inc.*, 107 Wash. App. 763, 774, 27 P.3d 1233 (2001). Before the doctrine may be applied the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical to the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Id.* The party asserting issue preclusion has the burden of proof. *McDaniels v. Carlson*, 108 Wn.2d 299, 303; 738 P.2d 254 (1987). At least two of the elements of collateral estoppel have not been established by Pacificorp in this case.

First, the issues in this case, though related, are not identical to those in the state court litigation. The state court case was an appeal of agency action taken without an evidentiary record, findings of fact or conclusions of law. The fundamental claim of the complaint was that

the Commission's failure to act was arbitrary and capricious. The complaint did not allege that the respondent utilities were imprudent and that the rates charged were therefore unfair, unjust, and unreasonable under Title 80 RCW.[15]

In addition, Public Counsel was not a party, nor is it in privity with the plaintiffs in the prior litigation, Elaine Willman and the Citizens Standup! Committee. The Washington Supreme Court recognized the distinction between the public and private interests of litigants in *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898 (1995). The court held that a private litigant's discrimination claim was not barred under the doctrine of *res judicata*, in part because she was held to be not in privity with the Equal Employment Opportunity Commission, which had obtained a consent decree against the same defendant for the same discriminatory actions. *Loveridge*, 125 Wn.2d at 766-767. The court also noted that "[p]rivity is established in cases where the person [to be barred] exercises actual control or substantially participates in the [prior] litigation." *Id.*, 125 Wn.2d at 768.

Public Counsel, as a part of the Washington Attorney General's Office, represents the people of the state of Washington in Commission proceedings, and is authorized to institute and prosecute all necessary proceedings and actions. RCW 80.01.100, 80.04.510. In that capacity, Public Counsel acts as a representative of the broad interests of the citizens who are ratepayers affected by the imprudent acts in the complaint. Public Counsel is not authorized by statute to,

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[15] Willman, et. al. make the following claims in their Petition for Judicial Review:

1) The Tribe does not have authority, under federal law, to demand payment of a tax from defendant corporations, except upon sales to itself or its members.

2) The Tribe does not have authority, under federal law, to demand payment of a fee from defendant corporations for their provision of service to nonmembers, except for the reasonable value of tribal property owned by the Tribe or its members, used by the defendants in the course of providing that service.

3) In the alternative, if the payment of the franchise fee is recoverable as an expense, it is a general operating expense which the WUTC is required to use to establish system-wide revenue need, not to pass through to customers within the Yakima Indian Reservation.

4) For the reasons stated above, it was unlawful or arbitrary and capricious for the WUTC to allow the tariff schedule revisions to go into effect.

and does not represent the interests of private individuals, or private associations of individuals who have intervened in this case.

Public Counsel is not collaterally estopped from bringing these claims before the Commission.

E. Public Counsel Prudence Claims Are Not Untimely.

Pacificorp asserts in its memorandum that "[t]he opportunity to assert that the utility's conduct was imprudent passed once the tariff revisions became effective."[16] The assertion is without merit. The Commission's most recent proceeding involving a challenge to tribal tax, the *Brannan* case, was a complaint case filed by ratepayers after the utility tariffs passing through the tax were already in place.[17] The complaint asked the Commission to "remove the Lummi Business Utility tax from the tariffs" of the respondent utilities.[18]

A complaint under RCW 80.04.110 may be brought at any time to challenge whether a rate is fair, just, reasonable, and sufficient. The prudence issue is incorporated within the determination of whether a rate is just and reasonable. *WUTC v. USWC*, p. 4. By definition, a complaint against a tariff is filed after the tariff is in effect. Pacificorp has offered no authority for the proposition that the Commission's failure to suspend a tariff acts as a legal bar to subsequent complaint challenges against the tariff after its effective date.

Finally, Public Counsel notes that when the Commission in February denied Public Counsel's request for establishment of a collaborative, it suggested that "other procedural means" were available and that "Public Counsel could complain against the tariffs."[19]

VI. RESPONSE TO MOTION OF CITY OF TOPPENISH

Public Counsel's complaint in this case is focused on the question of whether it was prudent for the respondent utilities to seek recovery of the Yakama Nation tribal exaction from

[16] Pacificorp Motion, p. 19.

[17] Indeed, the Lummi tax challenged in *Brannan* appears to have been the tax initially addressed ten years earlier in *WUTC v. US West.*

[18] *Brannan*, ¶ 3; Pacificorp itself recognized that the tax tariffs being challenged in *Brannan* were already in effect, since the respondent companies "were including tribal taxes in their rates[.]" Pacificorp Motion, p. 10.

[19] *In the Matter of Tariffs Related to Yakama Nation Franchise Ordinance*, Docket U-030174, Order on Petition for Collaboration, ¶ 13.

any ratepayer. If Public Counsel prevails on these claims, the Commission need not reach the question of whether to the charge is properly treated as a fee or a tax. Instead, the companies would have to determine whether to seek judicial resolution of the validity of the charge. Only if the charge is upheld would the Commission need to address recovery.

In the event the Commission grants the respondent motions for summary judgment, however, Public Counsel believes that the City of Toppenish raises valid questions about the proper characterization of the charge. Public Counsel is particularly concerned that Washington Supreme Court's decision in *Pacific Telephone &Telegraph*[20] be correctly applied. The proper inquiry under *Pacific* is whether is the amount of the franchise fee is so excessive as to constitute a manifest injustice.[21] The case does not appear to give the Commission the authority to entirely invalidate a franchise fee, either directly or indirectly.[22]

Public Counsel takes no position with regard to the issue raised in Section 5.3 of the Toppenish Motion, which argues that the city is outside the reach of the tribe's taxing authority.

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[20] *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200, 142 P.2d 498 (1943).
[21] *Id*., at 278.
[22] *Id*., at 281.

VII. CONCLUSION

For the foregoing reasons, respondents' motions for summary determination of Public Counsel's claims should be denied.

DATED this 29th day of September, 2003.

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