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, AND PACIFICORP D/B/A/ PACIFIC POWER & LIGHT COMPANY, *et al*., Defendants.	Docket No. U-030744 CITY OF TOPPENISH'S RESPONSE TO UTILITIES' MOTIONS FOR SUMMARY DETERMINATION

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1. INTRODUCTION

The Washington Supreme Court has long held that payments made by utilities to municipalities pursuant to franchises are not taxes.[1] Rate-making agencies such as the UTC lack legal authority to allow utilities to characterize payments made pursuant to franchises as taxes.[2] It was thus clearly erroneous for the Commission to allow utilities such as Cascade Natural Gas Corporation ("Cascade) and PacifiCorp d/b/a Pacific Power & Light ("PacifiCorp") (collectively the "Utilities") to pass those fees imposed pursuant to the Yakama Nation Franchise Ordinance ("Franchise Ordinance" or "Ordinance") through to the residents of the City of Toppenish ("City"). To protect its interests, the City filed its complaint in intervention under RCW 80.04.110 to challenge the Utilities' tariffs that characterize the Yakama Nation franchise fees as taxes.

2. SUMMARY OF ARGUMENT

In their Motions for Summary Determination, the Utilities seek an order dismissing the City's complaint. The Utilities ignore established law in assertions that the "Yakama Nation exaction has all the hallmarks of a tax."[3] A franchise may be compelled and may generate revenue for government. But such "hallmarks" do not turn a franchise fee into a tax. Further, the doctrine of collateral estoppel[4] does not bar the City from challenging the Utilities' tariffs, since the City was not a party to or in privity with a party in the Yakima Superior Court case.

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[1] *State ex rel. Pacific Telephone and Telegraph Co. v. Department of Public Service*, 19 Wn.2d 200, 142 P.2d 498 (1943). See, City's Motion for Summary Determination.
[2] *Ibid.*
[3] Cascade's Motion for Summary Determination, pg. 1.
[4] PacifiCorp's Motion for Summary Determination, pg. 2.

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3. ARGUMENT

3.1 A Franchise Is A Contract. The Yakama Indian Nation Establishes Fees For The Rights Granted Under The Franchise. Under Washington Law, Such Fees Are Not Taxes.

Yakama Nation Ordinance T-177-02 ("Franchise Ordinance" or "Ordinance") requires all utilities operating within the boundaries of the Reservation to enter into a franchise agreement with the Yakama Nation. The purpose behind the Franchise Ordinance is clearly stated in the Preamble:

> Utilities operating on the Reservation have placed Utility facilities on lands owned or controlled by the Yakama Nation without authorization or for which authorization has expired and the Tribal Council finds that it is in the public interest to require Utilities operating on the Reservation **to obtain permission for such facilitie**s by entering into agreements with the Yakama Nation. (Emphasis Added)

To effectuate its purpose, Section 3 of the Franchise Ordinance states that "[I]t shall be unlawful for any Utility to provide Utility Service to any person within the external boundaries of the Reservation without a valid Franchise obtained pursuant to the provisions of this Ordinance and any subsequent amendments." Moreover, in consideration for obtaining the Tribe's **permission to operate on lands owned or controlled** by the Yakama Nation, utilities are required to pay three percent (3%) of the utility's Gross Operating Revenues as a franchise fee.[5]

Neither of the Utilities have challenged the Yakama Nation's authority to require a franchise to operate within the Reservation.[6] Nor have they challenged the Tribal Council's

[5] Franchise Ordinance, Section 5.1.

[6] Indian tribes have inherent powers of local self-government analogous to that of municipalities. See, Kevin J. Worth, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 Vand.L.Rev. 1273 (1991). Indeed, one prominent scholar observed that "tribes … largely take the place that states and municipalities occupy towards other citizens of the United States." F. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1, 4 (1942). However, unlike cities, Indian tribes as sovereign powers have inherent authority to govern; they need not point to any enabling legislation to justify their actions. *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); F. Cohen, *Federal Indian Law* 232-257 (1982 ed.). Absent Congressional restriction, an Indian tribe has the inherent authority to grant franchises to utilities, and set the terms and conditions of such franchises.

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stated findings that utilities operating on the Reservation have placed utility facilities on lands owned or controlled by the Yakama Nation. To the contrary, both Utilities have argued that the Franchise Ordinance is not clearly unlawful.[7] At the same time, both Utilities inconsistently assert that Franchise Ordinance does not mean what it is says it means – that the charges imposed by the Yakama Nation as a condition of franchise are not franchise fees, but taxes.

3.1.1 A charge imposed pursuant to a franchise is neither a tax nor a license fee.

As an exercise of its sovereign power, a municipality may require that a utility must receive a franchise before it operates within the municipality's jurisdiction.[8] The municipality may refuse to grant a franchise at all.[9] However, if the municipality grants a franchise, it may do so on its own terms, conditions and limitations[10] – including requiring the utility pay the municipality a percentage of the utility's gross income derived from its operations within the municipality.[11] Once a municipality grants a franchise, the utility's options are to accept the franchise as offered, or reject it as a whole.[12] Upon acceptance by the utility, the franchise becomes a contract between the municipality and the utility.[13]

Washington courts have long held that the charges imposed by a municipality under a franchise are not taxes or license fees, but rather a charge similar to rent.[14] In *City of Spokane v.*

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[7] Cascade's Motion for Summary Disposition, pg. 8; PacifiCorp's Motion for Summary Determination, pg. 12.
[8] *City of Spokane v. Spokane Gas & Fuel Co.*, 175 Wash. 103, 107, 26 P.2d 1034 (1933).
[9] *Ibid*., at 107; *Snohomish County PUD No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 11, 586 P.2d 851 (1978).
[10] *Spokane Gas & Fuel Co.*, 175 Wash. at 107; *Snohomish County PUD No.1*, 91 Wn.2d at 11.
[11] *State ex rel. Pacific Telephone and Telegraph Co. v. Department of Public Service*, 19 Wn.2d 200, 270-282, 142 P.2d 498 (1943); *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252, 259, 39 S.Ct. 265, 63 L.Ed. 590 (1918); *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941); *City of Beaumont v. Gulf State Utilities Co.*, 163 S.W.2d 426, 428 (Tex. Civ. App. 1942); *City of San Diego v. Southern California Telephone Corp.*, 266 P.2d 14 (Cal. 1954); *City of Corpus Christi v. Southern Community Gas Co.*, 368 S.W.2d 144, 147 (Tex. Civ. App. 1963).
[12] *Spokane Gas & Fuel Co.*, 175 Wash. at 107; *Snohomish County PUD No.1*, 91 Wn.2d at 11.
[13] *Spokane Gas & Fuel Co.*, 175 Wash. at 108.
[14] *Ibid*., at 108.

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Spokane Gas & Fuel Co., 175 Wash. 103, 107, 26 P.2d 1034 (1933), the Washington Supreme Court discussed the characterization of a franchise fee imposed by the City of Spokane:

> Now, what was the character of the charge imposed by respondent under this contract in [the city's franchise ordinance], requiring appellant to pay two per cent of its gross receipts? That question must be answered by the nature of the right for which it was to be paid. What appellant acquired by the franchise was the right to lay gas mains in the streets of the city – to occupy a portion of the streets. **A charge imposed in a franchise is not a tax or a license.** It is not imposed under the sovereign power of taxation or police regulation. If it were, of course, it could be challenged only if arbitrary or so grossly unreasonable as to be capricious…. Such charges as these have been quite generally held to be in the nature of rental for the use and occupation of the streets.[15]

A charge imposed in a franchise is neither a tax nor a license fee – it is a species of rent paid for the permission to use public property.[16] Where the rent charged is so grossly unreasonable as to be capricious, the ratemaking agency may deem the excessive portion to amount to a tax.[17] However, as the Washington Supreme Court observed in *Snohomish County PUD No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 11, 586 P.2d 851 (1978), such cases are exceptional:

> The courts have never taken it upon themselves to review the appropriateness of conditions imposed on such a privilege nor to substitute their judgment for that of the municipal authorities. The power of the city is plenary over its property.[18]

Although the Yakama Nation is not a municipality, it does have the inherent authority of local self-government broadly analogous to that of municipalities.[19] Neither Cascade nor PacifiCorp have alleged that the Yakama franchise fee is a grossly unreasonable charge to pay for permission to operate on tribal lands.[20] What statutory limitations may exist for a

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[15] *Ibid*., at 108 (Emphasis Added).
[16] See, *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200, 278-280, 142 P.2d 498 (1943); Roger D. Colton & Michael F. Sheehan, "*Raising Local Government Revenue through Utility Franchise Charges; If the Fee Fits, Foot It*," 21 Urb. Law. 55 (1989).
[17] *Pacific Tel. & Tel. Co.*, 19 Wn.2d. at 282.
[18] *Snohomish County PUD No. 1*, 91 Wn.2d at 11.
[19] See, FN 6. One important distinction between the Yakama Nation and a municipality is that only the United States Congress – and not the State of Washington – may limit the Nation's inherent power of self-government. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) (Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state).
[20] Nor do Cascade and PacifiCorp allege that they do not locate their facilities on land owned or otherwise controlled by the Yakama Nation. For example, the utilities could have asserted that all of their facilities are located on lands belonging to non-members.

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Washington local government's imposition of franchise fees has no application to the Yakama Nation. Accordingly, as a matter of law, the charges imposed by Yakama Franchise Ordinance are neither taxes nor license fees.

3.1.2 The Utilities' continued operation in the Yakama Reservation constitutes acceptance of the terms and conditions in the Yakama Franchise Ordinance.

Although the power of a municipality to require that a utility must receive a franchise before it operates within the municipality's jurisdiction is grounded in the municipality's sovereign power, the charges imposed in a franchise arise from contract, not from the sovereign power of taxation or police regulation.[21] Cascade argues that because it [did not] sign a franchise agreement with the Yakama Nation, it has not entered into a contractual agreement with the Nation. Therefore, Cascade concludes, the Franchise Ordinance must impose a tax if the charges are to be deemed valid. However, Washington law does not support Cascade's conclusion.

Section 3 of the Yakama Franchise Ordinance states in relevant part:

> It shall be unlawful for any Utility to provide Utility Service to any person within the external boundaries of the Reservation without a valid Franchise obtained pursuant to the provisions of this Ordinance and any subsequent amendments.

The terms and conditions of the Yakama's franchise are spelled out in Section 5, which simply requires that utilities operating within the Reservation pay a franchise fee of three percent of the gross revenues derived from those operations.

The Utilities did not have to accept the Yakama's franchise – they could have refused to locate their facilities on land owned or controlled by the Yakama Nation. However, once the Yakama Nation passed the Franchise Ordinance, their only option was to accept the franchise as offered, or reject it as a whole.[22]

[21] *Spokane Gas & Fuel Co.*, 175 Wash. at 108-109.
[22] *Spokane Gas & Fuel Co.*, 175 Wash. at 107; *Snohomish County PUD No.1*, 91 Wn.2d at 11.

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It is undisputed that the Utilities continued to operate in the Reservation following the effective date of the Franchise Ordinance. Under the language of the Franchise Ordinance, the Utilities had no authority to operate in the Reservation – except pursuant to the terms and conditions of the Yakama's franchise. As a matter of law, their continued operation constitutes acceptance of the Yakama's franchise.[23] Further, having received the benefit of the franchise through their continued operation within the Reservation, the Utilities are estopped from challenging the validity of the franchise.[24] Through their continued operation within the Reservation, the Utilities accepted the terms and conditions of the Yakama's franchise pursuant to the Franchise Ordinance – including the requirement that they must pay three percent of their gross revenues resulting from their operation within the Reservation.

3.1.3 A franchise is imposed under a government's proprietary authority. Distinctions among taxes and fees based on the police and tax power of government have no application in these proceedings.

Cascade and PacifiCorp ignore basic Washington case law that franchise fees – even those requiring payment based on gross receipts - are not taxes.[25] Instead, Cascade seeks to apply the framework for addressing the difference between taxes and fees developed by the Washington Supreme Court in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) to support its characterization of the Yakama franchise fees as a tax. The three-part *Covell* test[26] provides "a useful and significant contribution to understanding what actually makes a tax a tax

[23] *Multicare Medical Ctr. v. State*, 114 Wn.2d 572, 584-86, 790 P.2d 124 (1990) (performance constitutes acceptance, creating unilateral contract).
[24] *Mobley v. Harkins*, 14 Wn.2d 276, 128 P.2d 289 (1942).
[25] E.g., *Spokane Gas & Fuel*, *supra*; *Pacific Tel. & Tel. Co.*, *supra.* *See also*, UTC Cause Nos. U-79-43, U-79-49, U-79-50.
[26] The prongs of the *Covell* test may be summarized as follows:
- First, is the primary purpose to accomplish desired public benefits that cost money, or is the primary purpose to regulate?
- Second, is the money collected allocated only to authorized purpose?
- Third, is there a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the ratepayer?

See, Hugh D. Spitzer, "Taxes v. Fees: A Curious Confusion," 38 Gonz.L.Rev. 335, 353 (2003).

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and what makes a user fee a user fee."[27] However, the *Covell* decision is limited only to those governmental charges imposed under a municipality's **taxing power** or pursuant to the municipality's **police powers**.[28]

In contrast, a charge imposed pursuant to a franchise "is not imposed under the sovereign power of taxation or police regulation."[29] Instead, such charges are a species of rent paid for the permission to use public property.[30] It is generally recognized that a sovereign may lease its property to private parties, so long as there is no interference with the public use.[31] Similarly, a municipality, having the power to impose conditions on granting a franchise, may require compensation for the use of public property as a condition of the grant of the right to use it, unless forbidden by statute or contrary to public policy.[32] The *Covell* test is simply inapplicable to franchise fees. Such fees arise out of the proprietary power of the municipality and not out of its taxing or police powers.

3.1.4 RCW 35.21.860, which forbids cities or towns from imposing a franchise fee for use of public property, has no bearing on the franchise fees imposed by the Yakama Nation.

Until 1982, the law in Washington permitted cities and towns to impose a franchise fee on the gross revenues derived from the franchise. In 1982, the Washington State Legislature enacted a law forbidding cities or towns from imposing franchise fees in excess of the

[27] Hugh D. Spitzer, "Taxes v. Fees: A Curious Confusion," 38 Gonz.L.Rev. 335, 336 (2003). In his article, Prof. Spitzer criticizes the tendency of Washington courts to ignore the actual holding of *Covell* and instead cling to the doctrine that every governmental charge can be understood as either a tax or a regulatory fee.
[28] Covell, 127 Wn.2d at 878.
[29] *Spokane Gas & Fuel Co.*, 175 Wash. at 108. See also, *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 278-279.
[30] See, *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 278-280; *Spokane Gas & Fuel Co.*, 175 Wash. at 108; Roger D. Colton & Michael F. Sheehan, "*Raising Local Government Revenue through Utility Franchise Charges; If the Fee Fits, Foot It*," 21 Urb. Law. 55 (1989).
[31] *Winkenwerder v. Yakima*, 52 Wn.2d 617, 624, 328 P.2d 873 (1958).
[32] McQuillan, *The Law of Municipal Corporations* §34.37(3rd Ed. 1995).

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administrative costs associated with the franchise.[33] Now codified as RCW 35.21.860, that statute forbids Washington cities or towns from imposing a franchise fee similar to that imposed by the Yakama Nation.

However, RCW 35.21.860 has absolutely no bearing on the franchise fees required pursuant to the Yakama Franchise Ordinance.[34] The authority of the Nation to charge a "rent" for the use of tribal land is a question of federal law, not state law. Assuming that the Yakama Nation has authority under federal law to require utilities operating within the Reservation boundaries do so pursuant to a franchise, the Nation is not limited to collecting a franchise fee that recoups costs of administrative service.[35]

3.1.5 Pursuant the Commission's prior decision in *Brannan v. Quest*, the franchise payments required by the Yakama Franchise Ordinance may not be rejected unless it is clearly illegal.

In *Brannan v. Quest*, the Commission concluded that it will reject a utility's pass-through to customers of a tribal tax only if the tax itself is clearly invalid.[36] This decision is cited by the Utilities for the proposition that unless the Yakama Nation franchise fee charge is "clearly unlawful," the Commission does not have a duty to reject or suspend the utilities' tariff filings.[37] However, the utilities' argument is inherently self-contradictory since the utilities'

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[33] Chapter 49, Washington Laws 1982, 1st Ex. Sess. Codified as RCW 35.21.860 (as amended). As originally adopted, the statute stated:

> No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, telephone, or gas distribution businesses… except that (a) that a [utility] tax may be imposed, and (b) a fee may be charged to such businesses that recovers actual administrative expenses incurred by a city or town that are directly related to receiving an approving a permit, license, and franchise, to inspecting plans and constructions, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW.

The original bill, ESB No. 4972, was a sweeping package of local governmental finance reforms, which traded authorization for a local options sales tax and a sales tax equalization process for elimination of local franchise fees above the level of actual costs.

[34] See, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) (Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state); see also, Felix S. Cohen, *FEDERAL INDIAN LAW*, 259-79 (1982 Ed.)

[35] The logical corollary to this is that if the Yakama Nation does not have the power under federal law, the State of Washington cannot grant it the authority to impose a utility tax.

[36] *Brannan v. Quest*, WUTC Docket Nos., UT-010988 et al.

[37] PacifiCorp's Motion for Summary Determination, page 11.

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tariff filings implicitly conclude that the Yakama Nation franchise fee is not valid – hence, it must be recharacterized as a "tax".

The *Brannon* decision involved a formal complaint to remove the Lummi Business Utility Tax from the tariffs of various utilities, to the extent the tax is passed through to non-members residing on fee land within the Lummi Reservation.[38] The charge imposed by the Lummi Nation was characterized by the tribal resolution itself as a tax and **not a franchise fee**: "there is imposed on and there shall be collected from each utility doing business within the Lummi Reservation a business privilege tax equal to 5% (five per cent) of the utility's gross receipts generated from retail sales within the Reservation."[39] The Lummi Tribal resolution stated that the charge was a tax, and as the Commission itself observed, "there is no indication that the tribal taxes are really franchise fees."[40] Accordingly, the Commission concluded that "until a court of competent jurisdiction has ruled that the tribal utility tax, or an analogous tax, is clearly illegal, we will not reject the pass-through of the Lummi and Swinomish utility taxes." [41]

In contrast, the Yakama Nation Franchise Ordinance imposes a franchise fee, not a tax. The charge imposed on franchisees pursuant to the Franchise Ordinance is characterized in the Ordinance as a "franchise fee".[42] The justification for the franchise fee given in the Ordinance – that utilities operating in the Reservation have placed utility facilities on lands owned or controlled by the Yakama Nation without authorization – is consistent with the Yakama Nation's characterization of their charge as a franchise fee, not a tax.[43] To paraphrase *Brannan*, there is no indication in the Franchise Ordinance that the tribal franchise fees are disguised taxes.

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[38] *Brannan v. Quest*, WUTC Docket Nos., UT-010988 et al.
[39] WUTC Docket No. UT-010988, Quest's Motion for Summary Determination and Brief Regarding Jurisdiction. Indeed, it was the complainants who argued in the alternative that either the tribal tax was illegal or it was really a franchise fee in disguise.
[40] WUTC Docket Nos., UT-010988 et al.
[41] WUTC Docket Nos., UT-010988 et al.
[42] Franchise Ordinance, Section 5.
[43] Franchise Ordinance, *Preamble*.

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Nonetheless, the Utilities have sought to invalidate the Yakama Nation franchise fees – by recharacterizing them as taxes. The Utilities have not argued that the Franchise Ordinance is invalid.[44] Yet, by filing a tariff characterizing the Yakama Nation franchise fees as taxes, the Utilities have effectively invalidated the Franchise Ordinance *sub silentio*. Such an action is contrary to the Commission's reasoning in *Brannan*.

The central question raised by the Commission in *Brannan* was: "Is the Lummi (or Swinomish) **utility tax** clearly invalid?"[45] Employing the reasoning of the *Brannan* decision, the central question must be: Is the Yakama Nation **franchise fee** clearly invalid? Unless the Yakama Nation franchise fee is clearly unlawful, the Commission must reject the Utilities' assertion that said fee is "really" a tax.[46]

3.1.6 The Utilities' tariff filings seeking to recharacterize the Yakama Nation Franchise Fee as a tax were clearly unlawful.

In *Pacific Tel. & Tel. Co.*, the Court observed that although the distinction between payments made by utilities pursuant to franchises and payments made pursuant to municipal taxing ordinances "may seem rather drawn, **we are convinced that a distinction in fact exists**."[47] This analysis is not founded on statutory distinctions, but on the basic legal difference between taxes and proprietary charges. Agencies "lack legal authority" to recharacterize franchise payments as taxes. Utilities are not permitted to pass such franchise fee payments to ratepayers within the Reservation.[48] Only by finding that the charges imposed pursuant to the Franchise Ordinance are so "grossly unreasonable as to be capricious" may the Commission characterize the **excessive** portion of the charge as a tax.[49] Such a determination must be made

[44] For example, by arguing that the Utilities have not placed utility facilities on lands owned or controlled by the Yakama Nation and that the Nation has no authority to charge a franchise fee for the use of non-member fee land.
[45] WUTC Docket Nos., UT-010988 et al.
[46] Similarly, the Commission rejected Brannan's argument that the Lummi tax is "really" a franchise fee.
[47] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 281 (Emphasis Added).
[48] *Ibid*,.
[49] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 278; *Spokane Gas & Fuel*, 74 Wash. at 108.

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without reference to the limitation contained in statute (RCW 35.21.860), since a State law restricting the authority of municipalities to impose franchise fees has no bearing on an Indian Nation's authority to require such payments. Ad as a matter of law, a three percent franchise fee is not "grossly unreasonable."[50]

The Utilities have not argued that the Yakama franchise fees were grossly unreasonable as rent for the use of tribal land – only that the franchise fees were "exorbitant if were considered a fee [for administrative services]."[51] However, as discussed above, the Yakama Nation is not limited to charging for merely administrative services – they are entitled to charge for use of land owned or otherwise controlled by the Nation. The Utilities have made no argument that the three-percent charge required by the Franchise Ordinance is grossly unreasonably or otherwise excessive. Without such a finding,[52] the Commission was without legal authority to allow the Utilities to characterize even a **portion** of their franchise payments as taxes.[53] Accordingly, the Utilities' tariff filings were not only unreasonable, but also unlawful.

3.2 The City Has Not Been Party To Prior Litigation Involving the Franchise Fee. The Yakima Superior Court Decision Does Not Preclude the City of Toppenish from Challenging the Utilities' Tariff Characterizing the Yakama Nation Franchise Fees as Taxes.

Pursuant to RCW 80.04.110, the City has an independent statutory right to petition the Commission for "any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission."[54] This statutory right is not based on some theory of representing individual

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[50] *Ibid*. See also, UTC Cause Nos. U-79-43, U-79-49, U-79-50, Finding 18 ("Expenses attributable to any such franchise fees not exceeding 3 percent are reasonable expenses to include in general operating expenses.").

[51] Cascade's Motion for Summary Determination, pg. 11.

[52] It is worth mentioning that such a finding would contradict prior determinations of the Commission that franchise fees not exceeding 3 percent of gross revenues are reasonable. *See*, UTC Cause Nos. U-79-43, U-79-49, U-79-50, Finding 18.

[53] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 278.

[54] Pursuant to RCW 80.04.010, "Public service company" includes every gas company, electrical company, telecommunications company, and water company.

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representatives of the City.[55] Rather the City has a recognized interest – as a municipal corporation – in the actions of public service corporations like the Utilities. The City has not been a party to any lawsuit challenging the Utilities' tariff filings.

More specifically, the City was not a party to the litigation filed in Yakima County Superior Court by Elaine Willman and the Citizens Standup! Committee.[56] In that lawsuit, the superior court concluded that:

> [T]he Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the 3% charge should be treated as a tax for ratemaking purposes. Thus the Washington Utilities and Transportation Commission did not have a duty required by law to either reject or suspend and set for an adjudicative hearing tariffs filed by PacifiCorp and Cascade Natural Gas Corporation that proposed to recover the 3% charge as a tax only from ratepayers located within the Yakima Reservation.[57]

The Utilities assert that the doctrine of collateral estoppel precludes the City from asserting its statutory right to challenge their tariff characterizing the Yakama Nation franchise fees as taxes.

Collateral estoppel is appropriate where (1) the issues in both cases are identical; (2) the first action resulted in a final judgment on the merits; (3) the party against whom the doctrine is invoked was a party to or in privity with a party to the first action; and (4) applying the doctrine would not work an injustice against the party to whom it is applied.[58] The Utilities assert that the doctrine applies to the City, because "the City of Toppenish, located within the boundaries of the Yakama Reservation, claims to represent the 'City and its residents,' which also naturally places them in privity with Willman, *et al*."[59] The Utilities cite absolutely no authority for this remarkable proposition which is contrary to the general rule in the United States that

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[55] e.g., Elaine Willman, or other party to prior litigation.
[56] *Willman v. WUTC*, Yakima Superior Court, Cause No. 03-2-00086-7.
[57] *Willman v. WUTC*, Yakima Superior Court, Cause No. 03-2-00086-7, Order Denying Plaintiffs' Motion for Summary Judgment.
[58] *City of Des Moines v. $81,231*, 87 Wn.App. 689, 700, 943 P.2d 669 (1997).
[59] PacifiCorp's Motion for Summary Determination, pg. 14.

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governments are not precluded from bringing subsequent litigation on the same issues following a prior unsuccessful private suit.[60] In the absence of legal authority, the claim must be rejected.

Privity denotes a mutual or successive relationship to the same right or property.[61] The binding effect of the adjudication flows from the fact that when the successor to that right or property acquires an interest in the right, the successor is then affected by the adjudication in the hands of the former owner.[62] One learned commentator enumerated the categories in which privity has been found by Washington courts:

> One category is successors in interest such as purchasers of land or other property and assignees of contract rights. A more general category is persons whose interests are represented by a party. A third category is those in actual control of the litigation. In addition, there are cases that extend privity to persons who participate in litigation though they are not in actual control. Perhaps most expansive are cases holding that testifying as a witness is at times sufficient. [63]

The City, as stated previously, has an independent statutory right to petition the Commission – a right not derivative of representing the interests of Elaine Willman or other residents within the City limits. The City is not the successor in interest of the Willman claim,[64] nor was the City's interests represented by the Willman's litigation.[65] Nor did the City participate in,[66] let alone have actual control of, the Willman litigation.[67] In short, there is no legal or factual basis for asserting that the City "sits in privity with Willman, *et al*" with respect to the *Willman v. WUTC* litigation in Yakima Superior Court. As a result, the City is not

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[60] 47 Am.Jur.2d *Judgments* §698; *Mississippi v. Louisiana*, 506 U.S. 73, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992).
[61] *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 143, 925 P.2d 1289 (1996).
[62] *Hackler v. Hackler*, 37 Wn.App. 791, 243, 683 P.2d 241 (1984).
[63] Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 819-820, (1985)
[64] *McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959).
[65] *LaHue v. Keystone Inv. Co.*, 6 Wn.App. 765, 496 P.2d 343 (1972); *Kincaid v. Hensel*, 185 Wash. 503, 55 P.2d 1050 (1936).
[66] *Youngquist v. Thomas*, 196 Wash. 444, 83 P.2d 337, *amended*, 196 Wash. 456, 87 P.2d 1120 (1938).
[67] *Mutual of Enumclaw Ins. Co., v. State Farm Mutual Auto. Ins. Co.*, 37 Wn.App. 690, 682 P.2d 317 (1984).

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precluded by the Yakima Superior Court decision from challenging the challenging the Utilities' tariff characterizing the Yakama Nation franchise fees as taxes.

4. CONCLUSION

When a sovereign exercises control over its property through regulation of franchises, it exercises neither the police power nor the taxing power. Rather, the government acts in its proprietary capacity and may impose fees for the use of its property. Washington law is clear. Such franchise fees are to be classified as operating expenses for tariff purposes. The Yakama Indian Nation franchise fee cannot lawfully be passed through directly to ratepayers.

For the reasons set forth in the City's arguments before the WUTC, the Commission should deny the Utilities' Motion for Summary Determination with respect to the issues raised in the City's Petition to Intervene, and grant the City's motion.

RESPECTFULLY SUBMITTED this ____ day of September 2003.

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