

UNOFFICIAL TRANSCRIPT FROM JUNE 28, 2000

**OPEN MEETING OF THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

Chairwoman Showalter: Good morning. This is a meeting of the Washington Utilities and Transportation Commission on June 28” [year 2001] . . .

Why don’t we go then to 1T, the Sanitary Service. We’ll get an introduction from Staff first and then allow Ms. Johnson [sic] to comment.

Mr. Colbo: Yes, good morning. Bob Colbo of the Transportation Program Staff. Item T is a filing by Sanitary Service Company in Docket No. TG-000922 and it seeks to modify their tariff adding two municipal taxes: one from the City of Blaine for 6% and another imposed by the Lummi Indian Nation at 5%. It was on the Consent Agenda since the Company asked for a LSN treatment, an early effective date of July 1st. Normally, that is the way we handle tax pass-throughs. However, this one has generated some controversy – particularly from Marlene Damson who is on the line. She has some legal concerns about the legality of the tax as it is being proposed by the Lummis.

Chairwoman Showalter: OK, let me ask a question then. Should we remove this from the Consent Agenda so we can have a motion on the rest of it or is that the appropriate way?

[Unidentified Woman]: Go ahead and take the comments.

Chairwoman Showalter: Take the comments and then act on having the whole agenda? All right. Then we’ll do that. Continue.

Mr. Colbo: OK. The only other thing I wanted to add was that the expected annual impact to the company and rate payers is about \$1,000 a year for the Lummi tax.

Chairwoman Showalter: Ms. Johnson [sic], do you have a comment? Why don’t you introduce yourself for the record.

Ms. Dawson: Yes, my name is Marlene Dawson . . .

Chairwoman Showalter: Excuse me. I’m sorry.

Ms. Dawson:

And I am a Watcom County Council member. I have been for six years and I have been a resident within the Lummi Reservation for about 24 years. I am very familiar with tribal issues and take a great deal of time and energy exploring the different legal ramifications. And as you know, you passed through this tax about 10 years ago. This Commission was the first and only in the entire United States that has ever passed a utility tax of this sort and they continue to be the only one. And I believe that you have an opportunity now with the tribe reopening this issue by asking Sanitary Service and Blaine to pay this fee to reexamine the legality of the issue because there've been additional information since you first passed it through. There were numerous cases that were referred to previously: Borland, Montana, Brendall. But the two most recent ones and I have referenced the one -- the Tracy King in the correspondence that I faxed down a couple of days ago -- and that deals specifically with the collection of fees. The U.S. Supreme Court was very clear that there has to be very much a working and consensual arrangement when that happened. Now the County -- and I mentioned that, you know, when the County permits the collection of a fee with the contractors with the tribe -- when the tribe has worked with the County and gone out of their way to get grants to reduce the cost for the County but otherwise, our County would not be paying the tribe for, you know, the contractors. They would not be asking the contractors to pay the tribe anything. OK so, that was the Tracy King that I referenced in the correspondence. There's another case that I forgot to reference and that was Straight v. A-1 Contractors, another U.S. Supreme Court case. This deals with the lack of jurisdiction of tribes with roads and easements saying that roads and easements -- the right of ways -- are very much fee lands and that the tribes have no jurisdiction over those. Of course, the Sanitary Service uses those roads and the U S WEST and the Puget Sound Energy uses the easements. It says right here, ". . . tribal power, however circumscribed over reservation land owned in fee by non-Indians and over reservation land in which non-Indians have acquired property rights substantial enough to be considered land alienated to non-Indians, such as easements and right-of-ways." So, basically, I think that this Commission has an opportunity now to take some corrective course and I think it is imperative because it doesn't matter how little or how much the money is, you are dealing with a civil rights issue here. And the civil rights of these non-Indian residents are being trampled on and it would be very nice to see this Commission step out and correct their actions.

Chairwoman Showalter:

Thank you. Mr. Cedarbaum do you have -- Mr. Cedarbaum is our Assistant Attorney General -- do you have any response to the comments of Ms. Dawson?

Mr. Cedarbaum:

Yes, just briefly. Hello, Ms. Dawson. We've spoken on the phone, I think, a couple of times before and I have corresponded with you as well as have other people in my division earlier. I guess I'll just make a few comments. One is that in 1992 in Docket UT-911306 (which I believe the Commission has copies of that Order and I have provided that previously to Ms. Dawson), the Commission considered the issue of taxation by the tribe on a utility which serves both tribal and non-tribal members. And at that time, the Commission considered a ream of case law including many of the cases that Ms. Dawson has cited to me over the past few months. And the Commission considered those cases and resolved the issue basically saying that the tax was not clearly invalid and arguably, was valid based on that case law. So, the Commission's position was that the tax was not a clearly invalid tax and that because of the cost of trying to litigate that issue all of the way up through the Federal courts and presumably to the U.S. Supreme Court was far greater than the benefit of winning that proceeding, the Commission decided to let the tax be passed through. Since that 1992 case, there have been correspondences with Ms. Dawson, one in 1995 in which she was told that no other additional case law would have changed that position of the Commission in the 1992 case and then since then, the State of Montana case which is the King case she references in her letter. I have reviewed that case and have corresponded with her on that in a letter earlier this year. That case involved a tribe's attempt -- and this was in Montana -- a tribe's attempt to cause the State of Montana to institute affirmative action programs, employment programs, with respect to construction workers on highways in the state. It was not a taxation issue and so I felt that that was clearly distinguishable from the tax issue you have before you which is a tax on utility and not the end-user itself. It was also (in the State of Montana), was also a case involving the tribe's assertion of jurisdiction over the State itself as opposed to utility. So, again, that case did not seem dispositive to me. So, after reviewing all of the cases and the Commission precedent, I still think the Commission is on solid ground in determining, in deciding that the tax is not a clearly invalid one and that it is a prudent expense or legitimate expense for the companies to pass through to their customers. That's not to say that if a court were to hear this that there might not be disagreement on that, it's just to say that it's a very complex issue that has no clear resolution and that at this point in time, I don't see any reason why the Commission should change its prior practice of allowing utilities (in this case, a solid waste company) to pass through the tax to end-users.

Chairwoman Showalter:

Thank you. Ms. Dawson, do you have any response?

Ms. Dawson: Well, I believe that Tracy King case did require a fee payment of \$100 for something rather . . . but I would also like to mention that the tribe has since changed their constitution so that the review of any activity affecting non-Indians must be voted on through the tribal membership and this has never occurred. I raised the issue with the tribal attorney and he said, "Well, that's your opinion." The fact that it grandfathers every year on December 31st doesn't seem to make a difference to him. The Tribal Council as opposed to the membership continues to reactivate all of these various pass throughs and that's an issue that this Board, I think, should also be addressing. Plus I think one of the issues that this Commission has said is that they thought it wasn't fair – that it was somewhat discriminatory to only collect fees from tribal people and not everyone. They thought that was racial discrimination and I did mention in my letter that the Justice Department has circumvented that entire argument by saying tribes are political groups, not racial groups.

Chairwoman Showalter: OK. Are there any questions from the Commissioners of Mr. Cedarbaum or Ms. Dawson?

Commissioner Hemstad: Well . . .

Chairwomen Showalter: This is Commissioner Hemstad.

Commissioner Hemstad: This is a tax assessed against the utility and the utility has paid it or is prepared to pay it and is now requesting that it be passed through to the ratepayers. Is that an accurate description of the mechanics here?

Mr. Cedarbaum: That's my understanding. This is a tariff filing by Sanitary Service, who is, which has essentially been sent a bill by the tribe for the tax and they're now seeking to pass it through as a business expense to their own consumers.

Commissioner Hemstad: So, I suppose the Sanitary Service could challenge the tax if it wished and then litigate the issue.

Mr. Cedarbaum: That's correct. As well as any of the presumably non-tribal members could form an association themselves and challenge the tax either in court with the Tribal Council if there are issues with respect to the constitution – with that tribe's constitution, as Ms. Dawson has related. Perhaps the Bureau of Indian Affairs might be a course of action as well. I would point out in that regard that in that 1992 case that I discussed earlier, there's an intervenor called the Fee Land Owners Association ("FLOA") which, I assume, was a group of non-tribal members contesting the pass through of the tax. So, they were and would be Ms. Dawson's constituents. I assume that they made their arguments, they were rejected by the Commission, and that association did not appeal either the ALJ's order to the Commission, and the Commission then affirmed the ALJ's Order, or appealed that case to Superior Court.

Ms. Dawson: I might mention that utility company (Sanitary Service) it's nothing off their . . . you know, no skin off their nose to pass it through because it's really not affecting them. It's affecting the ratepayers. And if I could tell you the number of issues that are on our plate for litigation, you would just be amazed. There are two major issues that the property owners are dealing with right now: water rights issue, an issue dealing with invasion of a well site of 100 feet from a commercial well that is inflicting harm on residents; there's a tide land issue . . .

Chairwoman Showalter: But Ms. Dawson, we can't go into other matters.

Ms. Dawson: But, I guess the bottom line is that this Commission has a legal responsibility. Instead of putting it on the property owners who are over-burdened, instead of putting it on the businesses, this Commission has a responsibility.

Chairwoman Showalter: I would like to respond to that. We are not a tax court. Our role is to determine whether an expense of a utility is a valid expense. I think if there was, as Mr. Cedarbaum says, a clearly invalid tax then it would be a clearly invalid expense. But I think barring that, we have to presume the validity of all kinds of expenses whether they are contractual or City-imposed, various things. We cannot be the arbiter of the validity of a tax. And in this case, in my view, we don't have a clearly invalid tax. Therefore, we have to presume it's valid. There are other avenues for either the utility or the ultimate ratepayer here to challenge this tax and it may be that it is invalid. But there's nothing before us actually to suggest that it is. There is just a claim that it is. So, in my view, the appropriate thing for this Commission to do is to allow the expense.

Ms. Dawson: OK. Thank you.

Chairwoman Showalter: And perhaps my fellow Commissioners would like to discuss this as well.

Commissioner Hemstad: I concur in that conclusion.

Commissioner Gillis: I have nothing to add. Would you be prepared to make a motion?

Chairwoman Showalter: OK then. I think we're ready for a motion on the whole Consent and No Action Agenda.

Commissioner Gillis: With respect to the entire consent agenda, including Item T – Sanitary Services, I move the Consent Agenda be accepted and Secretary be directed to enter the appropriate orders or letters.

Commissioner Hemstad: I second the motion.

Chairwoman Showalter: The motion carries. Next item is 2A. . . .