BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BERNICE BRANNAN, et al., Complainants v. QWEST CORPORATION, Respondent.	DOCKET NO. UT-010988 QWEST'S MOTION FOR SUMMARY DETERMINATION AND BRIEF REGARDING JURISDICTION
BERNICE BRANNAN, et al., Complainants v. SANITARY SERVICE COMPANY, INC. Respondent.	DOCKET NO. TG-010989
BERNICE BRANNAN, et al., Complainants v. PUGET SOUND ENERGY, INC. Respondent.	DOCKET NO. UE-010990

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TERRY McNEIL, et al., Complainants v. PUGET SOUND ENERGY, INC. Respondent.	DOCKET NO. UE-010995
TERRY McNEIL, et al., Complainants v. VERIZON NORTHWEST, INC. Respondent.	DOCKET NO. UT-010996
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant v. WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a RURAL SKAGIT SANITATION, G-237 Respondent.	DOCKET NO. TG-011084

Qwest Corporation ("Qwest") hereby moves for summary determination and dismissal of this case pursuant to WAC 480-09-426. Qwest respectfully requests that the instant motion be considered by the Administrative Law Judge and the Commissioners at the November 19, 2001 prehearing conference scheduled in this matter. Pursuant to WAC 480-09-425(3), other parties (including the Complainants) may respond to this motion within twenty (20) days from service of this document.

This pleading is intended by Qwest to serve both as a motion for summary determination and its brief on the preliminary legal issues raised by the Administrative Law Judge for consideration at the prehearing conference.

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I. Introduction

Since 1992, the Commission has squarely considered the precise issue raised in this case on at least three occasions – in 1992 (U S WEST's tariff proceeding), 1993 (Puget Power's rate increase proceeding) and 2000 (Sanitary Service Company's tariff at an open public meeting). Each time, the Commission has declined to predict how the federal courts would rule on the tax, has overruled the objections of complaining non-tribal members and has suggested that the complainants pursue their claims in federal court. As the governing case law has not clearly changed since 2000, the Commission should adhere to its precedent and dismiss this case.

II. Factual Background

On July 2, 1991, the Lummi Indian Business Council (the "LIBC") passed Resolution No. 91-67, which imposed a 5.0% gross retail receipts tax (the "Lummi tax") on utilities conducting business within the boundaries of the reservation.[1] The utilities (including respondents Qwest, Puget Sound Energy, Inc. and Sanitary Service Company) pass through the Lummi tax to all customers[2] receiving service within the boundaries of the reservation.[3] The Lummi tax has been regularly renewed by the LIBC and is currently set to expire on December 31, 2001.[4]

The Lummi tax is relatively minor in terms of the gross amount assessed and paid each year. Qwest remitted $17,165.70 to Lummi in 1999, $18,899.63 in 2000, and $14,636.60 in 2001 (through July).

Bernice Brannan and the 27 signatories (collectively, the "Lummi Complainants") of the "formal complaint" (the "Lummi Complaint") initiating this proceeding claim to be fee-land owning, non-tribal-member residents of the Lummi Reservation.[5] For purposes of this motion, Qwest assumes these

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[1] *Exhibit 1 (Lummi Resolution No. 91-67), at 7 ("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.")*

[2] Qwest does not track which of its customers residing within the reservation boundaries are members of the Lummi tribe. In order to do so, Qwest would need to design and implement expensive manual processes most likely involving coordination with the Lummi Indian Business Council, which may or may not cooperate with Qwest's frequent inquiries. Given the relatively small amount involved (Qwest paid $18,899.63 on the tax in 2000), implementation of such a system would not be prudent or justified.

[3] *Exhibit 2 (Qwest Tariff WN U-40, Section 2.6).*

[4] *Exhibit 3 (Lummi Resolution No. 2000-127).*

[5] *Lummi Complaint, at ¶ 2.*

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allegations to be true.

III. Procedural Background

On July 6, 2001, the Lummi Complainants filed the Lummi Complaint, demanding that the Commission:

> ...remove immediately the invalid and illegal* Lummi Business Utility tax tariffs a.k.a. as Business Privilege Tax on Qwest [as well as Puget Sound Energy and Sanitary Service Company] billings, on fee-land property within the exterior boundaries of the Lummi Reservation....[6]

Three separate dockets were opened by the Commission upon filing of the Lummi Complaint: UT-010988 (Qwest); TG-010989 (Sanitary Service); and UE-010990 (PSE).[7]

On July 9, 2001, a similar complaint (the "Swinomish Complaint") was filed by Terry McNeil and 27 others (the "Swinomish Complainants") claiming to be non-tribal residents of the Swinomish reservation requesting identical relief to that requested in the Lummi Complaint – i.e., the removal of the Swinomish business tax pass through from the tariffs of Puget Sound Energy (Docket No. UE-010995) and Verizon Northwest, Inc. (Docket No. UT-010996).[8]

On August 30, 2001, the Commission consolidated the three Lummi dockets and the two Swinomish dockets into a single proceeding (the "Consolidated Docket"), set a prehearing conference for October 22, 2001 and requested the parties to submit briefs on the preliminary issue of the Commission's jurisdiction to adjudicate the Consolidated Docket.[9] The briefing schedule has since been pushed back and the prehearing conference has since been moved to November 19, 2001 to permit the Complainants additional time to brief the preliminary legal issues.[10]

IV. Issue Presented

Whether the *Big Horn* and *Atkinson* decisions cited by the Complainants unambiguously render the Lummi tax clearly illegal so as to permit the Commission, given its prior decisions, to conclude that the Lummi tax must be removed from the tariffs of Qwest, PSE and Sanitary Service

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6 *Lummi Complaint, ¶ 1.*
7 *Notice of Complaints and Requirement for Answer (dated July 13, 2001).*
8 *Id.*
9 *Order of Consolidation and Notice of Prehearing Conference (dated August 30, 2001).*
10 *Commission Letter to Ms. Brannan and Mr. McNeil (dated September 19, 2001).*

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Company.

V. Discussion

A. Summary determination is appropriate as dismissal is required as a matter of law.

The Commission's rules provide two alternative procedural vehicles for a party (in this case, Qwest) to seek dismissal of a pending adjudicative proceeding. A motion to dismiss (modeled after one that would be made in Superior Court pursuant to Civil Rule 12(b)(6), 12(c) or 50) is appropriate when the pleading the moving party seeks to be dismissed (in this case, the Lummi Complaint) fails to state a claim upon which the Commission may grant relief. WAC 480-09-426(1). Alternatively, a motion for summary determination (modeled after one that would be made in Superior Court pursuant to CR 56) is appropriate when the pleadings filed in the proceeding, along with any properly admissible evidentiary support, reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law. WAC 480-09-426(2); CR 56(c).

In this case, either procedural vehicle is appropriate for resolution of this case since there are no relevant and material factual disputes and, as a matter of law, the Commission's prior decisions require that this case be dismissed.

B. While the Commission has jurisdiction to rule on the validity of Qwest's rates and tariffs, it is not a tax court.

Qwest does not deny that that the Commission has jurisdiction under Title 80, RCW, to rule on whether Qwest's rates, including that reflected in the tariff provision passing through the Lummi tax, are fair, just, reasonable and sufficient. However, that fact is neither dispositive nor particularly relevant to the more critical question of whether federal case law is so clearly defined as to allow the Commission to find that the Lummi tax is a clearly illegal tax.[11] This Commission has repeatedly held that it cannot reject the pass through of the Lummi tax since no court of competent jurisdiction has ruled that the tax (or an analogous tax) is clearly illegal. Since federal case law has not materially changed since June

[11] At the outset, Qwest notes that it is fairly indifferent and offers no opinion as to whether the Lummi tax is lawful. Qwest, like the Commission, is simply not in the position to definitively predict how the U.S. Supreme Court would rule on the issue. Consistent with the Commission's prior decisions, Qwest does not feel it or its ratepayers should be required to bear the expense of challenging the tax in federal court or litigating this proceeding.

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2000 (the last time the Commission was asked to reject the pass through), the Commission should adhere to its precedent and dismiss this case.

C. Commission precedent holds that the Commission will not reject the pass through of the Lummi Tax unless the Complainants establish that the tax is "clearly illegal" under controlling federal law.

Since 1992, the Commission has considered the validity of the pass through of the Lummi Tax at least three times and has concluded that it is not in the position to determine that the Lummi tax is unlawful. The Commission has also repeatedly made clear that it is not going to impose the burden of challenging the tribal tax on the utility.

1. The U S WEST Decision (1992).

In November 1991, U S WEST filed a tariff revision in order to pass through the Lummi tax to all residents of the Lummi reservation.[12] After objection by the Fee Land Owners Association (a group comprised of persons similarly situated to the Lummi Complainants), the Commission suspended the tariff and set the matter for hearing.[13] After hearing (which included the testimony of twenty-one persons, nineteen of whom were fee-land owning residents of the Lummi reservation), the Administrative Law Judge ruled that U S WEST's proposed tariff was proper and reflected a prudent business decision not to expend significant resources to challenge the validity of the Lummi tax in federal court.[14]

As to the jurisdiction of the Commission and the proper scope of its reviewing authority, the ALJ noted:

> As the memorandum of Commission staff succinctly pointed out, "This is not a tax case." The Commission's jurisdiction in this matter is to determine whether the proposed rate is "fair, just, reasonable and sufficient." RCW 80.04.130, 80.36.080. The Commission is not empowered to decide if the Lummi tax is valid. However, the Commission may inquire into the prudency of USWC's payment of that tax.[15]

Citing several Washington Supreme Court decisions, the ALJ recited that a utility's payment of

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[12] *Exhibit 4 (WUTC v. US WEST Communications, Inc., Docket No. UT-911036, First Supplemental Order (dated August 25, 1992),* at 1.

[13] *Id.*

[14] *Id.* at 3-8.

[15] *Id*. at 4.

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a tax levied by a legitimate authority is prudent and a proper expense to be recovered through its rates unless the tax is "clearly illegal."[16] Faced with an imprecise and/or inconsistent set of federal court decisions on the validity of various tribal assessments and taxes (none of which was analogous to the Lummi tax), the ALJ noted that it was unknown (and, implicitly, beyond the Commission's authority to predict) how the U.S. Supreme Court would rule on the Lummi tax; in the absence of clear direction from the federal courts, the Lummi tax was arguably valid and thus not clearly invalid.[17] Further, given the "relatively small amount of the Lummi tax," the ALJ found that U S WEST acted prudently in not expending the tens or hundreds of thousands of dollars necessary to wage a federal challenge of the Lummi tax.[18] Lastly, the ALJ reasoned that it was appropriate for the Lummi tax to be passed through to all retail customers within the boundaries of the reservation, regardless of tribal membership status, as all residents of the reservation potentially receive services from the tribe.[19]

Each of the ALJ's findings and conclusions was adopted by the full Commission in October 1992.[20]

2. The Puget Power Decision (1993).

Less than one year later, in the midst of Puget Sound Power & Light Company's rate increase case, the propriety of the Lummi tax was again challenged before the Commission by a group of persons ostensibly similar to the Lummi Complainants.[21] Relying on its recent holding in the *U S WEST* docket, the Commission once again rejected the complaining parties' argument that the Lummi tax was illegal and should not be passed through by the local utility. The Commission recounted and resolved the issue as follows:

> Finally, many of the people attending the Bellingham hearing addressed at least in part their opposition to Puget collecting a five percent utility tax levied by the Lummi Indians on owners of fee lands located within the reservation. Four witnesses spoke, representing two associations

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16 *Id*. at 4-5.
17 *Id*. at 5.
18 *Id*. at 5-6.
19 *Id*. at 6.
20 *Exhibit 5 (WUTC v. U S WEST Communications, Inc., Docket No. UT-911036, Second Supplemental Order (dated October 5, 1992),* at 1.
21 *Petition of Puget Sound Power & Light Co., Docket Nos. UE-920433, UE-920499, UE-921262, Eleventh Supplemental Order (dated September 21, 1993), 1993 Wash. UTC LEXIS 84,* at 186-189.

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> and many customers in the hearing room. They contended the five percent tax was "taxation without representation" and should not be collected. Speakers stated the Commission should either force Puget to challenge the tax in court, or the Commission should itself challenge the tax in court. In the meantime, speakers recommended any rate increase be reduced by five percent for owners of fee lands.
>
> This issue is relevant to this rate increase filing only to the extent the five percent collected would be five percent of a greater amount of electric revenue generated within the boundaries of the Lummi Indian Reservation. The Lummi Indian tax is not included in any adjustment in this case. The tax is treated in the same manner as municipal taxes, that is, both the revenue and expense are removed from the results of operations.
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> In 1992, the Commission approved a tariff filed by U S WEST Communications, Inc., to collect a similar tax on telephone revenues. [footnote omitted] The Commission agrees with several of the speakers that the proper forum to challenge this tax is the court system. It is not, however, the responsibility of the Commission to mount this challenge. Neither is it the responsibility of Puget Power. If the fee land owners feel the tax should be challenged, they are the proper parties to make such a challenge. In the meantime, Puget is collecting the tax and passing it through in the same manner as that approved by the Commission for U S WEST. The Commission does not feel it is appropriate to require a five percent reduction in the rate increase for fee landowners.

3. <u>The Sanitary Service Decision (2000)</u>.

The Lummi tax was again challenged in June 2000, this time in the context of an open public meeting agenda item regarding a pass through tariff revision on the part of Sanitary Service Company. This most recent challenge was posed by Ms. Marlene Dawson, a Whatcom County Council member who has petitioned to intervene in this case.[22] Ms. Dawson referred the Commission to more recent federal decisions which she believed supported her proposition that the Lummi tax was illegal and that the Commission should reject Sanitary Service's tariff revision. Relying on advice from Assistant Attorney General Robert Cederbaum that the cases cited by Ms. Dawson did not compel a finding that the Lummi tax was now "clearly invalid," Chairwoman Showalter articulated that the Commission was not in a position to adjudge the validity of the tariff and would presume its validity; the Commission voted unanimously to approve the pass through tariff revision. In her comments, Chairwoman

[22] On September 17, 2001, Ms. Dawson filed three nearly identical Petitions to Intervene, one in each of the Lummi dockets.

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Showalter explained:

> 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.[23]

D. The cases cited by the Complainants in the Lummi Complaint do not constitute an unambiguous change in law requiring the conclusion that the Lummi tax is clearly invalid.

In this case, the Complainants rely on two recent federal cases – *Big Horn County Elec. Coop., Inc. v. Adams*[24] and *Atkinson Trading Co., Inc. v. Shirley*[25] – for the proposition that the Lummi tax is now clearly invalid.[26] Neither of those cases is on point as neither involves judicial review of a tax analogous to the Lummi tax.

In the *Big Horn* decision, the Ninth Circuit affirmed the district court's ruling that the Crow Tribe's 3% *ad valorem*[27] utility tax was unlawful. The Court's analysis was based on the U.S. Supreme Court's 1981 decision in *Montana v. United States*,[28] which established the rule that, absent a grant of authority under treaty or federal statute, a tribe has no civil regulatory authority over tribal nonmembers. This rule is subject to two important, alternative[29] exceptions – (1) a tribe may regulate the activities of nonmembers who enter consensual commercial relationships with the tribe or its

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[23] *Exhibit 6 (Unofficial Transcript from June 28, 2000 Open Meeting of the WUTC)*, at 5.

[24] 219 F.3d 944 (9th Cir. 2000).

[25] 121 S. Ct. 1825 (2001).

[26] *Lummi Complaint*, at ¶ 1 (footnote).

[27] An *ad valorem* tax, as opposed to a use-based tax, is one assessed against the value of the subject utility property or facilities. A use-based tax, such as the Lummi tax, is an excise tax assessed against the actual proceeds from the sale of utility services.

[28] 101 S. Ct. 1245 (1981).

[29] Many of the Complainants in the Consolidated Docket filed form comments (in one of at least three forms) for the Commission's consideration. The majority (if not all) of these comments incorrectly describe the *Montana* exceptions as being in the conjunctive, rather than the disjunctive. Contrary to the Complainants' statements that a tribal tax must meet the requirements of both exceptions to constitute a valid exercise of tribal authority, the *Montana* exceptions are alternatives and the satisfaction of either exception renders a tribal tax lawful. *Big Horn, 219 F.3d at 951-952 ("[B]ecause **neither** Montana exception applies, the Tribe lacks jurisdiction to impose an ad valorem tax on BigHorn's utility property.").*

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members, and (2) a tribe has authority over the conduct of non-Indians on fee lands within the reservation when the conduct threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe.[30] While the Ninth Circuit held that neither *Montana* exception applied to the Crow Tribe's utility tax, its analysis of the first exception connotes that had the Crow Tribe's tax been use-based (as opposed to *ad valorem*) it probably would fit within the first *Montana* exception and be valid.

> The first exception [under *Montana*] allows a tribe to exercise jurisdiction over the activities of nonmembers who enter into a consensual relationship with a tribe. The district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because Big Horn entered into contracts with tribal members for the provision of electrical services. While the agreements creating Big Horn's rights-of-way were insufficient to create a consensual relationship with the tribe [citation omitted] Big Horn's voluntary provision of electrical services on the Reservation did create a consensual relationship. [citation omitted] Even with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory or adjudicative jurisdiction over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of "the activities of nonmembers who enter [into] consensual relationships." [citation omitted] An ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, a tax that is not included within *Montana's* first exception.[31]

Thus, the *Big Horn* decision undermines the Complainants' proposition that the Lummi tax should now be seen as clearly invalid.

In the *Atkinson* case, the U.S. Supreme Court analyzed whether an 8% hotel occupancy surcharge imposed by the Navajo Nation fit in either of the aforementioned exceptions to the *Montana* general rule. While the Supreme Court held that the Navajo tax did not fit within either exception,[32] the Court's analysis is not clarifying on the issue before the Commission in this case because the Navajo hotel tax is not analogous to the Lummi tax. To the extent the Commission would be (contrary to its precedent) inclined to guess how the U.S. Supreme Court would rule on the Lummi tax given its holding

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30 219 F.3d at 951.

31 *Id.*

32 101 S. Ct. at 1832-1835.

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in *Atkinson*, the *Big Horn* decision (and its obvious implication that a use-based utility tax fits within the first *Montana* exception) makes such a prediction highly dubious. As such, the Commission should adhere to its prior decisions and dismiss this case.

VI. Conclusion

While Qwest is ultimately indifferent as to whether the Lummi tax is a valid or an invalid exercise of tribal power, Commission precedent requires that the Commission grant Qwest's motion for summary determination and dismiss this case. The federal court system, and not the Commission, is the proper forum for the Complainants to challenge the legality of the Lummi tax. The Complainants have failed to establish why the Commission should divert from its prior decisions on this subject.

Respectfully submitted this _____ day of October, 2001.

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