BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BERNICE BRANNAN, et al, Complainants, V. QWEST CORPORATION, Respondent.	DOCKET NO. UT-010988 BRANNAN'S MEMORANDUM IN OPPOSITION TO QWEST'S MOTION FOR SUMMARY DETERMINATION ORAL ARGUMENT REQUESTED
BERNICE BRANNAN, et al, Complainants, V. SANITARY SERVICES, CO., INC., Respondent.	DOCKET NO. UG-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, Complainants, V. WASTE MANAGEMENT OF WASHINGTON, INC. d/b/a/ G-237, Respondent.	DOCKET NO. TG-011084

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I. INTRODUCTION

WUTC vs. U.S. West Communications, Inc., docket number UT-911036 and consolidated cases (collectively the "1992 Decision") is the critical decision to review. It sets out the reasoning for the determination that payment of the Lummi tax was prudent, as a local tax to be passed on, inter alia, to non-Indians on fee land, as within the jurisdiction imposing the tax.

The 1992 Decision is no longer governing precedent. The result should be reversed because federal case law now establishes that non-Indian land owners, and the utilities' sales to them, are outside the taxing jurisdiction of the Lummi Tribe.[1]

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[1] The Swinomish Tribal Community subsequently enacted a 3% utility gross receipts tax in all respects similar to the Lummi tax (except for an exemption of utilities paying a franchise tax pursuant to a prior agreement with the Tribe which bars any increase in their tax). Swinomish Indian Senate Ordinance No. 126 ("Utility Business Activity Tax Ordinance"), effective 1/1/1999, §§ 3.010, 3.020. On the basis of its 1992 Decision, the Commission ordered the Swinomish utility tax passed through to all reservation rate payers.

The Swinomish Reservation, like the Lummi, is dotted with residential and other non-Indian fee owned parcels along state

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"Payment of a clearly illegal tax is one example of an imprudent operating expense." Docket No. UT-911306, First Supp. Order ("the 1992 ALJ Order") at p. 5. Whether payment of the tax is a prudent expense, and the issue of proper allocation of the tax, even if its payment is prudent, are issues within this Commission's jurisdiction.[2]

Complainant Brannan requests oral argument on Qwest's motion for summary determination.

II. ARGUMENT

A. The 1992 Decision was premised on case law indicating broad tribal civil authority over nonmembers.

(S.R. 20) and county roads served by respondent utilities (including Waste Management, Inc.) along those roads. *See* Declaration of Terry McNeil, which adopts the arguments made herein. It was allotted pursuant to the Treaty of Point Elliott, and the allotments were later sold out of trust status, public roads and utility easements obtained, all in the same manner as the Lummi Reservation. Because the arguments concerning the Swinomish tax are identical to those concerning the Lummi tax, no separate reference is made hereafter to the Swinomish tax.

[2]Given the federal law presumption of lack of tribal civil jurisdiction over non-Indians, which recent cases make clear extends to taxing authority, Brannan denies having the burden of showing the Lummi utility receipts tax is "clearly illegal," although we believe we have shown that.

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1. The ruling that the utilities' payment of the Lummi tax was prudent was based on federal case law.

The 1992 ALJ Order, adopted without modification by the Commission, concluded, "The relatively small amount of the Lummi tax on USWC [the telephone company, Qwest's predecessor] does not justify the expenditure of many times more dollars on a court challenge to the tax, particularly when Federal case law supports the validity of such a tax." 1992 ALJ Order, page 5.

The tax has been imposed on all other utilities supplying services within the reservation, and in the intervening eight years many times the $15,000 mentioned in the ALJ Order has been collected from all of these utilities. Based on more recent federal case law, we estimate that it would cost approximately $25,000 to $50,0000 to challenge the tax in Federal District Court. Declaration of Coniff. Prudent utility management would now challenge the tax.

In 1992, the Commission may have had good reason to conclude that federal case law supported the validity of the Lummi utility tax. The Ninth Circuit read *Merrion v.*

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Jicarilla Apache Tribe, 455 U.S. 130 (1982), to authorize tribal taxation of all persons within a reservation even when no other tribal civil authority over nonmembers on fee land existed. *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (1983); *Burlington Northern RR v. Blackfeet Tribe*, 924 F.2d 899 (9 Cir. 1991). The Court of Appeals in these cases, and the 1992 ALJ Order (at p. 5) in finding the probable validity of the Lummi tax, relied on very general language in *Merrion* about tribal "self-government and territorial management."[3] Both the Court of Appeals (until recently, when it overruled *Blackfeet Tribe* explicitly and *Snow* implicitly) and this

[3]Although *Merrion* concerned only a tribal severance tax on oil and gas taken by nonmembers under license to the tribe from tribal trust land (entirely unrelated to fee land), the Court used broad language in its decision: "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. ... The petitioners avail themselves of the 'substantial privilege of carrying on business' within the reservation. ... They benefit from the provision of police protection and other governmental services, as well as from the 'advantages of civilized society' that are assured by the existence of tribal government." 455 U.S. at 137-139 [internal citations omitted]

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Commission[4] either neglected the statements by which the majority in *Merrion* qualified its comments on tribal taxing authority, or misconstrued them as including non-Indian fee land as within the category of "tribal lands":

> "a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. ... the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe."
>
> 455 U.S. at 141-142.

2. The 1992 Decision allocating the Lummi tax to all ratepayers within the reservation, including nonmembers, was also based on federal case law.

After holding that the Lummi tax was "certainly not clearly invalid", at p. 5, the 1992 ALJ Order ruled that the expense of payment of the Lummi tax should be passed to all utility rate payers within the reservation, including nonmember fee land owners, because they "live within the reservation boundaries and receive some services from tribal

[4]The 1992 ALJ Decision at p. 5 observed that it was uncertain whether federal courts would "draw an analogy" between tribal authority to impose a tax on receipts from a nonmembers' sale of services to other nonmembers on fee land (this case) and the ruling that a tribe lacks power to zone fee land except as to isolated pockets within large areas otherwise closed to non-member travel or use. *Brendale v. Conf. Tribes and Bands of the Yakima Indian Reservation*, 492 U.S. 408 (1989). Now it is no longer a matter of analogy, the same rules govern both cases.

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government", "are within the taxing authority's jurisdiction and, as rate payers, can expect to shoulder the burden of increased rates to pass through the Lummi utility tax." 1992 ALJ Order at p. 6. The ALJ Order followed the Staff's argument that nonmembers residing on fee land were "within the jurisdiction" of the Tribe, so that they would come within the rule of Washington case law limiting the pass-through of local taxes to persons within the jurisdiction imposing the tax. *State ex rel. Pac. T. & T. v. Dept. of Public Service*, 19 Wn.2d 200, 273-277 (1943) and *King County Water Dist. v. Seattle*, 89 Wn.2d 890, 901-903 (1978). This characterization of tribal jurisdiction as embracing both members and nonmembers within the reservation was supported in 1992 by Ninth Circuit cases such as *Snow* and *Blackfeet Tribe*. It is irreconcilable with the exclusion of tribal taxing authority from nonmember transactions on fee land and public roads and easements in more recent controlling federal cases.

B. Both grounds for the Commission's 1992 Decision are invalid under subsequent federal decisions.

The Supreme Court reviewed *Merrion* and its seminal case limiting tribal governmental authority, *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981), at length in the

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course of its unanimous decision in *Atkinson Trading Co. v. Shirley*, 531 U.S. --, 121 S.Ct. 1825 (2001). The Court emphasized that *Merrion* did not authorize any tribal taxation of a nonmember's conduct on fee land:

> "An Indian tribe's sovereign power to tax--whatever its derivation--reaches no further than tribal land.
>
> We therefore do not read *Merrion* to exempt taxation from *Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land. Accordingly, as in *Strate* [*v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997)[5]], we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty, or statute, and because the tax falls upon nonmembers on non-Indian on fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions."
>
> *Atkinson*, 121 S.Ct. at 1832.

This language creates a presumption adverse to the validity of the Lummi utility gross receipts tax, because it is imposed on sales from nonmembers (the utilities) to nonmembers on fee land. The Lummi Tribe or its flag bearers in this proceeding bear the burden of establishing one the *Montana* exceptions.

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[5] In *Strate*, the Court held a public road easement through Indian trust land, pursuant to 25 U.S.C. §§ 323-328, was the equivalent of fee land for purposes of tribal adjudicatory jurisdiction, so a tribal court had no jurisdiction over a suit stemming from a vehicle accident between nonmembers, even though tribal members suffered damages and the defendant was on the reservation to do business with the tribe.

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The *Montana* exceptions allow some tribal authority over the conduct of nonmembers (1) "who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 564, or (2) "when that conduct threatens or has some direct effect on the tribe's political integrity, economic security or welfare." *Id.* at 566.

The Court in *Atkinson* held invalid a tribal tax based on gross receipts from room rentals as applied to a nonmember's hotel on fee land along a public highway. The Court explained that the first *Montana* exception authorized tribal taxation of only that particular conduct of a nonmember which takes place by reason of the required "consensual relationship." Therefore, the hotel's employment of many tribal members and its owner's status as an "Indian trader" having federal and tribal consent to trade with the Tribe, although "consensual relationships," did not support the Navajo Tribe's claim of authority to tax the hotel's receipts from renting of rooms to other non-members:

> "In *Strate [v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997)], for example, even though respondent A-1

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> Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident [vehicle collision within the reservation], we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember 'was not a party to the subcontract, and the [T]ribes were strangers to the accident.' 520 U.S. at 457 ... A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another--it is not 'in for a penny, in for a Pound.'"
>
> *Atkinson*, 121 S.Ct. at 1833-34 (emphasis and bracketed explanatory material added)

The Court further observed that while a tribe might charge an appropriate fee for services to nonmembers, the general availability of some tribal services was "patently insufficient" to establish a "consensual relationship" sufficient under *Montana*'s first exception. "If it did, the exception would swallow the rule:

> All non-Indian fee lands within a reservation benefit, to some extent, from 'the advantages of a civilized society' offered by an Indian tribe." *Atkinson*, 121 U.S. at 1833, quoting *Merrion*, 531 U.S. at 137-8.

The Court explained that *Montana*'s second 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 the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the

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> political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands. *Montana*, 450 U.S., at 566, 101 S.Ct. 1245. Petitioner's hotel has no such adverse effect upon the Navajo Nation."
>
> 121 S.Ct. at 1834 n. 12.

Therefore, the earlier ruling mentioned by the 1992 ALJ Order at p. 5, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation*, 492 U.S. 408, 109 S.Ct. 2994 (1989),[6] did not aid the tribe's argument:

> "Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations.' *Strate* [*v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404 (1997)] 520 U.S., at 459, ... (quoting *Montana*, *supra*, at 564). Whatever effect petitioner's operation of the Cameron Trading Post [the hotel] might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity. *See Brendale*, *supra*, at 431 ... (opinion of White, J.)(holding that the impact of the nonmember's conduct 'must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.')"
>
> *Atkinson*, 121 S.Ct. at 1835.

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[6] ***Brendale*** denied tribal zoning authority over nonmember fee land except as to a "small non-Indian parcel located 'in the heart' of over 800,000 acres of closed and largely uninhabited land." *Atkinson*, 121 S.Ct. at 1834. "We think it plain that the judgment in ***Brendale*** turned on both the closed nature of the non-Indian fee land and the fact that its development would place the entire area 'in jeopardy.'" *Ibid*.

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We submit that the rulings in *Atkinson* establish a presumption that a tribal tax upon transactions between nonmembers on fee land is invalid. This presumption, together with the Court's narrow construction of the *Montana* exceptions, must guide the Commission's determination of whether payment of the Lummi tax by the utilities remains prudent and whether it is properly passed through to nonmembers.

C. The tribal tax held invalid in *Atkinson* was not different in principle from the Lummi utility gross receipts tax.

The tax reviewed by the Supreme Court in *Atkinson* was a tax of 8% percent of the rental price of any hotel room within the reservation, i.e., 8% of the hotel's gross receipts. Although formally a tax upon the guests, the hotel owner was obliged to collect the tax and pay it to the Navajo Tribe. 121 S. Ct. at 1829. The Lummi utility gross receipts tax is a tax of 5% percent of the utility's gross receipts generated from retail sales within the reservation, the sale being deemed to have occurred at the time the buyer is billed for the seller's delivery, or promised delivery of the goods or

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services to the buyer. Lummi Tax Code §§ 3.06.030 and .040, codifying Lummi Business Council Resolution 90-89 §§ 030. and .040.

The Lummi tax ordinance recites that it is "on the business activity of utility providers," Res. 90-89 § 010, even though it is explicitly imposed on their gross receipts. § 030. "The character of a tax is determined by its incidents, not by its name." *Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604, 607 (1999), quoting *Jensen v. Henneford*, 185 Wash 209, 217 (1936). "The nature of a tax is revealed by examining the subject matter of the tax and the incidents of the tax, '*i.e.*, the manner in which it is assessed and the measure of the tax." 139 Wn.2d at 607 n. 1, quoting *Weaver v. Prince George's County*, 281 Md. 349, 379 A.2d 399, 403 (1977). By the actual terms and effect of their Gross Receips Tax, Res. 90-89 § 030, the Lummi Tribe has taxed transactions between one non-member and another, taking place upon fee land. This is invalid under *Atkinson*.

Although the Lummi tax at issue formally falls upon the retail sellers, rather than the upon retail purchaser as in the tax *Atkinson* concerned, there is no real difference in

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operation of the two taxes. The Navajo hotel room tax considered in *Atkinson* and the Lummi utility tax at issue both require the seller to collect and pay the tribe a tax equal to a percentage of its gross receipts from retail sales, and if there is a deficiency, the seller is liable for it. The Lummi Tribe did not mandate that the utilities pass it through to their service customers on the reservation, but it was clear that this would be the result if the Commission ruled that the tax was likely to be valid.

The Supreme Court in *Atkinson* plainly did not deem formal placement of the tax on the hotel guests, as opposed to the hotel, as dispositive. If it had, the Court would not have spent the greater part of its analysis of the *Montana* exceptions discussing the hotel operator's relationship with the Indian tribe and the hotel operation's effect upon tribal land and members. *See*, *Atkinson*, 121 S.Ct. at 1832 - 1835.

The Lummi reservation is a patchwork of trust land and fee parcels located along public roads maintained by Whatcom County. *See*, 1992 Stipulated Issues and Record, ¶ 9 - 13 and Joint Ex. 10 (BIA Land Status Map of Lummi Reservation), and Declaration of Brannan. The utilities' easements over trust

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land and equipment on them do not derive from or create a consensual relationship with the Lummi Tribe; they are federal grants. All such utility easements on Indian trust lands, as rights of way for state or federal roads, are acquired through the operation of 25 U.S.C. §§ 323-28. ***Strate***, 520 U.S. at 454; ***Big Horn***, 219 F.3d at 949-50. ***Strate*** established that such easements are treated as fee land. 520 U.S. at 454-56; invalidation of the utility property tax in ***Big Horn*** was based on that. The utilities do not need any consensual relationship with the Tribe to provide their services to nonmembers on fee land; their only activity related to a consensual relationship with the Tribe is their provision of services to it and tribal members.

Atkinson establishes that application of the Lummi tax to the utilities' receipts from nonmembers on fee land is presumptively invalid. The burden of proof is on the Tribe or its flag bearer to establish that one of the two ***Montana*** exceptions (consensual relation with the Tribe or serious adverse impact on it), as narrowed in ***Strate*** and ***Atkinson***, applies to those receipts. The likelihood they can do so is nil.

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Staff noted,

> "There is precedent, outside the body of Indian law, indicating that a tax based on income from transactions outside the jurisdiction of the taxing authority was invalid. E.g., Allied-Signal, Inc. v. Director, Division of Taxation, 60 L.W. 4554, 4555 [504 U.S. 768, 112 S.Ct. 2251] (June 15, 1992)."

1992 Staff Memorandum at p. 11.

Allied Signal is still good law, and after *Atkinson* a challenge to the Lummi utility gross receipts tax would likely be sustained on a motion for summary judgment in District Court. An appeal would not get far in the Ninth Circuit and the Supreme Court would never review it, so the cost of litigation would be sharply reduced. Declaration of Coniff. Therefore payment of the tax is no longer a prudent management decision.

D. The Ninth Circuit's decision in *Big Horn* does not support application of first *Montana* exception to sustain the Lummi gross receipts tax.

Contrary to Qwest's suggestion in support of its motion for summary determination [Qwest Brief at p. 9-11], the Ninth Circuit's analysis in *Big Horn County Elec. Coop v. Adams*, 219 F.3d 944 (9 Cir. 2000), does not suggest the Lummi tax is supported by the first *Montana* exception. As noted by the Supreme Court in *Atkinson*, this exception allows tribal civil

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authority over a nonmember's activities only when those activities take place by reason of a "consensual relationship" with the tribe. The tribe's consequent civil authority does not extend over the nonmember's other activities or the nonmember's relationships with other nonmembers within the reservation which occur on fee land.

The Ninth Circuit in ***Big Horn*** assumed that, while ***Strate*** had compelled it to overrule its decision in ***Blackfeet Tribe*** that a tribe had authority to tax a utility's property upon reservation rights of way [219 F.3d at 952-3], a utility "formed a consensual relationship with the Tribe because [it] had entered into contracts with tribal members for the provision of electrical services." 219 F.3d at 951. The Court stated that this relationship did not support a tribal property tax on the nonmember, because it was not a tax on the nonmember's "activities." ***Id***. The "activities" to which that statement refers are the nonmember's provision of utility services <u>to tribal members</u>, i.e., activities derived from that "consensual relationship" with the tribe. The Supreme Court's earlier decision in ***Strate*** and its later decision in ***Atkinson*** require that reading of ***Big Horn***.

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In light of *Strate* and *Atkinson*, the only activities of the respondent utilities to which either *Montana* exception is pertinent is their provision of services to tribal members and the Tribe itself. A tax measured by receipts for those services would be valid. There is no worthwhile argument to sustain the Lummi tax on receipts from sales to nonmembers. Therefore, payment of the Lummi tax is not a prudent management decision.

E. If the utilities' payment of the tax is prudent (which we deny), the expense should be allocated to all utility ratepayers, not just those within the reservation.

Staff argued that *Blackfeet Tribe* established the Lummi Tribe's authority to tax utilities, because their lines run across trust land, and that *Merrion* and *Snow* established that tribal taxing authority extended to nonmembers on fee land. 1992 Staff Memorandum at pp. 7-8. That limited the argument for excluding nonmembers from the class to which tax would be passed through to "no taxation without representation." Staff then concluded that the same cases rendered the "simplistic appeal" of that argument inapplicable to nonmembers on fee land within an Indian reservation under the same federal case law. *Id*. Staff deemed nonmembers on fee land to be within the

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tribe's jurisdiction. The staff thereby distinguished *King County Water District No. 75 v. Seattle*, 89 Wn.2d 890 (1978), which held that a Seattle City tax on its water utility could not be passed through to utility customers outside the city. (Staff Reply Memorandum at pp. 2-3) All such reasoning was rendered invalid by *Strate* and *Atkinson*.

1. If payment of the tax is prudent in order to avoid tribal interference with the utilities' operation, it should be treated as a franchise fee and allocated to all rate payers within the state.

The State Supreme Court's decision in *State ex rel. Pacific Tel. & Tel. Co. v. D.P.S.*, 19 Wn.2d 200, at 271-283 (1943), analyzed the distinction between a municipal tax, to be passed through to ratepayers in the municipality, and a municipal franchise fee, to be passed through to all ratepayers. Although the utilities may have only the burden of showing their payment of the Lummi Tribe's exaction to be prudent, to qualify them as an operating expense, those payments may not be characterized as a <u>tax</u> for the purpose *Pacific Tel. & Tel.* unless the utilities affirmatively prove the Lummi's exaction to be lawful, i.e., "The company, by lawful authority, is required to pay them." 19 wn.2d at 273.

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The payments characterized in *Pacific Tel. & Tel.* as a franchise fee were for the use of public streets, as a matter of the utility's choice to run its lines and extend its services "which benefits not only the residents of the cities, but is a benefit to rate payers living without the city limits." 19 Wn.2d at 281. The law deems a local franchise fee, as distinguished from a local tax, to be a general operating expense, which must be allocated to all ratepayers. *Id.*

If payment of the Lummi tax is characterized as a prudently incurred expense (which Brannan denies), but the utilities cannot affirmatively prove that the Tribe has lawful authority to require them to pay it, it cannot be treated as a tax and must be deemed a general operating expense, under *Pac. Tel. & Tel.* At least one utility argues that if it does not pay the tax, the tribe will somehow interfere with its doing business within the reservation:

> "In order to have the tribe's permission to enter the Swinomish Indian Reservation for the purpose of providing solid waste collection services to the customers residing inside its boundaries, Waste Management must pay the tribal utility tax."
>
> Waste Management Memorandum, p. 5 (October 31, 2001).

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Allocation to all rate payers within the state of the expense of avoiding tribal interference with the utilities' business operations bears no relation to the "unjust discrimination" on which the Court in *Pac. Tel. Tel.* relied to restrict allocation of a valid local tax to rate payers within the jurisdiction. 19 Wn.2d at 277 (1943). Such interference with utility operations within the reservation would have adverse impacts (interruption of power and telephone grids, waste collection routes, etc.) outside the reservation as well as within it. The expense should therefore be included within general operating expenses, as with a franchise fee, which the Commission cannot, under *Pacific Tel. & Tel.*, order charged only to local rate payers. 19 Wn.2d at 281.

Staff in its 1992 memorandum noted the utilities' use of rights of way across reservation trust lands. It avoided the conclusion that the tribal tax was a franchise by its misreading of *Merrion* to authorize reservation-wide tribal taxation as a remaining part of inherent tribal sovereignty:

> "It is arguable that the Lummi utility tax is akin to a franchise fee so that it should be passed on the ratepayers in general. The company is using rights of way authorized by the United States for some of its facilities on the reservation. See Ex. 14. That use of property may seem analogous to what cities do when

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> justifying franchise fees. However, the justification for the tax is not the power to exclude. Merrion, 455 U.S. at 137. It is not an exaction for the right to enter the reservation."
>
> 1992 Staff Memorandum at p. 15.[7]

Merrion has been limited to its facts - a tribal tax on a nonmember's commercial activity on tribal land pursuant to contract with the tribe. The concept, relied by Staff in 1992, of reservation-wide inherent tribal sovereignty so as to allow taxation of nonmembers on fee land or equivalent easements is excluded by *Atkinson*.

Even without the use of any Lummi property or contracts with the Lummi Tribe, the utilities' payment of exactions which are of doubtful legality as a matter of prudence, to avoid threatened interference with their operations or legal action by the Lummi Tribe, is voluntary and so should not be treated as a tax under *Pac. Tel. & Tel.*, when the federal courts are open to a challenge of the tax and federal law

[7]Of course, a tribe has no power to exclude nonmembers from fee land or public roads or the utilities from their easements, all of which are federal grants pursuant to 25 U.S.C. §§ 323-28. *Strate*, 520 U.S. at 443-46 and 454; *Big Horn*, 219 F.3d at 949-950.

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establishes a presumption against the Lummi's authority to impose it.

2. If payment of the tax is deemed prudent as a tax, despite the recent changes in federal law, that expense should be allocated solely to tribal members.

If payment of the tax is deemed prudent, despite the recent federal decisions which indicate it is unlawful (*Strate*, *Big Horn* and *Atkinson*), the expense should be allocated only to tribal members. The Washington Supreme Court has held that the Commission should impose a differential rate to be applied to a local jurisdiction which imposes a valid tax on a regulated utility service, so as to recoup the expense of paying it from customers within that jurisdiction. *Pac. Tel. & Tel.*, 19 Wn.2d at 277; *King County Water District*, 89 Wn.2d at 901-903. The Court approved rulings of this Commission's predecessor "that such local taxes should not be passed on to ratepayers residing outside the jurisdiction imposing the tax." 89 Wn.2d at 901.

The only rate payers within the jurisdiction enacting the Lummi gross receipts tax are the tribal members. *Atkinson* makes clear that fee land owned by non-members cannot be deemed within the jurisdiction of a tribe, and that non-

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Indians owners are presumptively not subject to tribal taxation. Staff attempted to distinguish *King County Water District* by noting that at least some tribal services were available to non-Indians, "though minimal." 1992 Staff Reply Memorandum at 2, citing Ex. 15, Aff. Steve Holmes, ¶ 2-3 and Aff. Linnea Smith ¶ 7. Now the United States Supreme Court has held the mere availability of tribal services to be "patently insufficient" as a source of tribal authority over nonmembers on fee land. *Atkinson*, 121 S.Ct. at 1825. In light of this decision, the testimony of nearly all persons who testified in 1992 and Ms. Brannan's Declaration that nonmembers rely on the state and Whatcom county for governmental services and receive none from the Tribe,[8] non-Indians cannot be legitimately deemed part of the community benefitting by the tribe's imposition of the utility receipts tax.

[8]Brannan's declaration describes the Lummi Tribe's adversary relationship with nonmember fee land owners. The only arguable governmental service provided to certain of them by the Tribe is the Lummi Sewer District described in Brannan's declaration, which the federal district court obliged persons along the sewer line to hook up to. The sewer district is self-supporting and receives no funds from the Tribe; by means of the pass-through of the utility tax it provides substantial funds to the Tribe.

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Staff also argued that it would be discriminatory and administratively difficult to "draw a line around the pockets of non-tribal members living within the Lummi reservation." 1992 Staff Reply memorandum at p. 3; Staff Memorandum at p. 17. Staff failed to note that Indians on trust land exclude themselves from paying state and local taxes (Stip. Facts 12 and 26). If the Commission can authorize exclusion of Indian trust land from a utility tax and it can be readily carried out, then the Commission could authorize utilities to exclude nonmembers on fee land who notify them of their exempt status in relation to the Lummi tax.

It is not discrimination to limit the pass through of a tax to persons within the jurisdiction of the governmental body which imposes the tax. The fact implementation the General Allotment Act and other federal laws inviting non-Indians to purchase public lands within reservations have resulted in a checkerboard jurisdiction does not alter that conclusion.

Further, Staff argued,

> "once the nonmember 'share' of the tax burden is excluded, it would be passed on to the ratepayers in general. It would be unfair to make tribal members bear the tribal share as well as their share of the non-member share."

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1992 Staff Memorandum, p. 17

We disagree. It is not unfair to make the citizens of a jurisdiction bear the entire burden of a tax imposed by their government on revenue generated outside of its jurisdiction as well as within it, assuming that tax is valid as to them. That was exactly the result in *King County Water District*. Increased expense allocation to tribal members is within the Lummi Tribe's power to remedy promptly if they choose to do so. It is unfair for nonmembers within the reservation to have to bear the burden of the Tribe's utility tax, while receiving no benefits (or only minimal benefits) from tribal government, as well as the utility tax imposed by their own state and local governments - from which tribal members do receive benefits but from whose tax burdens they are exempt.

III. Conclusion

The Commission should distinguish its 1992 Decision in Docket No. UT-911306 and disallow utility tariffs which would pass through the Lummi gross receipts tax to all residents within the reservation. Under federal case law subsequent to 1992, the tribal tax is presumptively invalid as applied to

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receipts from sales to nonmembers on fee lands. Prudent utility management would challenge the Tribe's authority to enact the tax, for that reason and because the costs of litigation in federal district court are not excessive in light of these recent federal decisions.

Alternatively, if the Commission should rule that payment of the tax remains prudent despite the recent clarification of federal law, it should nonetheless rule that the expense cannot be allocated to nonmembers. The payments should be allocated either to all customers of the utilities, as a franchise fee, or if deemed a tax then to tribal members, as citizens of the taxing jurisdiction.

Assuming a ruling favorable to Brannan on the first issue, several outcomes are possible. The Lummi Tribe could amend their ordinance to apply to the utilities' gross receipts from sales to trust lands. The utilities, singly or in combination, could challenge the Lummi ordinance in federal district court. The utilities could refuse to pay the tax -- the Lummi Tribe would then decide whether their claim of authority under one of the *Montana* exceptions is strong enough to warrant bringing an action in federal district court to

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sustain the tax. Under the *Atkinson* presumption against tribal taxing power, this is where the Commission should let the matter lie.

Respectfully submitted this _____ day of November, 2001.

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