BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BERNICE BRANNAN, et al., Complainants, v. QWEST CORPORATION, Respondent.	)	DOCKET NO. UT-010988
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
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-010966
WASHINGTON UTILITIES AND TRANSPORTATION COMISSION, Complainant, v. WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a RURAL SKAGIT SANITATION. G-237 Respondent.	)	DOCKET NO. TG-011084 ORDER GRANTING MOTION FOR SUMMARY DETERMINATION

I. SYNOPSIS

1 The Commission finds valid tariffs that pass through tribal utility taxes to the customers of several utilities who live within the boundaries of the Lummi or Swinomish Indian Reservations. The Commission grants Qwest's Motion for Summary Determination and dismisses the complaints.

II. MEMORANDUM

2 **Parties:** Eric Richter and Joseph Lawrence Coniff, attorneys, Seattle, Washington, represent Bernice Brannan. Terry McNeil, La Conner, Washington, represents himself. Adam Sherr, attorney, Seattle, Washington, represents Qwest Corporation (Qwest). Judith A. Endejan, attorney, Seattle, Washington, represents Verizon Northwest, Inc. (Verizon). Steven C. Marshall and William R. Maurer, attorneys, Seattle, Washington, represent Puget Sound Energy (PSE). Edward J. Nikula, Bellingham, Washington, responds on behalf of Sanitary Service Company, Inc.

(SSC). Polly McNeill, attorney, Seattle, Washington, represents Waste Management of Washington, Inc., d/b/a Rural Skagit Sanitation (Waste Management).[1]

3 **Procedural History:** On July 6, 2001, Bernice Brannan and twenty-six other named individuals filed a formal complaint requesting that the Commission remove the Lummi Business Utility tax from the tariffs of Puget Sound Energy, Sanitary Service Company, and Qwest Corporation, to the extent the tax is passed through to non-tribal members residing on fee land within the Lummi Reservation. The Complainants rely on *Atkinson Trading Company, Inc. v. Shirley, et.al.*, 532 U.S. 645 (2001) and *Big Horn Electric Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000*) in support of their allegation that the tax is illegal and invalid as to non-tribal members.

4 On July 9, 2001, Terry McNeil and twenty-seven other named individuals filed a complaint requesting the Commission remove the Swinomish Utility Business Activity tax from the tariffs of Puget Sound Energy and Verizon Northwest, Inc., to the extent the tax is passed through to non-tribal members residing on fee land within the Swinomish Reservation. The Complainants also rely on the *Atkinson* and *Big Horn Electric* cases as authority for their allegation that the tax is illegal and invalid as to non-tribal members.

5 Pursuant to WAC 480-09-425(4), the Commission construed the pleadings liberally and considered the complaints as filed under *RCW 80.04.110*. On July 13, 2001, the Commission issued notice of the complaints and required each company named inby the complaints to file an answer, as set forth in *WAC 480-09-425(3)*. Qwest, Verizon, PSE, and SSCanswered the complaints.

6 On August 30, 2001, the Commission consolidated the three Lummi dockets and the two Swinomish dockets into a single proceeding[2], 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 complaints. Subsequently, the Commission extended the briefing schedule at Complainants' request, and rescheduled the prehearing conference for November 19, 2001.

7 Brannan, McNeil, Qwest, Verizon, PSE, Sanitary Service Company, and Waste Management of Washington, Inc. filed memoranda on the issue of the Commission's

[1] Marlene Dawson and Washington Refuse and Recycling Association (WRRA) filed petitions to intervene on September 17, and September 25, 2001, respectively. Both Ms. Dawson and WRRA demonstrated that they have a substantial interest in the outcome of this proceeding, and their participation will be in the public interest. We grant the petitions to intervene.

[2] On October 4, 2001, the Commission entered an order consolidating a sixth case with the other five dockets, *WUTC v. Waste Management of Washington, Inc., Docket No. TG-011084*, a tariff suspension that involves issues in common with the tribal tax complaints.

jurisdiction. Qwest moved for summary determination and dismissal of this case along with its brief on jurisdiction.[3]

8 The Commission called for responses to Qwest's Motion for Summary Determination by November 15, 200l. Brannan and McNeil filed responses in opposition to the motion. Verizon, Sanitary Service, and Waste Management filed responses in support of the motion.

9 On November 9, 2001, the Commission issued a notice cancelling the prehearing conference scheduled for November 19, 2001, in order to allow the Commission time to consider Qwest's dispositive motion, the responses of the parties, and to enter an order regarding the motion.

III. DISCUSSION AND DECISION

10 This Order addresses the jurisdictional memoranda filed by the parties and the motion for summary determination filed by Qwest; it does not rule on the legality of the tribal taxes.

A. The Commission's Jurisdiction

11 In the August 30, 2001, Prehearing Conference Order, Administrative Law Judge Karen Caillé required all parties to submit memoranda in support of their positions as to whether the Commission has jurisdiction over the complaints.

12 **McNeil.** Complainant McNeil argues that the Commission has jurisdiction over the complaints. He argues that the Commission's authority set forth in *RCW 80.01.040, .060, .070, .075* and the *Washington Constitution, article I, §§ 1, 2, 3, 12, 19, 28, and article VII, § 1* give the Commission jurisdiction over the complaints.

13 **Brannan.** Complainant Brannan initially argued generally that the Commission has jurisdiction over the rates and charges utility companies may charge their customers; therefore, the Commission has the jurisdiction to hear the complaints and consider whether the Qwest, PSE, and Sanitary Service Company should be allowed to continue to pass through the Lummi utility tax to customers in their rates. Upon retaining counsel, Brannan refined her argument to include the argument that the Commission has no jurisdiction to determine the validity of the tax.

14 However, Brannan argues that under *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001)*, the Commission must presume that the tribal utility taxes are illegal. Brannan argues that this presumption, coupled with the Commission's lack of jurisdiction over the validity of the tax, precludes the Commission from allowing the utilities to continue to pass through the Lummi utility

[3] Qwest's Motion for Summary Determination and Brief Regarding Jurisdiction, October 30, 2001.

tax to customers. Brannan further argues that if the tax is prudently paid by the utilities, they are general expenses and should be recovered by all ratepayers, not just those who reside on the reservation; and if the taxes are not prudently incurred, they are not recoverable through rates.

15 **Verizon.** Verizon argues that the Commission should follow the precedent set forth in *WUTC v. U S West Communications, Inc., Docket No. UT-911306, First Supplemental Order (Aug. 25, 1992), at 4*, which held that the Commission does not have jurisdiction to invalidate a tribal tax. Consistent with that precedent, Verizon states that the Commission has jurisdiction to regulate Verizon's rates and inquire as to whether Verizon's payment of the Swinomish tax is prudent.

16 **PSE.** PSE argues that the Commission has jurisdiction to determine whether PSE's tariff that passes through the tribal taxes is fair, just, reasonable and sufficient. PSE argues that its tariff is consistent with the Commission's holding in *WUTC v. U S West, Docket UT-911306*. PSE does not expressly comment as to whether the Commission has the jurisdiction to hold the tribal taxes invalid; however, implicit in PSE's citation of *WUTC v. U S West* is the argument that the Commission does not have jurisdiction to determine the legality of the underlying taxes.

17 **Waste Management.** Waste Management argues that the Commission does not have jurisdiction to hold the Swinomish tax invalid. Rather, Waste Management argues that the federal district courts have original jurisdiction over the legality of the tribal utility taxes. *Memorandum. of Waste Management, at 3* (citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)*). Waste Management argues that the Complainants "are attempting to do indirectly what they cannot do directly—namely, challenging the exercise of tribal power in a forum other than federal court." *Id.* at 4. Therefore, Waste Management argues that the Commission should dismiss the complaints for lack of jurisdiction. Waste Management then argues that because the Commission is without jurisdiction to invalidate the taxes, it should continue to allow the pass-through in the company's rates. *Id. at 4-5*.

18 **Qwest.** Qwest acknowledges that the Commission has jurisdiction to determine whether the company's rates are fair, just, reasonable and sufficient. However, Qwest argues that this authority does not resolve the question of whether the Lummi utility tax is "clearly illegal." *Qwest's Motion at 5-6*. Qwest notes that the "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 analogous tax) is clearly illegal." *Id. at 6*. Qwest argues that the Commission does not have jurisdiction to determine the legality of the Lummi tax. *Id.* Qwest raises additional arguments in support of a motion for summary determination, which we address below.

Commission Discussion and Decision

19 The Commission agrees with those parties who argue that the Commission does not have jurisdiction to determine whether the Lummi or Swinomish utility tax is legal. However, the Commission has jurisdiction to decide whether the rates of a utility subject to regulation under Title 80 or 81 RCW are fair, just, reasonable, and sufficient. *See RCW 80.01.040, 80.04.020, 80.28.010, 80.28.020, 80.36.080, 81.04.020, 81.77.030*. Thus, the Commission has jurisdiction to determine whether the expenses incurred by a regulated utility are prudent.

20 In deciding whether a utility can pass through a tax to ratepayers, the Commission must determine whether the utility's payment of that tax is prudent. Where a utility attempts to pass through a tax that is clearly invalid, the Commission has jurisdiction to disallow that pass-through. *WUTC v. U S West, Docket No. UT-911306, First Supplemental Order, at 4-5*. Therefore, the issue the Commission must decide in these dockets is whether the Lummi and Swinomish utility taxes are clearly invalid, such that a utility's payment of the taxes and consequent pass-through of those taxes to customers are imprudent.

B. Qwest's Motion for Summary Determination

21 On October 30, 2001, Qwest filed a motion for summary determination pursuant to *WAC 480-09-426(2)*, asking the Commission to dismiss the complaints. As more fully explained below, Qwest argues that the tribal utility taxes are not clearly invalid, and therefore, the Commission should continue to allow them to be passed through to ratepayers in rates until such time as a court of competent jurisdiction determines the legality of the taxes. *See Qwest's Motion at 11*.

22 **Standard of Review.** *WAC 480-09-426(2)* provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under *WAC 480-09-426(2)* the Commission may look to, but is not bound by, the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior courts. CR 56 is the summary judgment rule.

23 CR 56(b) provides that a party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in its favor as to all or any part of a claim. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The decision-maker must view the evidence in a light most favorable to a non-moving party; however, the non-moving

party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain.

24 **Qwest's Position.** Qwest contends that Commission precedent supports dismissal of this case because the ultimate issue is the legality of the tribal utility taxes, which the Commission has repeatedly held it cannot determine. *See Qwest's Motion 5-9 (citing WUTC v. U S West, supra*; *Petition of Puget Sound Power & Light Co., Docket Nos. UE-920433, -920499, Eleventh Supplemental Order (Sept. 21, 1993*)). Qwest further argues that the cases relied upon by complainants, *Big Horn, supra*, and *Atkinson Trading Co., supra*, do not constitute an unambiguous change in the law that would support a finding by the Commission that the tax is clearly invalid. *Qwest's Motion at 9-11*. Qwest argues that the *Big Horn* and *Atkinson* decisions are not on point because neither involves a review of a tax that is analogous to the Lummi tax. *Id.*

25 Qwest also argues that the Lummi tax may fall within the first exception to tribal taxation of nonmembers articulated by the Supreme Court in *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).* Qwest argues that had the utility tax at issue in *Big Horn* been a tax on the activities of the utility, rather than an *ad valorem* tax, the Ninth Circuit may have held that it was valid. *Qwest's Motion for Summary Determination, at 9-11.*

26 **Complainants' Response.** Brannan argues that the law has changed since the Commission issued its decision in *WUTC v. U S West*. In essence, Brannan argues that while it may have been prudent for US West to pay the Lummi tax in 1992, "[p]rudent utility management would now challenge the tax." *Brannan's Memorandum in Opposition to Motion for Summary Determination, at 4-5*. Brannan argues that the Supreme Court's *Atkinson* decision "establish[es] a presumption that a tribal tax upon transactions between nonmembers on fee land is invalid." *Id. at 10*. Brannan argues that this presumption must guide the Commission's determination as to whether a utility's pass through of the tax to its ratepayers is prudent. *Id.*

27 Brannan argues that the tribal hotel occupancy tax invalidated by the Supreme Court in *Atkinson* is no different in principle from the tribal utility tax at issue in these dockets. *Id. at 11-14*. In *Atkinson*, the incidence of the tribal hotel tax was on the hotel guests, not the owner of the hotel. While Brannan acknowledges that the tribal tax is on the gross receipts of the utilities doing business on the reservation, she argues that the incidence of the tax falls on the ratepayers, which makes the utility taxes analogous to the hotel taxes. *Id. at 11*.

28 Brannan also argues 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." *Id.*

29 Brannan disagrees with Qwest's argument that had the utility tax in *Big Horn* been a tax on the utility's activities, rather than an *ad valorem* tax, the Ninth Circuit may have held that the tax was valid. Brannan argues the activity that would subject the utilities to tribal taxation is the provision of services to tribal members that is derived from a consensual relationship with the tribe. It is Brannan's position that the provision of utility services to nonmembers on fee land is not provided pursuant to a consensual relationship with the tribe, and therefore the tax is invalid. *Brannan's Memorandum in Opposition to Qwest's Motion for Summary Determination, Id. at 15*.

30 **Verizon's Response.** Verizon responds to Qwest's Motion for Summary Determination and argues that the Commission should grant Qwest's motion for the reasons stated by Qwest. *Verizon's Response to Qwest's Motion for Summary Determination, at 2*. In its response, Verizon also argues that the Commission should dismiss the complaints on grounds of collateral estoppel because the Complainants have litigated the same issue in other cases before the Commission. *Id. at 2-3*.

31 **Waste Management's Response.** Waste Management supports Qwest's motion.

32 **SSC's Response.** SSC supports Qwest's motion. SSC also argues that the Commission should dismiss the complaint against SSC because not all signatories to the complaint are customers and therefore the complaint is not signed by 25 customers as required by RCW 80.04.110.[4]

33 **Brannan's Motion to Strike Verizon's Response.** Brannan moved to strike Verizon's response because it raises a new issue – collateral estoppel. Brannan argues that not all of the Complainants were parties in the prior cases and that there is not commonality of issues, in that the Complainants are arguing that the Commission should not consider the expense that the utilities would incur by litigating the tax in federal court. Brannan also restates the argument that the case law has changed significantly since the *WUTC v. U S West* order.

[4] On November 30, 2001, Brannan responded to Sanitary Services' pleading with a Motion to Amend Complaint, accompanied by a First Amended Complaint, in Docket Nos. UT-010988, TG-010989, and UE-010990. The Commission denies SSC's request that the complaint be dismissed, and grants Brannan's Motion's to Amend Complaint. Brannan's amendment remedies the defect in the complaints filed on July 6, 2001, that served as the basis for SSC's argument for dismissal in its November 14, 2001, response to Qwest's Motion for Summary Determination.

Commission Discussion and Decision

1. Relevant Cases

34 The parties to these dockets discuss several federal court cases in their various pleadings. Therefore, the Commission believes it would be helpful to include a brief discussion of some of those cases in order to set the analytical framework for the Commission's decision.

35 ***Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)***. This case is the benchmark on the subject of an Indian tribe's authority over nonmembers. In *Montana*, the Supreme Court considered the "sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." *450 U.S. at 547*.

36 The Court discussed the sovereign status of Indian reservations, but noted that the tribes have lost many of the attributes of sovereignty, due to their dependent status. Thus, the general rule is that absent Congressional authorization, Indian tribes do not have authority over the activities of nonmembers on non-Indian fee lands. *Montana, 450 U.S. at 564-65*. However, the Court set forth two exceptions to this general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [First,] [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. [Second,] [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-656 (citations omitted). Applying these exceptions to the circumstances in the case, the *Montana* Court held that the Crow Tribe had no power to regulate non-Indian hunting and fishing on reservation land owned in fee by nonmembers of the Tribe. In subsequent cases, the federal courts have considered whether a tribe's authority over nonmembers falls into one of these two exceptions.

37 ***Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001)***. In this case, the Supreme Court considered whether a hotel occupancy tax imposed by the Navajo Nation on any hotel room located within the boundaries of the reservation was valid when applied to nonmember hotel guests staying in hotels located on fee land. *121 S. Ct. at 1829*. The Court held that a tribe's authority to tax

nonmembers engaging in activity on fee land must fall within one of the *Montana* exceptions. *Id. at 1832*.

38 The Court held that the tax did not fall within the first *Montana* exception because there was no showing that the hotel guests had entered into a consensual relationship with the tribe. *Id. at 1832-34*. The Court rejected the argument that a relationship is created by emergency response services that a tribe may provide to a hotel guest. The Court held that the "consensual relationship must stem from 'commercial dealings, contracts, leases, or other arrangements,' and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." *Id. at 1833*. Rather, the "consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id.* Finding no nexus, the Court held the tax did not fall within the first *Montana* exception.

39 The Court also considered whether the Navajo hotel occupancy tax fell within the second *Montana* exception. The Court did not see how operation of the hotel on non-Indian fee land "'threatens or has some indirect effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id. at 1834 (citations omitted)*. Having found that the tax satisfied neither *Montana* exception, the Court invalidated the tax.

40 ***Big Horn Electric Coop., Inc. v. Adams, 219 F.3d 944 (2000)***. This case involved an *ad valorem* tax imposed by the Crow tribe on the value of all utility property located on tribal or trust lands within the exterior boundaries of the reservation. *Id.* At issue in *Big Horn* was the imposition of that tax on utility property located on rights-of-way granted by Congress, which is the equivalent of non-Indian fee land. *Id.* (*citing Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997))*. The Ninth Circuit applied *Montana* to the Crow tax.

41 The court held that the utility had formed a consensual relationship with the tribe by volunteering to provide electric service on the reservation. *Id. at 951*. Despite this consensual relationship, the court found that the tax did not fall within the first *Montana* exception because that exception applies only to the *activities* of nonmembers who enter into consensual relationships. *Id.* The court distinguished the Crow tax: "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." *Id.*

42 The Crow tax also did not fall within the second *Montana* exception. The tribe had argued that the tax was essential to the well-being of the tribe because the revenues it created financed important tribal services. *Id.* The court rejected this argument, holding that it would swallow *Montana*'s main rule, because almost any tribal tax would fall within the exception. *Id.*

2. Analysis

43 The Commission agrees with the majority of parties who argue that the Commission does not have the jurisdiction to invalidate the tribal taxes in question. However, as stated above, the Commission has jurisdiction to reject a utility's pass-through to customers of a tax that is clearly invalid, on the grounds that the utility's payment of that tax is not a prudent expense and its collection from customers is therefore improper. *Supra*, ¶¶ 19-20.

44 The Commission disagrees with Brannan's argument that the *Atkinson* decision establishes a presumption that a tribal tax on transactions between nonmembers on fee land is invalid. We believe the Lummi and Swinomish utility taxes are sufficiently distinguishable from the Navajo hotel tax that we cannot presume they are invalid.

45 Unlike the hotel tax, the utility taxes are imposed on the utilities, not the customers. Therefore, the relevant question is whether there is a consensual relationship between the utilities and the tribe such that the tax may fall within the first *Montana* exemption. In *Big Horn*, the Ninth Circuit held that a utility's "voluntary provision of electrical services on the Reservation did create a consensual relationship." *219 F.3d at 951*. Brannan argues that we must read *Big Horn* as supporting a consensual relationship only to the extent that the utilities provide service to *tribal members*. *Brannan's Memornadum in Opposition to Qwest's Motion for Summary Determination, at 15*. However, we believe the better argument is that *Big Horn* suggests a consensual relationship between the tribes and the nonmember utilities, which precludes us from holding that the taxes plainly fall outside the first *Montana* exception.

46 In addition, the possible relationship that a transient hotel guest who stays at a hotel on fee land may have with a tribe is distinguishable from the relationship a utility providing service throughout a reservation may have with a tribe where, as here, it provides service throughout the reservation. The consensual tribal relationship (or not) at issue in the *Atkinson* case is different from the tribal relationships in these dockets. Therefore, we believe the better argument is that the tribal utility taxes are not plainly outside the first *Montana* exception.

47 In invalidating the Crow Tribe's *ad valorem* utility tax, the Ninth Circuit was mindful of the distinction between taxing property on fee land and taxing the activities of those who have entered into a consensual relationship with the tribe. *Big Horn*, *291 F.3d at 951*. We agree with Qwest that the Ninth Circuit's discussion undermines the complainants' argument that the tribal taxes are clearly invalid. Therefore, we cannot hold that the Lummi or Swinomish utility tax is clearly invalid under either the *Atkinson* or *Big Horn* decisions.

48 Brannan also argues that even if the Lummi tax is valid, the Commission should consider it a franchise fee, rather than a tax, and require the utilities to recover it from all ratepayers as a general operating expense. *Brannan's Memorandum in Opposition to Motion for Summary Determination, at 16-19*. For the following reasons, we reject Brannan's argument.

49 First, Brannan argues that the utilities cannot characterize the Lummi's "exaction" as a tax for purposes of *State ex rel. Pacific Tel. & Tel. Co. v. Department of Pub. Serv., 19 Wn.2d 200, 271-83, 142 P.2d 498 (1943) (discussing difference between franchise and tax)* unless they first prove that the tribe has the lawful authority to impose the tax. Brannan's argument brings us back to our first question: Is the Lummi (or Swinomish) utility tax clearly invalid? We have determined that the tax is not clearly invalid; therefore, we will continue to allow the utilities to pass it through to customers as a prudent expense.

50 Second, Brannan argues that the tax is a franchise fee because the utilities pay the tax to avoid tribal interference with their operations, which is a benefit to their general operations. *Brannan's Mem. in Opposition to Motion for Summary Determination, at 17-18*. However, there is no indication that the tribal taxes are really franchise fees. They are not fees paid by the utilities for the privilege of doing business on the reservation. *See Pacific Tel. 19 Wn.2d 278-79.* Rather, they are taxes on the gross receipts of utilities doing business on the reservation. *See Lummi Business Council, Resolution 91-67 (attached as Ex. 1 to Qwest's Motion for Summary Determination).*

51 We find that the Lummi and Swinomish utility taxes are business and occupation taxes, not franchise fees. Therefore, we cannot permit the utilities to pass those taxes through to ratepayers who live outside the boundaries of the reservations. *See King County Water Dist. v. Seattle, 89 Wn.2d 890, 901-03, 577 P.2d 567 (1978).*

52 In summary we conclude that the cases cited by Complainants fail to establish that the tribal utility taxes are clearly illegal. 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. Accordingly, the Commission grants Qwest's Motion for Summary Determination and dismisses the complaints.

IV. FINDINGS OF FACT

53 Having considered all materials submitted by the parties to these dockets and based on the foregoing discussion of our general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the above discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

54 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate telecommunications companies, electrical companies, and solid waste companies that offer service to the public for compensation.

55 (2) Qwest Corporation and Verizon Northwest Corporation provide telecommunications services for hire to the public in the state of Washington.

56 (3) Puget Sound Energy, Inc. provides electrical service for hire to the public in the state of Washington.

57 (4) Waste Management of Washington Inc., d/b/a Rural Skagit Sanitation, G-237, and Sanitary Service Company, Inc., provide solid waste collection service under authority granted by the Washington Utilities and Transportation Commission.

58 (5) Qwest, PSE, and SSC provide service within the boundaries of the Lummi Indian Reservation.

59 (6) Verizon, PSE, and Waste Management provide service within the boundaries of the Swinomish Indian Reservation.

60 (7) The Lummi Indian Reservation imposes a 5% gross receipts tax on the provision of telecommunications, electrical, and solid waste collection services within the reservation. The Lummi tax is imposed on gross receipts of the company providing the service.

61 (8) The Swinomish Indian Reservation imposes a 3% gross receipts tax on the provision of telecommunications, electrical, and solid waste collection services within the reservation. The Swinomish tax is imposed on the gross receipts of the company providing the service.

62 (9) The Commission allows Qwest, PSE, and SSC to pass through the Lummi tax to customers who reside within the boundaries of the Lummi Reservation. The Commission allows the pass-through by approving each respective company's tariff that provides for the pass-through.

63 (10) The Commission allows Verizon, PSE, and Waste Management to pass through the Swinomish tax to customers who reside within the boundaries of the Swinomish Reservation. The Commission allows the pass-through by approving each respective company's tariff that provides for the pass-through.

64 (11) Complainant Bernice Brannan lives on fee land within the boundaries of the Lummi Reservation. Ms. Brannan is not a member of the Lummi Tribe.

65 (12) Complainant Terry McNeil lives on fee land within the boundaries of the Swinomish Reservation. Mr. McNeil is not a member of the Swinomish Tribe.

V. CONCLUSIONS OF LAW

66 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

67 (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties and subject matter of this proceeding. Chapter 80.01 RCW, Chapter 80.04 RCW, Chapter 80.36 RCW, Chapter 80.28 RCW, Chapter 81.04 RCW, Chapter 81.77 RCW.

68 (2) The Commission has jurisdiction to determine the prudency of the utilities' pass-through of the Lummi or Swinomish utility taxes.

69 (3) The Lummi and Swinomish utility taxes are not clearly invalid under the Supreme Court's decision in *Atkinson* or the Ninth Circuit's decision in *Big Horn.*

70 (4) The Lummi and Swinomish utility taxes are business taxes, not franchise fees. A utility's payment of the tax should be recovered by the ratepayers who live within the reservation, not by the utility's general body of ratepayers.

71 (5) Verizon's motion that the Commission dismiss the complaints on grounds of collateral estoppel should be denied.

72 (6) Brannan's Motion to Strike Verizon's Response to Qwest's Motion for Summary Determination requesting the Commission to dismiss the complaints on grounds of collateral estoppel should be denied.

73 (7) Qwest's motion for summary determination should be granted.

74 (8) The complaints should be dismissed.

VI. ORDER

THE COMMISSION ORDERS:

75 (1) Verizon's motion that the Commission dismiss the complaints on grounds of collateral estoppel is denied.

76 (2) Brannan's motion to strike Verizon's Response to Qwest's Motion for Summary Determination is denied.

77 (3) Qwest's motion for summary determination is granted.

78 (4) The complaints are dismissed.

DATED at Olympia, Washington, and effective this ____ day of January, 2002

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).