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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

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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 TRANSPORATION COMMISSION,  Complainant,  v.  WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a RURAL SKAGIT SANITATION. G-237,  Respondent.	DOCKET NO. TG-011084  (CONSOLIDATED)  PETITION FOR CLARIFICATION OF VERIZON NORTHWEST INC., AND PUGET SOUND ENERGY, INC.

1. Verizon Northwest Inc. (“Verizon”) and Puget Sound Energy, Inc. (“PSE”) (together, the “Joint Petitioners”) hereby petition for clarification of the Commission’s “Order Granting Motion for Summary

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Determination,” dated January 11, 2002 (the “Order”) in the above-captioned dockets.

The full name and address of each of the Joint Petitioners are:

Verizon:

Verizon Northwest Inc.  
1800 41<sup>st</sup> Street  
Everett, WA 98201  
Attn: Allan Thoms  
Vice President – Public Policy and External Affairs

PSE:

Puget Sound Energy, Inc.  
P.O. Box 97034  
Bellevue, Washington 98009-9734  
Attn: Steve Secrist  
Director, Rates and Regulation

2. This Motion brings into issue the following rules or statutes: WAC 480-09-810.

**I. BACKGROUND**

3. These dockets concern complaints filed by a number of individuals requesting the Commission remove the Lummi Business Utility tax and the Swinomish Utility Business Activity tax from the tariffs of a number of utilities, including the Joint Petitioners, to the extent such taxes are passed through to non-tribal members residing on fee land within the borders of the Lummi and Swinomish reservations, respectively. The complainants based their arguments on, among other cases, *Big Horn Electric Coop., Inc. v. Adams*, 219 F.3d 944 (2000) and *Montana v. United States*, 450 U.S. 544 (1981). The Commission consolidated the three Lummi dockets with the two Swinomish dockets into a single proceeding.<sup>1</sup>

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<sup>1</sup> The Commission also instituted its own complaint against Waste Management of Washington, Inc. and consolidated this complaint with those filed by the individuals discussed above.

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4. On October 30, 2001, Qwest Corporation (“Qwest”) moved for summary determination and dismissal of the consolidated case. Qwest argued that the tribal utility taxes were not clearly invalid and that the Commission should continue to allow such taxes to be passed through to ratepayers in rates until such time as a court of competent jurisdiction determines the legality of the taxes.

5. In the Order issued January 11, 2002, the Commission granted Qwest’s Motion and dismissed the complaints. In so doing, the Commission stated that “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.” Order at 11. The exception referred to concerns the authority of tribes to regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members. *Montana*, 450 U.S. at 565-66.

**II. ARGUMENT:**  
**The Commission Should Clarify That It Was Not Ruling On Whether The Joint Petitioners Have Entered Into A Consensual Relationship With The Tribes By Virtue Of The Provision Of Utility Services**

6. The Joint Petitioners respectfully request that the Commission clarify that it was not ruling on the question of whether a consensual relationship exists between the tribes and nonmember utilities as a matter of law, because the Commission does not need to answer this question in order to decide that the utility tax at issue is not clearly invalid. Due to the nature of each utility’s statutory obligation to serve, it would be inappropriate to characterize each utility’s relationship with the tribes and tribal members as strictly “consensual.” This finding is not essential to the Commission’s analysis, which provides other reasons as to why the taxes at issue here are not “clearly invalid” under the cases cited by the complainants.

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7. Petitioner Verizon provide telecommunication service to the tribes and tribal members pursuant to RCW 80.36.090, which obligates utilities to provide service as follows: “[e]very telecommunications company shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto . . . .” Petitioner PSE provides electric service to the tribes and tribal members under a similar statutory obligation. See RCW 80.28.110 (“Every . . . electrical company . . . shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available . . . electricity . . . as demanded . . .”).

8. Under these statutes, the Joint Petitioners *must* provide to all persons and corporations such service as demanded and to which the requester is entitled. This includes those customers that are tribes, members of tribes, or who live on tribal lands, so long as such customers are entitled to receive such service. The utilities *must* serve the tribes; if they continue to provide utility services to the public, they cannot refuse to serve the reservations. This is not the type of voluntary relationship described by the United States Supreme Court in *Montana*.

9. The holding in *Big Horn* supports the conclusion that the provision of utility service does not constitute a consensual relationship. As noted by the Commission in the Order, in that case the Ninth Circuit stated that a utility’s “voluntary provision of electrical services on the Reservation did create a consensual relationship.” *Big Horn*, 219 F.3d at 951. However, the utility at issue in the *Big Horn* case was an electric cooperative, which provided service only to its *members*, not all comers. Thus, the statement in *Big Horn* that Big Horn’s provision of electrical services on reservation land established a consensual relationship is distinguishable because Big Horn was not a public service company operating under a statutory duty to serve.

10. Clarifying the Order on this point will not disturb the outcome of the case or change the holding of the Order. In the

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Order, the Commission cites a number of independent grounds as to why the Lummi and Swinomish taxes are not presumably invalid. See Order at 11 (citing the fact that these taxes fell on the utilities, not the customer, and that the *Big Horn* case dealt with an *ad valorem* tax, not a use tax). Because these factors underlie the Commission’s conclusion that the applicable law has not changed since the Commission last ruled on this issue, the Commission’s conclusion that such taxes are legitimately passed through need not be disturbed. In that regard, there is no court precedent addressing the interaction between public utilities and the tribes, and consequently the Commission’s holding that the tax at issue in this case is not clearly invalid remains an accurate description of the current state of federal law. Thus, the Commission may clarify this portion of the Order without changing the overall effect of the Order.

11. The Order may have the effect of unnecessarily defining the nature of the interaction between the tribes and public utilities in this State. If this portion of the Order becomes precedent, it may inadvertently result in disputes between the tribes and public utilities as to the nature of their interactions.

**III. PRAYER FOR RELIEF**

12. The Joint Petitioners respectfully request that the Commission clarify the Order to clarify paragraph 45 of the Order as indicated above.

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DATED: January 22, 2002.

**GRAHAM & DUNN PC**

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by first class mailing with postage prepaid to:

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CERTIFICATE OF SERVICE - 2

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Dated at \_\_\_\_\_, Washington, this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
Pam Iverson

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