

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

BERNICE BRANNAN, et al., ) DOCKET NO. UT-010988  
)  
Complainants, )  
)  
v. )  
)  
QWEST CORPORATION, )  
)  
Respondent. )

..... )  
BERNICE BRANNAN, et al., ) DOCKET NO. TG-010989  
)  
Complainants, )  
)  
v. )  
)  
SANITARY SERVICE COMPANY, INC., )  
)  
Respondent. )

..... )  
BERNICE BRANNAN, et al., )  
)  
Complainants, ) DOCKET NO. UE-010990  
)  
)  
v. )  
)  
PUGET SOUND ENERGY, INC., )  
)  
Respondent. )

..... )  
TERRY McNEIL, et al., ) DOCKET NO. UE-010995  
)  
Complainants, )  
)  
v. )  
)  
PUGET SOUND ENERGY, INC., )  
)  
Respondent. )  
..... )

TERRY McNEIL, et al.,	)	
	)	
Complainants,	)	DOCKET NO. UT-010966
	)	
v.	)	
	)	
VERIZON NORTHWEST, INC.,	)	
	)	
Respondent.	)	
.....	)	
WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	
	)	DOCKET NO. TG-011084
Complainant,	)	
	)	
v.	)	
	)	
WASTE MANAGEMENT OF	)	
WASHINGTON, INC., d/b/a	)	ORDER CLARIFYING ORDER
RURAL SKAGIT SANITATION.	)	GRANTING MOTION FOR SUMMARY
G-237	)	DETERMINATION
	)	
Respondent.	)	
.....	)	

**I. SYNOPSIS**

1 This Order addresses the request of Verizon Northwest Inc. (Verizon) and Puget Sound Energy, Inc. (PSE) for clarification of paragraph 45 of the Order Granting Motion for Summary Determination. The Commission clarifies that it did not rule on the question of whether a consensual relationship exists between the Lummi and Swinomish tribes and the Respondent utilities.

**II. MEMORANDUM**

2 **Parties:** Eric Richter, attorney, Seattle, Washington, represents 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). James K. Sells, attorney, Silverdale, Washington, represents Washington Refuse & Recycling Association (WRRRA). Marlene Dawson, Ferndale, Washington, represents herself.

- 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 PSE, SSC, and Qwest, to the extent the tax is passed through to non-tribal members residing on fee land within the Lummi Reservation. The Complainants relied 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 (9<sup>th</sup> 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 similar complaint requesting the Commission remove the Swinomish Utility Business Activity tax from the tariffs of PSE and Verizon, to the extent the tax is passed through to non-tribal members residing on fee land within the Swinomish Reservation.
- 5     On August 30, 2001, the Commission consolidated the three Lummi dockets and the two Swinomish dockets into a single proceeding. 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.
- 6     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. Brannan and McNeil filed responses in opposition to the motion. Verizon, SSC, and Waste Management filed responses in support of the motion.
- 7     On January 11, 2002, the Commission entered an Order granting Qwest's motion for summary determination and dismissed the complaints. The Commission concluded that the cases cited by Complainants failed to establish that the tribal utility taxes are clearly illegal. The Commission explained that it would not reject the pass-through of the Lummi and Swinomish utility taxes until a court of competent jurisdiction has ruled that the tribal utility tax, or an analogous tax, is clearly illegal.

8 On January 22, 2002, Verizon and PSE (together Joint Petitioners) filed a Petition for Clarification of the Commission’s Order Granting Motion for Summary Determination.<sup>1</sup>

### III. DISCUSSION AND DECISION

#### A. Issue Raised for Clarification

9 Joint Petitioners ask the Commission to clarify that the Commission was not ruling on the question of whether a consensual relationship exists between the tribes and nonmember utilities as a matter of law.

10 The specific language that the Joint Petitioners ask the Commission to clarify is found in the last sentence of Paragraph 45 of the Order:

However, we believe the better argument is that *Big Horn*<sup>2</sup> 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*<sup>3</sup> exception.

11 Joint Petitioners argue that “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.’”<sup>4</sup> Joint Petitioners assert that they “*must* provide to all persons and corporations such service as demanded and to which the requester is entitled.”<sup>5</sup> See *RCW 80.36.090 and RCW 80.28.110*. Joint Petitioners assert that they cannot refuse to serve the reservations if they continue to provide utility services to the public. They argue that this is not the type of voluntary relationship described by the United States Supreme Court in *Montana*.

12 According to Joint Petitioners, the holding in *Big Horn* supports the conclusion that the provision of utility service [by a public service company] does not constitute a consensual relationship.<sup>6</sup> They reason that the utility at issue in the *Big Horn* case

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<sup>1</sup> The Commission received one letter from a non-party disagreeing with the decision prior to the deadline for filing petitions for reconsideration. Following the deadline for filing petitions for reconsideration, the Commission received four letters from non-parties asking the Commission to reconsider its decision. *RCW 34.05.470* does not permit the Commission to accept a petition for reconsideration beyond the ten-day statutory filing date. Accordingly, the letters received outside the ten-day time frame for filing petitions for reconsideration are not timely filed and cannot be considered. The Commission has read and considered the letter that was timely filed in which the author disagrees with the Commission’s decision. The Commission has determined that the statements in the letter would not cause the Commission to reconsider its decision.

<sup>2</sup> *Big Horn Electric Coop., Inc. v. Adams*, 219 F. 3d 944 (9<sup>th</sup> Cir. 2000).

<sup>3</sup> *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

<sup>4</sup> *Petition for Clarification at p.5.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

was an electric cooperative, which provided service only to its members, not all comers. They contend that the statement in *Big Horn* that Big Horn's provision of electrical service 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.

- 13 Joint Petitioners express concern that the Order may have the effect of unnecessarily defining the nature of the interaction between the tribes and public utilities in this state. They suggest that 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.

*Commission Discussion and Decision*

- 14 Upon review of paragraph 45 of the Order, we agree with Joint Petitioners that the last sentence of that paragraph is confusing. It is dicta. We did not intend it to be a conclusion about the nature of the relationship between the utilities and the tribes in the matter before us. Accordingly, the last sentence of paragraph 45 is stricken. In its place, we insert the following sentence:

We read *Big Horn* as involving a different tribal relationship from that in the dockets before us.

- 15 Our decision to continue to allow the pass-through of the tribal utility taxes is based on our analysis of the cases relied upon by Complainants for their argument that the Lummi and Swinomish taxes are presumptively invalid. We found the taxes in those cases distinguishable from public utility taxes. We have concluded that the applicable law has not changed since the Commission last ruled on this issue.<sup>7</sup> Thus, the Commission's previous decision that such taxes are legitimately passed through, because they are not clearly invalid, need not be disturbed.

**IV. ORDER**

- 16 The Commission clarifies the Order Granting Motion For Summary Determination as fully described in the text of this Order.

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<sup>7</sup> *WUTC v. U S West Communications, Inc.*, Docket No. UT-911306, First Supplemental Order (August 25, 1992).

DATED at Olympia, Washington, and effective this      day of February, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner