

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR YAKIMA COUNTY

Elaine Willman and the Citizens	)	
Standup! Committee,	)	
	)	NO. 03-2-00086-7
Plaintiffs,	)	
v.	)	MEMORANDUM OPINION
	)	
Washington Utilities and Transportation	)	
Commission, Cascade Natural Gas	)	
Corporation and Pacificorp, d/b/a/ Pacific	)	
Power and Light Company,	)	
	)	
Defendants.	)	

This matter came on for hearing on Plaintiffs' motion for partial summary judgment and the utility Defendants' cross motions. The court extended time for additional briefing in response to the *amicus* brief filed by the Yakama Indian Nation. The matter was submitted to the court for decision on May 30, 2003.

**SUMMARY**

To tax or not to tax is *not* the question. The knotty question is whether the taxation is "*clearly unlawful*." Non-tribal members assert it is taxation without representation, while the Yakamas assert it is trespass without compensation. Neither of these assertions can be conclusively resolved in this case in state court. Disgruntled litigants and ratepayers need knock on some other courthouse door for their answer.

The strict legal issue in this case in this court is *not* whether the Yakama Nation *can* impose a utility fee or tax on the utility companies. Rather, the question is

whether it *clearly* cannot. The Nation did impose fees on the companies. The companies, in turn, sought a revision of their tariffs to pass through the cost to the customers. The Washington Utility and Transportation Commission allowed the rate changes to be implemented.

The law is ambiguous. It is not clear whether the Nation can legally tax the utilities. That legal question is honestly debatable, and this court does not have jurisdiction to resolve that debate. Put simply, the underlying issue is in the wrong court. Plaintiffs' motion for summary judgment is denied. There evidence before the court on plaintiffs' summary judgment motion that the Commission exercised its discretion lawfully and did not act arbitrarily and capriciously. Plaintiff's motion for partial summary judgment is denied.

The court has jurisdiction to answer narrow issues posed by this appeal and the plaintiffs are not required to take alternative action before pursuing this appeal. Nor are the plaintiffs required to join the Yakama Nation in this action for administrative review. Defendants' various cross-motions for summary judgment are denied.

## ISSUES

**Issue:** The issue presented is whether the Washington State Utilities and Transportation Commission (hereinafter "WUTC" or "Commission") had a legal duty to take affirmative action to exempt from recovery a tax on utility customers that are non-tribal owners of fee land within the Yakama Reservation.

**Issue:** Whether the Commission could conclude that it is not clearly unlawful for the utilities to recover the tax from all customers within the Reservation, including non-tribal members.

**Issue:** Whether the Commission failed in its duty by allowing tariff revision to take effect by operation of law.

Plaintiffs ask the court to order the Commission to exempt non-tribal members on the Reservation from recovery of the Nation's utility tax.

The question is whether the Commission's inaction, allowing the tariff to be imposed by operation of law, amount to an "unreasonable preference" within the scope of RCW 80.28.090? The plaintiffs have not established the tariffs to be an "unreasonable preference."

## STATEMENT OF FACTS

There are both undisputed facts and evidence of facts the court must consider for purposes of considering the summary judgment motions.

The Yakama Indian Nation adopted a "franchise ordinance" August 6, 2002 imposing a fee on utility companies whose infrastructure (poles, lines, pipes, etc.,) crossed Yakama land. The fee was imposed on the utility defendants. Those utilities, in turn, sought permission to change the rate they could charge customers through a tariff revision. The WUTC has the authority to regulate the rates. A tariff is a document filed with the Commission that states the rates, terms and conditions of service by a regulated company to its customers.

The Yakama Reservation is a patchwork of fee and trust land. The reservation was established by treaty with the United States government in 1855 when various bands and tribes agreed to give up much of their land in exchange for certain ancestral rights and other considerations. There is evidence that the Nation, through its franchise ordinance, seeks to protect its interests in its own land.

Many utility customers are not tribal members and own land in fee within the reservation. Plaintiffs are in such a category and seek relief from the tax imposed on the utilities and passed through to consumers through the rate change allowed in the tariffs.

The record contains evidence the Commissioners exercised their discretion not to suspend the Cascade and PacifiCorp tariffs.

Of particular interest to non-tribal members receiving utility service on the Yakama Indian Reservation is whether the Nation's utility franchise fee charge is lawful. The Yakama Nation's utility charge is treated by the Commission as a tax on the utility companies. The Nation has not taxed the non-tribal member utility users. Rather, the Commission as allowed the tax to pass through to the ultimate users through the tariff revisions.

PacifiCorp filed its tariff revision on December 16, 2002 to become effective January 13, 2003. The Commission considered the tariff revision at an open meeting on January 8, 2003 attended by the petitioners and others. Previously Cascade had filed a tariff revision and the Commission approved the revision in docket number UG-021502.

The Commission staff concluded PacifiCorp's tariff revision is consistent with the outcome in Cascade's case. The Commission allowed PacifiCorp's tariff revision to take effect by operation of law under RCW 80.28.060.

There is evidence all utility users receive identical conditions of service at identical cost to the utilities that provide the service regardless of whether they are

tribal members. Thus, it is not an undue or unreasonable prejudice or disadvantage to require non-tribal members to pay the same rate for service that tribal members receive even though non-tribal members have no voice in tribal government.

Plaintiffs have not established by summary judgment motion their rights were violated. The record establishes the Commission exercised discretion in allowing the tariffs to take effect by operation of law. The Commission's failure to reject or suspend Cascade's and PacifiCorp's tariff filings was not arbitrary or capricious. Evidence supports the conclusion it was a reasoned choice taken with regard to the attending facts and circumstances. The record before the Commission developed over three separate days of public meetings supports the Commission's choice.

The Commission, as this court, lacks jurisdiction to decide whether the Yakama Nation has legal authority to impose a utility charge on the utility companies. The Commission's decision clearly recognizes when and if a court of competent jurisdiction rules the Nation lacks such authority the tariffs will be suspended.

Plaintiffs assert the Commission failed in its duty by allowing a tariff be revised by operation of law. The Commission may allow a tariff rate change to go into effect by operation of law on 30 days notice. RCW 80.28.060. The Commission chose to allow Pacificorp's requested tariff to take effect by operation of law after first considering comment from the public, including the plaintiffs. It considered, too, the action it had taken in Cascade's request when deciding whether to allow the revision to occur by operation of law.

#### **DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT RE INDISPENSIBLE PARTY**

Both defendants move for summary judgment claiming the Yakama Nation is an indispensable party. The Nation is indispensable only if this court must conclusively resolve whether the Nation has authority to impose a franchise fee on the utility companies. While that question is the underlying theme of the case, it need not be resolved conclusively by this court in this administrative review. Rather, the issues are whether the taxation question is honestly debatable in law and whether the Commission's action was unlawful (arbitrary and capricious). This court need not have jurisdiction over the Yakama Nation to decide whether the commission erred. The Nation need not be joined to resolve the issues. Defendants' summary judgment motion is denied.

## PACIFICORP'S MOTION FOR SUMMARY JUDGMENT

Respondent PacifiCorp moves for summary judgment on several grounds: agency inaction is not subject to review, lack of jurisdiction, and failure to exhaust administrative remedies.

This court rules as a matter of law state Superior Court is not the appropriate forum for petitioners' dispute with the Yakama Nation about the validity of the "franchise fee" in question. Tribal ordinances are presumptively valid and lawful until declare otherwise by a court with jurisdiction. State court lacks the jurisdiction necessary for such a determination.

PacifiCorp moves for summary judgment for failure to exhaust administrative remedies. Exhaustion is excused under RCW 34.05.534(3)(b) if the petitioners can show exhaustion would be futile. Futility has been shown.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES:** PacifiCorp asserts no Commission decision was made under RCW 80.28.090 and consequently there is nothing for the superior court to review.

PacifiCorp argues in its summary judgment that plaintiffs were required by RCW 34.05.534 to file a complaint under RCW 80.04.110. While plaintiffs have that option if at least twenty-five utility customers join the complaint, they are not required to do so before this court can exercise its judicial review authority. It is within the Commission's discretion to allow the tariff revisions to take effect by operation of law. This "inaction" is a conscious, discretionary choice. It is subject to review.

The Commission's action, or more accurately, its "inaction" by allowing the tariffs to take effect by operation of law, is subject to review now. PacifiCorp's motion for summary judgment is denied.

**DOCTRINE OF PRIMARY JURISDICTION:** In its cross-motion PacifiCorp asserts the Commission, rather than this court, should determine in the first instance whether recover of the Nation's tax from non-members violates RCW 80.28.090. Since the Commission heard from the public that issue was subsumed in the Commission's decision to allow the tariff revision to take effect by operation of law.

It is inferred that it found no basis to reject or suspend the companies' tariff proposals as unlawful under RCW 80.28.090. Had it done so it could not have allowed the revision to occur by operation of law. This court reviews its action, that is, its choice to allow the revision by operation of law, under the "arbitrary and capricious" standard. No party has established as a matter of law the Commission acted arbitrarily and capriciously.

## DISCUSSION

Whether the Yakama Nation Franchise Ordinance adopted August 6, 2002 is actually lawful cannot be decided here. This court lacks jurisdiction to answer that question. A related question is posed here: Whether the ordinance is *clearly unlawful* for purposes of reviewing the commission's action. If the right to tax is honestly debatable in law then it is not "clearly unlawful.

The record includes evidence that Yakama Reservation land, including some trust land, is burdened with the physical invasion of utility infrastructure without exempted right-of-way. The 3% level imposed by the Yakama Nation was within previously accepted guidelines. It is not patently oppressive. No doubt it was a considered decision, perhaps even a strategic one, by the Nation, to minimize the likelihood of rejection by the Commission.

Delivery system infrastructure is a complicated network. To parcel out backbone lines and exempt some, or partially exempt some would be onerous. The broader view is practical and reasonable.

Property rights are at issue: using or taking property. On one hand, Yakama Nation property was arguably being used without permission and without compensation. On the other hand, ratepayer property is being taken via increased monthly charges. The ratepayers, however, gain something in return: the utility service provided that depends in some part on transmission across Yakama Reservation land.

The Commission considered whether the Nation's utility charge should be treated a tax and recovered only from customers on the Reservation, or as a fee and recovered from customers throughout the utility's entire service territory including the Reservation. The Commissioners characterized the Nation's charge as a tax for ratemaking purposes.

The legal issue of whether the Nation has such authority is honestly debatable. Plaintiffs cite *Atkinson Trading co. v. Shirley*, 532 U.S. 645 (2001) in support of their position that the Nation has no authority to impose a tax on non-members. The facts in *Atkinson* are clearly distinguishable. There a hotel tax was imposed. The hotel was on fee land and accessed solely via non-Indian public rights-of-way. It was, therefore, isolated from the surrounding Indian lands.

By contrast, there is evidence that the utility infrastructure here crosses both fee and trust land. It is physically integrated within tribal lands and does not stand in isolation.

Arguably, *Montana v. United States*, 450 U.S. 544 (1981) does not apply since the “tax” is a franchise fee imposed directly on the utility companies. The Commission allowed it to be passed through to the consumers via the tariff revision. If *Montana* does apply, the third factor listed in the case is at issue. That is, whether the conduct of non-member utilities “threatens or has some direct effect on the political integrity the economic security, or the health and welfare of the tribe.” This, too, is an honestly debatable question since sovereign rights of the Nation are at issue when tribal land is exposed to a possible continuing trespass and encroachment with utility infrastructure. Property rights are held sacred by all sovereigns and are vigorously protected by individuals.

The original people of this land gave up precious rights when they negotiated treaties with the United States government. The debatable legal issue cannot be completely resolved in state court unless the Yakama Nation submits to this court’s jurisdiction. It has chosen not to and cannot be compelled to do so.

Taxes are presumed to be legal until declared by a court of competent jurisdiction to be otherwise. When a utility company includes in its tariff a tax imposed on it, that inclusion is a prudent expense unless the tax is clearly illegal. The company is not required to mount a legal challenge to every tax imposed by every taxing authority.

The tariff revision reflecting a 3% fee would be imprudent, and thus not allowed, if there was no rational basis for it. The record shows the Nation has spent hundreds of thousands of dollars to determine where all the lines are, and that determination still is not complete. The record contains evidence the income the Nation will receive from the franchise fees or taxes has a rational relationship to the administrative costs associated with observing the infrastructure and planning with the utilities for future expansion.

The fee or tax is on the gross revenue of the defendants. Their revenue has a clear nexus to the utilities’ activities, namely, providing service to all customers on the Reservation. This nexus is rationally based.

Conditions of service for utility customers are identical regardless of whether they are member of the Yakama Nation. That a member can participate in tribal government and non-members cannot does not rise to the level of “undue or unreasonable” discrimination since both receive the same utility service. No party has shown RCW 80.28.090 was violated as a matter of law.

## CONCLUSION

This ruling is based on summary judgment standard. The court does not weigh the evidence at this stage. Rather, it considers whether there is evidence in the record contrary to a moving party's position. The question is whether the record, as a matter of law, compels a certain result. All moving parties have failed and the court denies all of the summary judgment motions.

Plaintiffs have not established the Commission acted arbitrarily and capriciously as a matter of law. Nor have the plaintiffs established as a matter of law that recovery of the Nation's tax from non-tribal members constitutes unlawful rate discrimination. The Yakama Nation is not an indispensable party in this administrative review despite the Nation's utility franchise fee giving rise to the administrative action. The plaintiffs are not required to pursue additional remedies under RCW 80.28.090 before they are entitled to have the Commission's action allowing the tariff revisions to be implemented by operation of law. All summary judgment motions by all parties are denied.

The court directs counsel to prepare and submit orders consistent with this ruling for presentation on July 21, 2003 at 9:30 A.M. Motions to reconsider this ruling, together with supporting briefs, should be filed by June 23, 2003. Responsive briefing should be filed by July 7, 2003, and any reply by July 15, 2003.

Dated this 5<sup>th</sup> day of June, 2003.

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JUDGE