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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

The Public Counsel Section of the Office of the  
Washington Attorney General,

Complainant,

vs.

Cascade Natural Gas Corp. and PacifiCorp,  
d/b/a Pacific Power & Light Co.,

Respondents.

Docket No. U-030744

Reply to Opposition of PacifiCorp and  
Cascade to Petition for Intervention of  
Elaine Willman, et al.

**I. BACKGROUND**

Petitioners Willman and others have requested leave to intervene in this proceeding pursuant to WAC 480-09-430. They join in the Public Counsel's described prayer for relief as their chief claim, that respondents' tariffs for recovery of the franchise fee imposed by the Yakama Nation's Franchise Ordinance as a local tax are unjust and should be rejected, because payment of the fee is imprudent. Petitioners urge, in the alternative, that respondents' tariffs are further unjust, and should be rejected, because the Yakama Nation's franchise fee, if it is prudently paid, is properly characterized as a franchise fee and not a local tax, so that it should be recovered as general operating expense through the state-wide rate base. The City of Toppenish has petitioned to intervene in order to raise the latter claim as well.

Petitioner Elaine Willman has challenged the Commission's failure to suspend or reject the respondents' tariffs on a similar principal claim and the same alternative

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1 claim in the Yakima County Superior Court under Cause No. 03-2-000867. The  
2 Court has rejected Willman's first claim, ruling that the Commission "did not have a  
3 duty required by law to hold an adjudicative hearing under RCW 80.04.130 and reject  
4 or suspend tariffs filed by PacifiCorp and Cascage Natural Gas Corporation that  
5 recover from such non-tribal members, the charge imposed by the Yakama Nation on  
6 those utility companies ...." Order of July 28, 2003. In entering the Order of July  
7 28, Judge Van Nuys of the Superior Court made clear that she was ruling only on  
8 Willman's principal claim for relief and reserved judgment of the alternative "tax" or  
9 "fee" issue, which will be argued at a hearing on August 8, 2003. Her decision of  
10 that issue also, however, will only be a preliminary: whether the Commission erred in  
11 not suspending the respondent's tariffs as a matter of law and holding an adjudicatory  
12 hearing under RCW 80.04.130.

13 Now an adjudicative hearing is being held by the Commission, so whether the  
14 utilities should challenge the Yakama Nation's authority to impose the fee in federal  
15 court, rather than pay it and pass it through to rate payers, will be considered against  
16 a factual background.

## 17 **II. ARGUMENT**

18 WAC 480-09-430(2) permits intervention to broaden the issues. The  
19 broadening sought here is only slight, since the same facts and related law bear of the  
20 questions of whether the utilities' payment of the tribal fee is prudent and whether it  
21 is properly characterized as a "tax" or "fee," if it is prudent, for the purpose of the  
22 utilities' recovery of it from rate payers.

23 Judge Van Nuys' Memorandum Opinion of June 5, 2003 (copy attached as Ex.  
24 1) determined that the record made at the public hearings on the tariffs at issue  
25 permitted that Commission to conclude that the tribal franchise ordinance was not  
26 clearly unlawful under federal law. The Court concluded that the tribal Franchise  
27 Ordinance may come within *Montana's* second exception to its general rule that

1 Indian tribes have no governmental power over nonmembers on fee land within a  
2 reservation.<sup>1</sup> The Court reached that conclusion because:

3 "The record includes evidence that Yakama Reservation land, including  
4 some trust land, is burdened by the physical invasion of utility infrastructure  
5 without exempted right-of-way. The 3% level imposed by the Yakama Nation  
6 was within previously accepted guidelines. ...

7 "Delivery system infrastructure is a complicated network. To parcel out  
8 backbone lines and exempt some, or partially exempt some would be onerous.  
9 The broader view is practical and reasonable." [ Mem. Op. p. 6]

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

17 "The fee or tax is on the gross revenue of the defendants. Their revenue  
18 has a clear nexus to the utilities' activities, namely, providing service to all  
19 customers on the Reservation." [Mem. Op. p. 7]

20 Facts developed at an adjudicative hearing upon the Public Counsel's claim may or may  
21 not alter this preliminary view of the facts according to the allegations of the Yakama  
22 Nation, but it is certain that they will concern the same subject matter: whether and how  
23 the respondents' facilities unlawfully encroach upon tribal land, outside of federally  
24 granted rights of way. The Yakama Nation will be urged to provide its evidence before  
25 the adjudicative hearing, even though it is not a party and cannot be made a party  
26 without its consent to waive its sovereign immunity. The Tribe will probably comply  
27 with such a request, as it would accord with the position the Tribe took at the public

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28 <sup>1</sup> This exception allows tribal regulation or taxation of nonmembers' conduct which  
threatens or has some direct effect on the political integrity, the economic security, or  
the health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566  
(1981). *Montana's* exceptions were narrowly construed in *Atkinson Trading Co. v.*  
*Shirley*, 532 U.S. 645 (2001), in which the second exception was held to apply only to  
threatened effects which were "demonstrably serious," and to grant "Indian tribes nothing  
"beyond what is necessary to protect tribal self-government or control internal relations",  
*i.e.*, the tribe's "political integrity." 450 U.S. at 658 - 9.

1 hearings urging that respondents' tariffs be rejected and that its franchise fee be  
2 recovered within their state-wide rate base as a general operating expense. The utilities  
3 themselves presumably know where their own facilities are on the ground, where they  
4 are on tribal land, and upon what purported right they have placed them there.

5 If the Court's preliminary view of the facts as alleged is sustained by the evidence  
6 of actual facts at the hearing on this matter, then the Court's conclusion of law may  
7 likewise be reached by the Commission in this case and the respondents' payment of the  
8 tribal franchise fee deemed prudent. The same evidence, however, would determine  
9 whether the payment of the tribal franchise fee is properly deemed a fee for the use of  
10 tribal property or unrelated to the use of tribal property and so properly deemed to be  
11 a tax, under *State ex rel. Pac. Tel. & Tel. v. D.P.S.*, 19 Wn.2d 200, 278 - 281 (1943),  
12 and related cases, particularly *Lakewood v. Pierce County*, 106 Wn. App. 63, 74 - 79  
13 (Div. II, 2001).


14 In sum, the facts determinative of the alternative "tax" or "fee" claim for relief  
15 urged by Willman, et al., and the City of Toppenish are the same facts, or a subset of  
16 the same facts, upon which depend the Public Counsel's stated claim for relief.

### 17 III. SUMMARY

18 For the foregoing reasons, consideration of the alternative claim for relief urged  
19 by Willman, et al., will not substantially broaden the proceedings in this matter, and  
20 leave for petitioners to intervene and raise that claim for relief, as well as to support the  
21 Public Counsel's stated claim, should be granted.

22 Respectfully submitted this ~~5~~<sup>4</sup>th day of August, 2003.

23 Henke & Richter

24  
25 by:   
26 Eric Richter (WSBA 6978)  
27 Attorneys for Petitioners  
28 Willman et al.