

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

The PUBLIC COUNSEL Section of the  
Office of the Washington Attorney  
General

Complainant,

v.

CASCADE NATURAL GAS  
CORPORATION; PACIFICORP dba  
PACIFIC POWER & LIGHT COMPANY

Respondents.

DOCKET NO. UG/UE

COMPLAINT

(Yakama Nation Franchise Ordinance)

1. Complainant, the Public Counsel Section of the Office of the Washington Attorney General (Public Counsel), files this complaint pursuant to RCW 80.04.110, and other applicable statutes and law, regarding the proper regulatory treatment of a Franchise Ordinance (franchise fee) imposed on two regulated utilities by the Yakama Indian Nation (hereafter “Yakama Nation” or “Nation”)

**I. INTRODUCTION**

2. Public Counsel files this complaint in order to address and resolve the ongoing controversy regarding the collection of the franchise fee. In August of last year, the Yakama Nation adopted a Franchise Ordinance which was intended to impose a charge of three percent of revenues on all utilities operating on the reservation. Although the charge was designated by the Nation as a franchise fee, two utilities, Cascade Natural Gas Corporation (Cascade) and PacifiCorp, asked the Washington Utilities and Transportation Commission to instead allow recovery of the fee as a municipal tax. The Commission ultimately granted the request by allowing tariffs to go in to affect, without suspension and hearing. As a consequence, the franchise fee, now recharacterized as a municipal tax, was passed through to reservation ratepayers in the form of a surcharge on their bills. As a result, the franchise fee is currently

being collected solely from utility customers residing within the Yakama reservation, some of whom also pay other municipal utility taxes. Even though the franchise fee is currently being collected from ratepayers as a tax, Cascade has not yet paid the funds it has collected to the Nation. PacifiCorp began to make such payments only recently.

3. The Nation and the two utilities have yet to conclude formal franchise agreements, and there continues to be uncertainty regarding whether the Nation will approve franchise agreements that have been signed and tendered by Cascade and PacifiCorp. In fact, the Nation continues to review a range of options for dealing with utility company use of tribal lands, which may again change the proper treatment of the tribal charges, if any.

4. There are a number of serious factual and legal questions raised by this case, including the nature of the charge imposed. Determining whether the charge is a franchise fee or a tax is relevant to the Nation's ability to impose the exaction and also important because it determines who pays the charge. Franchise fees are typically included in general rates borne by all the ratepayers, while local taxes are paid only by the residents of the particular local jurisdiction. The analysis of the Yakama Ordinance involves complex and very fact-specific questions including the location of utility company facilities, rights of way and the status of any agreements and business relationships between the utility and the Nation. One of the difficulties presented by this case is that the detailed factual information necessary to resolve these issues is in the possession of the utilities, the Nation, and local governments, not the ratepayers. Treating the ordinance as a "tax" places the full burden of challenging the charges on the ratepayers, the parties with the least access to the facts.

5. For these reasons, Public Counsel requests this complaint proceeding to facilitate the determination of the proper regulatory treatment of the Nation's franchise ordinance in a formal evidentiary setting with an opportunity for all interested parties to participate and present evidence and legal briefs. While Public Counsel understands that the issues were discussed as part of the open meeting process to consider the company tariffs, no evidentiary record was

created, nor did the Commission issue a final order with written findings of fact and conclusions of law, as it did in the 1991 Lummi tax case<sup>1</sup> and the *Brannan* case.<sup>2</sup>

6. Public Counsel initially requested that the Commission establish a collaborative process as a means for resolving these issues. In its order denying the petition for a collaborative, the Commission observed that one option for Public Counsel to pursue was the filing of a complaint against the utilities involved, thereby creating a formal record on this issue, and a final order for purposes of judicial review.

## II. THE PARTIES

7. Complainant Public Counsel is a section of the office of the Washington Attorney General which represents the people of the state of Washington, including customers of regulated investor-owned utilities such as Cascade and PacifiCorp, in Commission proceedings pursuant to RCW 80.01.100 and 80.04.510. Public Counsel is authorized by the provisions of RCW 80.04.110 to file complaints with the Commission. Public Counsel's address is 900 Fourth Avenue, Suite 2000, Seattle, Washington 98164.

8. Cascade Natural Gas Corporation is a Washington corporation with its principal place of business in Seattle, Washington. Cascade's address is 222 Fairview Avenue North, Seattle, Washington, 98109-5312. Cascade is a gas company authorized to do business in the state of Washington and regulated by the Washington Utilities and Transportation Commission pursuant to RCW Title 80.

9. PacifiCorp, a subsidiary of Scottish Power, is an Oregon corporation with its principal place of business in Portland, Oregon. Its address is 825 N.E. Multnomah, Portland, Oregon 97232. PacifiCorp, doing business as Pacific Power & Light Company, is an electric company authorized to do business in the state of Washington and regulated by the Washington Utilities and Transportation Commission pursuant to RCW Title 80.

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<sup>1</sup> *WUTC v. U S West Communications, Inc.*, Docket No. UT 911306, First Supplemental Order

<sup>2</sup> *Brannan v. Qwest Corporation, Puget Sound Energy et al.*, Docket Nos. UT-010988 *et seq.*, Order Granting Motion for Summary Determination

### **III. JURISDICTION**

10. The Washington Utilities and Transportation Commission (WUTC or Commission) has jurisdiction over this complaint and the parties pursuant to RCW Chapters 80.01, 80.04, and 80.28, including, specifically 80.01.040 (general powers and duties of the Commission), RCW 80.04.110, 80.28.010 and 80.28.020. The Commission has jurisdiction to determine whether costs which regulated utilities seek to recover from customers have been prudently incurred.

### **IV. STATEMENT OF FACTS**

11. The Confederated Tribes and Bands of the Yakama Indian Nation is a federally recognized Indian Tribe, signatory to the Treaty of June 9, 1855 (12 Stat. 951). The Yakama Reservation lies within Yakima and Klickitat Counties. The Yakama Reservation is composed of land in multiple ownerships, including Trust lands, and lands owned in fee (by both Nation members and non-Indians). Towns within reservation boundaries include Toppenish and Wapato.

12. Cascade Natural Gas Corporation (Cascade), PacifiCorp dba Pacific Power & Light Company (PacifiCorp), and other regulated utilities provide utility service within the external boundaries of the Yakama Reservation to both tribal members and non-members residing on both fee and non-fee land.

13. On August 6, 2002, the Nation adopted the Yakama Nation Franchise Ordinance (Franchise Ordinance) T-177-02. The Franchise Ordinance required Cascade, PacifiCorp and other utilities operating on the reservation to enter into franchise agreements with the Nation in order to continue providing service on the Reservation. Under the proposed Franchise Agreement, utilities are required to pay a monthly franchise fee based on 3 % (three percent) of gross operating revenues rather than upon actual costs.

14. Cascade and PacifiCorp did not initially enter in to franchise agreements with the Nation, and instead, filed tariffs with the Commission to recover the charges from their

ratepayers by means of municipal tax additions to be collected from all their customers living within the Yakama Reservation boundaries.<sup>3</sup> The Cascade and PacifiCorp tariffs came on before the Commission at open meetings in November, December 2002, and January 2003. After receiving written and oral comment from the companies, the Nation, and other interested persons, the Commission took no action to suspend the tariffs and they were allowed to go into effect. As a result of this treatment, the full burden of these charges falls upon customers living within the reservation boundaries.

15. Pursuant to the approved tariffs, Cascade and PacifiCorp are currently authorized to impose a 3 % (three percent) surcharge on all of their customers who live within the boundaries of the Yakama Reservation, as a municipal tax addition to their bills.

Notwithstanding their collection of the Yakama charge as a municipal tax, it is Public Counsel's understanding that Cascade and PacifiCorp have signed proposed franchise agreements and submitted them to the Yakama Nation. The Nation, however, has not approved these agreements.

16. Under the case law of the United States Supreme Court and the Ninth Circuit Court of Appeals, specific elements must be present in order for Indian Tribes to impose taxes or fees on non-member activities on reservation land owned in fee by non-members. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-654 (2001); *Montana v. United States*, 450 U.S. 544, 565-566 (1981). There must be a showing that non-members have entered consensual relationships with the tribe or its members, or that the non-member conduct has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. The Yakama Nation's power to impose the proposed fee and the question of whether it is reasonable

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<sup>3</sup> Cascade's initial tariff was filed November 14, 2002, by Advice No. CNG/W02-11-01, docketed UG-021502. Cascade filed a related petition for an accounting order on December 2, 2002, docketed as UG-021576. PacifiCorp's tariff was filed December 16, 2002, as Advice No. 02-011, and docketed as UE-021637. PacifiCorp also filed a petition for an accounting order.

must be evaluated in light of the factual record and the case law addressing both tribal taxing authority specifically and tribal civil authority over non-members more generally.

17. Neither Cascade nor PacifiCorp have sought a judicial determination of the validity of the Yakama Nation charge or otherwise challenged the validity of the franchise fee.

18. On February 7, 2003, Public Counsel requested that the Commission initiate a collaborative process to review and address issues related to the Yakama Nation ordinance. The Commission denied the request by order on February 18, 2003.

19. Both Cascade and PacifiCorp have pending before the Commission petitions for accounting orders regarding the Franchise fee.

#### **V. FIRST CLAIM AGAINST CASCADE**

Public Counsel realleges the allegations set forth in paragraphs 7, 8, and 10 through 19 above.

20. For all or part of the period of time during which Cascade has recovered charges from its customers in the form of a municipal tax additive, no franchise agreement has been in place to act as a basis for the charge.

21. For all or part of the period of time during which Cascade has recovered charges from its customers in the form of a municipal tax additive, Cascade has not paid the Yakama Nation charges.

22. Cascade's collection of charges from its customers in the absence of a franchise agreement, and its collection of charges when it was not remitting payments to the Yakama Nation was unjust, unreasonable, excessive and otherwise in violation of law.

#### **VI. SECOND CLAIM AGAINST CASCADE**

Public Counsel realleges the allegations set forth in paragraphs 7, 8, and 10 through 19 above.

23. Cascade's actions set forth in this complaint establish that Cascade did not believe the franchise fee which the Yakama Nation sought to impose was a valid franchise fee under state law because it is not tied to actual costs or otherwise consistent with state law.

Notwithstanding its conduct reflecting this conclusion, Cascade failed to pursue any type of

formal challenge to the validity of the franchise fee and instead sought to have it approved as a municipal tax.

24.. For the reasons set forth in this complaint, the Cascade determination to impose the franchise fee as a tax, rather than challenging the validity of a fee, which it had determined not to pay, was not a prudent determination.

25. Because the charges Cascade is recovering and seeks to recover in the future from its customers as a result of the franchise fee are not prudently incurred, the rates in which they are incorporated are not lawfully recoverable from customers.

## **VII. THIRD CLAIM AGAINST CASCADE**

Public Counsel realleges the allegations set forth in paragraphs 7, 8, and 10 through 19 above.

26. There is a significant legal question as to whether a tribal franchise fee on utilities measured solely by a percentage of gross revenue from customers on the reservation is consistent with Supreme Court and 9<sup>th</sup> Circuit Court of Appeal decisions. Accordingly, it would be improper and imprudent for the companies to pay the franchise fee and expect automatic reimbursement from either the customers on the reservation or through inclusion in the general rate base unless and until there is evidence that the amount of the fee is reasonably related to compensation for use of trust property within the reservation, or there is a definitive court ruling that the franchise fee in its current form is consistent with applicable case law.

27. Cascade had a reasonable basis under federal law to challenge the authority of the Yakama Nation to impose the fees as set forth under the franchise fee ordinance.

28. Cascade's determination to seek recovery of the franchise fee from its customers, rather than challenging the validity of the charge, was not a prudent determination.

29. Because the charges Cascade is recovering and seeks to recover in the future from its customers as a result of the franchise fee are not prudently incurred, the rates in which they are incorporated are not lawfully recoverable from customers.

### **VIII. FIRST CLAIM AGAINST PACIFICORP**

Public Counsel realleges the allegations set forth in paragraphs 7 and 9 through 19 above.

30. For all or part of the period of time during which PacifiCorp has recovered charges from its customers in the form of a municipal tax additive, no franchise agreement has been in place to act as a basis for the charge.

31. For all or part of the period of time during which PacifiCorp has recovered charges from its customers in the form of a municipal tax additive, PacifiCorp has not paid the Yakama Nation charges.

32. PacifiCorp's collection of charges from its customers in the absence of a franchise agreement, and its collection of charges when it was not remitting payments to the Yakama Nation was unjust, unreasonable, excessive and otherwise in violation of law.

### **IX. SECOND CLAIM AGAINST PACIFICORP**

Public Counsel realleges the allegations set forth in paragraphs 7 and 9 through 19 above.

33. PacifiCorp's actions set forth in this complaint establish that PacifiCorp did not believe the franchise fee which the Yakama Nation sought to impose was a valid franchise fee under state law because it is not tied to actual costs or otherwise consistent with state law. Notwithstanding its conduct reflecting this conclusion, PacifiCorp failed to pursue any type of formal challenge to the validity of the franchise fee and instead sought to have it approved as a municipal tax.

34. For the reasons set forth in this complaint, the PacifiCorp determination to impose the Yakama franchise fee as a tax, rather than challenging the validity of a fee which it had determined not to pay, was not a prudent determination.

35. Because the charges PacifiCorp is recovering and seeks to recover in the future from its customers as a result of the franchise fee are not prudently incurred, the rates in which they are incorporated are not lawfully recoverable from customers.



## **X. THIRD CLAIM AGAINST PACIFICORP**

Public Counsel realleges the allegations set forth in paragraphs 7 and 9 through 19 above.

36. There is a significant legal question as to whether a tribal franchise fee on utilities measured solely by a percentage of gross revenue from customers on the reservation is consistent with Supreme Court and 9<sup>th</sup> Circuit Court of Appeals decisions. Accordingly, it would be improper and imprudent for the companies to pay the franchise fee and expect automatic reimbursement from customers on the reservation or through inclusion in the general rate base unless and until there is evidence that the amount of the fee is reasonably related to compensation for use of trust property within the reservation, or there is a definitive court ruling that the franchise fee in its current form is consistent with applicable case law.

37. PacifiCorp had a reasonable basis under federal law to challenge the authority of the Yakama Nation to impose the franchise fees as set forth under the Nation's ordinance.

38. PacifiCorp's determination to seek recovery of the Yakama Nation charge from its customers, rather than challenging the validity of the charge, was not a prudent determination.

39. Because the charges PacifiCorp is recovering and seeks to recover in the future from its customers as a result of the franchise fee are not prudently incurred, the rates in which they are incorporated are not lawfully recoverable from customers.

## **XI. RELIEF REQUESTED**

WHEREFORE, complainant Public Counsel respectfully requests that the Commission issue an order:

1. Finding that Cascade and PacifiCorp were imprudent in failing to challenge the franchise fee on federal law grounds, or in the alternative, in failing to challenge the franchise fee on state law grounds, or both..
2. Determining that, as a result of its imprudence, Cascade and PacifiCorp have charged an amount in excess of the lawful rate that would have been in effect absent the violation for customers on the Yakama reservation.

3. Finding that Cascade and PacifiCorp had no valid basis for collecting fees from customers for any period in which a franchise agreement was not in effect or any period when they were not remitting payments to the Yakama Nation.
4. Finding that the rates charged for utility service by Cascade and PacifiCorp were unjust, unreasonable, and excessive, and are otherwise in violation of the provisions of law.
5. Ordering Cascade and PacifiCorp to immediately cease and desist collecting the municipal tax addition from its customers, or including any Yakama franchise fee in rates until Cascade and PacifiCorp have received a judicial determination as to the validity of the tax.
6. Ordering Cascade and PacifiCorp to refund any monies collected from their customers if such charges are ultimately determined to be imprudent, unlawful, or excessive.
7. Adopting such other and further relief as the Commission may deem necessary.

DATED this 22<sup>nd</sup> day of May, 2003.

CHRISTINE O. GREGOIRE  
Attorney General

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Simon J. ffitc  
Assistant Attorney General  
WSBA No. 25977