

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

Tariffs Related to Yakama Nation Franchise Ordinance

DOCKET NO. U-030174

RESPONSE OF ELAINE WILLMAN and the CITIZENS STANDUP! COMMITTEE to PETITION TO ESTABLISH COLLABORATIVE PROCESS

Respondents Elaine Willman, a rate payer and non-Indian resident of fee land within the Yakima Indian Reservation, and the Citizens Standup! Committee, an organization of land owners within the boundaries of the Yakima Indian Reservation, oppose the establishment of a collaborative process but will participate if it is established.

Respondents see no prospect for resolution or useful narrowing of the issues regarding tariffs related to the Yakama Nation Franchise Ordinance by agreement. The fundamental issue is whether the utilities' payment of the Yakama Nation's franchise fee or any future utility tax imposed by the Nation, burdening utility sales to nonmembers, is a recoverable expenses at all, not merely

1
2 the manner in which the utilities should recover payment
3 from ratepayers.

4 The interests of the parties appear to be
5 irreconcilable, and the mediation proceeding is likely to
6 be rendered moot by the Yakama Nation's replacement of
7 their utility franchise fee by a utility tax. The Yakama
8 Nation has stated, through its counsel, Thomas Nelson:

9 "Based upon some preliminary discussions, it appears
10 that the Nation would entertain a privilege tax in
11 lieu of the franchise approach. Moreover, it seems
12 that a determination by the Commission that the
13 franchise fees are really privilege taxes in
14 disguise would create a strong incentive to replace
15 the franchise the franchise approach with a
16 privilege tax. After all, the privilege tax
17 approach was accepted by the Swinomish and Lummi
18 tribes with no major fallout; indeed, if a privilege
19 tax were involved, there would be no three-percent
20 limitation." Nelson to Washburn (WUTC), letter of
21 12/6/2002.

22 "... the Nation is reconsidering its franchise
23 ordinance; now, the thought is to acquiesce to the
24 exaction and in fact impose a privilege tax in an
25 amount not yet determined. If such a step is taken,
26 utilities will not be given a 'safe harbor' for
27 past, present, and future trespasses on Reservation
28 lands."
Nelson to Washburn (WUTC), letter of 1/7/2003.

29 An Indian tribe lacks authority under federal law to
30 tax or otherwise exercise civil authority over the
31 conduct of nonmembers on fee land or federally authorized
32 rights of way for public roads or utilities. Despite
33 that law and the absence of any proof that utilities use
34 any other Indian lands to provide service to nonmembers,
35 the utilities have consistently contended and the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Commission has held that it is more prudent for a utility to pay a tribe's exaction on its service to nonmembers than to challenge the tribe's demands.

There is no prospect of an agreement concerning treatment of the Yakama Nation's franchise fee to which Respondents or any other principled representative of ratepayers could be a party. Respondents contend the Commission should deny the utilities any recovery of their payment of exactions by the Yakama Nation upon sales to nonmembers, because that payment is not a prudent business expense and does not benefit ratepayers.

The only utility expense which Respondents believe should be recoverable, in relation to any tribal exaction upon sales to nonmembers, would be the expense of a judicial challenge to the utilities' purported obligation to pay it.

Respondents request the Commission deny the petition for the foregoing reasons. In the event the petition is granted, however, we agree that the collaborative process should be limited to a period of ninety days in which to complete its work and we will participate.

DATED this 11th day of February, 2003.

HENKE & RICHTER

by: /s/ Eric Richter

Eric Richter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Elaine
Willman and Citizens
Standup! Committee
(WSBA No. 6978)