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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 The Public Counsel Section of)Docket No. U-030744
4 the Office of the Washington)Volume I
5 Attorney General,)Pages 1-94
6)Complainant,)
7)v.)
8)Cascade Natural Gas Corporation,)
9)and PacifiCorp D/B/A Pacific)
)Power & Light Company,)
)Respondents.)
)_____)

10 A prehearing in the above matter
11 was held on August 11, 2003, at 1:34 p.m., at 1300
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge DENNIS MOSS,
14 Chairwoman MARILYN SHOWALTER and Commissioner RICHARD
15 HEMSTAD.

16 The parties were present as
17 follows:
18 PUBLIC COUNSEL, by Simon ffitch,
 Assistant Attorney General, 900 Fourth Avenue, Suite
 2000, Seattle, Washington, 98164.

19 PACIFICORP, by James M. Van
20 Nostrand and Michael P. O'Connell, Attorneys at Law,
21 Stoel Rives, 600 University Street, Suite 3600,
 Seattle, Washington 98101.

22 PUGET SOUND ENERGY, by Lynn F.
23 Logen, Tariff Consultant, 10885 N.E. Fourth Street,
 P.O. Box 97034, Bellevue, Washington 98004.

24 Barbara L. Nelson, CCR
25 Court Reporter

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1 CASCADE NATURAL GAS CORPORATION,
2 by John West and Mary Crego, Attorneys at Law, 500
3 Galland Building, 1221 Second Avenue, Seattle,
4 Washington 98101.

5 VERIZON NORTHWEST, by Michael
6 Atkins (for Judith Endejan), Attorney at Law, Graham
7 & Dunn, Pier 70, 2801 Alaskan Way, Suite 300,
8 Seattle, Washington 98121 (Appearing via
9 teleconference bridge.)

10 CHARTER COMMUNICATIONS
11 CORPORATION, by Mark P. Trincherro, Attorney at Law,
12 1300 S.W. Fifth Avenue, Suite 2300, Portland, Oregon
13 97201.

14 WILLMAN, ET AL., by Eric Richter,
15 Attorney at Law, Henke & Richter, 221 First Avenue
16 West, Suite 215, Seattle, Washington 98119.

17 CITY OF TOPPENISH, by Jeff
18 Richard, Attorney at Law, Foster, Pepper & Shefelman,
19 1111 Third Avenue, Suite 3400, Seattle, Washington
20 98101.

21 SPRINT, by William E. Hendricks,
22 Attorney at Law, 902 Wasco Street, Hood River, Oregon
23 97031.

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1 JUDGE MOSS: Let's be on the record. Good
2 afternoon, everyone. My name is Dennis Moss. I'm
3 the Administrative Law Judge with the Washington
4 Utilities and Transportation Commission. I'll be
5 assisting the Commissioners as presiding officer in
6 this matter, which is styled the Public Counsel
7 Section of the Office of the Washington Attorney
8 General against Cascade Natural Gas Corporation and
9 PacifiCorp, doing business as Pacific Power and Light
10 Company, Docket Number U-030744. As is obvious to
11 those assembled, the Commissioners will be sitting
12 and presiding in this case.

13 Our order of business today is this. We'll
14 take appearances as the first order of business.
15 Then we'll take up -- we have four petitions to
16 intervene that have been filed, there may be oral
17 petitions, as well, this being our first prehearing
18 conference. We'll take up any motions or requests.
19 The standard business there is to consider discovery,
20 a protective order if we need one, and there's also
21 been a written request from Public Counsel for the
22 assignment of a settlement judge in this proceeding.
23 We'll take that up.

24 Next we'll discuss our process and
25 procedural schedule. Basically what do we need to do

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1 and when and, if a hearing is indicated, where. And
2 I want to take up in that connection, too, the
3 question of whether anyone is planning to file a
4 dispositive motion, a motion to dismiss or a motion
5 for summary disposition, and if someone has such
6 plans, let's discuss a time frame for that.

7 We'll take up any other business the
8 parties may have, and I'll have a few closing remarks
9 that will give you some of the logistical parameters
10 for going forward with the case in terms of filing
11 and so forth.

12 So with all that said, let us begin with
13 our appearances. Since Public Counsel is the
14 Complainant in this matter, I believe we should start
15 with you, Mr. ffitch.

16 MR. FFITCH: Would you like, excuse me,
17 Your Honor, the full form of appearance?

18 JUDGE MOSS: This is our first prehearing,
19 so yes, full form of appearance today, and then we'll
20 use the shortened form in the future.

21 MR. FFITCH: Simon ffitch, Assistant
22 Attorney General, Office of Public Counsel, 900
23 Fourth Avenue, Suite 2000, Seattle, Washington 98164.
24 Phone number is 206-389-2055, fax is 206-389-2058,
25 e-mail address is simonf@atg.wa.gov.

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1 JUDGE MOSS: And Cascade is the first named
2 Respondent, so let's hear from Cascade's Counsel,
3 please.

4 MR. WEST: Yes, Your Honor, John West. I'm
5 appearing on behalf of Cascade Natural Gas
6 Corporation. My address is 500 Galland,
7 G-a-l-l-a-n-d, Building, 1221 Second Avenue, Seattle,
8 Washington, 98101. My phone is 206-623-1745, fax
9 206-623-7789, and my e-mail is jlw@hcmp.com.

10 JUDGE MOSS: Okay. Welcome, Mr. West.
11 Haven't seen you in a while. And Mr. Van Nostrand, I
12 believe you're representing PacifiCorp today.

13 MR. VAN NOSTRAND: Yes, thank you, Your
14 Honor. On behalf of PacifiCorp, James M. Van
15 Nostrand, with Stoel Rives, LLP, 600 University
16 Street, Seattle, Suite 3600, zip code is 98101.
17 Phone 206-386-7665, fax 206-386-7500, e-mail
18 jmvannostrand@stoel.com. Also appearing with me
19 today on behalf of PacifiCorp is my partner, Michael
20 P. O'Connell, same address. Phone number
21 206-386-7692.

22 JUDGE MOSS: All right. And do we have
23 someone here for Petitioner to intervene Elaine
24 Willman?

25 MR. RICHTER: Yes, Your Honor. This is

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1 Eric Richter, of Henke and Richter, Attorneys.

2 JUDGE MOSS: And Mr. Richter, if you would
3 pull the microphone a little closer and make sure the
4 button is in the up position.

5 MR. RICHTER: Okay. I'll try again. Eric
6 Richter, of Henke and Richter, address 221 First
7 Avenue West, Suite 215, Seattle, Washington, 98119.
8 Telephone 206-282-2911, fax 206-282-3022, e-mail
9 henkerichter@msn.com.

10 JUDGE MOSS: Thank you. City of Toppenish.

11 MR. RICHARD: Yes, Your Honor. Jeff
12 Richard, with Foster, Pepper and Shefelman, appearing
13 on behalf of the City of Toppenish. Our address is
14 1111 Third Avenue, Suite 3400, Seattle, Washington,
15 98101. Telephone 206-447-4400, fax number is 206-447
16 -- sorry, 206-749-2092, and e-mail address is
17 richj@foster.com.

18 JUDGE MOSS: All right. For Puget Sound
19 Energy. And -- well, I guess we are sort of short on
20 tables there. I apologize.

21 MR. LOGEN: Thank you, Your Honor. Lynn
22 Logen, with Puget Sound Energy. I'm a tariff
23 consultant. Telephone number 425-462-3872, fax
24 425-462-3414, e-mail address lynn.logen@pse.com. The
25 address, 10885 N.E. Fourth Street, Bellevue,

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1 Washington, 98004.

2 JUDGE MOSS: All right. Thank you. Mr.
3 Atkins, will you be entering an appearance for
4 Verizon Northwest?

5 MR. ATKINS: Well, yes. I'm here
6 telephonically on behalf of Judy Endejan of my firm,
7 Graham and Dunn, and her address, Judith A. Endejan,
8 Graham and Dunn, Pier 70, 2801 Alaskan Way, Suite
9 300, Seattle, Washington, 98121-1128. Her voice is
10 206-340-9694, fax is 206-340-9599, and her e-mail
11 address is jendejan@grahamdunn.com.

12 JUDGE MOSS: All right, thank you.

13 MR. ATKINS: Thank you.

14 JUDGE MOSS: I'll just note for the record,
15 Ms. Endejan did call me earlier and said she had an
16 unavoidable conflict and could not be here today.
17 Are there any other persons who wish to petition to
18 intervene orally?

19 MR. TRINCHERO: Yes, Your Honor. Mark P.
20 Trinchero, that's spelled T-r-i-n-c-h-e-r-o, with
21 Davis, Wright, Tremaine, Suite 2300, 1300 S.W. Fifth
22 Avenue, Portland, Oregon, 97201. Telephone
23 503-778-5318, fax number 503-778-5299, e-mail address
24 marktrinchero@dwt.com. I'll be here appearing on
25 behalf of Charter Communications Corporation, and you

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1 should have a copy of a written intervention in front
2 of you, which I've also distributed to those present
3 here today.

4 JUDGE MOSS: All right. And I do have
5 multiple copies of that. I'll distribute those.

6 MR. TRINCHERO: Thank you, Your Honor.

7 MR. HENDRICKS: Tre Hendricks, on behalf of
8 Sprint. My address is 902 Wasco Street, Hood River,
9 Oregon, 97031. Phone number 541-387-9439, fax is
10 541-387-9753, my e-mail address, and you'll have to
11 pardon the length, is tre.e.hendricks.iii@ -- yeah, I
12 know -- @mail.sprint.com.

13 JUDGE MOSS: Take this full name thing to
14 extremes at Sprint.

15 MR. HENDRICKS: That was not my creation.
16 I have to live with it now, so --

17 CHAIRWOMAN SHOWALTER: What's wrong with
18 tre@sprint.com?

19 MR. HENDRICKS: I asked them the same
20 question and I was given no answer, so --

21 JUDGE MOSS: All right. Welcome. And
22 Sprint wishes to intervene?

23 MR. HENDRICKS: Yes, Your Honor.

24 JUDGE MOSS: Okay. And we don't have a
25 written pleading from you, do we?

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1 MR. HENDRICKS: No.

2 JUDGE MOSS: Okay, very good. Well, we
3 will hear from the parties. Actually, I've got a
4 slightly different order to hear the petitions to
5 intervene than what we just went through, but I'll
6 follow my agenda on that. I think we -- well, we
7 have -- PacifiCorp and Cascade have also filed some
8 papers opposing certain of the petitions, at least in
9 part. So I think the most efficient thing to do
10 today will be to hear from the petitioners as a
11 group, and then we'll hear the responses, because I
12 suspect there will be some overlap, if not identity
13 in terms of points of opposition.

14 I'll also note, in that connection, that
15 Public Counsel did file a paper -- was it not
16 opposing or was it supporting the interventions, Mr.
17 Ffitch? I don't recall. I have it here.

18 MR. FFITCH: We, I believe, might have
19 phrased it as not objecting to the interventions of
20 Toppenish and Mr. Richter's clients. We would
21 support their being granted intervention.

22 JUDGE MOSS: Right. And your caption was
23 actually simply response, but you do say in the body
24 that you do not object. Okay, all right.

25 Let's hear from the City of Toppenish as to

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1 what its interest in the proceeding is and go from
2 there.

3 MR. RICHARD: Thank you. The City of
4 Toppenish has a direct and immediate interest in the
5 subject matter involved in this docket. Pursuant to
6 the Yakima Nation's franchise ordinance, the Yakima
7 Nation's requiring that all of the utilities that are
8 operating and providing utility service within the
9 external boundaries of the reservation enter into
10 franchise agreements in order to continue providing
11 service within the external boundaries of the
12 reservation.

13 And part of the requirement of the
14 franchise agreements is that all of the utilities pay
15 a three percent -- or make a three percent payment on
16 the gross revenues of the utility service operations
17 from each of the utilities.

18 Unlike Public Counsel, the City of
19 Toppenish does not contest whether the Yakima Nation
20 has the authority to require that the utility --
21 utilities enter into such a franchise agreement. Our
22 basic bone of contention is that the UTC incorrectly
23 characterized or recharacterized that franchise fee
24 as a municipal excise tax, and as such, has allowed
25 the utilities to directly pass through the payments

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1 on to the residents of the City of Toppenish and
2 other residents located within the external
3 boundaries of the Yakima Nation.

4 Worth reminding that the City of Toppenish
5 has an explicit statutory right to file such a
6 complaint before the UTC and as well as we have
7 associational standing to represent the residents of
8 the City of Toppenish pursuant to a recent Supreme
9 Court decision in Grant County versus Moses Lake.

10 So we think that we have a pretty strong
11 interest in how the Commission characterizes those
12 franchise fees, and as such, we believe we have a
13 right to intervene. We don't believe that our
14 intervention will unreasonably broaden the issues
15 involved in this. In fact, we believe that it will
16 supplement nicely with at least one of the arguments
17 that Public Counsel made in their initial complaint.

18 CHAIRWOMAN SHOWALTER: I'm sorry, can you
19 point to me where that is in the initial complaint;
20 that is, where our characterization is directly at
21 issue?

22 MR. RICHARD: Eric, I'm sure you have it
23 right in front of you there. Yeah, that's in
24 subsection four of Public Counsel's complaint, that's
25 on page two. There are a number of serious factual

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1 and legal questions raised by this case including the
2 nature of the charge imposed. Determining whether
3 the charge is a franchise fee or a tax is relevant to
4 the Nation's ability to impose the exaction and also
5 important because it determines who pays the charge.

6 CHAIRWOMAN SHOWALTER: I understand that
7 narrative and I can get to it later; I'm just -- that
8 in itself doesn't appear to be a direct complaint
9 about the tariff. It seems to be an explanation of
10 something.

11 MR. RICHARD: Well, if you look in at the
12 -- for instance, on the first claim against Cascade
13 on line 20, Public Counsel realleges --

14 JUDGE MOSS: Might give us a paragraph
15 number there.

16 MR. RICHARD: Sorry, paragraph 20. Also, I
17 believe it's repeated earlier in paragraph seven --
18 or sorry, paragraph -- realleges -- there we are.
19 It's based in paragraph 15 and then realleged in
20 paragraph 20, which is, basically, Pursuant to the
21 approved tariffs, Cascade and PacifiCorp currently
22 authorized to impose a three percent surcharge on all
23 the customers who live within the Yakima Nation as a
24 municipal tax addition to their bills,
25 notwithstanding their collection of Yakima charges of

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1 municipal tax. It's Public Counsel's understanding
2 that --

3 CHAIRWOMAN SHOWALTER: You need to slow
4 down for the court reporter.

5 MR. RICHARD: Pardon. It is Public
6 Counsel's understanding that Cascade and PacifiCorp
7 have signed proposed franchise agreements and
8 submitted them to the Yakima Nation.

9 Then it goes forward to the first claim
10 against Cascade in paragraph 20. For all or part of
11 the period of time during which Cascade has recovered
12 charges from its customers in the form of a municipal
13 tax additive, no franchise agreement has been in
14 place to act as a basis of the charge, and goes down
15 to say that, 22, Cascade's collection of charges from
16 its captive customers in the absence of a franchise
17 agreement, its collection of charges when it was not
18 remitting payments to the Yakima Nation was unjust.

19 And then the second bit there is 23,
20 paragraph 23, Cascade's actions set forth in its
21 complaint establishing Cascade did not believe that
22 the franchise -- actually -- let me jump to -- down
23 to the bottom here, which is essentially that in
24 paragraph 29, which is then repeated in 32 and 35, is
25 that the charges that Cascade and PacifiCorp is

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1 recovering and seeks to recover in the future from
2 its customers as a result of franchise fees are not
3 prudently incurred. The rates in which they
4 incorporated are not lawfully recovered from the
5 customers, and the Public Counsel's reasoning for
6 that is that the PacifiCorp determination to impose
7 the Yakima franchise fee as a tax, rather than
8 challenging the validity of a fee which it had
9 determined not to pay, was not a prudent
10 determination.

11 In essence, that -- the complaint that
12 Public Counsel or the specific complaint that Public
13 Counsel has made in their complaint is that the
14 franchise fee -- the Yakima Nation didn't have the
15 authority to impose the franchise fee and should have
16 contested the Yakima Nation's ability to impose that,
17 and as a result it wasn't properly -- wasn't
18 prudently incurred.

19 CHAIRWOMAN SHOWALTER: Wait, Counsel, you
20 are narrating right now. What I asked you is to
21 point to the complaint. You had said that the
22 complaint states and complains that this Commission
23 mischaracterized the charge. I'm very aware of the
24 parts of the complaint that allege that the companies
25 failed to investigate adequately whether the charge

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1 was lawful.

2 MR. RICHARD: Well, that's -- it's our view
3 that in the underlying narrative that Public Counsel
4 gives, that is part of the Public Counsel's complaint
5 that the -- there was improper determination, or at
6 least there was legal questions concerning the
7 characterization of the charge as a franchise fee or
8 as a tax, and that's in paragraph four, which I
9 understand is part of the narrative of Public
10 Counsel, and apparently not specifically reproduced
11 in the specific complaint -- or specific charges, but
12 nonetheless, Public Counsel, at least as part of the
13 factual basis for bringing the complaint, is raising
14 a legal question as to whether the charge was
15 properly characterized.

16 CHAIRWOMAN SHOWALTER: Okay. I'm trying to
17 get a sense of to what extent your intervention
18 depends on that analysis. First, is it in the
19 complaint? Second, what bearing does it have, if
20 any, that the Yakima Superior Court has found, is my
21 understanding, I haven't read the order yet, that
22 characterizing the charge as a tax was a permissible
23 interpretation? That may or -- as I say, I have not
24 read the order, but does that -- if that is the case,
25 does that affect your intervention here?

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1 MR. RICHARD: Well, we -- my interpretation
2 of the order is is that the Yakima Superior Court
3 more precisely came to the conclusion that it was
4 permissible for the UTC to come to the conclusion
5 that the Yakima Nation had the authority --

6 CHAIRWOMAN SHOWALTER: Can you speak into
7 the microphone?

8 MR. RICHARD: Sorry. That the Yakima
9 Nation had the authority to impose a franchise fee or
10 a tax or whatever it was going to be characterized,
11 and that the Yakima Superior Court came to the
12 conclusion that it wasn't the correct forum to answer
13 the questions about whether the Yakima Nation had the
14 authority to do what it imposed in the first place.

15 And as a result, it was reasonable for the
16 UTC to come to the conclusion that the Yakima Nation
17 had the authority to impose what it imposed. But I
18 -- my reading of the Superior Court order is that it
19 doesn't reach the conclusion of whether it was
20 properly characterized as a tax or as a utility
21 franchise fee or it's a utility -- utility tax.

22 CHAIRWOMAN SHOWALTER: And are you -- you
23 are referring to the order that was just issued?

24 MR. RICHARD: Correct, correct, by the
25 Yakima Superior Court. City of Toppenish's purpose

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1 of intervention is simply about how that charge is
2 characterized, whether it was properly characterized
3 as a franchise fee, which is the city's position, or
4 whether it would be more properly characterized as a
5 municipal excise tax, which was the position taken by
6 the Commission.

7 CHAIRWOMAN SHOWALTER: Okay. So what I'm
8 trying to get at here is that your interest in being
9 an intervenor relates to the issue of whether the
10 Commission properly characterized the charge or is
11 obligated to characterize the charge as distinct
12 from, I gather, what the company's obligation was?

13 MR. RICHARD: Correct.

14 CHAIRWOMAN SHOWALTER: All right. Thank
15 you.

16 COMMISSIONER HEMSTAD: If I can pursue the
17 issue of your position. I take it, then, you are
18 not, at least in this forum, questioning the
19 authority of the reservation itself to impose a fee?

20 MR. RICHARD: Correct, correct. We believe
21 that the Yakima Nation does have the authority to
22 impose or require a franchise agreement for utilities
23 to operate within external boundaries of the
24 reservation.

25 COMMISSIONER HEMSTAD: All right. I

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1 believe, when you started, you referenced you have a
2 statutory right to file. Would you give me a
3 statutory reference?

4 MR. RICHARD: Yes, sir. In RCW 80.04.110,
5 the city has an independent statutory authority to
6 bring a complaint before the UTC, similar to Public
7 Counsel's.

8 JUDGE MOSS: Have to have a signature of a
9 public official for that, don't you, a mayor or
10 something?

11 MR. RICHARD: We have a resolution of the
12 City of Toppenish.

13 JUDGE MOSS: Okay. That's probably
14 adequate, then. Does anybody have a copy of the
15 court's more recent order, by the way, that they
16 could hand up? We have not seen that at the bench.
17 Mr. Cedarbaum, I see you in the back of the room. I
18 believe you were involved in that case.

19 MR. CEDARBAUM: Thank you, Your Honor.
20 Robert Cedarbaum, Assistant Attorney General. The
21 order that Counsel for the City referenced was an
22 order that was entered on July 28th, that had to do
23 with only part of the plaintiff's complaint or
24 petition for review in that case dealing with the
25 tribe's authority to enact the ordinance and impose

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1 the charge. This past Friday the court heard oral
2 argument on the tax versus fee issue.

3 CHAIRWOMAN SHOWALTER: You know, Mr.
4 Cedarbaum, I realize there are people on the
5 conference bridge, so you'd better speak into the
6 microphone.

7 MR. CEDARBAUM: Thank you. Again, this is
8 Robert Cedarbaum, Assistant Attorney General. I've
9 been representing the Commission in the Superior
10 Court case in Yakima County, and some questions have
11 come up, I think, as to the status of that.

12 The petition for review involved a petition
13 filed by Elaine Willman and the Citizens Stand Up
14 Committee, in which there were two claims for relief.
15 The first had to do with the authority of the tribe
16 to impose this three percent charge on utilities and
17 how the Commission must deal with that for ratemaking
18 purposes. The second claim had to do with the
19 Commission's categorization of the charge as a tax or
20 a fee when the Commission allowed rates to go into
21 effect, which it treated the charge as a tax.

22 On July 28th, the Court issued an opinion
23 finding that the Commission had -- that the petition
24 for review as to the first claim involving the
25 legality of the tax should be dismissed. In other

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1 words, the court upheld the Commission's
2 determination that the tax was not clearly unlawful,
3 or the charge was not clearly unlawful, and therefore
4 could be passed on to customers, including
5 non-members of the tribe.

6 This past Friday, the second claim came
7 before the Court for oral argument. That had, again,
8 the claim involving the tax versus fee issue. And
9 the Court, from the bench, ruled on Friday that the
10 Commission was not arbitrary or capricious in
11 categorizing this charge as a tax for ratemaking
12 purposes, so a written order by the Court needs to be
13 prepared, which I volunteered to do, but I have not
14 done yet, and the Court has not yet entered a written
15 order, but I think the parties will probably come to
16 an agreement on that and one should be issued in due
17 course, hopefully this week.

18 So that is the current status of the case.
19 There is a written order, which we have copies for
20 anyone who -- I can make copies of Mr. Richter's
21 copy, dealing with, again, the tax legality issue
22 that upheld the Commission, and we're waiting for an
23 order on the second issue.

24 CHAIRWOMAN SHOWALTER: Thank you, Mr.
25 Cedarbaum. It was the second order I was interested

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1 in. I gather there is no written order yet.

2 MR. CEDARBAUM: That's correct, but there
3 should be relatively soon.

4 JUDGE MOSS: And I think the court's first
5 memorandum opinion is actually attached to the reply
6 to opposition of PacifiCorp and Cascade to petition
7 for intervention of Elaine Willman et al. At least I
8 find there a memorandum opinion from the referenced
9 court dated 5th of June.

10 MR. RICHARD: And Your Honor, that was the
11 memoranda I was referring to.

12 JUDGE MOSS: Okay.

13 CHAIRWOMAN SHOWALTER: I see we were
14 speaking a little bit at cross purposes, because I
15 was concerned with the most recent court
16 determination, and if it has been determined by a
17 court, we'll have to see what the written order says,
18 but if it has been determined by a court that
19 characterizing the charge as a tax, instead of a fee,
20 is permissible, then I am wondering what your
21 interest as an intervenor is?

22 MR. RICHARD: Well, not being a party to
23 that litigation, I don't know precisely the arguments
24 that are being raised there, but I believe -- my
25 understanding, from what was just said from the

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1 Assistant Attorney General, is that the court said
2 from the bench that it wasn't arbitrary and
3 capricious for the Commission to have treated it as a
4 tax, rather as a franchise fee.

5 Nonetheless, the Commission would have the
6 authority, I believe, to reconsider that original
7 treatment. I mean, the Yakima Superior Court's
8 order, at least as what was described, wouldn't
9 appear to prevent a reconsiderization of that
10 classification by the Commission.

11 CHAIRWOMAN SHOWALTER: Then that, in turn,
12 would depend on there being in the current complaint
13 that issue directly, or we'll hear from Mr. ffitich,
14 but that brings me all the way back to my first
15 question of is that at issue in this case or not, or
16 is it -- is this case about the company's obligation
17 to go and investigate the validity of the charge. So
18 that was why I asked the first question, of where is
19 it in the complaint.

20 JUDGE MOSS: I think, Mr. Richard, I
21 believe it was actually Mr. Richter, the Elaine
22 Willman, et cetera, response to the opposition that
23 acknowledges that this would be a broadening of the
24 issues in the case.

25 MR. RICHTER: This is Eric Richter. That

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1 is correct. The legal issues would be broadened.

2 CHAIRWOMAN SHOWALTER: Can you speak into
3 the microphone?

4 MR. RICHTER: That is correct, from our
5 view. The complaint from the Public Counsel raises
6 the first question we've all identified of whether
7 the payment by the utilities of the charge imposed by
8 the Yakima Nation is prudent.

9 The second issue, if it's a fee or tax
10 issue, is not the subject of a stated claim for
11 relief by the Public Counsel.

12 JUDGE MOSS: Right, okay. And does the
13 City of Toppenish agree with that perspective?

14 MR. RICHARD: I would agree with that
15 characterization. But nonetheless, we also agree,
16 though, with the characterization by Public Counsel
17 in their response to the petition to intervene that
18 that issue is an underlying issue implicit in the
19 case. I mean, we agree with Public Counsel's
20 characterization that that would not unduly broaden
21 the issues, because it's an issue that's present,
22 although not a specific request for relief in Public
23 Counsel's opinion.

24 CHAIRWOMAN SHOWALTER: Well, it shapes up
25 this way, though. If it turns out that, according to

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1 a court, that the tax is not -- the charge is not
2 clearly unlawful and the charge is permissibly
3 characterized as a tax, then the question becomes --
4 then the companies are entitled to proceed, I think,
5 on that order. So then, what is their obligation to
6 go beyond that interpretation and -- for prudence
7 purposes? And I'm not sure what it is, but Mr.
8 ffitch is probably --

9 COMMISSIONER HEMSTAD: Well, I was going to
10 say, perhaps we should hear from Mr. ffitch at this
11 point. Particularly after the second court order,
12 what, in your view, is the issue in front of this
13 Commission?

14 MR. FFITCH: Well, thank you, Commissioner
15 Hemstad and Madam Chairwoman. First of all, I would
16 agree with a lot of what's been said by Counsel for
17 Toppenish and Mr. Richter.

18 The issue before this Commission continues
19 to be the prudence of the companies'
20 recharacterization of the charge, the franchise fee
21 established by the tribe as a municipal tax additive.
22 We agree that the Commission's subsequent treatment
23 of that is an implicit issue here. We also agree
24 that that is not the direct subject of one of our
25 claims. In fact, it would be difficult for us to

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1 raise that directly because that would involve, in a
2 sense, Public Counsel filing a complaint or an appeal
3 against the Commission action directly. That matter
4 was already being addressed elsewhere.

5 But we, in order to file a complaint on the
6 matter before the Commission, framed it in terms of
7 the companies' conduct here. In other words, in a
8 Commission complaint, it doesn't lend itself to a
9 direct claim based on Commission characterization.
10 When we're framing complaint against the companies,
11 we need to talk about the companies' conduct. But I
12 do think that it's implicit in the conduct the impact
13 on the ratepayers as a result of the characterization
14 and ultimately the relief that might result.

15 I think we're going to have to evaluate the
16 impact of the state court decisions on this case.
17 Our view is that the impact may, in fact, be quite
18 limited, because the court was reviewing a case
19 without a record, there were no findings of fact, no
20 conclusions of law by this Commission, so the court
21 was limited in its ability to adjudicate this
22 question. And we would suggest -- perhaps this is a
23 slightly different take on the reconsideration point
24 being made by Counsel for Toppenish -- that this is
25 going to be the first time the Commission's going to

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1 have a record to really review and make findings of
2 fact on the nature of this charge, the basis for the
3 charge and the proper characterization. And because
4 the state court didn't have a chance to do that and
5 was perhaps reviewing it on the narrower basis, we're
6 not sure that those rulings are ultimately going to
7 be dispositive here.

8 JUDGE MOSS: Mr. ffitch, I'm sorry. Let me
9 interrupt the proceedings momentarily. Let's be off
10 the record.

11 (Recess taken.)

12 JUDGE MOSS: Why don't we go back on the
13 record.

14 CHAIRWOMAN SHOWALTER: Mr. ffitch, I'm not
15 sure where we were, but am I correct that the
16 complaint does not allege that the tariff itself is
17 unlawful; it alleges that the companies had a duty
18 and were imprudent not to exercise that duty to
19 investigate whether the charge was unlawful; is that
20 correct?

21 MR. FFITCH: Not entirely, Your Honor. I
22 would suggest that we would argue, in fact, that
23 because that duty was not carried out and because of
24 the flaws in the tariff itself as a tax or a
25 franchise fee, that it's an unlawful basis for a

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1 charge to the company -- to the customers.

2 CHAIRWOMAN SHOWALTER: So you are alleging
3 that the tariff operates in an unlawful manner?

4 MR. FFITCH: Well, I think that's implicit
5 in the prudence.

6 CHAIRWOMAN SHOWALTER: Well, I guess I'm
7 asking for an explicit statement if that's the case.
8 I didn't read it in the complaint; that's why I was
9 asking these questions. It seemed to me to be a
10 complaint about the companies' obligation to
11 investigate the validity of a charge imposed upon
12 them and whatever the threshold or standard might be
13 for that obligation to investigate. That's different
14 from an allegation that the tariff and the charges
15 under the tariff are unlawful, and I didn't see that
16 explicitly. I didn't really see it much implicitly,
17 so that's why I want to know what it is, partly just
18 to know, but it also affects, I think, the different
19 arguments that are being made here for intervention.

20 MR. FFITCH: Well, first of all, our
21 general position is that part of the problem with the
22 opposition in the intervention is it tries to really
23 parse the issues here and slice and dice them
24 excessively, and I think all parties here would
25 probably concede that these issues are all

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1 interrelated. It's really not possible or I think
2 desirable, I would suggest, to pull them all apart
3 and say we're talking about this in this case and not
4 this.

5 Obviously, the result of the
6 characterization of the charge results in a certain
7 kind of a ratemaking treatment and I think it's
8 difficult or impossible to segregate all those issues
9 as the case goes forward. They've been part of the
10 discussion before this Commission in the initial
11 tariff submission. They were part of the discussion
12 in the Yakima Superior Court case, although I would
13 suggest postured differently on a different record.
14 And I think it's not unreasonable to understand that
15 those are going to be part of the discussion here,
16 although perhaps in a different way, as an implicit
17 underlying aspect of our claims.

18 The short answer to your question about
19 whether it's unlawful is it is, in our view, an
20 unlawful charge which results from an imprudent
21 action on the part of the two utility companies.

22 CHAIRWOMAN SHOWALTER: Okay. Are you
23 saying it's unlawful because it was not prudently put
24 forth to the Commission or it's unlawful because, on
25 its face or operationally, it is unlawful? In other

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1 words, I interpreted -- I read your complaint as
2 faulting the prefiling conduct of the companies, that
3 they had failed in a duty, and therefore were
4 imprudent. I did not read in your complaint an
5 allegation that the tariff, as it operates now,
6 facially, regardless of how it got to us and through
7 us, is unlawful, and I think it makes a difference in
8 terms of both the motions to intervene and what
9 issues are in front of us, obviously it would have a
10 difference on the companies and how they would defend
11 themselves. Are they defending themselves on the
12 grounds that the threshold and standard for prudent
13 behavior is whatever we legally arrive at or are they
14 defending the tariff per se in its operation as a
15 lawful charge to be collected?

16 MR. FFITCH: Madam Chairwoman, I just -- I
17 don't think I'm able to really separate the issues
18 out that way. We think that the tariff, the charge
19 is unlawful, as it's currently being collected, for
20 the reasons set forth in the complaint. I don't
21 separate out the lawfulness from the basis for the
22 allegation.

23 CHAIRWOMAN SHOWALTER: Okay. Is the basis
24 for the allegation any more than imprudency on the
25 part of the company? Maybe that's the easiest way to

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1 put it. Is the basis for the allegation for the
2 unlawfulness of the tariff that the companies
3 imprudently failed to pursue legal action or inquiry
4 in its validity? Is there any other basis?

5 MR. FFITCH: The second and third claims
6 are essentially prudence claims, and the first claim
7 against each company is based on the absence of a
8 franchise agreement. There is no franchise agreement
9 in place for either one of these companies, yet funds
10 are being collected from their ratepayers on the
11 theory that there is some valid basis for -- arising
12 out of the franchise approach, the franchise
13 ordinance of the tribe, that that provides the basis
14 for the charge. There is no franchise agreement in
15 place for either Cascade or PacifiCorp. That's the
16 allegation in the complaint. There's a lot of
17 factual dispute about that.

18 CHAIRWOMAN SHOWALTER: All right. So then,
19 you are saying that -- are you saying, then, that
20 characterization of the charge as a tax, either by
21 the company or later by the Commission, is not
22 sufficient to overcome the absence of a franchise
23 agreement?

24 MR. FFITCH: That would be part of our
25 argument. In the case of Cascade, Cascade is not

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1 remitting any payments to the tribe at this time.
2 And again, these are the allegations of our
3 complaint. So there's no franchise agreement, there
4 is a collection going on and no funds are being paid
5 to the tribe. We don't think that's lawful, a lawful
6 basis for the charge.

7 COMMISSIONER HEMSTAD: Further, trying to
8 parse from the complaint the issues that are in front
9 of us, I take it from those statements that you're,
10 in effect, saying that any kind of a charge is
11 premature?

12 MR. FFITCH: That's the prudence claim;
13 that's correct.

14 COMMISSIONER HEMSTAD: Is Public Counsel
15 taking a position with regard to the appropriate
16 characterization here of a charge that would be
17 applied as a franchise fee or a tax?

18 MR. FFITCH: Not per se in the complaint.
19 However, I think, as kind of an initial matter,
20 certainly the tribe has characterized this as a
21 franchise fee. They have passed a franchise
22 ordinance. Franchises are lawful. Franchises are
23 lawful acts of governmental jurisdictions. We
24 believe that the treatment of this charge as a
25 franchise fee was not given kind of proper

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1 consideration that it should have been.

2 COMMISSIONER HEMSTAD: Well, but I'm trying
3 to pin down whether it's Public Counsel's position
4 that this only can be characterized as a franchise
5 fee?

6 MR. FFITCH: The difficulty I have in
7 answering that question directly is we don't have --
8 that's part of what the case is about, is --

9 COMMISSIONER HEMSTAD: I know.

10 MR. FFITCH: -- gathering the record to
11 determine.

12 COMMISSIONER HEMSTAD: I understand that.

13 MR. FFITCH: And the fact that the burden,
14 we believe, is really on the utilities and, to some
15 extent, the tribe to reach a conclusion on that point
16 before collecting funds from ratepayers in rates.

17 COMMISSIONER HEMSTAD: I see, but normally
18 in a complaint we would have an allegation of
19 something that is improper, and I guess you're saying
20 that the pre-tariff filing of the companies' conduct
21 was improper. And are you punting on the issue of
22 franchise fee versus tax?

23 MR. FFITCH: Well, we're not punting, but I
24 think that the factual record has to be developed so
25 that we can determine a characterization in this

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1 case. We don't have that information right now.

2 CHAIRWOMAN SHOWALTER: Why -- I want to
3 qualify all my questions here by saying it very well
4 may be the case that we will have motions and briefs
5 and things in writing, so we're trying to get an
6 outline of the case, not admissions against interest
7 or anything else. But once the tariff has been
8 allowed to go through, why is an attack on the
9 companies' conduct pre-filing relevant? Why isn't it
10 only relevant whether the tariff, in effect, is or
11 isn't lawful, which, as you say, is at least not
12 explicitly part of your case?

13 MR. FFITCH: Well, a couple of answers.
14 First of all, prudence of rate -- of company expenses
15 or charges collected through rates is reviewed, I
16 would suggest, by you, by regulators, after the fact,
17 after tariffs have been in place under which the
18 rates are collected in subsequent rate proceedings.
19 So the fact that a tariff is now in place doesn't
20 necessarily preclude a prudence review, I would
21 suggest.

22 Secondly, the avenues available to
23 ratepayers here are limited. If the tariff has been
24 approved without an adjudication, the ratepayer's
25 essentially left with not a lot of options to

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1 challenge the charge, and one of the options is to
2 file a complaint and to challenge the collection --
3 of the prudence of the collection of the charge. You
4 know, there was no rate case here in which the
5 prudence could ordinarily have been challenged, a
6 prudence of the level of charges, the prudence of the
7 -- excuse me, the incurring of the charge could have
8 been, could have been reviewed.

9 So the procedural options here are limited
10 for ratepayers, and this is, I think, a permissible
11 one.

12 COMMISSIONER HEMSTAD: Just so I
13 understand, who does Public Counsel see that it is
14 representing here, the ratepayers -- only the
15 ratepayers within the reservation boundaries, or do
16 you have an obligation to all ratepayers wherever
17 they're situated?

18 MR. FFITCH: There's certainly, I think in
19 this case, a focus on the ratepayers within the
20 reservation boundaries to make sure that charges that
21 are being imposed on them are appropriate. There's
22 also a general interest of all ratepayers in making
23 sure that the collection of this type of local
24 government or sovereign government charge is properly
25 collected, whether it's a franchise fee or a tax, is

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1 it at a reasonable level, how is it properly
2 apportioned, what's the legal basis for the charge.

3 We don't believe that those issues were --
4 although they were addressed, we understand that, in
5 the initial proceedings before the Commission,
6 because there was no record, because it was -- there
7 were no findings or conclusions of law, we think
8 those issues can be better addressed in an
9 adjudication and clarified for the benefit of all the
10 ratepayers.

11 JUDGE MOSS: One point you made there, Mr.
12 ffitch, you're not asking the Commission to determine
13 whether this was a lawful tax or whatever by the
14 sovereign nation, are you?

15 MR. FFITCH: We understand the limitations
16 of the Commission jurisdiction on that point, but
17 there is some degree of ability on the part of the
18 Commission to explore that issue under the heading of
19 prudence, as it has in previous cases.

20 JUDGE MOSS: I wanted to ask you about
21 outcomes, focus on that end. Is the outcome you're
22 looking for here that there would be a determination
23 in this proceeding that would result in a
24 pass-through of these charges to all ratepayers, or
25 is your goal that there should be no pass-through of

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1 these charges at all pending something further?

2 MR. FFITCH: The latter would be the
3 preferred choice at this point. We believe that
4 there's significant questions about this charge that,
5 at this time, they should not be collected from
6 ratepayers, and we believe that the utility
7 companies, who are the defendants, should have raised
8 those issues before presenting this to the Commission
9 with a different label on it for collection from
10 their ratepayers.

11 JUDGE MOSS: Are you going to ask us to
12 find that there is an affirmative obligation on the
13 part of regulated companies to conduct an
14 investigation through the federal courts, if
15 necessary, to determine the lawfulness of a charge
16 before the Commission can act on it in this fashion?

17 MR. FFITCH: Well, yes, in the sense that
18 that's part of the prudence determination, but we
19 wouldn't be asking for the adoption of that as an
20 inflexible rule in every case.

21 JUDGE MOSS: I see. The reason I asked
22 that question, that touches on the interest by some
23 of our petitioners, PSE, I believe, and Verizon, both
24 their interests, their expressed interest in the
25 case, and we'll hear from them later, but, at least

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1 as I understand the written papers, is that, I guess
2 you might say, policy type question as to whether
3 we're going to create possibly through this
4 adjudication some sort of affirmative obligation that
5 these utilities may not think they have.

6 And we'll need to consider that as we
7 considered their petitions to intervene, so that's
8 why I put that last question to you.

9 MR. FFITCH: I may address that on their
10 particular petitions, but we're not asking for, as I
11 say, a cut and dried inflexible requirement that
12 every charge be litigated through federal court.
13 We're asking that the charges be prudently incurred,
14 and where there is significant doubt about their
15 validity, as we think the companies' own conduct in
16 this case has indicated, that that be resolved before
17 customers are asked to pay these really rather
18 significant charges.

19 JUDGE MOSS: Just one -- I'm sorry, just
20 one more question to finish up my set. Should the
21 Commission decide that it does not wish to broaden
22 the issues in the proceeding so as to take up
23 directly the question of its prior determination with
24 respect to this being characterized as a tax, as the
25 Court has indicated that was not arbitrary and

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1 capricious and therefore it has, in that sense,
2 passed judicial muster as a determination --
3 actually, not a determination, but a decision to not
4 take action and let the tariff go into effect as
5 filed.

6 If the Commission took that course and said
7 we're not going to take up that question directly,
8 does your first claim disappear? In other words, is
9 the absence of a franchise agreement relevant in that
10 instance?

11 MR. FFITCH: I don't believe so.

12 JUDGE MOSS: You don't believe it
13 disappears or you don't believe it's relevant?

14 MR. FFITCH: I don't believe it disappears.
15 Sorry.

16 JUDGE MOSS: And how would it remain
17 relevant if we just effectively said this is a tax,
18 as far as we're concerned?

19 MR. FFITCH: I guess this comes back to --
20 our goal here in bringing the complaint is to provide
21 a forum for a record to be made upon which the
22 Commission could take a look at, with, you know,
23 broader assistance of the parties and a factual
24 record, of whether it's a tax or a fee, and that is a
25 factual determination, and it's different for every

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1 company. And we would suggest that -- we would
2 prefer that the Commission not, at the outset of the
3 case, essentially rule that that was not an issue,
4 take it off the table, on the basis of no additional
5 factual information.

6 JUDGE MOSS: Yeah, I didn't mean to be
7 suggestive. Just an option, possibility.

8 CHAIRWOMAN SHOWALTER: Prudence is maybe
9 the failure to keep one's expenses under control or
10 the failure to adequately plan for load or to
11 over-plan, those sorts of things. In this case,
12 isn't the prudence you're talking about a legal
13 inquiry, a duty of legal inquiry? In other words,
14 aren't you really saying that the company and its
15 lawyers needed to look at this letter that comes in
16 the mail from the tribe that says here is something
17 we call a franchise fee, but we're going to impose it
18 regardless, and it's three percent, that -- are you
19 saying that the companies were not prudent in taking
20 that document, recharacterizing it as a tax, and
21 bringing it to us?

22 Isn't this a legal issue, first and
23 foremost, in terms of threshold? Because I guess I
24 get back to if the court has decided that this
25 Commission could reasonably characterize this as a

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1 tax, are you putting the company to a different
2 standard than that? That the company had -- the
3 companies had some greater duty to investigate,
4 initiate a legal suit than look at the piece of paper
5 coming from the tribe and saying this looks like a
6 tax to us; we will bring that characterization to the
7 Commission?

8 MR. FFITCH: I think our position would be
9 that that would not be an adequate review of the
10 charge to meet a prudence requirement. I think that
11 we continue to have questions about whether the state
12 court ruling is dispositive of the questions here
13 because of the different posture, the different
14 record that they had. We don't think it ultimately
15 resolves finally these questions before the
16 Commission.

17 And I think that, if nothing else, that the
18 Commission has the discretion to look at these issues
19 on a factual record and make a different
20 determination, you know, on a new day, with new
21 information.

22 CHAIRWOMAN SHOWALTER: But are you asking
23 us to find the companies were imprudent?

24 MR. FFITCH: Yes; correct, that's --

25 CHAIRWOMAN SHOWALTER: All right. So you

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1 would have us find the companies imprudent in their
2 development of the filing; is that correct?

3 MR. FFITCH: That would be part of it. The
4 complaint speaks for itself, but I guess I would
5 describe it a little differently than that. That's
6 part of the claim, but another part of it is the
7 failure to resolve or challenge the charge given the
8 shortcomings or flaws that seem to be there, based on
9 the company's own actions.

10 JUDGE MOSS: Okay. Well, that was a very
11 illuminating discussion. I think we should probably
12 turn back to our petitions. And Mr. Richard, I think
13 you were probably finished on behalf of the city?

14 MR. RICHARD: Yes.

15 JUDGE MOSS: And so let's turn next to Mr.
16 Richter, for Elaine Willman and others. And let me
17 ask you first, Mr. Richter, the Commission, in
18 addition to serving Counsel of record with orders, is
19 obligated, legally obligated to serve a party, and in
20 this instance, you have -- I believe it's 46-some-odd
21 people listed in the appendix to the petition to
22 intervene. I'm assuming, and please correct me if
23 I'm wrong, that Elaine Willman would be the named
24 individual whom we would treat as the party?

25 MR. RICHTER: For the purpose of

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1 convenience, you may do that, Your Honor.

2 JUDGE MOSS: Yes, we do require that there
3 be one designated, so I want to make sure that we
4 designate the right one. And of course, we rely on
5 Counsel in a situation like this to communicate to
6 the full set of clients, but it's nevertheless an
7 obligation we have. So thank you for clarifying
8 that.

9 And with that, let's hear, if you would, a
10 brief argument with respect to Ms. Willman and
11 others' request for petition to intervene.

12 MR. RICHTER: Thank you, Your Honor,
13 Chairwoman Showalter, Commissioner Hemstad, Judge
14 Moss. The petition for intervention supports the
15 Public Counsel's principal complaint and raises the
16 additional claim that, in the event the payment by
17 the utilities of the charges imposed by the Yakima
18 Nation was prudent, that the characterization -- that
19 the pass-through of the charge as a municipal tax
20 addition was unlawful for two reasons. Principally,
21 the tax is a fee imposed by the tribe in line with
22 case law and the prior determinations of this
23 Commission in the past differentiating taxes and
24 fees. And secondly --

25 CHAIRWOMAN SHOWALTER: Will you use the

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1 microphone?

2 MR. RICHTER: And secondly, we believe that
3 this Commission has no power to allocate as a
4 municipal tax to the non-members of the tribe who
5 reside on the Yakima Indian Reservation the charges
6 imposed by the tax because non-members are not
7 benefited by the funds collected by the Yakima Nation
8 and they have no voice in the affairs of the Yakima
9 Nation.

10 COMMISSIONER HEMSTAD: I'm sorry, I'm not
11 sure I understood. You say that the tribe does not
12 have that authority or that the Commission does not
13 have that authority?

14 MR. RICHTER: Our position is that
15 Washington law, properly interpreted, constrains the
16 Commission to allocate the charge in the event it is
17 determined that it was prudently incurred, to -- as a
18 general operating expense and to treat it as a
19 general operating expense of the utilities so that it
20 should be borne as part of the cost basis of their
21 operations by all ratepayers statewide. That is in
22 the event that payment of the charge was prudent by
23 them in the first instance.

24 Our principal claim is that payment of that
25 charge was not prudent, and that therefore the -- and

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1 for that reason, that principal reason, that the
2 tariffs are unlawful.

3 And we read, I have to stand corrected by
4 whatever the Public Counsel has said, but we
5 certainly read the Public Counsel's complaint as a
6 challenge to the legality of the tariffs, and we wish
7 to raise that issue as -- on the basis that payment
8 of the charge was imprudent in the first place, and
9 secondly, on the basis that allocation of the charge
10 to -- solely to ratepayers within the Yakima
11 Reservation was unlawful. Now --

12 JUDGE MOSS: Excuse me, Mr. Richter. I
13 want to be sure I'm perfectly clear on this last
14 point, because I've heard you say two things. One,
15 the question of two possible outcomes, as discussed a
16 moment ago with Public Counsel, no pass-through at
17 all, pass-through to all ratepayers, as opposed to
18 the current situation, which allows for the
19 pass-through to persons within boundaries of the
20 reservation. Now, am I hearing --

21 MR. RICHTER: That's correct. Those are
22 the outcomes I seek.

23 JUDGE MOSS: So we're not looking at a
24 fourth outcome, which is pass-through to only tribal
25 members within the boundaries of the reservation?

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1 MR. RICHTER: Not here, no.

2 JUDGE MOSS: Okay. All right. I just want
3 to be clear. Thank you. Did you have something
4 further?

5 MR. RICHTER: Yes. There has been a
6 misconception, I think, as to the import of the
7 Court's order in the pending proceeding. As a party
8 to that proceeding, let me address that.

9 CHAIRWOMAN SHOWALTER: You need to get
10 closer to the microphone. Why don't you bring the
11 microphone up closer to the edge of table?

12 MR. RICHTER: I'll try to do that.

13 CHAIRWOMAN SHOWALTER: That's better.

14 MR. RICHTER: Now, the Court, in the
15 Willman case, was ruling on a challenge to the
16 failure of the Commission to suspend the tariffs and
17 order an adjudicative hearing after a public -- after
18 a mere public hearing. All the Court held is that
19 the Commission did not have a duty to do just that,
20 to suspend the tariffs and hold an adjudicative
21 hearing, pursuant to RCW 80.04.130.

22 In the court proceeding, the Court ruled on
23 a motion by defendants, by the utilities, to dismiss
24 the case for failure to utilize -- you know, failure
25 to exhaust administrative remedies and failure to

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1 demand an adjudicative hearing and, you know, raise a
2 complaint for an adjudicative hearing. Now, that
3 motion was denied.

4 I rather anticipate that if the case ever
5 went up on appeal or on appeal, the Appellate Court
6 would very likely send us right back here and hold it
7 was error for the -- for the plaintiffs and for the
8 court not to dismiss the case on the ground that the
9 plaintiffs failed to exhaust administrative remedies
10 and failed to ask for an adjudicative hearing.

11 So here we are now at an adjudicative
12 hearing. This is -- this is our only chance to
13 create a record, which the Washington courts then can
14 review the determination of this Commission, and of
15 course it is the only opportunity we have to make a
16 record on which this Commission can make a
17 determination of these issues, which it has simply
18 not done in a final way to date.

19 So I don't think it would be correct to say
20 that the Superior Court has ruled on these -- on
21 either the prudence issue or the tax versus fee issue
22 in a way which is binding here, because this
23 Commission, in this case, will develop a record of
24 facts, and a record of facts then, you know, will be
25 a different, simply a different record. It will not

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1 be the same record as mere record of allegations set
2 forth in a public hearing, which was reviewed by the
3 Superior Court earlier.

4 So the court simply has not made a final
5 ruling on these matters. It has simply said the
6 Commission had no duty to hold a public hearing and
7 suspend the tariffs. Well, we're here. I think the
8 Commission can rule on -- can now hear an attack on
9 these tariffs on the basis of facts.

10 CHAIRWOMAN SHOWALTER: We, of course, are
11 going to look forward to reading the actual order
12 when there is one, but isn't the issue that we had no
13 duty to suspend the tariff and hold hearings because,
14 said the court, it was permissible for us to look at
15 the underlying documents in front of us and
16 characterize the charge as a tax, because the
17 ordinance imposes three percent of revenues to all
18 companies regardless of the type of company,
19 regardless of their actual expenses, and because the
20 charge is imposed regardless of whether there is, in
21 fact, a franchise agreement.

22 In other words, what I'm asking is isn't
23 the reason that the court found we do not need to
24 hold a hearing that, legally, it was permissible to
25 characterize the charge as a tax?

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1 MR. RICHTER: The court looked at the
2 documents which were in the record before this
3 Commission.

4 CHAIRWOMAN SHOWALTER: I'm sorry?

5 MR. RICHTER: The court looked at the
6 documents, which were in the record before this
7 Commission, including the Yakima Nation franchise
8 ordinance and including the draft franchise agreement
9 presented by the Yakima Nation to the utilities, and
10 it considered the testimony at the public hearing.

11 CHAIRWOMAN SHOWALTER: Okay, excuse me.
12 I'm informed again that our phones are down.
13 Actually, you know, this is, in my view, this is why
14 adjudications are best done in the hearing room with
15 court reporters here, and we let people participate
16 by phone rarely and only with express permission.
17 I'm very sorry that the technology is not working
18 out. On the other hand, we need to have our hearing.
19 I think what we're going to have to do is, for those
20 who are cut off on the line, we will have to hear
21 from them in another way. We have and must have
22 their written pleadings, and we do have those, but I
23 think that we need to continue.

24 JUDGE MOSS: I think we can continue. The
25 only participant that was pre-authorized to

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1 participate by telephone was Verizon. We have their
2 written petition received just today, and since there
3 has been some opposition previously to intervention
4 filings, I would provide an opportunity for Counsel
5 to say whether they wished to respond in writing, and
6 we can handle it that way and take it under
7 advisement. So -- and I will say, too, that
8 Verizon's interests are consistent, at least in the
9 -- directionally consistent in scope with those
10 expressed by some of our other petitioners, so I
11 think we'll be in good shape on that.

12 So I would say let us continue and --
13 further questions for Mr. Richard, or did you --

14 CHAIRWOMAN SHOWALTER: One last question of
15 Mr. Richter. Just a clarification. I understood
16 you, at the beginning of this hearing, as saying you
17 believe that your interests did expand beyond the
18 underlying complaint, i.e., to the issue of whether
19 the charge, if it's collected in the manner of a tax,
20 is lawful. And that's what I thought I heard you say
21 at the beginning. And then, just a little bit ago, I
22 thought maybe you had characterized Public Counsel's
23 complaint as already going that far.

24 MR. RICHTER: Listening to Public Counsel
25 here today, it's a little less clear. When I read

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1 the complaint, I did not perceive a claim for relief
2 on the issue of whether, if the payment of charge was
3 prudent, that charge should be recovered solely from
4 ratepayers within the reservation or whether it
5 should be recovered as a part -- as a general
6 operating expense from all ratepayers statewide.

7 I didn't see that in the initial complaint,
8 but it was and is, as the Public Counsel has stated,
9 an issue, to some degree, implicit in it, but there's
10 no claim for relief on that point.

11 CHAIRWOMAN SHOWALTER: But in any event,
12 that is your interest?

13 MR. RICHTER: But that is our interest.
14 And we believe that it is governed by the same set of
15 facts that would be determinative of the Public
16 Counsel's stated claim. And because of that, we
17 think it efficient for the purpose of this
18 Commission's operations to consider this alternative
19 or this secondary claim at the same time, so that we
20 don't have to develop a factual record twice, which
21 will very likely be the same factual record.

22 COMMISSIONER HEMSTAD: Well, so I take it,
23 as a conclusion of law, you would -- you are
24 asserting that the tariff is unlawful?

25 MR. RICHTER: That is correct, Your Honor.

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1 JUDGE MOSS: Okay. Mr. Richter, if that
2 concludes your remarks? All right. Well, let's --
3 Mr. Logen, did you want to speak for PSE today? I
4 could invite you to perhaps move over here next to
5 Mr. Hendricks and share his microphone.

6 MR. LOGEN: Thank you, Judge Moss,
7 Chairwoman Showalter and Commissioner Hemstad. PSE
8 provides utility services on about 12 reservations,
9 and on two of those reservations, you're well aware
10 that we're presently collecting invading tax, the
11 Lummi Reservation and the Swonomish Reservation. And
12 our interests are -- and should this proceeding
13 affect those taxes or the future possibility of taxes
14 on our remaining reservations.

15 JUDGE MOSS: Okay. Thank you. Now, I
16 mentioned before we had Verizon on the phone and
17 we've lost them. Their interest, I think I can
18 fairly state, based on their written pleading, is
19 similar to that just stated by PSE, but of course the
20 written pleading speaks for itself and parties may
21 respond to it. We'll set a time for that later.
22 Let's hear from Mr. Hendricks, for Sprint.

23 MR. HENDRICKS: Thank you, Your Honor,
24 Madam Chairwoman, Commissioner Hemstad. Sprint has a
25 direct and substantial interest in this proceeding,

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1 in the outcome. The franchise ordinance purports to
2 apply to Sprint. Sprint is the Commission-regulated
3 incumbent local exchange carrier within the
4 boundaries of the reservation and serves, I believe,
5 almost all of the customers, with the exception of a
6 handful that Qwest serves in that area.

7 Sprint has the authority or the right to
8 seek approval of Commission tariffs which might
9 recover the fee. It has not done so thus far, but
10 certainly has the right to seek approval of such a
11 tariff, and of course that would depend upon any
12 ruling in this proceeding, as well.

13 The outcome of this proceeding could have a
14 substantial impact on Sprint's ratepayers, both
15 within and without the boundaries of the reservation,
16 depending on the outcome of the proceeding, and I
17 should also say that Sprint's intervention in this
18 matter will not broaden the issues or unduly broaden
19 the record or unreasonably delay the proceedings.

20 JUDGE MOSS: Okay. Thank you, Mr.
21 Hendricks. Mr. Trincherro, I skipped over you there.
22 Charter Comm.

23 MR. TRINCHERO: Thank you, Your Honor,
24 Madam Chairwoman, Commissioner Hemstad. As you will
25 see in our written petition to intervene, Charter's

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1 interest in this case is based on the fact that the
2 Yakima Indian Nation franchise ordinance at issue in
3 this proceeding also purports to apply to Charter, as
4 well as Cascade and PacifiCorp.

5 To the extent that this Commission makes
6 findings of fact or conclusions of law regarding the
7 validity of the Nation's franchise ordinance,
8 Charter's interests may be impacted, and therefore we
9 do believe we have a substantial and significant
10 interest in this proceeding. Like Sprint, I would
11 like to also assure the Commission that our
12 appearance and participation will not unreasonably
13 broaden the issues or burden the record or
14 unreasonably delay the proceeding in any way.

15 JUDGE MOSS: Okay. Well, let's hear from
16 the Respondents in the case. And Mr. West, Cascade
17 is named first, so we'll simply start with you.

18 MR. WEST: Your Honor, I find that I have
19 imprudently failed to introduce Mary Crego, of my
20 office, who is here in attendance, and since she
21 argued the case in Yakima recently, I felt it would
22 be advantageous to have her present Cascade's
23 arguments, if it please the Court.

24 CHAIRWOMAN SHOWALTER: Can you give us your
25 name again?

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1 MS. CREGO: I certainly can. It's Mary
2 Crego, C-r-e-g-o, and my address and information is
3 the same as Mr. West's.

4 JUDGE MOSS: Go ahead, Ms. Crego.

5 MS. CREGO: Thank you. I think it's clear,
6 from hearing from both Public Counsel, the City of
7 Toppenish, and Mr. Richter, that the petitions to
8 intervene by Toppenish and Elaine Willman, et al.,
9 would broaden the scope of the proceedings before
10 this court -- before this Commission. If there's any
11 question about that, all you need to do is look at
12 the relief requested in Public Counsel's petition,
13 and nowhere in that relief requested do they ask that
14 this Commission change its decision in terms of how
15 the franchise ordinance and franchise fee was
16 characterized. They ask for various other relief
17 against the Commission, but -- against the companies,
18 but they do not specifically ask for that decision to
19 be changed.

20 I think Mr. Richter correctly acknowledged
21 that what they're seeking to do would broaden the
22 scope of these proceedings. The only question, then,
23 is if there's any reason to do that, and on behalf of
24 Cascade, we would submit that there is not.

25 These are completely separate issues. It's

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1 very possible for this Commission to make a decision
2 about whether the utilities acted prudently and, to
3 the extent it finds it necessary, whether the Nation
4 had at least honestly debatable authority to enact
5 this franchise ordinance without addressing at all
6 the question of how it should be treated for
7 ratemaking purposes.

8 There are two unrelated questions, and
9 mixing them together in one proceeding is not
10 necessary, nor is it advisable. You've seen that
11 Plaintiff Elaine Willman, et al., would add at least
12 40 people to this proceeding, which could greatly
13 expand the scope of discovery, testimony, and
14 lengthen these proceedings, whereas the Commission --
15 the petition filed by Public Counsel actually
16 addresses some fairly narrow issues, some of which
17 may be the subject of dispositive motions that could
18 resolve these issues fairly concisely.

19 And we submit that the petitions to
20 intervene of Toppenish and Willman should be denied.
21 We do not have any objection to the petitions of the
22 utilities. We don't believe that those would broaden
23 the scope here at all.

24 COMMISSIONER HEMSTAD: Well, what if
25 Toppenish and the Willman group filed a complaint

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1 that raised the second issue that -- as you described
2 it. Would it be appropriate, then, for us to
3 consolidate the two proceedings?

4 MS. CREGO: Well, as to Toppenish, it's a
5 slightly different issue than as to Plaintiff Elaine
6 Willman. Mr. Richter made mention a moment ago that
7 in the proceeding in the Yakima Superior Court, the
8 utilities companies, PacifiCorp and Cascade, did make
9 a motion that Plaintiffs had failed to exhaust all of
10 their administrative remedies.

11 Plaintiff opposed that motion vigorously
12 and stated that any further proceedings before the
13 Commission would be futile, they had not failed to
14 exhaust all their administrative remedies and should
15 not be required to come back to the Commission before
16 the Court reached its decision.

17 We haven't thoroughly researched the issue,
18 but there may be some preclusive effect to
19 Plaintiff's litigation strategy in that context, in
20 the sense that you know that they previously made a
21 decision to go straight to court and have the issue
22 litigated. They lost. To come back down here and
23 start the same proceedings and raise many of the same
24 arguments over again would place a large burden on
25 the utilities having to reargue and relitigate these

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1 issues with the exact same plaintiffs.

2 As to the City of Toppenish, should they
3 choose to file their own complaint, depending on the
4 status of these proceedings, it may or may not be
5 appropriate to consolidate them. I think that would
6 very much depend on what was happening with this
7 proceeding, whether or not evidence had been
8 collected or whether or not certain legal issues had
9 been resolved.

10 CHAIRWOMAN SHOWALTER: I might be jumping
11 ahead slightly to what dispositive motions you had in
12 mind, but I'd like your observations on what the
13 appropriate sequencing is of this case. If there are
14 dispositive motions on the prudency question and if
15 the Commission rules that way and, of course, I make
16 no judgment as to how we would rule, but if we did
17 and therefore the prudency issue goes away, then
18 there would remain, either because it's in the case
19 due to intervenors, the other question -- let's call
20 it the prudency question and the validity question.
21 Whether -- the second being whether the charge is
22 invalid for any reason other than prudency.

23 But if the prudency question were ruled on
24 in favor of the companies, one way to do it would be
25 say let's have that first. And depending on which

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1 way that comes out, then entertain motions to
2 intervene. Because if it goes against the companies,
3 we have a proceeding on our hands with factual issues
4 that may well be the same as the complaint that they
5 could bring, or allow everybody in now because there
6 might be factual issues, but there could be
7 dispositive motions that potentially could eliminate
8 the underlying original complaint.

9 And I'm wondering, first of all, whether
10 you agree with that type of characterization, because
11 we're really trying to sort our way through what the
12 legal issues are and whether there is a right or
13 wrong way to sequence this proceeding.

14 MS. CREGO: In terms of characterization, I
15 think I agree, to the extent that you identify two
16 classes, although I would suggest that there's a
17 third. There is the prudence question, there's the
18 validity question, which I would interpret to be
19 similar to what you stated. Is there any other
20 reason that the Yakima Nations ordinance was invalid
21 or that the Yakima Nation lacked the authority to
22 impose this exaction. And then, potentially, if
23 intervenors are added, an entirely -- a third
24 question, which is once you've determined that the
25 utilities were prudent, that the ordinance was

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1 validly enacted and that they had the authority to do
2 that, how should it be treated for ratemaking
3 purposes, as a tax or a fee. It's that third that
4 we're saying is completely separate.

5 CHAIRWOMAN SHOWALTER: And actually, I see
6 that our language is going to get us in trouble here,
7 because that third one is what I meant by validity.
8 I wasn't even considering the authority of the tribe.
9 I meant is this, within the regulatory world, being
10 collected in a valid manner, so I meant the tax --

11 MS. CREGO: Okay.

12 CHAIRWOMAN SHOWALTER: -- versus fee issue.

13 MS. CREGO: So with that characterization
14 in mind, I think that there's a number of ways the
15 Commission could structure a proceeding. I think it
16 would certainly make sense to have dispositive
17 motions on legal issues addressed first, because, on
18 certain topics, there may not need to be additional
19 factual record.

20 And we have not specifically, you know,
21 determined what, if any, dispositive motions we would
22 be making, so I couldn't comment much more on that
23 topic, but as a preliminary matter, we do believe
24 that there are some subjects that would lend
25 themselves to legal decisions without needing to

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1 develop facts.

2 CHAIRWOMAN SHOWALTER: Mr. ffitch, you're
3 leaning into your microphone.

4 MR. FFITCH: I'll just chime in, Your
5 Honor, that we certainly had intended to address
6 sequencing and scheduling and this kind of an issue
7 when we got to that point of the proceeding. So I do
8 think there certainly are going to be some legal
9 issues in the case that may be dispositive, but we
10 continue to believe that the factual aspect of this
11 case is very important, and that's going to have a
12 bearing on the disposition of the legal issues, and
13 that's what's been missing so far.

14 We've actually had some legal decisions
15 from the state court, but no factual record. And the
16 parties are back here. It's a bit of a Catch 22.
17 Parties were here originally, there was the open
18 meeting type of process, but there was no
19 adjudication, no findings of fact. Certain parties
20 asked for suspension. That did not occur, so there
21 was no record made. Now we're back here, and I think
22 other parties are back here saying, Okay, well, let's
23 have the adjudication now. Let's get the facts out
24 there and then we can have findings of fact and
25 conclusions of law based on those findings. So I'm

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1 jumping the gun also in terms of sequencing, but we
2 think it's going to be pretty important, critically
3 important, really, to get some facts out here in this
4 case so that the Commission can -- the parties can
5 tie the law to the facts and then the Commission can
6 take a look at that in making its ultimate ruling.

7 So we would be real concerned about another
8 round of decisions made on the basis of no additional
9 facts. We would, you know, have a problem with that
10 kind of approach to the case.

11 CHAIRWOMAN SHOWALTER: Well, just for
12 dispositive legal motions, usually there aren't
13 facts. Usually those are things that are brought up
14 at the beginning of a proceeding which, in essence,
15 alleges that there are no facts that could change a
16 legal ruling.

17 JUDGE MOSS: Okay. Ms. Crego, did that
18 conclude your remarks?

19 MS. CREGO: Yes, thank you.

20 JUDGE MOSS: Mr. Van Nostrand.

21 MR. VAN NOSTRAND: Thank you, Your Honor.
22 PacifiCorp also opposes the interventions of Willman
23 and Toppenish to the extent they seek to broaden the
24 issues in the proceeding. From the discussion we've
25 had thus far and as described by Ms. Crego, it seems

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1 as though there's no dispute that the interventions
2 seek to broaden the scope of the issues in this case.
3 If you look at Public Counsel's complaint, the
4 specific claims, the specific relief requested, and
5 compare that to the relief sought in both petitions
6 to intervene, it's clear they're seeking to broaden
7 the issues.

8 And as a matter of procedure, the
9 Commission's rules require that if you seek to
10 broaden the rules -- the issues in a proceeding, you
11 need to file a special petition to intervene and make
12 the requisite showing. These parties have neither
13 acknowledged that they're seeking to broaden the
14 issues in the proceeding, have not styled their
15 petition as a special petition to intervene, nor have
16 they made the requisite showing that the interest is
17 served by having the issues broadened in this case.

18 I think going beyond that is the public
19 interest served by having the issues broadened in
20 this case, it's clearly an attack on the Commission's
21 previous finding. It's the issues that are being
22 litigated on appeal, it's the issues that have been
23 favorably resolved in favor of the Commission on
24 appeal, and it's essentially, as even the Counsel for
25 Toppenish admitted, a petition for reconsideration of

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1 the Commission's earlier actions. It's not proper to
2 be raised as an ancillary issue in a case which is
3 very narrowly styled Public Counsel's complaint. And
4 I think Mr. ffitch has clarified today what it is he
5 is seeking to raise in his complaint, and the issues
6 raised by Toppenish and Willman are outside that. So
7 we would urge the petitions be denied to the extent
8 they are seeking to broaden the issues in the case.

9 PacifiCorp does not oppose the petitions to
10 intervene of the other utilities. Frankly, as the
11 relief requested in Public Counsel's complaint is
12 stated, Any utility that serves an Indian tribe
13 potentially has an interest in the outcome of this
14 proceeding, because we see it as a frontal assault on
15 the Commission's current policy with respect to the
16 treatment of tribal taxes for ratemaking purposes.

17 This notion that a utility has -- I know
18 Mr. ffitch has specifically said that he isn't asking
19 for some hard and fast rule, but he is clearly
20 throwing into doubt and challenging the Commission's
21 current policy and is effectively imposing on the
22 utility an obligation to affirmatively challenge
23 utility taxes, and that's directly contrary to what
24 this Commission has found.

25 If a tax cannot be shown to be clearly

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1 invalid or illegal, the utility can seek permission
2 to recover rates. And by Public Counsel's complaint,
3 the relief Public Counsel is seeking, we would have a
4 new standard with respect to whenever a utility is
5 bringing before this Commission a tax imposed by an
6 Indian tribe, that we would have to take the further
7 effort of showing we've exhausted all possible legal
8 challenges to that tax.

9 So with respect to the other utility
10 petitions to intervene, I believe, to the extent that
11 that Commission's current policy is at issue in this
12 case, those utilities definitely have an interest in
13 the outcome.

14 JUDGE MOSS: Thank you.

15 MR. FFITCH: Your Honor, may I be heard on
16 the petitions to intervene, also?

17 JUDGE MOSS: Oh, sure, Mr. ffitch. Go
18 ahead.

19 MR. FFITCH: Thank you. With regard to the
20 utility -- additional utility petitions to intervene,
21 just two or three comments. First of all, I'll note
22 there's a distinction. We have -- both Puget Sound
23 Energy and Verizon, I don't believe, serve the Yakima
24 Nation, and haven't alleged that they do. So they're
25 differently situated than the other parties who have

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1 asked to intervene. I would suggest that if there's
2 a concern about broadening the issues and unduly
3 burdening the record, that allowing non-serving
4 utilities into the case to raise broader issues is
5 equally problematical.

6 We're, in fact, in favor of allowing all
7 parties to participate and to take a liberal view of
8 the issues in the case. So we're not opposing the
9 intervention of any of the utility companies. We
10 would ask that if Puget and Verizon are allowed to
11 intervene, that they're -- that the presiding officer
12 take care that their focus doesn't broaden this
13 proceeding out beyond the issues raised in the Yakima
14 concern -- the Yakima proceeding.

15 Again, we've said this over and over again.
16 These are very fact-specific determinations. We have
17 the other utilities who are directly affected seeking
18 to intervene here. I think that's legitimate.

19 The general policy concerns that Puget and
20 Verizon may have, we would hope would be able to be
21 addressed in some sort of amicus brief approach and
22 not have their participation, you know, unduly
23 broaden this case. And if there's a concern about
24 undue broadening or addition of issues, I would think
25 that there's -- what's sauce for the goose is sauce

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1 for the gander, and the other utilities, if we're
2 going to keep this narrow, let's keep it to Cascade
3 and Pacific and send everybody else home. But I
4 would suggest that's not a good approach here.

5 I think that the local city jurisdiction
6 and the local residents have a place here, I think
7 that the other affected utilities have a place here,
8 and I think that the onlooker companies, like Verizon
9 and Puget, have a place, within reason, as amicus.

10 JUDGE MOSS: Thank you, Mr. ffitich. And
11 I'm not sure that we'll need to hear any more from
12 the cities, but I think it is appropriate to allow
13 Willman and City of Toppenish both to have an
14 opportunity for brief response to the opposition to
15 their petitions if they wish. It's not required.

16 MR. RICHTER: Your Honor, this is, again,
17 Eric Richter, for Petitioners Willman, et al. We
18 have explicitly stated an alternative claim. If we
19 should have labeled that a special petition, we
20 regret the omission. It is a special petition to
21 that extent. But we have explicitly said that we are
22 asking for alternative relief that was not requested
23 in the first instance by the Public Counsel.

24 We also support the Public Counsel's claim,
25 so we, one, move to intervene strictly in support of

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1 Public Counsel; we secondly move to intervene to
2 raise the additional issue of how the charge, if it
3 was prudently paid, should be recovered, whether from
4 -- solely from ratepayers within the reservation,
5 which we contend is unlawful, or from ratepayers
6 statewide, as part of the general rate base of the
7 utilities.

8 Again, we do not believe the Superior Court
9 has ruled on that issue on a factual record, and that
10 to -- that the very likely result here, if the court
11 were to deny intervention, would be to simply have to
12 hear these -- the same factual record developed in a
13 later proceeding. We think the time to develop a
14 factual record is now, because it will be developed
15 -- basically it's the same facts pertain to the
16 Public Counsel's claim for relief as pertain to the
17 alternative claim for relief raised by Petitioners
18 Willman, that therefore efficiency should dictate
19 that the alternative claim for relief be considered
20 at the same time and in the same hearing by this
21 Commission.

22 CHAIRWOMAN SHOWALTER: Do I understand from
23 your oral remarks that you will be filing an amended
24 special petition and alleging a complaint directly?

25 MR. RICHTER: I can do that if the -- yeah,

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1 if the petition that I've already filed is not so
2 understood, I can certainly file an amended one. We
3 have requested specific relief and -- on page three,
4 paragraph C, and so I think we -- I think we've
5 stated the claim for relief we wish to state, but
6 we'll be happy to state it again in an amended
7 pleading if that's not sufficiently clear.

8 JUDGE MOSS: Okay. Mr. Richter, thank you.
9 Mr. Richard, anything final, final word?

10 MR. RICHARD: I'd just like to echo the
11 position taken by Mr. Richter. If it is the
12 Commission's determination that the City of Toppenish
13 should have filed a special petition, you know, we
14 would be perfectly pleased to amend our petition to
15 intervene and characterize it either as a special
16 petition or to file an independent complaint, as we
17 believe we have a statutory right to do so.

18 We're just of the opinion that for purposes
19 of judicial economy, given that the city will be
20 dealing with the same factual record that will be
21 generated by Public Counsel's complaint, that it
22 seems that the most appropriate route is to simply
23 intervene into this complaint and deal with the same
24 factual issues that are raised, the same factual
25 determination, but simply address the question -- the

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1 narrow question of what the proper characterization
2 of the Yakima ordinance is. Is it a tax or is it a
3 franchise fee.

4 JUDGE MOSS: Thank you. Insofar as the
5 petitions to intervene are concerned, the Commission
6 is as fully informed, I think, as it needs to be to
7 make its determination on those petitions, and we
8 will take the matter under advisement and will inform
9 the parties by means of a written order, which I
10 would anticipate could be entered later this week.
11 And so we'll rule at that time and in that fashion.

12 This brings us to the question of motions
13 and requests. I don't have any formal request on
14 discovery. Is discovery something you're going to
15 require? I keep hearing a lot about facts.

16 MR. FFITCH: Your Honor, actually, we had
17 -- the Commission has, in its prehearing conference
18 order, invoked the discovery rule.

19 JUDGE MOSS: How prescient of us.

20 MR. FFITCH: It's my understanding. We had
21 requested that earlier on and that was granted, so we
22 do have the discovery rule in effect.

23 JUDGE MOSS: I guess I should read our own
24 orders. How about a protective order? Have we
25 covered that base, as well, Mr. ffitich?

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1 MR. FFITCH: We're not requesting a
2 protective order, Your Honor.

3 JUDGE MOSS: All right. If that should
4 come up at some later point in the proceedings, it
5 can be brought forth by written motion.

6 Now, there's also, Mr. ffitch, your request
7 for a settlement judge. Let us hear about that.

8 MR. FFITCH: Yes, Your Honor, thank you.
9 After all of this vigorous debate on the issues and
10 the rights and wrongs of the various parties, we are
11 actually interested in providing an opportunity in
12 the first phase of this case to sit down with all of
13 the parties, the stakeholders, to see if there is
14 some resolution of the controversy that we can reach
15 short of litigation, and so we've asked for the
16 appointment of -- some help with that for the
17 appointment of a Commission settlement judge to
18 facilitate the discussions, consistent with the
19 similar practice in other cases.

20 We would expect to convene an initial
21 meeting and confer further with that judge about how
22 to structure the conversations. I'm aware that
23 meetings, conversations and so on, I believe, have,
24 to some extent, been occurring already, and you know,
25 we, by filing this complaint, we've advised parties

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1 informally that we're not intending to try to cut off
2 any kinds of informal resolutions that are being
3 sought, and we'd like to try to facilitate that
4 process.

5 JUDGE MOSS: And have you had direct
6 discussions with others regarding the prospects for
7 some sort of settlement negotiation?

8 MR. FFITCH: Only in a very preliminary
9 way, and not with all the parties here, but yes, we
10 have.

11 JUDGE MOSS: Well, let's hear, at least
12 briefly, what other parties might have to say.
13 Chairwoman Showalter has a question first.

14 CHAIRWOMAN SHOWALTER: Legal issues are not
15 capable of settlement agreements. That is, we will
16 have to determine whatever legal issues are in the
17 case for ourselves. Obviously, I suppose all parties
18 could agree on a legal position. Even then, though,
19 that would not -- in our case, we would not be
20 accepting a settlement of the law. We have to
21 determine the law.

22 So I'm wondering, given that it appears to
23 me there are several legal issues in the case and
24 some potentially precedential-setting ones, how you
25 would see a settlement conference proceeding before

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1 those legal issues were determined?

2 MR. FFITCH: Well, I think that the parties
3 can certainly -- one of the things the parties can
4 talk about is whether there's threshold questions
5 like that that have to be resolved first or whether
6 there's some other avenue that can resolve matters
7 without having to, you know, present those issues to
8 the Commission, and you know, that comes up in other
9 cases, as well, where if the case were litigated, the
10 Commission would have to address and confront certain
11 issues, but it's also possible that doesn't have to
12 occur if the parties can reach a resolution.

13 I would agree that the Commission
14 ultimately would have to pass on a settlement of the
15 complaint, as it does in other cases. The Commission
16 has the -- settlements are presented to the
17 Commission for approval and then the Commission has
18 to look at the legal issues, so I think I would
19 understand that, but I don't think that we can't talk
20 without a round of motions. In fact, I think part of
21 the philosophy of settlement is there's a lot of
22 benefits to parties to try to avoid the cost and
23 expense of litigation and try to resolve it through
24 other means, so if you don't get there, then you've
25 got the dispositive motions available to you. There

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1 are a number of avenues available, frankly.

2 The last case, I believe the Brannon case,
3 went forward on stipulated facts. That's something
4 else that is always available in these cases that
5 could be presented to the Commission if that's the
6 direction that things go.

7 JUDGE MOSS: So your suggestion, just to be
8 clear, Mr. Ffitch, is that we set aside some time at
9 the outset for maybe a couple of weeks or something
10 for some settlement discussion, and then we get a
11 status report as to what the prospects were for
12 either resolving some issues or perhaps stipulating
13 facts or what have you, and perhaps set further
14 procedural dates at that time, dependent on the
15 outcome, or are you suggesting something different?

16 MR. FFITCH: Well, I'm sorry. Now we're
17 getting to the proposed schedule and -- legitimate
18 question. What we had in mind and had shared with
19 the other parties, most of them, except for some of
20 the intervenors I wasn't aware of, was a defined
21 initial period actually longer than that, 60 days for
22 the parties to talk with the aid of a settlement
23 judge, and then a predetermined schedule with a
24 hearing date, testimony dates, things of that nature.

25 I believe that if -- and I didn't, in my

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1 proposed schedule, build in a dispositive motions
2 point. I guess my suggestion would be that we could
3 explore where we are in the settlement and then see
4 if there's other components that need to be built in,
5 like dispositive motions or stipulated presentations,
6 stipulated facts, and then add those to the schedule,
7 as parties have worked them up, in a consensus
8 position.

9 JUDGE MOSS: All right. Let's hear from
10 the Respondents next. Mr. Van Nostrand? Oh, we need
11 a break. We seem to have lost a couple of people
12 along the way, but we have not called a recess, so I
13 think we'll proceed. Mr. Van Nostrand.

14 MR. VAN NOSTRAND: Thank you, Your Honor.
15 I had a couple preliminary thoughts on the request
16 for mediation. Certainly PacifiCorp generally has
17 encouraged the appointment of settlement judges. I
18 think the company's on the record in rulemakings and
19 such as suggesting that pursuing early settlement
20 conferences with settlement judges is appropriate in
21 a number of cases.

22 I think, when I looked at the issues that
23 are raised in Public Counsel's complaint in this
24 case, I don't believe they lend themselves to a
25 productive mediation. When you look at allegations

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1 that the utilities were imprudent because they
2 characterized the fee as a tax and they sought to
3 pass it through, rather than challenge it in federal
4 court, if I look at allegations that utilities don't
5 have any authority to collect the tax anyway because
6 they didn't sign a franchise agreement, those are not
7 issues that lend themselves to any productive
8 solution through mediation.

9 I respectfully submit it would be a waste
10 of time to mediate to discuss those issues, because I
11 know PacifiCorp is not going to come in and put in on
12 the table whether or not we were prudent when we
13 believe we behaved fully consistent with the
14 Commission's practice in terms of doing a preliminary
15 review to determine whether or not the tax was
16 clearly invalid or unlawful, and once making the
17 requisite finding, proceeding to file it with the
18 Commission. So we believe our actions were entirely
19 prudent, and it essentially requires a reversal of
20 the Commission's existing policy for us to be found
21 that we weren't prudent. So I don't think those are
22 productive issues to be discussed in mediation.

23 There's a lot of discussion of the factual
24 record which is going to be developed, but that
25 factual record bears on the issue of whether or not

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1 the Commission mischaracterized this fee as a tax.
2 And until the scope of the proceeding is broadened to
3 include that issue, that's not the subject of
4 mediation, either.

5 But there's a lot of discussion about the
6 factual record. There is no factual record necessary
7 to resolve these legal issues that are raised in
8 Public Counsel's complaint. The factual issues are
9 related to the issues that are not even raised in
10 Public Counsel's complaint; they are raised in the
11 petitions to intervene as to all the evidence that
12 may support the treatment of the tribal tax as a
13 franchise, rather than a utility tax. And that's not
14 the subject of -- proper subject of a mediation given
15 procedurally where this proceeding sits with those
16 issues not properly being before the Commission, and
17 I think sound legal arguments as to whether or not
18 those issues can be brought before the Commission in
19 this proceeding.

20 CHAIRWOMAN SHOWALTER: With respect to the
21 issue that is in Public Counsel's complaint, the
22 prudence issue, do you see that issue as needing
23 discovery or facts, or will you be planning to bring
24 a dispositive motion?

25 MR. VAN NOSTRAND: We have not reached any

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1 firm decision in terms of dispositive motions. I
2 think there are strong legal issues that can be made,
3 but once the Commission allows the tariff to go into
4 effect, what relevance is there as to what was done
5 prefiling, there is that legal argument, and I think
6 there's the further legal argument of basically the
7 parties' conduct being bound by the Commission's
8 existing precedent, which we see as not requiring a
9 utility to have an affirmative obligation to go to
10 federal court and challenge a utility tax.

11 So we think -- we think there could be
12 dispositive motions made, but like I said, we have
13 not reached a decision, not fully researched those
14 issues, but there could be dispositive motions
15 without any necessary factual discussions.

16 MR. FFITCH: Your Honor, if I may just
17 respond to that. We strongly disagree with that.
18 The determination of -- the utilities' analysis of
19 the charge imposed on it by the tribe has everything
20 to do with the factual basis for the charge and the
21 nature of the companies' operations on the
22 reservation and so on, and that's -- there's -- it's
23 intertwined with -- the analysis of their decision is
24 intertwined with a factual determination. It's not a
25 purely legal issue that is exactly the same for every

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1 utility company serving the Yakima Nation or serving
2 any -- any particular local jurisdiction.

3 It has to do with the nature of the
4 charges, the amount of the charges, what they're
5 based on, what services are being provided, what kind
6 of utility facilities are in place. There's just a
7 lot of aspects to it that are essentially factual in
8 nature, in addition to the legal side of it.

9 CHAIRWOMAN SHOWALTER: One party who is not
10 here is the Yakima Tribe. Now, in the open meetings,
11 the three open meetings that we had, the tribe was
12 present and did put forth some evidence, which is in
13 the record in the court proceeding, and I'm wondering
14 to what extent are, I guess you, Mr. Ffitch, going to
15 be able to develop the record you deem necessary
16 without the tribe, and do we already have more
17 information in the court proceeding than we're likely
18 to get in this one?

19 MR. FFITCH: Well, we would hope that this
20 proceeding's going to make it possible to get a
21 better record than we had in the court proceeding.
22 The utility companies are in possession of
23 information, and the sort of threshold first-level
24 response to your question is when we're looking at
25 their prudence, we're primarily looking at the

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1 information that they had available to them in making
2 the decision. They have a lot of information about
3 their own facilities and where they're located and
4 what might be a reasonable basis for a charge, what
5 their own internal analysis was, that kind of thing.

6 We would also hope that there would be an
7 ability to get additional information, I'm not sure
8 to what extent, from other sources outside the
9 parties here, perhaps even from -- on a voluntary
10 basis from the Yakima Nation.

11 MR. RICHTER: Your Honor, may I -- are you
12 finished?

13 MR. FFITCH: I'm finished.

14 MR. RICHTER: May I address the
15 Commissioners' concern, Madam Chairwoman and
16 Commissioner Hemstad.

17 CHAIRWOMAN SHOWALTER: You need to speak
18 into the microphone.

19 MR. RICHTER: I'm sorry. I continually
20 need to be reminded of that. I'll endeavor to learn
21 the lesson eventually.

22 The factual record that bears, as I see it,
23 on the Commission or on the Public Counsel's
24 complaint, concerns that initial question which this
25 Commission made a preliminary determination of in the

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1 context of the public meeting, and that was was the
2 Yakima Nation's charge -- is the Yakima Nation's
3 charge to these utilities clearly unlawful.

4 Now, that may depend on facts. The
5 Commission, in the Brannon case and in earlier cases,
6 relied on the rationale that the -- that when an
7 Indian tribe imposes a charge, be it a tax or a fee,
8 a utility may well be bound to pay that under the
9 first Montana exception pertaining to -- agreed or
10 pertaining to the tribe's ability to tax conduct
11 which occurs on the reservation in the course of some
12 consensual agreement, and the consensual agreement in
13 that case being implied by reason of the utilities
14 doing business throughout the reservation.

15 And the Commission stated, in the Brannon
16 opinion, that that mere fact, not requiring any use
17 of actual tribal property by the utility, but merely
18 the mere fact of the utilities doing business on the
19 reservation, was -- you know, created a sufficient
20 nexus to a consensual relationship with a tribe so as
21 to render the tribal charge not clearly unlawful and,
22 therefore, the utilities not imprudent in paying it.
23 That was the Commission -- that was the Commission's
24 determination.

25 In the court case, the court did not follow

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1 that reasoning at all. In the court case, the court
2 said the Yakima tribe has before it an allegation or
3 it alleges that the utilities are extensively using
4 tribal property without authorization. That is to
5 say, without authorization either of the legal fee
6 holder, the United States, or the equitable fee
7 holder, the tribe.

8 And because of that extensive use that is
9 at least alleged by the tribe of tribal property
10 without authorization, the utilities may be subject
11 to regulation or taxation by the tribe under the
12 second Montana exception dealing with conduct that
13 threatens the political integrity of the tribe.

14 The view being that the extensive use of
15 tribal property may threaten the political integrity
16 of the Yakima Nation, and therefore -- or at least
17 the health and welfare of tribal members, as that is
18 mentioned in the Montana case, and that that
19 extensive use of tribal property is the foundation,
20 in the Court's view, that renders the Yakima Nation's
21 charge not clearly unlawful if it's a case, if it's a
22 fact.

23 But the court acknowledged, of course, that
24 it did not have a record of facts on that allegation.
25 And we believe a record of facts on that allegation

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1 can and should be developed and must be developed at
2 this hearing or a hearing -- if it's not developed
3 here, we'll file a separate complaint for a separate
4 proceeding -- to develop the factual record on that
5 point.

6 And we believe that those facts can be
7 found, one, the utilities certainly know where on the
8 ground their facilities are, and they certainly
9 should know whether those places on the ground are
10 owned by the Yakima Nation or by tribal members or by
11 the United States in trust for them, as opposed to
12 fee land.

13 Secondly, they should deed -- the utilities
14 should know whether their facilities are on roadways
15 for which they have franchises from the Yakima County
16 or the state. And certainly we can develop a record
17 with the assistance, if need be, from Yakima County,
18 to develop whether those roads were lawfully
19 established. It is apparently claimed at the Yakima
20 Nation that some roads were not lawfully established,
21 but we can develop a record on that.

22 We can also obtain the records on that
23 point from the Bureau of Indian Affairs. All roads
24 that were authorized by the United States are
25 authorized as a result of filings with the Bureau of

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1 Indian Affairs, or that are now with the Bureau of
2 Indian Affairs, formerly just the Interior Department
3 and the Commissioner of Indian Affairs. And those
4 roads were approved, if they were approved, by the
5 Secretary of the Interior, and those records can be
6 obtained from the BIA and placed in the records
7 before this Commission. None of that happened at the
8 public hearing.

9 And finally, at the public hearing, the
10 Counsel for the Yakima Nation, you know,
11 characterized the extensive fact-gathering that the
12 Yakima Nation is doing now, and presumably has done
13 in the meantime since the public hearings, so that
14 the Yakima Nation can presumably put in a great deal
15 of facts on these points, also.

16 Now, the Yakima Nation is not a party here,
17 but it may be called as a witness, and it may
18 volunteer to appear, because it was, after all, the
19 position of the Yakima Nation that the charges it
20 imposed should be considered a general operating
21 expense and recovered statewide in the nature of a
22 fee, rather than a tax, and therefore it would be in
23 the Yakima Nation's interest in support of that
24 position to put that evidence in the record here, and
25 I think they would do so.

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1 JUDGE MOSS: Just to follow up on this,
2 before we turn back to discussion of the question of
3 settlement, Chairwoman Showalter a moment ago raised
4 to you, Mr. Ffitch, the question of the Yakima Tribe
5 as a necessary party. Wouldn't they be a necessary
6 party to any settlement, even if they're not a
7 necessary party to the adjudication?

8 MR. FFITCH: I think, in the sort of
9 broader picture, they're certainly going to have to
10 be involved, you know, and I don't have any
11 indication that they, you know, would or would not be
12 involved in some final agreement with the utilities.

13 JUDGE MOSS: What I'm hearing is, in terms
14 of the factual record that we need, it is one upon
15 which we will be able to make a determination
16 potentially that this imposition of a charge is
17 clearly unlawful, for example. If facts were brought
18 forward and the Commission were asked to make such a
19 finding and made such a finding, just hypothetically
20 speaking, that would certainly implicate the interest
21 of the tribe, I would think.

22 MR. FFITCH: Yeah, I agree. I guess that's
23 a different question, as to whether they would have
24 to be a party to a settlement as presented to this
25 Commission. I just don't know the answer, if they

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1 would have to be, because I'm trying to sort of
2 imagine different settlement scenarios and -- I don't
3 know if they would have to be.

4 JUDGE MOSS: In a sense, this gets us back
5 to the issue of dispositive motions and whether we
6 want to do that early on, because one of the
7 affirmative defenses in PacifiCorp's answer, at
8 least, is that we cannot proceed in the absence of a
9 necessary party, and the tribe is such a party. I
10 don't remember if Cascade made that same pleading or
11 not, but there's an affirmative defense that does
12 question whether we would have some factual aspect.
13 Perhaps it is a legal question.

14 And so I'm just thinking out loud here in
15 terms of what we may need to do in terms of our
16 procedural schedule and the process that we decide on
17 today for going forward.

18 MR. FFITCH: I know we're not arguing that
19 motion right now, but it would seem to make it
20 impossible for the Commission to ever consider
21 prudence in a tribal tax case.

22 JUDGE MOSS: Unless the tribe waived its
23 sovereign immunity and sought to intervene.

24 MR. FFITCH: The Commission has, on two
25 previous occasions, actually ruled on tribal tax

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1 issues, the US West case in '91, and the Brannon
2 case, without having the tribe be a party to the
3 case, so --

4 JUDGE MOSS: Okay.

5 CHAIRWOMAN SHOWALTER: I guess I think it
6 probably gets to, to some degree, legal rulings
7 versus factual inquiry or, maybe better put is what
8 facts are necessary to arrive at a legal ruling. And
9 what I sense here is that Public Counsel and the
10 intervenors want to develop a lot of facts, because
11 their view of the law is that it is factually
12 intensive; therefore the facts need to be developed
13 before we can make a legal ruling, whereas the
14 companies are saying you don't need very many facts,
15 because the threshold to determine prudence or, for
16 that matter, this Commission's view of whether a
17 charge is lawful or not, is not one of deep and
18 detailed facts. It's more at the level of is there
19 an apparent charge by a tribe in the same way that we
20 have cities pass taxes and we do not -- we have not,
21 to date, and the companies have not, to date, gone
22 into long factual inquiries into the City of
23 Toppenish, for example. We take it as a given.

24 And that's what we're talking about here,
25 and so you can go either way. You can develop a lot

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1 of facts and then find out whether those facts were
2 necessary, or you can hear from the companies first
3 on their dispositive motions, based on not very many
4 facts, and see where that leads. And it could be
5 dispositive, meaning it would be in the company's
6 favor, or it could be not dispositive, meaning we
7 proceed with more facts. And I suppose we'll have to
8 sort our way through this. But I think that, to some
9 extent, that's why the parties are talking across
10 each other.

11 MR. RICHARD: Madam Chair, if it would be
12 all right for me to just make a word here. On the
13 issue of how much facts are determined, the City of
14 Toppenish is frankly more with the utility companies
15 on this. We don't believe that this is something
16 that, at least for the question of whether this was
17 properly characterized as a tax or as a franchise
18 fee, requires a terribly large amount of additional
19 facts.

20 CHAIRWOMAN SHOWALTER: Okay.

21 JUDGE MOSS: Okay. Mr. West, I gave Mr.
22 Van Nostrand an opportunity to express himself on the
23 proposal for a settlement judge and process to be a
24 part of our procedural schedule, and he had strong
25 feelings about that. Perhaps you do, as well.

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1 MR. WEST: Thank you, Your Honor. First of
2 all, Cascade supports alternate dispute resolution.
3 To the extent we could actually make some progress
4 through a meeting, we would much prefer to have
5 progress through a meeting. I have some doubt that
6 we will make a lot of progress, but we certainly
7 don't, in the abstract, say, no, we shouldn't have a
8 meeting, let's go ahead and let's fight.

9 I think that the dispositive motions issue
10 -- we just got the oral ruling on Friday, and we
11 haven't even seen the written ruling on the Yakima
12 case. My belief is that we will, after reviewing
13 that, do some research and come to some conclusions
14 that we can bring some motions based on that, and I
15 think that should be done before we get into any kind
16 of a deep discovery process.

17 So far as the factual record, I've heard
18 discussed through some of the other parties today --
19 I'm not -- that's not the kind of a factual record
20 I'm used to hearing about. It's things like was the
21 original grant of authority from the Yakima Nation to
22 the county valid? One of the large arguments, and
23 Mr. Richter alluded to this, that the Nation makes
24 and one of the pressures that Cascade feels, is that
25 the Nation's position is there are -- franchises from

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1 the county are invalid, because the grant of
2 authority to the county was flawed back in 1908, or
3 something like that.

4 We certainly don't have any facts that can
5 either back that up or say that that's untrue.
6 That's something between the county, who also isn't a
7 party here, and the Nation and the U.S. government.
8 And I just don't see that we're going to be able to
9 make a meaningful determination of those kinds of
10 basic things in the time frame we've got here of ten
11 months.

12 One thing that is -- I'm a little bit
13 troubled by, and it's kind of a policy issue, and
14 it's kind of overarching, and that is how deeply does
15 Public Counsel or should the Commission get into the
16 decision-making process at the utility in deciding,
17 yes, we should sue, or no, we shouldn't sue somebody.
18 There are a lot of privilege issues involved in that,
19 and the deeper we get into that, the more clearly
20 what we're going to do is make a road map for our
21 opposite parties in the event there ever is any
22 litigation on this matter.

23 For example, as to whether the Nation's tax
24 ordinance is valid. I certainly wouldn't voluntarily
25 lay out for the Nation what our analysis is of the

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1 cases and what our likelihood of positive or negative
2 results was in going into the advice my firm gave to
3 our client as to how it should proceed. So that's a
4 very troublesome issue to me.

5 If we get below this very high level,
6 clearly unlawful analysis, how detailed are we going
7 to get and whose interests are going to be harmed,
8 particularly the ratepayers.

9 CHAIRWOMAN SHOWALTER: Well, that's a very
10 interesting point that you raise, and in some
11 analogous way, I think it affects this Commission. A
12 question for us is going to be how deeply do we get
13 into the facts. We have said in the past we're not a
14 tax court. We're not really set up, we don't have
15 the expertise to be a tax court, let alone the
16 authority to be one, so in the past we have dealt
17 with a fairly high level of facts. That is, is there
18 an ordinance from the city, does it impose a charge,
19 those sorts of things.

20 We have not, in the past, gone into the
21 level of detail that you're talking about. So I
22 think that would be one of the issues that would have
23 to be addressed here, which is a -- it's a policy
24 decision in a sense. It really has to do with what
25 is the role of a utility commission vis-a-vis

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1 municipal or tribal taxes.

2 MR. WEST: Yes. That's all I had, Your
3 Honor.

4 JUDGE MOSS: Thank you. All right. Does
5 anybody else want to be heard on the question of
6 whether it would be productive to set aside a period
7 for settlement talk or related matter of dispositive
8 motions? Okay. Very well.

9 All right. The parties have given us quite
10 a bit to consider in terms of our process options and
11 opportunities for moving the case forward.
12 Fortunately, we are early in that process.

13 There is one matter outstanding that is of
14 some considerable significance to us that may have
15 implications, and that is what the court's order in
16 this latest round actually says. And so rather than
17 make firm determinations today regarding what our
18 process will be and setting dates for that, we will
19 await that order coming down from the Superior Court,
20 and it may be necessary to convene a second
21 prehearing conference for some further discussion,
22 although we are mindful of the various options the
23 parties have argued today with respect to settlement
24 talks, dispositive motions opportunity.

25 And let me just briefly ask. I would

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1 gather that the parties would be interested in
2 handling this case on a prefiled testimony basis if
3 we get to that step, rather than doing oral? Am I
4 presuming correctly?

5 MR. FFITCH: That's correct, Your Honor.
6 That's what my draft schedule contains.

7 JUDGE MOSS: All right. I'm going to get
8 you to hand that up to me today as a further piece of
9 information for us to consider. And if others have
10 proposals, I'll take those, too. And I assume
11 Respondents -- I may be presumptuous in thinking
12 Respondents, but prefiled testimony would be a
13 preference?

14 MR. WEST: Yes, Your Honor.

15 MR. VAN NOSTRAND: Yes, Your Honor.

16 JUDGE MOSS: Okay. Again, that all assumes
17 we get that far. All right. I think that probably
18 gives me the essential points that we can be thinking
19 about as we await developments from Yakima.

20 Just a few remarks in closing, if there's
21 no other business to be brought before us today, a
22 few administrative matters. Okay. Paper filings in
23 this proceeding, we need an original plus 14. That's
24 for our internal distribution needs at the
25 Commission. Please make all your filings through the

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1 Commission's secretary either by mail, directed to
2 the secretary at our mailing address, P.O. Box 47250,
3 1300 South Evergreen Park Drive, S.W., Olympia,
4 Washington, 98504-7250, or by other means of delivery
5 to the address I mentioned.

6 I want to stress that we ask that filings
7 of substance, for example, testimony, briefs,
8 motions, answers, include an electronic copy to the
9 Commission, either transmitted by e-mail to the
10 Records Center, or by means of a three and a
11 half-inch diskette, preferably in PDF format,
12 supplemented by MS Word or WP 5.0 or later. Service
13 on all parties must be simultaneous with filing.

14 At the appropriate point in time and
15 perhaps following a second conference, if necessary,
16 the Commission will enter a prehearing order
17 outlining our process and procedural schedule and
18 perhaps discussing some other matters, as well, that
19 will facilitate the forward movement of the case in
20 an efficient way, and we will certainly have, if we
21 go to hearing, have a final prehearing conference
22 shortly before that hearing for the exchange of
23 cross-examination exhibits and the conduct of other
24 business that would ensure an efficient hearing.

25 Anything further from the Bench? Nothing

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1 further from the Bench. Anything further from the
2 parties? With that, then, we'll be off the record.
3 I thank you all very much for being here today.

4 (Proceedings adjourned at 4:05 p.m.)

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