

Agenda Date: January 8, 2003  
Item Number: A1

Docket: UE-021637

Company Name: PacifiCorp d/b/a Pacific Power & Light Company

Staff: Mike Parvinen, Regulatory Analyst  
Thomas Schooley, Regulatory Analyst  
Graciela Etchart, Regulatory Analyst

**Recommendation:**

Allow the tariff filed in Docket UE-021637 to become effective January 13, 2003, as filed.

**Background:**

On December 16, 2002, PacifiCorp d/b/a Pacific Power & Light (PacifiCorp or Company) filed a tariff with a stated effective date of January 13, 2003. The filing requests rates to be collected from customers within the boundaries of the Yakama Indian Nation (Nation) in order to recover costs imposed by the Nation through the Yakama Indian Nation's Ordinance T-177-02. PacifiCorp serves electric customers in Yakima county including the towns of Toppenish and Wapato within the Reservation boundaries. The tariff will collect approximately \$500,000 in annual revenues.

This filing is being made consistent with the Commission's decision regarding Cascade Natural Gas Corporation's filing in Docket UG-021502 for recovery of the charges imposed by Ordinance T-177-02. The main issues in the Cascade filing and this filing are whether the charge is a tax or a franchise fee, and from which customers the Company should collect the costs. The basis for the creation of Ordinance T-177-02 was from research performed by the Yakama Nation which allegedly shows that PacifiCorp's poles and facilities are on tribal lands without authorization or for which authorization has expired. Staff has asked the Nation for support of such allegations and to date has not received any evidence other than an invitation to visit with the Nation in the future to discuss the situation and the findings from the research performed.

Docket UE-021637

January 8, 2003

Page 2

The Staff's recommendation and the Commission's conclusion in the docket filed by Cascade was that the charge is a tax and as a tax should be collected from the customers within the boundaries of the Nation. This filing is consistent with that outcome and no evidence is present to warrant a different outcome or conclusion.

**Conclusion:**

Staff recommendation is to allow the filing in Docket UE-021637 to become effective January 13, 2003, as filed.

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

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

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

**SUMMARY**

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

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

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

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

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

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## ISSUES

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

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

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

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

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

## STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## PACIFICORP'S MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

## DISCUSSION

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

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

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

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

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

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

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



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

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

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

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

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

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

## CONCLUSION

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

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

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

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

  
JUDGE

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KIM M. EATON, YAKIMA COUNTY CLERK

KIM M. EATON  
CLERK OF  
SUPERIOR COURT  
YAKIMA, WASHINGTON

The Honorable Heather Van Nuys  
Hearing Date: July 28, 2003

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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

Elaine Willman and the Citizens  
Standup! Committee,

Plaintiffs,

v.

Washington Utilities and Transportation  
Commission, Cascade Natural Gas  
Corporation and Pacificorp, d/b/a Pacific  
Power and Light Company,

Defendants.

CASE NO. 03-2-00086-7

ORDER DENYING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT AND DISMISSING  
PETITION FOR JUDICIAL  
REVIEW, IN PART

~~(PROPOSED)~~

THIS MATTER came before the Court on Plaintiffs' Motion for Summary Judgment. The Court, having considered the records and written submissions of the parties, including Plaintiffs' Memorandum in Support of Summary Judgment, the Memorandum of the Washington Utilities and Transportation Commission in Opposition to Plaintiffs' Motion for Summary Judgment, Cascade's Opposition to Plaintiffs' Motion for Summary Judgment, and the Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and having considered the evidence <sup>contained in the alternative record, in its entirety</sup> and the argument of counsel; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' Petition for Judicial Review arises from an ordinance passed by the Yakama Nation that requires all utilities providing service on the Yakama Nation Reservation to

ORDER DENYING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT [PROPOSED] - 1

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Utilities and Transportation Division  
1400 8 Evergreen Park Drive SW  
PO Box 40128 Olympia, WA 98504-0128  
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1 pay a charge equal to 3% of a utility's gross revenues from all sales on the Reservation.

2 This Court has jurisdiction over Plaintiffs' Petition for Judicial Review pursuant to  
3 RCW 34.05.570(4)(b).

4 2. Plaintiffs' Petition for Judicial Review sets forth two claims for relief. Claim 1 asks the  
5 Court to order the Washington Utilities and Transportation Commission to exclude  
6 non-tribal owners of fee land within the Yakama Nation Reservation from recovery of  
7 the Yakama Nation's charge imposed on Cascade Natural Gas Corporation and  
8 PacifiCorp. (Petition at ¶¶ 7(a) and (b), and 8(a).) In the alternative, Claim 2 asks the  
9 Court to order the Washington Utilities and Transportation Commission to require  
10 Cascade Natural Gas Corporation and PacifiCorp to recover the Yakama Nation's  
11 charge from all customers state-wide. (Petition at ¶¶7(c) and 8(b).)

12 3. On March 13, 2002, Plaintiffs filed a Motion for Summary Judgment. Plaintiffs'  
13 Motion is limited to Claim 1.

14 4. As to the matters raised in Plaintiffs' Motion for Summary Judgment, the Yakama  
15 Nation's charge is not clearly unlawful. Recovery of the Yakama Nation's charge from  
16 non-tribal owners of fee land within the Yakama Reservation does not violate the  
17 provisions of RCW 80.28.090. Thus, the Washington Utilities and Transportation  
18 Commission did not have a duty required by law to reject or suspend tariffs filed by  
19 PacifiCorp and Cascade Natural Gas Corporation that recover from such non-tribal  
20 members, the charge imposed by the Yakama Nation on those utility companies.  
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*Rec'd  
EO. 01. 130 to  
hold an adjudicative hearing under  
out set for hearing*

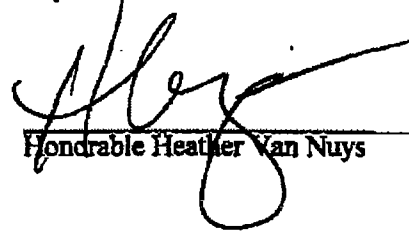
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5. As to the matters raised in Plaintiffs' Motion for Summary Judgment, the Commission was not arbitrary or capricious when it exercised its discretion to allow the tariffs referenced above to take effect by operation of law.

6. Plaintiffs' Motion for Summary Judgment is denied.


7. Plaintiffs' Petition for Judicial Review as to Claim 1 is dismissed.

DONE IN OPEN COURT This 28 day of July 2003.

  
Honorable Heather Van Nuys

Presented by:

CHRISTINE O. GREGOIRE  
Attorney General

  
ROBERT D. CEDARBAUM  
Senior Counsel  
Counsel for the Washington Utilities  
and Transportation Commission

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KIM M. EATON, YAKIMA COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

Elaine Willman and the Citizens  
Standup! Committee,

Plaintiffs,

v.

Washington Utilities and Transportation  
Commission, Cascade Natural Gas  
Corporation and PacifiCorp, d/b/a Pacific  
Power and Light Company,

Defendants.

CASE NO. 03-2-00086-7

ORDER DENYING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT ON ALTERNATIVE  
CLAIM AND DISMISSING  
PETITION FOR JUDICIAL  
REVIEW

[PROPOSED]

THIS MATTER came before the Court on Plaintiffs' Motion for Summary Judgment On Alternative Claim for Relief. The Court, having considered the records and written submissions of the parties, including Plaintiffs' Memorandum in Support of Summary Judgment on Alternative Claim, the Memorandum of the Washington Utilities and Transportation Commission in Opposition to Plaintiffs' Motion for Summary Judgment on Alternative Claim, PacifiCorp's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (Alternative Claim), Cascade's Brief Joining PacifiCorp's Memorandum In Opposition to Plaintiffs' Motion for Summary Judgment on Alternative Claim, and Plaintiffs' Reply Memorandum in Support of Summary Judgment on Alternative Claim, and

[PROPOSED] ORDER DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 1

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Utilities and Transportation Division  
1400 S Evergreen Park Drive SW  
PO Box 40128 Olympia, WA 98504-0128  
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1 having considered the evidence contained in the administrative record in its entirety and the  
2 argument of counsel; now, therefore, it is hereby

3  
4 **ORDERED, ADJUDGED AND DECREED THAT:**

- 5 1. Plaintiffs' Petition for Judicial Review arises from an ordinance passed by the Yakama  
6 Nation that requires all utilities providing service on the Yakama Nation Reservation to  
7 pay a charge equal to 3% of a utility's gross revenues from all sales on the Reservation.  
8 PacifiCorp and Cascade Natural Gas Corporation filed tariffs with the Washington  
9 Utilities and Transportation Commission proposing to recover the 3% charge as a tax  
10 only from ratepayers located within the boundaries of the Yakama Nation Reservation.  
11 The Washington Utilities and Transportation Commission agreed that the 3% charge  
12 should be treated as a tax for ratemaking purposes and it allowed the companies'  
13 proposed tariffs to go into effect by operation of law.
- 14 2. This Court has jurisdiction over Plaintiffs' Petition for Judicial Review pursuant to  
15 RCW 34.05.570(4)(b).
- 16 3. Plaintiffs' Petition for Judicial Review set forth two claims for relief. Claim 1 asked  
17 the Court to order the Washington Utilities and Transportation Commission to exclude  
18 non-tribal owners of fee land within the Yakama Nation Reservation from recovery of  
19 the Yakama Nation's charge imposed on Cascade Natural Gas Corporation and  
20 PacifiCorp. (Petition at ¶¶ 7(a) and (b), and 8(a).) In the alternative, Claim 2 asked the  
21 Court to order the Washington Utilities and Transportation Commission to require  
22 Cascade Natural Gas Corporation and PacifiCorp to recover the Yakama Nation's  
23 charge as a fee from all customers throughout the companies' service territories.  
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1 (Petition at ¶¶7 (c) and 8(b).) By Order entered July 28, 2003, the Court dismissed  
2 Plaintiffs' Petition for Review as to Claim 1.

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4 4. On June 30, 2003, Plaintiffs filed a Motion for Summary Judgment On Alternative  
5 Claim for Relief. This motion addressed Claim 2 of Plaintiffs' Petition for Judicial  
6 Review.

7 5. As to the matters raised in Plaintiffs' Motion for Summary Judgment On Alternative  
8 Claim for Relief, the Washington Utilities and Transportation Commission was not  
9 arbitrary or capricious when it determined that the 3% charge should be treated as a tax  
10 for ratemaking purposes. Thus, the Washington Utilities and Transportation  
11 Commission did not have a duty required by law to either reject or suspend and set for  
12 an adjudicative hearing tariffs filed by PacifiCorp and Cascade Natural Gas  
13 Corporation that proposed to recover the 3% charge as a tax only from ratepayers  
14 located within the Yakama Nation Reservation.

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16 6. Plaintiffs' Motion for Summary Judgment on Alternative Claim for Relief is denied.

17 7. Plaintiffs' Petition for Judicial Review as to Claim 2 is dismissed.

18 8. Plaintiffs' claims have all been dismissed on summary judgment. Therefore, this order  
19 represents a final dismissal with prejudice of all claims asserted in the Plaintiffs'  
20 Petition for Judicial Review.

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22 DONE IN OPEN COURT this 21 day of August, 2003.

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24 **HEATHER K. VAN NUYS**  
25 **JUDGE**

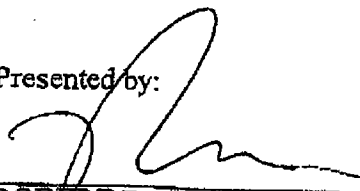
26 Honorable Heather Van Nuys

**[PROPOSED] ORDER DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 3**

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1 Presented by:



2  
3 ROBERT D. CEDARBAUM, WSBA #11770  
4 Senior Counsel  
5 Counsel for the Washington Utilities  
6 and Transportation Commission

7  
8 Approved as to form  
9 Notice of presentation waived:

10  
11 ERIC RICHTER, WSBA #6978  
12 Attorney at Law  
13 Counsel for Elaine Willman and the  
14 Citizens StandUp! Committee

15  
16 MARY E. CREGO, WSBA #31593  
17 Attorney at Law  
18 Counsel for Cascade Natural Gas Corporation


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20  
21 MICHAEL P. O'CONNELL, WSBA #8966  
22 Attorney at Law  
23 Counsel for PacifiCorp  
24  
25  
26

1 Presented by:

2

3 ROBERT D. CEDARBAUM, WSBA #11770  
4 Senior Counsel  
5 Counsel for the Washington Utilities  
and Transportation Commission

6 Approved as to form  
7 Notice of presentation waived:

8   
9 ERIC RICHTER, WSBA #6978  
10 Attorney at Law  
11 Counsel for Elaine Willman and the  
Citizens StandUp! Committee.

12 MARY E. CREGO, WSBA #31593  
13 Attorney at Law  
14 Counsel for Cascade Natural Gas Corporation

15 MICHAEL P. O'CONNELL, WSBA #8966  
16 Attorney at Law  
17 Counsel for PacifiCorp


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**[PROPOSED] ORDER DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 4**

**ATTORNEY GENERAL OF WASHINGTON**  
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Approved as to form  
Notice of presentation waived:

ERIC RICHTER, WSBA #6978  
Attorney at Law  
Counsel for Elaine Willman and the  
Citizens StandUp! Committee

  
MARY E. CREGO, WSBA #31593  
Attorney at Law  
Counsel for Cascade Natural Gas Corporation

MICHAEL P. O'CONNELL, WSBA #8966  
Attorney at Law  
Counsel for PacifiCorp

1 Presented by:

2

3 ROBERT D. CEDARBAUM, WSBA #11770  
4 Senior Counsel  
5 Counsel for the Washington Utilities  
6 and Transportation Commission

7  
8 Approved as to form  
9 Notice of presentation waived:

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11 ERIC RICHTER, WSBA #6978  
12 Attorney at Law  
13 Counsel for Elaine Willman and the  
14 Citizens StandUp! Committee

15

16

17 MARY E. CREGO, WSBA #31593  
18 Attorney at Law  
19 Counsel for Cascade Natural Gas Corporation

20

21 Michael P. O'Connell  
22 MICHAEL P. O'CONNELL, WSBA #8966  
23 Attorney at Law  
24 Counsel for PacifiCorp

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[PROPOSED] ORDER DENYING  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 4

ATTORNEY GENERAL OF WASHINGTON  
Utilities and Transportation Division  
1400 S Evergreen Park Drive SW  
PO Box 40128 Olympia, WA 98504-0128  
(360) 664-1183



4. PacifiCorp pays a three percent (3%) fee to the Yakama Nation in accordance with the Franchise Ordinance. The amounts and dates paid for 2003 are as follows:

<u>Payment Date</u>	<u>Amount</u>	<u>Period</u>
February 27, 2003	\$ 3,814.84	Jan 14-31, 2003
March 20, 2003	\$32,409.63	Feb 1-28, 2003
April 14, 2003	\$35,990.93	Mar 1-31, 2003
May 12, 2003	\$38,757.33	Apr 1-30, 2003
June 13, 2003	\$27,689.79	May 1-31, 2003
July 14, 2003	\$39,992.66	June 1-30, 2003
August 19, 2003	\$38,238.18	July 1-31, 2003

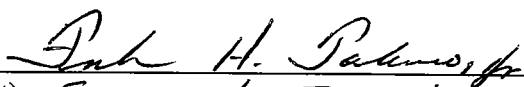
5. The amounts are accounted for on the books as follows: a) A 3 % tax is included on the bill of each customer living within the boundaries of the Yakama Nation reservation. The liability arising from this charge is credited to account 240325, Provision for Franchise Taxes. b) In the subsequent month, amounts collected are remitted to the Yakama Nation, which relieves the liability.

SWORN TO UNDER THE PENALTY OF PERJURY THIS 10 DAY OF SEPTEMBER, 2003.

  
 \_\_\_\_\_  
 Clark Satre

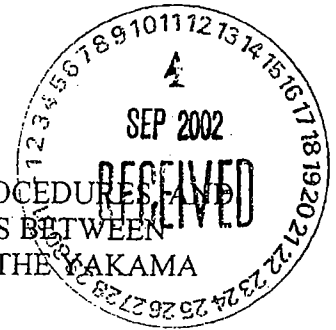
Given under my hand and official seal this 10 day of SEPT., 2003.



Signature:   
 Name (Print): FRANK H. TALARICO, JR.  
 NOTARY PUBLIC in and for the State of  
 Washington, residing at YAKIMA  
 My appointment expires: SEPT. 12, 2006

# Yakama Nation Franchise Ordinance

ORDINANCE ESTABLISHING MINIMUM REQUIREMENTS, PROCEDURES, AND APPLICATION INFORMATION FOR FRANCHISE AGREEMENTS BETWEEN PUBLIC UTILITIES OPERATING ON THE RESERVATION AND THE YAKAMA NATION



## *PREAMBLE*

The Yakama Nation, comprised of fourteen confederated tribes and bands, is a sovereign nation pursuant to the Treaty of June 9, 1855 (12 Stat. 951), entered into with the United States of America.

The Yakama Tribal Council is the governing body of the Confederated Tribes & Bands of the Yakama Nation, as delegated by the authority of the Yakama Nation General Council, pursuant to Resolution T-38-56.

The Tribal Council finds that, by virtue of providing Utility Service to the residents of the Reservation and by obtaining easements to place facilities within such Reservation, Utilities have entered into consensual relationships with the Yakama Nation and its members.

Utilities operating on the Reservation have placed Utility facilities on lands owned or controlled by the Yakama Nation without authorization or for which authorization has expired and the Tribal Council finds that it is in the public interest to require Utilities operating on the Reservation to obtain permission for such facilities by entering into agreements with the Yakama Nation.

As a sovereign nation, the Yakama Nation retains the authority to regulate the activities of entities that have entered into consensual relationships with the Yakama Nation and to regulate activities that threaten the political or economic interests of the Yakama Nation. The Tribal Council further finds that the health, safety, and welfare of the residents of the Reservation require that the Yakama Nation regulate and control the activities of Utilities operating on the Reservation.

## Section 1: Policy

It is the policy of the Yakama Nation to require any Utility providing Utility Service to the Yakama Nation or residents of the Reservation to comply with the terms of this ordinance by entering into a Franchise Agreement with the Yakama Nation.

## Section 2: Definitions

As used in this Ordinance, the following terms shall have the following meanings:

2.1 "Applicant" means any Utility that applies for a Franchise pursuant to the terms of this Ordinance.

Franchise shall subject a Utility to the penalty provisions of this Ordinance set forth in Section 6 of this Ordinance.

#### Section 4: Procedure for Obtaining Franchise

4.1 Filing of Application. Any Utility desiring to enter into a Franchise with the Yakama Nation must submit an application to the Yakama Nation, which shall be considered pursuant to the procedures set forth in this section. An application may be filed at any time.

4.2 Contents of Application. At a minimum, any application must contain the following:

4.2.1 The legal name and business structure of the Applicant;

4.2.2 A demonstration of the Applicant's technical, legal, and financial ability to provide Utility Service to the residents of the Reservation, including but not limited to audited financial statements for the previous three fiscal years;

4.2.3 If, at the time the Application is filed the Applicant is providing Utility Service to the residents of the Reservation:

4.2.3.1 A detailed description, including maps, one-line diagrams and physical descriptions and location of all facilities used by the Applicant to provide Utility Service to its customers on the Reservation;

4.2.3.2 A detailed statement of the Applicant's gross revenue from its operations on the Reservation; and

4.2.3.3 Other information requested by the Tribal Council.

4.2.4 A description of the Utility Service to be provided, including the proposed rate(s) for such service;

4.2.5 A statement that the Applicant is fully licensed, bonded, and authorized to provide Utility Service in the State of Washington;

4.2.6 A demonstration that the proposal is consistent with all tribal, federal, and any applicable state rules and regulations; and

4.2.7 Other information reasonably requested by the Tribal Council.

4.3 Consideration of Applications. The Tribal Council will consider each Application that is found to comply with the terms of this Ordinance. In evaluating an Application, the Tribal Council will consider:

4.3.1 The Applicant's past service record, including billing practices and response to customer complaints, on the Reservation and in other communities;

4.3.2 The nature of the proposed Utility Service;



- 4.3.3 The proposed rates for Utility Service;
- 4.3.4 The proposed area of service; and
- 4.3.5 Whether the Application serves the interest of the residents of the Reservation.

4.4 Temporary Franchise. Any Applicant that is serving customers on the Reservation at the time its Application is filed may request the Tribal Council to grant such Utility a Temporary Franchise. The Tribal Council may grant an Applicant a Temporary Franchise if it determines that doing so will serve the public interest. Any Temporary Franchise shall last no longer than one hundred twenty (120) days and may not be extended or renewed without Tribal Council Resolution. Any Utility operating under a Temporary Franchise shall remit franchise fees set forth in Section 5 of this Ordinance within thirty (30) days issuance of such Temporary Franchise and every thirty (30) days thereafter.

4.5 Granting of Application. If the Tribal Council determines that the granting of an Application serves the public interest, it may grant a Franchise to such Applicant, subject to the terms and conditions as agreed upon by the Applicant and the Tribal Council.

4.6 Denial of Application. If the Tribal Council determines that the granting of an Application does not serve the public interest, it may refuse to grant a Franchise to such Applicant. Any action to contest such decision shall be pursuant to the terms of the Yakama Nation Tribal Administrative Code, T-020-01.

#### Section 5: Franchise Fee

5.1 Any Utility that is providing Utility Service to the residents of the Reservation as of the effective date of this Ordinance shall be liable for a franchise fee equal to three percent (3%) of such Utility's Gross Operating Revenue.

5.2 Such franchise fee shall begin accruing as of the effective date of this Ordinance.

5.3 Such franchise fee shall be owed by such Utility to the Yakama Nation notwithstanding that such Utility may not have entered into a Franchise with the Yakama Nation as of the effective date of this Ordinance.

#### Section 6: Penalty for Operating Without Franchise

Any Utility that is providing Utility Service to the residents of the Reservation within sixty (60) days following the effective date of this Ordinance and has neither obtained a Temporary Franchise pursuant to Section 4.4 of this Ordinance nor entered into a valid Franchise with the Yakama Nation shall be required to pay the Yakama Nation the franchise fee set forth in Section 5 of this Ordinance as well as one thousand dollars (\$1,000.00) for each day that such Utility is operating on the Reservation without a Franchise. The Tribal Council also reserves the right to prohibit all Utilities not in compliance with this Ordinance from serving customers on the Reservation.

## Section 7: Removal of Facilities on Expiration of Franchise

7.1 Within one (1) year after the expiration of its Franchise or, in the event that no Franchise is obtained, within one (1) year from the date of this Ordinance, a Utility shall remove all property and materials (including poles, posts, towers, wires, conduits, mains, pipes, rails, tracks, ties, railways, pole lines, telegraph, telephone or electric distribution lines, or structures or equipment of any kind) placed in, on, upon, over, under or beneath any public right of way, or any portion of the Yakama Lands, unless further time is granted by the Yakama Nation.

7.2 If all property and materials referred to in subsection 7.1 of this section are not removed within the time specified in such section, all and every part thereof shall be forfeited and escheat to the Yakama Nation.

7.3 The Yakama Nation may notify the owner of the property and materials referred to in subsection 7.2 of this section that it waives forfeiture and escheat and may thereafter compel removal of such property and materials from the public right of way, or any portion of the Yakama Lands, and restoration of the public right of way and any affected portion of the Yakama Lands and may maintain suit in Tribal Court to require such removal and restoration or the payment of the cost thereof by the Utility owning such property.

## Section 8: Enforcement and Review

Any proceeding to construe, adjudicate, or enforce any provision of this Ordinance shall be brought under the Yakama Nation Tribal Administrative Code, T-020-01. The Yakama Nation in no other way waives its sovereign immunity from suit.

## Section 9: Effective Date

This ordinance shall take effect thirty (30) days after its enactment by the Yakama Nation Tribal Council.

Passed by the Tribal Council this 6<sup>th</sup> day of August, 2002.

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

Complainant,

v.

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

Respondents.

Docket No. U-030744

**AFFIDAVIT OF CAROL HUNTER IN  
SUPPORT OF MOTION FOR SUMMARY  
DETERMINATION**

STATE OF UTAH                                )  
  ) ss.  
County of Salt Lake                                )

I, Carol Hunter, being first duly sworn on oath, state as follows:

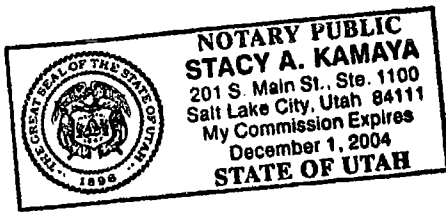
1. I am the Vice President of Community Relations at PacifiCorp. I am competent to testify as to the matters set forth herein and make this affidavit based on personal knowledge.
2. By letter dated September 3, 2002, PacifiCorp received notice of the adoption of the Yakama Nation Franchise Ordinance.
3. Upon receiving notice of the enactment of the Franchise Ordinance, I communicated with legal counsel regarding the legal, regulatory, and jurisdictional implications of the Franchise Ordinance for the purpose of securing legal advice on behalf of PacifiCorp.
4. Without waiving any privilege of confidentiality regarding advice provided by legal counsel, PacifiCorp determined that the Franchise Ordinance was not clearly invalid or illegal.
5. The issues and the legal advice I received are related to my specific corporate duties as Vice President of Community Relations.

6. The substance of the above-referenced communications has at all times been treated as confidential within PacifiCorp. As such, it is my understanding that the specific legal advice is protected by the attorney client privilege and is not subject to disclosure.

SWORN TO UNDER THE PENALTY OF PERJURY THIS 15<sup>th</sup> DAY OF  
SEPTEMBER, 2003.

  
\_\_\_\_\_  
Carol Hunter

Given under my hand and official seal this 15<sup>th</sup> day of Sept, 2003.



Signature: Stacy A. Kamaya  
Name (Print): STACY A. KAMAYA  
NOTARY PUBLIC in and for the State of Utah,  
residing at Salt Lake County, Utah  
My appointment expires: 12/1/2004