BEFORE THE WASHINGTON STATE

UTILITIES AND TRANSPORTATION COMMISSION

THE PUBLIC COUNSEL SECTION OF THE OFFICE OF THE WASHINGTON ATTORNEY GENERAL, Complainant, v. CASCADE NATURAL GAS CORPORATION, AND PACIFICORP D/B/A/ PACIFIC POWER & LIGHT COMPANY, *et al.*, Defendants.	Docket No. U-030744 CITY OF TOPPENISH'S MOTION FOR SUMMARY DETERMINATION

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

TABLE OF CONTENTS

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

I. INTRODUCTION

The Yakama Nation requires utilities providing service to those residents within the external boundaries of the Yakama Reservation pay a 3% franchise fee on gross revenues derived from such service as condition of being allowed to operate within the Reservation.[1] Such franchise requirements are well within the recognized power of tribes to regulate the use of tribal property by non-tribal members. However, the recent decisions of the Utilities and Transportation Commission ("UTC" or "Commission") permit tariffs that characterize this franchise fee as a utility tax.[2] The utilities' tariffs that pass those fees directly to the residents of the City are contrary to long-established Washington law.[3]

Since 1943, the Washington Supreme Court has held that payments made by utilities to municipalities under franchises are not taxes.[4] Instead, such payments must as a matter of law be classified as general operating expenses.[5] The Court has held that rate-making agencies such as the UTC lack legal authority to allow utilities to pass such payments to the ratepayers within the jurisdiction in which the utilities are operating under franchises.[6] Accordingly, it was an error of law for the Commission to allow utilities such as Cascade Natural Gas Corporation ("Cascade) and PacifiCorp d/b/a Pacific Power & Light ("PacifiCorp") to pass those fees through to the residents of the City.

II. RELIEF REQUESTED

City of Toppenish ("City") hereby moves for summary determination of this case pursuant to WAC 480-09-426. This pleading is intended by the City to serve both as its motion for summary determination and its brief on the question of the regulatory characterization of Yakama Nation franchise charge.

---

[1] Yakama Nation Ordinance T-177-02.
[2] See, *UTC Docket Nos.* UG-021502, UG-021576, and UE-021637.
[3] *State ex rel. Pacific Tel. & Tel. Co., v. Dept. of Public Services*, 19 Wn.2d 200, 281, 142 P.2d 498 (1943).
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

III. FACTUAL BACKGROUND

3.1 Historical Background

3.1.1 Yakama Reservation.

The Yakama Indian Reservation was established by treaty in 1855 and covers approximately 1.3 million acres in what was the Territory of Washington.[7] Some eighty percent of the reservation's land is currently held by the United States in trust for the benefit of the Yakama Nation or its individual members; twenty percent is owned in fee by tribal members and non-tribal members as a result of patents distributed during the allotment era.[8]

3.1.2 Original Town of Toppenish Removed from Yakama Reservation.

The City came into being as a result of several special acts of the United States Congress. In 1883-84 the Northern Pacific Railroad was built across the Yakima Valley. In the central part of the Valley - an area that was called Toppenish - the railroad constructed a depot and section house. The land surrounding the railroad development at Toppenish was all within the boundaries of the Yakama Indian Reservation and was at that time all tribally owned.

A few years later, the United States Congress passed the General Allotment Act of 1887, also known as the Dawes Act,[9] which empowered the President to allot most tribal land without the consent of Indian nations.[10] The Dawes Act restricted immediate alienation or encumbrance by providing that each allotted parcel would be held in trust for a period of 25 years or longer; only then would a fee patent issue to the tribal allottee.[11]

---

[7] See, Treaty with Yakima Nation, 12 Stat. 951 (1855).
[8] See, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 256, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).
[9] 24 Stat. 388, as amended; 25 U.S.C. § 331, *et seq*.
[10] See, *Yakima Indian Nation*, 502 U.S. 251, 256.
[11] 24 Stat. 389; see *Yakima Indian Nation*, 502 U.S. 251, 256. The policy of allotment came to an end in 1934 with passage of the Indian Reorganization Act. See, 48 Stat. 984, 25 U.S.C. § 461, *et seq*.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

In anticipation of the Dawes Act, five Yakama families claimed land near the Toppenish section house, to establish a hold on land that they hoped to be allotted to them. In 1887, the Dawes Act granted these families trust titles to the lands they had claimed with the restriction that none of the alloted land could be sold until 1912. On March 3, 1905, by means of a special act, the United States Congress conveyed to Josephine Lille, one of the original Yakama Settlers, "the absolute fee-simple title thereto, free and clear from any trusts or reservations, and with full power in her to dispose of the same without restriction."[12] She immediately had 40 acres plotted into individual lots and began selling them free of trust. This first plat was drafted under the name "The Town of Toppenish."

The following year, the Congress passed more special acts and granted fee-simple patents to Susan Stone Swasey, Charles Wannassay, and Franklin P. Olney. The Congressional Act stated that "the issuance of said patents shall operate as a removal of all restrictions as to the sale, encumbrance, or taxation of the lands so patented."[13] These properties were platted into city blocks, and the plats retain the names of the original owners 97 years later. Within a year, the residents of these plats petitioned Yakima County to incorporate the area. On April 29, 1907 the City of Toppenish was incorporated. The area of incorporation was not Dawes Act allotments but specifically removed from the Reservation by acts of Congress.

3.2 Yakama Nation Franchise Ordinance

As a result of the Dawes Act and other acts of Congress, the Yakama Reservation is a "crazy-quilt patchwork of regulatory authority."[14] To exercise effective control over the use of tribal land, the Yakama Nation commissioned an "extensive, expensive study to determine the scope of trespasses on their lands." [15] For the purposes of their study, "trespass" was defined as

[12] United States Statutes at Large, Fifty-eight Congress, Sess. III, Ch. 1479 (1905).
[13] United States Statutes at Large, Fifty-ninth Congress, Sess. I, Ch. 3504 (1906).
[14] December 6, 2002 Letter of Thomas H. Nelson to Carole J. Washburn, UTC Docket. No. UG-021502: Objection of Yakama Nation.
[15] *Ibid*.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

non-Indian use of tribal lands without proper permit or authorization.[16] The study, which focussed initially upon facilities installed by PacifiCorp, "led to the conclusion that there were serious continuing trespasses" by utilities on Reservation land.[17] As explained by the tribe's lawyer, Thomas H. Nelson, the study found that:

> In almost all circumstances, there were no indications of bad faith, but there were indications of overreaching by individuals, acting beyond the scope of authority by the Bureau of Indian Affairs ("BIA"), negligence or worse by utilities, and many, many trespasses and other violations of a technical nature. For example, although the utilities relied primarily on county road rights of way to place their utility facilities, in some cases there were rights of way (and utility facilities) where there were no roads, in others there were roads but no rights of way, and in still others the utilities "missed the rights of way. Even greater problems are present in situations in which utilities left the road rights of way; in many cases, the utilities relied upon consent to install facilities by individuals who had absolutely no authority to grant such consent.[18]

To "reassert control over lands and interests in lands that have been and are being usurped," the Yakama concluded a franchise ordinance was needed. Therefore, on April 6, 2002, the Tribal Council of the Confederated Tribes & Bands of the Yakama Nation ("Yakama Nation") approved Resolution T-177-02 ("Franchise Ordinance" or "Ordinance"). The preamble to the Ordinance makes it clear that its purpose is reassert control over Reservation land and exact a price for property used by utilities:

> 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.

The Franchise Ordinance establishes the terms by which a utility is permitted to continue to operate on the Reservation. Section 3 of the Ordinance states that:

> It shall be unlawful for any Utility to provide Utility Service to any person within the external boundaries of the Reservation without a valid Franchise obtained pursuant to the provisions of this Ordinance and any subsequent amendments. This requirement applies to all Utilities serving customers on the Reservation, notwithstanding that such Utility's facilities may be placed on poles or other facilities owned by another Utility. The failure to enter into a valid Franchise shall subject a Utility to the penalty provisions of this Ordinance… .

---

[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Section 5 of the Ordinance requires that any utility providing utility services to the residents of the Reservation must pay a 3% fee on gross revenues derived from utility operations within the external boundaries of the Yakama Reservation.[19]

Effectively, the Ordinance provides that a utility consents to the terms of the Franchise Ordinance by its continued operation within the external boundaries of the Yakama Reservation.[20] Section 6 of the Ordinance establishes the penalties for utilities that operate without a franchise agreement. Any utility providing utility service without a valid franchise shall pay the Nation:

- The franchise fee on gross revenues;
- One thousand dollars ($1,000.00) for each day that the utility is operating on the Reservation without a franchise;
- The Tribal Council reserves the right to prohibit the utility from operating on the Reservation; and
- Require that the utility remove its facilities, including poles, wires, pipelines and conduits from tribal lands. [21]

In return for the utilities' execution of franchise agreements and payment of franchise fees, "the Yakamas (i) will consent to the continued presence of trespassing facilities, and (ii) will assist the utilities in placing future facilities in places acceptable to the Yakamas."[22]

Finally, the Nation has stated its opinion that both the Nation and the utilities are benefited by the Franchise Ordinance. The utilities get the privilege to continue operating on tribal property. Such a privilege may be very valuable to the utilities:

---

[19] Section 5.1 of the Franchise Ordinance states that:

> 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 Revenues.

[20] Washington Courts have upheld franchise ordinances providing that continued utility operations within the boundaries of a jurisdiction after the effective date of the ordinance constitute consent to the terms of the franchise ordinance. See, e.g., Order Denying Rabanco's Motion for Partial Summary Judgment on City Utility Tax, *City of Shoreline v. Allied Waste Industries*, King County Cause No. 00-2-14156-4 SEA.

[21] Section 7.1 of the Franchise Ordinance states that within a year "after the expiration of its Franchise or, in the event that no Franchise is obtained…. 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…".

[22] December 6, 2002 Letter of Thomas H. Nelson to Carole J. Washburn.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

> First, beyond the issue of administrative costs, major attention should be given to the very lands that the utilities have been and are occupying without proper authorization. Of course, it would be very difficult to attempt to quantify the value of the benefits that the utilities have enjoyed from the use of those lands, and therefore it might be more appropriate to ask how much it would cost the utilities to comply with strict enforcement of legal rights relating to use of Nation property. From the discussion of the nature of property ownership on the Reservation it should be clear that some problems – like obtaining consent to cross some Allotted lands – are exceedingly difficult to solve, and thus the costs of strict compliance would appear to be enormous. Finally one might ask what it would cost the trespassing utilities to reconfigure their systems and take other steps necessary to avoid trespassing in the future…. For all of these reasons, it seems clear that the privileges afforded – continued use of the lands, a promise to work with the utilities in the securing of rights necessary for the placement of new facilities, and a promise to assist in finding appropriate locations for the placement of such facilities – certainly at least equal the very low franchise fee of three percent of gross revenues.[23]

According to the Nation, the Franchise Ordinance is "the most direct and simple manner of dealing with serious land problems that have been plaguing the Reservation for the better part of a century. [A] franchise approach has the possibility of leading to a new, healthier understanding among the Yakamas, the non-Indian residents on the Reservation, and the utilities that provide their services on the Reservation." [24] The City supports the Nation's interest in this regard.

3.3 WUTC Characterization of Yakama Nation Franchise Fees as an "Excise Tax".

On November 14, 2002, Cascade filed a tariff with the UTC under Docket UG-021502 to allow Cascade to treat the franchise fee as a municipal tax and pass the charge to customers within the external boundaries of the Yakama Nation. On December 16, 2002, PacifiCorp filed a similar tariff with the UTC under Docket UE-021637.

As viewed by UTC staff, the main issue before the UTC in the tariff filings was "whether the charge is a tax or a franchise fee, and from which customers the Company should collect the costs."[25] Even though the Franchise Ordinance established on its face a franchise

---

[23] *Ibid.*
[24] *Ibid.*
[25] *Open Meeting Memo,* Docket UE-021637.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

fee, the UTC staff reasoned that the Yakama Nation Franchise Ordinance actually imposed an excise tax:

1. A 1979 Commission Order defined "reasonable franchise fees as those which local jurisdictions have historically imposed"; and
2. A 1982 legislative act forbid municipalities from charging fees except to the extent the fees covered the municipality's costs; and
3. Since no local jurisdiction has imposed a franchise fee based on revenues in the last twenty years, the historical level of franchise fees based on revenues is zero percent; therefore
4. Franchise fees greater than zero percent are excessive and unreasonable, and thus an excise tax.

In short, the UTC staff reasoned that any franchise fee based on revenues is actually an excise tax.[26] Having now characterized the Yakama Nation's franchise fee as a tax, the UTC staff concluded that the fair rate treatment would be to allow utilities to pass the tax through to customers within the external boundaries of the Yakama Nation. The Commission agreed and permitted the tariffs.

IV. ISSUE PRESENTED

Are utilities authorized by law to characterize charges for use or occupancy of tribal property as a tax, rather than a cost, for tariffs?

V. ANALYSIS

5.1 Franchise Fees Are Not Taxes.

5.1.1 Fees and taxes distinguished.

Washington common law holds that a "tax" is a payment whose primary purpose is to raise general revenue for the operation of government.[27] A "tax" is a general charge levied against persons or property to raise money for the public treasury to fund the public purposes of government:

[26] *Open Meeting Memo*, Docket Nos. UG-021502 and UG-021576.
[27] E.g., *Covell v. Seattle*, 127 Wn.2d 874, 879-89, 905 P.2d 324 (1995).

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

> Taxes are defined to be burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes or, more briefly, an imposition for the supply of the public treasury.[28]

Since a "tax" raises general revenue for the government's operation, there is no necessary connection between (1) the person who bears the burden of paying a tax dollar – i.e., the "taxpayer", and (2) how or for whose benefit that dollar is spent.[29]

In contrast, a charge for the use of public property is neither a "tax" nor a licensing or regulatory "fee".[30] Instead, it is more akin to a "rent" for the use of public property.[31] Under a municipal utility franchise, a public utility is given the right to use public rights-of-way for its lines, poles, gas lines and the like.[32] When the utility acquires the right to occupy streets, it acquires a franchise. When that same utility actually occupies the municipal property pursuant to the franchise, it is in effect acquiring a property interest.[33] As consideration for the franchise,

---

[28] *State ex rel. Nettleton v. Case*, 39 Wash. 177, 182, 81 P. 554 (1905); accord, *Hillis Homes v. Snohomish Co.*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (*Hillis Homes I*). This underlying feature of a "tax" is neither novel nor new. As John Locke wrote about "taxes" over 300 years ago: "'Tis fit everyone who enjoy his share of the protection [of government] should pay out of his estate his proportion for the maintenance of it." *Two Treatises on Government* (original ed. 1690), Mentor Books (1965) at 408. Confirming the consistency of this concept that taxes raise general revenue for government not specifically tied to the "benefit" each taxpayer receives, one of today's leading public finance economists (David Hyman) writes: "Taxes, the principal means of financing government expenditures, are compulsory payments that do not necessarily bear any direct relationship to the benefits of government goods and services received." David Hyman, *Public Finance: A Contemporary Application of Theory to Policy*, (3d ed. 1990) at 2. The common law principal that a "tax" raises general revenue to fund the general operation of government is accordingly based on the state's sovereign power "to raise revenue to defray the expenses of government and to distribute its burdens equitably among those who enjoy its benefits." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279, 76 L.Ed. 1102, 52 S.Ct. 556 (1932); *Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175 (1935).

[29] E.g., *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 33-34, 211 P.2d 651 (1949), *reversed on other grounds, State ex rel. Washington State Finance Committee v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963).

[30] See e.g., *City of San Diego v. Southern Cal. Tel. Corp.*, 266 P.2d 14 (Cal. 1954).

[31] See, *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200, 278-280, 142 P.2d 498 (1943); Roger D. Colton & Michael F. Sheehan, "*Raising Local Government Revenue through Utility Franchise Charges; If the Fee Fits, Foot It*," 21 Urb. Law. 55 (1989).

[32] See e.g., McQuillan, *THE LAW OF MUNICIPAL CORPORATIONS*, §34.01 (3rd Ed. 1986).

[33] See e.g., 36 Am.Jur.2d *Franchise*, 3 (1943)("The right to occupy streets is a franchise; the actual occupation of them in that way, pursuant to a franchise, is the exercise of an easement.")

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

the local government can insist upon "rent" for the use of public property.[34] However, unlike "regulatory fees," charges for the use of public property do not have to be limited to administrative costs – a municipality has the right to earn a profit on its proprietary activities.[35]

5.1.2 The *Pacific Tel. & Tel.* Decision – Washington Supreme Court Case Law Forbids the UTC From Characterizing Franchise Fees as Taxes.

In *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200, 142 P.2d 498 (1943), the Washington Supreme Court recognized that the "matter of payments to municipalities under franchise provisions presents a different question from that … concerning payments made pursuant to municipal taxing ordinances."[36] *Pacific Tel. & Tel.* involved a challenge to a decision by the UTC's precursor - the State Department of Public Service - to allow a utility to pass franchise fees to the local ratepayers. Several cities had granted a utility "franchises authorizing [the utility] to place its poles, wires, and conduits in the public streets, the franchises requiring [the utility] to pay to the cities, respectively, certain sums of money based upon agreed percentages of [the utility's] gross income from the rate payers residing in the respective cities".[37] Concluding – as the UTC did here - that the franchise fees should be treated as taxes, the Department entered an order allowing the utility to pass the franchise fees on to the ratepayers residing in the respective order.

The Washington Supreme Court disagreed, stating that the "matter of payments to municipalities under franchise provisions presents a different question from that … concerning

[34] See e.g, *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252, 259, 39 S.Ct. 265, 63 L.Ed. 590 (1918); *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941); *City of Beaumont v. Gulf State Utilities Co.*, 163 S.W.2d 426, 428 (Tex. Civ. App. 1942); *City of San Diego v. Southern California Telephone Corp.*, 266 P.2d 14 (Cal. 1954); *City of Corpus Christi v. Southern Community Gas Co.*, 368 S.W.2d 144, 147 (Tex. Civ. App. 1963).

[35] See, Roger D. Colton & Michael F. Sheehan, "*Raising Local Government Revenue through Utility Franchise Charges; If the Fee Fits, Foot It,*" 21 Urb. Law. 55, 70 (1989). Washington courts have recognized that public agencies can charge a rent for use of public property that exceeds administrative costs. See e.g, *King County v. Taxpayers of King County*, 133 Wash.2d 584, 598-600, 949 P.2d 1260 (1997)(County allowed to set rent on profession baseball team that required annual payments of $700,000 and profit sharing).

[36] *State ex rel. Pacific Telephone and Telegraph Co. v. Department of Public Service* (hereafter "*Pacific Tel. & Tel. Co.*"), 19 Wn.2d 200, 278, 142 P.2d 498 (1943).

[37] *Ibid*. at 270.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

payments made pursuant to municipal taxing ordinances."[38] The Court began with observing that:

> A franchise is "a special privilege conferred by the government on an individual or individuals and which does not belong to the citizens of the country generally, of common right." Such a franchise as those with which we are here concerned is a contract between a municipal corporation and a person who has applied for leave to engage in certain business operations of a public nature within the limits of the municipality. Franchises granted to respondent include the right to place poles, wires, and conduits within the public streets. Any person desiring such a franchise must apply therefor to the municipal corporation. If his application be favorably considered, a franchise is offered upon certain conditions. This offer the applicant may accept or refuse. [39]

The Court further noted that "franchises granted to public utilities vary greatly as to the obligations assumed by the grantee."[40] Some franchises require "payment of certain percentages of [the utility's] gross income received within the territorial limits of the grantor." [41] Others require the utility to furnish to the municipality certain services without charge.[42]

Unlike a tax, however, the benefits of the franchise do not run solely to the municipality. The franchise grants a useful right to the utility – the privilege of placing utility facilities on land owned or controlled by the municipality:

> On the other hand, respondent, under the franchises, enjoys the privilege of using the public streets, subject to certain conditions, for installation of its apparatus. This latter right is, of course, valuable, and indeed necessary, and is a privilege for which a cash payment may reasonably be exacted.[43]

Another way of phrasing this is that the privilege granted to the utility by a franchise is analogous to a lease or an easement of city property:

> If the [utility] desired to use some available city property, it might well negotiate a lease and pay a rental therefor. If the use of the property were necessary in the conduct of [the utility's] business, such rental would undoubtedly be considered by the rate-making authority a proper operating expense.

As the Court reasoned, "if the use of the property were necessary in the conduct of respondent's business, such rental would undoubtedly be considered by the rate-making

---

[38] *Ibid*. at 281.
[39] *Ibid.* at 278.
[40] *Ibid.*
[41] *Ibid.*.
[42] *Ibid.*
[43] *Ibid.*

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

authority a proper operating expense."[44] Accordingly, the Court concluded that the Department's order to treat the franchise fees as taxes was an error of law:

> We are convinced… that payments made… under franchises such as those here in questions, **as a matter of law** fall within the classification of general operating expenses, and that the department erred in… according to [the utility] the right to charge such franchise payments to the ratepayers of the respective cities. [45]

Admittedly, it is possible that a municipality might impose a franchise fee that is so excessive as to cause a manifest injustice. In those circumstances, the franchise fee should not be classed as general operating expenses and ratemaking agency "might well, if it deemed a franchise exaction so excessive as in part to amount to a tax, apportion the payment between general operating expense and the local rate payers." [46]

But, the Court emphasized that this would be the exception to the rule, not the rule itself. The general rule in the United States is that franchise fees are not taxes.[47] As a result, they are not to be treated as taxes for ratemaking purposes:

> While the distinction between payments made by [utilities] pursuant to franchises which it enjoys, and payments made pursuant to municipal taxing ordinances may seem rather finely drawn, we are convinced that a distinction in fact exists, and that, as to the former class, the law requires that such payments be considered as general operating expenses, and that (subject to the exception above noted as to an excessive or unreasonable exaction) the department lacks legal authority to direct or permit respondent to pass such payments along to the rate payers within the respective cities within which [the utility] is operating pursuant to the franchises. [48]

In sum, under Washington law as set forth in *Pacific Tel. & Tel.*, franchise fees requiring utilities make payment of a percentage of gross receipts derived from their operation in a

---

[44] *Ibid.* at 278-279.
[45] *Ibid*. at 281.
[46] *Ibid*. at 282.
[47] See, e.g., *Alachua County v. Florida*, 737 So.2d 1065 (Fla.1999) (franchise fees collected from utilities are not taxes); *Santa Rosa County v. Gulf Power Co.*, 635 So.2d 96 (Fla.Dist.Ct.App.1994) (franchise fee to use right-of-way is not a "tax"); *City of Chicago v. Chicago Fiber Optic Corp.*, 287 Ill.App.3d 566, 222 Ill.Dec. 821, 678 N.E.2d 693, 698 (1997) (franchise fee for telecommunications corporation's use of city public ways and tunnel system for fiber optic cable is not an illegal "toll"); *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill.App.3d 617, 217 Ill.Dec. 274, 666 N.E.2d 1212, 1217 (1996) (franchise fees and taxes have different purposes meriting distinct treatment); *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 337 S.C. 35, 522 S.E.2d 804, 806 (1999) ("tax" is enforced contribution to support government, but "fee" is charge for particular benefit to payer).
[48] *Ibid*, at 281.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

jurisdiction are not taxes unless they are so excessive so as to constitute a manifest injustice. [49] Moreover, the Commission is without legal authority to allow a utility to pass those payments on to the ratepayers residing within the jurisdiction – instead, the payments must as a matter of law be treated as general operating expenses. [50]

5.1.3 National Authority Is Consistent with Washington Law.

As the United States Supreme Court noted in 1893, the use of public property by utilities "effectually and permanently dispossess the general public" of property being used so that cities, as trustees of the city property, have a right to compensation for that use.[51] In 1884, the city of St. Louis enacted an ordinance requiring each telegraph and telephone company to pay a fee of five dollars per pole for each pole "erected or used" by the company in the "streets, alleys and public places" of the city. In sustaining the right of the city to impose that fee against a challenge by Western Union Telegraph Company, the United States Supreme Court distinguished the charge from a "tax". According to the Court, the St. Louis fee "is more in the nature of a charge for the use of property belonging to the city – that which may be called rental."[52] In *Western Union*, the United States Supreme Court made a distinction between the City of St. Louis acting in a "proprietary" and in a "sovereign" capacity. A "tax," the Court said, "is a demand of sovereignty; a toll is a demand of proprietorship."[53]

Charging for the use of municipal land through an income-based fee can take many forms.[54] Charges calculated as a basis of gross receipts have been commonly made a part of local utility franchise contracts and accepted as valid.[55] In *City of San Diego v. Southern California Telephone Corp.*, the California Supreme Court considered charges on a utility's

---

[49] *Ibid*. at 278.
[50] *Ibid*. at 281(Emphasis Added).
[51] *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99, 13 S.Ct. 485, 37 L.Ed. 380 (1893).
[52] *Ibid*. at 97.
[53] *Ibid*. at 99.
[54] See, McQuillan, *THE LAW OF MUNICIPAL CORPORATIONS*, §34.37 (3rd Ed. 1986).
[55] See, Roger D. Colton & Michael F. Sheehan, "*Raising Local Government Revenue through Utility Franchise Charges; If the Fee Fits, Foot It*," 21 Urb. Law. 55, 74 (1989).

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

gross receipts. No question existed but that the gross receipt exaction was for the use of city property. As the court expressly stated: "The payment required is not a tax upon the property of the corporation, nor a license charge for the privilege of operating its business. It is compensation for the use of the portions of the highway covered by the franchise easements."[56]

Other courts have come to the same conclusion. In *Nashville Gas & Heating Co. v. City of Nashville,*[57] the city had imposed a 5 percent gross receipt charge above and beyond its basic franchise charge.[58] The gross receipts fee was considered "compensation required by the City to be paid for the use of its streets, i.e., a rental payment or payment in the nature of rental…." [59] The Tennessee Supreme Court upheld the charge against the challenge that it was in fact a tax.[60]

More recently, the Colorado Supreme Court was faced with a franchise fee set at 2 percent of the gross receipts of Rocky Mountain Natural Gas Company.[61] The Colorado Public Utilities Commission directed Rocky Mountain to compute its rates without including the cost of the franchise fee and then to surcharge the rates of municipal residents with the cost. The Colorado Supreme Court reversed, finding that the franchise fee was "merely a change in the form of assessing the costs of doing business…."[62] The court noted that "incident" to the franchise was the acquisition of "right-of-way to create a line within the municipality without having to condemn land each time and pay damages therefor and the right to make repairs without having to compensate the city." [63] The purpose of the franchise, the court said, was "to substitute the agreed franchise charge for the actual cost to Rocky Mountain of carrying on its business" rather than go through the expense and inconvenience of condemnation and payment for damages. [64]

---

[56] *City of San Diego v. Southern California Telephone Corp.*, 266 P.2d 14 (Cal. 1954).
[57] *Nashville Gas & Heating Co. v. City of Nashville,* 152 S.W.2d 229 (Tenn. 1941)
[58] *Ibid*, at 230.
[59] *Ibid*, at 233.
[60] *Ibid*, at 233-34.
[61] *City of Montrose v. Public Utilities Commission,* 197 Colo. 119, 590 P.2d 502 (1979).
[62] *Ibid*, at 505.
[63] *Ibid*, at 504-505.
[64] *Ibid*, at 505.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

5.1.4 UTC Precedent Conforms to *Pacific Tel. & Tel*.

Although the decision is now nearly sixty years old, the Washington Supreme Court has not overruled or otherwise commented on *Pacific Tel. & Tel.* It remains the law of Washington State on this matter and until the recent Cascade and PacifiCorp tariffs, the Commission has acted in accordance with the *Pacific Tel. & Tel.* decision. In a 1980 order, the UTC concluded that "franchise fees which municipalities in the State of Washington have historically imposed on revenues derived from sales made by public utility companies within their corporate limits average approximately 2.5 percent. Expenses attributable to any such franchise fees not exceeding 3 percent are reasonable expenses to include in general operating expenses."[65]

5.2 The Yakama Nation Franchise Ordinance Charges Utilities a Franchise Fee and Does Not Impose a Tax.

In exchange for the right to place utility facilities on lands owned or controlled by the Yakama Nation, the Yakama Nation Franchise Ordinance requires utilities to pay three percent of the utilities gross operating revenue for utility service within the external boundaries of the Reservation.[66] On its face, the Franchise Ordinance states that it is imposing the franchise fee to compensate the Nation for the utilities' use of tribal land. The Nation's right to impose such a franchise fee arises in contract, not tax.[67] The utilities do not have to agree to the terms of the Franchise Ordinance, they can always procure an easement over private property not controlled by the Nation. As the *Pacific Tel. & Tel.* Court observed:

> It might well be that [the utility] would find it convenient to procure an easement over private property outside the municipal limits, for the purpose of placing its poles and wires. Money paid for such an easement would certainly be properly classed as an operating expense. It seems reasonable to consider that payment of a certain proportion of [the utility's] gross income collected from ratepayers within the city limits be considered as compensation for use of the streets, if no other provision has been made for the payment for the privilege. Such franchise payments, if considered as compensation for use of the streets, would be properly classed as a general operating expense.[68]

---

[65] UTC Cause Nos. U-79-43, U-79-49, U-79-50, Finding 18 (Emphasis Added).
[66] Section 5.1 of the Franchise Ordinance.
[67] *City of Lakewood v. Pierce County*, 106 Wn.App. 63, 77, 23 P.3d 1 (2001).
[68] *Ibid*. at 279 (Emphasis Added).

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Similarly, the Nation's franchise fee for continued use of property is properly classified as a general operating expense of the utilities, not as a municipal tax. The Commission should have followed the direction of the Washington Supreme Court and its prior tariff rulings and treated the Nation's franchise fee as a general operating expense.

5.2.1 A 3% franchise fee charged by the Yakama Nation for use of tribal land is neither excessive nor unreasonable.

A 3% franchise fee charged by the Nation for this privilege is neither excessive nor unreasonable. As noted above, in 1980 the Commission concluded that "[e]xpenses attributable to any such franchise fees not exceeding 3 percent are reasonable expenses to include in general operating expenses."[69] Under the existing UTC precedent, a franchise fee not exceeding three percent is presumptively reasonable.

Since the Commission entered no findings, it is impossible to state with certainty why existing case law and UTC precedent was not followed regarding the Yakama Nation Ordinance. The UTC staff, however, asserted in their Open Meeting Memo that as a result of a 1982 law prohibiting municipalities from imposing a franchise fee or charge upon utilities "for the use of the right of way,"[70] all franchise fees based on gross receipts must be "excessive" and "unreasonable."[71] Under RCW 35.21.860, Washington cities may only recover the administrative costs associated with the franchise.

It should go without saying that RCW 35.21.860 has absolutely no bearing on the authority of the Yakama Nation to impose franchise fees for the use of the right of way.[72] The authority of the Nation to charge a "rent" for the use of tribal land is a question of federal law, not state law. Assuming that the Nation has the authority to charge a franchise fee based on gross receipts for use of tribal land, the Commission is bound by *Pacific Tel. & Tel. Co* – if the

---

[69] UTC Cause Nos. U-79-43, U-79-49, U-79-50, Finding 18 (Emphasis Added).
[70] RCW 35.21.860.
[71] *Open Meeting Memo*, Docket Nos. UG-021502 and UG-021576.
[72] See, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) (Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state); see also, Felix S. Cohen, *FEDERAL INDIAN LAW*, 259-79 (1982 Ed.)

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Nation's charge is not unreasonable for the "use of the right of way," the charge must be characterized as a general operating expense. Under the holding in *Pacific Tel. & Tel. Co.*, the Commission lacks the legal authority to allow PacifiCorp or Cascade to pass the charges to the residents of the City of Toppenish. [73]

5.2.2 The Commission must defer to the Nation's characterization of its Franchise Ordinance.

In finding that the Nation's charges on utilities operating on Reservation land were a tax despite the plain language in the Franchise Ordinance stating that the charges were franchise fees for the privilege of operating on tribal land, the Commission violated Washington law. RCW 37.12.070 provides:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this statute.

Washington courts have interpreted this statute to mean that unless the tribal ordinance is "necessarily inconsistent" with the civil law of the state, the ordinance shall be given full force and effect.[74] For example, in *Makah Indian Tribe v. Clallam County*,[75] the Washington Supreme Court held that, notwithstanding Washington community property requirements, an Indian on a reservation should be given control over community property based upon tribal customs.

Here, the Commission should have given the Nation's characterization of its own Franchise Ordinance proper deference, treating what the Nation enacted as a franchise fee like a franchise fee, *i.e*, not a tax.[76] Only if treating the charges imposed under the Nation's Ordinance as franchise fees was "necessarily inconsistent" with Washington law, can the

[73] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 278.
[74] *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 685, 440 P.2d 442 (1968).
[75] *Ibid*.
[76] UTC staff asserted that the Yakama Nation Franchise Ordinance "is similar" to the tax imposed by the Lummi Nation in *Brannan v. Quest*. Dockets UT-010988, TG-010989, UE-010990, UE-010995, UT-010966, and TG-011084. However, *Brannan* involved charge characterized by the Lummi Nation as a business utility tax and not a franchise fee.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Commission lawfully disregard the Ordinance's own characterization.[77] Since the Nation's characterization of the franchise charges as franchise fees is not inconsistent with Washington law – *Pacific Tel. & Tel.* requires such a characterization – the Commission's disregard of the tribal ordinance violated the parameters of its authority.

5.3 A Tribal Tax Cannot Be Passed on to the Residents of a City Outside the Tribe's Taxing Jurisdiction.

Since the Nation's Franchise Ordinance does not impose a tax, it should be unnecessary for the Commission to determine whether payments of that tax can be passed through to the residents of the City. However, assuming *arguendo* that the Nation's Franchise Ordinance imposes a tax - and not a franchise fee - on utilities, the Commission erred by allowing Cascade and PacifiCorp to pass that tax on to the residents of the City. The City is not within the jurisdiction of the Nation to impose a tax. Utilities cannot pass the Nation's tax through to the residents of the City.

5.3.1 Under Washington Law, a Municipal Tax Cannot Be Passed on to Residents Outside of the Jurisdiction Imposing the Tax.

The authority of the Commission to allow payments made by a utility under a municipality's taxing ordinance to be passed on to the ratepayers in the respective municipal corporation was recognized by the Washington Supreme Court in *Pacific Tel. & Tel.*:

> We are convinced that the department, in so far as taxes are concerned, has the power to fix special exchange rates applicable to the different communities, which will in effect require the rate payers in each community to absorb a sum equal to the amount of the tax which respondent is required to pay to **that** municipality.[78]

In *King County Water District No. 75 v. City of Seattle* the Court held that collection of such taxes must be exacted only from the beneficiaries of that tax – utilities cannot pass on local taxes "to ratepayers residing outside the jurisdiction imposing the tax."[79] For example, a utility cannot collect a local tax imposed by a city from customers residing in areas outside of the

[77] *Makah Indian Tribe*, 73 Wn.2d 685.
[78] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 277 (Emphasis added).
[79] *King County Water District No. 75 v. City of Seattle*, 89 Wn.2d 890, 901, 577 P.2d 567(1978).

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

city's jurisdiction, even when the city tax is based on the utility's gross revenues regardless of whether the income was generated from within or without the city.[80] In *King County Water District No. 75*, the Washington Supreme Court held that the Seattle Water Department could collect revenues to pay Seattle's business and occupation tax only from the beneficiaries of the tax, the utility customers residing in Seattle.[81]

The Court has recognized certain circumstances when a city may impose its utility tax on the gross income of the utility received from nonresident customers. In *Burba v. City of Vancouver*, the Court upheld the application of a utility tax imposed by the City of Vancouver on nonresident customers.[82] *Burba* involved nonresident retail customers in the unincorporated areas near Vancouver that were directly served by that city; they received their water directly from Vancouver wells and all their sewage was returned to Vancouver for treatment.[83] The Court concluded that the *Burba* utility tax was lawful because "the taxable event at issue occurs substantially within the city limits and a sufficient nexus exists between the City and the event taxed to justify its utility assessment against resident and nonresident users."[84]

Here, there is no such nexus between the residents of the City and the Yakama Nation's utility tax. The Yakama Nation does not provide utility service to the residents of the City. The residents of the City are not beneficiaries of the Yakama Nation tax and the Commission is thus controlled by *King County Water District No. 75*. Assuming the UTC staff is correct and the Nation's Franchise Ordinance imposes a tax, the *King County Water District No. 75* decision prohibits the Commission from allowing payments made by a utility under Ordinance to be passed on to ratepayers outside the jurisdiction of the Nation. Since the City is not within the Nation's jurisdiction to impose a tax, the Commission cannot allow the utility to pass payments of the Nation's tax through the residents of the City.

---

[80] *Ibid*. at 903 (citing *Re Cortez Nat. Gas. Co.*, 14 P.U.R.3d 105 (Colo. Pub. Util. Comm'n 1956)).
[81] *Ibid*. at 903.
[82] *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989).
[83] *Ibid.* at 804.
[84] *Ibid.* 113 Wn.2d at 810.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

5.3.2 An Indian Tribe's Tax Authority Only Extends to Trust Lands.

As a preliminary matter, an Indian tribe's inherent power to tax only extends to "transactions occurring on trust lands and significantly involving a tribe or its members."[85] Absent Congressional authorization, Indian tribes do not have authority over the activities of nonmembers on non-Indian fee lands.[86] In *Montana v. United States*, the United States Supreme Court recognized two exceptions to this general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [First,] [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual dealings, contracts, leases, or other arrangements. [Second,] [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[87]

Arguably, the first *Montana* exception would permit the Nation to tax the activities of those utilities that have entered into a consensual relationship with a tribe by agreeing to provide utility service on the Reservation.[88] The utilities could pass the tax on to non-Indian residents on fee lands within the Reservation.[89]

5.3.3 The City Is Not Within the Yakama Reservation or on Yakama Allotment Lands.

The utilities, however, can not pass the tax on to the residents of the City – since they do not reside on fee lands within the Reservation. In 1905, by means of a special act, the lands now comprising the City were conveyed by the United States Congress to Josephine Lille with "absolute fee-simple title thereto, free and clear from any trusts or reservations, and with full

---

[85] *Merrion v. Jicarilla Apacahe Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645, 653, 121 S.Ct. 1825, 1832, 149 L.Ed.2d 889 (2001) ("An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land.").

[86] *Montana v. United States*, 450 U.S. 544, 564-65, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

[87] *Montana*, 450 U.S. at 565.

[88] See, *Big Horn Electric Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000)

[89] *Pacific Tel. & Tel. Co.*, 19 Wn.2d at 277; *King County Water District No. 75*, 89 Wn.2d at 901.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

power in her to dispose of the same without restriction."[90] That Act of Congress explicitly stated that the Dawes Act provisions reserving limited tribal interest in the land "shall not hereafter apply to or affect the said real property, and the patent hereto issue to her, bearing the date July 10, 1897, and recorded in Volume 52, Page 235, in the records of the General Land Office, be, and the same is hereby, canceled and held for naught."[91] Similar provisions are contained in the special Acts of Congress for the other plots that made up the City.[92] By making the land that became the City "free and clear from any trusts or reservations," Congress made "clear and plain" its intent to remove the land from the Yakama Reservation.[93]

As a result of these Acts of Congress, the State of Washington and its political subdivision, the City, acquired primary jurisdiction over the land.[94] The State was permitted to incorporate the City. Applying the test adopted by the United States Supreme Court in *South Dakota v. Yankton Sioux Tribe*, the special Acts of Congress had the effect of removing the areas that became the City from the Reservation.[95]

The Nation has no authority to impose a tax on non-Indian resident within the City. Although the Nation may have the authority under one of the *Montana* exception to impose a tax on non-Indian residents on fee lands within the Reservation – Congress removed the City from the Reservation. Since Washington law forbids the utilities from passing local taxes "to ratepayers residing outside the jurisdiction imposing the tax,"[96] if the Nation's Franchise

---

[90] United States Statutes at Large, Fifty-eight Congress, Sess. III, Ch. 1479 (1905).
[91] United States Statutes at Large, Fifty-eight Congress, Sess. III, Ch. 1479 (1905).
[92] United States Statutes at Large, Fifty-ninth Congress, Sess. I, Ch. 3504 (1906).
[93] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 797-798, 139 L.Ed.2d 773 (1998) (citing *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d (1984)).
[94] *Yankton Sioux Tribe*, 522 U.S. at 343.
[95] *Yankton Sioux Tribe*, 522 U.S. at 343-344 ("The most probative evidence of congressional intent [to remove land from an Indian reservation] is the statutory language, but the Court will also consider the historical context surrounding the Act's passage, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there."); *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164; *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994).
[96] *King County Water District No. 75*, 89 Wn.2d at 901.

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

Ordinance imposes a tax and not a franchise fee, the Commission erred by allowing the utilities to pass that tax on to the residents of the City.

VI. CONCLUSION

The fees charged to utilities operating within the Yakama Reservation pursuant to the Yakama Nation's Franchise Ordinance are precisely what they purport to be – a franchise fee paid in exchange for the utility's ability to continue operating within the Reservation. The fees are not taxes and the Commission's characterization of the franchise fees as taxes is outside of the Commission's legal authority pursuant to the *Pacific Tel. & Tel.* decision.

The Nation's right to regulate and charge for use of Reservation land is not at issue. What is at issue has already been conclusively determined by the Washington Supreme Court. Under existing Washington law, the Commission cannot allow PacificCorp or Cascade to pass the franchise fees on to the residents of the City. Even assuming that the Commission correctly characterized the Nation's franchise fees as taxes, the Commission cannot allow the utilities to pass those taxes on to the residents of the City – since the City is outside of the Nation's jurisdiction.

The City respectfully requests the Commission modify the tariffs filed in Docket Nos. UG-021502 and UG-021637 so that the Nation's franchise fees are treated as general operating expenses of the utilities. In the alternative, the City respectfully requests that the Commission modify the above tariffs so that the utilities do not pass payments made pursuant to the Nation's Franchise Ordinance on to residents of the City.

RESPECTFULLY SUBMITTED this ____ day of September 2003.

FOSTER PEPPER & SHEFELMAN PLLC

P. Stephen DiJulio, WSBA # 7139
Jeffery A. Richard, WSBA No. 28219
Attorneys for City of Toppenish

FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400