

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

Terry McNeill, et al.,)	
)	Docket No. UT-010996
Complainants,)	
)	RESPONDENT VERIZON NORTHWEST
v.)	INC.'S ANSWER TO COMPLAINT
)	
Verizon Northwest, Inc.,)	
)	
Respondent.)	

ANSWER OF VERIZON NORTHWEST INC.

Verizon Northwest Inc. (Verizon) 1800 41st Street, Everett, Washington 98201 hereby submits its answer in accordance with the Washington Utilities and Transportation Commission's "Notice of Complaints and Requirement for Answer" dated July 13, 2001. The complaint seeks to discontinue Verizon's application of a charge to cover payment of a Utility Business Activity tax to the Swinomish Tribal Community.

Verizon denies all allegations of the complaint not expressly admitted.

Answer

1. As to the allegations set forth in the first paragraph of the complaint, Verizon admits that it passes through to its customers receiving service within the exterior boundaries of the Swinomish reservation the Swinomish Utility Business Activity Tax (the "Swinomish tax"). This tax is imposed on Verizon by the Swinomish Indian Tribal Community. As to the aggregate amount of the Swinomish tax passed through to "fee land residents," Verizon is presently

without knowledge of information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

2. As to the second paragraph of the complaint, Verizon is presently without knowledge of information sufficient to form a belief as to the truth of the allegations regarding the fee-owning status of the signatories and whether those signatories have been charged the Swinomish tax, and therefore denies the same.

3. As to the third paragraph of the complaint, this paragraph contains legal conclusions and requires no answer. Nevertheless, Verizon offers its analysis of the cases cited in the third paragraph of the complaint (see “Analysis of Applicable Law,” below).

Affirmative Defenses

4. The complaint fails to state a claim upon which relief can be granted. (Verizon incorporates by reference its “Analysis of Applicable Law,” below.)

5. At all relevant times, Verizon acted in accordance with its tariffs and applicable law.

6. Some or all of complainants’ claims are barred for lack of jurisdiction.

7. Some or all of complainants’ claims are barred by the doctrines of estoppel or res judicata.

8. Verizon cannot be compelled to challenge the validity of the Swinomish tax in any court.

Analysis of Applicable Law

The Allegations

On July 9, 2001, twenty-eight individuals (Complainants) filed a complaint requesting that the Commission "remove" the Swinomish Utility Business Activity tax from the tariffs of Verizon and other companies to the extent the tax is passed-through to non-tribal members on "fee-land" within the Swinomish Reservation. The Complainants assert that this tax is invalid under Atkinson Trading Co. v. Shirley, 121 S.Ct. 1825 (May 29, 2001) and Big Horn Electric Cooperative v. Adams, 219 F.3d 944 (9th Cir. 2000).

The Commission's Lummi Order

The issue presented here – the legality of a utility tax levied by an Indian tribe – was addressed by the Commission in Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., First Supplemental Order, Docket No. UT-911306 (Aug. 25, 1992) [hereinafter the *Lummi Order*]. There, U S WEST filed tariff revisions to recover a five percent gross receipts tax levied by the Lummi Indian Tribe upon telephone service revenues generated within the boundaries of the Lummi Indian Reservation. Several non-Lummi residents of the reservation opposed the tariff filing, arguing that the Lummi tax was illegal. The Commission noted that it was not empowered to decide if the Lummi utility tax was valid; instead, the Commission examined the prudence of U S WEST's payment of that tax. (*Lummi Order* at 4.)

The Commission held that U S WEST acted prudently in paying and not challenging the tax, because (1) the tax was "not clearly invalid" and (2) "the

relatively small amount of the tax [\$15,757 for two years] did not justify the expenditure of many times more dollars [hundreds of thousands of dollars] on a court challenge to the tax.” (*Lummi Order* at 5.) The Commission noted that the tax supported, among other things, fire department services and paramedics, and held that “it is not unjust to require residents of a jurisdiction to pay taxes for the common good, even to fund services which they may never use.” (*Lummi Order* at 6.) The Commission therefore approved U S WEST’s tariff revisions and allowed U S WEST (and other utilities) to pass-through this tax to all Lummi Reservation customers.

The Swinomish Tax and Verizon’s Tariff

In August 1998 the Swinomish Tribal Community enacted Ordinance No. 126 (copy attached), which created a Utility Business Activity tax, to be imposed beginning January 1, 1999. On its face, this tax applies to Verizon’s sale of retail telecommunications services for premises located within the boundaries of the Swinomish Reservation, regardless of whether the premises are Indian or non-Indian land or the customer is a member of the tribe or not. The levy is three percent of Verizon’s gross receipts from such sales.

Pursuant to the precedent of the *Lummi Order*, Verizon filed tariff revisions to establish a charge that passes through the tax. The tariff revisions are effective. Verizon collects the charge from its customers and remits the tax to the tribe.

Verizon’s Swinomish Tariff Charge is Prudent

Applying the Lummi Order to this case, Verizon has acted prudently in not challenging the Swinomish tax, and therefore the complaint should be dismissed. Here, as there, the utility tax helps support various government services, including fire protection and emergency medical services. (See Ordinance No. 126at Sections 1.020 and 1.030). Here, as there, the “relatively small amount of the tax” – Verizon collected \$14,880 in 2000 – “does not justify the expenditure of hundreds of thousands of dollars on a court challenge to the tax.”

Nor is the tax “clearly invalid.” Complainants assert that the tax is invalid under the post-Lummi Order Atkinson and Big Horn court rulings, but these cases are distinguishable from the Swinomish situation.

In Atkinson, the Supreme Court struck down a Navajo Tribe tax levied on guests staying at a non-Indian hotel located on non-Indian land within the Navajo Reservation. Under the legal principles applied by the Court, the tax could not stand because there was no commercial relationship between the tribe and the affected hotel and its guests. In this case, on the other hand, Verizon is doing business generally on the entire reservation.

In Big Horn, the Ninth Circuit Court of Appeals struck down an *ad valorem* property tax levied on an electric cooperative's non-Indian property on the Crow Reservation. The court ruled that while a commercial relationship existed between the electric utility and the tribe because the utility provided electric services on the reservation, the tribe was not authorized to impose a property tax -- as opposed to a tax on the cooperative's commercial "activities" within the

reservation. The Swinomish tax is not an ad valorem tax; rather, it is a tax on Verizon's activities on the reservation (a three percent gross receipts tax).

Thus, the two decisions cited in the complaint do not render the Swinomish tax "clearly invalid," and the Commission's *Lummi Order* remains applicable.

WHEREFORE, Verizon requests that the Commission dismiss the complaint.

Respectfully submitted,

Verizon Northwest Inc.

By _____

Charles H. Carrathers III
Vice President and General Counsel
P.O. Box 152092
HQE02H20
Irving, TX 75015-2092
972-718-2415
Fax: 972-718-3926

Date: August 3, 2001