BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General, Complainant, vs. CASCADE NATURAL GAS CORPORATION; PACIFICORP dba PACIFIC POWER & LIGHT COMPANY, Respondents.	Docket No. U-30744 **CASCADE'S MOTION FOR SUMMARY DETERMINATION PURSUANT TO WAC 480-09-426**

I. INTRODUCTION

The essence of Public Counsel's Complaint is that utilities such as Cascade Natural Gas Corporation ("Cascade") should be required to challenge tribal exactions in federal court, even if those exactions are not clearly unlawful. This argument is contrary to the Commission's existing standard for determining when a tax is prudently incurred and can be passed through to ratepayers. This dramatic change, which would place onerous new burdens on regulated utilities and the Commission, is unwarranted by law or public policy. Public Counsel's Complaint should be dismissed in its entirety.

Interveners Elaine Willman, et al. ("Willman") and the City of Toppenish ("Toppenish") claim that even if the Yakama Nation exaction is an expense prudently incurred by Cascade, the exaction should be treated as a franchise fee to be allocated among ratepayers statewide. The Commission has already thoughtfully considered and rejected this argument. The Yakama Nation exaction has all the hallmarks of a tax, including compelled payment absent any contractual agreement and a purpose of generating revenue. Thus, the Commission should grant summary determination in favor of Cascade dismissing Willman and Toppenish's petitions.

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II. FACTS

A. The Commission Previously Considered the Yakama Ordinance and Allowed Cascade's Tariff to Take Effect.

In August 2002, the Yakama Nation passed an ordinance that required utilities providing service within the external boundaries of the Yakima Indian Reservation (the "Reservation") to pay a fee equal to three percent of the utility's gross operating revenue within the Reservation. Administrative Record ("AR")[1] 9-13 (Yakama Nation Franchise Ordinance, § 5). Under the terms of the Yakama Ordinance, a utility company must pay this fee regardless of whether it enters a franchise agreement with the Yakama Nation:

> 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.

Yakama Ordinance, § 5.3. The Yakama Ordinance became effective on September 5, 2002.

Cascade filed a tariff revision[2] to collect the charge imposed by the Yakama Ordinance from its customers within the Reservation boundaries as a municipal tax. AR 18–20, Docket No. UG-021502. The Commission considered this revision at public meetings on November 27 and December 11, 2002. AR 64–100, 173–213. Willman, personally and through her attorney Eric Richter, participated in these proceedings. Toppenish submitted written comments on the proposed tariff. AR 104.

The Yakama Nation also participated in the public hearings. The Yakama Nation's counsel acknowledged during one of the public hearings that: "the Yakama Nation agrees wholeheartedly with the Brannan decision which says 'It is ultimately the determination of the Washington Utilities and Transportation Commission concerning how rates are going to be spread.'" AR 99-100.

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[1] Citations to the Administrative Record refer to the record compiled by the Commission during its review of the Cascade and PacifiCorp tariffs and consecutively numbered for the Yakima Superior Court proceedings. Cascade will provide an appendix containing copies of the cited portions of the Administrative Record to the Commission or any party upon request.

[2] The revised tariff filed by Cascade on November 14, 2002 was Cascade's Thirty-Fifth Revision Sheet No. 500-A canceling Substitute Thirty-Fourth Revision Sheet No. 500-A to its WN U-3 Tariff.

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The Commission concluded that for ratemaking purposes, the Nation's exaction was similar to a municipal tax and, therefore, opted to take no action and allowed the tariff to take effect by operation of law. AR 212. This conclusion followed the recommendation made by the Commission staff. AR 165-172.

B. The Yakima Superior Court Upheld the Commission's Choice to Allow Cascade's Tariff to Take Effect.

Willman challenged the Commission's failure to suspend the tariff in Yakima Superior Court. Willman's case was dismissed in its entirety in two summary judgment motions. The Superior Court concluded that the Commission's actions were not arbitrary or capricious. In a seven page opinion, the Superior Court also noted that the Yakama Ordinance was not clearly illegal and that utility companies did not have an obligation to challenge the Yakama Ordinance in federal court. *Willman v. WUTC, Cascade and PacifiCorp*, No. 03-2-00086-7, Memorandum Opinion at 7 (June 5, 2003 Yakima Super. Ct.).

III. RELIEF REQUESTED

Pursuant to WAC 480-09-426, which incorporates the standard of Civil Rule 56, Cascade requests that the Commission dismiss Public Counsel's Complaint and the Petitions to Intervene of Willman and Toppenish because there are no disputed issues of material fact and Cascade is entitled to summary disposition as a matter of law.

IV. STATEMENT OF ISSUES

1. Should Public Counsel's first claim against Cascade be dismissed because state law does not require a contractual agreement before a utility prudently incurs a tax?

2. Should Public Counsel's second and third claims against Cascade be dismissed because under existing Commission precedent, it is not imprudent for Cascade to recover from ratepayers the cost of paying a tribal tax that is not clearly unlawful?

3. Should the Petitions to Intervene of Willman and Toppenish be dismissed because as a matter of law the exaction imposed by the Yakama Ordinance can be reasonably

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recovered as a municipal tax from ratepayers within the external boundaries of the Yakima Reservation?

V. DISCUSSION

A. The Existence of a Franchise Agreement is Irrelevant to Whether Cascade Can Recover the Tribal Exaction as a Tax.

Public Counsel's first claim against Cascade is that it is unreasonable for Cascade to recover the exaction imposed by the Yakama Nation from ratepayers as a municipal tax without executing a franchise agreement with the Nation. This claim is without merit. Under the terms of the Yakama Ordinance, the Yakama Nation exaction is imposed regardless of whether a utility enters a franchise agreement. Yakama Ordinance, § 5.3. Cascade sought and received a tariff revision allowing it to pass this mandatory payment through to local residents as a tax.[3]

Under Washington law, payment of a tax does not require a contractual relationship. "[A] tax is an enforced contribution of money, assessed or charged by authority of sovereign government for the benefit of the state or the legal taxing authorities. It is not a debt or contract in the ordinary sense, but is an exaction in the strictest sense of the word." *State ex rel. City of Seattle v. Dep't of Pub. Util.*, 33 Wn.2d 896, 902, 207 P.2d 712 (1949); *see also State ex rel. Pac. Tel & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 281, 142 P.2d 498 (1943). Because Cascade's lawfully filed tariff[4] permits it to pass this charge through to ratepayers as a municipal tax, no contractual agreement is required before that charge is prudently incurred. It is irrelevant whether a franchise agreement has been signed and Public Counsel's first claim should be dismissed as a matter of law.

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[3] Cascade will address Willman and Toppenish's claims that the exaction was improperly characterized as a tax in Section C of this motion.

[4] In permitting this tariff to take effect, the Commission necessarily determined that the underlying tax obligation was a just and reasonable expense incurred by Cascade. Now that the tariff has taken effect, it has the force of state law. *Wash. Indep. Tel. Assoc. v. WUTC*, 148 Wn.2d 887, 893, 64 P.3d 606 (2003). Cascade joins PacifiCorp's argument that because the tariff has taken effect, Public Counsel's claims based on prudence are now untimely. PacifiCorp Motion for Summary Determination at 17–19.

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Public Counsel also claims that it is unreasonable for Cascade to collect the charge approved in its tariff from ratepayers because it has not yet remitted payment to the Yakama Nation. Public Counsel Complaint at ¶ 22. While Cascade admits that it has not yet remitted payment to the Yakama Nation, it denies there is anything improper with this accounting treatment. Cascade's liability for the three percent exaction began on December 6, 2002. Cascade is awaiting the paperwork from the Nation to begin making payments.[5] Although it is unusual for this much time to elapse before receiving the proper paperwork, the tax liability does not go away merely because the paperwork has not been received. It would not be prudent for Cascade to make a payment to any entity without first receiving the proper documentation.

Because utility charges cannot be collected retrospectively, it is common practice for utility companies to establish tariffs to recover known and measurable charges from ratepayers in advance of receiving proper documentation. If the liability continues, but there is a delay in the paperwork, it would be a normal accounting practice to hold the funds collected pending receipt of the necessary paperwork. Cascade is continuing to negotiate with the Nation regarding when Cascade will remit payment to the Nation. Nothing in the negotiations thus far indicates that Cascade may be relieved of the tax burden it has incurred and continues to incur. Thus, because Cascade is incurring the tax burden, it is reasonably prudent for Cascade to collect those charges from ratepayers within the Reservation as permitted by revised tariff.

[5] It is the Nation's actions that have resulted in a delay of payment. Although a franchise agreement is not required before Cascade incurs liability for the Yakama Nation tax, Cascade has nonetheless attempted to comply with the Yakama Nation ordinance by signing and submitting to the Nation a franchise agreement that conforms to the form requested by the Nation's counsel. Cascade has Cascade indicated it was prepared to commence payments upon receipt of the fully executed agreement. To date, Cascade has not received such a document. It is Cascade's understanding that the document has not yet been signed by the Nation. Rather than sign the franchise agreement, the Nation has thus far has chosen to negotiate with Cascade for an alternative that may be more beneficial to the people living within the Reservation and to Cascade.

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B. Cascade's Decision to Seek Recovery of the Yakama Nation Exaction as a Tax Rather than a Franchise Fee Was Not Imprudent.

Public Counsel's second and third claims against Cascade are centered on Public Counsel's argument that Cascade should have challenged the validity of the Yakama Ordinance and the Yakama Nation's authority in federal court. Public Counsel Complaint at ¶¶ 24-25, 27-28. Public Counsel does not cite to any cases, statutes, or Commission regulations or precedent that imposed this burden. Public Counsel merely claims that Cascade's failure to mount a legal challenge to the validity of the Yakama Nation's Fee Ordinance was imprudent, and, therefore, the exaction cannot be recovered from ratepayers.

1. The Commission has properly decided that it is not the proper forum to determine the validity of taxes.

The Commission has a well-established practice of presuming taxes are valid for ratemaking purposes unless the taxes appear clearly unlawful. This standard is consistent with state law. *See State ex rel. City of Seattle v. Dep't of Util.*, 33 Wn.2d 896, 902, 207 P.2d 712 (1949) ("Taxes, of whatever time or nature, are part of operating expenses and of necessity must be taken into consideration in fixing rates to be charged by public utilities."). The Commission recently affirmed this policy in *Brannan v. Qwest Corp.*, Docket No. UT-010988 (Jan. 11, 2002) at ¶¶ 43-44, 52 ("Until a court of competent jurisdiction has ruled that the tribal tax, or an analogous tax, is clearly illegal, we will not reject the pass-through of the Lummi and Swinomish utility taxes.").

The Commission followed this existing standard when it reviewed the Cascade tariff revision. Commissioner Showalter noted: "I would presume [the tax] is valid unless there is case law that clearly invalidates it and I don't think we have that case." AR 209. The Commission's standard was upheld by the Yakima Superior Court in *Willman v. WUTC.* The Yakima Superior Court decided:

> 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.

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Memorandum Opinion at 7.

The Commission's policy of permitting pass-through of taxes that are not clearly unlawful is a reasonable exercise of its discretion. *See POWER v. WUTC*, 104 Wn.2d 798, 808, 812, 711 P.2d 319 (1985) (noting that just and reasonable standard gives Commission broad discretion to set rates that are fair to customers and also permit utilities to recover their operating expenses). The Commission is authorized by the legislature to set utility rates, but it is not designated as a tax court. Similarly, public utilities should not be required to challenge the validity of every tax imposed by a governing body.

Public Counsel seeks to impose an onerous new burden on utilities and the Commission. Under Public Counsel's approach, a utility could not pass a tax through to ratepayers unless it had litigated a case in federal court opposing the exaction.[6] Such a case would not only be expensive, but could also take years to obtain a final judgment. The expense of litigation could ultimately be born by ratepayers through recovery of general operating expenses. Because rates cannot be imposed retroactively, regulated utilities would be forever foreclosed from recovering the taxes incurred by the utility during that period of time, even if the tax is found to be valid by a federal court. Although Public Counsel may claim that a federal court challenge would not be necessary for every single exaction, at the very least any duty to mount federal legal challenges would create a new burden on utilities and the Commission to determine when pursuit of federal litigation was required before an exaction could be recovered. This burden is far greater than the state law requirements that rates be just and reasonable.

[6] Public Counsel does not allege in its complaint that the Yakama Nation exaction was clearly unlawful. Public Counsel does contend that Cascade should have challenged the tribe's authority in federal court because it had "a reasonable basis" to do so. Public Counsel Complaint at ¶¶ 27-28.

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2. The Yakama Ordinance is not clearly unlawful.

Using the Commission's reasonable existing standard, the Yakama Nation tax is not clearly unlawful.[7] The only cases cited by Public Counsel in support of its position, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) and *Montana v. United States*, 450 U.S. 544 (1981), have already been addressed by this Commission. The Commission considered both these cases in the *Brannan* decision, and concluded that tribal taxes of regulated utilities within reservation boundaries are not clearly unlawful under these decisions.[8] *See Brannon*, at 9-11.

The Yakima Superior Court reached a similar conclusion. The court found that *Atkinson* was clearly distinguishable from the Yakama Nation tribal exaction at issue in the present case. Memorandum Opinion at 6. The Superior Court also found that it was honestly debatable whether one of the *Montana* exceptions applied in this case. Memorandum Opinion at 7. Thus, the Yakama Ordinance is not clearly unlawful. Under existing Commission standards, Cascade has met its burden of demonstrating that the charges related to the Yakama Ordinance were prudently and reasonably incurred and Public Counsel's complaint should be dismissed.

3. No additional discovery is necessary on this issue.

Public Counsel may claim that summary determination of this issue is inappropriate because Public Counsel would like to conduct more discovery. However, these legal issues do not require additional discovery. Whether the Yakama Nation's exaction is clearly unlawful can be determined by looking at the face of the ordinance, the previous record at public hearings before the Commission, the Yakima Superior Court decision, and the existing

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[7] It is telling that Public Counsel's Complaint does not actually allege that the Yakama Nation tax is clearly unlawful, but rather says that there is "a significant legal question" about whether the Yakama Nation Franchise Ordinance is consistent with Supreme Court and Ninth Circuit Court of Appeals decisions. Public Counsel Complaint at ¶ 26.

[8] The Yakama Ordinance includes findings that on their face place the Ordinance within the circumstances under which *Atkinson* and *Montana* would permit a tribe to regulate conduct within its Reservation boundaries. Yakama Ordinance, Preamble ¶¶ 3, 5. To the extent Public Counsel is claiming that regulated utilities have an obligation to mount legal challenges to factual findings made by recognized governing bodies, that would also place a heavy new burden on regulated utilities.

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federal case law. Whether the Commission's clearly unlawful standard complies with its obligation to ensure rates are not unjust or unreasonable is also a question of law, and has been previously addressed as such by the Commission and the Yakima Superior Court.

Public Counsel may also claim more discovery is necessary to determine whether Cascade believed the Yakama Nation exaction to be lawful. This argument should also be rejected because there is no disputed conduct by Cascade that requires further investigation. Public Counsel's core allegation is that Cascade has failed to mount a legal challenge in federal court to the Yakama Nation's authority. Cascade admits that it has not done so, and asserts that it has no legal duty to do so. Although Public Counsel claims "Cascade's action set forth in this Complaint establish that Cascade did not believe the franchise fee which the Yakama Nation sought to impose was a valid franchise fee under state law" (Public Counsel Complaint at ¶ 23), Public Counsel does not allege any actions by Cascade in the Complaint that create a material issue of fact on this issue.

Public Counsel's only allegation in this regard is that Cascade "did not initially enter into franchise agreements with the Nation, and instead, filed tariffs with the Commission to recover the charges from their ratepayers by means of municipal tax additions . . . " Public Counsel Complaint at ¶ 14. This allegation is insufficient to raise a material issue of fact. Cascade admits that it believed that the Yakama Ordinance imposed a tax, rather than a franchise fee, because it required Cascade to pay whether or not it reached a franchise agreement with the Nation. Thus, even if Cascade's beliefs regarding the Yakama Ordinance were relevant, the only evidence is that Cascade admits that it considered the Yakama Ordinance to be a tax rather than a fee, and applied to the Commission for appropriate treatment given that conclusion.

C. It is Not Unreasonable to Characterize the Yakama Ordinance Exaction as a Tax Rather Than a Fee.

Interveners Willman and Toppenish argue that if the Commission finds that the Yakama Ordinance does create a prudently incurred cost to utilities, that cost should be considered a franchise fee to be borne by all ratepayers, rather than a municipal tax passed

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through solely to ratepayers within the Yakama Indian Reservation. *See, e.g.*, Willman Petition for Intervention at ¶ 5b. Willman raised this identical argument in the Yakima Superior Court case. After extensive briefing and oral argument by all parties on the tax-versus-fee issue, the Court ruled that "the Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the three percent charge should be treated as a tax for rate making purposes." *Willman v. WUTC*, Order Denying Plaintiffs' Motion for Summary Judgment at 3.

It is well established in Washington that the characterization of charges by the governmental entity imposing them is not dispositive. *Covell v. City of Seattle*, 127 Wn.2d 874, 886, 905 P.2d 324 (1995); *see also City of Lakewood v. Pierce County*, 106 Wn. App. 63, 23 P.3d 1 (2001). A tax is a levy made for the purpose of raising revenue for general governmental purpose. *Franks & Son, Inc. v. State of Wash.*, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998). As previously noted in Section A, another key component of a tax is that it is not consensual.

Washington courts use a three-part test to determine if an exaction is a tax or a fee. *Covell*, 127 Wn.2d at 879. First, if the primary purpose of the exaction is to raise revenue rather than to regulate, the exaction is a tax. *Covell*, 127 Wn.2d at 879; *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001). In the present case, the Yakama Ordinance is a revenue raising exaction based on a percentage of gross revenue, similar to a business and occupation tax. Courts next consider whether the funds collected are allocated only to a regulatory purpose. *Covell*, 127 Wn.2d at 879. The Yakama Ordinance does not limit the Nation's ability to use the funds, therefore under this factor the exaction is also properly characterized as a tax. Finally, courts consider whether there is a direct relationship between the fee charged and the service received by the those who pay the fee, or between the fee charged and the burden produced by the payer. *Covell*, 127 Wn.2d at 879. Because

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Cascade must pay the three percent charge regardless of whether it signs the franchise agreement or receives any benefit from the Nation,[9] this also indicates the exaction is a tax.

Intervener Willman may claim that *Pacific Telephone* supports Willman's position that the exaction is a fee rather than a tax. However, in *Pacific Telephone* the court considered a franchise agreement that created a voluntary contract with a entity. *State ex rel. Pac. Tel. & Tel. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 282, 142 P.2d 498 (1943). In this case, Cascade has not entered into a contractual agreement with the Nation. Therefore, Cascade is receiving no benefits or privileges from the Nation in exchange for its payment of the Yakama Nation tax.

Interveners may argue that more discovery is necessary to determine whether the exaction is a tax or a fee. However, as described above, the Commission already has before it all the necessary information to apply the three-part test and determine as a matter of law that the Yakama Nation exaction can reasonably be passed on to ratepayers as a municipal tax. Because no additional information is necessary, this Commission should grant summary determination and uphold its previous position that the Yakama Ordinance imposes a tax on utilities that can be passed through to all ratepayers within the Reservation boundaries.

VI. CONCLUSION

The question before the Commission is a question of law: should a regulated utility be required to challenge a tribal tax in federal court before that tax is considered a prudent expense that can be recovered from ratepayers? Such a position would either require a bright-line rule that every tax must be challenged, or extensive findings by utilities and the Commission regarding the validity of every tax imposed. The Commission is not a tax court, and should not place this onerous burden on itself or the utilities it regulates. As a matter of

[9] As noted during the public hearings, the Yakama Ordinance could generate more than $100,000 per year from Cascade. Although this is a normal amount for a tax to generate, this amount is exorbitant if it were considered as a fee. As the Commission staff noted, the fees for administrative services collected by other governments from Cascade range from $500 to $4,000. AR 168.

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law, the Yakama Nation exaction is not clearly unlawful and Cascade should be permitted to recover this amount from ratepayers. Public Counsel's Complaint should be dismissed.

The interveners' complaints should also be dismissed. To determine the issue as a matter of law, the Commission need look no further than the face of the Yakama Ordinance and the information it has already considered at public meetings. The revenue generating, non-contractual charge imposed by the Nation is a tax and should be recoverable as such. The Commission's choice to allow Cascade's tariff seeking recovery as a municipal tax has already upheld review by the Yakima Superior Court. Summary determination should be granted in favor of Cascade.

DATED this _____ day of September, 2003.

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By_____
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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be sent by electronic mail and U.S. Mail to Simon ffitch, James M. Van Nostrand, Eric Richter, Lynn F. Logan, P. Stephen DiJulio, Jeffery A. Richard, Mark P. Trinchero, Judith A. Endejan, William (Tre) E. Hendricks III, and Adam L. Sherr.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 15th day of September, 2003, at Seattle, Washington.

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Brenda K. Partridge

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