

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

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In the Matter of	)	DOCKET NO. U-030174
	)	
Tariffs Related to Yakima Nation	)	
Franchise Ordinance	)	ORDER ON PETITION FOR
	)	COLLABORATION
.....	)	

1 **Synopsis:** *The Commission denies a request by Public Counsel to open a collaborative negotiation to review two utility companies' tariffs that the Commission recently allowed to go into effect. The purpose of the proposed discussions is not appropriate for a collaborative approach, as it seeks review of a matter now on judicial review in Superior Court, or may address matters that are beyond the Commission's jurisdiction.*

**Introduction**

2 This docket was instituted by the filing on February 7, 2003, of a petition by the Public Counsel section of the Office of the Attorney General. Public Counsel asked the Commission to establish a collaborative under WAC 480-09-479 to "review the correct characterization" of a charge imposed by ordinance of the Yakama Nation, "and the manner in which the charge is to be collected." Public Counsel proposed that the goal of the collaborative would be to "form the basis for a declaratory order, an interpretive and policy statement, or other appropriate order."<sup>1</sup>

**Nature of the Issue**

3 The Commission declined to suspend tariffs for further review in two separate proceedings.<sup>2</sup> The tariffs, now in effect, allow the utilities to recover from

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<sup>1</sup> The proposal seeks institution of a process to generate a proposed policy or interpretive statement authorized in RCW 34.05.236, or a proposed declaratory order authorized in RCW 34.05.240.

<sup>2</sup> Docket No. UG-021502, involving a tariff filed by Cascade Natural Gas Company, and Docket No. UE-021637, involving a tariff filed by PacifiCorp, dba Pacific Power & Light. The matters were addressed in the Commission's open public meetings of November 27 and December 11, 2002, and January 8, 2003, respectively.

customers on land within the Yakama Nation reservation a charge by the Nation, pursuant to ordinance, of 3% on all utility sales within the reservation. In allowing the tariffs to become effective, Commissioners did not accept arguments that the charge should be suspended for improperly treating the charge as a tax, when the charge is called a "franchise fee" in the ordinance.<sup>3</sup>

- 4 By treating the charge as a tax, the tariffs pass its effect directly to customers on the Yakama Reservation. The Yakama Nation and customers of the utilities argued that, as a franchise fee, it should be absorbed generally by all of the companies' Washington State ratepayers. The Commission declined to suspend the tariffs, which became effective pursuant to law. *RCW 80.28.060, RCW 80.04.130*. The propriety of the tariffs have been challenged by citizens living on the reservation in the Superior Court for Yakima County, No. 03-000867.

#### **Process for Consideration of the Request for a Collaborative**

- 5 In order to determine the proper process for considering Public Counsel's request for a collaborative, the Commission has reviewed both the nature of the relief sought (invalidation of tariffs that have become effective) and the nature of the expected product of a collaborative (a proposed interpretive or policy statement, or a proposed declaratory order) to determine the proper process for considering the request. The Commission enters an order immediately because of the clarity of the issues posed and because the interested persons deserve a prompt response.

#### **Role of Alternate Dispute Resolution**

- 6 Public Counsel cites the Commission's encouragement of alternate dispute resolution, also called ADR. *WAC 480-09-465*. The Commission does encourage ADR. In the past two years, the Commission has considered parties' proposed settlements in numerous matters including individual complaints, Commission complaints, general rate proceedings, and proceedings seeking temporary or emergency rates -- in other words, almost the entire range of matters that the Commission has authority to resolve. The Commission also pursues consensus and invites broad participation in rulemaking proceedings.

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<sup>3</sup> Among other factors considered by the Commission, the charge on sales is not related to costs or responsibilities under franchise agreements, and is applied to all sales, whether or not a franchise agreement exists with the utility.

- 7 The appropriateness and availability of ADR in many settings does not prove that ADR is appropriate for every matter or should be available in every setting. We take Public Counsel's characterization of the goal of his proposal at face value -- to review the correct characterization of the Yakama charge and the manner in which it is to be collected. Those are precisely the issues that challengers raised against the tariffs when the Commission allowed them to become effective, and they are the questions that are currently the subject of judicial review. The proposed collaborative would attempt to gather parties -- some already parties to the litigation and others not -- for the purpose of reviewing the now-effective tariffs. This raises two issues with regard to the proposed process.
- 8 First, the collaborative is defined by rule as a process to allow interested parties, acting independently of the Commission but under its aegis, to resolve differences and make a common proposal to the Commission. Here, the two commissioners considering the matter declined to accept the arguments, the tariffs became effective, and the Commission is now an interested party by virtue of the pending judicial review. In addition, the collaborative structure contemplated in the rule contemplates communications between the collaborative and the Commission through the agency's Secretary. That could appear to restrict communications between the Commission and the lawyers defending it in the litigation, which is inappropriate.
- 9 Another concern is whether the parties would be willing to support the goals of a collaborative. At least one of the relevant parties to a collaborative has stated opposition to a collaborative. It observed that the parties' differences appear irreconcilable, though it would attend collaborative sessions if they are ordered.<sup>4</sup>

### **Effect of the collaborative**

- 10 In proposing that the collaborative "review the correct characterization" of the Yakama charge, Public Counsel is implicitly arguing for a different result than the Commission reached. Otherwise, no proposed interpretive or policy statement or declaratory order would be necessary and there would be no value to the collaborative. Here, the participating Commissioners heard argument and extensive briefing by representatives of the affected companies, citizens residing

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<sup>4</sup> Unsolicited response to the petition from Eric Richter, Henke & Richter on behalf of Elaine Willman and the Citizens Stand Up! Committee.

on the reservation, the Yakama Nation itself, and the Commission Staff, and considered the advice of respected and capable counsel. During Commission deliberations, covering some eighty pages of transcript, both participating Commissioners made extensive and well-considered statements describing their views for declining to suspend the tariff. Now that the tariffs have taken effect, the appropriate way to challenge them is either by a complaint filed with the Commission, or a challenge in court. The validity of the tariffs is currently under judicial review. The Commission sees little promise in authorizing a collaborative on a matter on which it has already declined to take action while the courts are undertaking an independent and appropriate review.

- 11 We draw clear distinctions between the present circumstances and a) those in which parties to a pending adjudicative matter before the Commission seek a mediated settlement of the actual pending dispute, or b) those in which interested persons come together to address developing policy issues that have not been before the Commission and that are not on judicial review, in search of appropriate regulatory treatment. Both of those settings can be appropriate for alternate dispute resolution. The current setting is not.

### **Matters outside the Commission's jurisdiction**

- 12 Not mentioned in Public Counsel's petition, but a conceivable motive for the petition, is the pursuit of a change in the structure or the details of the Yakama Nation ordinance itself. It is clear that the provisions of a Yakama Nation ordinance are far outside the Commission's jurisdiction. To the extent the proposal is not a collateral challenge to the tariffs, but instead would focus on tribal authority or actions, a Commission collaborative is not the appropriate process.
- 13 Other procedural means might better address the concerns that Public Counsel raises. As we have noted, Public Counsel could complain against the tariffs, bear the burden of proving them unlawful, and pursue negotiations or mediation among defined parties in the context of that matter. Or, affected parties could pursue the current state court litigation. Or, litigation in federal court might produce a definitive conclusion to the matter. Or, the parties could jointly seek public policy mediation that would assist them in addressing the current disagreement and might provide a basis for long-term cooperative interaction on the myriad of matters that will confront them as lawful residents of the same land. The Commission has no jurisdiction to mandate any of these possible

approaches, but the cooperative spirit that led Public Counsel to make this proposal and others to support it has the potential to address long-term issues that go far beyond the scope of the Commission's jurisdiction.

**"Unresolved matters"**

- 14 Public Counsel refers to "unresolved matters" that appear to include negotiations that might lead to franchise agreements between utilities and the Yakama Nation, and possible future tariff filings before the Commission. We disagree with the characterization of those circumstances as "unresolved matters." The current ordinance, and the tariffs' treatment of it, at this point have already occurred. Any future ordinances, and corresponding treatment, are at this point somewhat speculative possibilities. We observe that to the extent that those events occur, and parties bring us new questions based on new facts that result in new and actual disputes with our jurisdiction, Commission processes remain available for resolution of those disputes.

**Conclusion**

- 15 In light the Commission's completed proceedings allowing the tariffs to take effect, and in light of pending court proceedings on the matter, we find a collaborative to be inappropriate, and deny Public Counsel's request.

DATED at Olympia, Washington and effective this \_\_\_\_ day of February, 2003

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner