

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

COST MANAGEMENT SERVICES, INC.,)	
)	Docket No. UG-061256
Complainant,)	
)	
v.)	
)	COMPLAINANT'S MOTION FOR
CASCADE NATURAL GAS CORPORATION,)	SUMMARY DETERMINATION
)	TO RESOLVE ALL ISSUES IN ITS
Respondent.)	FAVOR
_____)	

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1. Cost Management Services, Inc. (“CMS”), the complainant in this proceeding, hereby submits this motion for summary determination, requesting the Washington Utilities and Transportation Commission (“Commission”) to resolve in its favor all issues raised in its complaint against Cascade Natural Gas Corporation (“Cascade”).

2. Throughout this pleading, references are made to the “**CMS Complaint**,” filed in this proceeding on July 31, 2006; the “**Cascade Answer**,” filed on August 22, 2006; and to the Reply of Cost Management Services, Inc., to the Answer of Cascade Natural Gas Corporation (“**CMS Reply**”), filed on August 28, 2006, and accepted into the record by the Administrative Law Judge at the prehearing conference of September 14, 2006.

I. EXECUTIVE SUMMARY OF CMS’ POSITION

3. This case concerns Cascade’s violations of RCW Chapter 80 and WAC Chapter 480 in running two business lines within a single regulated gas company, utilizing a single set of regulated assets. Its first business line is the sale of natural gas at retail to customers within its certificated service territory, based on rates and contracts on file with, and regulated by, this Commission. Cascade’s second business line also involves the sale of natural gas at retail, but these sales are privately negotiated with contracts and prices different from the contracts and rates on file with this Commission. Cascade’s second business line sells gas at retail all across the state of Washington, both inside and

outside Cascade's certificated service territory. The second business line is illegal under many provisions of RCW Chapter 80 and WAC Chapter 480.

4. Cascade purports to excuse its violations of RCW Chapter 80 by claiming that the Federal Energy Regulatory Commission ("FERC") deregulated retail gas sales when, acting pursuant to the Natural Gas Act, 15 U.S.C. §717, *et seq.*, it issued its regulation on "blanket marketing certificates," codified at 18 C.F.R. §284.402. Cascade maintains that this FERC regulation allows it to ignore state laws regarding the regulation of retail rates, contracts and service territories by establishing a federally deregulated retail-marketing function within a Washington-regulated "gas company."

5. Cascade's federal-deregulation claim is patently false – ludicrously so. Stipulated Fact No. 9 is Cascade's admission that its private sales are not "sales for resale." Instead, they are all sales at retail to end-use customers. Anyone reading 18 C.F.R. §284.402 must readily conclude that the FERC regulation is expressly limited to "sales for resale at negotiated rates in interstate commerce of [a] category of gas that is subject to the [Federal Energy Regulatory] Commission's Natural Gas Act jurisdiction." Moreover, there is over 60 years' worth of U.S. Supreme Court precedent under the Natural Gas Act holding that FERC cannot regulate – or deregulate – retail gas sales to end-users by gas companies such as Cascade, even if 18 C.F.R. §284.402 had purported to do so.

6. Since CMS filed its complaint, Cascade has been retreating from its indefensible claim of federal pre-emption; however, its violations of RCW Chapter 80 continue.

7. "The legislature has declared that operating as a gas utility in the state of Washington is a business affected with the public interest and that such utilities should be regulated." WAC 480-90-001 Enforcement of this legislative policy embedded in Washington law is entrusted to this Commission by RCW 80.04.015:

Whether or not any person or corporation is conducting business subject to regulation under this title, or has performed or is performing any act requiring registration or approval of the commission without securing such

registration or approval, shall be a question of fact to be determined by the commission.

8. When the facts demonstrate violations of law by regulated entities, this Commission has both the power and the duty to remedy those violations. This is well-settled law under RCW 80.01.040. “Agencies of government are not at liberty to disregard statutes without explicit or implicit authority to do so. The Commission cannot, under the guise of administrative discretion, refrain from regulating a company that meets the statutory definition” *In re Metrolink Corp*, Docket No. U-88-2370-J, Second Supplemental Order (May 1989).
9. The facts before the Commission have been stipulated by CMS and Cascade and submitted for the record on November 3, 2006. Many of these facts come from the record of Cascade’s recent general rate case, Docket No. UG-060256.
10. Stipulated facts clearly and unequivocally demonstrate a continuing pattern of willful violations of Washington laws governing private, unregulated retail sales of natural gas by a regulated “gas company.” Cascade’s illegal retail sales are occurring across the state, both inside and outside its certificated service territory. Cascade admits that it is actively marketing off-tariff sales of natural gas to its Schedule Nos. 663 and 664 transportation customers and is currently making private sales to 44 of them. Stipulated Fact No. 8. Cascade admits, as well, that it is also making private sales of natural gas at retail to customers outside its certificated service territory, within the territories reserved by this Commission to other “gas companies” under RCW 80.28.190.
11. For the second business line to succeed, Cascade must offer its private customers better gas prices than they could get under tariff. Utilizing a common set of regulated assets and expertise, Cascade’s private retail business line competes against its regulated retail business line. The result is that Cascade sacrifices its legal obligation to secure the lowest cost gas for its core customers in deference to its private sale business line.

12. Cascade’s multiple violations of RCW Chapter 80 leave this Commission unable to fulfill its statutory obligations. Because Cascade has not filed the rates and contracts for its private sales, the Commission cannot determine whether Cascade is cross-subsidizing its private customers. It cannot determine whether undue discrimination or undue preference is afoot. It cannot determine whether Cascade’s prices to its private customers are “just and reasonable.”
13. Cascade claims that it must ignore RCW Chapter 80 in order to compete and that its competition, although illegal, benefits consumers. Yet, CMS and eight other gas sellers lawfully compete to “sell natural gas commodity to Cascade’s Washington non-core customers.” Stipulated Fact No. 4. It is no small irony for Cascade to claim that it must break the law to keep these nine competitors honest.
14. Cascade has at its disposal lawful tools available to gas companies under RCW Chapter 80 – or at least available to it within its certificated service territory. It may file a banded rate proposal under RCW 80.28.075 or negotiate and file special contracts under WAC 480-80-143. It could also petition this Commission for permission to incorporate a separate marketing affiliate with a separate set of books, affiliate-dealing rules and other safeguards against cross-subsidization, undue discrimination and undue preference.

II. STATEMENT OF FACTS

The facts of this case are clear and undisputed.

A. Rate Schedule Nos. 663 and 664

15. Cascade is a natural gas local distribution company (“LDC”) operating in the states of Washington and Oregon. Cascade is a “gas company” under RCW 80.04.010, and a “public service company” under RCW 80.04.010. Stipulated Fact No. 1.
16. Cascade’s Schedule Nos. 663 and 664, by their express terms, cover only the transportation of natural gas by Cascade over its local distribution system. Each schedule

expressly states the following: “[s]ervice under this schedule shall include transportation on the Company’s distribution facilities only.” This transportation service is available to end-use, retail customers for the transportation of natural gas separately purchased by that customer to its end-use facility within Cascade’s certificated service territory. Neither Schedule No. 663 nor No. 664 covers any sale of natural gas to any customer, either by Cascade or by any third-party gas supplier. Instead, sales of natural gas must be separately arranged by the end-use customer.

17. Customers utilizing Schedule Nos. 663 and 664 fit Cascade’s definition of non-core market customer: “A customer who purchases unbundled gas services. A non-core customer purchases distribution services from Cascade and purchases gas supply and pipeline transportation services separately.” Cascade Rule 2, “Definitions,” definition M.

18. Cascade’s retail, non-core customers are able to make purchases of natural gas commodity from CMS and other competitive sellers by electing transportation service under either Cascade Schedule No. 663 or No. 664. Stipulated Fact No. 5.

19. The sale of gas by CMS is not regulated by the Commission because it does not own or control any facilities that would subject it to Commission jurisdiction. Stipulated Fact No. 3. There are a number of other companies that currently compete to sell natural gas commodity to Cascade’s Washington non-core customers. CMS aside, IGI, Avista Energy, Wasatch, Devlar Energy, Dynegy, Coral, Kimball Energy, and Sempra are all sellers, not regulated by the Commission, that compete to sell natural gas commodity to Cascade’s non-core customers. Stipulated Fact No. 4.

20. The “Other Services” paragraphs of Schedule Nos. 663 and 664 each contain the following representation to the public about Cascade’s authorization to make sales of natural gas to retail, end-use customers receiving transportation service under either of these schedules:

Service under this schedule requires customer to secure both gas supply and pipeline transportation capacity services either through the Company or through third party

arrangements. Gas Supplies purchased through the Company will be in accordance with the FERC regulations. (18 CFR Part 284.402 Blanket Marketing Certificates). [Stipulated Fact No. 6, emphasis supplied.]

21. In Docket No. UG-060256, Cascade has agreed to remove the language, underscored in the provision of Schedule Nos. 663 and 664 quoted in the preceding paragraph. Stipulated Fact No. 24. When this removal takes effect, these rate schedules will no longer include a representation to the public that it has been authorized under 18 C.F.R. §284.402, the FERC regulation, to sell natural gas at retail to customers within its certificated service territory at rates and under contracts different from those on file with this Commission.

B. Cascade's Private, Retail Sales of Natural Gas Within Its Certificated Service Territory

22. Despite the modifications to Schedule Nos. 663 and 664 described in the preceding paragraph, Cascade has been selling, and continues to sell, natural gas at retail to its Schedule Nos. 663 and 664 customers under the purported authorization of 18 C.F.R. §284.402. *See* Stipulated Fact Nos. 6 and 8.

23. In mid-2006, Cascade provided unbundled transportation service to approximately 159 unique customer locations in Washington, pursuant to Rate Schedule Nos. 663 and 664. Stipulated Fact No. 8. In 2005-06, Cascade also sold natural gas commodity to approximately 44 of those customers under contracts specifying negotiated rates for gas commodity. None of these customer rates for gas commodity, contracts, or forms of contract are on file with the Commission. Stipulated Fact No. 8.¹

24. None of Cascade's sales of natural gas commodity to Schedule Nos. 663 or 664 customers are "sales for resale," Stipulated Fact No. 9. "Sale for resale" is a term of art

¹ At Cascade's request, the Stipulated Facts omit the names of these 44 private retail gas customers. However, complete listings of these customers are included in the record of Cascade's general rate case, Docket No. UG-060256, as Exhibit No. 85C.

employed in the Natural Gas Act to delineate FERC's jurisdiction and authority over wholesale sales of natural gas and exclude from FERC's jurisdiction any authority to regulate retail sales of natural gas to end-uses.

25. Cascade actively advertises and markets its private natural gas sales business to retail customers. It offers customers individualized, private natural gas commodity rate schedules, not on file with this Commission. Cascade's webpage (<http://www.cngc.com/business/industrial.asp> at "Weekly Price Update") contains the following statement regarding regulated transportation rates and negotiated rates for natural gas commodity made available by Cascade:

The Pricing Matrix Site for your specific rate schedule (RS). Your specific RS can be found on your distribution transportation contract with Cascade Natural Gas Corporation ("CNGC"). The following prices are estimates based on current month forward pricing and are priced for delivery at the citygate and the burnertip.

Stipulated Fact No. 10.

C. Cascade's Private, Retail Sales of Natural Gas Outside Its Certificated Service Territory and Within the Territories Certificated By This Commission to Other Gas Companies

26. As a gas company subject to regulation by this Commission under RCW Chapter 80, Cascade provides natural gas service within a service territory under certificates of public convenience and necessity issued by this Commission pursuant to RCW 80.28.190. *See, e.g., Cascade Natural Gas Company*, Docket No. UG-001119, Order Accepting Settlement Agreements; Granting Revised Application (March 2001).
27. Avista Corporation, dba Avista Utilities, is a gas company subject to regulation by this Commission under RCW Chapter 80. Avista Utilities provides natural gas service within a service territory under certificates of public convenience and necessity issued by this Commission pursuant to RCW 80.28.190. *See, e.g., Avista Utilities*, Docket No. UG-010319, Order Granting Application (April 2001).

28. Puget Sound Energy, Inc. (“PSE”), is a gas company subject to regulation by this Commission under RCW Chapter 80. PSE provides natural gas service within a service territory under certificates of public convenience and necessity issued by this Commission pursuant to RCW 80.28.190. *See, e.g., Puget Sound Energy*, Docket No. UG-021031, Order Granting Application (October 2002).
29. Northwest Natural Gas Company is a gas company subject to regulation by this Commission under RCW Chapter 80. Northwest Natural provides natural gas service within a service territory under certificates of public convenience and necessity issued by this Commission pursuant to RCW 80.28.190.
30. Exhibit 23, Contract No. SP0600-05-D-7518, is a public document. It is a contract for the sale of natural gas by Cascade for end-use by the United States of America, Department of Defense, at specified Defense Department locations throughout Washington. Stipulated Fact No. 26.
31. Cascade has executed contracts for the sale of natural gas to end-use customers at facilities located within the WUTC-certificated service territories of Avista Utilities and Puget Sound Energy (“PSE”), and is currently selling natural gas pursuant to such contracts. Such contracts include, but are not limited to, the Defense Department contract contained in Exhibit 23 and described in the preceding paragraph. Among the facilities outside Cascades’s certificated service territory to which it is selling natural gas commodity are the Everett Naval Base and McChord Air Force Base, each located in PSE’s certificated service territory, and Fairchild Air Force Base, located in Avista’s certificated service territory. Stipulated Fact No. 27.
32. The Stipulated Facts and exhibits of this case do not include any private contract for the retail sale of natural gas that Cascade has not filed with this Commission, but agreed with its customer to keep confidential.

III. ARGUMENT

A. Standards For Summary Determination

33. This Commission's regulations require that summary determination be granted if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." WAC 480-07-380(2)(a). In considering a motion for summary determination, the Commission must "consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules." *Id.*

34. In this proceeding, there are no issues of material fact in dispute. Accordingly, the Commission may enter summary determination in favor of CMS. A material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The burden is on the moving party to demonstrate there is no genuine issue as to a material fact and, as a matter of law, summary judgment is proper. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The non-moving party must "set forth specific facts showing there is a genuine issue for trial." *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). To satisfy their burden, the non-moving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value." *Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413, 418 (2001); *see also Bates v. Grace United Meth.*, 12 Wn. App. 111, 115, 529 P.2d 466 (1974) (A non-moving party may not oppose a motion of summary judgment by nakedly asserting there are unresolved factual questions).

B. Cascade is Engaged in Private Retail Sales of Natural Gas Across the State of Washington in Violation of RCW Chapter 80 and WAC Chapter 480.

1. Cascade's illegal private sales of natural gas to retail customers located within Its certificated service territory.

35. Although Cascade has tariffs on file with this Commission regarding retail sales

of natural gas within its certificated service territory, Cascade is also selling natural gas off-tariff to 44 selected retail customers. Stipulated Fact No. 8. These private, retail gas sales are made to customers electing transportation-only service under Schedule Nos. 663 or 664. *Id.* Cascade’s private sales “rebundle” transportation-only service under Schedule Nos. 663 or 664 with natural-gas commodity sales and interstate pipeline capacity. These private retail sales are not “special contracts” filed with the Commission. Neither the applicable rates nor the applicable forms of contract have ever been filed with this Commission by Cascade. *Id.* The consequence of these dual sales programs is that this Commission is left to regulate only the tariff portion of Cascade services. The Commission never knows about, much less reviews, what Cascade withholds from Commission oversight and review. Cascade has made Commission oversight and control elective, at the discretion of Cascade, the regulated entity.

36. Regarding Cascade’s private, retail sales of natural gas, the stipulated facts of this case evidence violations of each of the following statutes and Commission regulations:²

- **RCW 80.28.050**, which requires Cascade to file with this Commission all rates and all forms of contract relating to its private retail sales of natural gas in Washington.
- **WAC 480-80-141**, which specifies that, if a gas company chooses to use service contracts, each contract or a standard form of that contract must be filed with the Commission.
- **RCW 80.28.060**, regarding Cascade’s imposition of private rates and forms of contract without “thirty days’ notice to the commission and publication for thirty days”
- **RCW 80.28.080**, regarding Cascade’s imposition of private-sale prices that are “greater or less or different” from the “rates and charges applicable to such service as specified in its schedule filed and in effect at the time.”
- **RCW 80.28.090**, regarding Cascade’s ongoing practice of offering “undue preference or advantage” to its private, retail natural-gas

² Relevant statutes and regulations are quoted at pp. 4-7 of the CMS Complaint.

customers and to its private sales program as a “particular description of service in any respect whatsoever,” which this Commission remains powerless to identify or remedy so long as Cascade fails to file the relevant rates and forms of contract in accordance with RCW 80.28.050.

- **RCW 80.28.100**, regarding Cascade’s continuing practice of offering its private sales customers special rates for gas that are not authorized under RCW Chapter 80 and that are different from the rates received “from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.” Again, this Commission remains powerless to identify or remedy such discrimination so long as Cascade fails to file the relevant rates and forms of contract in accordance with RCW 80.28.050.

37. As the Commission well knows, these requirements are not merely legal rituals to be honored or ignored at the whim of the regulated entity. Instead, the provisions cited above are the bedrock of utility regulation, “simply designed to ensure that all ratepayers in the same area pay the same rate and are not unfairly discriminated against in that manner.” *Willman v. WUTC*, 154 Wash. 2d 801, 810, 117 P.3d 343 (2005). “[O]nce the tariff took effect, the parties could not negotiate around its terms... .” *National Union Insurance Company of Pittsburgh, PA. v. Puget Sound Power & Light*, 94 Wash. App. 163, 176, 972 P.2d 481 (1999).

2. **Cascade’s illegal private sales of natural gas commodity outside its certificated service territory to end-use customers in areas already certificated by this Commission to other gas companies**
 - a. **This Commission’s regulation of Cascade does not stop at the boundary of Cascade’s certificated service territory.**

38. The foregoing discussion of how Cascade is violating Washington law by making private, retail sales of natural gas inside its certificated service territory also pertains to its extraterritorial retail gas sales. RCW 80.01.040(3) empowers this Commission to:

regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for

compensation, and related activities; including, but not limited to, electrical companies, gas companies, irrigation companies, telecommunications companies, and water companies. [Emphasis supplied.]

Washington law does not carve out any geographic area outside Cascade’s service territory where it may make unregulated, private retail gas sales. Cascade is a regulated “gas company,” subject to this Commission’s jurisdiction over rates and contracts anywhere and everywhere in Washington where it sells natural gas at retail.³

39. None of the rates or contracts regarding any of the extraterritorial retail gas sales referenced in Stipulated Fact Nos. 26 and 27 have been filed with this Commission. It follows, inescapably, that each of these extraterritorial retail sales reflects ongoing violations of each of the provisions of RCW Chapter 80 and WAC Chapter 480 discussed above in relation to Cascade’s private sales inside its service territory.

b. Cascades’s extraterritorial sales also violate RCW 80.28.190.

1. Washington law on certificated service territories for gas companies.

40. Gas companies in the state of Washington may only provide service within areas certificated to them by this Commission. RCW 80.28.190 provides, in part:

No gas company shall, after January 1, 1956, operate in this state any gas plant for hire without first having obtained from the commission under the provisions of this chapter a certificate declaring that public convenience and necessity requires or will require such operation and setting forth the area or areas within which service is to be rendered...

41. Under the rule of statutory construction found in RCW 80.04.010, “service” is to be construed broadly and given its most inclusive meaning. This broad construction of “service” is embedded in RCW 80.01.040(3), which empowers and obligates this Commission to “regulate in the public interest ... the business of supplying any utility service or commodity to the public for compensation... .” Emphasis supplied.

³ Subject to the limitations of RCW 80.28.190, discussed below.

42. It is simply beyond question that natural gas commodity is a “utility service or commodity,” when sold at retail by Cascade. Cascade admits it is doing just that, outside its certificated service territory. “Among the facilities outside Cascades’s certificated service territory to which it is selling natural gas commodity are the Everett Naval Base and McChord Air Force Base, each located in PSE’s certificated service territory, and Fairchild Air Force Base, located in Avista’s certificated service territory.” Stipulated Fact No. 27, emphasis supplied.

43. Yet, RCW 80.28.190 prohibits a gas company from providing service outside its certificated service territory without prior authorization by this Commission. If a gas company wishes to provide service across a broader geographic area it must first secure an order from this Commission expanding its certificated service area. If that broader geographic area would intrude into a certificated service territory granted by this Commission to another gas company, as Cascade admits is the case here, then another passage of RCW 80.28.190 imposes additional obligations on the applicant, to be satisfied in advance:

The commission shall have power, after hearing, when the applicant requests a certificate to render service in an area already served by a certificate holder under this chapter only when the existing gas company or companies serving such area will not provide the same to the satisfaction of the commission and in all other cases, with or without hearing, to issue the certificate as prayed for...[Emphasis supplied.]

44. Note that this portion of RCW 80.28.190 applies regardless of whether the construction of any new “gas plant” is involved in the extraterritorial service proposed by a gas company. Unlike the sentence from RCW 80.28.190 regarding an application for an initial service territory, quoted above in paragraph 40, the passage quoted above in paragraph 43 regarding a service territorial expansion does not even mention “gas plant.” In short, gas companies operating gas plant anywhere in the state of Washington cannot sell gas at retail outside their certificated service territories without first:

- applying first to this Commission for an expansion of its existing certificated service territory, and
- demonstrating, to this Commission’s satisfaction, that the existing incumbent gas company “will not provide the same [service] to the satisfaction of the commission.”

45. Although Cascade has shirked its obligations under RCW 80.28.190 regarding the extraterritorial retail sales covered in Stipulated Fact Nos. 26 and 27, it has complied with this law in the past. It followed this statutory process in the case that led to this Commission’s order in *Cascade Natural Gas Company*, Docket No. UG-001119, Order Accepting Settlement Agreements; Granting Revised Application (March 2001). In that case, Cascade proposed to provide service to one or more end-use customers located within the territory certificated to Avista Utilities:

Both Cascade and Avista are engaged in the business of furnishing gas service within the state of Washington as public service companies. Avista currently holds a certificate for gas service in a portion of Grant County. In its application, Cascade seeks to provide the services described in its Schedule 700 in a territory that overlaps Avista’s service territory. Avista has held this authority since 1960.

Commission Order, p. 2, ¶7 (“Background Facts”).

46. Cascade proposed to provide one or more services under its Schedule 700 to Basin Frozen Foods, an end-use customer located within the territory certificated to Avista Utilities. *Id.* pp. 2-3, ¶9. None of the services offered by Cascade under Schedule 700 are so obviously a utility service as an actual sale of natural gas commodity. *See* discussion in paragraph 41, above. Regulating retail sales of natural gas is the core mission of this Commission regarding gas companies like Cascade.

47. At the conclusion of Docket No. UG-001119, this Commission extended Cascade’s service territory to allow it to provide Schedule 700 services to a single customer within Avista’s service territory, Basin Frozen Foods, upon a showing that this met the public interest (*id.*, p. 3, ¶12) and that such service by Cascade would meet a

customer need “required by the public convenience and necessity” (*id.*, p. 3, ¶13).⁴

48. Finally, it is important to note that Cascade was obligated to obtain an amended certificate of public convenience and necessity in Docket No. UG-001119, even though Cascade was not proposing to construct or operate any “gas plant” within Avista’s service territory. The case did involve a new facility, but that facility was a new “bypass pipeline” owned by Cascade’s proposed new customer, Basin Frozen Foods. *Id.* p. 2, ¶8, *see* discussion above in paragraph 44.⁵ Basin Frozen Foods also intended to operate its pipeline. The fact that Cascade was not to be the operator of this customer-owned facility was nicely captured by Cascade’s statement of the issue in Docket No. UG-001119: “Does Cascade need a Certificate to provide gas line design, maintenance, inspection, and repair services in Grant County when such services plainly do not involve operation of a ‘gas plant’ in the county and other companies currently are providing identical services in the state without Certificates?”⁶ This Commission’s order in Docket No. UG-001119 establishes that Cascade must seek a new certificate of public convenience

⁴ Cascade originally sought to provide Schedule 700 services to “any customer in an eight-square-mile territory,” but by the time the Commission acted, Cascade’s requested only to serve a single customer within Avista’s certificated territory, Basin Frozen Foods. *Id.*, p. 2, ¶8.

⁵ The Commission’s decision in Docket No. UG—001119 is fully consistent with its later decision in Cascade Natural Gas Company, Docket No. UG-020632, Order Holding that a Certificate of Public Convenience and Necessity Is Not Required ((June 2002). This later case also dealt with customer-owned facilities, including some outside Cascade’s certificated service territory. Commission Order, p. 1, ¶1. However, Cascade made it clear to the Commission that it did not propose to “operate” any customer-owned facility. Order, p. 1, ¶3. In the words of Commission Staff member Merton Lott in the Staff Memo of June 14, 2002, presented to the Commission in that case, “[a]t most, CNG would provide consultation, making suggestions and recommendations to the owner/operator of gas plant to assist management in its decisions.” In sum, Cascade applied for a certificate, but was told none was necessary for it to enter into nothing more than consulting contracts.

⁶ Exhibit 24 to the Stipulation of Facts, p. 3 (“Questions Presented”), emphasis supplied. The quoted document is a Cascade application described in Stipulated Fact No. 28.

and necessity even though the new extra-territorial service would not involve either the construction or operation of “gas plant.”

2. Application of Washington law on certificated service territories to the stipulated facts of this case.

49. The stipulated facts of this case document that Cascade is selling natural gas at retail to end-use customers located outside its certificated service territory and inside the territories certificated by this Commission to other gas companies. There is no need to measure the meets and bounds of the certificated territories of these other gas companies, Cascade now admits exactly what it is doing:

Cascade Natural Gas Corporation has executed contracts for the sale of natural gas to end-use customers at facilities located within the WUTC-certificated service territories of Avista Utilities and Puget Sound Energy (“PSE”), and is currently selling natural gas pursuant to such contracts. Such contracts include, but are not limited to, the contract between the United States of America, Department of Defense, and Cascade Natural Gas Corporation, described in [Stipulated Fact No. 26]. Among the facilities outside Cascades’s certificated service territory to which it is selling natural gas commodity are the Everett Naval Base and McCord Air Force Base, each located in PSE’s certificated service territory, and Fairchild Air Force Base, located in Avista’s certificated service territory.

Stipulated Fact No. 27. *See also* Stipulated Fact No. 26.

50. Plain and simple, these stipulated facts show ongoing, conscious violations of RCW 80.28.190 by Cascade. Cascade is selling natural gas commodity as a service to end-use customers in the certificated service territories of PSE and Avista Utilities. CMS also believes that Cascade is making sales of natural gas commodity within the certificated Washington service territory of Northwest Natural Gas Company.⁷

⁷ If Cascade disputes that it is selling natural gas commodity to end-use customers within Northwest Natural’s service territory, it can so state in its answer to this pleading.

51. Review of Commission records discloses no proceeding in which Cascade ever applied to expand its certificated service territory to overlap the certificated areas of Avista, PSE, or Northwest Natural. Perforce, Cascade never made the requisite demonstration under RCW 80.28.190 that Cascade's private, end-user customers within the certificated territories of these other gas companies needed natural gas commodity that the incumbent gas companies were unwilling to provide.

52. Thus, Cascade is chronically violating RCW 80.28.190. The confidentiality of its private sales of natural gas within the certificated service territories of other gas companies have allowed these violations to escape general notice. These violations came to the attention of CMS because the retail gas-sales contract between the U.S. Department of Defense and Cascade, identified in Stipulated Fact No. 26, is a public document. This Department of Defense contract, covering Cascade's retail sales of natural gas to Defense Department facilities across Washington and included with the Stipulation as Exhibit No. 23, was obtained by CMS through a Freedom of Information Act request.

53. From the Defense Department contract and from Stipulated Fact No. 27, it is clear that Cascade's private gas sales outside its service territory include:

- sales of natural gas for end-use at the Everett Naval Base, located in PSE's certificated service territory,
- sales of natural gas for end-use at McChord Air Force Base, located in PSE's certificated service territory, and
- sales of natural gas for end-use at Fairchild Air Force Base, located in Avista's certificated service territory.

There has never been a determination by this Commission under RCW 80.28.190 regarding any of these end-use sales the "existing gas company or companies serving such area will not provide the same to the satisfaction of the commission..."

54. Cascade admits in Stipulated Fact No. 27 that it also has other retail gas sales contracts with other customers outside its certificated service territory. However, these other contracts remain confidential and undisclosed.

55. Is Cascade selling natural gas at prices to selected end-users of its choosing within the certificated territories of Avista, PSE and Northwest Natural that are lower than its prices to customer in its own certificated service territory? The secrecy of Cascade's private retail gas sales means that CMS cannot answer this question and, more importantly, neither can this Commission. There is no public record of Cascade's private sales, either inside or outside its certificated service territory, upon which to determine whether Cascade's private, non-tariff customers are getting better prices than its tariff, "core" customers. Regarding these private sales by Cascade, the provisions of RCW Chapter 80 relating to regulated gas companies might as well be repealed unless the Commission enforces those provisions in this case. Penalties against Cascade are clearly warranted under RCW 80.04.380 and RCW 80.04.385.

C. There Has Never Been, Nor Could There Be, Any Federal Pre-Emption of Washington State Utility Law by FERC That Might Excuse Cascade's Chronic, Ongoing Violations Of RCW Chapter 80 AND WAC Chapter 480.

1. Cascade's changing story about the applicability of a FERC regulation to its private retail sales of natural gas.

56. Pre-emption of Washington state law by FERC under 18 C.F.R. §284.402 has been the legal linchpin of Cascade's claim that it may make private retail gas sales, free of regulatory oversight and control by this Commission under RCW Chapter 80. This representation is stated in both Schedule Nos. 663 and 664. See paragraph 16, above. Cascade's legal position is explained by its Vice President Jon Stoltz in the recent Cascade rate proceeding, Docket No. UG-060256:

FERC Order No. 547 issued on November 30, 1992 authorized jurisdictional gas sales for resale at market rates, with pre-granted abandonment, to all persons who are not interstate pipelines, except marketing affiliates of non-open

access pipelines. ... The enactment of Order No. 547 removed the restrictions on local distribution company (LDC) marketing certificates and allows LDCs to freely compete in the sale of gas with other marketers.

Stipulated Fact No. 7, Exhibit 1.

57. Of late, however, Cascade's legal position has been adrift. In answer to CMS' Complaint in this case, Cascade never squarely asserted that 18 C.F.R. §284.402 applied to its private retail sales of natural gas. Instead, it tried to confuse the legal issue by asserting that federal regulation of natural gas was complicated beyond this Commission's comprehension, urging this Commission to defer to the wisdom of FERC regarding the scope of this Commission's authority under RCW Chapter 80. Cascade Answer, pp. 5-8, ¶¶9-13.

58. More recently, Cascade has agreed to remove all reference to 18 C.F.R. §284.402 from Schedule Nos. 663 and 664. Stipulated Fact No. 24. This is surely a tacit admission by Cascade that it has been misrepresenting its federal legal authority to make private retail sales of natural gas at rates not on file with this Commission.

59. In place of its reliance on 18 C.F.R. §284.402, Cascade began in its answer to the CMS Complaint to hypothecate a fallback legal argument to defend its unregulated retail sales to Schedule Nos. 663 and 664 customers. Citing several cancelled rate schedules and Schedule No. 687, which does not even cover sales of gas, Cascade has begun to assert that its purported reliance on 18 C.F.R. §284.402 was all a harmless mistake. In its cross-motion for summary determination in this case, we can expect Cascade to develop its new-found claim that this Commission, not FERC, has somehow deregulated retail gas sales by Cascade to transportation customers under Schedule Nos. 663 and 664. CMS will respond to Cascade's latest claim of legal authority after it has been completely theorized, in our answer to Cascade's cross-motion.

60. While this proceeding continues, however, Cascade has an ongoing program of private sales at retail, under contracts with Schedule Nos. 663 and 664 customers, that are

grounded on 18 C.F.R. §284.402. Moreover, Cascade is selling gas at retail to customers within the certificated service territories of Avista Utilities, PSE and probably Northwest Natural. Clearly, these are not retail customers that utilize either Schedule No. 663 or 664; these retail customers take transportation service from their local gas company, not from Cascade. There is no Commission-approved rate schedule, whether effective or cancelled, on which Cascade can mount any defense of the legality of these extraterritorial private, retail gas sales. Lest there be any confusion that C.F.R. §284.402 might apply either to Cascade's private territorial or extraterritorial retail sales, CMS provides the argument in the following section of this pleading.

2. **FERC has absolutely no role under the Natural Gas Act in regulating retail gas sales by Washington gas companies or in erasing the geographic boundaries of their certificated service territories.**

61. To the best of our knowledge, Cascade is the only LDC anywhere in the United States ever to have asserted that 18 C.F.R. §284.402 pre-empted state utility law and authorized unregulated retail sales of natural gas to that company's end-use customers. Neither are we aware of any assertion by any other LDC that 18 C.F.R. §284.402 authorized it to leap the fence of its certificated service territory and make unregulated retail sales of natural gas in territories certificated to other local distribution companies. Such assertions are simply not credible anywhere in the natural gas industry.

62. Cascade began its novel assertions about the pre-emptive, deregulatory effect of 18 C.F.R. §284.402 even after it had been told, personally, by the U.S. Court of Appeals for the Tenth Circuit that the Natural Gas Act simply did not apply to retail gas sales by an LDC such as Cascade. In *Cascade Natural Gas Corporation v. FERC*, 955 F.2d 1412 (10th Cir. 1992), the court held:

Section 1(b) of the NGA gave the Commission [FERC] plenary jurisdiction over three areas, and three areas only: (1) the "transportation of natural gas in interstate commerce," (2) the "sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). See *Panhandle Pipe Line Co. v. Public Serv. Comm'n of Ind.*,

332 U.S. 507, 516, 68 S.Ct. 190, 195, 92 L.Ed. 128 (1947) (“*Panhandle I*”).

Since Congress intended to complement, not supplant, existing forms of state regulation, Congress excluded from the Commission’s jurisdiction “any other transportation or sale of natural gas” and “the local distribution of natural gas.” 15 U.S.C. § 717(b). ...

With this, Congress believed that it had cleanly and completely divided the regulatory universe between those matters granted to the Commission and the excluded matters over which the states exercised authority prior to the NGA.

Cascade Natural Gas Corporation, 955 F.2d at 1416-17 (emphasis supplied). It is hard to imagine a clearer judicial explanation of why Cascade should never have had a single thought that 18 C.F.R. §284.402 somehow deregulated its retail gas sales.

63. Moreover, the Tenth Circuit was not announcing any new interpretation of law in *Cascade Natural Gas Corporation v. FERC*. Its statements of law have been well settled for over 60 years:

The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, *the means adopted was limited to the regulation of sales in interstate commerce at wholesale*, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to the state regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record and from this court’s decisions.

Central States Electric Co. v. City of Muscatine, 324 U.S. 138, 144 (1945) (emphasis added, citations to federal statute, legislative history and federal case law omitted). *See also Panhandle Eastern Pipe Line Co. v. Michigan PSC*, 341 U.S. 329, 334 (1951):

By this [Natural Gas] Act, Congress occupied only part of the field. As to sales, only the sale of gas in interstate commerce for resale was covered. Direct sales for consumptive use were designedly left to state regulation.

3. **In adopting 18 C.F.R. §284.402, FERC did absolutely nothing that could have suggested to any intelligent reader that it was perturbing settled law under the Natural Gas Act in an effort to regulate retail gas sales.**

64. FERC has said or done nothing to suggest that it was pushing the limits of its jurisdiction under the Natural Gas Act in a way that might disturb settled law regarding retail gas sales. The regulation in question, 18 C.F.R. §284.402, provides:

Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas Act jurisdiction. A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate. [Emphasis supplied.]

65. Unless Cascade simply neglected to read the text of the very rule on which it relies to ignore RCW Chapter 80, it could not have concluded that this FERC rule had any application to retail gas sales at all. FERC's regulation does not address retail gas sales by Washington gas companies or any other LDC. FERC's rule is limited by its terms to "interstate commerce" and to "any category of gas that is subject to the Commission's Natural Gas Act jurisdiction." FERC's regulation is clear. It creates absolutely no overlap between federal and state regulation that might confuse a reader, particularly an industry savvy reader like Cascade whose misuse of this regulation can only have been willful.

66. FERC makes the same clear distinction in the explanatory text of Order No. 547, which accompanied the issuance of 18 C.F.R. §284.402. FERC stated flat-out that the new regulation does not apply to retail sales by LDCs:

Section 1(b) of the NGA [15 U.S.C. §717(b)] provides, in part, that the NGA does not apply "to the local distribution of natural gas or to the facilities used for such distribution."

Regulations Governing Blanket Marketing Sales Certificates, [Statutes & Regulations 1991-1996 Transfer Binder] Fed. Energy Reg. Comm'n Rep. (CCH) ¶30,957, at p. 30,724, n.34. Cascade must have willfully chosen to ignore this language as well.

67. FERC's introductory statement to its new rule is also crystal clear:

The Federal Energy Regulatory Commission (Commission) is issuing a final rule governing jurisdictional sales for resale of natural gas by all persons who are not interstate pipelines. The final rule issues blanket certificates of public convenience and necessity authorizing certificate holders to make jurisdictional gas sales for resale at negotiated rates, with pregranted abandonment. [Emphasis supplied.]

Order No. 547, Fed. Energy Reg. Comm'n Rep. (CCH) ¶30,957, at p. 30,718. Even if Cascade had overlooked the language of the regulation itself, this passage from Order No. 547 should have been a tip-off because Cascade admits that none of its private gas sales covered discussed in this pleading is a "sale for resale." Stipulated Fact No. 9. All of Cascade's extraterritorial gas sales are made to end-users. Stipulated Fact No. 27. Order No. 547 does not contain a single reference to any such retail sales of natural gas.

68. This is not to say that the FERC regulation has no application whatsoever to LDCs, such as Cascade. LDCs can make sales for resale, separate from their retail sales, when they sell gas at wholesale to other energy companies. When an LDC does so, it is subject to FERC's NGA jurisdiction, just like any other entity making wholesale gas sales. However, wholesales for resale are legally distinct from retail sales to end-users. FERC's regulation of the former does not allow it to intrude into state regulation of the latter. For a further discussion of these well-settled legal distinctions, please refer to the CMS Complaint at pp. 8-13, ¶¶ 19-32.

69. There is simply no plausible way in which Cascade could have misread 18 C.F.R. §284.402, FERC Order No. 547, the language of the Natural Gas Act, the Tenth Circuit's decision in *Cascade Natural Gas Corporation v. FERC* and 60 years of U.S. Supreme

Court precedents to conclude that FERC had deregulated the retail sale of natural gas and pre-empted RCW Chapter 80. Penalties against Cascade are clearly warranted under RCW 80.04.380 and RCW 80.04.385.

D. Cascade's Illegal Retail Sales of Natural Gas Do Violence To This Commission's Sound Regulation Of Gas Companies.

70. Stripped of the patina of pre-emptive deregulation by FERC, it becomes clear that Cascade is simply running two business lines within a single company, using a single set of Commission-regulated assets and expertise. It operates a regulated utility business, grounded on published rates that have been determined by this Commission to be just and reasonable and not unduly discriminatory or preferential. Off the same set of books, and across the state of Washington, it also runs a private business, grounded on private deals involving prices and contracts never filed with this Commission. The second business can only survive to the extent Cascade is able to offer better prices to its non-core customers lower than they could purchase gas under tariff. This second business inherently creates situations of cross-subsidization, undue discrimination and undue preference, violative of RCW Chapter 80, but never uncovered or remedied by this Commission, which never knows the details of Cascade's private deals.

71. Cascade has created an unincorporated marketing affiliate within a single regulated gas company. Because only a single corporation is involved, the regulatory safeguards of RCW Chapter 80.16 seem not to apply. However, Cascade's end-run of the affiliated interest statute creates all the risks to ratepayers that have troubled this Commission in past cases:

The danger in an affiliated interest arrangement is that the pressure for profit creates a risk to ratepayers that management may shift the costs and burdens of company operations so that beneficial aspects flow to the affiliate (while benefiting the same stockholders) and burdensome aspects flow to the regulated company (and ultimately to ratepayers). In other words, any affiliated transaction poses

a risk to ratepayers. Risks of manipulation, intentional or not, are inherent in any arrangement of this sort and are difficult to discover.

Washington Utilities and Transportation Commission v. Avista Corporation d/b/a Avista Utilities, Docket No. UG-021584, Sixth Supplemental Order Rejecting Benchmark Tariff, p. 3, ¶7 (February 2004).

72. Actually, Cascade's end-run of RCW Chapter 80.16 compounds the regulatory problems associated with affiliated-interests. The audit trail of Cascade's two, intra-corporate business lines is muddied by the fact that both operate off a single set of books.

73. Cascade's dual business lines divide the company's loyalties between the customers to whom it offers private gas deals and its core customers to whom it owes public service obligations under RCW Chapter 80. This Commission's integrated resource planning rules drive this point home. WAC 480-90-238 provides:

Each natural gas utility regulated by the commission has the responsibility to meet system demand with the least cost mix of natural gas supply and conservation. In furtherance of that responsibility, each natural gas utility must develop an "integrated resource plan." [WAC 480-90-238(1).]

"Integrated resource plan" or "plan" means a plan describing the mix of natural gas supply and conservation designated to meet current and future needs at the lowest reasonable cost to the utility and its ratepayers. [WAC 480-90-238(2)(a).]

"Lowest reasonable cost" means the lowest cost mix of resources determined through a detailed and consistent analysis of a wide range of commercially available sources. At a minimum, this analysis must consider resource costs, market-volatility risks, demand-side resource uncertainties, the risks imposed on ratepayers, resource effect on system operations, public policies regarding resource preference adopted by Washington state or the federal government, the cost of risks associated with environmental effects including emissions of carbon dioxide, and the need for security of supply. [WAC 480-90-238(2)(b).]

74. Simply put, “least cost planning” obligates Cascade to devote its full efforts to plan for, and procure, the “lowest cost mix of resources” with which to serve its core customers. This obligation covers both the “short term,” WAC 480-90-238(3)(h), and the long term. Cascade simply cannot fulfill these obligations to its core customers if it distracts itself with marketing and selling gas to its private customers at prices lower than the “lowest cost mix of resources” it must dedicate to core customers. Cascade cannot lawfully run both businesses; each one contradicts and undercuts the other. In the end, ratepayers of the regulated business will get shortchanged of their legal rights under RCW Chapter 80, and this Commission will not have the means with which to effect a remedy because Cascade’s private rates and contracts are never filed.

E. Cascade’s Illegal Retail Sales of Natural Gas Are Injurious To Competition.

75. Illegal competition can never be fair competition. By attempting to compete off its regulated set of books, Cascade creates endless opportunities for the cross-subsidization of its private-sale customers by core customers that purchase at tariff prices. As an incumbent gas company, Cascade can make available regulated assets in its negotiated private deals. Cascade rebundles these elements into single negotiated prices. It is nearly impossible to tell whether Cascade’s pricing for its private customers offers price concessions on gas commodity, interstate pipeline capacity, or even Schedule No. 663 or 664 service.

76. If Cascade’s real objective is competition and not the elimination of competition, it need not break the law to foster this objective. The record of this case identifies nine different unregulated gas suppliers that already compete for the business of Cascade’s Schedule Nos. 663 and 664 customers. Stipulated Fact No. 4. On the other hand, if Cascade still wishes to join in this competition, it could do so legally and fairly by forming a marketing affiliate with a separate set of books, affiliate-dealing rules and other safeguards against cross-subsidization, undue discrimination and undue preference.

F. Cascade Has Neglected The Marketing Tools Legally Available To It As A Gas Company Under RCW Chapter 80 And WAC Chapter 480.

77. “Both the banded rates statute ... and the special contracts rule ... were intended to be tools for gas companies to use in responding to ... competitive pressures. They were designed to encourage flexible pricing, a necessary step for them to meet competition and retain high volume customers.” *Washington Utilities and Transportation Commission v. Cascade Natural Gas Corporation*, Docket No. UG-930511, Fourth Supplemental Order Approving Special Contract, at p. 4 (April 1994). Cascade has employed special contracts in the past. Special contracts are sufficiently flexible to allow a contract customer to return to transportation service under Schedule No. 664. *In the Matter of Cascade Natural Gas and Puget Sound Energy, Inc.*, Docket No. UG-020482, Order Approving Termination of Special Contract (May 2002). Two important points need to be made about these tools.

78. First, neither banded rates nor special contracts relieve Cascade of its obligation to file rates and contracts with this Commission. Each of these tools works in concert with the other provisions of RCW Chapter 80 to ensure that rates and contracts are filed with, and reviewed by, this Commission prior to their imposition and use.

79. Second, the key purpose of these tools is to allow gas companies to retain customers whose contributions through rates to cover fixed costs would otherwise be lost. No such risk to Cascade is presented regarding its Schedule Nos. 663 and 664 customers. Those customers are, and will remain, paying customers of Cascade. Cascade recovers from each of these customers all the fixed costs allocated to them under rate schedules reviewed and approved by this Commission, except to the extent Cascade discounts the recovery of those costs in its private, rebundled sales of natural gas at negotiated prices. These prices are not filed with the Commission so it is impossible to determine what costs those private prices recover.

IV. REQUESTED RELIEF

80. WHEREFORE, CMS requests an order of the Commission:

- A. holding that no genuine material issues of fact remain unresolved and granting CMS's Motion for Summary Determination;
- B. directing Cascade to cease and desist from making retail sales of natural gas, both its private sales of "rebundled" service within its service territory and its private sales of natural gas commodity elsewhere in the state of Washington, except under rates, contracts and forms of contract on file with, and approved by, this Commission;
- C. directing Cascade to cease and desist from making retail sales of natural gas outside its certificated service territory, except upon compliance with RCW 80.28.190;
- D. determining the validity of unfiled contracts previously executed by Cascade for retail sales of natural gas, at prices other than those specified in Cascade's published rate schedules, under WAC 480-80-124;⁸
- E. imposing penalties on Cascade warranted under RCW 80.04.380 and RCW 80.04.385;
- F. providing for such other relief or penalties as the Commission may consider appropriate under the circumstances of this proceeding; and

⁸ The reference to 18 C.F.R. §284.402 in the "other services" paragraphs of Schedule Nos. 663 and 664 could be construed as an express representation that Cascade possessed all regulatory approvals necessary to engage in unregulated retail sales of natural gas. In addressing the legal status of previously executed "unregulated" contracts, CMS would ask the Commission to avoid any hardship to customers who may have relied upon such a representation by Cascade. Any consequences should be borne by Cascade, not its customers.

G. an award against Cascade of CMS's attorney fees and costs of this action.

DATED this 15th day of November, 2006.

Respectfully submitted,

Davis Wright Tremaine LLP

By: 

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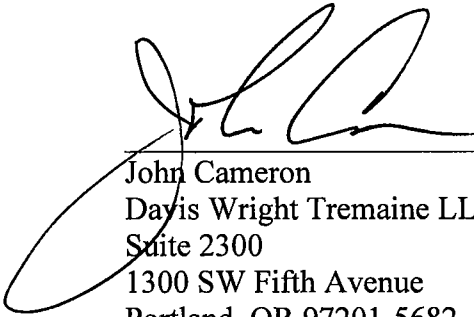
Of Attorneys for Complainant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of November, 2006, served the foregoing Motion for Summary Determination to Resolve All Issues in Its Favor upon parties of record in these proceeding, as follows:

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