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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

COST MANAGEMENT SERVICES,  
INC.,

Complainant,

v.

CASCADE NATURAL GAS  
CORPORATION,

Respondent.

No. UG-061256

RESPONDENT'S RESPONSE TO  
COMPLAINANT'S MOTION FOR  
SUMMARY DETERMINATION

RESPONDENT'S RESPONSE TO  
COMPLAINANT'S MOTION FOR  
SUMMARY DETERMINATION – i

32032-0004/LEGAL12551588.2

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1 Respondent, Cascade Natural Gas Corporation ("Cascade"), respectfully submits this  
2 memorandum in response to Complainant, Cost Management Services, Inc.'s ("CMS"),  
3 motion for summary determination ("CMS Motion").  
4  
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6  
7 **I. INTRODUCTION AND SUMMARY**  
8

9 The Commission should deny CMS's motion, and grant Cascade's motion for  
10 summary determination, because the undisputed facts show that Cascade's unbundled gas  
11 sales have been authorized by the Commission and conducted pursuant to Cascade's filed  
12 rate schedules, and fully comply with Washington law. CMS utterly fails to meet its burden  
13 as the complainant to prove its claim. Moreover, CMS fails to meet its burden as a party  
14 moving for summary determination to show that it is entitled to prevail based upon  
15 undisputed facts. CMS's motion is not supported by either undisputed facts or the law. In  
16 fact, CMS's motion conveniently ignores the facts in the record. Instead, CMS bases its  
17 motion on misstatements of fact and law, gross mischaracterizations of Cascade's positions,  
18 and unbridled speculation.  
19

20 CMS's motion is also irresponsible because it makes claims and assertions which the  
21 slightest diligence by CMS would have shown to be false. CMS makes scurrilous  
22 allegations against Cascade without having bothered to undertake any investigation. CMS  
23 requested no discovery from Cascade in this proceeding. Even a minimal amount of  
24 investigation by CMS would have revealed its accusations to be completely baseless.  
25 Following are some examples of CMS's false statements which any investigation would  
26 have revealed to be untrue:  
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- 43 • CMS claims that Cascade makes its unbundled sales of gas below cost, and  
44 that these sales are subsidized by Cascade's core customers when, in fact,  
45 Cascade recovers all of its costs in making these sales from its non-core gas  
46 supply customers.  
47

RESPONDENT'S RESPONSE TO  
COMPLAINANT'S MOTION FOR  
SUMMARY DETERMINATION - 1

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- CMS claims that Cascade "rebundles" its gas supply sales with its transportation services and offers customers one price when, in fact, Cascade makes these sales under two separate contracts.
  - CMS implies that Cascade offers its gas supply customers a discount on gas commodity, pipeline transportation, and/or regulated distribution system transportation services when, in fact, Cascade does no such thing.
  - CMS claims that Cascade's unbundled sales of gas are "secret" when, in fact, Cascade has always been open and above board about its sales activity, both inside and outside its service territory.
  - CMS claims Cascade's unbundled sales of gas are not made pursuant to Rate Schedule No. 687 when, in fact, Cascade and Commission Staff currently treat these sales under that rate schedule.

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In arguing that Cascade's unbundled sales of natural gas to its transportation customers are "illegal," CMS Motion at 2, CMS completely ignores 18 years of regulation of these sales by the Commission. For 18 years, the Commission has allowed Cascade to make these sales at prices that reflect the competitive market without filing either its negotiated rates or any actual contracts. Unlike Cascade's distribution system transportation service, Cascade's sales of gas are made in a highly competitive market and the Commission does not need to regulate the gas commodity prices for any reason. In fact, regulation of these prices would shackle Cascade's ability to participate in this market to the detriment of all its customers. The Commission does regulate Cascade's charges for services provided in connection with supplying unbundled gas, through the very mechanism CMS advocates – a banded rate under Rate Schedule No. 687. Cascade's unbundled sales of gas have been fully authorized by the Commission.

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CMS makes its arguments under the banner of consumer protection; however, CMS does not seek to benefit Cascade's customers, who have never complained to the Commission. Rather, CMS seeks only to improve its competitive position by removing Cascade as a competitor in the market. Even in this proceeding, Cascade's customers, as

1 represented by the Northwest Industrial Gas Users ("NWIGU"), do not claim that Cascade's  
2 sales are illegal or unauthorized. Cascade's customers benefit from these sales, and granting  
3 CMS's Complaint would, in fact, harm Cascade's customers in a number of ways.  
4  
5

6  
7 There is no merit to CMS's argument that Cascade may not sell gas to customers  
8 located outside Cascade's authorized service territory without a certificate of public  
9 convenience and necessity. Under clear Commission precedent, Cascade is not required to  
10 amend its certificate to include any additional territory in order to make such sales because  
11 Cascade's sales do not involve operating any gas plant in those areas. In fact, in making  
12 these sales, Cascade does not operate differently from CMS in any relevant manner. Thus,  
13 if Cascade is subject to a certificate requirement for these sales, so is CMS. CMS purports  
14 to be protecting the interests of other gas utilities in challenging these sales; however, once  
15 again, these other utilities have not complained even though they are aware of these sales  
16 which CMS falsely describes as "secret." As with its primary challenge, CMS seeks to  
17 advance its own competitive interests at the expense of customer choice.  
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29 Finally, CMS seeks relief that is not warranted and which the Commission is not  
30 authorized to grant. CMS asks the Commission to declare that Cascade's existing contracts  
31 with its gas sales customers are void. CMS also asks the Commission to hold Cascade's  
32 customers harmless from such a ruling. While NWIGU does not advocate that the  
33 Commission should grant CMS any relief, it joins CMS by stating that if the Commission  
34 does grants CMS relief, it should be at the expense of Cascade's shareholders, not Cascade's  
35 customers. As NWIGU recognizes, declaring customer contracts void at the peak of the  
36 winter heating season would subject those customers to increased gas costs by forcing them  
37 back into the market.  
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1 None of this relief is warranted because Cascade has done nothing wrong. The  
2 Commission also lacks authority to grant the relief CMS requests. The only way that the  
3 Commission could hold these customers harmless from such increased gas costs would be to  
4 require Cascade to bear those increased costs. There is no basis for ordering such drastic  
5 relief, especially where there is no evidence in the record to quantify the amount of such  
6 relief or to assess its impact on Cascade's operations. More fundamentally, however,  
7 granting such relief would be equivalent to ordering Cascade to pay damages to these  
8 customers, who are not even parties to this proceeding, which is beyond the Commission's  
9 statutory authority.  
10

11 The Commission should also deny CMS's request that the Commission impose  
12 penalties on Cascade. There is no basis for the imposition of penalties because Cascade has  
13 not violated any statute or rule or order of the Commission. Moreover, an award of  
14 penalties is not justified under the standard the Commission applies. In addition, the  
15 Commission lacks the power to impose penalties under the statutes that CMS relies on.  
16 Likewise, the Commission should deny CMS's request for an award of attorneys' fees as  
17 unjustified and beyond the Commission's authority.  
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33 **II. CASCADE'S UNBUNDLED GAS SALES TO ITS TRANSPORTATION**  
34 **CUSTOMERS FULLY COMPLY WITH WASHINGTON LAW**  
35

36 **A. The Commission Has Authorized Cascade To Sell Unbundled Gas Without**  
37 **Tariffed Gas Prices or Filed Contracts for 18 Years**  
38

39 As discussed in depth in Cascade's opening brief, the Commission has authorized  
40 Cascade to make the very sales that CMS challenges. For over 15 years, from 1988 through  
41 2004, Cascade sold unbundled gas to its customers under Rate Schedule Nos. 681 through  
42 684. Throughout that entire period, Cascade's sales were made in the same manner that  
43 CMS claims is improper; that is, the sales were made at negotiated prices that were not  
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1 reflected in any rate schedule and pursuant to contracts that were not filed with the  
2  
3 Commission. These prices differed from the rates in Cascade's rate schedules for bundled  
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5 gas sales. The Commission specifically authorized Cascade to make sales in this manner  
6  
7 pursuant to the terms of those rate schedules. Even after Cascade canceled those four rate  
8  
9 schedules, it continued to make these gas sales in the same manner. Cascade also continued  
10  
11 to charge fees pursuant to Rate Schedule No. 687 and to report all its revenue from these  
12  
13 sales under that rate schedule. Thus, Cascade has made its sales in the manner that CMS  
14  
15 now challenges for 18 years, with full Commission authority.

16  
17 Even though the Stipulated Facts set forth in detail the history of Cascade's making  
18  
19 these unbundled gas sales pursuant to its Commission-filed tariff, CMS fails even to  
20  
21 acknowledge those facts, let alone to address them. CMS acts as if it alone has uncovered  
22  
23 some great wrongdoing; however, Cascade has been open and above board with its  
24  
25 unbundled sales activity. These sales were made pursuant to tariff and with Commission  
26  
27 knowledge and approval for a very long time.

28  
29 CMS states that "Cascade claims that it must ignore RCW Chapter 80 in order to  
30  
31 compete and that its competition, although illegal, benefits consumers." CMS Motion at 4.  
32  
33 Cascade "claims" no such thing. Cascade has shown that its unbundled gas sales have been  
34  
35 in full compliance with all laws and orders of the Commission.

36  
37 CMS also argues that Cascade's Rate Schedule No. 687 "does not even cover sales of  
38  
39 gas." CMS Motion at 19. CMS's argument ignores and contradicts the stipulated facts that  
40  
41 "Cascade currently accounts for the revenue from its optional gas commodity sales by  
42  
43 attributing it to Rate Schedule 687. For the test year utilized in Cascade's current rate case,  
44  
45 October 1, 2004 through September 30, 2005, Cascade accounted for \$30,404,867.18 in  
46  
47 revenue from gas supply and related activities under Rate Schedule 687." Stipulated Facts,

1 ¶ 17. CMS's argument also flies in the face of Staff's testimony in Cascade's current rate  
2 case that these sales are made pursuant to Rate Schedule No. 687. *See* Cascade's Opening  
3 Brief at 10-11. CMS's argument is also at odds with the basis of paragraph 12 of the  
4 settlement agreement in the rate case that includes revenue from these sales in Cascade's  
5 revenue requirement and provides for a sharing of the revenue from these sales with all  
6 customers. *See* Cascade's Opening Brief at 11-12.  
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12 The Commission should dismiss CMS's Complaint because Cascade has been  
13 making its unbundled gas sales with full Commission authority.  
14

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16  
17 **B. Cascade's Customers Benefit From, and Are Not Harmed by, These Sales**

18 In an attempt to support its claim that Cascade has been making unbundled gas sales  
19 in violation of Washington law, CMS argues that Cascade's customers have been harmed by  
20 these sales in a variety of ways. Not only does CMS fail to support its argument with any  
21 facts, these claims are in fact disproven by the facts in the record. Cascade's customers  
22 benefit from these sales and are not harmed by them in any way.  
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29 **1. Cascade does not subsidize these sales with revenue from its core**  
30 **customers**

31 CMS repeatedly argues that Cascade must be subsidizing its unbundled gas sales to  
32 non-core customers with revenue from its core customers. CMS Motion at 24; *see also*  
33 Complaint, ¶ 44 (alleging that Cascade makes "unregulated retail sales of natural gas at  
34 prices below full cost."). In fact, this appears to be CMS's fundamental attack on Cascade's  
35 sales. CMS, however, offers no evidence to support its allegation that Cascade is making  
36 these sales below their cost, or that Cascade's core customers are subsidizing these sales in  
37 any way. As the complainant, CMS is required to produce evidence to support its claims.  
38 CMS made no effort whatsoever to investigate these accusations because it undertook no  
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1 discovery in this case.<sup>1</sup> Despite the fact that there is no factual basis to support them, CMS  
2 persists in making these patently false accusations. The Commission should disregard this  
3 argument, and CMS's other unsupported arguments, since it is based on speculation, not  
4 evidence.  
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8  
9 The undisputed evidence in the record is that Cascade fully recovers its costs of  
10 selling unbundled gas to non-core customers in its prices for that gas supply. Declaration of  
11 Jon T. Stoltz filed November 15, 2006 ("Stoltz Decl."), ¶ 6. Cascade does this by entering  
12 into gas supply contracts that match its customers' requirements and charging its customers  
13 the same prices Cascade pays for gas supply. *Id.*, ¶¶ 4-5. Cascade then *adds* to this price a  
14 component to cover Cascade's risk, a component to cover pipeline charges, a tariffed fee for  
15 Cascade's services, and a tariffed rate to cover governmental charges. *Id.*, ¶¶ 5-6. Cascade's  
16 unbundled sales to non-core customers are not subsidized by core customers. There is no  
17 factual basis whatsoever for CMS's argument that Cascade's core customers subsidize  
18 Cascade's sales of gas to non-core customers.<sup>2</sup>  
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29 **2. Cascade does not "rebundle" gas supply with distribution system**  
30 **transportation service and does not offer discounts**  
31

32 CMS argues that Cascade somehow "rebundles" its sales of gas to non-core  
33 customers with its sale of transportation to those customers. "Cascade rebundles these  
34 elements into single negotiated prices." CMS Motion at 26. CMS further asserts that "[i]t is  
35 nearly impossible to tell whether Cascade's pricing for its private customers offers price  
36 concessions on gas commodity, interstate pipeline capacity, or even Schedule No. 663 or  
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43 <sup>1</sup> As reflected in the Prehearing Conference Order dated September 18, 2006, at 4, CMS did  
44 not request any discovery in this case and agreed with Cascade that the Commission should decide  
45 this case based upon cross-motions for summary determination.

46 <sup>2</sup> In any event, the Commission can and routinely does address issues of cross-subsidization  
47 by making appropriate adjustments in rate cases. There is no reason for the Commission to be  
concerned about these allegations in this proceeding.

1 664 services." *Id.* Once again, CMS cites absolutely no support for its assertions. CMS's  
2 statements are irresponsible because CMS did not review any contracts or the pricing of any  
3 of Cascade's sales. Again, CMS made no effort to obtain such information in discovery, yet  
4 it persists in making unfounded accusations. These assertions are simply figments of CMS's  
5 imagination and should be ignored.  
6  
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9

10 CMS's assertions about "rebundling" and offering discounts on regulated rates are  
11 untrue. Cascade does not rebundle its gas sales to non-core customers with its sale of  
12 transportation under Rate Schedule No. 663 or 664. Cascade provides distribution system  
13 transportation service to non-core customers under service agreements that are entirely  
14 separate from, and do not depend upon, its contracts to sell gas to these same customers.  
15 Supplemental Declaration of Jon T. Stoltz filed December 1, 2006 ("Supp. Stoltz Decl."),  
16 ¶ 2. If a customer purchases both distribution system transportation and gas supply from  
17 Cascade, it does so pursuant to two separate contracts. *Id.* Cascade does not offer price  
18 concessions on its regulated transportation service to customers that also purchase  
19 unbundled gas from Cascade. *Id.* Moreover, Cascade does not discount its cost for gas  
20 commodity, and it provides pipeline transportation service at market rates. Stoltz Decl., ¶ 5.  
21 Thus, there is no factual basis for CMS's argument that Cascade rebundles these services or  
22 offers discounts.  
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37 **3. Cascade does not engage in unlawful price discrimination**

38 Next, CMS argues that Cascade is guilty of price discrimination because it must be  
39 offering better prices to its non-core customers than it offers to its core customers for a  
40 bundled service. CMS Motion at 24. CMS also claims that Cascade offers different prices  
41 to customers located inside and outside its service territory. *Id.* at 18. Once again, CMS  
42 undertook no effort to investigate the facts, and provides no facts to support its accusation.  
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1 CMS asserts that neither it nor the Commission can determine whether Cascade is  
2 discriminating between customers inside and outside its service territory because of the  
3 "secrecy" of these sales. CMS Motion at 18. There is nothing secret about Cascade's sales  
4 of gas to customers outside its service territory. When Cascade sells gas to a customer of  
5 another gas company, such as Avista or Puget Sound Energy, that other gas company is  
6 informed about the fact that Cascade will be delivering gas to that utility's distribution  
7 system and the particular customer buying the gas is identified. Supp. Stoltz Decl., ¶ 6. In  
8 addition, CMS could have sought information about these sales in discovery, but chose not  
9 to do so.

10 Cascade is not guilty of price discrimination in making these sales. Cascade's sales  
11 to non-core customers *are* made at different rates from its bundled sales to core customers.  
12 Non-core customers pay a tariffed rate for regulated transportation service. They pay a  
13 different, market-based rate if they also choose to buy gas from Cascade, plus additional  
14 charges for pipeline transportation, Cascade's services, and governmental taxes and fees.  
15 The total of those prices may be lower, or may turn out to be higher, than the price core  
16 customers pay for bundled sales service. *See* Exhibit 20 at 19 (Cascade's Response to a  
17 CMS data request in the rate case related to comparing gas commodity prices.)<sup>3</sup> When non-  
18 core customers select an index price, they take the risk of price fluctuations. The difference  
19 in the rates paid by bundled sales customers and unbundled transportation and sales  
20 customer is not unlawful price discrimination, however, because customers that take  
21 bundled service are not similarly situated to customers that take transportation service from  
22 Cascade. Transportation customers have the ability to purchase gas from a number of

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<sup>3</sup> All references to "Exhibits" in this memorandum are to exhibits to the Stipulated Facts, unless otherwise indicated.

1 sources. They also bear the risk of buying gas and pipeline services in a competitive market.  
2  
3 Cascade's core customers are protected from these risks to some extent because of how  
4  
5 Cascade purchases gas on their behalf. Cascade's core customers are also protected from the  
6  
7 risks non-core customers choose because customers electing transportation service may not  
8  
9 return to core service for at least one year, and may terminate such service only on  
10  
11 September 30 of any given year. Exhibit 6 at 1; Exhibit 7 at 6. These conditions ensure that  
12  
13 Cascade is able to protect its core customers if a non-core customer reconsiders its decisions  
14  
15 to take transportation service and to buy gas in the open market.

16  
17 Cascade also does not unfairly discriminate among its customers for unbundled gas  
18  
19 sales. The vast majority of Cascade's non-core customers who purchase gas from Cascade  
20  
21 do so at an index price; they all pay the same price for gas commodity. Stoltz Decl., ¶ 5.  
22  
23 They also all pay the same rates for pipeline capacity and governmental taxes and fees. *Id.*,  
24  
25 ¶¶ 5-6. What differs in their rates is the charge that Cascade includes for its services;  
26  
27 however, this charge is within a banded rate as authorized by Rate Schedule No. 687. *Id.*,  
28  
29 ¶ 6. Charging different customers rates within a Commission-authorized banded rate does  
30  
31 not constitute price discrimination.

32  
33 **4. Cascade's unbundled sales do not affect performance of its**  
34 **responsibilities to core customers**

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36 CMS takes its allegations to an even higher level of speculation when it argues that  
37  
38 by engaging in these sales, Cascade somehow breaches its obligations to its core customers  
39  
40 to obtain gas for them at the lowest cost, as required by least-cost planning rules. CMS  
41  
42 Motion at 3, 25-26. CMS even goes so far as to argue that "Cascade cannot lawfully run  
43  
44 both businesses." *Id.* at 26. Once again, CMS fails to support its allegations with even a  
45  
46 shred of evidence.  
47

1 Cascade is perfectly able to meet its obligations to core customers and, at the same  
2 time, to make gas sales to non-core customers. Cascade fully participates in the  
3 Commission's least-cost planning process, and the Commission has accepted Cascade's  
4 plans. Cascade's filed its latest least-cost plan on December 31, 2004 (Docket UG-041831),  
5 and the Commission accepted it on June 22, 2005. The Commission's acceptance letter  
6 states that the plan meets the requirements of WAC 480-90-238 (and may be found on the  
7 Commission's website). As the Commission is aware, least-cost planning requires a gas  
8 company to utilize a variety of means – including both long-term and short term purchases,  
9 storage, and financial hedges – to secure an adequate supply of gas at reasonable prices,  
10 giving consideration to both price and reliability of system resources. Cascade devotes itself  
11 to meeting the punctilio of its least-cost planning obligations. CMS provides absolutely no  
12 evidence to support its accusation that Cascade fails in any respect to comply with its least-  
13 cost planning obligations for gas supply to core customers.  
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27 Cascade's purchase of gas supply for its sales of unbundled gas to non-core  
28 customers is made entirely separately from its purchase of gas supply for sales to core  
29 customers and does not interfere in any way with meeting Cascade's obligations to core  
30 customers. Supp. Stoltz Decl., ¶ 3. When a customer requests to purchase unbundled gas  
31 supply from Cascade, Cascade enters into a supply contract that matches the needs of a  
32 specific customer or group of customers. Stoltz Decl., ¶ 4. Cascade recovers from those  
33 customers the cost of its gas supply, plus other charges. *Id.*, ¶ 5. Cascade's unbundled gas  
34 sales program is operated entirely separately from its purchase of gas to meet the needs of its  
35 core customers. Supp. Stoltz Decl., ¶ 3. These sales activities are not at odds with  
36 Cascade's obligations to its core customers, and CMS has not proven otherwise.  
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1                   **5. Cascade's unbundled sales do not thwart Commission regulation**

2                   Finally, CMS argues that the Commission's ability to regulate Cascade is somehow  
3                   compromised if Cascade makes its unbundled sales by the same entity that operates as a  
4                   regulated utility. CMS Motion at 4. CMS argues that if Cascade utilizes a single entity for  
5                   unbundled gas sales and utility operations, the Commission "cannot determine" if Cascade is  
6                   cross-subsidizing its unbundled sales customers or engaging in undue discrimination. *Id.*  
7                   CMS would have Cascade conduct these operations through a separate affiliate. *Id.* at 4, 26.  
8                   CMS argues that the Commission is unable effectively to audit Cascade's unbundled sales  
9                   activity if that is conducted by the same entity that makes utility sales, and that Cascade  
10                  somehow skirts the protections offered by affiliated interest statutes. *Id.* Once again, CMS  
11                  offers no evidentiary support for these false allegations.  
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22                  The Commission's regulatory tools and abilities are not as weak or compromised as  
23                  CMS asserts. The Commission's ability to audit Cascade's unbundled sales activity is  
24                  unaffected by the fact that Cascade makes these sales by the same entity that makes its  
25                  utility sales. Cascade documents the revenues and expenses that pertain to these sales and  
26                  the Commission is equally able to audit these records as if Cascade had conducted the  
27                  operations through a separate entity. Supp. Stoltz Decl., ¶ 4. Indeed, in its current rate case,  
28                  Cascade produced records relating to these revenues and expenses and is unaware of any  
29                  problem that Commission Staff or any other party had in accessing or understanding these  
30                  records. *Id.*  
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40                  Neither the Commission nor Cascade's customers would benefit if Cascade made  
41                  these sales through a separate affiliate. Cascade purchases gas specifically to meet its  
42                  unbundled sales obligations; it does not utilize gas purchased for core customers. Cascade  
43                  also recovers from non-core customers market rates for pipeline services. The only other  
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1 services that Cascade provides to support these sales are administrative, and Cascade is  
2 easily able to document and justify these expenses, and the Commission is able to audit  
3 these expenses. No purpose would be served by requiring Cascade to utilize a separate  
4 affiliate and then to comply with the affiliate transaction rules. Those requirements are  
5 designed to ensure that unregulated activities, conducted for the benefit of a utility's  
6 shareholders, are not improperly subsidized by regulated activities. Cascade has now agreed  
7 to share the revenue from these transactions with its core customers; thus, Cascade's core  
8 customers will enjoy some of the benefits of these transactions. While Cascade does not  
9 think there is any need to apply the affiliate transaction rules to these sales, Cascade is not  
10 opposed to conducting these sales through an affiliate if the Commission thinks it is required  
11 or desirable.  
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23 **6. Cascade's customers would be harmed if Cascade were required to**  
24 **terminate these sales**

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26 The thrust of CMS's argument is that Cascade's customers are harmed by Cascade's  
27 unbundled sales activity. Not only does CMS fail to support its argument with any facts, the  
28 facts in the record show that there is no merit to CMS's argument.  
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32 Moreover, Cascade established in its opening brief that its customers benefit from  
33 these sales and would actually be harmed if Cascade were required to cease making these  
34 sales. First, customers with current contracts would be prejudiced if their contracts were  
35 declared void and the customers were required to obtain new gas supplies at the peak of the  
36 winter supply season. Second, Cascade's non-core customers would lose a competitive  
37 option, which many of them have found attractive. Third, rates for all Cascade customers  
38 would be higher. *See* Cascade's Opening Brief at 15-17.  
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1 **C. Cascade Has Acted Consistently With Its FERC Authority**

2 CMS states that "Cascade maintains that this FERC regulation [18 C.F.R. § 284.402]  
3 allows it to ignore state laws regarding the regulation of retail rates, contracts and service  
4 territories by establishing a federally deregulated retail-marketing function within a  
5 Washington-regulated 'gas company.'" CMS Motion at 2. Cascade makes no such  
6 argument. As is clear from Cascade's Answer and opening brief, Cascade's gas sales are in  
7 full compliance with both FERC authority and Washington regulatory laws.  
8  
9

10 CMS also argues that Cascade has misrepresented its authority to make these sales  
11 under its FERC blanket marketing certificate. CMS Motion at 28, n.8. As discussed in  
12 more detail in Cascade's Answer, Cascade's activities are subject to both state and federal  
13 regulation. On the federal side, FERC has established rules and regulations that specifically  
14 apply to local distribution companies and other "shippers" participating in the interstate  
15 transportation market. *See, e.g.*, 18 C.F.R. § 284.224 and 18 C.F.R. § 284.8(g) (2006).  
16 Cascade's activities on behalf of non-core customers are authorized under both the FERC  
17 blanket marketing certificate and FERC's rules and regulations concerning the sales and  
18 transportation of natural gas in interstate commerce. Services performed by Cascade on  
19 behalf of its non-core customers that are authorized by its FERC blanket marketing  
20 certificate include making nominations and balancing on behalf of customers in connection  
21 with the interstate transportation of gas. They also include Cascade's interstate  
22 transportation, gas purchases, and other dealings with gas suppliers in interstate commerce  
23 on behalf of its customers.  
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42 Cascade does not claim that the FERC regulation allows Cascade to "ignore state  
43 laws." To the contrary, Cascade showed in its opening brief that its sales of gas to  
44 Washington customers are authorized under state law. Cascade added the challenged  
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1 language to its tariff, referring to 18 C.F.R. § 284.402, in 2004 because many of the  
2 unbundled gas sales and other services it provided to non-core customers located in  
3 Washington were also authorized pursuant to federal authority by the blanket marketing  
4 certificate FERC granted to Cascade pursuant to 18 C.F.R. § 284.402. Stoltz Decl., ¶ 3.  
5 Several of Cascade's existing rate schedules at that time contained both state jurisdictional  
6 and federal jurisdictional services, thereby creating an overlap of state and federal authority  
7 and the potential for confusion. *Id.* That is why Cascade made the tariff revisions it did in  
8 2004, not to mislead customers. There is no evidence in the record that Cascade intended to  
9 misrepresent its authority or that any customers were, in fact, misled in any respect.<sup>4</sup>  
10

11 CMS points to Cascade's agreement in the rate case settlement to remove the  
12 challenged language from its tariff as a "tacit admission by Cascade that it has been  
13 misrepresenting its federal legal authority . . ." CMS Motion at 19. CMS ignores section  
14 20 of that settlement agreement in which the parties agreed that the settlement represents a  
15 compromise of disputed provisions. Exhibit 22 at 17. The parties also agreed that, by  
16 entering the settlement agreement, no party admits, agrees, or consents to any fact, principle  
17 or theory, nor shall any party be deemed to have agreed that any provision of the settlement  
18 agreement is appropriate for resolving issues in other proceedings. *Id.* at 18. Thus, the  
19 Commission should not draw any inference from Cascade's agreement in the rate case  
20 settlement to remove certain language from its tariff. Even CMS's suggestion that the  
21 Commission should do so may have a chilling effect on parties' agreeing to settle disputed  
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<sup>4</sup> CMS again overstates its case when it asserts that Cascade was "told, personally, by the U.S. Court of Appeals for the Tenth Circuit that the Natural Gas Act simply did not apply to retail sales by an LDC such as Cascade." CMS Motion at 20. The issue presented in *Cascade Natural Gas Corp. v. F.E.R.C.*, 955 F.2d 1412, 1417 (10th Cir. 1992), was whether FERC has jurisdiction over the construction of bypass pipelines, not whether FERC has jurisdiction over retail sales of gas.

1 issues in Commission proceedings for fear that another party may cite its compromise on a  
2  
3 disputed issue as evidence in another proceeding.  
4

5 **III. CASCADE IS NOT REQUIRED TO EXPAND ITS CERTIFICATED**  
6 **SERVICE TERRITORY TO SELL GAS OUTSIDE ITS UTILITY TERRITORY**  
7

8 **A. CMS's Claim Is Outside the Scope of This Proceeding**  
9

10 CMS's Complaint challenges Cascade's sale of gas to its customers taking service  
11 under Rate Schedule Nos. 663 and 664, *i.e.*, Cascade's distribution system transportation  
12 customers. Complaint, ¶ 2. In its motion, for the first time, CMS separately challenges  
13 Cascade's sales of gas to customers that are located outside Cascade's certificated public  
14 service company service territory. CMS Motion at 11-18. CMS claims that these sales are  
15 unauthorized because Cascade did not apply to the Commission to expand its service  
16 territory pursuant to RCW 80.28.190. *Id.* at 12-18.  
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23 The Commission should not consider this new claim, which is plainly outside the  
24 scope of the issues and claims framed by the Complaint. The Commission's rules require  
25 that a complaint set forth the grounds for the complaint and the relief requested, as well as  
26 citations to relevant statutes and rules. WAC 480-07-370(1)(a). CMS did not set forth any  
27 facts about these sales in its Complaint, nor did it request relief relating to these sales.  
28 Moreover, CMS failed to list RCW 80.28.190 as one of the statutes upon which it based its  
29 Complaint. Because CMS did not raise any issue regarding these sales in its Complaint,  
30 Cascade did not address them in its motion. CMS should not be allowed to raise new issues  
31 in its motion that Cascade has not had an opportunity to address affirmatively in its motion.  
32 CMS's claim regarding Cascade's extra-territorial sales improperly expands the scope of this  
33 Complaint proceeding and should not be addressed.  
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1 Cascade must make an additional comment in response to CMS's claim that these  
2 sales are "secret." CMS Motion at 18; see also *id.* at 17 ("The confidentiality of its private  
3 sales of natural gas within the certificated service territories of other gas companies have  
4 allowed these violations to escape general notice."). There is nothing secret or confidential  
5 about Cascade's sales of gas outside its certificated service territory. Each gas company is  
6 informed each time Cascade sells gas to one of its customers, and both Cascade as the seller  
7 and the customer as buyer are identified. Supp. Stoltz Decl. ¶ 6. This clearly happened with  
8 respect to the one sale that CMS discusses. *Id.*, and Exhibit 1 thereto. In addition, Cascade  
9 produced documents relating to these sales, including the specific contract CMS relies upon,  
10 in its rate case. *Id.*, ¶ 5. Furthermore, even though they are aware of Cascade's making  
11 these sales, no gas company has complained to the Commission about them.  
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23 **B. Cascade Is Not Required To Expand its Certificated Service Territory Because**  
24 **It Does Not Operate Gas Plant When It Makes These Sales**

25 Pursuant to clear Commission authority, Cascade's sales of gas to customers outside  
26 its certificated service territory are lawful. Cascade is not required to amend its certificate  
27 pursuant to RCW 80.28.190 to expand its service territory to make these sales because  
28 Cascade does not operate any gas plant outside its authorized utility service territory when it  
29 makes these sales. CMS's complaint about these sales is baseless. The Commission has  
30 already ruled that Cascade is not required to amend its certificate to provide services outside  
31 its certificate service territory if such services do not involve the operation of gas plant.  
32 Each of the authorities that CMS relies on are distinguishable because they did involve the  
33 potential operation of gas plant in a new area. If the Commission determines that Cascade *is*  
34 operating gas plant in making these sales, then that decision would equally apply to CMS  
35 and require it to obtain a certificate to make its sales because Cascade and CMS are  
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1 similarly situated in terms of how they make gas sales outside Cascade's public service  
2 company service territory.  
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5 CMS first argues that the Commission may regulate Cascade's sales outside its  
6 certificated service territory under RCW 80.01.040(3), which authorizes the Commission to:  
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8  
9 Regulate in the public interest, as provided by the public  
10 service laws, the rates, services, facilities, and practices of all  
11 persons engaging within this state in the business of supplying  
12 any utility service or commodity to the public for  
13 compensation, and related activities; including, but not limited  
14 to, electrical companies, gas companies, irrigation companies,  
15 telecommunications companies, and water companies.  
16

17 This section generally authorizes the Commission to regulate certain activities, but more  
18 specific authorization must be provided in the public service laws for any regulatory action.  
19

20 In this case, the more specific authorization that CMS claims applies to Cascade is found in  
21 RCW 80.28.190. If the Commission concludes that this statute alone authorizes it to  
22 regulate Cascade's sales anywhere in the state of Washington, then the Commission should  
23 likewise regulate CMS's sales under the same authority, because CMS is a "person[]  
24 engaged within this state in the business of supplying any . . . commodity to the public for  
25 compensation."  
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32 RCW 80.28.190(1) provides:  
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34  
35 No gas company shall, after January 1, 1956, operate in this  
36 state any gas plant for hire without first having obtained from  
37 the commission under the provisions of this chapter a  
38 certificate declaring that public convenience and necessity  
39 requires or will require such operation and setting forth the  
40 area or areas within which service is to be rendered; but a  
41 certificate shall be granted where it appears to the satisfaction  
42 of the commission that such gas company was actually  
43 operating in good faith, within the confines of the area for  
44 which such certificate shall be sought, on June 8, 1955. Any  
45 right, privilege, certificate held, owned or obtained by a gas  
46 company may be sold, assigned, leased, transferred or  
47 inherited as other property, only upon authorization by the

1 commission. The commission shall have power, after hearing,  
2 when the applicant requests a certificate to render service in an  
3 area already served by a certificate holder under this chapter  
4 only when the existing gas company or companies serving  
5 such area will not provide the same to the satisfaction of the  
6 commission and in all other cases, with or without hearing, to  
7 issue the certificate as prayed for; or for good cause shown to  
8 refuse to issue same, or to issue it for the partial exercise only  
9 of the privilege sought, and may attach to the exercise of the  
10 rights granted by the certificate such terms and conditions as,  
11 in its judgment, the public convenience and necessity may  
12 require.

13  
14 It is plain that this statute requires a gas company to obtain a certificate from the  
15 Commission only when it intends to "operate . . . any gas plant for hire", and this is how the  
16 Commission has consistently applied the statute. CMS argues that RCW 80.28.190 requires  
17 a gas company to obtain a certificate to provide any service in any area in the state,  
18 regardless of whether the company is operating gas plant in that area. CMS Motion at 13.  
19  
20 CMS attempts to support this construction by isolating the third sentence of RCW  
21 80.28.190(1), which provides an additional requirement when a gas company seeks to  
22 provide service in an area already served by a certificate holder. *Id.* Thus, CMS would read  
23 RCW 80.28.190(1) to require Cascade to obtain a certificate to sell gas in the service  
24 territory of Avista or Puget Sound Energy and to show that those companies are not  
25 providing service to the satisfaction of the Commission.  
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28  
29 CMS's proposed construction of RCW 80.28.190(1) takes language out of context  
30 and is inconsistent with the plain intent of the legislature. This statute requires a gas  
31 company to obtain a certificate only to operate gas plant in an area. The additional  
32 requirement CMS focuses on is plainly intended to reduce the circumstances in which public  
33 service companies are operating gas plant in the same area, in order to avoid the inefficient  
34 duplication of utility facilities. It is unreasonable to read this language to apply to services,  
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1 such as the sale of gas, that do not involve the operation of gas plant. It is also unreasonable  
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3 to apply this language to services that are competitive; there is no good reason to exclude a  
4  
5 gas company from competing with the incumbent gas company and several unregulated  
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7 marketers for gas sales to non-core customers simply because the Commission finds that the  
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9 incumbent is already making such sales to the satisfaction of the Commission. This  
10  
11 argument serves only CMS's unabashed effort to have the Commission exclude Cascade  
12  
13 from the market.

14  
15 The Commission has consistently applied RCW 80.28.190 only to circumstances  
16  
17 where a public service company seeks to operate gas plant, including each of the cases cited  
18  
19 by CMS. Thus, in Docket UG-010319, Avista applied for authority to extend the territory in  
20  
21 which it could provide natural gas service through the operation of gas plant. It is  
22  
23 noteworthy that the Commission's form application used in that proceeding relates to an  
24  
25 application under RCW 80.28.190 for a certificate of public convenience and necessity "to  
26  
27 operate a gas plant for hire."<sup>5</sup> Similarly in Docket UG-021031, the Commission granted  
28  
29 Puget Sound Energy's application to extend the area within which it could operate gas plant  
30  
31 for hire.

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33 CMS's attempt to find support for its position based on Cascade's application in  
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35 Docket UG-001119 also falls flat. In that docket, Cascade initially applied for a certificate  
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37 to provide certain services with regard to customer-owned piping in an area of Grant  
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39 County. CMS states that the Commission's final order in that docket "establishes that  
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41 Cascade must seek a new certificate of public convenience and necessity even though the  
42  
43 new extra-territorial service would not involve either the construction or operation of 'gas  
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46 <sup>5</sup> This document and the others referenced in this section, unless otherwise noted, are  
47 available on the Commission's website.



1 plant." CMS Motion at 15-16. The Commission's final order stands for no such thing.  
2  
3 Even though Cascade initially applied for a certificate to provide the referenced services  
4  
5 outside its existing territory, Cascade later filed a petition for a determination that Cascade  
6  
7 did not require a certificate to provide those services. Exhibit 24. A review of the pleadings  
8  
9 in that proceeding establishes that the central contested issue was whether the services  
10  
11 Cascade proposed to provide involved the operation of gas plant. See briefs of Commission  
12  
13 Staff, Cascade, Avista, and NWIGU and First Supplemental Order Denying Summary  
14  
15 Determination, dated January 19, 2001, at 4-7 (this order is not found on the Commission's  
16  
17 website and a copy is attached as Exhibit A hereto).<sup>6</sup>

18  
19 The Commission treated Cascade's petition in UG-001119 as a motion for summary  
20  
21 determination, and denied Cascade's motion and the cross-motions of the other parties,  
22  
23 finding that there was a question of fact as to whether Cascade was "proposing to operate a  
24  
25 gas plant for hire." Exhibit A at 7. The Commission noted that one of the listed services  
26  
27 that Cascade proposed to provide was "Operation and maintenance of customer-owned  
28  
29 piping system." *Id.* The Commission decided that whether Cascade required a certificate to  
30  
31 provide the services depended upon whether Cascade would be operating gas plant for hire.

32  
33 The Commission's final order in that case accepted the settlement agreements of the  
34  
35 parties and granted a revised application that sought a certificate for a narrow area  
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37 encompassing only the right-of-way of the customer-owned pipeline that gave rise to the  
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39 initial application. That final order noted, however, that "the settlement agreement and  
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41 petition represent a negotiated settlement in the public interest for the sole purpose of  
42  
43 settlement. The parties do not waive any right to assert any position in any other proceeding  
44

45  
46 <sup>6</sup> As discussed in the Commission's order, NWIGU joined Cascade in arguing that Cascade  
47 did not require a certificate because it proposed to provide services but not to own or operate gas  
plant in that area of Grant County. Exhibit A at 5.

1 before the Commission." Order Accepting Settlement Agreements; Granting Revised  
2 Application, Docket UG-001119 (March 30, 2001) at 3. Given the basis of the  
3 Commission's previous order denying summary determination and the fact that the final  
4 order was based upon settlement agreements, the Commission's final order in that docket  
5 certainly does not establish that Cascade is required to obtain a certificate if it is providing  
6 services that do not involve the operation of gas plant.  
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12 CMS's discussion of Docket UG-001119 is ultimately irrelevant because the  
13 Commission's order in subsequent Docket UG-020632 puts to rest CMS's argument that  
14 Cascade requires a certificate to provide services that do not involve the operation of gas  
15 plant. Cascade applied in that case for a declaration that a certificate of public convenience  
16 and necessity is not required for Cascade to provide services assisting customers with the  
17 safe operation of their gas piping systems throughout the state, the same services that were  
18 addressed in Docket UG-001119. Order Holding That a Certificate of Public Convenience  
19 and Necessity Is Not Required, Docket UG-020632 (June 18, 2002) at 1. After Cascade  
20 agreed to remove a reference to "operation" of customer-owned piping – the same phrase  
21 that concerned the Commission in Docket UG-001119 – the Commission agreed that  
22 Cascade did not require a certificate to provide the referenced services throughout the state,  
23 and issued the order to that effect. *Id.* at 1. Consistent with its previous decisions, the  
24 Commission held that a certificate was not required because Cascade would not be  
25 "operating" any gas plant. CMS construes the order far too narrowly when it argues that the  
26 order is simply based on the fact that Cascade would be entering "nothing more than  
27 consulting contracts." CMS Motion at 15, n.5. This order completely refutes CMS's  
28 argument that Cascade must obtain a Commission certificate under RCW 80.28.190 where it  
29 is only providing services, but not operating gas plant, outside its certificated territory.  
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1 Cascade is not required to obtain a Commission certificate to sell gas to customers  
2 located outside its certificated utility territory because such sales do not involve Cascade's  
3 operating any gas plant outside its certificated territory, any more than CMS's sales involve  
4 the operation of gas plant. CMS pled in its Complaint that it "does not own any 'gas plant.'"  
5 Complaint, ¶ 5. CMS and Cascade are in precisely the same situation when they sell gas to  
6 customers outside Cascade's certificated service territory. Just like CMS, Cascade's sales do  
7 not involve the operation of gas plant and Cascade is not required to obtain a Commission  
8 certificate to make such sales.  
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17 **IV. THE RELIEF THAT CMS REQUESTS IS NEITHER WARRANTED NOR**  
18 **AUTHORIZED**

19  
20 **A. The Commission Should Not Declare Existing Contracts Void Because That**  
21 **Would Harm Cascade's Customers**

22 As part of its requested relief, CMS asks the Commission to declare that Cascade's  
23 existing contracts with its gas sales customers are void. The Commission should deny this  
24 relief because Cascade has done nothing wrong. Moreover, Cascade pointed out in its  
25 opening brief that this would harm those customers by requiring them to enter new gas  
26 supply arrangements in the middle of the winter heating season. NWIGU also recognized in  
27 its initial brief that declaring customer contracts void at the peak of the winter heating  
28 season would subject those customers to increased gas costs by forcing them back into the  
29 market. NWIGU's Initial Brief at 2. Nevertheless, CMS asks the Commission to void these  
30 existing contracts, but to hold Cascade's customers harmless from such a ruling. CMS  
31 Motion at 28, n.8. CMS does not explain how the Commission can or should do that, and  
32 simply relegates that comment to a footnote. While NWIGU does not advocate that the  
33 Commission should grant CMS any relief, it joins CMS by stating that if the Commission  
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1 does grants CMS relief, "it should be at the cost of Cascade's shareholders and not its  
2 customers." NWIGU's Initial Brief at 2.  
3

4  
5 The only way that the Commission could hold Cascade's customers harmless from  
6 increased gas costs due to the Commission's voiding their existing gas supply contracts  
7 would be to require Cascade to bear those increased costs. There is no basis for ordering  
8 such drastic relief, especially where there is no evidence in the record to quantify the amount  
9 of such relief or to assess its impact on Cascade's operations. Additionally, granting such  
10 relief would be equivalent to ordering Cascade to pay damages to these customers, who are  
11 not even parties to this proceeding, which is beyond the Commission's statutory authority.  
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14  
15 RCW 80.04.440 makes a public service company who violates any law liable to the  
16 persons affected for all loss, damage, or injury caused thereby; however, it also requires that  
17 an action to recover such damages be brought in court by the injured person. CMS's claim  
18 that the Commission order Cascade's shareholders to bear the financial burden of an order  
19 voiding existing gas supply contracts is inconsistent with the requirements of RCW  
20 80.04.440 in two separate respects. First, it asks the Commission to award damages,  
21 whereas the legislature has delegated that responsibility to the courts. Second, it requires  
22 such actions to be brought by the injured parties. No customer has brought a claim against  
23 Cascade relating to these sales. In addition, there is no evidence on which the Commission  
24 could base an award of damages. The Commission should deny CMS's claim that the  
25 Commission void contracts at Cascade's expense.  
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41 **B. The Commission Should Not Impose Penalties on Cascade**

42 CMS also asks the Commission to impose penalties on Cascade under RCW  
43 80.04.380 and 80.04.385. CMS Motion at 24. There is no basis for an award of penalties in  
44 this case, as Cascade has not violated any statute or any rule, order, or requirement of this  
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1 Commission. Even if CMS had proven such a violation, penalties are not automatic and  
2 would not be appropriate in this case.  
3

4  
5 The Commission has established seven factors to consider in connection with  
6 awarding penalties.<sup>7</sup> CMS neither cites nor addresses these factors, nor does it offer any  
7 evidence that would allow the Commission to apply these factors. Examination of these  
8 factors would not favor imposition of a penalty. The evidence shows that, at all times,  
9 Cascade made its unbundled gas sales in full compliance with all Commission requirements.  
10 Furthermore, at all times, Cascade was open and above board in connection with these sales,  
11 and fully informed the Commission of its activities. Cascade provided the Commission with  
12 all required reports and information, and fully responded to all requests for information from  
13 Commission Staff. Exhibit 20 at 18. No customer has ever complained to the Commission  
14 about these sales, and CMS's Complaint is the first time any party has complained to the  
15 Commission about these sales. The Commission should not impose penalties simply  
16 because Cascade has relied both upon state and federal authority for its various activities.  
17 See *Verizon Northwest, Inc. v. WorldCom, Inc. et al.*, 61 Fed. Appx. 388, 2003 WL  
18 1827229 at \*4 (9th Cir. 2003) (copy attached as Exhibit B) (holding that the Commission  
19 was arbitrary and capricious in imposing penalties simply because Verizon took inconsistent  
20 positions). Imposition of penalties is not justified.  
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40 <sup>7</sup> In *MCIMetro Access v. US WEST, Inc.*, Docket No. UT-971063 (Feb. 10, 1999), the  
41 Commission articulated seven factors to guide its decision whether to impose penalties: whether  
42 (1) the offending conduct was associated with new requirements, (2) the offending party should have  
43 known its conduct constituted a violation, (3) the conduct was gross or malicious, (4) repeated  
44 violations occurred, (5) the Commission previously had found violations, (6) the offending conduct  
45 improved, and (7) remedial steps were undertaken. *MCIMetro*, Docket No. UT-971063, ¶ 158. See  
46 also *Washington Utilities and Transportation Commission v. Electric Lightwave, Inc.*, Docket Nos.  
47 UT-001532 and UT-001533 (March 19, 2001).

1 CMS asks the Commission to impose penalties under RCW 80.04.380 and  
2  
3 80.04.385. The Commission does not have authority to award penalties under either RCW  
4  
5 80.04.380 or 80.04.385 in this case. The penalties authorized by these sections are available  
6  
7 only pursuant to the procedures established in RCW 80.04.400. RCW 80.04.400 requires  
8  
9 that an action to recover penalties must be brought in the name of the state of Washington  
10  
11 and in Superior Court. This proceeding is neither brought by the state nor is it in court. The  
12  
13 Commission cannot impose penalties under RCW 80.04.380 or 80.04.385 in this case.<sup>8</sup> In  
14  
15 addition, RCW 80.04.385 plainly does not apply in this case. That statute authorizes  
16  
17 penalties against officers, agents, and employees of a public service company. CMS has not  
18  
19 named any such person in its Complaint, and there is no basis in the record to award  
20  
21 penalties against any officer, agent, or employee of Cascade, even if penalties were  
22  
23 warranted, which they are not.

24  
25 **C. The Commission May Not Award CMS Attorneys' Fees**

26 CMS also requests that the Commission award it attorneys' fees and costs incurred in  
27  
28 this action. CMS Motion at 29. This relief is not requested in CMS's Complaint. CMS is  
29  
30 not entitled to an award of attorneys' fees and costs even if it prevails in this action. CMS  
31  
32 cites no authority pursuant to which the Commission may award attorneys' fees and costs,  
33  
34 for there is none. "Washington follows the American rule that a prevailing party normally  
35  
36 does not recover its attorney fees." *Dempere v. Nelson*, 76 Wn.App. 403, 406, 886 P.2d 219  
37  
38 (1994). Attorney fees are properly awarded only if specifically authorized by a contract,  
39  
40 statute, or recognized equitable ground. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52,  
41  
42 70, 847 P.2d 440 (1993); *Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch.*

43  
44  
45  
46 <sup>8</sup> RCW 80.04.405 does authorize the Commission to impose penalties in a lower amount  
47 than RCW 80.04.380 or 80.04.385; CMS has not requested penalties under RCW 80.04.405.

1 *Dist.*, 96 Wash.2d 806, 815, 638 P.2d 1220 (1982); *Seattle Sch. Dist. 1 v. State*, 90 Wash.2d  
2  
3 476, 540, 585 P.2d 71 (1978). CMS cites no statute or other ground that would justify an  
4  
5 award of attorneys' fees, even if the Commission were authorized to make such an award. If  
6  
7 any party were entitled to an award of attorneys' fees, it is Cascade for being required to  
8  
9 defend a baseless Complaint.

10  
11 **V. CONCLUSION**

12  
13 For the foregoing reasons, as well as those asserted in the memorandum in support of  
14  
15 Cascade's motion for summary determination, the Commission should deny CMS's motion  
16  
17 for summary determination, and grant Cascade's motion.

18  
19 DATED: December 1, 2006

Respectfully submitted,

20  
21 **PERKINS COIE LLP**

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23  
24 By: 

25  
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36 Attorneys for Respondent  
37 Cascade Natural Gas Corporation  
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SERVICE DATE

JAN 19 2001

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of	)	
	)	DOCKET NO. UG-001119
CASCADE NATURAL GAS	)	
CORPORATION,	)	
	)	
	)	FIRST SUPPLEMENTAL ORDER
for a Certificate of Public Convenience and	)	DENYING SUMMARY
Necessity to Operate a Gas Plant for Hire in	)	DETERMINATION; NOTICE OF
the General Area of Grant County	)	PREHEARING CONFERENCE
	)	(January 30, 2001)
.....	)	

1 **SYNOPSIS:** The Commission denies the request of Cascade Natural Gas Corporation for a summary determination of whether Cascade needs certificate authority to provide the services listed in Schedule 700 of its tariff, ruling that the significant factual and legal issues raised by the question are not a proper subject for summary determination.

2 **PROCEDURAL HISTORY:** On July 17, 2000, Cascade Natural Gas Corporation ("Cascade") filed with the Commission an application to amend its Certificate of Convenience and Necessity ("Certificate") so that it may operate gas plant for hire in Grant County. The area Cascade seeks a Certificate to serve is within the certificate territory of Avista Corporation ("Avista"). Cascade limited the scope of its application to offering services contained in its Rate Schedule 700 ("Schedule 700"). A copy of the tariff pages is attached as Appendix A.

3 A prehearing conference was held on October 26, 2000. The parties asked the Commission to decide whether Cascade needs a Certificate in a first stage of this proceeding. The parties agreed to file concurrent briefs on November 16, 2000. On December 7, 2000, the Commission sent out bench requests seeking further information from Cascade asking for more information regarding what the Company is seeking in this proceeding, and how it proposes to offer its services. Cascade answered on December 12, 2000.

4 **PARTIES:** The parties were present as follows: Cascade Natural Gas by John West, attorney at law, Seattle; the Washington Utilities & Transportation Commission and its staff ("Commission Staff") by Robert D. Cedarbaum, Assistant Attorney General, Olympia; Avista Corporation ("Avista") by Tom DeBoer, Paine, Hamblen, Coffin, Brooke & Miller LLP, Spokane; and Northwest Industrial Gas Users ("NWIGU") by Edward A. Finklea, Energy Advocates LLP, Portland.



5       **BACKGROUND:** 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 the portion of Grant County in which Cascade seeks to provide the services described in its Schedule 700. Avista has held this authority since 1960. The area Cascade proposes to serve encompasses eight square miles of Grant County adjacent to the city of Warden. The Williams gas pipeline bisects the area.

6       The spark that fired this controversy is a decision by Basin Foods, Inc. ("Basin") to construct its own bypass line to the interstate pipeline. Avista has provided gas sales service to Basin under a filed tariff since December 1999, and will continue to do so until Basin's pipeline is completed. Cascade has overseen the construction of Basin's bypass pipeline, and Basin has asked Cascade to maintain and operate the line once construction is complete. Although Basin is the only potential customer discussed in the parties' filing, Cascade seeks broader authority to serve any customers in an eight-square-mile territory. If the Commission decides that no Certificate is needed, then Cascade proposes to offer its services statewide.

7       The parties originally stipulated that Cascade seeks to provide, and will limit itself to providing, the services outlined in its Schedule 700. Those services are:

- Design piping system
- Construct piping system
- Operation and maintenance of customer-owned piping system
- Design cathodic protection system
- Install cathodic protection system
- Operation and maintenance of cathodic protection system
- Perform leak surveys Repair leaks
- Locating Services
- Odorization Testing
- Preparation of required reports to WUTC & other Agencies, as required. Such reports may include Operation and Maintenance Plans, Written Emergency Plans, other compliance reports.

10       On December 7, 2000, the Commission served three Bench Requests on Cascade, seeking further information on the factual bases for its application. The requests asked: (1) Please list exactly what services you want to provide to customer-owned pipelines. (2) How do the items listed in response to question (1) overlap with the menu of services included in Cascade's Rate Schedule 700? And (3) Does Cascade plan to make the services it offers available at the option of the Company, or does it propose to offer these services to anyone that owns piping systems?

- 11 Cascade's responses to the bench requests indicate that it proposes to offer the services included in its Schedule 700, but also alleges that Cascade does not intend to promote or construct bypass pipelines. Cascade indicates that it intends to offer services to assist customers to operate their own property safely and in compliance with state and federal regulations.

### THE PRESENT MOTIONS

- 12 The inquiry before the Commission, which the parties framed in the prehearing conference, is in the nature of cross motions for summary determination. In a summary determination proceeding inquiry the Commission would need to determine that no issues of material fact are present, then apply the law to agreed facts. *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724; 837 P.2d 1000 (1992).
- 13 The document Cascade filed on November 16, 2000, (Petition for Determination the Cascade Does Not Require Certificate of Public Convenience and Necessity for Services Described in Rate Schedule 700) raises an additional issue. If the Commission were to convert this application proceeding to a petition for declaratory order, additional process will be needed. Under RCW 34.05.240(7), before entering a declaratory order that would substantially prejudice the rights of any person who would be a necessary party, the Commission would need to receive that person's written consent. We would have to give notice to all certificated gas companies pursuant to RCW 34.05.240 and WAC 480.09.230, and seek their consent. Given the fact that Avista is actively opposing Cascade's application, it is highly unlikely that the Commission would receive this consent.
- 14 The Commission is charged with regulating in the public interest 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 gas companies. In order to rule on cross motions for summary determination the Commission would need to answer the following questions, basing its conclusion on the facts with which the parties have agreed.

- (A) Is the natural gas pipeline owned by Basin, or any other gas pipelines that may be built in the nine square mile area Cascade seeks to serve, "gas plant?"

"Gas plant" includes all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas.

15 If yes, then

(B) Is Cascade a “gas company”?

"Gas company" includes every corporation or company owning, controlling, operating or managing any gas plant within this state. Whether or not any person or corporation is conducting business subject to regulation under this title is a question of fact to be determined by the Commission.

RCW 80.04.010 defines “gas company” to include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state.

16 If yes, then

(C) Is supplying the rates, services, facilities and practices listed in Schedule 700 engaging in supplying any utility service or commodity to the public for compensation?

17 If resolution of any of these questions relies on facts that are not included in the record, or that require further development in the record, the Commission will need to continue the questions to a fact finding hearing.

#### **THE PARTIES’ PRESENTATIONS ON THE MOTIONS**

18 Cascade frames two main arguments: first, that the Commission lacks authority to require Cascade to obtain a certificate, and second, that a certificate is not appropriate because other companies deliver similar services in Washington without certificates.

19 Cascade argues that it does not need a Certificate to operate a gas plant in Grant County, and that the Commission lacks authority to require a Certificate for services that do not involve operation of a gas plant. Cascade insists that it does not, and does not intend, to own, lease, control, or use the gas pipeline, stressing that it only seeks to provide services to lines that are privately owned and operated in the county. Cascade describes its services as “limited to the design, maintenance, inspection, and repair activities described in Cascade’s application and Rate Schedule 700.” Cascade Brief, p. 4. Cascade argues, “there is no provision of Title 80 that authorizes the commission to regulate” the services Cascade seeks to provide in this case. *Id.* p. 7.

20 Cascade acknowledges in its statement of background facts that it is engaged in the business of furnishing gas service within the state of Washington as a public service company. Cascade argues, however, that certificate authority should not be required in this

case because other companies deliver similar services in Washington without certificates, claiming that requiring it to obtain a certificate before it provides these services while at the same time other companies engage in identical activities without regulation lacks apparent fairness.

Cascade argues that the Commission must be strictly limited in its operations to the authority provided by the legislature, and that “vigilance” is particularly a concern in this case because the statutes at issue concern the authority of the Commission to create and regulate monopolies and exclusive rights, citing *Electric Lightwave v. Utilities & Transp. Comm’n*, 123 Wn.2d 530, 869 P.2d 1045 (1994). In *Electric Lightwave* the court upheld a Commission determination that the Commission had not granted U S WEST an exclusive operating territory. Cascade acknowledges that the gas statute, in RCW 80.28.190, expressly provides the Commission with the power to grant exclusive rights to gas companies operating “gas plants” in defined areas. Cascade repeats its argument that the statute does not apply to companies providing gas line design, maintenance, inspection, and repair services. On this basis it claims that “The inference to be drawn from this is that the legislature intended for there to be competition among providers of such services.” Cascade Petition, p. 8.

- 21 The parties did not stipulate whether the services contained in schedule 700 are available from entities other than Avista or Cascade. Cascade alleges that other companies deliver similar services in Washington without certificates. It states: “These companies include major corporations that own and operate or contract with others to operate gas facilities in areas in which Cascade does possess certificates.” Cascade Petition p. 8.
- 22 NWIGU agrees with Cascade, without any analysis of the statutory language, stating that “so long as an entity seeks only to provide these services, and not to own or operate ‘gas plant’ in the state, as that term is defined in the relevant statutes, the entity does not need a Certificate” from the Commission. NWIGU Comments, p. 1.
- 23 NWIGU has posited the argument that Cascade is not a gas company under RCW 80.28.190 so long as it does not own, lease, control, or use any real estate, fixtures, or personal property for or in connection with the transmission, distribution, sale, or furnishing of any type of gas for light, heat, or power in Grant County to third parties.
- 24 NWIGU argues that Cascade does not require a certificate because the provision of such services is not within the authority of the Commission to regulate.
- 25 Avista argues that the services proposed in Schedule 700 clearly fall within the provisions of RCW 80.28.190, and require a certificate from the Commission. Avista notes the definition of “gas plant” and claims that the pipeline is “used or to be used for or in connection with” the “furnishing of natural gas.” Avista Brief, p. 7. Avista claims that the

pipeline services that Cascade has proposed to offer are broad, and include all services necessary to operate the pipeline, noting that Schedule 700 includes, among other services “[o]peration and maintenance of customer-owned piping system.”

- 26 Avista also argues that Cascade is a “gas company” subject to the general jurisdiction of the Commission. Avista notes that Cascade may argue that it is only offering services that other non-regulated pipeline companies may offer without a certificate, but argues that there is a significant difference between Cascade and other service providers because Cascade is in the business of supplying natural gas while other pipeline service companies are not. Avista argues that if Cascade is allowed to provide these services without a public interest review, then it would be in a position to encourage the construction of pipelines in order to bypass existing providers.<sup>1</sup>
- 27 Avista argues that a narrow reading of RCW 80.28.190 is inconsistent with the language, intent, and policy of the laws regulating public utilities, and that the provisions of the public utility statutes must be construed together to accomplish the purpose of assuring the public of adequate service at fair and reasonable rates. Avista argues, further, that other jurisdictions have broadly construed their public utility statutes to effectuate the purpose of the statutes.
- 28 Avista notes: “While Cascade may argue that it is only offering service that other non-regulated pipeline companies may offer without a Certificate issued by the Commission, there is a significant difference between Cascade and these other service providers—Cascade is in the business of supplying natural gas while other pipeline service companies are not.” Brief of Avista, p. 7.
- 29 Commission Staff agrees with Avista that “gas plant” includes property “used or to be used for or in connection with the furnishing of natural gas. Staff Brief, p.4. Staff argues that it doesn’t matter whether the customer, rather than Cascade, owns the piping system, or that the system may not include transmission or distribution facilities, or that Cascade does not sell natural gas to any customer. Rather, according to Staff, “It is enough that Cascade proposes to operate and maintain the customer’s system, and that the piping system (again, regardless of ownership) is used in connection with the provision of natural gas, as is clearly the case here. *Id.*”
- 30 Commission Staff notes: “Cascade may also argue that there are other companies providing services similar to Schedule 700, but without a certificate of public convenience and necessity from the Commission. There is, however, not evidence of

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<sup>1</sup> The Commission has authorized banded rates in past proceedings as a tool to discourage uneconomic bypass of gas companies. See, *WUTC v. The Washington Water Power Company*, Docket No. UG-901459, Third Supplemental Order (March 1992), p. 21. The concept is somewhat akin to “cream skimming.” See, *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1357, App. No. GA-849 (June 1988).

any such occurrences.” Brief of Commission Staff, p. 6, fn. 3.

31 Commission Staff argues that Cascade acts as a gas company subject to Commission regulation in providing the services listed in Schedule 700 because Cascade is operating or managing gas plant within this state. RCW 80.04.010. Staff also notes that Cascade may argue that there are other companies providing services similar to Schedule 700, but without a certificate, but that there is no evidence of any such occurrence. Staff views as the “ultimate irony” the possibility that the Commission might not regulate Cascade’s provision of operation and maintenance services in a new territory, when the Commission now regulates those same services under tariff throughout Cascade’s existing certificated territory.

32 Commission Staff asks the Commission to ascertain and give effect to the intent of the Legislature as embodied in the relevant statutes.

#### **THE COMMISSION’S DISCUSSION AND DECISION**

33 Cascade has consistently described Schedule 700 as “limited to the design, maintenance, inspection, and repair activities described in Cascade’s application and Rate Schedule 700.” The language of Schedule 700 is, however, much broader. It includes: “Operation and maintenance of customer-owned piping system” along with ten other tasks.

34 Although the parties all agree that the activities in Schedule 700 provide the factual basis for the Commission’s examination of the cross motions for summary determination, they interpret the meaning of the described activities differently. In deciding a motion for summary determination, the Commission is guided by CR 56 of the civil rules for superior court. WAC 480-09-426. In deciding summary judgment motions before the superior court, the court is charged with viewing all facts, and inferences therefrom, in the light most favorable to the non-moving party. *Washington Fed’n of State Employees, Council 28, etc. v. Office of Fin. Management*, 121 Wn.2d 152; 849 P.2d 1201(1993).

35 In reviewing the cross motions for summary determination before us, the Commission will apply the same standard. In deciding the motion for summary determination by Cascade, therefore, the Commission interprets the services offered in Schedule 700 as broadly as possible, as is most favorable to Avista and Commission Staff. Given a broad reading, the facts could indicate that Cascade is proposing to operate a gas plant for hire. In deciding the motion for summary determination by Avista and Commission Staff, however, the Commission interprets the services offered in Schedule 700 as narrowly as possible; as is most favorable to Cascade. Given a narrow reading, the facts could indicate that Cascade is not proposing to operate a gas plant for hire. Both motions should be denied, so that the Commission can explore the issue in a more fully developed factual context. Some parties have argued that the services listed in

Schedule 700, when combined, describe what it means to operate a pipeline. The parties have not provided any information on what tasks are performed by these or other parties when operating a pipeline. The Commission needs to explore the factual circumstances in more depth to determine this issue.

36 All parties have made factual assertions regarding what pipeline services, if any, are being provided by non-regulated companies. Based on these assertions, they have argued that certain outcomes are appropriate. The record, however, contains no facts regarding whether other providers exist, or what services they provide. If a party believes that this issue is relevant, then it should develop a factual record to support its contention.

37 The Commission will deny both motions for summary determination. A second prehearing conference will be held to allow the parties to plan and move forward on the hearing phase of this proceeding.

#### NOTICE OF PREHEARING CONFERENCE



38 **NOTICE IS HEREBY GIVEN** That a prehearing conference will be held at 9:30 a.m., on Tuesday, January 30, 2001, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. If you are unable to attend the prehearing conference in person, you may attend via the commission's teleconference bridge line. The Commission's conference bridge number is 360-664-3846. Any party wishing to participate via the conference bridge line should call the conference bridge number at the time for scheduled for the prehearing conference.

#### ORDER

39 The cross motions for summary determination are denied.

DATED at Olympia, Washington, and effective this 19<sup>th</sup> day of January, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

  
 MARILYN SHOWALTER, Chairwoman  
  
 RICHARD HEMSTAD, Commissioner

APPENDIX A

WN U-3

Substitute Original Sheet No. 700

CASCADE NATURAL GAS CORPORATION

OPTIONAL CUSTOMER-OWNED PIPING CONSTRUCTION, OPERATION, & MAINTENANCE SCHEDULE NO. 700

AVAILABILITY:

This schedule offers optional services not currently provided under other schedules. The services are available, at the option of the Company, to anyone that owns piping systems located within the Company's certificated area. Under no circumstances will this tariff supercede the Company's response to any emergency situation. Customers electing these optional services will remain liable for the safety of their customer owned piping systems as defined in Rule 10 of this tariff.

(N)

DESCRIPTION:

Under this schedule the Company will provide a menu of services for customer-owned piping systems. The services available under this schedule include the following:

- Design piping system
- Construct piping system
- Operation and maintenance of customer-owned piping system
- Design cathodic protection system
- Install cathodic protection system
- Operation and maintenance of cathodic protection system
- Perform leak surveys
- Repair leaks
- Locating Services
- Odorization Testing
- Preparation of required reports to WUTC & other Agencies, as required. Such reports may include Operation and Maintenance Plans, Written Emergency Plans, other compliance reports.

RATE:

I. The charges for these services will be specified in the contract and will be on a time and material basis. The following represent standard service rates which apply during regular business hours.

Labor & Equipment

	Semi-Skilled Labor	\$45 per hour
Skilled Labor	\$60 per hour	
Professional/Technical	\$90 per hour	
Supervisory	\$120 per hour	
Service Truck w/ Gas Technician	\$60 per hour	
Dump Truck w/ Driver	\$75 per hour	
Backhoe w/ Operator	\$90 per hour	
Welding Rig w/ Welder & Helper	\$105 per hour	
3 Man Crew & Equipment	\$220 per hour	



Services performed on Evenings/weekends will be charged at 1.5 times the standard hourly rate. Services performed on holidays will be charged at 2 times the standard hourly rate. A one hour minimum will apply.

Materials

· Cost of materials plus 35% for handling.

II. The total of all charges invoiced by Company shall be subject to state sales tax.

WASHINGTON UTILITIES & TRANSPORTATION COMM. DOCKET NO. UG-000598

**CNG/W00-03-02**

ISSUED April 20, 2000

EFFECTIVE May 11, 2000

**WN U-3**

**Substitute Original Sheet No. 700A**

CASCADE NATURAL GAS CORPORATION

**OPTIONAL CUSTOMER-OWNED PIPING CONSTRUCTION, OPERATION, & MAINTENANCE SCHEDULE NO. 700 continued**

**CONTRACT:**

Customers receiving service under this rate schedule shall execute a contract for those services.

**TERMS OF PAYMENT:**

Payment shall be due and payable within fifteen (15) days from the date the bill is rendered.

**SPECIAL TERMS AND CONDITIONS:**

1. The application of this rate is subject to the General Rules and Regulations of the Company as they may be in effect from tin

(N)

WASHINGTON UTILITIES & TRANSPORTATION COMM. DOCKET NO. UG-000598

**CNG/W00-03-02**

ISSUED April 20, 2000

EFFECTIVE May 11, 2000

**APPENDIX B  
GOVERNING STATUTES AND RULES**

The following statutory provisions and rules establish standards that govern the Commission's determinations in this proceeding:

**RCW 80.01.040 General powers and duties of commission.** The utilities and transportation commission shall:

(1) Exercise all the powers and perform all the duties prescribed therefore by this title and by Title 81 RCW, or by any other law.

\*\*\*\*\*

(3) 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.

**RCW 80.04.010 Definitions.** As used in this title, unless specifically defined otherwise or unless the context indicates otherwise:

\*\*\*\*\*

"Gas plant" includes all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas, or the manufacture, transmission, distribution, sale or furnishing of other type gas, for light, heat or power.

"Gas company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state.

\*\*\*\*\*

"Public service company" includes every gas company, electrical company, telecommunications company, and water company. . . .

\*\*\*\*\*

The term "service" is used in this title in its broadest and most inclusive sense.

**RCW 80.04.015 Conduct of business subject to regulation--Determination by commission.** 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. . . .

**RCW 80.28.190 Gas companies--Certificate--Violations--Commission powers--Penalty--Fees.** No gas company shall . . . 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. . . . 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 said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require. . .

**RCW 34.05.240 Declaratory order by agency--Petition.** (1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for: (a) The form, contents, and filing of petitions for a declaratory order; (b) the procedural rights of persons in relation thereto; and (c) the determination of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

(3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.

(4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

- (a) Enter an order declaring the applicability of the statute, rule, or order in

question to the specified circumstances;

(b) Set the matter for specified proceedings to be held no more than ninety days after receipt of the petition;

(c) Set a specified time no more than ninety days after receipt of the petition by which it will enter a declaratory order; or

(d) Decline to enter a declaratory order, stating the reasons for its action.

(6) The time limits of subsection (5) (b) and (c) of this section may be extended by the agency for good cause.

(7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(8) A declaratory order has the same status as any other order entered in an agency adjudicative proceeding. Each declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusions.

**WAC 480-09-230 Declaratory orders.** As prescribed by RCW 34.05.240, any interested person may petition the commission for a declaratory order. The commission will consider the petition. Within fifteen days after receiving the petition, the commission will give notice of the petition to all persons required by law and to any other person the commission deems desirable. Within thirty days of receipt of a petition for declaratory order, the commission will:

(1) Enter a declaratory order; or

(2) Notify the petitioner that no declaratory order is to be entered and state reasons for the action; or

(3) Set a specified time, no later than ninety days after the day the petition was filed, by which the commission will enter a declaratory order; or

(4) Set a reasonable time and place for a hearing. If a hearing is held, it must be held no more than ninety days after receipt of the petition. If a hearing is held, the commission will give at least seven days' notification to the petitioner, all persons to whom notice is required by law and any other person it deems desirable. The notice must include the time, place, and the issues involved.

(5) The commission may upon a finding of good cause extend the times specified in subsections (3) and (4) of this section.

(6) If a hearing is held or statements of fact are submitted, as provided in subsection (4) of this section, the commission shall within a reasonable time:

(a) Enter a declaratory order; or

(b) Notify the petitioner that no declaratory order is to be entered and state the reasons for the action.

The commission will serve its order upon all persons who are required to receive notice under subsection (4) of this section.

**WAC 480-09-426 Motion for summary disposition.** (1) Motion to dismiss. A party may move to dismiss an opposing party's pleading, including the documents initiating the case, if the pleading fails to state a claim on which the commission may grant relief. In ruling upon a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 12 (b)(6), 12(c), or 50, as applicable, of the civil rules for superior court.

(2) Motion for summary determination. A party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.



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**C**

## Briefs and Other Related Documents

Verizon Northwest Inc. v. Worldcom, Inc.C.A.9 (Wash.),2003.This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,Ninth Circuit.

VERIZON NORTHWEST INC, Plaintiff-Appellant,  
 v.

WORLDCOM, INC; The Washington Utilities and Transportation Commission (WUTC); Marilyn Showalter, in her official capacity as Chairwoman of the Washington Utilities and Transportation Commission; Richard Hemstad, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission; William R. Gillis, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission, Defendants-Appellees.

No. 01-35332.

D.C. No. CV-99-00912-JCC.

Argued and Submitted July 11, 2002.

Decided April 7, 2003.

The United States District Court for the Western District of Washington, John C. Coughenour, J., granted summary judgment upholding decision by Washington Utilities and Transportation Commission (WUTC) interpreting and approving Telecommunications Act interconnection agreement between incumbent local exchange carrier (ILEC) and competitive local exchange carrier (CLEC). ILEC appealed. The Court of Appeals held that: (1) federal question statute provided basis for jurisdiction over claim; (2) Court's review of state law issues was not precluded; (3) Hobbs Act did not preclude review; (4) Internet service provider (ISP) bound traffic was not exempt from negotiated reciprocal compensation provisions of interconnection agreements; (5) interpretation of interconnection agreement by WUTC was not arbitrary and capricious; and (6) decision by WUTC

to assess penalties against ILEC was arbitrary and capricious.

Affirmed in part, and reversed in part.

West Headnotes

**[1] Federal Courts 170B ↩️199**

170B Federal Courts

170BIII Federal Question Jurisdiction

170BIII(C) Cases Arising Under Laws of the United States

170Bk199 k. Carriers, Shipping and Communications. Most Cited Cases

The federal question statute provides a basis for jurisdiction over a claim by an incumbent local exchange carrier (ILEC) that a state regulatory commission's order requiring reciprocal compensation for Internet service provider (ISP) bound calls is pre-empted by the Telecommunications Act. 28 U.S.C.A. § 1331; Communications Act of 1934, §§ 251-261, as amended, 47 U.S.C.A. §§ 251-261.

**[2] Federal Courts 170B ↩️15**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk15 k. Federal Question Cases in General, Claims Pendent To. Most Cited Cases (Formerly 372k14)

Review by the Court of Appeals, of state law issues under the federal question statute, is not precluded in a lawsuit brought under the Telecommunications Act. 28 U.S.C.A. § 1331; Communications Act of 1934, § 252(e)(6), as amended, 47 U.S.C.A. § 252(e)(6).

**[3] Telecommunications 372 ↩️900**

372 Telecommunications

372III Telephones

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## 372III(F) Telephone Service

372k899 Judicial Review or Intervention

372k900 k. In General. Most Cited

Cases

(Formerly 372k263)

Hobbs Act did not preclude review by Court of Appeals, of interpretation of agreement between incumbent local exchange carrier (ILEC) and competitive local exchange carrier (CLEC) that required reciprocal compensation for Internet service provider (ISP) bound traffic and that required ILEC to continue paying reciprocal compensation for local calls beyond two year expiration date, since neither side sought to re-adjudicate issues that had been conclusively determined by Federal Communications Commission (FCC); at most, parties merely asked Court to interpret FCC's rulings, to extent they were final and binding, and to determine whether actions of Washington Utilities and Transportation Commission (WUTC) were consistent with Telecommunications Act. 28 U.S.C. § 2343; Communications Act of 1934, §§ 251-261, as amended, 47 U.S.C.A. §§ 251-261.

**[4] Telecommunications 372 ⇐864(2)**

372 Telecommunications

372III Telephones

372III(F) Telephone Service

372k854 Competition, Agreements and  
Connections Between Companies

372k864 Reciprocal Compensation

372k864(2) k. Internet Service  
Providers. Most Cited Cases

(Formerly 372k267)

Under the Telecommunications Act, Internet service provider (ISP) bound traffic is not exempt from the negotiated reciprocal compensation provisions of interconnection agreements. Communications Act of 1934, §§ 251(g), 252(e)96), as amended, 47 U.S.C.A. §§ 251(g), 252(e)(6).

**[5] Telecommunications 372 ⇐864(1)**

372 Telecommunications

372III Telephones

372III(F) Telephone Service

372k854 Competition, Agreements and

## Connections Between Companies

372k864 Reciprocal Compensation

372k864(1) k. In General. Most

Cited Cases

(Formerly 372k267)

Interpretation of interconnection agreement by Washington Utilities and Transportation Commission (WUTC), to require incumbent local exchange carrier (ILEC) to continue paying reciprocal compensation for local calls beyond two year expiration date, was not arbitrary and capricious, although ILEC asserted that failure of competitive local exchange carrier (CLEC) to comply with statute in Telecommunications Act governing procedures for negotiation, arbitration, and approval of agreements caused extension to lapse; requiring CLEC to comply with requirements of that statute in order to avoid lapse in extension would have had effect of imposing additional extension terms to agreement which would have been contrary plain meaning rule in Washington law. Communications Act of 1934, §§ 251-261, as amended, 47 U.S.C.A. §§ 251-261; Restatement (Second) of Contracts §§ 212, 214(c).

**[6] Telecommunications 372 ⇐856**

372 Telecommunications

372III Telephones

372III(F) Telephone Service

372k854 Competition, Agreements and  
Connections Between Companies372k856 k. Negotiation, Validity and  
Approval of Agreements. Most Cited Cases

(Formerly 372k267)

Interpretation of extension provision in interconnection agreement by Washington Utilities and Transportation Commission (WUTC), as applying to all interconnection arrangements, was not arbitrary and capricious; although it may have been possible that parties intended to extend only physical interconnection arrangements beyond expiration date, alternative interpretation as proposed by incumbent local exchange carrier (ILEC) would have imposed one-way obligation on competitive local exchange carrier (CLEC) to continue terminating Internet service provider (ISP) bound traffic originated by customers of ILEC without compensation. Communications Act of

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1934, §§ 251-261, as amended, 47 U.S.C.A. §§ 251-261.

[7] Telecommunications 372  1002

372 Telecommunications

372III Telephones

372III(H) Penalties

372k1002 k. Violations of Rules or Regulations Concerning Competition. Most Cited Cases

(Formerly 372k267)

Decision by Washington Utilities and Transportation Commission (WUTC) to assess penalties against incumbent local exchange carrier (ILEC) for "unreasonable conduct" under Washington Revised Code, for ILEC's attempt to characterize calls one way for purpose of interpreting reciprocal compensation and another way for customer billing, was arbitrary and capricious; actions by ILEC in support of its interpretation of Telecommunications Act as it related to interconnection agreement did not merit sanctions even under WUTC's own standards. Communications Act of 1934, §§ 251-261, as amended, 47 U.S.C.A. §§ 251-261; West's RCWA 80.04.380, 80.36.170.

\*390 Appeal from the United States District Court for the Western District of Washington, John C. Coughenour, District Judge, Presiding.

Before SCHROEDER, Chief Judge, FISHER and PAEZ, Circuit Judges.

MEMORANDUM <sup>FN\*</sup>

FN\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\*1 Plaintiff Verizon Northwest, Inc. ("Verizon"), an incumbent local exchange carrier ("ILEC"), appeals from the district court's summary judgment upholding a decision by the Washington Utilities and Transportation Commission ("WUTC"). The

WUTC interpreted and approved Verizon's interconnection agreement ("the Agreement") with its competitor WorldCom, Inc. ("WorldCom"), a competitive local exchange carrier ("CLEC"). The parties negotiated the Agreement pursuant to the Telecommunications Act of 1996 ("The Act"), Pub.L. 104-104, 110 Stat. 56 (codified in part at 47 U.S.C. §§ 251-261). The WUTC also assessed \$66,000 in penalties against Verizon because it found that Verizon violated state law by withholding payment under the Agreement. WorldCom and the WUTC ("Appellees") challenge our jurisdiction over the appeal. <sup>FN1</sup>

FN1. We review *de novo* the district court's grant of summary judgment, *see US W. Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir.1999); we also review *de novo* whether the WUTC's rulings were consistent with the Act and its implementing regulations. *Id.* We review any state law questions raised by the WUTC's interpretation of the Agreement under an arbitrary and capricious standard. *US W. Communications, Inc. v. Wash. Utils. & Transp. Comm'n*, 255 F.3d 990, 994 (9th Cir.2001).

We affirm the district court's summary judgment ruling upholding the WUTC's \*391 interpretation of the Agreement requiring reciprocal compensation for ISP-bound traffic and requiring Verizon to continue paying reciprocal compensation for local calls beyond the two year expiration date. However, we conclude that the WUTC's decision to impose penalties against Verizon was arbitrary and capricious and therefore reverse this part of the district court's judgment affirming the WUTC's assessment of \$66,000 in penalties against Verizon.

I.

[1] First, we reject Appellees' challenge to our jurisdiction over Verizon's appeal. After the Supreme Court's recent decision in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002),

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Appellees' jurisdictional arguments must fail. As we explained in *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, and 01-17161 ("*Pacific Bell*"), a decision that we filed today, the Supreme Court in *Verizon Maryland* held that 28 U.S.C. § 1331 provides a basis for jurisdiction over an ILEC's claim that a state regulatory commission's order requiring reciprocal compensation for ISP-bound calls is pre-empted by federal law. *Verizon Md.*, 122 S.Ct. at 1758.

[2] We also reject the two jurisdictional arguments that Appellees claim remain after *Verizon Maryland*. *Verizon Maryland* leaves little room to argue that § 252(e)(6) in any way limits federal court jurisdiction. Although the Court did not directly address the review of state law questions, *Verizon Maryland* explicitly states that "nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331," and that § 252 "does not distinctively limit the substantive relief available," *id* at 1759. In light of the Court's interpretation of § 252, we conclude that our review of state law issues under § 1331 is not precluded.

[3] We also reject Appellee's arguments that the Hobbs Act, 28 U.S.C. § 2343, precludes our review. Here, as in *Pacific Bell*, neither side seeks to re-adjudicate issues that already have been conclusively determined by the FCC. At most, they merely ask the court to interpret the FCC's rulings, to the extent that they are final and binding, and to determine whether the WUTC's actions here were consistent with federal law.

## II.

\*\*2 [4] The WUTC's construction of the Agreement to require reciprocal compensation for ISP-bound traffic is also controlled by our analysis and decision in *Pacific Bell* where we held that ISP-bound traffic is not exempt from the negotiated reciprocal compensation provisions of interconnection agreements. In *Pacific Bell*, as here, the appellant ILECs (Pacific Bell and Verizon California) argued that the state regulatory commission's interpretation of the reciprocal compensation provisions of their interconnection

agreements with CLECs was contrary to federal law. Specifically, the ILECS argued that a state regulatory commission's inclusion of ISP-bound traffic in a reciprocal compensation provision was contrary to the FCC's *Remand Order*, which exempted ISP-bound traffic from reciprocal compensation provisions. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic ("Remand Order")*, 16 F.C.C.R. 9151, 9152-53 (2001). Because the D.C. Circuit explicitly rejected the FCC's attempt to exclude ISP-bound traffic from reciprocal compensation, we concluded that federal law did not preclude the inclusion of ISP-bound traffic in the \*392 reciprocal compensation provisions of interconnection agreements. *Pacific Bell*; *see also WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C.Cir.2002).

Although Verizon acknowledges that the D.C. Circuit rejected the FCC's attempt to exclude ISP-bound traffic by calling it an "exception" under § 251(g) to the Act's reciprocal compensation requirements, it argues that because the D.C. Circuit did not vacate the portions of the *Remand Order* establishing a cost-recovery mechanism for ISP-bound calls, the FCC's conclusion that ISP-bound traffic is not subject to reciprocal compensation requirements still stands. Because the D.C. Circuit explicitly rejected the FCC's analysis exempting ISP-bound calls from reciprocal compensation provisions<sup>FN2</sup> and preserved only the prospective application of the interim alternative payment scheme for ISP-bound traffic as established in the *Remand Order*,<sup>FN3</sup> we reject Verizon's argument that the WUTC's decision to include ISP-bound calls in the compensation agreement was contrary to federal law. *Remand Order*, 16 F.C.C.R. at 9189.

FN2. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C.Cir.2002)

FN3. *WorldCom, Inc. v. FCC*, 288 F.3d at 431.

We also reject Verizon's argument that the WUTC's

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interpretation of “Local Exchange Traffic” to include ISP-bound traffic is contrary to federal law because longstanding FCC precedent establishes that ISP-bound traffic is not local. As we explained in *Pacific Bell*, the FCC has yet to resolve whether ISP-bound traffic is “local” within the scope of § 251. It was therefore not inconsistent with this provision and well within the WUTC's authority for it to subject ISP bound traffic to reciprocal compensation.

### III.

[5] Verizon argues that the WUTC erred by interpreting the Agreement to require Verizon to continue paying reciprocal compensation for local calls beyond the two year expiration date. As a matter of contract interpretation, this issue is controlled by the terms of the Agreement and state contract law. We agree with the district court that the WUTC's resolution of this issue was not arbitrary and capricious. See *US W. Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir.1999).

\*\*3 Under Washington law, contract interpretation is governed by the “context rule” of the Restatement (Second) of Contracts §§ 212, 214(c) (1981). *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222, 229-230 (1999). In contrast to the “plain meaning” rule, the “context rule” permits a court to look to extrinsic evidence to discern the meaning or intent of words or terms used by contracting parties, even when the parties' words appear to the court to be clear and unambiguous. *Id.* at 222. However, extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. *Id.*

Section VIII of the Agreement, titled “TERM,” laid out the terms of expiration as well as the terms under which the Agreement could be extended: Notwithstanding the foregoing, this Agreement shall, if not superseded by an interconnection agreement, expire two years after the effective date of the Agreement. In the event that the Agreement expires after two years, the interconnection

arrangements in this Agreement shall remain in place until the Parties are able to negotiate and implement a new interconnection agreement.\*393 Negotiations on such a new agreement shall commence no later than 45 days prior to the expiration of this Agreement.

The WUTC concluded that WorldCom satisfied the extension provision by initiating negotiations on a new interconnection agreement more than 45 days prior to the expiration date of the Agreement. Verizon argues that the WUTC erred by not interpreting the 45-day deadline to incorporate the statutory procedures for negotiation and arbitration under 47 U.S.C. § 252. According to Verizon, WorldCom's failure to comply with § 252 caused the extension to lapse.

Although Washington law permits the WUTC to consider extrinsic evidence even if contract terms are not ambiguous, it is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract. The Agreement provided that its terms would be extended if, upon expiration, negotiations for a new agreement had commenced at least 45 days prior to that date. The negotiations having commenced more than 45 days prior to the date of expiration, the WUTC concluded that requiring WorldCom to also comply with the requirements of § 252 in order to avoid a lapse in that extension would have the effect of imposing additional extension terms. Accordingly, the WUTC's interpretation of the Agreement to require only that WorldCom initiate negotiations 45 days prior to the expiration date was not arbitrary and capricious.

[6] Next, we reject Verizon's argument that the WUTC erred by interpreting the extension provision of the Agreement to apply to all interconnection arrangements, as opposed to only the physical connection between the parties' networks. Because Verizon's interpretation would have imposed a one-way obligation on WorldCom to continue terminating ISP-bound traffic originated by Verizon's customers without compensation, the WUTC concluded that the term “interconnection arrangements” included all arrangements in the Agreement. *Id.* Although it may be possible that

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the parties intended to extend only the physical interconnection arrangements beyond the expiration date, it was not arbitrary and capricious for the WUTC to interpret the extension provision as applying to all interconnection arrangements.

#### IV.

\*\*4 [7] Finally, we conclude that the WUTC's decision to assess penalties against Verizon was arbitrary and capricious and therefore reverse the district court's summary judgment upholding the penalty. The WUTC imposed penalties against Verizon for "unreasonable conduct" under sections 80.04.380 and 80.36.170 of the Washington Revised Code, concluding that it "subjected its competitor, WorldCom, to unfair and unreasonable disadvantage." By refusing to pay for ISP-bound traffic under the Agreement's reciprocal compensation provision because it claimed that the calls were not local but nevertheless billing its customers for this traffic as if the calls were local, Verizon's actions were construed by the WUTC and the district court as "trying to have it both ways" and therefore warranting penalties under Washington state law.

The reasons the WUTC supplied for the imposition of sanctions here - that Verizon took inconsistent and self-serving positions with respect to the interpretation of the Agreement - do not constitute sufficient grounds for imposing penalties. It simply does not follow from Verizon's attempt to characterize calls one way for the purpose of interpreting the reciprocal compensation and another way for customer billing that Verizon subjected WorldCom to unfair \*394 treatment or even that it was attempting to cut off the fees that WorldCom was due.

The WUTC's justification for imposing penalties here does not even meet the standards that it has established for itself for determining when sanctions are appropriate.<sup>FN4</sup> Verizon's actions in support of its interpretation of federal law as it related to the Agreement do not merit sanctions under the WUTC's own standards. The WUTC's decision to impose sanctions in this case was arbitrary and

capricious and we therefore vacate the sanctions imposed by the WUTC. AFFIRMED in part, REVERSED in part

FN4. In *MCIMetro Access Transmission Servs. Inc. v. U.S. W. Communications, Inc.*, 1999 WL 132851 (Feb. 10, 1999), the WUTC articulated eight factors to guide its decision whether to impose penalties:

- whether (1) the offending conduct was associated with new requirements of first impression,
- (2) the offending party should have known its conduct constituted a violation,
- (3) the offending conduct was knowing or intentional,
- (4) the offending conduct was gross or malicious,
- (5) repeated violations occurred,
- (6) the Commission previously had found violations,
- (7) the offending conduct improved, and
- (8) remedial steps were undertaken.

*MCIMetro*, WUTC No. UT-971063 (¶ 158); see also *Wash. Utils. & Transp. Comm'n v. Elec. Lightwave*, WUTC Nos. UT-001532, UT-001533, 2001 WL 514418 , at \*4 (Mar. 19, 2001) (citing *MCIMetro* ).

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Briefs and Other Related Documents (Back to top)

- 2001 WL 34098457 (Appellate Brief) Reply Brief of Appellant Verizon Northwest Inc. (Sep. 24, 2001) Original Image of this Document (PDF)
- 2001 WL 34098456 (Appellate Brief) Brief of Commission Appellees (Aug. 31, 2001) Original Image of this Document (PDF)
- 2001 WL 34098455 (Appellate Brief) Response Brief of Appellee WorldCom, Inc. (Aug. 28, 2001) Original Image of this Document with Appendix (PDF)
- 2001 WL 34098454 (Appellate Brief) Opening Brief of Appellant Verizon Northwest Inc. (Jul. 19,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this **RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION** upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and by first class mail, postage prepaid to:

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