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December 1, 2006

Via E-mail and UPS Overnight

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive, SW
Olympia, WA 98504-7250

Re: In the matter of *Cost Management Services, Inc. v. Cascade Natural Gas Corporation*
Docket No. UG-061256

Dear Secretary Washburn:

Enclosed for filing please find Cost Management Services, Inc.'s Answer to Respondent's Cross-Motion for Summary Determination. The original plus ten copies will follow by mail.

Very truly yours,

Davis Wright Tremaine LLP

John A. Cameron

JAC:mq
Enclosures
cc: Judge Ann Rendahl
Service List (via email & regular mail)

ORIGINAL

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

COST MANAGEMENT SERVICES, INC., Complainant,	)	Docket No. UG-061256
v.	)	**ANSWER OF COST MANAGEMENT SERVICES, INC., TO RESPONDENT'S CROSS-MOTION FOR SUMMARY DETERMINATION**
CASCADE NATURAL GAS CORPORATION, Respondent.	)	

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Of Attorneys for Complainant, Cost Management Services, Inc.

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BEFORE THE
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CASCADE NATURAL GAS CORPORATION, Respondent.	)	

1. Cost Management Services, Inc., ("CMS") submits this answer to the cross-motion of Cascade Natural Gas Corporation ("Cascade"), entitled "Cascade's Motion for Summary Determination and Memorandum in Support." It was originally filed on November, 15, 2006, and refiled on November 22. It will be referenced as "**Cascade Cross-Motion.**" CMS will reference its own motion for summary determination as "**CMS Cross-Motion.**"

I. SUMMARY

2. The CMS Cross-Motion demonstrates that Cascade is running two business lines within a single gas company, utilizing a single set of regulated assets. Its first business line is regulated by this Commission. Cascade's second business line involves private sales of natural gas across Washington, inside and outside its certificated service territory. The second business line is unlawful.

3. The Cascade Cross-Motion still clutches the fig leaf of 18 C.F.R. § 284.402. Offering neither supporting citations of its own nor rebuttal to the copious citations offered by CMS in pleadings since this case began, Cascade still maintains that FERC jumped the jurisdictional barrier of the Natural Gas Act, 15 U.S.C. §717(b), and, without ever saying it was doing so, somehow pre-empted this Commission's regulation of retail gas sales by Cascade. No other local distribution company anywhere in the country has

claimed that FERC has jurisdiction over retail sales. Cascade insists that this Commission must take its bald assertion of federal pre-emption at face value and stand down from exercising its statutory responsibilities unless and until FERC specifies the limits of state regulatory authority under RCW Chapter 80.

4. Anticipating the loss of its federal pre-emption defense, however, the Cascade Cross-Motion offers a series of fall-backs. If 18 C.F.R. §284.402 means only what it says, then it must have been this Commission that deregulated retail gas sales by Cascade, and by no other Washington gas company, when Cascade began to use its Schedule No. 687. If this Commission notices that Schedule No. 687 does not cover sales of natural gas by Cascade, then this harmless oversight should be overlooked. If not that excuse, then Cascade feels it should be deemed authorized to make "minor tariff revisions" as necessary to deregulate itself under RCW Chapter 80. Plainly, Cascade hopes this Commission will suspend reality and refrain from applying Washington law to Cascade's second business line of private retail gas sales.

5. The Cascade Cross-Motion does not even mention the extraterritorial gas sales Cascade stipulates it is making to end-use customers located within the certificated service territories of Avista Utilities and Puget Sound Energy. Cascade has no rate schedule on file to cover extraterritorial sales. This comes as no surprise because this Commission has never authorized Cascade's extraterritorial sales under RCW 80.28.190.

6. Paragraphs 56-61, of this pleading propose specific remedies that avoid any hardship or prejudice to customers that relied on Cascade's misrepresentation of authority to make private sales. CMS' remedies are totally consistent with the position taken by the Northwest Industrial Gas Users in their Initial Brief filed November 15, 2006.

II. ARGUMENT

A. It's Time For Cascade To Let Go Of Its Federal Deregulation Fig Leaf.

1. Cascade manufactures legal confusion where none actually exists.

7. Cascade continues to mislead this Commission about 18 C.F.R. §284.402, starting on the very first page of the Cascade Cross-Motion, lines 30-33:

> 18 C.F.R. §284.402, a FERC rule which authorizes companies like Cascade to engage in certain natural gas transactions pursuant to a blanket marketing certificate.

This deceptive oversimplification obscures the key jurisdictional distinction between what FERC regulates under the Natural Gas Act and what this Commission regulates under RCW Chapter 80. To capture that distinction, the quoted phrase would have to be edited as follows:

> 18 C.F.R. §284.402, a FERC rule which authorizes "natural gas companies" like Cascade to engage in ~~certain~~ sales of natural gas for resale ~~transactions~~ pursuant to a blanket marketing certificate.

8. Distortions continue throughout Cascade's pleading. Compare Cascade's clipped citation to 15 U.S.C. §717c(a) against the statute as codified:

Cascade citation to 15 U.S.C. §717c(a)	**15 U.S.C. §717c(a) as codified**
"Section 4(a) of the NGA gives FERC jurisdiction over '[a]ll rates and charges made, demanded or received by any natural-gas company for *or in connection with* the transportation or sale of natural gas.' 15 U.S.C. §717c(a) (emphasis added)." Cascade Cross-Motion, p. 2, n. 2.	All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful. [Emphasis supplied.]

Lopping off the singularly relevant statutory phrase creates a misleading statutory picture.

9. Cascade's motive is transparent in creating legal confusion where none exists when it states, "...Cascade believes that only FERC has jurisdiction to decide questions about the scope of authority that FERC has granted." Cascade Cross-Motion, p. 3, n. 4. It hopes to create a specter of FERC involvement that will cause this Commission to back down from enforcing RCW Chapter 80 regarding Cascade's private retail sales—inside its certificated service territory and, presumably, outside as well.

2. Putting aside the Cascade Cross-Motion, the law is clear.

10. Under 15 U.S.C. §717a(6), "natural gas company" means "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale" (emphasis supplied). Cascade is a "natural gas company" under the Natural Gas Act, but only regarding gas sales it makes for resale, i.e., sales to other "natural gas companies" and others purchasing at wholesale for resale to end-users. Sales for resale are subject to FERC jurisdiction; retail sales to end-users are not. The fact that Cascade makes both wholesale and retail gas sales does not make its retail sales subject to FERC regulation—or deregulation—under the Natural Gas Act.

11. Cascade clearly knows the difference between a sale for resale and a retail sale to an end-user. [1] In Stipulation of Fact No. 9, Cascade admits that "[n]one of Cascade's sales of natural gas commodity to Schedule Nos. 663 or 664 customers are 'sales for resale.'" In Stipulation of Fact No. 27, it concedes "Cascade Natural Gas Corporation has executed contracts for the sale of natural gas to end-use customers at facilities located within the WUTC-certificated service territories of Avista Utilities and Puget Sound Energy ("PSE"), and is currently selling natural gas pursuant to such contracts."

[1] *See also* comments of the American Gas Association on 18 C.F.R. §284.402, quoted in the CMS Complaint, p. 13, ¶32 (Exhibit A to the complaint). The entire industry would find it a curious anomaly if this Commission accepted the claim that FERC deregulated retail gas sales.

3. FERC has already made the determination about retail gas sales that Cascade claims to be necessary – adversely to Cascade.

12. To end the canard of FERC retail deregulation, one need only observe that FERC already addressed Cascade's fanciful claim. FERC wrote 18 C.F.R. §284.402 to read:

> Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas Act jurisdiction. [Emphasis supplied.]

Paralleling 15 U.S.C. §717c(a), FERC limited application of this rule to "sales for resale"—not to the retail sales at issue in this case. *See* Stipulated Fact Nos. 9 and 27.

13. In Order No. 547, which explained the issuance of 18 C.F.R. §284.402, FERC explained that Cascade's sales of gas at retail are not covered because they are beyond the jurisdictional limit of the Natural Gas Act. That order states:

> Section 1(b) of the NGA [15 U.S.C. §717(b)] provides, in part, that the NGA does not apply "to the local distribution of natural gas or to the facilities used for such distribution." [2]

14. What more could FERC be asked? Cascade could only be proposing to ask FERC the following: ignoring the plain language of the regulation itself, FERC Order No. 547, the jurisdictional barrier of the Natural Gas Act and over 60 years of Supreme Court precedent, why doesn't 18 C.F.R. §284.402 deregulate retail gas sales too and even erase retail service territorial boundaries? Cascade's position is just a smokescreen.

4. Cascade cites to cases that are either irrelevant or directly contrary to its position in this proceeding.

15. Cascade Cross-Motion, at p .2, n. 2, cites *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1263 (8th Cir. 1991). This case is totally irrelevant to 18 C.F.R. §284.402

[2] Regulations Governing Blanket Marketer Sales Certificates, [Statutes & Regulations 1991-1996 Transfer Binder] Fed. Energy Reg. Comm'n Rep. (CCH) ¶30,957, at p. 30,724, n.34.

because it was decided on April 4, 1991, over 1.5 years before FERC issued this regulation on December 8, 1992. Moreover, that case dealt with FERC's jurisdiction over interstate pipeline service, not its regulation of gas sales for resale. 929 F.2d at 1263. The case does not even warrant the footnote reference Cascade gave it.

16. Cascade's same footnote also cites *Nicole Gas Production Ltd.*, 103 FERC ¶61,328, 2003 WL 21353915 (2003). This case does not concern, or even cite, 18 C.F.R. §284.402. Instead, the case concerned a metering dispute between an interstate pipeline and a natural-gas-producer customer of that pipeline. The Commission noted that "section 26.9(b) [of the pipeline tariff] requires Columbia to install meters and meter stations to measure gas received into its system." 103 FERC ¶61,328, p. 62,262.

17. The only significance of *Nicole Gas Production Ltd* to this complaint case came on appeal of that decision, which was reversed, *sub nom.*, in *Columbia Gas Transmission Corp. v. FERC*, 404 F.2d 459 (D.C. Cir. 2005). The D.C. Circuit made short work of FERC's "boot-strap" claim of jurisdiction over natural-gas gathering facilities, despite their explicit exclusion from FERC jurisdiction under the Natural Gas Act:

> The breathtaking scope of FERC's claim is made clear by its response to a hypothetical raised at oral argument. In the Commission's view, if a filed tariff stated that its provisions "shall apply to the production or gathering of natural gas," FERC would have jurisdiction over those activities, ... notwithstanding that they are precisely the activities that the NGA excludes from FERC's purview, *see* 15 U.S.C. § 717(b).
>
> FERC cites no case, and we cannot find one, in which a court has permitted the Commission to use the filed rate doctrine as such a jurisdictional boot-strap. An examination of the statutory language explains the lack of precedent in support of FERC's view.
>
> ***
>
> Because the Natural Gas Act unambiguously denies FERC jurisdiction to issue the orders challenged in the petition for review, we grant the petition and vacate the orders. [404 F.2d at 462-63.]

18. The quoted language should sound familiar because it is the same legal concept advanced by CMS. Just as the Natural Gas Act expressly excludes gas-gathering from FERC jurisdiction, it also expressly excludes regulation of retail gas sales by "gas companies" like Cascade. This is further judicial support that FERC has no jurisdiction over any Cascade retail sale of natural gas. *See* CMS Cross-Motion, pp. 20-21.

19. When Cascade itself cites a case that undercuts its claim, and supports instead CMS's legal position, it becomes all the more clear that 18 C.F.R. §284.402 does not, and could not, apply to Cascade's retail gas sales. Neither could FERC have acted under the Natural Gas Act to expand Cascade's certificated service territory.

B. Rate Schedule No. 687 Does Not Apply To Cascade's Retail Gas Sales.

1. The language of Schedule No. 687 contradicts Cascade's position.

20. Cascade waffles between claiming that it does not require a Commission-approved rate schedule to sell gas to retail customers, [3] asserting that its Schedule No. 687 covers its retail sales, [4] and finally acknowledging that Schedule No. 687 does not apply, but could, if only this Commission would turn a blind eye to several "minor tariff revisions" Cascade wishes it had made. [5]

21. Cascade's purported reliance on Schedule No. 687 suffers from the same defect as its claimed reliance on 18 C.F.R. §284.402. One must ignore the words of Schedule No. 687 and accept the claim that it applies to services not even mentioned. Cascade's first misreading of the language of Schedule No. 687 is its claim that it covers retail gas sales by Cascade – a distortion that cannot survive a reading of the schedule, which provides a complete listing of covered services:

[3] Cascade Cross-Motion, p. 13.
[4] *Id.*, p. 12.
[5] *Id.*, p. 14.

GAS MANAGEMENT SERVICES DESCRIPTION:

The company will, acting as an agent, manage the transportation & delivery of natural gas on the interstate pipeline. Services offered under this schedule include the following:

- Daily Nominations on [specified interstate pipelines]
- Review of all nomination confirmations
- Pipeline Balancing services
- Monthly Management reports ....
- Release unused firm transportation capacity on behalf of customer. ...[Schedule No. 687, emphasis supplied.]

22. Each listed service relates to transportation of gas on an upstream interstate pipeline. Clearly, Cascade does not act as a gas seller under Schedule No. 687, it acts as transportation agent for non-core customers electing these transportation services.

23. The only Schedule No. 687 reference to gas commodity comes in its "availability" provision: "These services are available throughout the Company's service territory to Non-core end users who currently purchase their own gas supply that is transported on Williams Northwest Pipeline (WNWP), Westcoast Energy, Inc. (WEI), and/or Gas Transmission Northwest (GTN)." *See* Exhibit 14 to the Stipulated Facts (emphasis supplied). This is not a gas-sale provision; rather, it presumes that a customer has already purchased gas upstream and uses the help of Cascade, as agent, in arranging to transport the customer's gas over an interstate pipeline.

24. On the other hand, if Cascade were selling gas to a customer then none of the services actually specified in Schedule No. 687 would be necessary to that customer. Instead, Cascade would arrange interstate-pipeline transportation on its own account for its own gas to be sold and delivered to that customer. Forcing Schedule No. 687 to apply to sales of gas by Cascade makes the actual language of this schedule irrelevant. Square peg, round hole. The schedule simply cannot be made to fit sales of gas by Cascade.

25. Thus, Schedule No. 687 has no relevance to this case. Yet, to indulge in a bit of Cascade's revisionism, even if the list of Schedule No. 687 services had included gas sales by Cascade, those could not be simple, arms-length commercial transactions. Schedule No. 687 expressly states that Cascade is "acting as an agent" for its customer. Under Washington agency law, this would impose a duty on Cascade to go beyond arms-length dealing and get the very best price for its principal: a Schedule No. 687 customer.

26. Loyalty is the chief virtue required of an agent. *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157 (1966). The loyalty demanded of any agent by law creates a duty in the agent to act solely for the benefit of the principal in all matters connected with the agency. *Id.* (citing Restatement (Second) of Agency § 387 (1958)). *See also Farrell v. Score*, 33 Wn.2d. 856, 411 P.2d 146 (1966) (the law exacts of agent the utmost fidelity to his principal) and *Mersky v. Multiple Listing Bureau of Olympia*, 73 Wn.2d 225, 228-29, 437 P.2d 897 (1968) ("[T]here flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible ...").

27. If Schedule No. 687 had applied to gas sales by Cascade, such sales would have to be sweetheart deals – the "best bargain possible," not merely prices negotiated by commercial parties at arms-length. "Acting as an agent," Cascade would have had an affirmative duty to sell gas to its principals at prices that were "unduly preferential" compared to rates paid by its core customers, siphoning off "the least cost mix of natural gas supply" Cascade must acquire for core customers under WAC 480-90-238.

28. If Schedule No. 687 said what Cascade wishes it meant, then it would patently violate the prohibition against "undue preference or advantage to any customer" under RCW 80.28.090 and the integrated resource planning obligation to core customers under WAC 480-90-238. Cascade cannot help but trip over conflicts of interest in deviating from its basic obligations to its core customers.

2. Schedule No. 687 is not, and does not even purport to be, a "banded rate" under RCW 80.28.000 for any gas sale by Cascade.

29. Cascade next claims that Schedule No. 687 is a "banded rate." [6] One need only read RCW 80.28.075 to see that this statement is false. A "banded rate" means a rate that has a minimum and maximum rate.

30. Schedule No. 687 does not specify a rate for gas sales – no minimum rate and no maximum rate. Instead, Schedule No. 687 specifies only a range of "gas management fees" charged "for the performance of the daily gas management services," i.e., the services Cascade provides, "acting as an agent," that relate to transportation of a customer's gas on an upstream interstate pipeline. *See* paragraphs 21-23, *supra.*

3. Cascade's "minor tariff revisions" are not minor at all.

31. Whether discussing 18 C.F.R. §284.402 or Schedule No. 687, Cascade ignores their written words and reads them as it wishes they had been written. It could only have been with this revisionism in mind when Cascade wrote:

> In addition, CMS may argue that the literal terms of Rate Schedule No. 687 do not cover the supply of gas. Cascade thinks that the terms of Rate Schedule No. 687 are sufficiently broad to include these sales, and this is consistent with Staff's rate case testimony discussed above. Nevertheless, even if the Commission thinks that Rate Schedule No. 687 does not literally apply to unbundled gas sales, the Commission still should not conclude that these sales since 2004 are unlawful. To do so would simply elevate form over substance. [Cascade Cross-Motion, pp. 13-14.]

[6] Cascade Cross-Motion, p. 12, lines 20-30.

32. First, rate schedules are not mere formalities, with substance to be followed or ignored as a "gas company" sees fit in order to conduct a private business outside of Commission regulation. "Once a utility's tariff is filed and approved, it has the force and effect of law." *General Telephone Co. of the Northwest v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986), citing *Moore v. Pacific Northwest Bell*, 34 Wash.App. 448, 455, 662 P.2d 398 (1983); and *Allen v. General Tel. Co.*, 20 Wash.App. 144, 151, 578 P.2d 1333 (1978). *See also* cases cited in the CMS Cross-Motion, p. 11, ¶37.

33. The Commission is not merely some bystander when it comes to enforcing tariffs. RCW 80.04.470 states: "It shall be the duty of the commission to enforce the provisions of this title and all other acts of this state affecting public service companies ..."

34. Second, from both the legal and policy perspective, Cascade is asking this Commission to sanction private, deregulated retail sales in which other Washington gas companies do not engage. It would be strange policy indeed if this Commission were to be lulled into taking an action that could deregulate retail gas sales generally under the guise of some "minor fix." If the Commission has any interest in allowing gas companies to divide their loyalties to core customers by making private retail sales in competition against their own tariff businesses, the matter should be explored generically in a rulemaking proceeding, not through a backdoor effort by Cascade to relieve itself from the consequences of its violations of RCW Chapter 80.

35. The Commission should bear in mind that none of Cascade's private customers pose the slightest risk of by-pass. Customers located within Cascade's service territory are, and should remain, paying transportation customers under Schedule Nos. 663 or 664. Those located outside Cascade's service territory, by definition, pose no by-pass risk.

4. Among its other limitations, Schedule No. 687 has no extraterritorial application outside Cascade's service territory.

36. Cascade cannot freight Schedule No.687 with the burden of legalizing its extraterritorial sales in the certificated service territories of Avista Utilities, Puget Sound Energy and Northwest Natural Gas. The availability provision of that schedule reads:

> These services are available throughout the Company's service territory to Non-core end users who currently purchase their own gas supply that is transported on Williams Northwest Pipeline (WNWP), Westcoast Energy, Inc. (WEI), and/or Gas Transmission Northwest (GTN). [*See* Exhibit 14 to the Stipulated Facts.]

Schedule No. 687 has no extraterritorial effect. Nor could it under RCW 80.28.190.

5. Cascade cannot lawfully sell gas at retail under no rate schedule at all.

37. It comes as no surprise that the language of Schedule No. 687 does not match Cascade's advocacy because that rate schedule was never intended to apply to gas sales by Cascade until after the fact, when CMS pointed out the inapplicability of 18 C.F.R. §284.402. As a third fall-back, on page 13 of the Cascade Cross-Motion, Cascade implies that it can lawfully sell gas at retail without having any applicable tariff at all. This implication is contradicted by numerous provisions of RCW Chapter 80. For a discussion of the statutory provisions applicable to any retail gas sale by a "gas company" anywhere in Washington, *see* CMS Cross-Motion, pp. 9-12, ¶¶35-39. For a discussion of the additional requirements imposed on gas companies by RCW 80.28.190 regarding extraterritorial retail gas sales, *see* CMS Cross-Motion, pp. 12-18, ¶¶40-55.

C. Lacking Any Legal Basis In Schedule No. 687, Cascade Cannot Turn To Its Long-Cancelled Rate Schedules, None Of Which Ever Received Commission Scrutiny.

38. At pp. 5-6 of the Cascade Cross-Motion, there is a string of references to various cancelled rate schedules regarding "customer owned gas supply," balancing, interruptible pipeline capacity, optional underground gas storage, etc. All these schedules applied

only in Cascade's service territory; none aid Cascade's defense of its current gas sales.

39. It is important to note the order-of-magnitude differences between any sales covered by Cascade's schedules cancelled in 2004 and its larger sales program underway today with no applicable rate schedule at all. Cascade's occasional sales of gas solely inside its service territory prior to 2004 bear marked differences from the pervasive gas-sales program it now actively promotes across Washington. These cancelled rate schedules simply cannot be used as precedent for its much-expanded, $30 million/year second business line extending into the service territories of other gas companies.

40. This absence of precedential support is further highlighted by the fact that adoption and cancellation of these rate schedules were ministerial actions by the Commission secretary without decision by this Commission. Merely by allowing a rate schedule to become effective or cancelled carries no Commission endorsement that a gas company's filing is just and reasonable or otherwise in compliance with statutes and Commission regulations. WAC 480-80-010(2) provides:

> If the commission accepts a tariff ... that conflicts with these rules, the acceptance does not constitute a waiver of these rules unless the commission specifically approves the variation consistent with WAC 480-80-015 ...

No formal Commission action when these rate schedules became effective, and Commission records note the following housekeeping entry when they were later cancelled: "Removes obsolete rate schedules and makes miscellaneous text changes." See CMS Reply of August 28, 2006, p. 3, ¶7. The Commission never deregulated Cascade's gas sales under the guise of housekeeping actions by its secretary. Thus, every issue raised by CMS is an issue of first impression for the Commission.

41. Fundamentally, there are only three things that can be said with any degree of certainty about Cascade's cancelled rate schedules. First, they cannot be used to legalize

Cascade's ongoing program of private retail gas sales. Second, none of these cancelled schedules ever would have applied to Cascade's extraterritorial retail sales. Third, the vagueness of Cascade's discussion of its operations under these cancelled schedules suggests the existence of other violations of RCW Chapter 80 in addition to those that form the basis of the CMS complaint.

D. The Stolz Declaration Answers Nothing; It Merely Begs The Fundamental Regulatory Questions At Issue In This Case.

42. Cascade attempts to rely on the conclusory Stolz Declaration. Cascade had proposed to include the contents of the Stolz declaration among the Stipulated Facts in this case. However, CMS declined. CMS would no sooner stipulate to Mr. Stoltz's claims about the pricing of Cascade's private gas sales than it would stipulate to Cascade's case-in-chief filed at the start of a rate case. The Stoltz declaration is just Cascade's side of the story about how retail gas service should be priced in the state of Washington. The only difference between the Stolz declaration and a Cascade case-in-chief is that Cascade asserts that the former should be taken by this Commission as a conclusive demonstration of how private gas sales should be priced – with no review whatsoever by this Commission or input from Staff, Public Counsel or the public.

43. The Stoltz declaration recounts a private rate case to which this Commission was not invited and in which Cascade's officers and directors assumed the role of WUTC commissioners. The prices charged by Cascade for its private gas sales realize the rates of return and margins acceptable to Cascade management. Questions never arise in Cascade's private rate case about whether its private prices are unduly discriminatory or unduly preferential to core customers because Cascade's sole purpose is to derive the price that will close a deal with some prospective private customer. Cross-subsidization

is not a violation of acceptable ratemaking in Cascade's private rate case; instead, it is a private ratemaking tool to help Cascade close a deal with a private customer. And, issues never arise about whether some private customer is siphoning off "the least cost mix of natural gas supply," which Cascade is obligated to acquire for core customers under WAC 480-90-238. If such siphoning does not occur, how else can Cascade's private sales effectively compete against its own tariff service?

44. There is a double irony in Cascade's assertion that CMS has not demonstrated that Cascade's private sale prices fail to recover their costs. Cascade Cross-Motion, p. 13, lines 36-38. First, Cascade implies that it can shed its burden of proof under RCW 80.04.130(2) to justify its rates merely by refusing to file private rates and merely substituting the Stoltz declaration. Second, how could CMS – or the Commission for that matter – prove anything about secret rates not filed with the Commission?

45. At bottom, this Commission has no more reason to accept in the Stoltz declaration than CMS did. The Commission does not accept at face value the rate filing of any gas company or electric company it regulates. Neither should it accept a declaration whose whole purpose is a one-sided substitute for the regulation of Cascade's private-gas sales.

E. The $200,000 Rate Case Credit Equates To Only 10 Cents/Month Per Customer.

1. The credit expressly relates to "gas management services," not to gas sales.

46. Cascade attempts to make much out of an arrangement it negotiated with Commission Staff in its recent general rate case under which Cascade will credit $200,000 in Schedule No. 687 net revenues per year to its core customers. Stipulated Fact No. 25. CMS was not a party to this side deal, but certainly would not oppose any transfer of money from Cascade's shareholders to its ratepayers. As explained at some length above in ¶¶21-27, Schedule No. 687 does not apply to gas sales by Cascade so the

credit is not dependent on this Commission's decision in this case concerning the legality of Cascade's private gas sales inside or outside its certificated service territory.

2. Cascade grossly undervalues the public interest.

47. In another round of revisionism, Cascade claims that this $200,000 credit legalizes its private gas sales after the fact. Cascade claims this should be the pay-off for this Commission to turn a blind eye to "minor tariff revisions" to Schedule 687 and probably to Cascade's extraterritorial sales. This claim collapses of its own absurdity. Surely, nothing in the rate case settlement purports to extract this *quid pro quo.*

48. Moreover, it is important to put this credit into perspective. Cascade has 164,619 customers. [7] If one were to assume an equal distribution of this amount to all customers (which very likely overestimates the amount going to residential customers), a transfer of $200,000 per year to those customers equates to $1.21 per customer per year, only 10 cents per month. It would be no surprise if this amount were most often lost in rounding.

49. In return for 10 cents per month, each customer would forfeit:

- the statutory protections under RCW 80.28.080 and RCW 80.28.090 regarding rates that unduly discriminate against those customers and against rates that are unduly preferential,
- their right under WAC 480-90-238 to a gas supply to meet their "current and future needs at the lowest reasonable cost to the utility and its ratepayers," with no diversion of the cheapest supplies for private sales,
- the statutory rights that all of Cascade's rates and contracts be on file and that all rates be just and reasonable as determined by this Commission,
- the right under RCW 80.28.190 to have Cascade devote its efforts to customers within its certificated service territory and refrain from making private retail gas sales to end-users outside those boundaries.

50. There is an appalling lack of proportionality to Cascade's proposed trade. As

[7] Exhibit KJB-2, p. 5 of 5, to the rate case testimony of Cascade witness Katherine J. Barnard, admitted into the record of Docket No. UG-060256 as Exhibit No. 92.

Cascade would have it, a residential customer receiving a $200+ winter gas bill would have the meager comfort of knowing that the bill might be ten cents lower because of a $200,000 credit this Commission accepted as trade for allowing Cascade to sell its cheapest gas to its private customers – even those private customers in the service territories of Avista, PSE and Northwest Natural. If this Commission accepts Cascade's proposed trade, then the "public interest" under RCW Chapter 80 will never have traded so cheaply—ONE THIN DIME!

F. Cascade's Solicitude For Its Private Sale Customers Is Nothing More Than A Request That It Be Allowed To Continue Providing Gas Service At Unduly Preferential Rates, Terms and Conditions To Non-Core Customers Inside And Outside Its Certificated Service Territory.

1. Private customers' gains are core customers' losses.

51. The foregoing section of this pleading dealt with what core customers lose as Cascade runs its second business line of private gas sales. This section deals with the opposite side of that equation: what Cascade's private customers gain at the expense of those core customers.

52. Undue preference is the opposite side of undue discrimination. Cascade's private customers, both inside and outside its certificated service territory, receive negotiated prices that are unduly preferential. Cascade must intend to give its private customers better prices than the rates Cascade charges its core customers. How could this not be the case, if Cascade's second business line of non-tariff, private gas sales is to compete successfully against Cascade's tariff service?

53. Cascade is wrong in claiming "there is no pro-competitive reason to require the Commission to review and approve Cascade's unbundled gas prices to ensure that they are above cost." Cascade Cross-Motion, p. 13, lines 42-44. If Cascade is selling gas to

private customers below its costs, then, of necessity, these sales must be unduly preferential toward private customers, in violation of RCW 80.28.090, and unduly discriminatory against its core customers, in violation of RCW 80.28.080.

54. Even before the advent of the integrated resource planning, this Commission has insisted that gas companies devote their attention to their core customers. "The Commission agrees with the position of the company that it should, to the extent possible, make transportation service available to end-use customers without otherwise prejudicing its obligation to provide service to its core group of sales customers." *Washington Utilities and Transportation Commission v. The Washington Water Power Company*, Docket No. UG-901459, Third Supplemental Order (March 1992) (emphasis supplied).

55. Cascade claims its violations of RCW Chapter 80 are necessary in order to benefit competition. It made the same claim when it asked this Commission to allow it to provide Schedule No. 700 services inside Avista's service territory without a certificate of public convenience and necessity. Stipulated Fact No. 28 and related Exhibit 24, p. 9 of 11 ("If the Commission imposes the requirement for a Certificate on Cascade to perform Rate Schedule 700 services while other companies perform similar services without similar regulations, it puts Cascade at a substantial competitive disadvantage."). A desire to compete is not a defense to violations of RCW Chapter 80. For Cascade to make illegal sales of natural gas at retail is not competition, it is market manipulation.

56. Stipulated Fact No. 4 lists nine gas suppliers that are lawfully operating in Cascade's service territory. Competition would do just fine without Cascade.

2. CMS seeks remedies that would not prejudice any customer that relied on Cascade's misrepresentation of federal authority to make private retail sales.

57. CMS has consistently maintained that the remedy fashioned by this Commission

for Cascades's violations of RCW Chapter 80 should avoid any hardship to customers who relied on Cascade's misrepresentation of private-sale authorization. The consequences should be borne solely by Cascade. CMS Complaint, p. 19. None of Cascade's private retail customers need be left without a contractual gas supply as winter looms. Thus, CMS proposes the following.

a. Private contracts to be maintained.

58. Private contracts should remain in place so that no customer who relied on Cascade's misrepresentations faces any risk regarding gas supply or price. Cascade should be ordered to notify each customer that it acted in violation of RCW Chapter 80 by offering private rates and contracts different from those on file.

b. Illegal practices to be prohibited.

59. RCW 80.28.020 provides:

> Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint, ... that the rates or charges demanded, exacted, charged or collected by any gas company, electrical company or water company, for gas, electricity or water, or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, ... the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order. [Emphasis supplied.]

Acting pursuant to this statutory authority, the Commission should order Cascade permanently to cease marketing or making any new private sales of gas or renewing or extending any existing contracts—both inside or outside its certificated service territory.

c. Penalties.

60. Penalties are required. "Once the Commission finds facts that constitute a violation of law or regulation, it *must* assess a penalty whether or not there are

identifiable damages – it has no discretion." *Rose Monroe v. Puget Sound Power & Light Co.*, Docket No. UG-85-70, Order Affirming Proposed Order (October 1986).

d. Audit.

61. The Commission should order a "cost of service" audit of Cascade to determine the amount of undue preference accorded each private customer throughout the term of each private gas sale contract. The amounts of these undue preferences should be paid by Cascade, in the form of a credit, to the 191 cost of gas account for the benefit of Cascade's core customers.

62. By adopting these specific remedies, the Commission will (a) ensure that Cascade does not profit from its wrongdoing, (b) ensure that core customers receive their full statutory protections under RCW Chapter 80 and WAC Chapter 480, and (c) protect the integrity of its own jurisdiction under RCW Chapter 80. At the same time, no private customer will be prejudiced as the result of its reliance on Cascade's misrepresentation of its authority to make private retail gas sales at rates not on file with this Commission.

G. No Discovery Materials Were Misused In Either Docket No. UG-061256 or Docket No. UG-060256.

1. Docket No. UG-060256

63. Cascade intimates that CMS intervened in its general rate case merely for the purpose of mining that case for discovery information that would be used in its subsequent complaint. That assertion is false. CMS intervened in Cascade's general rate proceeding to take issue with the testimony of Cascade Vice President Jon Stolz that FERC had deregulated retail sales of natural gas. *See* Stipulated Fact No. 7 and the related Exhibit No. 1. CMS also sought to challenge related statements contained in Cascade Rate Schedules Nos. 663 and 664 that retail end-users can purchase gas at retail

from Cascade pursuant to 18 C.F.R. §284.402. CMS diligently pursued its rate-related issues in Cascade's rate proceeding to the conclusion of that case.

64. Settlement discussions in Cascade's rate proceeding focused on issues relating to cost allocation, rate spread and rate design. CMS became concerned that issues about the legality of Cascade's private gas sales would not receive adequate attention in a rate case dominated by revenue and cost issues. After seeking the advice of Commission Staff about the advisability of severing its legal issues into a separate proceeding, CMS filed the complaint that commenced Docket No. UG-061256, while continuing to pursue the ratemaking aspects of those issues in the Cascade general rate case. [8]

65. In the Cascade rate case, CMS sponsored the direct expert testimony of Theodore Lehmann regarding two propositions. First, knowledgeable people in the natural gas industry would not confuse the "sales for resale" regulated by FERC under the Natural Gas Act with any retail sale of gas regulated by this Commission. Second, it is deceptive and misleading to retail consumers for Cascade to state in both Schedule Nos. 663 and 664 that it is authorized by FERC to make private retail sales of natural gas.

66. The Lehmann testimony became part of the rate case record along with many of Cascade's responses to CMS data requests – including confidential responses submitted under seal. Stipulated Fact No. 20. In the rate case, CMS received relief regarding its claim about Cascade's deceptive and misleading representations:

> In paragraph 12.b(iii) [of the rate case settlement agreement], Cascade and CMS agreed that Cascade would eliminate the following language from its Rate Schedule Nos. 663 and 664:
>
> > Gas Supplies purchased through the Company will be in accordance with the FERC regulations (18 CFR Part 284.402 Blanket Marketing Certificates).

[8] CMS includes this statement in its pleading only after first clearing it with Staff.

Stipulated Fact No. 24, last sentence and attached quote. Thus, it is wrong for Cascade to intimate that CMS' participation in the rate case was disingenuous.

67. The settlement agreement in Cascade's rate case includes an "Attachment B," which is the agreement between Cascade and CMS to stipulate specified facts of record in the complaint case, Docket No. UG-061256. Attachment B stipulated facts include Cascade's responses to CMS data requests (including the confidential responses), plus the information in Stipulated Fact Nos. 26 and 27 about Cascade's private gas sales within the service territories of other Washington gas companies. Cascade thereby agreed that the facts adduced by CMS in the rate case would become Stipulated Facts in this case.

2. <u>Docket No. UG-061256</u>

68. WAC 480-07-320 provides that "[p]arties may request consolidation or may request the severance of consolidated matters by motion to the commission." In filing its complaint, CMS essentially took the procedural step of seeking the severance of its legal issues for separate determination in a case to run in parallel with the rate case.

69. CMS' complaint met the requirements of WAC 480-07-370(1)(a)(ii):

> A formal complaint must be in writing and must clearly and concisely set forth the ground(s) for the formal complaint and the relief requested. A formal complaint must state: ***
>
> (C) Facts that constitute the basis of the formal complaint, including relevant dates; ...

70. Commission precedent holds that a complaint will be dismissed if it fails to present a *prima facie* case. *GTE Northwest Incorporated v. Whidbey Telephone Company*, Docket No. UT-950277, Fifth Supplemental Order (April 1996). Thus, CMS had to state more in its complaint than it had a difference of opinion with Cascade about the legal significance of 18 C.F.R. §284.402. That abstract issue probably would not

have survived a motion to dismiss or dismissal *sua sponte* by this Commission. CMS had to assert more to make its *prima facie* case. It did so by stating that Cascade was in fact making private retail sales of natural gas, in violation of RCW Chapter 80, under purported authority of 18 C.F.R. §284.402. CMS supported this assertion by reference to the non-confidential statement of Cascade in the rate case that it was in fact making private retail gas sales under claimed authority of 18 C.F.R. §284.402.

71. Nothing in Commission regulations prohibits a party from simultaneously using in two parallel proceedings the facts gathered in one of those proceedings – provided those facts are relevant to both. To be sure, a party cannot use information gathered in settlement discussions, which did not happen here. Neither can a party use confidential information covered by a protective order – which CMS has studiously avoided doing.

72. Moreover, nothing in the CMS complaint has worked any prejudice on Cascade. For a complainant to make a *prima facie* case does not resolve that case. Instead, the case proceeds and the respondent is given the opportunity to request an adjudicatory hearing on any facts it chooses to contest or to offer other forms of rebuttal.

73. Cascade did not request an adjudicatory proceeding in Docket No. UG-061256. Neither did it seek to rebut CMS' factual assertions. Quite the contrary, Cascade actually agreed in its rate case that CMS could use facts originally stated in the CMS complaint – and more – as Stipulated Facts in the complaint proceeding. *See* ¶62, above.

74. On September 14, 2006, a prehearing conference was convened by the administrative law judge in Docket No. UG-061256, to determine, *inter alia*, whether that proceeding should be consolidated with Docket No. UG-060256 due to a similarity of issues raised. Stipulated Fact No. 25. Essentially, the judge asked CMS whether it

wanted to reconsolidate the complaint issues that had just been severed from the rate case. Had the two cases been consolidated, there would have been only a single record and Cascade would have had no occasion to question the use of facts in two proceedings.

75. The cases were not consolidated because CMS and Cascade each preferred that they proceed separately, in "parallel." *Id.* CMS is pursuing its legal issues in this "parallel" proceeding – apart from the numerical issues of the rate case.

3. To decide this case, the Commission need not rely on any part of the Cascade rate case record that is not also a Stipulated Fact in this case.

76. Nothing in CMS' complaint violated either the letter or spirit of Commission procedural rules. Having survived a possible motion to dismiss for failure to state a *prima facie* case, however, the purpose of that document is now accomplished. In deciding this case, this Commission can rely for factual support exclusively on the Stipulated Facts agreed to by CMS and Cascade. Those Stipulated Facts include all the facts stated in the CMS complaint – and more. Relying on Stipulated Facts cannot possibly work any prejudice on Cascade, which agreed to every one of them.

77. Finally, it bears repeating that the record of this case never has contained any information claimed to be confidential by Cascade. Cascade acknowledges this. "CMS did not disclose the confidential information ..." Cascade Cross-Motion, p. 18, line 29. Although Cascade agreed in Attachment B to the rate case settlement that confidential data responses would be included in the Stipulated Facts, CMS acceded to Cascade's subsequent wishes not to include that confidential information. [9]

[9] *See* CMS Cross-Motion, p. 6, n. 1.

III. CONCLUSION

78. Cascade's second business line is fatally flawed. The Stipulated Facts and pleadings in this case demonstrate that Cascade's efforts to make private retail sales reflect a poorly considered set of evasions. It has misled both this Commission and its Schedule Nos. 663 and 664 customers by claiming that FERC has overridden RCW Chapter 80 regarding the retail gas sales of Cascade's choosing. Its fallback defenses point to retail schedules that do not apply and to cancelled schedules never endorsed by this Commission. It secretly extended its private sales program into the service territories of Avista, PSE and Northwest Natural Gas without complying with RCW 80.28.190.

79. In addition to the violations of RCW Chapter 80, Cascade's evasions violate fundamental regulatory principles by making both tariff and off-tariff gas sales with the same set of regulated assets. This carries all of the risks inherent in affiliated interest transactions. At bottom, Cascade cannot fulfill its public service obligations to core customers while simultaneously competing against its own core business.

80. Cascade should be ordered to obey the law. CMS asks this Commission to avoid working any hardship on the Cascade private customers who have been misled by adopting the specific remedies proposed in ¶¶ 56-61 of this pleading.

DATED this 1st day of December, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of December, 2006, served the foregoing **ANSWER OF COST MANAGEME NT SERVICES, INC., TO RESPONDENT'S CROSS-MOTION FOR SUMMARY DETERMINATION** upon parties of record in these proceeding, as follows:

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Dated this 1st day of December, 2006.

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