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4 **BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION**  
5 **COMMISSION**  
6

7 COST MANAGEMENT SERVICES,  
8 INC.,

9  
10 Complainant,

11 v.

12  
13 CASCADE NATURAL GAS  
14 CORPORATION,

15  
16 Respondent.  
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No. UG-061256

RESPONDENT'S RESPONSE TO  
COMPLAINANT'S MOTION  
REQUESTING THAT THE COMMISSION  
TAKE OFFICIAL NOTICE OF A  
REGULATORY FILING MADE BY  
CASCADE ON DECEMBER 21, 2006

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20 Respondent Cascade Natural Gas Corporation ("Cascade") respectfully submits this  
21 response to Complainant Cost Management Services, Inc.'s ("CMS") Motion Requesting  
22 That the Commission Take Official Notice of a Regulatory Filing Made by Cascade on  
23 December 21, 2006 (the "Motion"). The Commission should deny the Motion because  
24 (1) the record in connection with the pending motions for summary determination is closed,  
25 (2) CMS stipulated to the truth of a fact that it now seeks to discredit, and (3) the  
26 Commission may not take official notice of the contents of the document CMS submits  
27 pursuant to WAC 480-07-495(2). In the event the Commission does take official notice of  
28 the document, it should also consider the Second Supplemental Declaration of Jon T. Stoltz,  
29 filed herewith, and should not draw any conclusions adverse to Cascade for the reasons  
30 discussed in that declaration and this Response.  
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RESPONDENT'S RESPONSE TO  
COMPLAINANT'S MOTION TO TAKE  
OFFICIAL NOTICE - 1

32032-0004/LEGAL12945958.1

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**I. DISCUSSION**

**A. The Commission Should Deny CMS's Motion To Take Official Notice**

**1. The record on the pending motions is closed**

At the joint request of CMS and Cascade, the Commission established a procedural schedule that required stipulated facts to be filed by November 8, 2006, simultaneous motions for summary determination to be filed by November 15, 2006, and response briefs to be filed by December 1, 2006. Upon submission of the response briefs on December 1, 2006, the record in connection with these cross-motions was closed. The Commission's schedule contemplated no additional filings of evidence or argument in connection with these motions; however, CMS seeks to do both in its Motion, and only days before the Commission is scheduled to issue an order in this case. The Commission should deny the Motion because it seeks to present both evidence and argument outside of the timeframes requested by the parties and established by the Commission.

**2. CMS stipulated to the truth of a fact that it now seeks to discredit**

Paragraph 17 of the Stipulated Facts includes the following statement: "Cascade currently accounts for the revenue from its optional gas commodity sales by attributing it to Rate Schedule 687." CMS and Cascade stipulated that this fact is "true and correct for purposes of cross-motions for summary determination in this proceeding." Stipulated Facts at 1. CMS now seeks to discredit this stipulated fact by introducing a filing in which Cascade mistakenly indicated that the revenue from these sales is attributed to Rate Schedule Nos. 681-683. CMS claims that the filing contradicts Cascade's "statement" and "claim" in this proceeding, and argues that it "vigorously disputed and rebutted" that claim (Motion at 2); however, CMS ignores the fact that it stipulated to the truth of that statement.

1 The Commission should not permit CMS to contradict a stipulated fact. The purpose  
2 of stipulating to the truth of certain facts was to simplify the parties' presentation of facts in  
3 connection with cross-motions for summary determination and to reduce the need for the  
4 Commission to make findings of disputed facts. Moreover, CMS had the opportunity to  
5 seek discovery prior to stipulating to the facts and to present its own evidence in a timely  
6 fashion. CMS refers only to page 3 of Attachment A in the document. The data in that  
7 document are presented as of June 30, 2006. If CMS desired to dispute the manner in which  
8 Cascade currently accounts for revenue from non-core gas sales, it could have requested this  
9 type of information in discovery and presented it to the Commission in a timely manner.  
10 Instead, CMS sought no discovery whatsoever in this proceeding and stipulated that it is true  
11 that "Cascade currently accounts for the revenue from its optional gas commodity sales by  
12 attributing it to Rate Schedule 687." CMS fails even to address why the Commission should  
13 consider this late-filed evidence when it had ample opportunity to discover and present  
14 evidence within the timeframes established by the Commission. The Commission should  
15 deny the Motion because it seeks to contradict a fact that CMS stipulated is true.  
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31 **3. The Commission should not take official notice of the contents of the**  
32 **document**

33 The regulatory filing of Cascade of which CMS requests the Commission take  
34 official notice is a December 21, 2006 letter from Cascade to the Commission indicating that  
35 Cascade does not plan to make a Purchased Gas Adjustment filing in 2006 (the "Filing").  
36 CMS simply asserts, without making any showing, that the Commission may take official  
37 notice of the Filing because Cascade submitted it "to comply with Commission requirements  
38 imposed under WAC 480-90-233" and thus it contains "'judicially cognizable facts' of which  
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1 this Commission can take official notice pursuant to RCW 34.05.452(5)." Motion at 3.<sup>1</sup>

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3 The fact that a document is filed with the Commission to comply with regulatory  
4 requirements is not a specified basis for taking official notice pursuant to  
5  
6 RCW 34.05.452(5).  
7

8  
9 The contents of the Filing are not subject to official notice pursuant to  
10  
11 WAC 480-07-495(2), which provides in pertinent part:

12  
13 **(2) Official notice.**

14  
15 (a) The commission may take official notice of:

16  
17 (i) Any judicially cognizable fact. Examples of such  
18 facts include, but are not limited to:

19  
20 (A) Rules, regulations, administrative rulings and  
21 orders, exclusive of findings of fact, of the  
22 commission and other governmental agencies;

23  
24 (B) Contents of certificates, permits, and licenses  
25 issued by the commission; and

26  
27 (C) Tariffs, classifications, and schedules regularly  
28 established by or filed with the commission as  
29 required or authorized by law.  
30

31 (ii) Technical or scientific facts within the  
32 commission's specialized knowledge; and

33  
34 (iii) Codes or standards that have been adopted by an  
35 agency of the United States, or this state or of  
36 another state, or by a nationally recognized  
37 organization or association.  
38

39 CMS claims that the contents of the document include "judicially cognizable facts,"  
40 and relies only upon subsection (a)(i) (or the corresponding provision in RCW  
41 34.05.452(5)(a)). The Filing does not include "judicially cognizable facts" as that term is  
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46 <sup>1</sup> CMS cites only RCW 34.05.452(5) in support of its Motion, and ignores the Commission's  
47 own evidence rule governing official notice, WAC 480-07-495(2).

1 used in the Commission's rule. First, the Filing does not fit within any of the specific  
2  
3 examples of such facts set forth in subsections (a)(i)(A), (B), or (C). Second, the document  
4  
5 does not set forth facts that could otherwise be considered "judicially cognizable facts."

6  
7 "Judicially cognizable facts" are those adjudicative facts subject to judicial notice  
8  
9 pursuant to Washington Rule of Evidence 201(b):

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11 **Kinds of Facts.** A judicially noticed fact must be one not  
12 subject to reasonable dispute in that it is either (1) generally  
13 known within the territorial jurisdiction of the trial court or (2)  
14 capable of accurate and ready determination by resort to  
15 sources whose accuracy cannot reasonably be questioned.

16  
17 While Cascade believes that its business records are generally accurate, the contents of its  
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19 business records certainly are not "generally known within" the state, nor are they "capable  
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21 of accurate and ready determination by resort to sources whose accuracy cannot reasonably  
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23 be questioned." The types of facts which the Commission has made the subject of official  
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25 notice under WAC 480-07-495(2)(a) include: the effective date of an acquisition;<sup>2</sup> bodies of  
26  
27 law and agency orders;<sup>3</sup> the fact that a utility has filed a general rate case;<sup>4</sup> and the corporate  
28  
29 tax rate.<sup>5</sup> In these situations, the facts were "not subject to reasonable dispute" within the  
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31 meaning of Washington Rule of Evidence 201(b) in that they are either "generally known  
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36 <sup>2</sup> *Washington Utilities and Transportation Commission v. PacifiCorp d/b/a Pacific Power &*  
37 *Light Company*, Docket Nos. UE-050684, UE-050412, Order No. 04 at ¶ 159 (April 17, 2006)  
38 (taking official notice of the MEHC and PacifiCorp merger effective date)

39 <sup>3</sup> *Washington Utilities and Transportation Commission v. US West Communications, Inc.*,  
40 Docket Nos. UT-941464, UT-941465, UT-950146, 20th Supplemental Order (Nov. 15, 1996) (taking  
41 official notice of Telecommunications Act of 1996 and Federal Communications Commission  
42 order).

43 <sup>4</sup> *Washington Utilities and Transportation Commission v. Washington Natural Gas*  
44 *Company*, Docket Nos. UG-940034, UR-94-814, 5th Supplemental Order (April 11, 1995) (taking  
45 official notice of pending general rate case and declining to revise tariffs until conclusion of such  
46 case).

47 <sup>5</sup> *Washington Utilities and Transportation Commission v. Washington Natural Gas*  
*Company*, Docket No. UG-920840, 4th Supplemental Order (Sept. 27, 1993).

1 within the territorial jurisdiction of the court" or are "capable of accurate and ready  
2 determination."  
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4  
5 In the case of the document offered by CMS, on the other hand, CMS itself disputes  
6 the accuracy of Cascade's records when it claims that the information in the Filing  
7 "contradicts" other assertions that Cascade has made. Motion at 2. While Cascade denies  
8 any such claim, the mere fact that CMS argues that the facts in the Filing contradict other  
9 assertions shows that CMS does not believe the contents are "capable of accurate and ready  
10 determination by resort to sources whose accuracy cannot reasonably be questioned."  
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17 The Commission must distinguish between taking official notice of the fact that a  
18 document was filed versus taking official notice of the contents of a filed document. While  
19 the fact that Cascade made the Filing with the Commission may be subject to official notice,  
20 that does not also mean that facts set forth in the Filing are subject to official notice. The  
21 Commission has recognized that it may not take official notice of material presented in other  
22 proceedings to prove the *truth of the contents* of those materials.<sup>6</sup> In similar fashion,  
23 Washington and state other courts have long held that judicial notice may not be taken of  
24 records of other proceedings to prove the truth of the contents therein.<sup>7</sup>  
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33 WAC 480-07-495(2)(a)(i)(A) incorporates a similar concept when it permits official  
34 notice of "Rules, regulations, administrative rulings and orders, *exclusive of findings of fact*,  
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38 <sup>6</sup> *Washington STS, Ltd. v. US West Communications*, Docket No. UT-921213, 2nd  
39 Supplemental Order (June 28, 1993) ("It is improper to take official notice of testimony in a prior  
40 case when offered for the truth of the testimony.").

41 <sup>7</sup> *State v. K.N.*, 124 Wash.App. 875, 882 (2004) ("But while a court may take judicial notice  
42 of its own records, that does not mean it notices the truth of all facts that are asserted in those  
43 records.") See also *Arlington Education Assoc. v. Arlington Sch. Dist. No. 3*, 177 Or. App. 658, 660  
44 (2001) ("Judicial notice does not extend discerning the accuracy of the contents of a private  
45 document merely because it happens to be found among court records."); *Peterson v. Crook County*,  
46 172 Or App 44, 51 (2001) ("[t]he fact that certain records or entries exist or certain statements were  
47 made may be indisputable. However, the truth of those statements may be disputable, and hence will  
not be subject to judicial notice.").

1 of the commission and other governmental agencies." (Emphasis added.) Just like the  
2 Commission will not take official notice of findings of fact contained in its own orders, it  
3 may not take official notice of facts included in regulatory filings made by utilities. CMS  
4 does not cite any authority supporting the taking of official notice of the contents of the  
5 Filing.  
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10 As the Commission has ruled, it has discretion whether to take official notice of a  
11 document under its rules, and it will refuse to take official notice where that "does not assist  
12 in the determination" of an issue before the Commission.<sup>8</sup> For the reasons discussed in the  
13 following section, the Filing will not assist the Commission in resolving the issues  
14 presented. For all of these reasons, the Commission should decline to take official notice of  
15 the Filing in this proceeding.  
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23 **B. The Commission Should Give No Weight to the Filing**

24 Even if the Commission decides to take official notice of the Filing, it should give  
25 the Filing no weight in its decision. Cascade showed in its briefs and with its evidence,  
26 including the Stipulated Facts, that the Commission had fully authorized Cascade's sales of  
27 unbundled gas, and that Cascade has made those sales pursuant to its effective rate  
28 schedules. Specifically, Cascade showed that, prior to March 1, 2004, Cascade made those  
29 sales pursuant to Rate Schedule Nos. 681 through 684, and that subsequent to that date,  
30 Cascade made those sales pursuant to Rate Schedule No. 687. CMS claims that the Filing  
31 contradicts that assertion because line 28 of page 3 to Attachment A states that in the year  
32 ending June 30, 2006, Cascade made "sales of gas to 'noncore' customers under Cascade  
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44 <sup>8</sup> *In re Verizon Northwest, Inc.*, Docket No. UT-041127, Order No. 03 at ¶ 88 (Feb. 22,  
45 2005) (noting that while Commission has authority to take official notice of California ALJ  
46 discovery order, it may exercise its discretion and refuse to do so where taking such notice "does not  
47 assist in the determination of the pending petitions for review.")

1 Rate Schedule Nos. 681 and 683." Motion at 2.<sup>9</sup> CMS also claims that this document is  
2 significant because it "makes absolutely no reference to Schedule No. 687." *Id.*  
3

4  
5 As described in detail in the Second Supplemental Declaration of Jon T. Stoltz  
6 (Second Supp. Stoltz Decl.), submitted herewith, Cascade's reference to Rate Schedule  
7 Nos. 681, 682, and 683 in the Filing was an inadvertent error. Cascade identified its revenue  
8 from unbundled gas supply sales and related services to non-core customers in lines 28 and  
9 29 of page 3 of the Filing. Second Supp. Stoltz Decl., ¶¶ 4-5. These are the same type of  
10 gas supply sales and services that are at issue in this proceeding. *Id.* They are also the same  
11 type of gas supply sales and services for which Cascade attributed its revenue to Rate  
12 Schedule No. 687 in the current rate case. *Id.*, ¶ 6; Stipulated Facts, ¶ 17, Ex. 17. Cascade  
13 should have attributed the revenue in lines 28-29 to Rate Schedule No. 687, consistent with  
14 its stipulated current practice, rather than to canceled Rate Schedule Nos. 681-683. *Id.*, ¶¶ 4-  
15 5. Cascade cited Rate Schedule Nos. 681-683 based on its historical practice and in view of  
16 unique customer circumstances. *Id.*, ¶¶ 4-5.  
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20 These lines of the spreadsheet did not receive the close examination by Cascade that  
21 they should have received because the figures relating to non-core sales have no relevance to  
22 calculation of the Purchased Gas Adjustment, which was the purpose of the Filing. *Id.*, ¶¶ 4-  
23 5. The Commission considers only Cascade's costs to serve the core market in connection  
24 with Purchased Gas Adjustments. *Id.*, ¶ 2. Cascade's costs to serve the non-core market are  
25 not relevant to the Purchased Gas Adjustment calculation. *Id.* Cascade included  
26 information relating to its gas supply sales and service to non-core customers for  
27 informational purposes only. *Id.* That is why these lines did not receive the careful review  
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46 <sup>9</sup> In fact, line 28 refers to Rate Schedule Nos. 681 and 682. Line 29 refers to Rate Schedule  
47 No. 683.



1 they should have received and the reference to canceled rate schedules was inadvertently  
2 included. Cascade regrets any confusion caused by this error.  
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4  
5 The erroneous reference to Rate Schedule Nos. 681-683 does not undercut Cascade's  
6 evidence or arguments in this proceeding. It is plain that Cascade did not make its sales in  
7 the year ending June 30, 2006 under those rate schedules, since those schedules were not in  
8 effect during that period. It is also established as true for purposes of this proceeding that  
9 "Cascade currently accounts for the revenue from its optional gas commodity sales by  
10 attributing it to Rate Schedule 687." Stipulated Facts, ¶ 17. Thus, even if the Commission  
11 does take official notice of and consider the contents of CMS's late-filed document, it should  
12 not give these references any weight.  
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## 21 II. CONCLUSION

22 For the foregoing reasons, the Commission should either deny CMS's Motion to take  
23 official notice of the Filing or give the Filing no weight in its decision.  
24

25 DATED: January 9, 2007

26 Respectfully submitted,

27 **PERKINS COIE LLP**

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29 By: 

30  
31  
32  
33  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served this **RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION REQUESTING THAT THE COMMISSION TAKE OFFICIAL NOTICE OF A REGULATORY FILING MADE BY CASCADE ON DECEMBER 21, 2006** 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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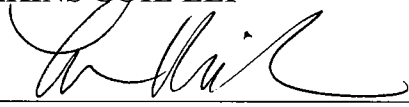
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Dated this 9th day of January, 2007.

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