

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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|----------------------------------|---|-----------------------------------|
| COST MANAGEMENT SERVICES, INC., |) | |
| |) | Docket No. UG-061256 |
| Complainant, |) | |
| |) | |
| v. |) | |
| |) | MOTION OF COST |
| CASCADE NATURAL GAS CORPORATION, |) | MANAGEMENT SERVICES, INC., |
| |) | FOR PERMISSION TO REPLY TO |
| Respondent. |) | THE ANSWER OF CASCADE |
| |) | NATURAL GAS CORPORATION |
| | | (and attached reply) |

1. Pursuant to WAC 480-07-370(1)(d)(ii), Petitioner Cost Management Services, Inc., ("CMS") moves for permission to reply to the answer of Respondent Cascade Natural Gas Company ("Cascade") filed in this case on August 22, 2006. As permitted under the cited regulation, a copy of the CMS reply is an attachment to this motion. As grounds for granting this motion, CMS states the following.

I.

2. Cascade is playing a shell game with the alleged legal justification under which it purports to make unregulated retail gas sales. Schedule Nos. 663 and 664 state:

Gas Supplies purchased through the Company will be in accordance with the FERC regulations. (18CFR Part 284.402 Blanket Marketing Certificates).

This is the sole authorization Cascade uses when it holds itself out to Schedule 663 and 664 customers as having the legal authority to make unregulated retail sales. This is the way Cascade Vice President Jon Stoltz describes and attempts to justify the company's

“unregulated” retail sales in Cascade’s pending rate case before the Commission, Docket No. UG-060256. See CMS Complaint, at p. 16, paragraphs 39 and 40.

3. Now, however, in its answer (at pp. 2-5), Cascade cites to a surfeit of retail rate schedules – some in effect, some cancelled. Regarding each one, Cascade now claims that the Commission has somehow backstopped the alleged deregulation of Cascade’s retail gas sales previously attributed by the company solely to the FERC regulation found at 18 C.F.R. §284.402.

4. Cascade is simply throwing rate schedules against the wall, hoping one of them might stick as a justification of its illegal retail sales. However, none of retail rate schedules cited by Cascade has any more relevance to unregulated LDC retail gas sales than 18 C.F.R. §284.402. CMS requests Commission leave to address each of the cited retail rate schedules in the attached reply, briefly demonstrating that not one of them contains the claimed authorization.

II.

5. Cascade’s answer also mounts a novel first-in-time argument about the purported applicability of 18 C.F.R. §284.402 to retail gas sales by LDCs. Once Cascade merely asserts that its retail gas sales to Schedule Nos. 663 and 664 customers have been deregulated by C.F.R. §284.402, this Commission is barred from enforcing RCW Chapter 80 or its implementing regulations regarding such sales unless and until FERC grants this Commission permission to do so. Cascade answer, at pp. 5-8.

6. Cascade is attempting to elevate a possible legal defense against its alleged violations of RCW Chapter 80 into a jurisdictional bar to Commission enforcement of those very statutes. Cascade would have the Commission seek FERC permission to

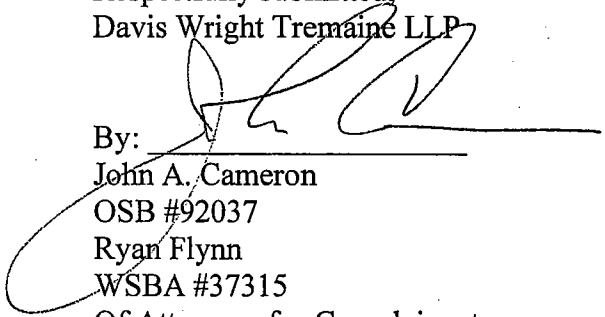
regulate Cascade's retail gas sales. CMS requests Commission leave to refute this new claim.

III.

7. Cascade mischaracterizes both the motives and objectives of CMS. Cascade quotes passages of the CMS complaint out of context to support its perverse conclusions about the motivations of CMS. Cascade answer, at pp. 5-8. CMS requests Commission leave to set the record straight on what it is, and is not, requesting.
8. **WHEREFORE**, for the foregoing reasons, CMS requests the Commission's permission to file the attached reply to the answer filed by Cascade on August 22, 2006.

DATED this 28th day of August, 2006.

Respectfully submitted,
Davis Wright Tremaine LLP

By: 

John A. Cameron
OSB #92037
Ryan Flynn
WSBA #37315
Of Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by U.S. Mail:

DATED, at Portland, Oregon this 28th day of August, 2006.



Susan Prudhomme
Davis Wright Tremaine LLP
Suite 2300
1300 SW Fifth Avenue
Portland, OR 97201-5682
(503) 241-2300

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| Complainant, |) | |
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| v. |) | |
| |) | REPLY OF COST MANAGEMENT |
| CASCADE NATURAL GAS CORPORATION, |) | SERVICES, INC., TO THE |
| |) | ANSWER OF CASCADE |
| Respondent. |) | NATURAL GAS CORPORATION |
| |) | |

1. This reply accompanies the motion of Complainant Cost Management Services, Inc., (“CMS”) for permission to reply to the Answer of Respondent Cascade Natural Gas Company (“Cascade”) filed in this case on August 22, 2006. As permitted under WAC 480-07-370(1)(d)(ii), CMS attaches this Reply to its Motion and files the two documents concurrently with the Commission.

**I. CASCADE’S NEW ATTEMPT TO TIE ITS “DEREGULATED”
RETAIL SALES TO ITS RETAIL RATE SCHEDULES IS FUTILE.**

2. Up until now, Cascade’s sole purported justification for making retail gas sales outside Commission oversight and control has rested exclusively – and wrongly – on 18 C.F.R. §284.402. In its Answer, Cascade now alleges that this Commission has backstopped that claimed federal authorization through tacit approval or acquiescence. Review of each of the cited rate schedules shows this to be a false claim.

3. Schedule Nos. 663 and 664. Cascade Schedule Nos. 663 and 664 are explicitly limited to distribution services. The “Other Services” paragraphs of Schedule Nos. 663 and 664 each provide:

Service under this schedule shall include transportation on the Company’s distribution facilities only. [Emphasis supplied].

Gas sales are separate from these schedules, each of which continues with the statement: “Gas Supplies purchased through the Company will be in accordance with the FERC regulations. (18CFR Part 284.402 Blanket Marketing Certificates).” Thus, these schedules dead-end Cascade back to its claim that FERC deregulated its retail gas sales through 18 C.F.R. §284.402.

4. Schedule No. 685. Cascade also cites Schedule No. 685 for authority to engage in unregulated retail sales. The purpose of Schedule No. 685, however, is for Cascade to:

provide levels of firm peak day and firm annual capacity (if available) on the natural gas transmission system of Williams Northwest Pipeline Corporation to customers receiving service under this schedule as specifically agreed to between Company and customer.

This schedule covers only transportation management services, not gas sales. The plain language of this schedule reveals it to be another dead-end for Cascade.

5. Schedule No. 687. This schedule provides for gas management services, not commodity sales. Pursuant to Schedule No. 687, Cascade, acting as “agent” and not as a commodity seller, will “manage the transportation & delivery of natural gas on the interstate pipelines,” which applies to “Non-core end users who currently purchase their own gas supply....” While this schedule contemplates that the end-use customer will source its own retail supply of gas; it does not purport to make such sales.

6. Cascade Rule 20. Cascade speculates that Rule 20 provides the elusive authority for its unregulated retail sales. First, Cascade’s rules and regulations are intended to *govern* rate schedules, not *act* as rate schedules. As a result, Cascade’s implication that Rule 20 provides the rate authority for unregulated retail sales is contrary to the role of

rules and regulations in Cascade's tariff. Second, Rule 20 is not intended to authorize unregulated retail sales. The purpose of Rule 20 is:

to define the operating obligations and conditions for those customers utilizing unbundled distribution system transportation services under Schedules 663 or 664 of this tariff.

Rule 20 does not purport to address commodity gas sales in any manner. Rather, the plain language of Rule 20 states that it is intended to ensure the consistent and efficient administration of unbundled transportation services.

7. Cancelled Rate Schedule Nos. 681, 682, 683, and 684. Cascade engages in rank speculation by suggesting that the cancellation of Schedule Nos. 681, 682, 683, and 684 signaled Commission acquiescence in Cascade's unregulated retail sales. The Commission's own record of Cascade's filing in Docket No. UG-040134 clearly indicates that no such acquiescence can be implied. The Commission's notation on this unopposed filing reads:

Removes obsolete rate schedules and makes miscellaneous text changes.

This Commission record is found on the Commission website at:

www.wutc.wa.gov/rms2.nsf/bf6a5eafd41b0e0988257067006ef0b4/7fc37ad4071.

8. Clearly, Docket No. UG-040134 was just a housekeeping matter. "Obsolete" is a far cry from "deregulate." The docket did not even lead to a Commission order. The effect of the Cascade filing in Docket No. UG-040134 was that these schedules were withdrawn, nothing more and nothing less. All of these schedules were cancelled in March 2004, thereby extinguishing any possible relevance to this proceeding, which concerns ongoing retail gas sales outside the Commission's oversight and control under RCW Chapter 80.

9. Just as Cascade first maintained that FERC somehow deregulated retail gas sales in its Order No. 547 without even saying so, it now argues that this Commission in Docket No. UG-040134 somehow took the monumental step of deregulating retail gas sales without ever ordering it. Just reciting these propositions shows them to be nothing more than attempts to defend the indefensible.

10. CMS is at a loss to understand any significance of the last sentence of ¶ 7 of Cascade's Answer. This is new information, but the staff member is not identified and neither is the context explained. Perhaps the staff member accepted at face value Cascade's misstatement of the effect of 18 C.F.R. §284.402. No matter. It is implausible even to suggest that a member of Staff could do something even the Commission has no statutory authority to do -- disclaim jurisdiction under RCW Chapter 80.

II. LACKING ANY SUPPORT FOR ITS READING OF 18 C.F.R. §284.402, CASCADE MERELY TRIES TO CONFUSE THE COMMISSION INTO A MISTAKEN BELIEF THAT THE ISSUE IS TOO DIFFICULT FOR IT TO DECIDE.

11. Cascade is in denial about a wealth of federal regulations, orders, statutes and case law offered by CMS, each standing for the proposition that FERC's order could not, and did not, deregulate retail gas sales by any LDC:

- The express language of the FERC rule itself is limited to wholesale sales for resale; it does not cover retail LDC sales.¹
- FERC said its rule did not deregulate any retail sales when it adopted 18 C.F.R. §284.402b in its Order No. 547.²

¹ CMS Complaint, at p. 10, ¶ 27.

² Id., p. 11, ¶ 28.

- Congress erected a jurisdictional barrier to FERC regulation, or deregulation, of retail gas sales by LDCs in 15 U.S.C. §717(b).³
- The same year FERC issued its Order No. 547, the Tenth Circuit instructed Cascade about the jurisdictional barrier between FERC regulation and state regulation of LDC retail sales in Cascade Natural Gas Corporation v. FERC, 955 F.2d 1412 (10th Cir. 1992).

12. Even FERC's website confirms this obvious point for lawyers and laypeople alike. "What FERC Does," also explains "What FERC Does Not Do":

Many areas outside of FERC's jurisdictional responsibility are dealt with by State Public Utility Commissions. Areas considered outside of FERC's responsibility include:

- Regulation of retail electricity and natural gas sales to consumers; ... [See www.ferc.gov/about/ferc-does.asp].

13. Lacking even a single citation to support its expansive reading of FERC jurisdiction to countermand RCW Chapter 80, Cascade tries to confuse the Commission by blurring the distinctions between federal and state regulation and between interstate transportation and local distribution. Answer, p. 6, ¶ 11. It claims to be "any person who is not an interstate pipeline," which is true, but it ignores that 18 C.F.R. §284.402 covers only "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," which excludes LDC retail sales because of the jurisdictional barrier of 15 U.S.C. §717(b). It claims to be one of the "shippers" participating in the interstate transportation market (id.), which can be true, but ignores that "shipper" connotes a transportation function, not a sales function, and that shippers are customers and unregulated in that role. The term "shipper" is completely different from the term "seller." Cascade claims that CMS "conveniently

³ Id., at p. 19, ¶ 19.

ignores FERC's authority over, and Cascade's right to participate in, the interstate sales and transportation market," *id.*, which must mean that Cascade never read ¶¶ 22 and 23 of the CMS Complaint.

14. Cascade's alleged confusion must be tactical because the distinctions between FERC jurisdiction and this Commission's jurisdiction are not difficult to grasp. To be crystal clear, here are the proper distinctions:

- Cascade may sell gas at wholesale for resale under 18 C.F.R. §284.402;
- Cascade may be a "shipper" on federally regulated interstate pipelines, allowing it to move gas as a customer of those pipelines and acting in that customer role without FERC regulation; but
- Cascade cannot sell gas at retail, or otherwise escape regulation by this Commission under RCW Chapter 80, by invoking 18 C.F.R. §284.402.

15. If there were the slightest chance that FERC had jurisdiction over retail gas sales by LDCs, then surely Cascade's Answer would have identified at least one other LCD in Washington State or elsewhere in the country that had invoked 18 C.F.R. §284.402 to self-deregulate its own retail sales. Cascade did not do so because there are no such LDCs. If the Commission accepts Cascade's claim that the Natural Gas Act and 18 C.F.R. §284.402 applies to LDC retail gas sales, it will have accepted a proposition that FERC and everyone in the natural gas industry know to be false.

III. CASCADE'S REQUEST FOR REFERRAL OF THE MATTER TO FERC IS ANOTHER FUTILE ATTEMPT TO DEFEND THE INDEFENSIBLE BECAUSE THE ONLY ISSUE PRESENTED IN THIS CASE IS A MATTER OF STATE LAW.

16. Cascade would turn the famous "Attleboro Gap" from a legal theory grounded on the Commerce Clause into a game to be played by utilities seeking to evade regulation:

tell state regulators there is a federal question at issue and urge them to defer, and then conduct business in a retail environment left unregulated by the state.

17. Consistent with that approach, Cascade's Answer questions the basic competence of this Commission to read and understand 18 C.F.R. §284.402. Unless and until FERC is asked to address this issue, Cascade would have this Commission ignore all the authorities cited by CMS, blindly accept that FERC has deregulated Cascade's retail sales and refrain from regulating those retail sales under RCW Chapter 80. According to Cascade, only FERC can determine – for a second time, even after it issued Order No. 547 – that 18 C.F.R. §284.402 does not deregulate Cascade's retail sales. Cascade claims this proposition is “well settled.” Answer, p. 7, ¶ 13. However, it does not cite even a single authority to support this claim – a sure sign of an argument gasping for oxygen.

18. Even if the Commission were to be so timid in the exercise of its jurisdiction under RCW Chapter 80, there is no 18 C.F.R. §284.402 compliance issue for FERC to decide. Either Cascade is in compliance with 18 C.F.R. §284.402 (if the rule covers retail sales) or Cascade is selling gas beyond FERC's jurisdiction under the Natural Gas Act (if the rule does not cover retail sales). Either way, there would be no issue presented regarding Cascade's violation of any federal law or regulation, no federal relief to be considered. FERC would look askance at a request for an advisory opinion on whether Cascade's retail sales are outside its jurisdiction under the Natural Gas Act; i.e., whether this Commission should be advised to exercise its statutory obligations under RCW Chapter 80. The issue before this Commission is not whether Cascade is complying with federal law. Answer, p. 6, ¶ 10. The sole issue is whether Cascade is violating RCW Chapter 80, and that is a question for this Commission to decide, not FERC.

19. RCW 80.28.050 mandates that every gas company file with the Commission “all rates and charges” and “all forms of contract” used for retail sales of natural gas. RCW 80.28.080 prohibits Cascade from charging any amount different from the rates and charges on file with the Commission. RCW 80.28.090 and 80.28.100 outlaws undue discrimination and undue preferences. RCW 80.04.380 and 80.04.385 subjects gas companies and their employees to penalties in the event of violations of RCW Chapter 80. WAC 480-80-124 voids contracts executed in violation of RCW Chapter 80. None of these statutes and regulations are optional at the election of Cascade. None are dependent for their enforcement upon permission from FERC.

20. Cascade’s Answer asserts that this Commission is not competent to read and understand a federal regulation, necessitating recourse to FERC for guidance, even about a regulation clear on its face and even about retail LDC gas sales expressly withheld from federal jurisdiction by federal statute. Yet, this Commission reads and interprets federal regulations continuously in the course of exercising its regulatory powers, e.g., FERC’s Uniform Systems of Account for public utilities and natural gas companies, IRS regulations and EPA regulations. Must this Commission also defer to the Internal Revenue Service on questions relating to the federal tax code and IRS regulations? Should this Commission refrain from deciding Cascade’s tax costs for ratemaking purposes until it secures IRS letter rulings?

21. This case is simple. It presents no colorable question of whether a Commission action has been pre-empted by some federal regulation. Yet, this Commission has not hesitated in the exercise of its jurisdiction in the face of more serious allegations of pre-emption by federal laws and regulations. In Washington Exchange Carrier Association v.

LocalDial Corporation, 233 P.U.R. 4th 208 (2004), this Commission determined that it was not pre-empted by federal law or regulations of the Federal Communications Commission (“FCC”) over a telecommunications service. In so determining, the Commission construed both the federal Telecommunications Act of 1996 and the FCC’s implementing regulations. The Commission did not hesitate in performing its regulatory duties; it did not simply await FCC permission to regulate.

IV. CASCADE MISCHARACTERIZES CMS’ POSITIONS.

22. Cascade mischaracterizes both the motives and objectives of CMS. Here is perhaps the most egregious example:

| <u>CMS’ Statement</u> | <u>Cascade’s Revision</u> |
|---|---|
| <p>CMS prays for an order of the Commission: B. directing Cascade to cease and desist from making retail sales of natural gas under purported authority of 18 C.F.R. §284.402 and to refrain from making any non-tariff retail sales of natural gas <u>except in accordance with Washington law and Commission regulations; ...</u></p> <p>CMS Complaint, p. 19, ¶ 47(B), emphasis supplied.</p> | <p>By requesting that the Commission ... direct Cascade to “cease and desist from making retail sales of natural gas” (Complaint, ¶47(b)), CMS is seeking to eliminate an option that currently exists for Cascade’s customers and thereby improve CMS’ competitive position, to the detriment of Cascade and the customers currently obtaining this service from Cascade.</p> <p>Cascade Answer, p. 8, ¶ 15.</p> |

23. The contrast is striking. CMS is not attempting to eliminate customer options, only to have Cascade follow the law. Cascade, on the other hand, believes that it’s necessary to violate the law in order to preserve its monopoly position in the face of a small gas marketer. Cascade’s allusions to Commission acquiescence apparently signals

a belief that this Commission should just look the other way, ignore this assault on its jurisdiction and allow Cascade's illegal retail gas sales to continue.

24. CMS made specific reference in its Complaint to WAC 480-80-143, which allows gas companies to file "special contracts" with the Commission, including non-tariff-standard rates. Were Cascade to pursue this alternative, however, it would be required to demonstrate publicly that it was not misusing its incumbent provider position to preserve its monopoly position by granting undue preferences to non-core customers and unduly discriminating against core customers. As things stand, Cascade's "unregulated" retail sales block this Commission from fulfilling its statutory duties regarding preference and discrimination under RCW 80.28.090 and 80.28.100.

25. Finally, a brief word about Cascade's allegation that CMS somehow misused data responses in Docket No. UG-060256. Answer, p. 8, ¶ 14. The information obtained by CMS is relevant both to the Cascade rate case and to this proceeding. CMS filed its Complaint so that it could cleanly present a fundamental legal issue to the Commission outside a rate case, which can be largely number-driven. CMS disclosed no confidential information. See Complaint, pp. 15-16, ¶¶ 37 and 38. CMS also filed testimony in the rate case about this issue, as it relates to rate schedules at issue in that proceeding. There is no improper motive or action; CMS simply wants to pose its issues in a manner most likely to lead to the clearest possible resolution by the Commission.

CONCLUSION

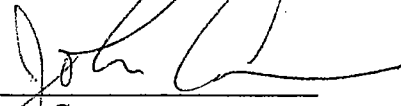
26. At page 1 of its Answer, ¶ 2, Cascade states "it is unnecessary for the Commission to conduct an adjudicative proceeding in order to resolve the issues in CMS's Complaint" Elsewhere, it states repeatedly that the CMS Complaint "sets

forth legal contentions, conclusions, and/or characterizations" Answer, pp. 9-11, passim. However, CMS does not believe its issues require an adjudicatory proceeding. Instead, as it stated in paragraph 47(A) of its Complaint, CMS believes that its Complaint can be resolved as a matter of law. Despite the multiple references to irrelevant retail rate schedules (some cancelled), despite claims about some mysterious intersection between federal and state regulation, Cascade is simply trying to buy time by encouraging this Commission to defer to FERC on a matter of retail sales and rate regulation explicitly outside FERC's jurisdiction under the Natural Gas Act and on which 18 C.F.R. §284.402 has absolutely no bearing. CMS simply asks this Commission to direct Cascade to obey Washington law regarding all its retail sales of natural gas.

27. **WHEREFORE**, for the foregoing reasons, CMS requests the Commission to grant the relief requested in its Complaint against Cascade.

DATED this 28th day of August, 2006.

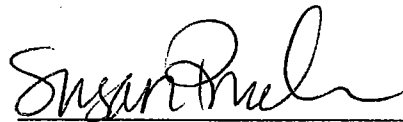
Respectfully submitted,
Davis Wright Tremaine LLP

By: 
John A. Cameron
OSB #92037
Ryan Flynn
WSBA #37315
Of Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by U.S. Mail.

DATED, at Portland, Oregon this 28th day of August, 2006.



Susan Prudhomme
Davis Wright Tremaine LLP
Suite 2300
1300 SW Fifth Avenue
Portland, OR 97201-5682
(503) 241-2300