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March 22, 2007

VIA ELECTRONIC MAIL and UPS

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

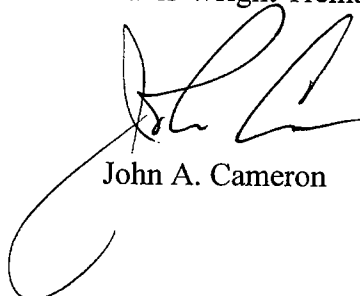
Re: In the matter of *Cost Management Services, Inc. v. Cascade Natural Gas Corporation*
Docket Nos. UG-061256 and UG-070332

Dear Secretary Washburn:

Enclosed for filing please find the original plus seven copies of MOTION OF COST MANAGEMENT SERVICES, INC., FOR CLARIFICATION OF ORDER NO. 3 IN DOCKET UG-061256; REQUEST THAT THE COMMISSION DIRECT CASCADE TO FILE ITS PRIVATE CONTRACTS IN COMPLIANCE WITH WAC 480-80-14; and REQUEST FOR CONSOLIDATION OF DOCKET NOS. UG-061256 AND UG-070332, in the above referenced dockets.

Very truly yours,

Davis Wright Tremaine LLP



John A. Cameron

JAC:smp

Enclosures

cc: Service List (w/encl. via US Mail)

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matters of

COST MANAGEMENT SERVICES, INC.,
Complainant,

v.
CASCADE NATURAL GAS CORPORATION,
Respondent.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.
CASCADE NATURAL GAS CORPORATION,
Respondent.

Docket No. UG-061256

Docket No. UG-070332

**MOTION OF COST MANAGEMENT
SERVICES, INC., FOR
CLARIFICATION OF ORDER NO. 3
IN DOCKET UG-061256**

**REQUEST THAT THE COMMISSION
DIRECT CASCADE TO FILE ITS
PRIVATE CONTRACTS IN
COMPLIANCE WITH WAC 480-80-143**

**REQUEST FOR CONSOLIDATION OF
DOCKET NOS. UG-061256 AND UG-
070332**

1. Pursuant to Order No. 04, issued by the Administrative Law Judge in Docket No. UG-061256 on March 5, 2007, Cost Management Services (“CMS”) submits this motion for clarification of Commission Order No. 03 regarding the following issues:

1. Enforcement of the Commission’s order to Cascade Natural Gas Corporation (“Cascade”) that it file, in accordance with RCW Chapter 80 and relevant Commission regulations, all contracts under which it sells natural gas to Non-Core customers.
2. The course of future proceedings in Docket No. UG-061256, which requires clarification of ambiguous Commission statements about a Staff “investigation,” and consolidation of Docket No. UG-061256 with proceedings in Docket No. UG-070332, which concerns “tariff revisions” filed by Cascade in response to Commission Order No. 3.

2. CMS asks the Commission to provide the requested clarifications in an order directing Cascade to file its contracts, consolidating two pending investigations, and directing that the results of Staff’s investigation take the form of prepared testimony.

BACKGROUND

3. In Order No. 3, the Commission held, *inter alia*, that Cascade has repeatedly violated RCW 80.28.050, RCW 80.28.080 and applicable WAC regulations by engaging in private retail sales of natural gas to “non-core” customers under rates and contracts different from those on file with the Commission. Order No. 3, ¶¶ 2, 59, 61, 63, 129.
4. The Commission refrained from exercising its authority to void Cascade’s private contracts out of concern that doing so might harm customers who had relied on Cascade’s misrepresentations that its private gas sales were authorized by 18 C.F.R. §284.402. Order No. 3, ¶ 98. Instead, the Commission ordered Cascade to file these contracts:

We do not void existing contracts, but require Cascade to file these contracts with the Commission for review, in conjunction with filing new tariff schedules for gas supply services. ... We will review existing contracts to ensure Cascade is in compliance with state laws and regulations governing special contracts. *Id.*

See also, Order No. 3, ¶ 2 (“We also require Cascade to file with the Commission, within 30 days of the effective date of this Order, the necessary gas supply tariffs and contracts – including contracts for sales outside of Cascade’s territory.”) and ¶ 140.
5. The reference to “regulations governing special contracts” in ¶ 2 was explained and amplified in Order No. 3, ¶ 58. “Cascade’s unlawful failure to file its private contracts “does not result in any waiver of statutory requirements to file contracts, or the Commission’s rules requiring the filing of special contracts.” The Commission directed Cascade to file its contracts under WAC 480-80-143. *Id.*, n. 88.
6. The Commission set for hearing issues concerning whether Cascade’s private gas-sale agreements were unduly discriminatory or unduly preferential. “Because there are

material issues of fact in dispute, we will set the matter for hearing, unless CMS requests otherwise based on our resolution of the remaining issues in this Order.” Order No. 3, ¶ 64. CMS wants this hearing to occur as explained below.

7. Order No. 3 contains ambiguous and somewhat contradictory reference to a Staff investigation:

Staff suggests that the Commission direct Staff to investigate Cascade’s competitive activity to ensure the Company meets statutory requirements. Because we require Cascade to file gas supply tariff schedules and its existing gas supply contracts with the Commission, we do not find it necessary to initiate a Staff investigation. We fully expect Staff to investigate Cascade’s competitive activities thoroughly in reviewing these filings. [Footnote omitted.]

8. On February 12, 2007, Cascade belatedly provided to the Commission at least some of “its existing contracts to non-core customers, including contracts for out-of-territory gas sales.” These contracts constitute the agreements, rates, terms and conditions under which Cascade has been making private gas sales to non-core customers. The contracts were submitted under seal, without any of the information required regarding contractual rate filings under WAC 480-80-143, even the information required under WAC 480-80-143(7) regarding contracts designated “confidential” by the filing entity. Cascade supplemented its February 12 submission on March 7 with copies of additional contracts. It is not clear whether there are contracts yet to be submitted.

9. In the same February 12 submission, Cascade also filed four rate revisions, which it described as follows:

The purpose of this filing is to comply with the Commission’s Order 03 in Docket UG-061256, which requires Cascade to file tariff schedules to provide gas supply services to non-core customers ...

Cascade transmittal letter of February 12, 2007, second paragraph. These revisions are totally lacking in specifics, leaving Non-Core gas sales to the unilateral determination of Cascade as they have been in the past under the contracts yet to be filed with the Commission. These tariff revisions, if approved by the Commission, would allow Cascade to perpetuate its unlawful cross-subsidization of private gas sales, creating undue preference for non-core customers and undue discrimination against core customers.

10. By order of March 14, 2007, in Docket No. UG-070332, the Commission suspended these Cascade rate revisions and initiated complaint proceedings in which “Cascade bears the burden of proof to show that the proposed tariffs, including terms, conditions, and rates, are fair, just, reasonable and sufficient. Order No. 1 in Docket No. UG-070332, ¶ 10. This order also refers to an investigation of Cascade. *Id.*, ¶¶ 9, 15 and 16. *Compare* the investigation described in ¶ 9 of this pleading, above.

11. On March 1, 2007, the presiding Administrative Law Judge in Docket No. UG-061256 ordered Cascade to provide CMS with copies of Cascade’s private gas-sale contracts. Consistent with the protective order in Docket No. UG-061256, CMS is now reviewing these contracts as is Commission Staff.

ARGUMENT

I. **The Commission Should Enforce Its Clear Order That Cascade “File” All Of Its Private Contracts In Accordance with RCW 80.28.050 and 80.28.080 and WAC 480-80-143.**

A. **Cascade’s February 12 and March 7 Contract Submissions Are Legal Nullities.**

12. Uncertainty exists regarding Cascade’s filing obligation only because Cascade has ignored the Order No. 3 directive that it file its private contracts. The word “file” is a

regulatory term of art. RCW 80.28.050 imposes a duty on Cascade to “file with the commission” its rates and contracts.¹ RCW 80.28.080 prohibits Cascade from charging any rate different from those “filed and in effect at the time.”² WAC 480-80-143 refers to contracts “filed for commission approval.” WAC 480-80-010(2) specifies that “[t]he tariffs, price lists, and contracts filed by public service companies must conform with these rules.” It is no easier to misconstrue the duty to “file” contracts than to ignore the Natural Gas Act’s application only to “sales for resale.” Yet, Cascade continues to ignore its “duty to know and comply with state statutes and the Commission’s rules, including those governing tariffs and contracts for services.” Order No. 3, ¶ 91.

13. The Commission determined that Cascade violated RCW Chapter 80 and Commission rules by failing to file its private gas sale agreements, as follows:

¹ RCW 80.28.050 requires:

Every gas company, electrical company and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electrical company or water company.

² RCW 80.28.080 contains the following prohibitions:

No gas company ... shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time, nor shall any such company directly or indirectly refund or remit in any manner or by any device any portion of the rates or charges so specified, or furnish its product at free or reduced rates ...

No gas company ... shall extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

The Commission's rules governing gas companies require companies to "file with the commission all contracts for the retail sale of regulated utility services to end-use customers" that state charges or conditions different from existing tariffs or that provide services not addressed in existing tariffs.

Allowing Cascade to cancel its tariff schedules does not result in a waiver of statutory requirements to file contracts, or the Commission's rules requiring filing of special contracts. [Order No. 3, ¶¶ 57 and 58.]

14. It is clear from these quoted passages of Order No. 3 that the Commission used the word "file" in its formal meaning under the statute and Commission regulations. Order No. 3 does not say "just drop off copies at the Commission's front desk."
15. On February 12, 2007, Cascade just dropped off copies of some of its private gas-supply contracts in a sealed envelope. Cascade's submittal is patently defective under Order No. 3 and the rules and statutes relied upon by the Commission in its Order.
16. Specifically, the Commission relied in large part on WAC 480-80-143 in finding Cascade was violating the law by not having these special contracts on file. Order No. 3, ¶ 57, n. 88. WAC 480-80-143(1) clearly states: "Gas, electric, and water companies must file with the commission all contracts for the retail sale of regulated utility service to end-use customers" that differ from published tariffs.
17. WAC 480-80-143 requires the following information:
 - (5) Each application filed for commission approval of a contract must:
 - (a) Include a complete copy of the proposed contract;
 - (b) Show that the contract meets the requirements of RCW 80.28.090 (prohibiting unreasonable preference and RCW 80.28.100 (prohibiting rate discrimination));
 - (c) Demonstrate, at a minimum, that the contract charges recover all costs resulting from providing the service during its term, and, in addition, provide a contribution to the gas, electric, or water company's fixed costs;

- (d) Summarize the basis of the charge(s) proposed in the contract and explain the derivation of the proposed charge(s) including all costs computations involved; and
- (e) Indicate the basis for using a contract rather than a filed tariff for the specific service involved. If the basis for using a contract is the availability of an alternative service provider, identify that provider. [WAC 480-0143(5), emphasis supplied.]

18. Cascade provided none of this information when it submitted the contracts in question; however, this information is vital if the Commission is to be effective in its regulation of contracts under RCW Chapter 80. The record contains no request for waiver of the rules or explanation of why Cascade chose to ignore them.

19. Even contracts designated as “confidential” may not simply be dropped off at the Commission in a sealed envelope, as Cascade has done here. Instead:

(7) Filings under this section may be submitted with portions designated as “confidential” pursuant to WAC 480-07-160. However, any filing that designates the essential terms and conditions of the contract as “confidential” shall be rejected by the commission as not in compliance with the public inspection requirement of RCW 80.28.050. Essential terms and conditions are:

- (a) Identity of the customer;
- (b) Nature and characteristics of the service provided, including interruptible, firm or peak delivery;
- (c) Duration of the contract, including any options to renew;
- (d) Charge(s) for service, including minimum charge provisions;
- (e) Geographic location where service will be provided; and
- (f) Additional obligations specified in the contract, if any.

WAC 480-80-143(7). Cascade provided none of this information regarding any contract.

20. Cascade has presented the Commission with an anomaly under the law. Because none of the contracts were filed before their proposed effective dates, the Commission’s authority over those contracts has been compromised. Unless the Commission enforces

WAC 480-80-143 now, it sets an adverse precedent that will allow Cascade (and other gas companies) to evade WAC 480-80-143 in the future. Cascade should be directed to comply with WAC 480-80-143, as it was explicitly directed to do in Order No. 3.

B. Further Remedies are Warranted by Cascade's Refusal to File Its Contracts as Directed by the Commission.

21. Order No. 3 establishes that Cascade's compliance with the law has been far too infrequent and casual. Cascade's latest failure is totally unexcused; neither did it seek a waiver of the filing requirement. *Compare* Order No. 3, ¶ 58, n. 89. Penalties should be assessed against Cascade for noncompliance with WAC 480-80-143. "No deviation from these rules is permitted without written authorization by the commission. Violations will be subject to penalties as provided by law." WAC 480-80-010(4). The Commission put Cascade on notice of additional penalties in Order No. 3: "Failure to do so [file the contracts] may result in additional penalties including an order to cease and desist from making additional sales without complying with state law." Order No. 3, ¶ 95.

22. It remains uncertain whether Cascade has submitted all its contracts. Some were dropped off on February 12, 2007. Others came in on March 7. Cascade should be directed to submit an affidavit with its filing attesting that all its contracts have been filed.

II. The Commission Should Consolidate Docket Nos. UG-061256 and UG-070332 For the Purpose of Combined "Investigations" Of Cascade in Which the Staff Investigation Ordered in Docket Nos. UG-061256 Takes The Form Of Testimony And Briefs To Be Submitted To The Commission Along With Those Of CMS And Other Parties Regarding Issues Of Cascade's Unduly Discriminatory And Unduly Preferential Gas Sales To Non-Core Customers.

A. The Uncertainty.

23. Uncertainty exists concerning the scope of further proceedings regarding Cascade's alleged cross-subsidization of gas sales to non-core customers at the expense

of the core. The Commission has made an ambiguous directive to Staff “to investigate Cascade’s competitive activities thoroughly in reviewing these filings,” i.e., “Cascade’s gas supply tariff filings and its existing gas supply contracts.” Order No. 3, ¶ 99. It has set for hearing on material issues of fact the question of whether Cascade’s gas sales to Non-Core customers are unduly discriminatory, under RCW 80.28.090, or unduly preferential, under RCW 80.28.100. *Id.*, ¶ 64. It has initiated a complaint proceeding in Docket No. UG-070332 to investigate the tariff revisions Cascade filed in purported compliance with Order No. 3. *See* ¶ 11 of this pleading, above. These separate regulatory activities ought to be conjoined into a single, consolidated evidentiary proceeding to avoid piecemeal, and potentially contradictory, outcomes.

B. The Appropriate Focus of the Further Evidentiary Proceedings That Have Been Ordered by the Commission.

24. The Commission has determined that Cascade’s private gas-sale agreements are unlawful under RCW 80.28.050 and 80.28.080. Evidentiary proceedings are necessary to take evidence on cross-subsidization and to ensure that remedies are fashioned to ensure that Cascade does not cross-subsidize non-core customers at the expense of the core. Such a remedy should be sufficiently clear and enforceable to avoid a situation, like the status quo, in which cross-subsidization cannot be determined without detailed review of bundled prices and vague terms and conditions found in individual contracts.

25. Now that a complaint proceeding has been initiated on Cascade’s tariff revisions, Cascade bears the burden of demonstrating that its tariff revisions do not perpetuate the opportunity for it to cross-subsidize non-core gas customers. Now that Cascade’s private retail gas contracts have been made available (on a confidential basis) to Commission

Staff and CMS, we expect that these contracts will reflect cross-subsidization that has occurred and continues to occur under Cascade's private contracts which are still in effect. Evidence regarding existing cross-subsidization should help point the Commission toward meaningful, enforceable remedies.

26. The Commission will have its choice of two basic remedies. Either Cascade's proposed tariff revisions will have to be reformed to eliminate the threat of cross-subsidization, undue discrimination and undue preference, or, if cross-subsidization is too inherent in Cascade's non-core gas sales, such sales by Cascade -- as a regulated gas company -- should be prohibited as they are in many jurisdictions.

27. Now that Cascade's tariff revisions have been suspended in Docket No. UG-070332, Cascade may not proceed with further non-core gas-sale agreements during the period of suspension under rates and forms of contract different from those on file with the Commission. Thus, the Commission is presented with an opportunity to fashion an appropriate remedy before Cascade makes any other private gas sale.

C. CMS Requests a Single, Consolidated Evidentiary Proceeding in Which CMS, Staff, Cascade and Other Parties Would Participate.

1. Docket Nos. UG-061256 and UG-070332 should be consolidated for further evidentiary proceedings.

28. Docket No. UG-070332 concerns the tariff revisions filed by Cascade in compliance with Order No. 3 rulings made by the Commission on summary judgment determinations on which Cascade prevailed. To the extent cross-subsidization is determined to be a serious problem in the evidentiary proceedings that have been ordered

by the Commission in Docket No. UG-061256,³ the Commission will necessarily order changes to the tariff revisions filed by Cascade in Docket No. UG-070332.

29. It seems quite impractical, and potentially counterproductive, to proceed separately in the two dockets when the integral relationship between them is apparent on the face of Cascade's transmittal letter, dated February 12, 2007. CMS asks that Docket Nos. UG-061256 and UG-070332 be consolidated for further proceedings. Cascade should then proceed to file supporting testimony in order to meet the burden of proof imposed on it by the Commission in its suspension order in Docket No. UG-070332. CMS expects to file data requests, written direct testimony and exhibits in this proceeding, and cooperate with Commission Staff regarding its investigation. The consolidated cases could then be resolved promptly, together. In contrast, proceeding separately could well lead to confusion and potentially anomalous results.

2. The Commission's multiple references to "investigations" should be clarified so that Staff conducts a single investigation presented to the Commission in the form of prepared testimony, cross-examination and argument in consolidated Docket Nos. UG-061256 and UG-070332.

30. The Commission's investigation directive needs to be clarified and rationalized. In Order No. 3, ¶ 99, the Commission states both that "we do not find it necessary to initiate a Staff investigation,"⁴ and that "[w]e fully expect Staff to investigate Cascade's competitive activities thoroughly in reviewing these filings."⁵ The Commission also ordered an investigation separately in Docket No. UG-070332.

³ See discussion above in ¶ 8 of this pleading.

⁴ See second sentence of ¶ 99.

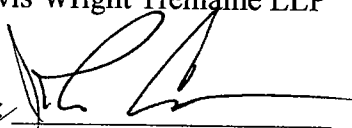
⁵ See third sentence of ¶ 99.

31. Only one investigation need be conducted. However, investigations in and of themselves do not contain self-implementing recommendations and remedies. Investigations in the context of RCW 80.04.015 take the form of formal evidentiary proceedings that include "testimony under oath." That is the investigatory process best suited to yield a meaningful outcome, consistent with the rights of the parties. Accordingly, CMS asks the Commission to clarify Order No. 3 in Docket No. UG-061256 and Order No. 1 in Docket No. UG-070332 by directing that Staff conduct a single investigation to be presented to the Commission and the parties in the form of prepared testimony, direct and rebuttal as Staff sees fit. This testimony, along with testimony from CMS, Cascade and other parties would be subject to cross-examination so that the Commission would have a complete record on which to decide issues about Cascade's cross-subsidization of non-core customers at the expense of the core.

32. WHEREFORE, CMS requests the Commission to grant the clarifications and relief requested in this motion.

DATED this 22nd day of March, 2007.

Respectfully submitted,
Davis Wright Tremaine LLP

By: 
John A. Cameron, OSB #92037
Francie Cushman, OSB #03301
Of Attorneys for Complainant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of March, 2007, I served the foregoing **MOTION OF COST MANAGEMENT SERVICES, INC. FOR CLARIFICATION OF ORDER NO. 3 IN DOCKET UG0061256; REQUEST THAT THE COMMISSION DIRECT CASCADE TO FILE ITS PRIVATE CONTRACTS IN COMPLIANCE WITH WAC 480-80-143; and REQUEST FOR CONSOLIDATION OF DOCKET NOS. UG-061256 AND UG-070332** upon the parties shown on the official service list (below) in UG-061256 and UG-070332, by causing the same to be mailed, postage-prepaid, through the U.S. Mail.


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DOCKET UG-061721

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