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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

**COST MANAGEMENT SERVICES,
INC.,**

Complainant,

v.

**CASCADE NATURAL GAS
CORPORATION,**

Respondent.

Docket No. UG-061256

**RESPONDENT'S MOTION FOR
CLARIFICATION**

**RESPONDENT'S MOTION FOR
CLARIFICATION**

32032-0004/LEGAL13092750.1

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MOTION

1. Respondent Cascade Natural Gas Corporation ("Cascade") respectfully moves the Commission to clarify Order 03 entered in this proceeding on January 12, 2007 (the "Order"). Specifically, Cascade requests that the Commission clarify the scope of further proceedings with respect to the allegations of complainant Cost Management Services, Inc. ("CMS") regarding RCW 80.28.090 and 80.28.100, as discussed in paragraph 64 of the Order. Cascade requests that the Commission clarify the Order to provide that no further proceedings are required with respect to CMS's allegations under RCW 80.28.090 and 80.28.100, and close this docket.

STATEMENT OF ISSUES

2. Cascade submits that the Commission has resolved all of the issues with respect to these two statutes that CMS raised in its Complaint. CMS claimed only that Cascade was in violation of state law by not making its unbundled gas sales pursuant to tariffs and contracts that were filed with the Commission. CMS expressly chose not to challenge the rates at which Cascade was making such sales on any ground, including that they were discriminatory or anticompetitive. In addition, CMS is not entitled, under RCW 80.04.110(1), to raise any additional issues under RCW 80.28.090 or 80.28.100 under the existing Complaint or under any amended complaint. As an unregulated competitor of Cascade, CMS does not have standing under RCW 80.04.110(1) to challenge the rates that Cascade charges its non-core customers for gas supply or to assert that those rates are discriminatory, unremunerative, illegal, or anticompetitive, which appear to be the claims that CMS now wishes to assert. Moreover, the Commission does not have jurisdiction to

1 consider a claim by CMS that Cascade's practices injure CMS as an unregulated competitor
2 of Cascade.
3

4 3. For these reasons, the Commission should clarify the Order to provide that no further
5 proceedings are required with respect to CMS's allegations under RCW 80.28.090 and
6 80.28.100. In addition, having fully resolved all of the issues that were raised or that could
7 have been raised by CMS in this complaint proceeding, the Commission should close this
8 docket.
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14 DISCUSSION

15 A. Background

16 1. CMS's Claims

17 4. CMS asserted in its Complaint that "Cascade is violating state law by selling natural
18 gas at retail to non-core customers, i.e., customers that take transportation-only service,
19 without tariffs and contracts on file with the Washington Utilities and Transportation
20 Commission." Order at ¶ 3. The "central point" of CMS's Complaint was that Cascade may
21 not rely on authority granted under its FERC blanket marketing certificate in making these
22 sales, but instead must comply with state tariff and contract-filing requirements. Complaint,
23 ¶¶ 3, 19. The relief that CMS requested was that the Commission "(1) order Cascade to
24 cease and desist from making unlawful, unregulated retail sales of natural gas to customers
25 that take transportation-only service" and "(2) determine whether all unfiled contracts
26 previously executed by Cascade for retail sales of natural gas . . . are void or voidable."
27 Complaint, ¶ 2.
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42 5. CMS did not challenge the rates at which Cascade was making these sales and did
43 not claim that the rates were discriminatory or below cost. Indeed, CMS specifically
44 disclaimed that it was asking the Commission to decide any such issues: "This complaint
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1 concerns the fundamental unlawfulness of Cascade's retail sales of natural gas, *not whether*
2
3 *Cascade's prices in the relevant agreements are just, reasonable, unduly discriminatory,*
4
5 *unduly preferential, or anticompetitive."* Complaint, ¶ 45.

6
7 6. CMS's allegation with respect to RCW 80.28.090 and 80.28.100 was simply that
8
9 "Cascade's use of 'unregulated' prices other than tariff prices necessarily violates RCW
10
11 80.28.090 and 80.28.100 because it blocks the Commission from carrying out its duties
12
13 under those provisions to prevent undue preferences and undue discrimination." Complaint,
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15 ¶ 46. Thus, the only issue CMS's Complaint raised under RCW 80.28.090 and 80.28.100
16
17 was that Cascade's failure to make its gas supply sales at prices set forth in tariffs prevented
18
19 the Commission from ensuring that Cascade's customers were protected from undue
20
21 discrimination. As discussed below, CMS does not have standing under RCW 80.04.110(1)
22
23 to make any further claim that Cascade's rates violated RCW 80.28.090 or 80.28.100
24
25 because they were discriminatory, unremunerative, or anticompetitive.

26 27 **2. The Order**

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29 7. The Order resolved the "fundamental" issues raised in CMS's Complaint and
30
31 addressed both of CMS's requests for relief. The Commission determined that Cascade
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33 violated state law by making the challenged sales without the appropriate tariffs or contracts
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35 on file with the Commission. Order, ¶ 6. The Commission, however, denied CMS's request
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37 that the Commission order Cascade to cease and desist making such sales. Order, ¶ 94.
38
39 Instead, the Commission ordered Cascade to file tariff schedules to provide gas supply
40
41 services to non-core customers. Order, ¶ 140. The Commission also denied CMS's request
42
43 that the Commission declare Cascade's gas supply contracts to be void or voidable. Order,
44
45 ¶¶ 97-98. Rather, the Commission ordered Cascade to file its existing contracts for gas
46
47 supply services to non-core customers. *Id.* With respect to these contracts, the Commission

1 stated: "We will review existing contracts to ensure Cascade is in compliance with state laws
2 and regulations governing special contracts." *Id.*, ¶ 98.
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4
5 8. The Order denied both CMS's and Cascade's motions for summary determination
6 "concerning whether Cascade is in violation of RCW 80.28.090 or RCW 80.28.100." Order,
7 ¶ 64. The Commission found that neither CMS nor Cascade presented facts sufficient to
8 allow the Commission to determine whether "Cascade has provided an undue preference or
9 advantage or charged different rates or charges to similarly situated persons." *Id.* Thus, the
10 Commission set that matter for hearing. *Id.* Cascade thinks that neither party presented
11 such facts because the Complaint did not present any such claim.¹ This is why Cascade is
12 requesting clarification of the Order.
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21 **B. The Commission Has Resolved All of the Claims CMS Made in its Complaint,**
22 **Including its Allegations Under RCW 80.28.090 and 80.28.100**
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24 9. As shown above, the Order resolved all of the claims that CMS made in its
25 Complaint. The Commission first determined that Cascade's unbundled gas sales to non-
26 core customers were not authorized by its FERC blanket marketing certificate, as Cascade
27 had believed. Order, ¶¶ 40-50. Next, the Commission determined that Cascade's sales since
28 March 2004 violated RCW 80.28.050 because Cascade had not filed tariffs or contracts that
29 covered these sales. Order, ¶¶ 51-61. The Commission found that Cascade did not violate
30 RCW 80.28.060 because it obtained Commission approval to cancel its gas supply tariffs in
31 2004. Order, ¶ 62. The Commission also found that Cascade violated RCW 80.28.080
32 because it did not have effective tariff schedules governing its gas supply sales. Order, ¶ 63.
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42 ¹ Consistent with the limited nature of the claim in its Complaint, CMS's Motion for
43 Summary Determination on All Issues did not ask the Commission to find that Cascade had
44 discriminated among customers by charging them different rates. Rather, CMS simply argued that
45 the Commission "remains powerless to identify or remedy such discrimination so long as Cascade
46 fails to file the relevant rates and forms of contract . . ." Complainant's Motion for Summary
47 Determination on All Issues at 11.

1 In addition, the Commission found that Cascade did not violate RCW 80.28.190 in making
2 gas sales outside its service territory. Order, ¶¶ 68-73.

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5 10. In short, the Order resolved the fundamental issue raised in CMS's Complaint and
6 determined that Cascade was required to make its gas supply sales pursuant to state tariffs.
7
8 The Order also addressed, and denied, both aspects of the relief that CMS requested in its
9 Complaint; the Commission did not order Cascade to cease and desist from making its gas
10 supply sales and did not declare existing contracts void or voidable. Rather, the
11 Commission ordered Cascade to file tariffs that would govern those sales and to file its
12 existing contracts.
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19 11. The relief the Commission ordered also addressed CMS's allegations under RCW
20 80.28.090 and RCW 80.28.100. By ordering Cascade to make its future sales pursuant to
21 tariff and to file its existing gas supply contracts, the Commission ensured its ability to
22 "carry out its duty" to ensure that Cascade's gas sales did not unduly discriminate against
23 any customer. See Complaint, ¶ 46. CMS's Complaint did not ask the Commission to
24 determine whether the prices at which Cascade sold gas were discriminatory; in fact, CMS
25 expressly disclaimed that it was seeking any such relief. Complaint, ¶ 45. Thus, by
26 ordering Cascade to file tariffs and existing contracts for gas supply, the Commission fully
27 addressed the allegations CMS made under 80.28.090 and RCW 80.28.100. Having done
28 so, there was no reason for the Commission to set any issues for hearing.
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39 12. RCW 80.04.110(2) provides, in pertinent part, that "All grievances to be inquired
40 into shall be plainly set forth in the complaint." Under this provision, the Commission does
41 not have jurisdiction in a complaint proceeding to consider allegations and claims that are
42 not set forth in a complaint. *North Pacific Public Service Co. v. Kuykendall*, 127 Wash. 73,
43 219 P. 834 (1923); see also *State v. Department of Public Service*, 6 Wash.2d 676, 682, 108
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1 P.2d 663 (1940)("That the department of public service is limited to the hearing and the
2 determination of those issues only which are raised by the pleadings is well settled in this
3 jurisdiction."). Since CMS's Complaint does not challenge Cascade's rates in any way, let
4 alone claim that they are below cost or discriminatory, the Commission may not consider
5 any such claims in this proceeding at this time.
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11 **C. CMS Does Not Have Standing To Make Additional Claims Under RCW**
12 **80.28.090 and 80.28.100**

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14 13. Recognizing the limited nature of its Complaint, CMS may attempt to expand the
15 issues in this case by seeking leave to amend its Complaint to add allegations under RCW
16 80.28.090 and 80.28.100. However, CMS does not have standing to bring a complaint
17 before this Commission challenging Cascade's rates as being discriminatory or
18 anticompetitive. Thus, any such proposed amendment would be futile.
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24 14. CMS brought its Complaint under RCW 80.04.110. Complaint, ¶ 2. RCW
25 80.04.110(1) sets forth the type of parties that have standing to make different types of
26 complaints against a regulated public service company. As an unregulated competitor of
27 Cascade, CMS lacks statutory standing to challenge Cascade's rates and may not claim that
28 they are discriminatory, unremunerative, or anticompetitive. RCW 80.04.110(1) provides:
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34 Complaint may be made by the commission of its own
35 motion or by any person or corporation, chamber of commerce,
36 board of trade, or any commercial, mercantile, agricultural or
37 manufacturing society, or any body politic or municipal
38 corporation, or by the public counsel section of the office of the
39 attorney general, or its successor, by petition or complaint in
40 writing, setting forth any act or thing done or omitted to be done
41 by any public service corporation in violation, or claimed to be
42 in violation, of any provision of law or of any order or rule of
43 the commission: PROVIDED, That no complaint shall be
44 entertained by the commission except upon its own motion, as to
45 the reasonableness of the schedule of the rates or charges of any
46 gas company, electrical company, water company, or
47 telecommunications company, unless the same be signed by the

1 mayor, council or commission of the city or town in which the
2 company complained of is engaged in business, or not less than
3 twenty-five consumers or purchasers of such gas, electricity,
4 water or telecommunications service, or at least twenty-five
5 percent of the consumers or purchasers of the company's
6 service: PROVIDED, FURTHER, That when two or more
7 public service corporations, (meaning to exclude municipal and
8 other public corporations) are engaged in competition in any
9 locality or localities in the state, either may make complaint
10 against the other or others that the rates, charges, rules,
11 regulations or practices of such other or others with or in respect
12 to which the complainant is in competition, are unreasonable,
13 unremunerative, discriminatory, illegal, unfair or intending or
14 tending to oppress the complainant, to stifle competition, or to
15 create or encourage the creation of monopoly, and upon such
16 complaint or upon complaint of the commission upon its own
17 motion, the commission shall have power, after notice and
18 hearing as in other cases, to, by its order, subject to appeal as in
19 other cases, correct the abuse complained of by establishing
20 such uniform rates, charges, rules, regulations or practices in
21 lieu of those complained of, to be observed by all of such
22 competing public service corporations in the locality or localities
23 specified as shall be found reasonable, remunerative,
24 nondiscriminatory, legal, and fair or tending to prevent
25 oppression or monopoly or to encourage competition, and upon
26 any such hearing it shall be proper for the commission to take
27 into consideration the rates, charges, rules, regulations and
28 practices of the public service corporation or corporations
29 complained of in any other locality or localities in the state.

30
31 15. In sum, the first clause of RCW 80.04.110(1) authorizes "any person" to bring a
32 complaint that a public service company is acting in violation of any law or rule or order of
33 the Commission. The second clause (the "PROVIDED" clause) states that the Commission
34 shall not hear a complaint regarding the reasonableness of the rates charged by a public
35 service company unless such complaint is brought by the Commission on its own motion, by
36 certain elected officials, or by a minimum number of customers. The third clause (the
37 "PROVIDED FURTHER" clause) provides an exception to the second clause that allows a
38 public service company that competes with another public service company to bring a
39 complaint that the rates charged by that competing public service company, or its other
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1 practices, "are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or
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3 tending to oppress the complainant, to stifle competition, or to create or encourage the
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5 creation of monopoly . . ." An unregulated competitor, however, does not have standing to
6
7 make any such claims.

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9 16. CMS brought its Complaint under the first clause of RCW 80.04.110(1). Complaint,
10 ¶ 8 ("RCW 80.04.110 authorizes 'any person or corporation,' such as CMS, to file a formal
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12 complaint against any public service company regarding any violation of law or
13
14 Commission regulation."). The only "violation" CMS alleged was that Cascade was
15
16 violating Washington law by selling gas supply without tariffs or contracts on file with the
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18 Commission. CMS does not have standing to bring a complaint before the Commission
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20 challenging the rates at which Cascade was making such sales under either the second clause
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22 of RCW 80.04.110(1), since it is not one of the types of parties mentioned therein, nor under
23
24 the third clause, since it is not a public service company. Complaint, ¶ 5 ("CMS is not a 'gas
25
26 company' under RCW 80.04.010").

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29 17. CMS has authority under RCW 80.04.110(1) only to complain that Cascade is in
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31 violation of law. That is the complaint that CMS brought and that is the complaint that the
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33 Commission decided. CMS does not have authority to bring – and the Commission does not
34
35 have jurisdiction to hear – a complaint challenging Cascade's rates. Only certain parties may
36
37 challenge the reasonableness of Cascade's rates, as provided by the second clause of RCW
38
39 80.04.110(1). Additionally, only competitors that are public service companies regulated by
40
41 the Commission may bring a claim, under the third clause of RCW 80.04.110(1), that
42
43 Cascade's rates "are unreasonable, unremunerative, discriminatory, illegal, unfair or
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1 intending or tending to oppress the complainant, to stifle competition, or to create or
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3 encourage the creation of monopoly"²
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5 18. While CMS's Complaint does not state a claim challenging Cascade's rates, CMS has
6 asserted before the Commission that the rates Cascade is charging under its gas supply
7 contracts are below cost and discriminatory. CMS even made these assertions before it had
8 reviewed any of the existing contracts, so Cascade is not aware of the basis for such
9 assertions, and denies such claims. Notwithstanding that CMS has not formally asserted
10 such claims, these are apparently the types of claims that CMS would now like the
11 Commission to address in this docket. The Commission may not consider such claims in a
12 complaint brought by CMS because CMS lacks standing under RCW 80.04.110(1) to bring
13 such claims. Thus, any amendment that CMS may propose to make to add such claims
14 would be futile.
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25 **D. The Commission Does Not Have Jurisdiction To Consider Claims by CMS That**
26 **Cascade's Rates Are Discriminatory, Below Cost, or Anti-competitive**
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28 19. Not only does CMS lack statutory standing to bring a claim challenging Cascade's
29 rates, the Commission also lacks jurisdiction to hear any such complaint. The Supreme
30 Court's holding in *Cole v. Washington Utilities & Transportation Commission*, 79 Wash. 2d
31 302, 485 P.2d 71 (1971), that the Commission lacks jurisdiction to consider the effects of a
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36 ² CMS may argue that the first clause of RCW 80.04.110(1) should be broadly interpreted to
37 allow "any person" to bring a complaint before the Commission about any violation of law,
38 including a claim that the rates a public service company charges are below cost or discriminatory.
39 However, if the legislature had intended such a broad interpretation of the first clause of that section,
40 there would have been no need for it to enact the third clause of that statute authorizing only public
41 service companies to bring claims challenging the rates of competing public service companies as
42 unremunerative, discriminatory, or anticompetitive. The Commission should not interpret RCW
43 80.04.110(1) in such a way as to render the third clause superfluous. *Connolly v. State of*
44 *Washington*, 79 Wash.2d 500, 502-03, 487 P.2d 1050 (1971). The only reasonable interpretation of
45 RCW 80.04.110(1), that gives effect to all of its provisions, is that the only competitors that may
46 bring a claim that a public service company's rates are unremunerative, discriminatory, or
47 anticompetitive are those competitors who themselves are public service companies.

1 regulated utility's practices on an unregulated competitor, remains good law and bars the
2 Commission from exercising jurisdiction over the types of claims that CMS now seeks to
3 raise. The facts in *Cole* are quite similar to those that are presented by the additional claims
4 CMS seeks to raise. In *Cole*, a residential customer who was also a competitive fuel oil
5 dealer claimed that Washington National Gas Company's ("WNG") home "dry-out" gas
6 service rates violated RCW 80.28.090 and 80.28.100 because they unduly discriminated
7 against residential consumers. 79 Wash. 2d at 308-09. The complainant also claimed that
8 WNG's conversion burner leasing program violated RCW 80.28.020 because it was operated
9 below cost, and also violated the discrimination statutes. *Id.*

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19 20. The Oil Heat Institute ("OHI") sought to intervene in the proceeding to assert that
20 WNG's practices harmed the competitive fuel oil industry. Additionally, OHI and the
21 complainant sought leave to amend the pleadings to include the effect of WNG's practices
22 on the fuel oil industry. The Commission denied both intervention and amendment of the
23 pleadings, and the Supreme Court affirmed. The court upheld denial of OHI's petition to
24 intervene on the grounds that OHI did not have a "substantial interest" in the rates charged to
25 customers of a regulated competitor. The court also agreed with the Commission that OHI's
26 concerns were beyond the concerns of the Commission under a reasonable interpretation of
27 the term "public interest." The Commission had concluded that its jurisdiction extended
28 "only to consider the effects of competitive practices of one regulated utility upon another
29 regulated utility and no other business. [The] interest of the public which is to be protected
30 is that only of customers of the utilities which are regulated." 79 Wash. 2d at 306. The
31 court agreed and affirmed denial of OHI's petition to intervene.

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45 21. The court also affirmed denial of the appellants' motions to amend the complaint to
46 require consideration of the effect of WNG's practices on unregulated fuel oil dealers on the
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1 ground that the Commission does not have jurisdiction to consider the effects of a regulated
2 utility upon an unregulated competitor. 79 Wash. 2d at 306-07. Thus, the court held that the
3 Commission correctly refused to consider a claim that WNG's practices of providing service
4 at rates that were either below cost or discriminatory harmed its unregulated competitors.
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9 22. Any claims that CMS were to make that Cascade is providing unbundled gas supply
10 at rates that are below cost or unduly discriminate among Cascade's customers are similarly
11 outside the jurisdiction of the Commission to consider. CMS competes with Cascade for the
12 sale of such gas supply; however, CMS's activities are entirely unregulated by the
13 Commission. For the same reasons that the Commission in *Cole* lacked jurisdiction to
14 consider claims by OHI and the complainant (as fuel oil dealer) that WNG's practices were
15 below cost or discriminatory and harmed unregulated competitors, the Commission lacks
16 jurisdiction to consider claims by CMS that Cascade's unbundled gas sales are made at rates
17 that are below cost or discriminate among Cascade's customers.
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27 23. *Cole* has been viewed as persuasive precedent by other state commissions. For
28 example, the Alabama Public Service Commission applied *Cole* to dismiss, for lack of
29 jurisdiction, a claim by an unregulated competitor challenging a utility's sales practices:
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33 These cases recognize that the basic objective of public service
34 commissions is to assure that rates charged by utilities subject to
35 their jurisdiction are fair to the consuming public as well as to
36 the regulated entity, and that these commissions should not be
37 called on by businesses not subject to their regulation for
38 protection from competition from the regulated utility. It would
39 be unfair for this Commission to become a forum for imposing
40 restrictions on the competitive activities of a regulated utility at
41 the behest of, and simply to protect the competitive position of
42 their unregulated competitors.
43

44 *Alabama Propane Gas Association, Inc. v. Alabama Power Company*, 98 P.U.R.4th 459,
45 1988 WL 391393 (Ala. P.S.C. 1988). Similarly in this case, the Commission should halt
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1 any attempt by CMS to have this Commission continue to examine Cascade's competitive
2 sales at the behest of an unregulated competitor. Instead, the Commission should leave this
3 investigation to Staff, as provided in the Order.
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7 **E. The Commission Should Clarify That No Further Proceedings Are Required in**
8 **This Docket and Close This Docket**
9

10 24. For the foregoing reasons, the Commission should find that it has resolved all of the
11 claims that CMS has made in its Complaint. In addition, the Commission should find that
12 any efforts by CMS to bring additional claims challenging the rates at which Cascade has
13 been making unbundled gas supply sales, through an amended complaint, would be futile
14 because (1) CMS lacks standing to bring such claims and (2) such claims made by CMS are
15 outside the jurisdiction of the Commission. Because the Commission has resolved all
16 claims that CMS has made, and all claims that CMS lawfully could make, in this case, the
17 Commission should clarify the Order to provide that no further proceedings are required in
18 this docket, and should close this docket.
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27 25. In addition to seeking to expand the scope of its purported discrimination claim,
28 CMS may also assert that the Commission should conduct further proceedings in this docket
29 to consider the tariffs that Cascade has filed to comply with the Order. The Commission has
30 already opened Docket No. UG-070332 to consider Cascade's tariff filing, and there is no
31 reason also to consider those proposed tariffs in this proceeding.³ CMS may also assert that
32 the Commission needs to consider whether Cascade fully complied with the Order based on
33 the manner in which Cascade "filed" its existing gas supply contracts. Even if there were
34 any merit to CMS's claim that Cascade somehow improperly filed its existing contracts, that
35 issue can and should be addressed by Staff in its ongoing investigation, as required by the
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46 ³ Cascade also addresses this issue in its response to CMS's motion to consolidate, also filed
47 on this date.

1 Order. Once again, the question of whether Cascade properly filed those contracts does not
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3 implicate any legitimate interests of CMS that this Commission has jurisdiction to consider.
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5 Rather, it is Cascade's customers who have a legitimate interest that the Commission may
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7 address, and Staff is more than qualified to investigate and represent such interests.
8

9 **CONCLUSION**

10 26. For the foregoing reason, Cascade respectfully requests that the Commission
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12 (1) grant Cascade's motion for clarification, (2) find that no further proceedings are required
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14 in this docket concerning CMS's allegations under RCW 80.28.090 and 80.28.100, and
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16 (3) issue an order closing this docket.
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19 DATED: March 22, 2007

Respectfully submitted,

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21 **PERKINS COIE LLP**

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this **RESPONDENT'S MOTION FOR CLARIFICATION** upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and U.S. mail to:

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Dated this 22nd day of March, 2007.

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