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August 28, 2007

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

Re: WUTC Docket No. UG-061721
In the Matter of the Joint Application of MDU Resources Group, Inc. and Cascade Natural Gas Corporation

Nonconsolidation opinion regarding MDU Resources Group, Inc. and Cascade Natural Gas Corporation

Commissioners and Staff:

We have acted as special counsel to Cascade Natural Gas Corporation, a Washington corporation (*"Cascade"*), for the purpose of providing this opinion to you in connection with the acquisition of Cascade by MDU Resources Group, Inc., a Delaware corporation (*"MDU Resources"*).

OPINION

Based upon the facts on the date hereof, and the assumptions, legal considerations and reasoning set forth herein, it is our opinion that based on existing statutory and case law, in a competently argued and properly presented case with a correctly reasoned judicial decision in conformity with existing statutory and case law, and over the competently argued objection of creditors of Cascade or any other party in interest, the bankruptcy court would not, in a case under the Bankruptcy Code (as defined below) in which MDU Resources is a debtor, cause a substantive consolidation of the assets and liabilities of Cascade with those of MDU Resources and treat such assets and liabilities as though Cascade and MDU Resources were one entity.

BACKGROUND

Cascade is wholly owned by Prairie Cascade Energy Holdings, LLC ("Prairie Cascade"), a Delaware limited liability company. Prairie Cascade is wholly owned by MDU Energy Capital, LLC, a Delaware limited liability company ("MDU Energy Capital"). MDU Energy Capital is wholly owned by MDU Resources. MDU Resources, Prairie Cascade and MDU Energy Capital are hereinafter collectively referred to as the *"Upstream Affiliates."*

GENERAL QUALIFICATIONS AND ASSUMPTIONS

For purposes of this opinion we have only examined Order 06 entered on June 27, 2007 in Docket UG-061721 by the Washington State Utilities and Transportation Commission (the "*Order*")

and the certificates attached hereto as Exhibit A (the "*Factual Certificates*"), and have assumed the accuracy thereof in all respects material to the our opinion. We have assumed in all respects material to our opinion that: (i) each of MDU Resources and Cascade is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization; and (ii) creditors of Cascade have reasonably relied on the separateness of Cascade from MDU Resources and would suffer prejudice from, or would be harmed by, a consolidation of Cascade with MDU Resources We have conducted no independent factual investigation of our own, but rather have relied solely upon the Factual Certificates and the assumptions set forth herein, all of which we assume to be true, complete and accurate in all material respects.

The law covered by our opinion is limited to the Bankruptcy Reform Act of 1978 as amended and codified in Title 11 of the United States Code (the *"Bankruptcy Code"*). We have not reviewed, nor is our opinion in any way predicated upon an examination of, any other law.

We express no opinion as to any matter not specifically set forth herein, including, without limitation, the effect of substantive consolidation of any other entities or persons other than as expressly set forth herein. We note that the question of whether the assets and the liabilities of Cascade will be substantively consolidated with those of MDU Resources is inherently fact-specific. Other than as specifically provided herein, we cannot opine as to what action a court will take in the future when reviewing actions that have not occurred as of the date hereof. We express no opinion as to the substantive consolidation of the assets and the liabilities of Cascade with those of MDU Resources, if such consolidation is done in a manner that is not prejudicial to Cascade's creditors. Finally, we assume that any case involving the issues that are the subject of this opinion is properly presented and competently argued, and the applicable law is correctly applied.

ADDITIONAL FACTUAL ASSUMPTIONS

A. Cascade.

1. To the extent material to its separateness, Cascade at all times will comply with the ring-fencing provisions of the Order.

2. Cascade is, and intends in the future to remain, solvent; provided, however, that our opinion is not based on any assumption as to Cascade's future solvency.

3. Cascade maintains, and intends in the future to maintain, adequate capital in light of its contemplated business operations; provided, however, that our opinion is not based on any assumption as to Cascade's future adequate capitalization.

4. Cascade will not engage in any type of fraudulent activity material to its separateness.

B. **Upstream Affiliates.**

1. To the extent material to Cascade's separateness, each Upstream Affiliate has caused, and at all times hereafter will cause, Cascade to be operated and managed in compliance with the ring-fencing provisions of the Order.

2. No Upstream Affiliate will engage in any type of fraudulent activity material to Cascade's separateness.

LEGAL ANALYSIS

A. Discussion of Law. The following discussion summarizes our analysis in reaching our opinion and does not constitute an independent opinion as to any element of the analysis.

1. Introduction

In a bankruptcy case in which MDU Resources is a debtor, creditors may want to bring Cascade's assets into MDU Resources' bankruptcy estate to enhance their ultimate recovery. The method by which this may be accomplished is known as substantive consolidation.[1] The Bankruptcy Code does not provide explicit statutory authority for substantive consolidation. Rather, courts have relied on the broad grant of power codified in Section 105(a) of the Bankruptcy Code which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." But see In re Stone & Webster, Inc., 286 B.R. 532, 540-541 (Bankr. D. Del. 2002) (finding "clear statutory authority in the Bankruptcy Code for substantive consolidation" pursuant to Section 1123(a)(5)(C) of the Bankruptcy Code); In re Affiliated Foods, Inc., 249 B.R. 770, 775 (Bankr. W.D. Mo. 2000) (stating that Section 1123(a)(5)(C) of the Bankruptcy Code "indicates Congress' intent that a Chapter 11 debtor be free to merge or consolidate with another entity as part of the reorganization process") (quoting In re Gaming of Amer., Inc., 228 B.R. 275, 287 (Bankr. N.D. Okla. 1998)).

There is a split of authority as to whether or not the bankruptcy court has either subject matter jurisdiction or personal jurisdiction over a non-debtor. Some courts have held that substantive consolidation may be achieved even though one of the subject entities is not a debtor in bankruptcy proceedings. See Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941); see also Soviero v. Franklin Nat. Bank, 328 F.2d 446 (2d Cir. 1964); In re Munford, Inc., 115 B.R. 390 (Bankr. N.D. Ga. 1990); In re Tureaud, 45 B.R. 658 (Bankr. N.D. Okla. 1985), aff'd, 59 B.R. 973 (N.D. Okla. 1986); In re Crabtree, 39 B.R. 718 (Bankr. E.D. Tenn. 1984); In re 1438 Meridian Place, N.W., Inc., 15 B.R. 89 (Bankr. D. C. 1981).

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[1] "Substantive Consolidation" should be distinguished from joint administration or procedural consolidation, which permit unitary administration of the estates of two or more related debtors in bankruptcy in the same court. See Fed. R. Bank. P. 1015.

Some courts have refused to take jurisdiction under the equitable powers of Section 105 of the Bankruptcy Code. See Matter of Fesco Plastics Corp., 996 F.2d 152 (7th Cir. 1993); In re Schwinn Bicycle Co., 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997); In re Deltacorp, Inc., 111 B.R. 419, 420 (Bankr. S.D.N.Y. 1990). These courts reason that on its face Section 105(a) does not broaden the bankruptcy court's jurisdiction and thus a bankruptcy court cannot use Section 105 to add something to the Bankruptcy Code or to achieve a result inconsistent with the Bankruptcy Code. Section 105 is viewed merely as an aid to the exercise of jurisdiction. To substantively consolidate a non-debtor with a debtor would effectively force a non-debtor into bankruptcy without Section 303 Bankruptcy Code protections for involuntary petitions and thus, would arguably be contrary to the express Bankruptcy Code limitations for involuntary petitions. In re Circle Land and Cattle Corp., 213 B.R. 870 (Bankr. D. Kan. 1997).[2]

Substantive consolidation of affiliated entities closely resembles a corporate merger in which the rights of shareholders and creditors of the merging entities are affected. Accordingly, "substantive consolidation usually results in, inter alia, pooling the assets of, and claims against, the two entities; satisfying liabilities from the resulting common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans." In re Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988); accord In re American Way Service Corp., 229 B.R. 496, 526 (Bankr. S.D. Fla. 1999); In re Steury, 94 B.R. 553, 554 (Bankr. N.D. Ind. 1988).

However, substantive consolidation is not merely a procedural device, but rather a measure that affects substantive rights. Certain creditors may face a harsh economic result associated with an involuntary combination of their debtor's estate with less solvent estates. For example:

> It must be recognized and affirmatively stated that substantive consolidation, in almost all instances, threatens to prejudice the rights of creditors. This is so because separate debtors will almost always have different ratios of assets to liabilities. Thus, creditors of a debtor whose asset-to-liability ratio is higher than that of its affiliated debtor must lose to the extent that the asset-to-liability ratio of the merged estates will be lower.

In re Snider Bros., 18 B.R. 230, 234 (Bankr. D. Mass. 1982) (citation omitted). For this reason, the Second Circuit noted that "[t]he power to consolidate should be used sparingly . . . ." Chem. Bank New York Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966). See also In re Ltd. Gaming of Am., Inc., 228 B.R. 275, 286-87 (Bankr. N.D. Okla. 1998).

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[2] The opinion set forth herein does not depend on Cascade being a non-debtor at the time substantive consolidation with MDU Resources is sought.

The need to protect interests of creditors affected by substantive consolidation was underscored in the case In re Augie/Restivo Baking Co., 860 F.2d at 518-19, in which the court stated:

> The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors.
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> [C]reditors who make a Loan on the basis of the financial status of a separate entity expect to be able to look to the assets of their particular borrower for satisfaction of that loan. Such lenders structure their Loan according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound company available in case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets.

The Third Circuit was even more emphatic in In re Owens Corning, 419 F.3d 195, 210 (3d Cir. 2005) stating:

> If an objecting creditor relied on the separateness of the entities, consolidation cannot be justified *vis-à-vis* the claims of that creditor.

These concerns are no less applicable where investors purchase the securities of one entity that may be related to another independent entity. In re Flora Mir Candy Corp., 432 F.2d 1060 (2d Cir. 1970).

Recently, attempts to substantively consolidate two or more related entities have increased as a result of the pervasiveness of complex corporate structures. According to one court:

> There is, however, a 'modern' or 'liberal' trend toward allowing substantive consolidation, which has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures by subsidiary corporations operating under a parent entity's corporate umbrella for tax and business purposes.

Eastgroup Properties v. Southern Motel Assoc., Ltd., 935 F.2d 245, 248-49 (11th Cir. 1991) (citations omitted). However, the Third Circuit expressly disagreed in In re Owens Corning that such a "liberal trend" exists.[3]

A variety of judicially created standards have been developed over the years to determine whether substantive consolidation should be granted in any given case. The fluidity and uncertainty associated with such standards have been noted by several courts, but are best typified by the comment "[t]hat as to substantive consolidation, precedents are of little value, thereby making each analysis on a

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[3] In re Owens Corning, 419 F.3d at 209, n.15.

case by case basis." In re Crown Mach. & Welding Inc., 100 B.R. 25, 27-28 (Bankr. D. Mont. 1989). This ad hoc approach is largely responsible for the unsettled nature of the appropriate standards, relevant factors, the weight to be attached to such factors and the significance of competing considerations offered by objectors to substantive consolidation. Accordingly, this opinion, as well as any other analysis of whether there is a substantial risk of substantive consolidation, is subject to the general qualification that there can be no guaranty as to whether substantive consolidation will be granted by a court exercising its discretionary equitable authority in any given instance.

2. Analysis Employed

There are essentially two principal tests for determining whether two or more related entities should be substantially consolidated. The traditional test examines widely cited substantive consolidation factors or elements, which are based on common law alter ego or veil piercing doctrines. The second "balancing" test gives greater weight to the impact of substantive consolidation on creditors and uses certain factors to aid in the determination of whether there is substantial identity between the entities to be consolidated and whether consolidation is necessary to avoid some harm or realize a certain benefit for all creditors.

a. Traditional Common Law Theories

Because there is no explicit statutory authority for this extraordinary relief, a number of cases decided shortly after the enactment of the Bankruptcy Code relied principally on the presence or absence of certain "elements" similar to factors relevant to the traditional common law doctrines of "piercing the corporate veil" and "alter ego" theories. See, e.g., In re Vecco Constr. Indus., 4 B.R. 407 (Bankr. E.D. Va. 1980); In re Gulfco Inv. Corp., 593 F.2d 921 (10th Cir. 1979); In re Food Fair Inc., 10 B.R. 123 (Bankr. S.D.N.Y. 1981); In re Tureaud, 45 B.R. 658; In re 1438 Meridian Place, N.W., Inc., 15 B.R. 89; In re Stop & Go of Am., Inc., 49 B.R. 743 (Bankr. D. Mass. 1985); In re Baker & Getty Fin. Serv., 78 B.R. 139 (Bankr. N.D. Ohio 1987); see also In re S.I. Acquisition, Inc., 58 B.R. 454, 460 n.3 (Bankr. W.D Tex. 1986), rev'd on other grounds, 817 F.2d 1142 (5th Cir. 1987).

Two sets of substantive consolidation elements are often cited. In the cases that depend primarily on the "alter ego" theory, the following factors are cited as relevant to the issue of whether substantive consolidation is justified:

(1) parent corporation owns all or a majority of the capital stock of the subsidiary;

(2) parent and subsidiary have common officers and directors;

(3) parent finances subsidiary;

(4) parent is responsible for incorporation of subsidiary;

(5) subsidiary has grossly inadequate capital;

(6) parent pays salaries, expenses or losses of subsidiary;

(7) subsidiary has substantially no business except with parent;

(8) subsidiary has essentially no assets except for those conveyed by parent;

(9) parent refers to subsidiary as department or division of parent;

(10) directors or officers of subsidiary do not act in interests of subsidiary, but take directions from parent; and

(11) formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

Fish v. East, 114 F.2d 177 (10th Cir. 1940); In re Tureaud, 45 B.R. at 662; In re Gulfco Inv. Corp., 593 F.2d 921 (10th Cir. 1979); Eastgroup Properties, 935 F.2d at 250 (11th Cir. 1991).

Under the "alter ego" approach, courts did not generally permit consolidation without a showing that organization of the subsidiary resulted in some blatant abuse, even in cases where one or more of the above factors was present. As noted by one court:

> Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from its stockholders, whether they be one or more . . . . But notwithstanding such situation and such intimacy of relation, the corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution, and when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetuate a fraud.

Commerce Trust Co. v. Woodbury, 77 F.2d 478, 487 (8th Cir. 1935) (citations omitted). Thus, it was observed that "The reported cases have generally been easily decided because the courts could point to blatant abuses of the separate corporate entities in the enterprise structure . . . ." Landers, A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy, 42 U. Chi. L. Rev. 589, 635 (1975). It has been noted that "[i]n the older cases, the application of substantive consolidation was limited to extreme cases involving fraud or neglect of corporate formalities and accounting procedures." In re Standard Brands Paint Co., 154 B.R. 563, 568 (Bankr. C.D. Cal. 1993).

Beginning with In re Vecco Constr. Indus., 4 B.R. at 407, 410, the courts have focused on a revised series of substantive consolidation "elements" to be considered in determining whether to substantively consolidate affiliated debtor corporations:

(1) the degree of difficulty in segregating and ascertaining individual assets and liabilities;

(2) the presence or absence of consolidated financial statements;

(3) the profitability of consolidation at a single physical location;

(4) the commingling of assets and business functions;

(5) the unity of interests and ownership between the various corporate entities;

(6) the existence of parent and inter-corporate guarantees of the loan; and

(7) the transfer of assets without formal observance of corporate formalities.

While courts have considered the various factors listed above, some courts have stated that the existence of these factors is not dispositive. "Rather, they should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice movant alleges it suffers from debtor's separateness." In re DRW Property Co. 82, 54 B.R. 489, 495 (Bankr. N.D. Tex. 1985) (citing In re Donut Queen, 41 B.R. 706, 709-10 (Bankr. E.D.N.Y. 1984)). In weighing the relative costs and benefits, the courts have considered the costs of identifying separate assets where the books and records of the two identities are mixed (e.g., DRW Property, 54 B.R. at 495-96); the reliance, or lack thereof, by creditors of one corporation on the assets of the related entity, (e.g. In re Stop & Go of Am., Inc., 49 B.R. 743, 748-49 (Bankr. D. Mass. 1985); Donut Queen, 41 B.R. at 710-11; In re Baker & Getty Fin. Services, 78 B.R. 139, 142-43 (Bankr. N.D. Ohio 1987)); and whether creditors who dealt with one corporation knew of its relationships with the affiliated entity, In re Snider Brothers, 18 B.R. 230, 235-36 (Bankr. D. Mass. 1982). The courts recognized, however, that "[t]here is no one set of elements which, if established, will mandate consolidation in every instance." Snider Bros., 18 B.R. at 234. As a result, courts have tended to focus on other "equitable" factors discussed below.

b. The Balancing Tests

In addition to evaluating the above-enumerated factors, most courts also have engaged in an analysis involving a "balance of the equities" – *i.e.*, whether the benefits of consolidation outweigh potential harm to creditors. According to the Second Circuit:

> Resort to consolidation in such circumstances [involving commingling of assets and business functions], however, should not be Pavlovian. Rather, substantive consolidation should be used only after it has been determined that all creditors will benefit because untangling is either impossible or so costly as to consume the assets . . . . Commingling, therefore, can justify substantive consolidation only where "the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors," or where no accurate identification and allocation of assets is possible. In such circumstances, all creditors are better off with substantive consolidation.

In re Augie/Restivo Baking Co., 860 F.2d at 519 (citations omitted); accord In re Mortgage Inv. Co., 111 B.R. 604, 609 (Bankr. W.D. Tex. 1990); Holywell Corp. v. Bank of New York, 59 B.R. 340, 347 (S.D. Fla. 1986), appeal dismissed, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823 (1988); In re Richton Int'l Corp., 12 B.R. 555, 558 (Bankr. S.D.N.Y. 1981). The Second Circuit reduced the laundry list of traditional factors to two critical factors, "whether creditors dealt with the entities as a single economic unit and, 'did not rely on their separate entity in extending credit,' . . . [or] whether the affairs

of the debtors are so entangled that consolidation will benefit all creditors." In re Augie/Restivo Baking Co., 860 F.2d at 518 (citations omitted).

Similarly, another court has stated:

> A review of the case law reveals that equity has provided the remedy of consolidation in those instances where it has been shown that the possibility of economic prejudice which would result from continued corporate separateness outweighed the minimal prejudice that consolidation would cause. While several courts have recently attempted to delineate what might be called "the elements of consolidation," I find that the only real criterion is that which I have referred to, namely the economic prejudice of continued debtor separateness versus the economic prejudice of consolidation. There is no one set of elements which, if established, will mandate consolidation in every instance. Moreover, the fact that corporate formalities may have been ignored, or that different debtors are associated in business in some way, does not by itself lead inevitably to the conclusion that it would be equitable to merge otherwise separate estates.

In re Snider Bros., 18 B.R. at 234 (citations omitted). The court further stated that "the evidence in support of an application to consolidate must do more than show a unity of interest or an intermingling of funds." Id. at 238.

Certain guidelines have been adopted in some decisions for allocating the burden of proof. The proponent seeking consolidation has the ultimate burden of proof that substantive consolidation should be granted in a particular case. "[I]t must be clearly shown that not only are the 'elements of consolidation' present in a given bankruptcy setting, but that the court's action is necessary to prevent harm or prejudice, or to effect a benefit generally." Id. In addition, in the face of an affirmative showing that consolidation is warranted, an objecting creditor has the burden of proving that it relied solely on the credit of one of the entities and that consolidation will therefore result in more than minimal harm. Id.; In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 766 (Bankr. S.D.N.Y. 1992).

The Eleventh Circuit has adopted a similar analysis stating:

> the proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit. When this showing is made, a presumption arises "that creditors have not relied solely on the credit of one of the entities involved." Once the proponent has made this prima facie case for consolidation, the burden shifts to an objecting creditor to show that (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation. Finally, if an objecting creditor has made this showing, "the

> court may order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm . . . ."

Eastgroup Properties, 935 F.2d at 249 (citations omitted); In re Optical Technologies, Inc., 221 B.R. 909, 912 (Bankr. M.D. Fla. 1998). The Eleventh Circuit drew this test from the decision in In re Auto-Train Corp., 810 F.2d 270 (D.C. Cir. 1987). The Eighth Circuit has adopted a three factor variant of the Eleventh Circuit Eastgroup Properties test whereby Courts examine the following three factors in their substantive consolidation analysis: (1) the necessity of consolidation due to the interrelationship among the entities; (2) whether the benefits of consolidation outweigh the harm; and (3) the prejudice resulting from refusal to consolidate. In re Giller, 962 F.2d 796, 799 (8th Cir. 1992) (finding substantive consolidation appropriate where sole majority shareholder ignored corporate form and fraudulently transferred assets). See also In re Huntco, Inc., 302 B.R. 35, 39 (Bankr. E.D. Mo. 2003) (the three factors are "only illustrative of the type of fact specific analysis the court must conduct") (citing In re Affiliated Foods, 249 B.R. 770, 777 (Bankr. W.D. Mo. 2000)).

In the bankruptcy case of In re Bonham, 229 F.3d 750, 763 (9th Cir. 2000), the Ninth Circuit Court of Appeals affirmed a bankruptcy court's *nunc pro tunc* substantive consolidation of two non-debtor corporations with an individual debtor's chapter 7 bankruptcy case. The court held that the "bankruptcy court's power of substantive consolidation has been considered part of the bankruptcy court's general equitable powers since the passage of the Bankruptcy Act of 1898." Id. (citing In re Reider, 31 F.3d at 1105; Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941)). Although the Ninth Circuit explicitly adopted the Second Circuit's test, the Court seemed to analyze the facts more with reference to the two guiding principles of substantive consolidation enumerated by the Eleventh Circuit in Eastgroup Properties – entanglement and disregard of corporate formalities, and balancing of harms – rather than strictly within the framework of its newly adopted rule. Id. at 766-67. After reciting six relevant factors in a footnote[4], the court recited multiple facts illustrating that the debtor had commingled its assets with those of non-debtors, used the names of non-debtor entities interchangeably, lacked separate financial statements and tax returns, and the debtor made all decisions for each of the non-debtor entities, all to the point where "the exercise of disentangling the affairs of [the debtor and non-debtor entities] would be needlessly expensive and possibly futile." Id. Further, the Bonham Court took pains to address the effect of substantive consolidation on creditors, which is relevant to both elements of the Second Circuit's Augie/Restivo test. The Court expressly found that substantive consolidation would impose no unfair harm on third parties and that the only "harm" was to early investors who had been paid at the expense of other investors, in that all investors would share losses equally under substantive consolidation.

In In re Owens Corning, 419 F.3d 195 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1910 (2006), the Third Circuit presented a comprehensive analysis of substantive consolidation and found that the following principles underlie this remedy:[5] (i) limiting the cross-creep of liability by respecting entity

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[4] See In re Bonham, 229 F.3d 750, 766 n. 10 (9th Cir. 2000).

[5] In re Owens Corning, 419 F.3d at 211.

separateness is a fundamental ground rule; (ii) the harms to be addressed by substantive consolidation are nearly always those caused by debtors who disregard separateness; (iii) mere benefit to administration of the case is not sufficient to invoke the remedy of substantive consolidation; (iv) substantive consolidation is extreme and imprecise and should be rarely used; (v) substantive consolidation may not be used for the primary purpose of tactically disadvantaging a group of creditors in the plan process. The Court concluded:

> In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.[6]

Because substantive consolidation is an equitable doctrine, its application has been tailored to the facts of the case. In re Standard Brands Paint Co., 154 B.R. 563, 573 (Bankr. C.D. Cal. 1993). However explained or applied, some variant of the balancing test has been employed by the vast majority of courts. For example, in the Third Circuit, the In re GC Cos., Inc. Bankruptcy Court examined and applied the Second Circuit Augie/Restivo test and the Eleventh Circuit Eastgroup Properties test side by side in allowing substantive consolidation. In re GC Cos., Inc., 274 B.R. 663 (Bankr. D. Del. 2002), *aff'd in part by, remanded by*, 298 B.R. 226 (D. Del. 2003). On appeal, the United States District Court for the District of Delaware concluded that the Bankruptcy Court had not abused its discretion by weighing the equities of a request for substantive consolidation, which was essentially an Eastgroup Properties influenced standard. Id. at 231-232 (while the District Court likened its approach to the bankruptcy court's approach in Eastgroup Properties, it declined to expressly adopt that rule).

Under any variant of the balancing test, the laundry list of consolidation factors enumerated earlier remains relevant, but not necessarily dispositive, as to whether substantive consolidation should be granted. Some courts look to the consolidation factors as evidence in support of proving a *prima facie* case for consolidation. See, e.g., Eastgroup Properties, 935 F.2d at 249-50; In re Augie/Restivo Baking Co., 860 F.2d at 518-20. Other courts have employed a hybrid approach which looks to the traditional factors independently of the question as to whether the equities of the case warrant consolidation. See e.g., In re Luth, 28 B.R. 564, 566-68 (Bankr. D. Idaho 1986); In re Richton Int'l. Corp., 12 B.R. at 557-59.

In applying any of the analysis discussed above, most courts tend to examine similar factors. In general, if creditors did not rely on the financial strength of related entities, courts will not order substantive consolidation merely because two related entities are affiliated in business or because two related entities' assets to some extent have been commingled or because a wholly-owned subsidiary has failed to observe certain corporate formalities. See In re Owens Corning, 419 F.3d 195 (3d Cir. 2005);

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[6] Id.

In re Augie/Restivo Baking Co., 860 F.2d 515; Eastgroup Properties, 935 F.2d 245; In re Snider Bros., 18 B.R. 230; In re 599 Consumer Electronics, Inc., 195 B.R. 244 (Bankr. S.D.N.Y. 1996).

On the other hand, courts also will order substantive consolidation where creditors did not distinguish between affiliated entities and relied on the assets of both entities. See In re Mortgage Inv. Co., 111 B.R. at 604.

Similarly, when the combination of affiliates' assets, liabilities and business affairs are so "hopelessly entangled" such that segregation is either prohibitively expensive or impossible, courts are prone to grant substantive consolidation. See Chem. Bank New York Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966). Even in this scenario, protection of creditors whose interests would be adversely and unfairly affected by consolidation may predominate over financial entanglement concerns. See In re Flora Mir Candy Corp., 432 F.2d at 1063 (unlikely that any showing of accounting difficulties would justify consolidation when claims of debenture holder of formerly independent entity, whose stock was subsequently transferred, would be extinguished or diluted; no evidence of accounting difficulties when financial statements for each debtor had been prepared by accountants).

Additionally, the failure to consistently observe corporate formalities is typically given some evidentiary weight in cases, but usually is not dispositive unless such elements, together with other evidence, support a finding of fraudulent or inequitable conduct by the debtors or their principals. See In re Baker & Getty Fin. Serv., 78 B.R. at 142 (substantive consolidation ordered when corporate funds were commingled and used for principal's personal purposes, inadequate records of transfers were made, and corporate entities were alter ego of principal who admitted having engaged in Ponzi scheme to defraud investors); In re Tureaud, 45 B.R. at 661 (alter ego finding based on majority of "elements" and fraud supported substantive consolidation of nondebtor entities in face of "hopeless" commingling of personal and corporate assets, numerous undocumented inter-corporate transfers, lack of distinction between inter-company transactions despite separateness of books and records, and impossibility of accurately tracing all transfers).

To temper the inequities of consolidation, the bankruptcy court may order limited, conditional or qualified consolidation, thus protecting or accommodating the interests of creditors who may be harmed by consolidation, but one cannot be assured of such protection. In re Creditors Serv. Corp., 195 B.R. 680, 690 (Bankr. S.D. Ohio 1996).

In expressing our opinion, we note the following considerations presented by the facts of this case:

(1) The financial and business affairs of Cascade and MDU Resources are readily distinguishable from each other.

(2) Cascade will be operated as a separate entity from MDU Resources and the respective assets and liabilities of Cascade and MDU Resources are ascertainable in a bankruptcy or otherwise so as to preclude valid support for substantive consolidation under the standards discussed above.

(3) Cascade will maintain its assets in such a manner that it is not costly or difficult to segregate, identify or ascertain such assets. As a result, it would be difficult for any third party to persuade a bankruptcy court that substantive consolidation of Cascade with MDU Resources is warranted under the balancing test or the substantive consolidation "elements" approach, because of the lack of any actual prejudice to creditors' interests associated with the recognition of separate entities.

(4) Cascade will not assume any obligation or liability as guarantor, endorser, surety or otherwise for MDU Resources, nor pledge any of its assets as backing for any securities of MDU Resources.

(5) Cascade's creditors have reasonably relied upon Cascade's separateness from MDU Resources and would suffer prejudice from, or would be harmed by, substantive consolidation.

(6) Each of Cascade and MDU Resources was established for a legitimate business purpose and not for the purpose of perpetuating a fraud or circumventing public policy.

(7) Cascade's capitalization as of the date hereof provides it with adequate capital to conduct its respective business, so the continued recognition of Cascade and MDU Resources as entities distinct from one another would not circumvent public policy.

In reaching our conclusion herein, we have relied upon concepts from the cases discussed herein that involve general principles regarding the doctrine of substantive consolidation. While we believe that the general principles applicable in the context of analysis of substantive consolidation should be applied to reach the result that substantive consolidation of Cascade with MDU Resources would not be ordered, we caution that a court addressing the issue of substantive consolidation would rule on the issue of substantive consolidation based upon the particular facts and circumstances before it, and might, therefore, reach a different result based on those facts. Therefore our opinion is a reasoned opinion based upon an analysis of case law decided under the laws of various jurisdictions that we believe would be applicable by analogy to the factual patterns set forth herein. Thus, our opinion is not a guaranty as to what a particular bankruptcy court actually would hold, but an opinion as to the decision a bankruptcy court would reach assuming that the issues were properly presented and assuming that the bankruptcy court correctly followed existing precedent as to legal and equitable principles applicable in bankruptcy cases.

In this regard, we further note that legal opinions on matters involving bankruptcy law unavoidably have inherent limitations that generally do not exist in respect of other issues on which opinions of third parties typically are provided. These inherent limitations exist primarily because of (i) the pervasive equity powers of the bankruptcy court, (ii) the overriding goal of reorganization to which other legal rights and policies may be subordinated, (iii) the potential relevance of the exercise of judicial discretion, as evidenced by the fact that courts have accorded different degrees of significance to a variety of factual elements, (iv) facts and circumstances arising in the future which are different from those assumed herein, and (v) the nature of the bankruptcy process in general.

Accordingly, the conclusions reached herein must be considered in light of these broad statutory and equitable powers of the bankruptcy court over the debtor's property, estate, creditors, and equity security holders. Consequently, we render no opinion as to the availability or effect of a preliminary injunction, temporary restraining order, or other such temporary relief, or equitable remedies other than substantive consolidation and except as set forth expressly herein.

This opinion is rendered for the sole benefit of the addressee hereof and no other person or entity is entitled to rely hereon. The opinion expressed herein is given on the date hereof only, and we assume no obligation to update or supplement our opinion to reflect any fact or circumstance that may hereafter come to our attention or any change in law that may hereafter occur or become effective.

Very truly yours,

Perkins Coie LLP

PERKINS COIE LLP

EXHIBIT A

Factual Certificates

CERTIFICATE IN SUPPORT OF OPINION OF PERKINS COIE LLP

August __, 2007

This Certificate is given in connection with the opinion letter dated August __, 2007 (the "Opinion Letter") concerning substantive consolidation to be delivered by Perkins Coie LLP (the "Firm") in connection with the acquisition of Cascade Natural Gas Corporation by MDU Resources Group, Inc. Unless otherwise specified, capitalized terms not defined herein have the meanings assigned to them in the Opinion Letter.

The undersigned, in [his/her] capacity as _____ of Cascade Natural Gas Corporation, hereby certifies, acknowledges and confirms the following:

1. I have knowledge of Cascade's business and affairs. I have reviewed the Order and the portions of the Opinion Letter entitled "BACKGROUND", "GENERAL QUALIFICATIONS AND ASSUMPTIONS" and "ADDITIONAL FACTUAL ASSUMPTIONS " and have, or someone assisting me has, examined such corporate records, and made such inquiries of Cascade's officers and counsel as I deemed reasonable and necessary in order to reasonably insure the material accuracy of the certifications set forth herein. With respect to the matters covered in this Certificate, it is understood that I am certifying as to matters of fact and not as to conclusions of law. It is further understood and acknowledged that I am executing this Certificate not in an individual capacity, but solely in my capacity as an officer and that I am without personal liability as to the matters contained in this Certificate. Neither Cascade nor I am aware of any fact or circumstance that would render any factual statement or conclusion reached in this Certificate inaccurate, misleading or untrue in any material respect.

2. I am duly authorized by Cascade to execute this Certificate on its behalf.

3. I acknowledge that the representations contained in this Certificate may be relied on by the Firm in rendering the Opinion Letter. Cascade agrees to indemnify the Firm against any and all liability resulting from any material misrepresentation or misstatement contained in this Certificate.

4. The facts and assumptions contained under the headings "BACKGROUND", "GENERAL QUALIFICATIONS AND ASSUMPTIONS" and "ADDITIONAL FACTUAL ASSUMPTIONS " of the Opinion Letter that relate to Cascade are, to the best of my knowledge and belief, true and correct in all material respects as of the date hereof, and Cascade has no reason to believe that any statement or fact expressed in the Opinion Letter relating to Cascade is untrue inaccurate or incomplete in any material respect.

CASCADE NATURAL GAS CORPORATION

By:_____
Title:_____

CERTIFICATE IN SUPPORT OF OPINION OF PERKINS COIE LLP

August __, 2007

This Certificate is given in connection with the opinion letter dated August __, 2007 (the "Opinion Letter") concerning substantive consolidation to be delivered by Perkins Coie LLP (the "Firm") in connection with the acquisition of Cascade Natural Gas Corporation by MDU Resources Group, Inc. Unless otherwise specified, capitalized terms not defined herein have the meanings assigned to them in the Opinion Letter.

The undersigned, in [his/her] capacity as _____ of MDU Resources Group, Inc., hereby certifies, acknowledges and confirms the following:

1. I have knowledge of MDU Resources' business and affairs. I have reviewed the Order and the portions of the Opinion Letter entitled "BACKGROUND", "GENERAL QUALIFICATIONS AND ASSUMPTIONS" and "ADDITIONAL FACTUAL ASSUMPTIONS " and have, or someone assisting me has, examined such corporate records, and made such inquiries of MDU Resources' officers and counsel as I deemed reasonable and necessary in order to reasonably insure the material accuracy of the certifications set forth herein. With respect to the matters covered in this Certificate, it is understood that I am certifying as to matters of fact and not as to conclusions of law. It is further understood and acknowledged that I am executing this Certificate not in an individual capacity, but solely in my capacity as an officer and that I am without personal liability as to the matters contained in this Certificate. Neither MDU Resources nor I am aware of any fact or circumstance that would render any factual statement or conclusion reached in this Certificate inaccurate, misleading or untrue in any material respect.

2. I am duly authorized by MDU Resources to execute this Certificate on its behalf.

3. I acknowledge that the representations contained in this Certificate may be relied on by the Firm in rendering the Opinion Letter. MDU Resources agrees to indemnify the Firm against any and all liability resulting from any material misrepresentation or misstatement contained in this Certificate.

4. The facts and assumptions contained under the headings "BACKGROUND", "GENERAL QUALIFICATIONS AND ASSUMPTIONS" and "ADDITIONAL FACTUAL ASSUMPTIONS " of the Opinion Letter that relate to MDU Resources are, to the best of my knowledge and belief, true and correct in all material respects as of the date hereof, and MDU Resources has no reason to believe that any statement or fact expressed in the Opinion Letter relating to MDU Resources is untrue inaccurate or incomplete in any material respect.

MDU RESOURCES GROUP, INC.

By:_____
Title:_____