

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

TREE TOP, INC.,)	DOCKET UG-210745
)	
Complainant,)	OPENING BRIEF OF TREE TOP, INC.
)	REDACTED
v.)	
)	
CASCADE NATURAL GAS)	
CORPORATION,)	
)	
Respondent.)	
)	
)	
)	

I. INTRODUCTION

1. At the start of the COVID-19 pandemic, consumers overwhelmed grocery stores and warehouses to purchase goods they believed were necessary for the health and safety of their families. Basic cleaning supplies and hand sanitizers quickly became scarce as the fear and uncertainty caused by the looming pandemic drove many to purchase more products than they could reasonably expect to use themselves. Unfortunately, some individuals also sought to take advantage of the fact that these potentially lifesaving goods were becoming increasingly scarce, hoarding all manner of sanitizers and selling them to individuals at extortionary prices. Instead of being lauded for their business acumen, these grifters were condemned for such selfish, short-sighted behavior, some even facing charges for price gouging.¹

¹ Neil Vigdor, *Tennessee Brothers Who Hoarded Hand Sanitizer Settle to Avoid Price-Gouging Fine*, NY TIMES, (Jun. 22, 2020), <https://www.nytimes.com/2020/04/22/us/hand-sanitizer-matt-colvin-noah-coronavirus.html>.

2. These facts are very similar to the facts underlying the dispute between Tree Top Inc. (“Tree Top”) and Cascade Natural Gas Corporation (“Cascade”).² From February 11–20, 2021, colder than normal weather affected most of the lower 48 states.³ Further, an unprecedented Arctic cold front moved through Texas crippling the state’s electric and natural gas infrastructure.⁴ The sleet and ice brought on by the storm caused Texans across the state to lose power and heat for several days and hundreds of people lost their lives.

3. Due to this extreme weather event, the natural gas and electric markets in Texas and surrounding states ceased to function properly—and in many cases they did not function at all. As supplies tightened and natural gas providers cancelled or were unable to fulfill their contracts, utilities and power producers had to turn to the volatile spot market.⁵ As a result of astronomical prices, and accompanied with accusations of unlawful price gouging, natural gas traders and pipeline companies made up to \$11 billion dollars in just nine days.⁶ In the immediate aftermath of the weather event, multiple Texas utilities filed for bankruptcy protection. In recognition of this market dysfunction, Texas state regulators have since taken steps to unwind electric bills and other power transactions that would otherwise be payable under normal market conditions.⁷

² To be clear, Tree Top is not suggesting that Cascade had any involvement in price gouging or other activities that arose in Texas and the surrounding markets.

³ *Cold Weather Brings Near Record-High Natural Gas Spot Prices*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 5, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=47016>.

⁴ *Valentine’s Week Winter Outbreak 2021: Snow, Ice, & Record Cold*, NATIONAL WEATHER SERVICE (last visited July 11, 2022), <https://www.weather.gov/hgx/2021ValentineStorm>.

⁵ De Chant, Tim, *\$11 Billion in 9 Days—Texas’ Natural Gas Sellers Cashed in on Deep Freeze*, ARS TECHNICA (July 12, 2021), <https://arstechnica.com/tech-policy/2021/07/11-billion-in-9-days-texas-natural-gas-sellers-cashed-in-on-deep-freeze/>.

⁶ *Id.*

⁷ *Texas Utility Settles Over Sky-High Energy Bills from Freeze*, SPECTRUM NEWS 1 (Aug. 31, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/08/31/texas-utility-settles-over-sky-high-energy-bills-from-freeze>.

While these events did not happen in the Pacific Northwest—the 2021 Texas Energy Crisis had a direct and substantial impact on gas supplies and transportation customers in this region.

4. The 2021 Texas Energy Crisis is at the heart of this case. As explained more fully below, the single issue presented in this case is whether it is fair, just and reasonable for Cascade to assess an \$198,845⁸ overrun entitlement charge based off a dysfunctional market hub in Wyoming when Cascade and its customers were not exposed to the dysfunctional market stemming from the Texas Energy Crisis.⁹

5. All rates and charges of regulated utilities must be fair, just and reasonable under RCW 80.28.010. It was not fair, just and reasonable for Cascade to assess such excessive charges to Tree Top based on a market that had no relationship to any actual or potential cost to Cascade. Tree Top respectfully requests that the Washington Utilities and Transportation Commission (“Commission”) require Cascade to modify the overrun entitlement charge issued to Tree Top using the Sumas market hub, in the manner identified in Tree Top witness Mullins Direct Testimony, resulting in a refund of approximately \$196,634, inclusive of interest.¹⁰

II. BACKGROUND

6. Tree Top is a food processing manufacturer with locations in Washington, Oregon, and California. Tree Top’s headquarters are located in Selah, Washington. The company specializes

⁸ To calculate the charge, Cascade used the Northwest Pipeline overrun entitlement rate formula equal to “150% of the highest midpoint price for the day at NW Wyoming Pool, NW south of Green River, Stanfield Oregon, NW Canadian Border (Sumas), or Kern River Opal supply pricing points.” The highest published mid-point price on Friday February 12 was [REDACTED] at the Opal market, resulting in an entitlement rate of [REDACTED] after the 150% adder. Over the holiday weekend, however, the price jumped significantly. The highest published mid-point price over the period Saturday February 13 through Tuesday February 16 increased to [REDACTED] based on the Green River market, resulting in an entitlement rate of [REDACTED] after the 150% adder. Mullins, Exh. BGM-1T, p. 14.

⁹ Robbins, Exh. CR-1RT at 7:14–16.

¹⁰ Mullins, Exh. BGM-1T at 4, Table 1, Line 10.

in the production of apple juice, apple sauce, apple ingredients, and other fresh fruit juice concentrates, such as apple and pear.¹¹ Tree Top is an important link in the supply chain for the arboriculture industry in central Washington and employs approximately 600 individuals in Washington State.¹²

7. In February 2021, an unprecedented series of winter and ice storms spread across the Southwest United States, leading to the Texas 2021 Energy Crisis.¹³ These storms crippled the natural gas infrastructure in Texas and Oklahoma, reducing production by nearly 50% over Presidents’ Day weekend.¹⁴ Reduced production, coupled with increased demand for heating due to these historic, unprecedented winter storms lead to market failures in the Southwest. Some utilities paid astronomical prices to maintain supply on their systems, while those with access to gas were able to reap excess profits.¹⁵

8. In response to forecasted weather conditions over Presidents’ Day, on February 10, 2021, Northwest Pipeline issued a Level II Overrun Entitlement, in which customers must balance their gas consumption daily within 108% of their nominated volumes.¹⁶ Cascade likewise issued a Level II Overrun Entitlement (the “Overrun Entitlement”) shortly thereafter.¹⁷

9. The purpose of an overrun entitlement period is to encourage transportation customers to monitor their usage more closely, requiring them to balance their gas requirements daily rather than monthly.¹⁸ For example, during a declared “thirteen percent overrun entitlement” period, a

¹¹ *Id.* at 4:3–6.

¹² *Id.* at 4:6–8.

¹³ *Id.* at 18:4–9.

¹⁴ *Id.* at 19:4–9.

¹⁵ *Id.* at 20:3–10.

¹⁶ *Id.* at 11:12–14.

¹⁷ *Id.* at 11:12–19.

¹⁸ *Id.* at 8:4–6.

customer that takes fifteen percent more natural gas than it has nominated would receive an overrun entitlement imbalance charge for the two percent of gas used above the declared entitlement. Customers that exceed their overrun entitlement are subject to charge pursuant to Cascade's Schedule 663, which states:

The overrun charge that will be applied during any overrun entitlement period will equal the greater of \$1.00 per therm or 150% of the highest midpoint price for the day at NW Wyoming Pool, NW south of Green River, Stanfield Oregon, NW Canadian Border (Sumas), Kern River Opal, or El Paso Bondad supply pricing points (as published in Gas Daily)¹⁹

As shown above, the minimum charge for an overrun entitlement charge is \$1/therm or \$10/dth compared to the [REDACTED] charged by Cascade using Green River pricing.²⁰ Further, an overrun entitlement is a less severe operating condition than a curtailment. The charge for violating a curtailment order under most Washington gas utility tariffs is some variation of \$50/dth for the first 2 hours and \$100.00/dth thereafter compared to the assessed overrun entitlement charge of [REDACTED] based on Green River pricing.²¹ Cascade, however, uses the same charge for both a curtailment and an overrun entitlement.

10. Cascade's Schedule 663 mirrors Northwest Pipeline's tariff.²² Under that tariff, Cascade is responsible to Northwest Pipeline for imbalances, including those attributable to its own transportation customers.²³ The purpose of this mirrored language is to pass through to the responsible customer the cost of an overrun entitlement that Cascade owes to Northwest Pipeline. However, due to this mirrored language, there exists the real possibility that, as is the

¹⁹ Robbins, Exh. CR-3, Schedule 663 at 9.

²⁰ Mullins, Exh. BGM-1T at 16:9–11.

²¹ *Id.* at 10:9–11:8.

²² *Id.* at 7:17–20.

²³ *Id.* at 8:16–18.

case here, these Northwest Pipeline market references are used to apply an overrun entitlement charge when Cascade itself does not owe Northwest Pipeline any overrun entitlement charge. In such instances, while an overrun entitlement charge may still be appropriate, the market reference used to determine the charge is divorced from the local market realities of Cascade's system. This construct usually does not present a problem. But in a case where there is extreme market dysfunction on part of the Northwest Pipeline system, and no actual market exposure to the utility, an overrun entitlement charge assessed may be unreasonable.

11. Despite its best intentions, Tree Top did not perfectly forecast its daily gas requirements during the entitlement period over the 2021 Presidents' Day weekend. During the declared period in February 2021, Tree Top exceeded its entitlement primarily on February 15 and 16.²⁴ While Tree Top did exceed its overrun entitlement tolerance at certain plants and certain days, Tree Top used [REDACTED] dth less than it supplied during the Entitlement Period and [REDACTED] dth less than its authorized Level 2 108% entitlement amount.²⁵ In other words, Tree Top delivered more gas than it used over the holiday weekend. Strictly applying Schedule 663, Cascade assessed an overrun entitlement charge based off the dysfunctional prices at Green River caused at least in part by the Texas Energy Crisis. Those charges amounted to \$196,663.96, or "12.6 times the cost of acquiring a similar amount of gas at the Sumas market over the same period and 67 times Cascade's actual costs."²⁶ The charge assessed for the overrun entitlement charge was [REDACTED] based on Green River pricing.²⁷ Comparing this charge to the minimum overrun entitlement charge of \$10/dth in Schedule 663, or the maximum charge for violating a more

²⁴ *Id.* at 15:7–8.

²⁵ *Id.* at 14:1–4.

²⁶ *Id.* at 18:8–10.

²⁷ *Id.* at 16:9–11.

severe curtailment order of \$100.00/dth in other Washington gas utility tariffs, demonstrates that this charge is excessive and not fair, just and reasonable.

12. To be clear, the market price at Sumas was also sufficiently inflated during this time even though it was not experiencing the volatility and dysfunction like the Green River trading hub experienced, due to the unique characteristics of gas markets in the northwest.²⁸ Accordingly, using the Sumas hub to base an overrun entitlement charge is a reasonable alternative and more consistent with any actual, or potential, costs Tree Top's imbalance imposed on Cascade.

13. After receiving the invoice containing the overrun entitlement charges, Tree Top attempted to work with Cascade to discuss the reasonableness of modifying the charges to more accurately reflect local market prices.²⁹ This was in part because, as Tree Top has since confirmed, Cascade did not actually purchase and was not exposed to any gas from the Green River market.³⁰ Cascade did not make any daily gas purchases in February 2021³¹ and was using stored gas to manage its daily load requirements for its core customers.³² As a result, neither Cascade nor its customers were exposed to the dysfunctional prices at Green River or suffered harm due to Tree Top's overrun—especially since Tree Top delivered more gas than it consumed over the holiday weekend.³³ Cascade declined to work with Tree Top to address these issues, prompting Tree Top to file this Complaint.

²⁸ *Id.* at 21:4–7.

²⁹ Tree Top's Response in Opposition to Cascade's Motion for Summary Judgment at ¶8.

³⁰ *Id.* at 26:19–21 (Cascade's Amended Answer and Affirmative Defenses to Tree Top Inc.'s Complaint ¶ 15).

³¹ Mullins, Exh. BGM-1T at 26:12–15.

³² Robbins, Exh. CR-1RT at 27:10–14.

³³ Mullins, Exh. BGM-1T at 14:1–15:2.

14. On September 24, 2021, Tree Top filed a Complaint seeking reparations under RCW 80.04.220 for an overrun entitlement charge paid and collected by Cascade. The basis of Tree Top's reparations claim is not that it owed no entitlement charge or that Cascade unlawfully applied its tariff, but that the amount of the charge as calculated by Cascade was not fair, just and reasonable. The amount of the entitlement charge was unreasonable because it was based on market prices during an extreme weather event at a dysfunctional trading hub in Wyoming to which Cascade had no exposure.

III. STATEMENT OF FACTS

15. Tree Top respectfully requests that the Commission order Cascade to modify the overrun entitlement charge issued to Tree Top using the Sumas market hub. Using the Sumas market hub will produce an overrun entitlement charge that is appropriate considering the facts of this case, without being overly punitive.

16. The undisputed facts in this case are as follows:

- a. Tree Top is a food processing manufacturer with several locations in Washington and employs approximately 600 people in Washington.³⁴
- b. Tree Top is a transportation customer of Cascade taking service under Cascade Schedule 663.³⁵
- c. As a transportation customer of Cascade, Tree Top is responsible for securing its own natural gas commodity through a gas marketer—Cost Management Services (CMS).³⁶ Cascade does not provide natural gas service to Tree Top.
- d. In response to forecast weather conditions and supply disruptions in the Permian Basin, on Wednesday February 10, 2021, Northwest Pipeline issued a Level II Overrun Entitlement for all points of receipt north of the Kemmerer Compressor

³⁴ *Id.* at 4:2–8.

³⁵ *Id.* at 1:9–10.

³⁶ *Id.* at 5:9–11.

station beginning Friday, February 12, 2021, through Tuesday February 16, 2021.³⁷ Shortly thereafter, Cascade followed suit and declared an Overrun Entitlement for its transportation customers pursuant to Schedule 663 of its tariff.³⁸

- e. Prior to the Overrun Entitlement declaration, Cascade had communicated to Tree Top's market agent, CMS regarding the likelihood of an Overrun Entitlement over the Presidents' Day weekend.³⁹ Accordingly, on Monday February 8, 2021, CMS requested updated usage estimates from Tree Top for the weekend, in order to procure additional gas supplies for the entitlement period if necessary.⁴⁰ Following the formal declaration of the Overrun Entitlement by Cascade, each of Tree Top's facilities provided updated usage estimates, or confirmed their existing estimates based on the production schedule available at that time.⁴¹ CMS subsequently procured gas for Tree Top and its other customers and modified Tree Top's nomination schedules in accordance with the revised gas procurement.⁴²
- f. The Overrun Entitlement period at issue occurred over the 2021 Presidents Day weekend.⁴³
- g. Tree Top was unable to perfectly forecast its *daily* gas requirements during the entitlement period over the holiday weekend. Tree Top delivered more gas than it used over the holiday weekend.
- h. While Tree Top did exceed its entitlement at certain plants and certain days, Tree Top used [REDACTED] dth *less* than it supplied during the Entitlement Period and [REDACTED] dth *less* than its authorized Level II 108% entitlement amount.⁴⁴
- i. Notwithstanding the fact that Tree Top delivered more gas to Cascade than it used during the Overrun Entitlement period, Cascade assessed an overrun entitlement to

³⁷ See Mullins, Exh. BGM-4 at 15–16 (Cascade's Resp. to Tree Top DR 21).

³⁸ Mullins, Exh. BGM-1T at 11:12–19.

³⁹ *Id.* at 12:4–5.

⁴⁰ *Id.*

⁴¹ *Id.* at 12:6–9.

⁴² *Id.* at 12:9–10.

⁴³ The typical nomination deadline to purchase day ahead gas for a transportation customer at 9:00 AM PT on the day before gas flows. On a weekend, however, the deadline is Friday at 9:00 AM for the subsequent three days: Saturday, Sunday, and Monday, and in the case of a holiday weekend, the deadline is Friday at 9:00 AM for the subsequent four days: Saturday, Sunday, Monday, and Tuesday. Thus, all day-ahead gas transactions for February 13, 2021 through February 16, 2021 had to be completed by 9:00 AM on Friday February 12, 2021. Between mid-day Wednesday February 10, 2021 and Friday morning February 12, 2021, there was limited time to procure gas supplies for the Entitlement Period for the long weekend.

⁴⁴ *Id.* at 15:1–4.

Tree Top in the amount of \$198,845 based on the South of Green River NW (“Green River”) market hub.⁴⁵

- j. The highest published mid-point price on Friday February 12 was ██████/dth at the Opal market, resulting in an entitlement rate of ██████/dth after the 150% adder.⁴⁶ Over the holiday weekend, however, the price jumped significantly. The highest published mid-point price over the period Saturday February 13 through Tuesday February 16 increased to ██████/dth based on the Green River market, resulting in an entitlement rate of ██████/dth after the 150% adder.⁴⁷ The Green River market was seeing record trades along with accusations of price gouging.
- k. The minimum penalty for an overrun entitlement in Schedule 663 is \$1/therm or \$10/dth.⁴⁸
- l. An overrun entitlement is a less severe operating condition than a curtailment. The penalty for violating a curtailment order under other Washington gas utilities’ tariffs is some variation of \$50/dth for the first two hours and \$100.00/dth thereafter compared to the assessed overrun entitlement charge of \$179.70/dth based on Green River pricing.⁴⁹
- m. Cascade did not purchase gas from Green River, nor was it exposed to Green River prices over the time period in question.⁵⁰
- n. Cascade was not assessed Overrun entitlement charges from NW Pipeline.⁵¹
- o. Cascade’s sales customers were not exposed to Green River prices and were not harmed by Tree Top’s overrun entitlement.⁵²

///

///

///

///

⁴⁵ *Id.* at 16:4–6.

⁴⁶ *Id.* at 16:9–11.

⁴⁷ *Id.* at 16:11–15.

⁴⁸ Robbins, Exh. CR-3, Schedule 663 at 9.

⁴⁹ Mullins, Exh. BGM-1T at 10:9–11:8.

⁵⁰ Robbins, Exh. CR-1RT at 7:14–16.

⁵¹ Mullins, Exh. BGM-1T at 24:13–25:2

⁵² Robbins, Exh. CR-1RT at 7:14–16.

IV. ARGUMENT

A. The Overrun Entitlement Charges Assessed to Tree Top Using the Green River Market Hub Were Excessive and Not Just, Fair, Reasonable or Sufficient.

17. The Commission applies a just, fair, reasonable, and sufficient standard when evaluating the permissibility of charges made by gas utilities. Under RCW 80.28.010, “[a]ll charges made, demanded or received by any gas company, electrical company, wastewater company, or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.”⁵³ The Commission has defined this standard as:

“fair to customers and to the Company’s owners; just in the sense of being based solely on the record developed in the proceeding following principles of due process of law; reasonable in light of the range of possible outcomes supported by the evidence and; sufficient to meet the needs of the Company to cover its expenses and attract necessary capital on reasonable terms”⁵⁴

18. Overrun entitlement charges are not an exception to the just, fair, reasonable, and sufficient standard. While Cascade has frequently equated overrun entitlement charges to a “penalty,”⁵⁵ that characterization, whether accurate or not, does not mean Cascade is allowed to charge rates that are not reasonable to exemplify and penalize its customers. Overrun entitlement charges are still made in connection with a service, and therefore, must be evaluated under the same fair, just, reasonable, and sufficient standard as Cascade’s general rates.

⁵³ RCW 80.28.010.

⁵⁴ *WUTC v. Puget Sound Energy*, Dockets UE-090704 and UG-090705 (consolidated) Order 11 ¶ 18 (Apr. 2, 2010).

⁵⁵ Mullins, Exh. BGM-1T at 25:14–26:3.

19. In this case, the service at issue is Cascade’s role as an intermediary between Northwest Pipeline and its transportation customers with respect to overrun entitlements. The overrun entitlement charges Cascade assessed to Tree Top were based on the Northwest Pipeline declared Level II Overrun Entitlement. Under the Northwest Pipeline tariff, Cascade has an obligation as a Receiving Party, to cover potential overrun entitlement charges assessed by Northwest Pipeline, including those caused by transportation customer imbalances.⁵⁶ Thus, the overrun entitlement charges are designed to compensate Cascade for providing that intermediary service.
20. When evaluating the reasonableness of a charge, the charge must inherently be measured against the underlying service provided. Thus, the reasonableness of the charges to Cascade must be measured against Cascade’s role in covering potential overrun entitlement charges assessed by Northwest Pipeline, which are specifically caused by the transportation customer.
21. In this case, however, there is agreement that neither Cascade nor its core gas customers incurred any incremental cost in connection with the entitlement overruns of Tree Top.⁵⁷ Due in part to transportation customers, including Tree Top, delivering substantially more gas than consumed during the declared Overrun Entitlement, Cascade did not incur any overrun entitlement charges from Northwest Pipeline.⁵⁸ Cascade did not purchase any gas in daily markets during the overrun entitlement, nor at all in February 2021.⁵⁹ Thus, the overrun entitlement charges Cascade assessed were entirely devoid of any costs that it actually incurred with respect to the service it was providing.

⁵⁶ *Id.* at 7:12–20.

⁵⁷ Robbins, Exh. CR-1RT at 28:12–13.

⁵⁸ Mullins, Exh. BGM-1T at 29:8–31:10.

⁵⁹ *Id.* at 23:1–2.

22. Tree Top is not, however, requesting that it be absolved of all overrun entitlement charges. Rather, Tree Top is requesting that the Commission consider whether the formula Cascade applied, which relied on a dysfunctional market hub in Wyoming, resulted in a reasonable outcome that was consistent with the purpose of the tariff under these circumstances. The purpose of the overrun entitlement provision of the tariff is to encourage customers to balance gas on a daily basis, rather than a monthly basis, in certain operational conditions.⁶⁰ An overrun entitlement is a less severe operating condition than a curtailment, but in this case even using a curtailment charge contained in Puget Sound Energy, Avista or NW Natural tariffs would have resulted in a lesser charge than the one Cascade imposed.⁶¹ Considering this context, using the Green River market as the basis for the charge was excessive and not necessary to encourage customers to balance gas on a daily basis—especially considering that Tree Top delivered more gas than it used over the holiday weekend which benefited Cascade and its customers.

23. It is undisputed that the Green River market spiked to excessive levels over the Presidents' Day weekend as a result of the Texas Energy crisis, an event which did not impact Cascade or its core gas customers.⁶² The intent of the tariff that applies 150% of a market rate loses all meaning when it is applied to a broken market that has no relationship with any real cost to the utility or its customers. Therefore, it is appropriate for the Commission to direct Cascade to assess the 150% overrun entitlement charge based on a market that more reasonably represents the cost of Tree Top's imbalance during the Overrun Entitlement.

⁶⁰ *Id.* at 8:4–6.

⁶¹ *Id.* at 11:6–8.

⁶² Robbins, Exh. CR-1RT at 25:17–26:21.

24. The overrun entitlement charges issued by Cascade were over 12.6 times the cost of acquiring a similar amount of gas at the Sumas market over the same period and approximately 67 times Cascade's actual imbalance costs.⁶³ Assessing a charge that is 6700% Cascade's actual costs is excessive, even if viewed as a punitive measure, and not necessary to provide an incentive for customers to balance on a daily basis, particularly when the overrun entitlement charge rate was designed to be 150% of the prevailing market rate. The enumerated list of markets in Schedule 663, including the Green River market, may make sense in the context of the Northwest Pipeline tariff, as Northwest Pipeline must purchase gas to balance its system across its entire pipeline footprint, from Southern Colorado to the Canadian border.⁶⁴ Those markets, however, are not reasonable in the context of the unique circumstances of this case.⁶⁵ Cascade was neither assessed overrun entitlement charges based on the Green River market nor otherwise exposed to that market.

25. The charge assessed for the overrun entitlement was [REDACTED]/dth based on Green River pricing. Comparing this charge to the minimum overrun entitlement charge of \$10/dth in Schedule 663, or the charge for violating a more severe curtailment order of \$50/dth for the first 2 hours and \$100.00/dth thereafter in Puget Sound Energy's tariffs, shows that this charge is excessive and not fair, just and reasonable. Accordingly, using the Green River market hub in the overrun entitlement charge calculation produces an unreasonable outcome. Tree Top respectfully requests that the Commission order Cascade to apply a charge based on 150% of the

⁶³ Mullins, Exh. BGM-1T at 28:3–29:5.

⁶⁴ *Id.* at 23:6–15.

⁶⁵ *Id.* at 23:17–24:3.

regional markets to which Cascade was exposed, as proposed in the Direct Testimony of Tree Top witness Mullins and shown in the confidential table below.⁶⁶

**Confidential Table 1
Proposed Overrun Entitlement Charges to Tree Top**



26. Cascade attempts to distract from the actual issue before the Commission, arguing that the Commission lacks authority to provide the requested relief,⁶⁷ the excessive charge it assessed Tree Top based on the dysfunctional Green River market was reasonable to curb inappropriate behavior, and that Tree Top had ample opportunity to modify its consumption.⁶⁸ But, while Tree Top disputes Cascade’s arguments and characterization of these issues as described below, they are nonetheless beside the point. Even though Tree Top delivered more gas than it nominated over the holiday weekend benefiting Cascade and Cascade’s customers, Tree Top does not

⁶⁶ *Id.* at 32:7–33:9.

⁶⁷ Blattner, Exh. LB-1T at 24:3–4.

⁶⁸ Robbins, Exh. CR-1RT at 39:6–10.

dispute that it exceeded its overrun entitlement on Monday February 15, 2021, and Tuesday February 16, 2021, at certain facilities. Rather, based on the facts involved here, Tree Top requests that the overrun entitlement charge be assessed using the Sumas market hub rather than based on the broken Green River market.⁶⁹

27. At the heart of the Commission's duties is to determine just and reasonable rates.⁷⁰ Tree Top asks the Commission to consider whether an overrun entitlement charge of \$196,663.96, based off dysfunctional market prices that Cascade was not exposed to,⁷¹ is fair, just and reasonable. Tree Top proposes that, in this unique instance, basing the overrun entitlement charge off prices at a regional trading hub, specifically Sumas, would yield a just and reasonable outcome. As shown in Confidential Table 1 and 4 in Mr. Mullins Direct Testimony, the prices at Sumas were still inflated during this time period.⁷² Accordingly, using the Sumas pricing would still send to Tree Top the signals intended by Schedule 663 while mitigating the disproportionate harm caused by its strict and unreasonable application.

B. The Commission Has Authority To Provide The Requested Relief.

28. Cascade continues to question the Commission's ability to provide the requested relief in this matter. Cascade's witness argues "I am not aware of any precedent in which the Commission relied on its authority under RCW 80.04.220 to grant a complainant the type of relief Tree Top is seeking in this case."⁷³ Cascade not only ignores the plain language contained in RCW 80.04.220, it also ignores a prior settlement of an overrun entitlement penalty approved

⁶⁹ Mullins, Exh. BGM-1T, Confidential Table 1 and 4.

⁷⁰ RCW 80.28.020.

⁷¹ Mullins, Exh. BGM-4R at 4 (Cascade's Resp. to Tree Top DR 4).

⁷² *Id.*

⁷³ Blattner, Exh. LB-1T at 24:3-4.

by the Commission on facts similar to that presented here.⁷⁴ The Commission clearly has the authority to provide Tree Top's requested relief under RCW 80.04.220. RCW 80.04.220 provides:

When complaint has been made to the commission concerning the **reasonableness** of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.

29. Cascade argues that the Commission must enforce and apply Cascade's overrun entitlement charge because the calculation is in Cascade's tariff. Cascade's view that the Commission must adhere strictly to the wording of the tariff, even if it produces a patently unreasonable result, is untenable and ignores RCW 80.28.010.⁷⁵ The unique circumstances of this case, including the extraordinary impacts of the Texas Energy crisis on Green River and other extra-regional markets, led to an unreasonable result. These kinds of unprecedented market conditions were not considered when the overrun entitlement language was developed by Cascade. Accordingly, it is within the Commission's authority to calculate the overrun entitlement charges in a reasonable manner. In fact, this is precisely the reason why the Commission is empowered to order reparations: *for instances when a lawfully-applied tariff yields unreasonable results.*

⁷⁴ *Seattle Children's Hospital et al., vs Puget Sound Energy*, Docket UG 190857, Order 04 (Approving Settlement without Condition).

⁷⁵ Robbins, Exh. CR-1RT at 28:13–17.

30. Cascade also raises concerns about increased litigation before the Commission and potential violation of the filed rate doctrine.⁷⁶ These concerns are unfounded. First, *Courts* invoke the filed rate doctrine to preserve the *Commission's* exclusive jurisdiction over the reasonableness of rates, prohibiting plaintiffs from using common-law claims and defenses to avoid paying commission-approved rates.⁷⁷ The filed rate doctrine does not prevent the Commission from examining the reasonableness of rates, which is the only thing Tree Top is asking the Commission to do.⁷⁸ The filed rate doctrine was already raised by Cascade in its answer and Tree Top was required to provide a detailed response.⁷⁹ Second, Tree Top brings this complaint before the Commission under unique circumstances; it is highly unlikely that transportation customers would waste significant resources and time challenging charges lawfully assessed during normal conditions. Indeed, Cascade has made it clear that rather than working with its customers to resolve disputes, Cascade will litigate. Tree Top has had to defend against two separate motions to dismiss before having the opportunity to discuss the merits of this case. Furthermore, what Cascade fails to recognize is the fact that RCW 80.04.220 *already provides customers the ability to challenge the reasonableness of charged rates*. Should the Commission agree that an overrun entitlement charge based off dysfunctional market conditions is unreasonable, the status quo will remain unchanged. The Commission will have simply exercised its power to determine the reasonableness of rates, something it regularly does. The Commission should not fear the specter of increased litigation that Cascade conjures simply due to the exercise of its statutory powers.

⁷⁶ Blattner, Exh. LB-1T at 23:8–22.

⁷⁷ *Tenore v. AT&T Wireless Service*, 136 Wash.2d 322, 331–32, 962 P.2d 104, 108 (1998).

⁷⁸ RCW 80.04.220.

⁷⁹ Tree Top's Resp. in Opposition to Cascade's Motion to Dismiss at ¶¶ 11–15.

C. Tree Top’s Did Not Engage in Inappropriate Behavior.

31. Cascade seeks to distract from the actual issue in this case and attempts to focus the Commission’s attention on Tree Top’s behavior. Effectively, Cascade’s argument is that Tree Top’s behavior somehow justified Cascade in charging unreasonable and excessive rates.⁸⁰ Such arguments, however, distort the issue presented to the Commission. Instead of focusing on whether the charge assessed was fair, just, and reasonable, Cascade tries to paint Tree Top as a bad actor, a repeat offender, and seems to imply that Tree Top was attempting to game the system to use less expensive gas owned by other customers for its food production facilities. The fact that Tree Top delivered more gas than it used over the holiday weekend undermines all these baseless arguments. Tree Top’s nominations and gas usage over the holiday weekend are shown in the confidential table below:

///

///

///

///

///

///

///

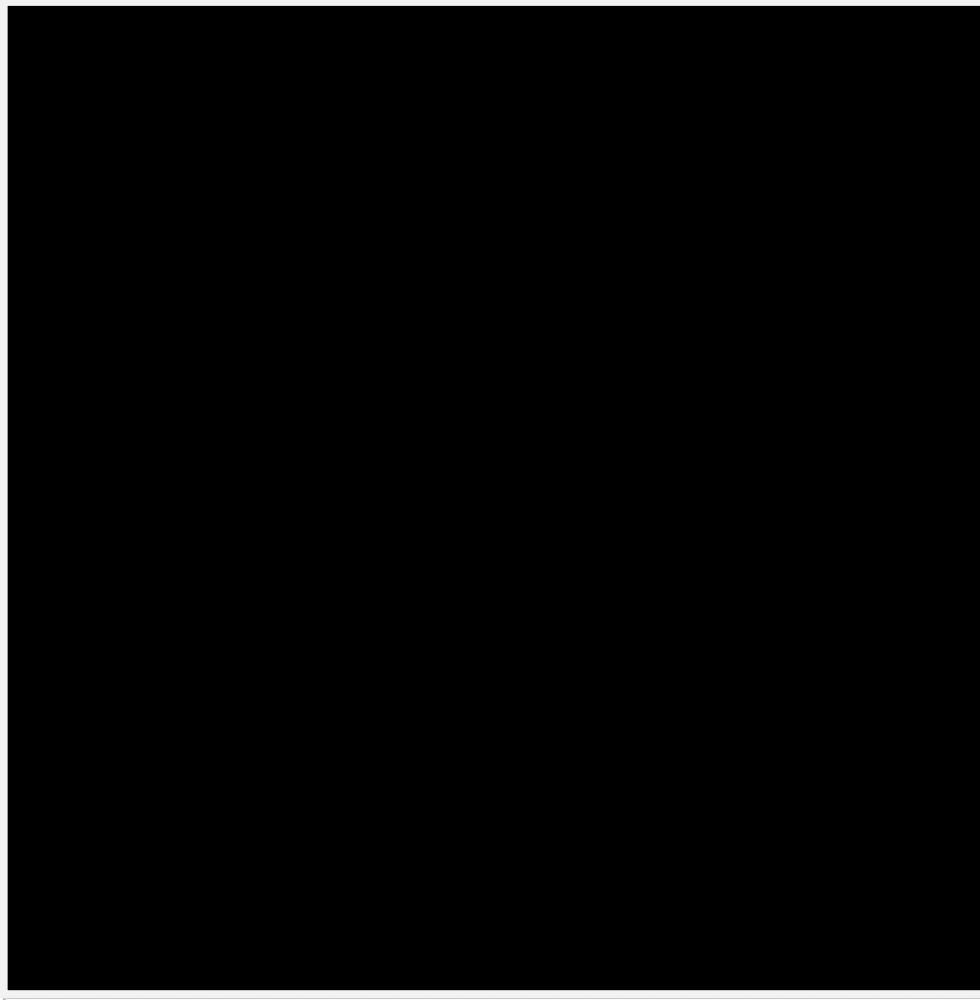
///

///

///

⁸⁰ Robbins, Exh. CR-1RT at 30:3–32:5.

Confidential Table 2⁸¹
Tree Top Entitlement Overruns February 2021 (dth)



32. As shown in the table above, while Tree Top did exceed its entitlement at certain plants and certain days, Tree Top used [REDACTED] dth *less* than it supplied during the Entitlement Period and [REDACTED] dth *less* than its authorized Level II 108% entitlement amount. Indeed, Cascade recognized that the behavior of transportation customers, such as Tree Top, and their marketers contributed to Cascade avoiding costs during the Overrun Entitlement, noting that “CMS and other marketers

⁸¹ Mullins, Exh. BGM 1T, p. 14

delivered more gas to Cascade’s system than their transportation customers used during the February 2021 Entitlement Period.”⁸² Notwithstanding, Cascade continues to insist that the excessive charges were reasonable and appropriate to curb Tree Top’s so called inappropriate behavior.

33. Cascade also makes several statements that Tree Top had “numerous opportunities to update its nominations throughout the event.”⁸³ Notwithstanding the fact that this may technically be true, simply changing a nomination without securing the associated gas supply is meaningless. Indeed, Cascade’s arguments are inconsistent with the reality of how a transportation customer procures its gas requirements. While it is true Tree Top’s marketer has several opportunities to update nominations after the fact, it cannot do so if it did not provide corresponding gas supplies in the first place.⁸⁴ All of Tree Top’s gas is purchased in day ahead markets.⁸⁵ Therefore, Tree Top’s gas supplies for the entire President’s Day weekend—Saturday February 13, 2021 through Tuesday, February 16, 2021—had to be secured by 9:00 AM on Friday February 12, 2021.⁸⁶ Any potential nominations changes that occur after the fact are therefore limited to gas supplies that have already been procured.⁸⁷ Given the timing of the February 2021 Overrun Entitlement, there were a large number of nomination changes being made over a short period of time, so it is possible that some of those were not entered until the

⁸² Blattner, Exh. LB-1T at 17:20–18:5.

⁸³ Robbins, Exh. CR-1RT at 4:2–3.

⁸⁴ Mullins, Exh. BGM-7T at 7:12–8:5.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

weekend, as Cascade suggests.⁸⁸ Tree Top needed to nominate for the entire weekend by 9:00 AM on Friday February 12, 2021 in order to secure the associated gas supply.⁸⁹

34. Further, Tree Top is not contesting the fact that it had imbalances during the Entitlement Period, nor is it contesting responsibility to balance daily during an overrun entitlement. Rather, Tree Top is arguing that the 150% overrun entitlement charges be calculated based on market rates that are reasonable, based on the cost of the imbalance gas in regional markets, rather than the dysfunctional Green River extra-regional market to which Cascade was not exposed. Cascade never established that using the excessive Green River market rates was reasonable except as a punitive measure meant to exemplify its misplaced view of Tree Top's behavior. This line of reasoning, however, is both improper and irrelevant. Tree Top did not behave in an inappropriate manner, and the Commission does not evaluate the reasonableness of rates based on their punitive or exemplary effects. Rates are deemed reasonable in relation to the cost of providing service.

⁸⁸ *Id.*

⁸⁹ As Mr. Mullins explains in his direct testimony:

“The fact that the Overrun Entitlement occurred over Presidents Day weekend was a complicating factor in this situation. The typical nomination deadline to purchase day ahead gas for a transportation customer is 9:00 AM PT on the day before gas flows. On a weekend, however, the deadline is Friday at 9:00 AM PT for the subsequent three days: Saturday, Sunday, and Monday, and in the case of a holiday weekend, the deadline is Friday at 9:00 AM PT for the subsequent four days: Saturday, Sunday, Monday, and Tuesday. Thus, all day-ahead gas transactions for February 13, 2021 through February 16, 2021 had to be completed by 9:00 AM on Friday February 12, 2021. Between mid-day Wednesday February 10, 2021, and Friday morning February 12, 2021, there was limited time to procure gas supplies for the Entitlement Period for the long weekend.”

Id. at 13:8–17.

D. Tree Top’s Overrun Entitlement Charges Should Be Based On A Reginal Trading Hub That Provides The Proper Pricing Signal To Customers.

35. The only issue the Commission needs to resolve is whether the market Cascade used to assess the 150% overrun entitlement charge was fair, just, and reasonable. Tree Top does not argue that it should not be required to pay *any* charge but that, in this specific instance, the charge reflect the purpose of an overrun entitlement and the market realities it is meant to be based on. Cascade argues that regardless of what was happening at the Green River market, that the charge was reasonable because it was based on Cascade’s filed tariff.⁹⁰ This argument is without merit and ignores RCW 80.28.010. Cascade seems to imply that no matter how high, dysfunctional, or broken the Green River market becomes, that because Green River is identified in the list of markets in Cascade’s tariff, using the Green River market as the basis for the overrun entitlement charge must be just and reasonable.

36. Cascade did not purchase gas from Green River nor any other market to cover its customers’ entitlements during February 2021.⁹¹ The fact that Cascade’s Schedule 663 mirrors the same formula for overrun entitlements that Northwest Pipeline applies may makes sense when Northwest Pipeline charges Cascade an overrun charge to cover its customers’ purchases. In those cases, Cascade merely passes on Northwest Pipeline charges to the transportation customer responsible for them. However, when Cascade is not charged an overrun charge by Northwest Pipeline, applying that same formula, especially when that formula references markets that Cascade is not exposed to, is not necessarily just and reasonable. This, however,

⁹⁰ Blattner, Exh. LB-1T at 6:3–5.

⁹¹ *Id.* at 25:18–20.

does not create a problem in most cases. This only becomes an issue when one or more markets in the tariff become dysfunctional.

37. Tree Top agrees that overrun entitlement charges are “meant to create an incentive for Transportation Service Customers to align their gas consumption with their gas nominations during constrained periods.”⁹² Further, Tree Top is not arguing that, simply because neither Cascade nor its customers suffered harm due to Tree Top’s overrun, it should not be required to pay a charge; in other words, Tree Top is not arguing “no harm, no foul.”⁹³ The only thing Tree Top is requesting is that the charge assessed be *reasonable* as required by RCW 80.28.010.

38. Cascade argues that Tree Top should not be allowed to revise the charge based off its own preferred pricing point.⁹⁴ But Tree Top does not argue that it, or any other transportation customer, should be allowed to make such an election in violation of Schedule 663 whenever it is convenient for them. Tree Top argues that, *in this specific instance*, where an unprecedented winter storm caused market dysfunction in another part of the country, strict application of the enumerated markets in the Schedule 663 overrun entitlement provision is unreasonable. Tree Top recommends Sumas as a pricing point because it is a logical, regional trading hub for the Pacific Northwest and the market that Cascade was exposed to during the Overrun Entitlement.⁹⁵

///

///

///

///

⁹² *Id.* at 21:6–8.

⁹³ *Id.* at 20:20.

⁹⁴ *Id.* at 25:8–11.

⁹⁵ Mullins, Exh. BGM-1T at 32:15–33:4.

E. It Is Reasonable and Consistent with Cascade’s Tariff To Net the Daily Overrun Entitlements of Tree Top’s Four Facilities.

39. In Opening Testimony, Tree Top also requested that daily nominations of its four facilities be netted when calculating its overrun entitlement charges.⁹⁶ This treatment is justified because Tree Top had oversupplied some of its plants, while undersupplying others during the Overrun Entitlement. This treatment is justified based on the terms of Cascade’s tariff and is consistent with the way that overrun entitlement charges are assessed to Cascade from Northwest Pipeline.

40. In Cascade’s Schedule 663, Overrun Entitlements are not applied on a meter-by-meter basis. They are applied to each customer. The tariff States “[c]ustomers served under this schedule shall pay Company for all unauthorized overrun or underrun quantities that exceed the percentage specified by the Company in its declared entitlement.”⁹⁷ A customer is subsequently defined in Cascade Rule 2 as “[a]ny person, corporation, partnership, government agency, or other entity that applied for, has been accepted for, and is currently receiving natural gas service.”⁹⁸ A customer is not defined in Cascade’s Tariff as a single point of delivery; a customer represents the entity being served. Since the overrun entitlements apply at the customer level, not the meter level, it is consistent with Cascade’s tariff to combine the overrun entitlements for all of a customer’s facilities when assessing overrun entitlement charges, as Tree Top Requests.

41. This treatment is also consistent with the way that overrun entitlement charges impact Cascade from a cost perspective. Netting the entitlement overruns for all points of delivery on

⁹⁶ *Id.* at 3:6–9.

⁹⁷ Robbins, Exh. CR-3, Schedule 663 at 9 (emphasis added).

⁹⁸ Cascade Tariff Substitute Seventh Revision Sheet No. 6.

Cascade's system is reasonable because that is the way that Northwest Pipeline assesses overrun entitlement charges to Cascade.⁹⁹ Northwest Pipeline assesses overrun entitlement charges on the aggregate nominations for all delivery points on a Receiving Party's system. The overruns are not calculated individually for each delivery point on Cascade's lateral. In fact, the fact that the entitlement overruns are netted, with transportation customers supplying more than used, is one of the reasons why Cascade was able to avoid paying any charges to Northwest Pipeline.

42. Cascade's statement that this approach "ignores the physical realities of Cascade's natural gas distribution system"¹⁰⁰ is also irrelevant to this proceeding because the physical limitations Cascade identified in testimony were not implicated in the Overrun Entitlement. The Overrun Entitlement impacted all delivery points on Cascade's system and any overrun entitlement charges that would have potentially been assessed to Cascade would have been based on the net overrun entitlement for its entire system, not the sum of the individual delivery points. Cascade's objection to this approach is also inconsistent with its Tariff that applies overrun entitlements at the Customer level, not at the point of delivery. Cascade appears to argue for strict application of its tariff when it is in its favor, and a more flexible interpretation when it is not.

F. This Commission Has Approved A Settlement Reducing Overrun Entitlement Charges To A More Reasonable Level.

43. Finally, reconsideration of the reasonableness of an overrun entitlement charge is not without precedent with this Commission. The Commission itself approved a settlement between Puget Sound Energy and a group of customers, reducing overrun entitlement charges from

⁹⁹ Mullins, Exh. BGM-7T at 8:6–9:10.

¹⁰⁰ Robbins, Exh. CR-1RT at 36:10–11.

\$100/dth to \$10/dth.¹⁰¹ Even though only a handful of customers brought the complaint, Puget Sound Energy applied the settled rate to all similarly situated customers.¹⁰² While Cascade alleges the Puget Sound Energy case was entirely different—Cascade is simply wrong. The Puget Sound Energy case involved an overrun entitlement charge assessed to Puget Sound Energy’s transportation customers—which is analogous to the situation presented here. Similarly, the Idaho Public Utility Commission approved a settlement reducing an overrun entitlement charge when neither the utility nor its customers were harmed by a customer’s overrun entitlement.¹⁰³ While Cascade disputes the particulars of these cases,¹⁰⁴ it is undisputed that the power to consider the reasonableness of charges and order reparations is proper and fully within the Commission’s authority despite Cascade’s suggestion to the contrary.

V. CONCLUSION

44. The only issue before the Commission is whether the overrun entitlement charges assessed to Tree Top were just and reasonable. Cascade assessed Tree Top a total of \$196,663.96 in overrun entitlement charges, or 12.6 times the cost of acquiring a similar amount of gas at Sumas and 67 times Cascade’s actual costs. Tree Top acknowledges that Cascade strictly and lawfully applied Schedule 663, but simply argues that such strict application in this instance results in unjust and unreasonable rates—especially considering that Tree Top delivered more gas than it used over the holiday weekend. Tree Top also requested that daily nominations of its

¹⁰¹ Mullins, Exh. BGM-1T at 31:16–19 (*Seattle Children’s Hospital et al., vs Puget Sound Energy*, Docket UG 190857, Order 04 (Approving Settlement without Condition)).

¹⁰² *Id.*

¹⁰³ *Id.* at 31:22–23:2 (Avista Corporation’s Petition for Approval of a Settlement Agreement Between Clearwater Paper Corporation and Avista Corporation, AVUG2002, Order 34712, 2020 WL 3630529, at *3 (Jun 30, 2020, Idaho P.U.C.)).

¹⁰⁴ Blattner, Exh. LB-1T at 24:6–25:11.

four facilities be netted when calculating its overrun entitlement charges.¹⁰⁵ This treatment is consistent with Cascade's tariffs. Accordingly, Tree Top asks the Commission to exercise its inherent and statutory powers to determine a just and reasonable rate in this instance and order Cascade to issue appropriate reparations with interest from the date of Tree Top's payment, June 24, 2021.

DATED: July 13, 2022.

Respectfully submitted,



Chad M. Stokes, WSB 37499, OSB 004007
Cable Huston LLP
1455 SW Broadway, Suite 1500
Portland, OR 97201
Telephone: (503) 224-3092
E-mail: cstokes@cablehuston.com

Attorneys for Tree Top, Inc.

¹⁰⁵ *Id.* at 3:6–9.