

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matters of

COST MANAGEMENT SERVICES, INC.,
Complainant,

v.
CASCADE NATURAL GAS CORPORATION,
Respondent.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.
CASCADE NATURAL GAS CORPORATION,
Respondent.

Docket No. UG-061256

Docket No. UG-070332

**RESPONSE OF COST
MANAGEMENT SERVICES IN
OPPOSITION TO CASCADE
NATURAL GAS CORPORATION'S
MOTION FOR CLARIFICATION OF
ORDER NO. 3**

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1. Cost Management Services, Inc. (“CMS”) hereby responds to the Motion for Clarification, submitted by Cascade Natural Gas Corporation (“Cascade”) on March 22, 2007. Cascade’s latest pleading continues its effort to evade Commission regulation of its retail gas sales to non-core customers.

I. SUMMARY

2. For at least the last three years, Cascade has been making illegal retail gas sales based on the misrepresentation that this Commission’s regulation of such sales under RCW Chapter 80 had been pre-empted by the Federal Energy Regulatory Commission. When CMS challenged this pre-emption claim as patently false, Cascade fell back to an argument that this Commission lacked the competence to decide whether it or FERC had jurisdiction over private, retail gas sales. *See* Order No. 3, ¶ 49. After the Commission rejected the federal pre-emption claim and ruled that Cascade’s numerous non-core gas sale contracts violated Washington law, Cascade ignored the Commission’s directive that it file all of those contracts in accordance with WAC 480-80-143. Now, under the guise of a request for “clarification,” Cascade improperly seeks interlocutory appeal of the Commission’s order directing that a hearing be conducted on whether Cascade’s illegal contracts are unduly discriminatory or unduly preferential.

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A. What's At Stake In Docket Nos. UG-061256 And UG-070332

3. Here is a recap of the issues before the Commission:

<u>CMS Issue</u>	<u>UG-061256</u>	<u>UG-070332</u>
Federal pre-emption?	Resolved against Cascade Order No. 3, ¶ 48.	
Are Cascade's contracts unduly discriminatory or preferential?	Unresolved on summary judgment; set for hearing on a "genuine dispute of material fact." Order No. 3, ¶¶ 54, 55 and 64.	Not addressed.
Are core customers entitled to refunds relating to Cascade's unduly discriminatory or preferential contracts?	To be determined as a possible remedy in the hearing ordered in Order No. 3, ¶¶ 54, 55 and 64.	Not addressed.
Has Cascade violated RCW 80.28.050 by failing to file its private gas-sale agreements?	Resolved against Cascade. Order No. 3, ¶¶ 56, 66. Yet, <u>Cascade has not complied</u> with the directive to file its contracts in accord with WAC 480-80-143. Order No. 3, ¶¶ 58, 61, 63.	Not addressed.
Must Cascade file tariff schedules regarding gas sales to non-core customers?	Resolved against Cascade. Order No. 3, ¶ 66.	In Order No. 1, a hearing was ordered in which Cascade must prove the lawfulness of its tariff revisions.
Do Cascade's extra-territorial gas sales violate RCW 80.28.190?	Unresolved on summary judgment.	Not addressed.
Should Cascade be allowed to sell gas to non-core customers and, if so, under what safeguards for core customers?	Ultimate issues to be decided by the Commission.	Ultimate issues to be decided by the Commission.

4. If the Commission were to terminate Docket No. UG-061256 as requested by Cascade, several of the issues listed in the middle column of the table above – including

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the contract filing issue under WAC 480-80-143 -- could remain unresolved. Termination of Docket No. UG-061256 could allow Cascade to sweep under the rug its repeated violations of RCW Chapter 80 and WAC 480-80-143 and avoid the regulatory consequences of its unlawful practices.

5. CMS believes, instead, that the only logical action that the Commission can take, consistent with its statutory obligations, is to consolidate Docket Nos. UG-061256 and UG-070332 into a single proceeding to comprehensively resolve all of the outstanding issues listed above. *See* CMS Motion For Clarification of Order No. 3 (March 22, 2007).

6. Most of Cascade's arguments in support of prematurely terminating Docket Nos. UG-061256 turn on an overly literalist reading of what was, or was not, contained in the original CMS complaint. As explained below, CMS does not agree with Cascade's claims. However, rather than quibble about details, CMS is filing an amended complaint concurrent with this pleading. The amended complaint addresses each of the alleged shortfalls mentioned by Cascade about the original complaint.

7. Included with the CMS amended complaint is the affidavit of CMS expert witness Donald Schoenbeck. After the Administrative Law Judge ordered Cascade to provide copies of its private gas-sale agreements to CMS on March 1, 2007, Mr. Schoenbeck has reviewed the contracts actually provided by Cascade so far, in cooperation with the Commission's Staff. Mr. Schoenbeck provides a representative survey of those contracts. The Schoenbeck affidavit deals with the pricing and pricing practices utilized in these private agreements. The affidavit, submitted in accordance with the protective order in Docket No. UG-061256,¹ has a direct bearing on CMS' claims of undue discrimination and undue preference.

¹ Only some of Cascade's private contracts are confidential; however, the entire Schoenbeck affidavit is being filed pursuant to the protective order.

8. At least some of Cascade's contracts are obscure or somewhat confusing. Full understanding of these agreements will require data requests. If this investigatory process sounds messy or protracted to the Commission, it is just a foretaste of what the Commission would have to endure if it allows Cascade's tariff revisions in Docket No. UG-070332 to become effective after suspension. Those tariff revisions would simply allow Cascade to perpetuate the legally untenable status quo.

9. In the hearing ordered by the Commission in Docket No. UG-061256, hopefully to be consolidated with Docket No. UG-070332, CMS intends to introduce testimony by Mr. Shoenbeck to help the Commission resolve:

- Whether Cascade is making available to its non-core customers the economic benefits of the cheapest gas supplies available to Cascade?
- Whether Cascade is virtually giving away to non-core customers the interstate pipeline capacity paid for through the rates of core customers?

10. In addition to Commission Staff, Public Counsel also desires to pursue through hearing suspicions about Cascade's unduly discriminatory and unduly preferential gas sales to non-core customers. Because Public Counsel may lack the level of expertise available to CMS in investigating arcane matters relating to gas markets and interstate pipeline capacity, it has elected to rely in part on CMS' extensive expertise on such matters. CMS has accepted Public Counsel's offer of a "Joint Presentation and Defense Agreement." If the Commission grants CMS' motion to consolidate Docket Nos. UG-061256 and UG-070332, it can expect that CMS, Commission Staff and Public Counsel will cooperate in presenting evidence and proposing remedies for Cascade's unduly discriminatory and unduly preferential gas sales.

II. RESPONSES TO ALLEGATIONS RAISED IN CASCADE'S MOTION

A. **Cascade's Pleading Is an Untimely Interlocutory Appeal of Order No. 3**

11. In its original complaint, CMS asked the Commission to rule as a matter of law that Cascade's private gas-sale agreements with non-core customers were unduly discriminatory and unduly preferential because the prices specified in those agreements are not on file with the Commission and are different from Cascade's published rate schedules and tariffs. Non-core customers would never have entered into these agreements unless they obtained prices lower than Cascade's published rates. According to CMS, those private prices were unduly preferential toward non-core customers, and unduly discriminatory toward core customers, regardless of whether they were significantly lower or only modestly lower than published rates.

12. The Commission was not willing to adopt CMS' position as a matter of law, in part because of contested facts Cascade put into the record through the declarations of Cascade Vice President Jon Stoltz:

RCW 80.28.090 prohibits companies from giving an undue or unreasonable preference or advantage to any person, while RCW 80.28.100 prohibits companies from charging different rates or charges to similarly situated persons, e.g., acting with undue discrimination. While we agree with CMS that the purpose of these statutes is to discourage discrimination among similarly situated customers and prevent anticompetitive behavior, CMS has not set forth sufficient facts to show that Cascade has provided an undue preference or advantage or charged different rates or charges to similarly situated persons. The stipulated facts merely identify that Cascade sells natural gas to non-core customers based on an index or set price. Without more, CMS can demonstrate only the possibility that undue preference or discrimination has occurred. Further, the statements in Stoltz's Supplemental Declaration present facts that refute or call into question whether Cascade has given undue preferences or acted with undue discrimination. We therefore deny both CMS's and Cascade's cross-motions for summary determination concerning whether Cascade is in violation of RCW 80.28.90 or RCW 80.28.100. Because there are material issues of fact in dispute, we will set the matter for hearing, unless CMS requests otherwise based on our

resolution of the remaining issues in this Order. Order No. 3, ¶ 64, emphasis supplied.

13. Thus, Cascade itself, through two Stoltz declarations, has introduced into the record many of the contested facts that the Commission has set for hearing. Cascade itself opened the door to this hearing and should not complain that the Commission did not accept the Stoltz declarations at face value.

14. Paragraph 24 of Cascade's motion asks the Commission to hold that no further proceedings are required in Docket No. UG-061256. Cascade asks the Commission to decide that it erred in concluding that material issues of fact remain to be determined, Order No. 3, ¶¶ 54, 55 and 64, and to reverse its order that a hearing be conducted regarding those material issues, *id.* The only "clarification" sought by Cascade is that the Commission reverse itself. Although styled as a "motion for clarification," Cascade is actually making an interlocutory appeal of Order No. 3.

15. Cascade's interlocutory appeal is untimely. WAC 480-07-810(3) provides:

Process for seeking review. Any party may petition for review of an interlocutory order. Petitions for interlocutory review must be filed and served on other parties *within ten days after service of the order* or issuance of the ruling for which review is requested. * * *. [WAC 480-07-810 (emphasis supplied).]

16. Order No. 3 expressly contains, in bold letters, a "Notice to the *Parties*" that administrative review may be sought by filing a petition within 10 days of service of the Order. Order No. 3, ¶ 37. Cascade's mislabeled interlocutory appeal should be denied.

B. CMS' Original Complaint Raised the Issues of Undue Discrimination and Undue Preference that the Commission Has Now Set for Hearing; CMS' Amended Complaint Further Amplifies Those Issues.

Cascade argues that the Commission has resolved all claims CMS made in its complaint, including its allegations regarding undue discrimination under RCW 80.28.090 and undue preference under RCW 80.28.100. Cascade claims that the Commission does not have jurisdiction in a complaint proceeding to consider claims not

set forth in the complaint. Cascade Motion, ¶ 12. Cascade is wrong. It has ignored key elements of the CMS complaint that clearly put Cascade and all parties on notice that these were issues to be decided in Docket No. UG-061256. In setting these issues for hearing in Order No. 3, the Commission merely disagreed with CMS that these issues could be decided against Cascade as a matter of law.

17. CMS put these issues directly before the Commission by the allegations in the Complaint. CMS specifically alleged that it is the Commission's duty to ensure that no gas company grant any undue or unreasonable preference or advantage to any customer under RCW 80.28.090, and set forth that statute in its entirety. Complaint, ¶ 13. CMS further alleged that it is the Commission's duty to ensure that no gas company unduly discriminate against any customer under RCW 80.28.100, and also set forth that statute completely. Complaint, ¶ 14. In addition, CMS alleged as a cause of action that Cascade's use of "unregulated" prices other than tariff prices necessarily violates RCW 80.28.090 and RCW 80.28.100 because it blocks the Commission from carrying out its duties under those provisions to prevent undue preferences and undue discrimination. Complaint, ¶ 46. As to these allegations, the Commission specifically found remaining factual issues for determination, and set the matter for hearing. Order No. 3, ¶ 64.

18. Cascade also argues that CMS's Complaint "expressly disclaimed" that it was asking the Commission to determine whether the prices at which Cascade sold gas were discriminatory. Cascade Motion, ¶ 11 (citing Complaint, ¶ 45). By quoting this paragraph out of context, Cascade seems to hope that the Commission will miss the point that CMS could not argue with more specificity regarding the very private gas-sale contracts that Cascade refuses to file to this day. Paragraph 45 of the CMS Complaint, when quoted completely, makes this distinction:

This complaint concerns the fundamental unlawfulness of Cascade's non-tariff retail sales of natural gas, not whether Cascade's prices in the relevant agreements are just, reasonable, unduly discriminatory, unduly preferential, or anticompetitive. Such ratemaking issues cannot even be addressed by CMS or the Commission because Cascade has never filed the relevant contracts and prices as it was required to do under the Washington statutes and regulations cited above. [Complaint, ¶ 45.]

19. The complaint deals with the contractually specified rates that Cascade has unlawfully refused to file. Before the unduly discriminatory and unduly preferential failings of those rates could be addressed, CMS first had to demonstrate to the Commission that RCW 80.40.050 was being violated by stripping away Cascade's claim that Commission jurisdiction over those rates had been pre-empted by 18 C.F.R. §284.402. Although the contracts and rates have still not been filed in accordance with the explicit directive of Order No. 3, at least Staff and CMS now have copies of the relevant documents. It is now time to review these suspicious agreements in the hearing ordered by the Commission in Order No. 3.

20. Fundamentally, Cascade's argument is that it can defeat this Commission's jurisdiction under RCW 80.28.090 and RCW 80.28.100 simply by refusing to comply with RCW 80.28.050 by not filing its retail rates and contracts. Hiding behind 18 C.F.R. §284.402, Cascade unlawfully withheld the very information it faults CMS for not specifying with greater detail in the allegations of its complaint dealing with undue discrimination and undue preference.² Clearly, the Commission did not buy this preposterous argument in Order No. 3 (see ¶¶ 58, 61 and 63). To do so now would reward Cascade for repeated violations of RCW Chapter 80 and Commission regulations.

21. In short, CMS alleged that Cascade was necessarily violating RCW 80.28.090 and 80.28.100 by its failure to file its gas-sales contracts and rates. It asked this Commission

² Cascade refused to provide CMS copies of the contracts until ordered to do so by the Administrative Law Judge, even though CMS was entitled to them under the terms of the protective order in Docket No. UG-061256.

to order Cascade to make such filings so that the Commission could then determine whether such violations were occurring. Unless a hearing is held on those issues, the Commission cannot fulfill its obligations relating to RCW 80.28.090 and 80.28.100.

22. Lest there be any doubt left by Cascade's assertions, CMS is concurrently filing its amended complaint. In that pleading, CMS renews its request that the Commission rule Cascade's private gas sales unduly discriminatory and unduly preferential in violation of RCW 80.28.090 and RCW 80.28.100. The amended complaint makes specific reference to the hearing ordered in ¶¶ 54, 55 and 64 of Order No. 3.

C. CMS' Original and Amended Complaints Are Properly Filed Under RCW 80.04.110; The Provisos of that Statute Do Not Apply.

23. In a further effort to defeat Commission investigation of its unlawful practices, Cascade next argues that CMS cannot make additional claims under RCW 80.28.090 and 80.28.100 because CMS cannot meet limitations imposed by the first proviso clause of RCW 80.04.110(1). Cascade's argument fails because the first proviso clause does not apply under well-established judicial precedents.

24. CMS filed its complaint, and now its amended complaint pursuant to RCW 80.04.110(1), which specifies:

(1) Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, or by the public counsel section of the office of the attorney general, or its successor, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: ...
[Emphasis supplied.]

Both the complaint and amended complaint are validly filed under this provision. The all-inclusive statutory phrase "in violation, or claimed to be in violation, of any provision

of law or of any order or rule of the commission” necessarily includes RCW 80.28.090, RCW 80.28.100 and WAC 480-80-143.

25. Cascade improperly invokes the following proviso of RCW 80.04.110(1), which next follows the passage quoted immediately above:

PROVIDED, That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telecommunications company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telecommunications service, or at least twenty-five percent of the consumers or purchasers of the company's service ... [Emphasis supplied.]

26. This proviso of RCW 80.04.110(1) applies only to complaints concerning “the reasonableness of the schedule of the rates or charges of any gas company.” “Reasonableness” of rates established and on file with the Commission is a statutory standard separate and distinct from “undue discrimination” and “unduly preference.”

27. The quoted proviso does not apply here because CMS is not challenging the “reasonableness” or the “justness and reasonableness” of Cascade’s unpublished prices in any of its private retail gas-sale agreements. CMS does not contend or allege that Cascade’s private sales rates are unreasonable in and of themselves. Rather, CMS contends that the rates reflected in Cascade’s contracts are unduly preferential toward non-core customers and unduly discriminatory against both core customers and non-core customers not favored with special contract rates. CMS specifically alleged as a cause of action that Cascade’s use of “unregulated” prices other than tariff prices necessarily violates RCW 80.28.090 and RCW 80.28.100 because it blocks the Commission from carrying out its duties under those provisions to prevent undue preferences and undue discrimination. Complaint, ¶ 46.

28. A case squarely on point is *State ex rel Goss v. Metaline Falls Light & Water*, 80 Wash. 652, 141 P. 1142 (1914). In *Goss v. Metaline Falls*, Goss, a customer of a water company, filed a mandamus proceeding in superior court asking the court to require the water company to provide service to that customer at a specific rate, based on Goss's belief that the water company was charging him rates in excess of those charged to other customers. The trial court dismissed the complaint, finding that the Commission had the exclusive jurisdiction to entertain such complaints. Goss appealed.

29. On appeal, Goss argued that he could not obtain relief from the Commission because section 80 of the Public Utilities Act only allowed complaints to be brought by certain elected officials, or by a group of at least 25 customers.³ The court disagreed, stating that if the water company:

is practicing discrimination in charging rates as alleged, it is doing an act in violation of the Public Utilities Law, and [Goss] may file a complaint with the commission. * * * It is apparent that [the exception set forth in the "PROVIDED" clause], considered in connection with other portions of the section, pertains only to complaints affecting the reasonableness of the schedule of rates or charges of a public service corporation, and that it does not negate the authority of any person to complain of a discrimination of which a corporation may be guilty. [*Goss*, 80 Wash. at 655—656.]

Thus, the proviso cited by Cascade simply does not apply to the legal violations alleged by CMS in its complaint.

³ Section 80 of the Public Utilities Act considered in *Goss* is, for all relevant purposes, exactly the same as RCW 80.04.110(1). As quoted by the court, that statute provides:

“Complaint *** may be made *** by any person ***in writing, setting forth any action or thing done or omitted to be done by any public service corporation in violation *** of any provisions of law. ***’. ****’Provided, that no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedules of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five customers or purchasers of such gas, electricity, water or telephone service.” [*Goss*, 80 Wash. at 655-56.]

30. The *Goss* decision has never been overruled or questioned in all the years since it was issued. The Legislature is deemed to acquiesce in the statutory interpretation of the court if no change is made for a substantial time after the decision. *Washington Independent Telephone Association v. WUTC*, 64 P.3d 606, 148 Wash.2d 887 (2003).

31. Moreover, the ruling in *Goss* is also consistent with the definitive rule of statutory construction, “*expressio unius est exclusio alterius*,” employed by the courts of Washington. In *Barnett & Lim Associates v. City of Federal Way*, 135 Wash.App. 1038, 2006 WL 318 7282 at 3, the court observed:

“Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded.’ *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim **expressio unius est exclusio alterius**--specific inclusions exclude implication.’ *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571 980, P2d 1234 (1999) (citing *Washington Natural Gas Co. v. Public Util. Dist. No. 1*, 77, Wn.2d 94, 98, 459 P.2d 633 (1969)). ‘The maxim ‘**expressio unius est exclusio alterius**’ is the law in Washington, barring a clearly contrary legislative intent.’ *Algona v. Sharp*, 30 Wn.App. 837, 842-843, 638 P.2d 627 (1982) (finding that because ‘assessment liens’ were not among the several types of liens listed in the homestead statute, an inference must be made that the legislature intended their omission from the homestead statute) *Algona*, 30 Wn.App. at 842 (citing *Knowles v. Holly*, 82 Wn.2d 694, 513 P.2d 18 (1973)).”

If the Legislature had wanted to include assertions regarding undue discrimination and undue preference in the proviso of RCW 80.04.110(1), it would have done so. ⁴

32. This conclusion is also compelled by the peculiar facts of this case. The RCW 80.04.110(1) proviso addresses the “reasonableness of the schedule of rates or charges of

⁴ See *Cowlitz Stud Company v. Clevenger*, 157 Wash.2d. 569, 576, 141 P.3d 1 (2006).

a public service corporation.” Cascade has no “schedule of rates or charges” for its private retail gas sales, which it has never filed. Even assuming that the proviso of RCW 80.04.110(1) could apply, there is nothing to which it would apply.⁵

33. Any way you cut it, the proviso of RCW 80.04.110(1) simply does not apply as a limitation either on CMS’ original complaint or its amended complaint.

D. CMS Has Standing to Bring Its Original and Amended Complaints.

34. It is ironic that Cascade questions CMS’ standing to continue its complaint proceeding challenging Cascade’s cross-subsidization of its private gas sales at the expense of customers who pay regulated rates. Cascade certainly is not representing its customers’ interests in Docket No. UG-061256. Its every effort in this proceeding has been an attempt to evade its responsibility to its regulated customers. Had CMS not filed its complaint, Cascade’s ongoing violations of law would have gone undiscovered.

35. As CMS has made clear throughout the proceedings in Docket No. UG-061256, in Cascade’s recent general rate case and in its petition to intervene in Docket No. UG-070332, CMS plays two market roles. First, it is a seller of natural gas. Second, and equally important, it formally serves as the agent for industrial and commercial gas users whose consumption is too small to warrant the expense of in-house gas-purchasing and gas-management expertise. In this second capacity, CMS serves a role like the one played by the Northwest Industrial Gas Users plays for its member. Cascade’s pleading completely ignores this second agency role in yet another attempt to evade this Commission’s jurisdiction under RCW Chapter 80.

36. CMS explained this second role in its complaint. CMS alleged as follows:

CMS is a Washington corporation engaged in the sale of natural gas as a competitive gas marketer. CMS markets

⁵ The second proviso of RCW 80.04.110(1) does not apply here. As Cascade notes at pp. 7, lines 41-42, of its Motion, the second proviso is an exception to the first proviso.

competitively priced natural gas to industrial and commercial customers, some of which are located within the service territory of Cascade. CMS is not a 'gas company' under RCW 80.04.010 because it does not own any 'gas plant.' Indeed, CMS does not own, control, operate or manage any natural gas property, plant, equipment or facility of any kind. The only cascade customers able to do business with CMS are those that take transportation-only services from Cascade under Schedules 663 or 664, i.e., those customers whose access to the gas plan of Cascade allows them to purchase gas from CMS at the Cascade city gate or other delivery point up-stream from the Cascade city gate.

CMS focuses its market efforts on a market segment consisting of businesses with significant gas consumption, but not sufficiently large to warrant in-house, energy management expertise. CMS customers comprise a discrete segment of the market for competitive gas supplies. They tend to have gas-consumption levels lower than the entities comprising the Northwest Industrial Gas Users group. [Complaint, ¶¶ 5-6.]

37. In its petition to intervene in Docket No. UG-070332, the proceeding on Cascade's tariff revisions filed in response to Order No. 3, CMS amplified on its role as agent for transportation customers of Cascade:

CMS markets natural gas to industrial and commercial customers within the service territory of Cascade. These customers access CMS via Cascade's Schedule No. 663 transportation rate. CMS's interests as a competitive marketer are aligned with those of Cascade's ratepayers because Cascade's cross-subsidization of competitive gas sales at the expense of the customers of its regulated utility services also harms CMS.

CMS also acts as agent for its customers in arranging transportation services under Cascade Schedule No. 663, securing interstate pipeline capacity (as necessary) and providing gas-management services that members of the Northwest Industrial Gas Users ("NWIGU") have in-house. In this second agency capacity, CMS directly represents the interests of its clients as customers of Cascade in ensuring that Cascade's rates are not unduly discriminatory, unduly preferential, or otherwise in violation of Washington law. [CMS petition of March 12, 2007, in Docket No. UG-070332, ¶¶ 6 & 7.]

38. The foregoing statements are reiterated in CMS' amended complaint, filed concurrent with this pleading.

39. CMS' customer-agent role is not subservient to its gas-sales role. CMS takes its agency role seriously. CMS participated as a party in Cascade's last general rate case, Docket No. UG-060256, on behalf of the transportation-only customers for whom it acts as agent. On December 5, 2006, CMS filed a statement in lieu of reply brief in support of the "rate-spread and rate-design agreement of the parties would yield rates that better reflect the cost of serving the transportation customers of Cascade Natural Gas Corporation ('Cascade')."

40. Moreover, as explained above, CMS has entered into a Joint Participation and Defense Agreement with Public Counsel. The Joint Defense Agreement recognizes that CMS and Public Counsel "have some common and mutual interests in presenting and prosecuting issues related to cross-subsidies between core and non-core Cascade customers asserted in this case, and in negotiations regarding such claims." Joint Defense Agreement, ¶ 1, attached.

41. Ignoring the history of CMS participation before the Commission on behalf of transportation-only customers,⁶ and long after the complaint proceeding in Docket No. UG-061256 was initiated, Cascade now argues that the Commission does not have jurisdiction in these proceedings. It cites *Cole v. WUTC*, 79 Wash.2d 302, 485 P.2d 71 (1971). However, *Cole* is readily distinguishable from the facts in this case.

42. If *Cole* applies at all to this case, its effect would be limited to CMS' first of two roles. Unlike the Oil and Heat Institute that sought to participate in the Commission case leading to the *Cole* decision, CMS is not just an unregulated competitor of Cascade.

⁶ CMS has performed the same role in proceedings regarding the gas rates and services of Puget Sound Energy. *In the Matter of the Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Docket Nos. UG-040640 and UE-040641.

CMS also acts as an agent for its customers in arranging transportation services under Cascade Schedule No. 663, securing interstate pipeline capacity (as necessary) and providing gas-management services that members of the Northwest Industrial Gas Users have in-house. CMS directly represents the interests of its clients as customers of Cascade in ensuring that Cascade's rates are not unduly discriminatory, unduly preferential, or otherwise in violation of Washington law.

43. In fact, CMS's interests and concerns in this case are less like the purported intervenor in *Cole*, and more like the case's *original complainant*, over whom the Commission's jurisdiction was—appropriately—not questioned. *Cole*, a fuel oil dealer and residential customer of Washington National Gas Company, complained to the Commission that the low-cost leasing program and “dry-out” rate were being operated as “loss-leaders” at the expense of the gas company's *existing customers*, who were forced to subsidize the promotions at higher rates. The Commission's proceeding continued regarding alleged adverse consequences on Washington Natural's existing customers, just as CMS asks the Commission to do in this case.

44. Significantly, the Commission has interpreted the *Cole* opinion as limiting its jurisdiction only regarding “regulated utilities’ actions on *totally independent* unregulated competitors.” *Washington Utilities and Transportation Commission v. U.S. West Communications, Inc.*, Docket UT-950200, Eleventh Supplemental Order, 1996 WL 120838 at *3 (January 3, 1996) (emphasis supplied). In *WUTC v. U.S. West*, U.S. West moved to limit the participation of the Northwest Payphone Association (“NWPPA”) in rate proceedings. The Commission found NWPPA's participation proper, and specifically distinguished *Cole*, holding:

The State Supreme Court approved the Commission's determination that it would not consider the effects of regulated utilities' actions on totally independent

unregulated competitors. *Cole v. WUTC*, 79 Wash.2d 302, 485 P.2d (1971) Here, however, we have a dispute between a utility and competitors who are the utility's customers, wholly dependent upon the utility for underlying services that enable them to be competitors, and the utility has the power to determine the viability of that competition. It is clear that the Commission may properly consider competitive issues in an evolving competitive market. See, RCW 80.36.080; 80.36.170; and 80.36.186. [*WUTC v. U.S. West*, 1996 WL 120838 at *3.]

45. It is clear that this case is not just a dispute between a regulated utility and a competitor who is "totally independent of the utility's actions." To the contrary, both CMS and the Cascade customers for whom it acts as agent are "wholly dependent" upon Cascade's actions. Absent the non-core transportation service for which CMS is "wholly dependent" on Cascade, CMS has no business. The Cascade customers for whom CMS acts as agent are "wholly dependent" on Cascade for the non-core transportation service they need to procure gas. CMS comes to these proceedings representing those interests. *Alabama Propane Gas Association v. Alabama Power Company*, 98 P.U.R.4th 459, 1988 WL 391393 (1988), on which Cascade also relies, draws this same distinction.

46. Thus, it won't do for Cascade ask the Commission to reverse its hearing order because "the Commission does not have jurisdiction to consider a claim by CMS that Cascade's practices injure CMS as an unregulated competitor of Cascade." Cascade Motion, pp. 1-2. That is a red herring. Unlike the petitioner in *Cole v. WUTC*, CMS has never sought from the Commission an examination of "the economic effects of practices of a regulated public service utility upon nonregulated competitors." 485 P.2d at 73. CMS appreciates that the Commission is not a court of general jurisdiction. CMS ask the Commission only that it compel Cascade to comply with its obligations as a gas company under RCW Chapter 80 – remedies expressly entrusted to Commission jurisdiction.

47. CMS and Public Counsel have begun their analysis of Cascade's suspect private gas-sale contracts. In cooperation with CMS, Commission Staff has embarked on the

investigation ordered by the Commission in Order No. 3, subject to Staff's motion for clarification. *See* Section III of this pleading, below. This case can and should proceed.

48. Lest there be the slightest concern about any possible impact of *Cole v. WUTC*, the Commission should bear in mind that the hearing it ordered in Order No. 3, ¶¶ 54, 55 and 64, may also proceed on the Commission's own motion. The Commission has explicit authority to initiate complaint proceedings on its own motion in RCW 80.04.110(1). However the Commission decides to continue the proceedings in this docket and in Docket UG-070332, CMS's participation is proper, and perhaps essential, to the Commission's business. *See Re Puget Sound Power and Light Company*, Docket No. UE 951270, Washington Utilities and Transportation Commission, Fourth Supplemental Order, 1996 WL 497460 (July 10, 1996) ("Consistent with *Cole*, the Commission is not allowing the intervenors to intervene for the purpose of demonstrating the economic effects of the merger upon them individually. ... The Commission hopes that it will benefit from the intervenors' expertise as we proceed to determine how the merger will affect the implementation of Commission policy adopted to benefit the applicants' customers."). 1996 WL 497460 at *2.

49. In summary, CMS clearly has standing to continue in the complaint proceeding it initiated to challenge Cascade's unduly discriminatory and unduly preferential private gas-sale agreements. If the Commission has any doubt about this assertion, however, it should proceed on its own motion with the hearing it has ordered in Order No. 3. CMS's continuing participation can only benefit the Commission in this endeavor. To do otherwise would allow Cascade to evade Commission jurisdiction under RCW 80.28.090 and RCW 80.28.100. For all its efforts to derail the hearing in Docket No. UG-061256, the Commission should ask itself what Cascade is attempting so vigorously to hide from scrutiny. The Schoenbeck affidavit provides a good indication of the answer.

19 – UG-061256/UG-070332 CMS' RESPONSE TO CASCADE'S MOTION FOR CLARIFICATION

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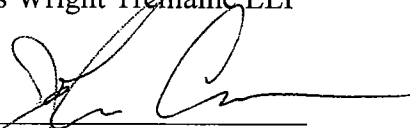
III. RESPONSES TO THE MOTION OF COMMISSION STAFF

50. The Commission Staff has also filed a motion for clarification regarding the investigation it was ordered to undertake in Docket No. UG-061256. Staff's questions are perfectly legitimate to be raised in a motion for clarification. Each is consistent with similar inquiries made by CMS in its own motion for clarification. CMS commends to the Commission the answers it proposed for adoption in this case.

51. WHEREFORE, CMS asks the Commission to grant the clarifications requested in its motion of March 22, 2007, and deny Cascade's motion filed on the same day.

DATED this 9th day of April, 2007.

Respectfully submitted,
Davis Wright Tremaine LLP

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

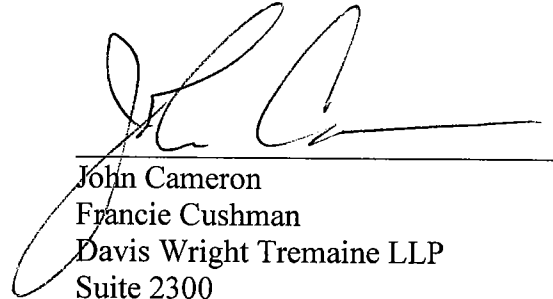
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of March, 2007, served the foregoing **RESPONSE OF COST MANAGEMENT SERVICES IN OPPOSITION TO CASCADE NATURAL GAS CORPORATION'S MOTION FOR CLARIFICATION OF ORDER NO. 3** upon parties of record in these proceeding, as follows:

UG-061256				
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Dated this 9th day of March, 2007.



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