

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

COST MANAGEMENT SERVICES, INC.,	)	DOCKET UG-061256
)	
	)	ORDER 05
Complainant,)	
	)	ORDER CLARIFYING ORDER
v.	)	03; GRANTING IN PART
	)	CASCADE’S AND STAFF’S
CASCADE NATURAL GAS	)	MOTIONS FOR
CORPORATION,	)	CLARIFICATION; DENYING
	)	CMS’ MOTION FOR
Respondent.	)	CLARIFICATION, MOTION FOR
	)	CONSOLIDATION, MOTION TO
	)	AMEND COMPLAINT;
	)	GRANTING CMS’ MOTION TO
	)	LODGE AFFIDAVIT; DENYING
	)	CASCADE’S MOTION TO
	)	STRIKE; CLOSING DOCKET
.....)	
)	
WASHINGTON UTILITIES AND	)	DOCKET UG-070332
TRANSPORTATION COMMISSION,)	
	)	ORDER 02
Complainant,)	
	)	ORDER DENYING CMS’
v.	)	PETITION FOR INTERVENTION
	)	AND MOTION FOR
CASCADE NATURAL GAS	)	CONSOLIDATION
CORPORATION,)	
)	
Respondent.)	
.....)	

SUMMARY

- 1 **SYNOPSIS.** *This order denies CMS' petition to intervene in Docket UG-070332, Cascade's new gas sales tariff filing, and denies CMS' petition to consolidate the filing with the complaint in Docket UG-061256, finding that CMS lacks standing and that this Commission lacks jurisdiction to consider CMS' allegations.*
- 2 *This order denies CMS' motion for clarification, and grants in part Cascade's and Staff's motion. The order clarifies the Commission's Order 03, directing Staff to investigate the contracts Cascade filed in response to Order 03, whether Cascade acted with undue preference or discrimination through these contracts, and whether there has been any cross-subsidization, and by closes Docket UG-061256. If Staff determines there is sufficient evidence to go forward with a complaint, Staff should recommend the Commission issue a complaint against Cascade. This order denies CMS' motion to amend its complaint finding CMS lacks standing and this Commission lacks jurisdiction over CMS' additional allegations.*
- 3 *This order also denies Cascade's motion to strike Staff's response to motions for clarification, but grants the Company's motion to file a reply. While there is merit in Staff's concerns about Cascade's recent proposal for sales of natural gas, the issues need not be addressed in the complaint proceeding. Finally, this order grants CMS' motion to file an affidavit concerning the release of confidential information, but recommends the Commission assess a penalty of \$4,000 against CMS for violations of the protective order, Order 02 in Docket UG-061256.*
- 4 **NATURE OF PROCEEDINGS.** Docket UG-061256 involves a complaint by Cost Management Services, Inc. (CMS), against Cascade Natural Gas Corporation (Cascade or Company), asserting, among other issues, that Cascade is violating state and federal law by selling natural gas at retail to customers that take transportation-only service without the necessary contracts and tariffs on file.

5 Docket UG-070332 involves tariff revisions filed by Cascade in response to Order 03 in Docket UG-061256. The tariff revisions establish schedules for retail gas sales and associated services. The Commission suspended the tariff schedules in Order 01 following the March 14, 2007, open meeting.

6 **APPEARANCES.** John A. Cameron and Francie Cushman, Davis Wright Tremaine, LLP, Portland, Oregon, represent CMS. Lawrence H. Reichman and James M. Van Nostrand, Perkins Coie, LLP, Portland, Oregon, represent Cascade. Edward A. Finklea and Chad M. Stokes, attorneys, Cable Huston Benedict Haagenesen & Lloyd LLP, Portland, Oregon, represent the Northwest Industrial Gas Users (NWIGU). Simon ffitich, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington Office of the Attorney General (Public Counsel).¹ Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents the Washington Utilities and Transportation Commission's (Commission) regulatory staff (Commission Staff or Staff).²

7 **PROCEDURAL HISTORY.** CMS filed a formal complaint against Cascade in Docket UG-061256 on August 1, 2006, asserting that Cascade was violating state law by selling natural gas at retail to non-core customers without tariffs, special contracts or other Commission-regulated mechanisms in place.³

8 On January 12, 2007, the Commission entered Order 03 in that docket, after considering the parties' cross-motions for summary determination. The Order found Cascade in violation of certain state laws and Commission rules, assessed a penalty against Cascade and required Cascade to file new gas supply tariffs and existing gas

¹ Judith Krebs has represented Public Counsel in this matter, but Simon ffitich has recently been substituted as the representative for Public Counsel.

² In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including advocacy Staff. *See* RCW 34.05.455.

³ The earlier procedural history in Docket UG-061256 is set forth in Order 03 in that docket, and will not be repeated in this order.

supply tariffs with the Commission. After determining that there were material facts in dispute on the issue of whether Cascade provided an undue preference or advantage or discrimination under RCW 80.28.090 and RCW 80.28.100, the Commission denied the parties' motions for summary determination and set the matter for hearing. The Commission found insufficient facts as to whether Cascade violated RCW 80.28.190 in making gas sales out of its service territory and noted that CMS must amend its complaint if it seeks to pursue this claim further. The Commission also directed Staff to investigate Cascade's competitive activities.

- 9 On February 12, 2007, Cascade filed with the Commission in Docket UG-070332 revisions to its Tariff, WN U-3, reflecting gas supply service options available to non-core customers.
- 10 On March 1, 2007, the Commission held a prehearing conference in Docket UG-061256 before Administrative Law Judge Ann E. Rendahl to discuss whether and how the parties wished to proceed with CMS' complaint. Following the conference, Judge Rendahl entered Order 04, establishing a procedural schedule to allow the parties to file motions for clarification of Order 03 to best determine whether and how to proceed in Docket UG-061256.
- 11 On March 12, 2007, CMS filed a protest to the tariff revision filed in Docket UG-070332, a petition to intervene in that docket, a request to consolidate the docket with Docket UG-061256, and a request that the Commission direct Cascade to file its contracts in compliance with WAC 480-80-143.
- 12 On March 14, 2007, the Commission suspended Cascade's tariff filing in Docket UG-070332. The parties agreed to address CMS' outstanding petition and motions during the briefing schedule established in Docket UG-061256.
- 13 Cascade, CMS and Staff filed motions seeking clarification of Order 03 on March 22, 2007. Also on March 22, Cascade filed responses to CMS' petition to intervene, and motions to consolidate Dockets UG-061256 and UG-070332. These pleadings spawned a number of responses and additional motions.

- 14 On April 9, Cascade, CMS, Staff, Public Counsel and NWIGU filed responses to the motions for clarification. Also on April 9, CMS filed a Motion for Leave to File Amended Complaint, along with a proposed amended complaint and Affidavit of Donald W. Schoenbeck.
- 15 On April 16, Cascade filed a Motion to Strike Staff's Response to Strike Staff's Response to Motion for Clarification, as well as a response to CMS' motion to amend its complaint, claiming CMS had violated the Commission's protective order, Order 02, in Docket UG-061256.
- 16 On April 19, CMS filed a response to Cascade's motion to strike and a Motion to Lodge Affidavit of Douglas Betzold Concerning Confidential Information Covered by Protective Orders.
- 17 On April 26, Staff filed a response to Cascade's motion to strike, and Cascade filed a response to CMS' motion to lodge an affidavit.

MEMORANDUM

- 18 Although the Commission resolved most of the issues in Docket UG-061256 in Order 03, there remain a number of unresolved issues. Some of these unresolved issues stem from the parties' need for greater clarity about the Commission's decision in Order 03 setting certain issues for hearing and directing Staff to conduct an investigation, and others stem from CMS' continued concerns about whether Cascade's private gas supply contracts violated state law and whether Cascade's current practices, including a pending tariff filing, are lawful. This order addresses no less than nine separate petitions and motions and the many responses to those pleadings filed in these proceedings.⁴

⁴ While recognizing that CMS and Cascade are competitors, there is no need, however, for vitriolic and quarrelsome language in the pleadings in this proceeding. Counsel for the parties are fully capable of zealously representing their clients' interests without resorting to disrespectful and derogatory statements.

I. CMS' Petition for Intervention, Motion for Consolidation

A. Petition for intervention

19 After Cascade filed revisions to its tariff in compliance with Order 03 reflecting gas supply service to non-core customers, CMS filed a petition to intervene in the tariff docket. CMS asserts its “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.”⁵ CMS also asserts an agency relationship with Cascade’s customers, asserting it “directly represents the interests of its clients as customers of Cascade.”⁶ CMS argues that it must be a party in the tariff proceeding to pursue a remedy effectively in its complaint proceeding.⁷

20 Cascade asserts that CMS lacks standing to intervene in the tariff proceeding as an unregulated competitor of Cascade under *Cole v. Washington Utilities and Transportation*.⁸ Cascade further argues that, under *Cole*, the Commission lacks jurisdiction to consider the impact of Cascade’s proposed tariffs on CMS or its customers.⁹

21 In *Cole*, a fuel oil dealer and customer of Washington Natural Gas Company (WNG) filed a complaint with the Commission asserting that a program WNG offered to gain new gas customers was subsidized by existing customers. The Oil Heat Institute (OHI) petitioned to intervene to show the adverse effect of WNG’s program on fuel oil dealers. The Commission denied OHI’s petition to intervene and a motion by Cole and other customers to address OHI’s concerns. The Commission determined that only a consumer was entitled to bring a rate complaint and that the Commission had “no jurisdiction to examine the economic effects of practices of a regulated public

⁵ CMS Petition to Intervene, ¶ 6.

⁶ *Id.*, ¶ 7.

⁷ *Id.*, ¶ 8.

⁸ Cascade Response to Petition for Intervention, ¶ 4, citing *Cole v. Washington Utilities and Transportation Commission*, 79 Wash. 2d 302, 485 P.2d 71 (1971).

⁹ *Id.*, ¶ 6.

utility upon unregulated competitors.”¹⁰ The state supreme court upheld the Commission’s decision, finding that “it is doubtful whether the institute can prove a ‘substantial interest’ in rates charged to customers of a competitor who is regulated by different laws and who provides an entirely different type of fuel service.”¹¹ The court also found that the public interest the Commission must protect is “only that of customer of the utilities which are regulated.”¹²

22 CMS is a gas marketer that competes with Cascade in the sale and supply of natural gas to Cascade’s transportation-only customers, who take service under Tariff Schedules 663 and 664.¹³ Some of CMS’ customers are thus also Cascade’s customers.¹⁴ Cascade alleges that, similar to the facts in *Cole*, CMS is an unregulated competitor of Cascade, that CMS lacks a substantial interest in the rates charged to regulated customers, and that CMS’ concerns are outside of the Commission’s interest in protecting the public interest, i.e., the customers of regulated utilities.¹⁵ Cascade asserts that CMS’ clear interest is to enhance its competitive position, not to protect Cascade’s customers.¹⁶

23 CMS asserts that it has two roles, acting both as a competitive gas marketer, and as an agent for some of Cascade’s customers in arranging for transportation services, securing pipeline capacity and providing gas management services.¹⁷ CMS asserts that through this second role, it has a substantial interest in the rates charged to its customers, also regulated customers of Cascade. CMS further argues that the Commission has recognized an exception to *Cole* where the competitor is the utility’s customer, and is wholly dependent upon the utility to provide the services that allow

¹⁰ *Cole*, 79 Wash. 2d at 304.

¹¹ *Id.*, at 305.

¹² *Id.*, at 306.

¹³ Complaint, ¶ 5. These tariff schedules have been consolidated into Schedule 663.

¹⁴ *Id.*

¹⁵ Cascade Response to Petition for Intervention, ¶¶ 1, 9.

¹⁶ *Id.*, ¶ 2.

¹⁷ CMS Response to Cascade Motion for Clarification, ¶ 42.

them to be competitive.¹⁸ CMS asserts that it represents the interests of Cascade's transportation customers, who are wholly dependent on Cascade for the transportation of gas.¹⁹

24 CMS' petition to intervene in Docket UG-070332 is denied. CMS' agency relationship with Cascade's customers is not sufficient to establish a substantial interest in Cascade's gas supply tariff filing. CMS is not a customer of Cascade, nor an association representing Cascade customers' interests, and may represent no other interests but its own. In fact, CMS demonstrates its self-interest in preserving its competitive position in its motion to intervene: CMS requests the Commission consider prohibiting Cascade from making private gas sales as a remedy for cross-subsidization.²⁰ Removing Cascade as a supplier of natural gas at retail benefits only CMS, not Cascade's customers.

25 In addition to the question of standing, CMS' petition raises the issue of the Commission's jurisdiction under *Cole* to consider the impact of Cascade's rates on CMS or its customers. Under *Cole*, the Commission's authority to regulate in the public interest extends only to the interests of customers of a regulated utility, not to an unregulated competitor or its customers. CMS' agency relationship with Cascade's customers is too tenuous to fall within the Commission's public interest authority over Cascade's rates.

26 Contrary to CMS' arguments, CMS' participation is not "essential to the Commission's business" or adjudication of the issues in the tariff proceeding.²¹ Other parties and interested persons can address CMS' issues effectively without presenting issues of standing or jurisdiction.²² Public Counsel, NWIGU and Staff may all

¹⁸ *Id.*, ¶¶ 44-45, citing *WUTC v. U S WEST Communications, Inc.*, Docket UT-950299, Eleventh Supplemental Order at 4 (Jan. 3, 1996).

¹⁹ *Id.*, ¶ 45.

²⁰ CMS Petition to Intervene, ¶ 15.

²¹ CMS Response to Cascade's Motion for Clarification, ¶ 48.

²² See Public Counsel's Response to Motions for Clarification, ¶ 5.

address and pursue the question of whether Cascade's proposed tariff includes cross-subsidization of rates in making retail gas supply sales.

B. Motion to consolidate

- 27 CMS requests the Commission consolidate the complaint proceeding in Docket UG-061256 with the tariff proceeding in UG-070332. CMS asserts that concerns about cross-subsidization in the complaint proceeding will not be effectively considered without also reviewing Cascade's proposed gas supply tariffs. Cascade asserts that consolidating the dockets is not appropriate: The complaint proceeding is backward looking - considering Cascade's past actions and contracts – whereas the tariff proceeding addresses how Cascade will make retail gas sales in the future. Further, Cascade asserts that CMS bears the burden of proof in the complaint, whereas Cascade bears the burden in the tariff filing. Cascade argues that CMS seeks to shift the burden of both dockets to Cascade by consolidating the dockets.
- 28 The Commission has discretion under WAC 480-07-320 to consolidate proceedings “in which the facts or principles of law are related.” Consolidating Cascade's recent tariff proposal for making retail gas supply sales with a complaint about Cascade's prior actions in making retail sales is not appropriate under this standard. Allegations that Cascade has and continues to cross-subsidize rates between customer classes do not justify consolidating the two proceedings. While both dockets relate to Cascade's retail sales of natural gas, one docket addresses Cascade's past behavior and the other addresses how Cascade will make sales in the future. CMS bears the burden of proof in the complaint proceeding and Cascade bears the burden in the other. Given these significant differences, CMS' motion to consolidate the dockets is denied.
- 29 Following entry of this order, the Commission will schedule a prehearing conference in Docket UG-070332 to resolve any additional petitions for intervention, address any other procedural matters, and establish a procedural schedule to move forward in that docket.

II. Motions for Clarification

A. Did Order 03 resolve all issues in CMS' complaint?

30 Cascade seeks clarification of paragraph 64 of Order 03, specifically that the Commission has resolved all of the issues raised in CMS' complaint concerning whether Cascade violated RCW 80.28.090 and RCW 80.28.100 relating to undue preference and undue discrimination. In that paragraph, the Commission denied both CMS' and Cascade's motions for summary determination on this point, finding that CMS had not presented sufficient facts to allow the Commission to decide the issue. The Commission set the matter for hearing, finding that there were material facts in dispute.

31 Cascade asserts that no party presented sufficient facts because CMS did not present a claim on this issue.²³ Cascade notes that CMS' complaint specifically excludes "whether Cascade's prices in the relevant agreements are just, reasonable, unduly discriminatory, unduly preferential, or anticompetitive."²⁴ Cascade asserts that CMS claimed only that Cascade's failure to make gas supply sales at prices set forth in tariff prevented the Commission from ensuring that Cascade's customers were protected from undue preference and discrimination.²⁵ Cascade asserts the Commission lacks jurisdiction to consider allegations not set forth in a complaint.²⁶ Further, Cascade asserts there is no need to set any issues for hearing as it is sufficient that the Commission required Cascade to file existing contracts and make any future sales under tariff, and directed Staff to investigate Cascade's actions. Cascade requests the Commission close the docket and allow Staff to conduct its investigation informally.

²³ Cascade Motion for Clarification, ¶ 8.

²⁴ *Id.*, ¶ 5, quoting Complaint, ¶ 45. CMS explains in the next sentence of the complaint that "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."

²⁵ Cascade Motion for Clarification, ¶ 6; Complaint, ¶ 46.

²⁶ Cascade Motion for Clarification, ¶ 12.

32 CMS requests the Commission deny this aspect of Cascade’s motion as an untimely petition for interlocutory review of the order. Further, CMS argues that its complaint does allege violations of RCW 80.28.090 and RCW 80.28.100. CMS could not address in its complaint specific violations of the statutes due to Cascade’s failure to file its contracts for review, but limited its claims to violations of the statutes because of Cascade’s failure to file the contracts. CMS asserts that now the Commission and parties have copies of the contracts, the issue is ripe for Commission consideration through the hearing ordered by the Commission.²⁷ CMS asserts the Commission cannot fulfill its obligations under the statutes without a hearing. To avoid any doubt, CMS seeks to amend its complaint, specifically claiming violations of RCW 80.28.090 and RCW 80.28.100, as well as cross-subsidization based on a review of the contracts.

33 Public Counsel also opposes Cascade’s motion, asserting “there is no question that the commission intended this adjudication to proceed on the merits to resolve these questions.”²⁸

34 Cascade’s motion requesting “clarification” that the issues of undue preference and discrimination were either never claimed or have been decided is denied. Contrary to Cascade’s argument, CMS’ complaint alleges violations of RCW 80.28.090 and RCW 80.28.100, recognizing a lack of information about specific undue preference and discrimination without access to the contracts.²⁹ The complaint lists Cascade’s violation of RCW 80.28.090 and RCW 80.28.100 as a cause of action, asks the Commission to find Cascade bound by the statutes, and to provide for such relief as the Commission finds appropriate.³⁰ The Commission appropriately addressed these allegations in Order 03.

35 CMS correctly identifies Cascade’s argument as an untimely request for interlocutory review of Order 03. Where the Commission enters an order during the course of a

²⁷ CMS Response to Cascade Motion for Clarification, ¶¶ 18-19.

²⁸ Public Counsel Response to Motions for Clarification, ¶ 3.

²⁹ Complaint, ¶¶ 45-46.

³⁰ *Id.*, ¶¶ 46-47.

proceeding that is not a final order, parties may seek administrative review of the interlocutory order within ten days of service of the order.³¹ If Cascade believed the Commission erred, it was obligated to exhaust its administrative remedies by timely seeking review of the Order under WAC 480-07-810.

- 36 The crucial issue is not whether the complaint sufficiently alleged or claimed undue preference and discrimination, but the appropriate process for the Commission to consider CMS' allegations. Before the Commission can hear CMS' allegations of discrimination and undue preference, CMS argues that Staff must complete its investigation into the contracts and the allegations should be expanded to address cross-subsidization of rates. Cascade raises sufficient concerns about CMS' standing and the Commission's jurisdiction over CMS' proposed amended complaint for the Commission to question the value of continuing the proceeding. For the reasons discussed below, Cascade's recommendation to close the docket has merit.

B. CMS' standing to pursue its complaint

- 37 Cascade also questions the effect of paragraph 64 in Order 03 by alleging CMS lacks standing to bring its complaint under RCW 80.04.110(1), the statute governing formal complaints before the Commission. Cascade asserts that certain provisos in the statute limit the persons and companies that may file complaints with the Commission. CMS and Public Counsel assert the provisos do not apply to CMS or its allegations of undue preference or discrimination, and that CMS has standing to bring its complaint.
- 38 The Commission's complaint statute, RCW 80.04.110(1), provides:

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*

³¹ WAC 480-07-810.

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*: **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: **PROVIDED, FURTHER**, That when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint *or upon complaint of the commission upon its own motion*, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.³²

39 Cascade's motion is denied on the issue of standing under RCW 80.04.110(1). Under the statute, *any person or corporation* may file a complaint about any violation of law

³² RCW 80.04.110(1) (emphasis added).

or order of a public service corporation. CMS clearly meets the requirements of this provision and may address in its complaint any violation of law, including discrimination and undue preference under RCW 80.28.090 and RCW 80.28.100.³³

40 The first proviso of RCW 80.04.110(1) limits who may file complaints concerning the reasonableness of rates, e.g., the Commission, the utility's customers, and representatives of towns or cities in which the utility operates. This proviso does not limit CMS from bringing its complaint, as it currently stands. A complaint which simply alleges discrimination and undue preference in a company's practices is different from a complaint alleging discrimination in rates.

41 The second proviso addresses complaints between public service companies for anti-competitive behavior. Under this proviso, two public service companies or the Commission on its own motion, may bring a complaint alleging "unreasonable, unremunerative, discriminatory, illegal, unfair" or anti-competitive rates, charges, rules, regulations or practices of the competing public service companies. This proviso does not limit the scope of issues about which the Commission has jurisdiction to address under the first part of RCW 80.04.110(1).³⁴ CMS may bring a simple claim of discrimination or undue preference without falling under the second proviso.

42 CMS had standing under RCW 80.04.110(1) to pursue the simple allegations of discrimination or undue preference in its complaint. There is no basis under RCW 80.04.110(1) to challenge CMS' standing to file its initial complaint or the Commission's consideration of these issues in Order 03. However, where CMS seeks to amend its complaint to include allegations of cross-subsidization of rates, CMS has a more difficult task in demonstrating standing. Allegations of cross-subsidization involve issues of the reasonableness of rates more than discriminatory practices. There is also the question of CMS' substantial interest in the issues it raised in its complaint. Considering Cascade's agency relationship with Cascade's customers,

³³ CMS Response to Cascade's Motion for Clarification, ¶ 27, citing *State ex rel Goss v. Metaline Falls Light & Water*, 80 Wash. 652, 141 P. 1142 (1914).

there is enough of a basis for finding a substantial interest for CMS to pursue the issues in its original complaint. The issues did not address the reasonableness of rates, but whether Cascade was properly following Commission requirements for filing tariffs and contracts for its retail sales of natural gas.

C. Commission jurisdiction over CMS' complaint

43 Cascade also questions the Commission's jurisdiction under *Cole* over CMS' complaint.³⁵ For the reasons discussed below, Cascade's motion to clarify that the Commission lacks jurisdiction over the complaint is denied.

44 The Commission has jurisdiction under RCW 80.04.110(1) to hear complaints from any person or corporation for violation of state law and orders. CMS filed its complaint in conjunction with its concerns over issues raised in Cascade's recent rate case in UG-060256. No party complained of CMS' standing to intervene in the rate case or to bring its complaint. CMS' complaint did not address the rates or economic effects of the Cascade's practices on CMS, but whether Cascade violated Commission rules and statutes. Given these circumstances, the Commission had jurisdiction to consider the issues in CMS' complaint and to enter Order 03.

45 Where, however, CMS seeks to amend its complaint to address the possibility that Cascade has cross-subsidized rates between core and non-core customers, the issues of standing and Commission jurisdiction are more strongly tested. Engaging in cross-subsidies is arguably a violation of the requirements in RCW 80.28.010 that a gas company's charges be fair, just, reasonable and sufficient. An allegation of subsidizing rates, however, would fall under the second proviso of RCW 80.04.110(1), limiting the persons who may bring such a complaint, and would not meet the standards established in *Cole*. It would not be appropriate to direct the parties to pursue in hearing issues in an amended complaint over which the Commission may lack jurisdiction. CMS suggests that if there is a doubt as to its

³⁴ *Id.*

³⁵ CMS Motion for Clarification, ¶ 19, citing *Cole*, 79 Wash. 2d 302.

standing and the Commission's jurisdiction under *Cole*, the Commission can pursue the issues in the complaint on its own motion to ensure the Commission's decision is upheld on jurisdictional grounds.³⁶

46 Given CMS' tenuous standing to further pursue issues in the complaint and lack of a substantial interest in the issues raised in its amended complaint, paragraph 64 of Order 03 is clarified to require that Staff consider the claims of undue preference and discrimination while investigating Cascade's gas supply contracts filings, and if justified, recommend the Commission issue a complaint, rather than addressing the issues in a more immediate hearing in Docket UG-061256. It is appropriate to close Docket UG-061256 to allow Staff to investigate the remaining issues and pursue them in a proceeding over which there would be no question of the Commission's jurisdiction. Doing so does not allow Cascade to "skirt adjudication" of the matter, or suggest the Commission is avoiding its responsibilities to ensure Cascade offers fair, just, reasonable or sufficient rates.³⁷

D. Violations of WAC 480-80-143

47 CMS alleges that that Cascade failed to comply with Order 03 by not filing its current gas supply contracts with the Commission as required in WAC 480-80-143. CMS requests the Commission assess a penalty against Cascade for this rule violation, or in the alternative, prohibit Cascade from selling natural gas at retail. Cascade objects to CMS' allegations.

³⁶ CMS Response to Cascade's Motion for Clarification, ¶¶ 48-49.

³⁷ Both Public Counsel and CMS imply the Commission can simply pursue on its own motion allegations CMS raises in its complaint without the Commission conducting an investigation of its own. CMS Response to Motions for Clarification, ¶ 49; Public Counsel Response to Motions for Clarification, ¶ 9. Initiating a complaint blindly based on CMS' and Public Counsel's allegations without further investigation by Staff would be an improper and unjustified use of the Commission's authority to issue complaints under RCW 80.04.110.

48 Order 03 found that Cascade was in violation of RCW 80.28.050 and WAC 480-80-143 for failing to file gas supply tariffs and contracts with the Commission.³⁸ WAC 480-80-143(5) requires:

- (5) Each application filed for commission approval of a contract must:
 - (a) Include a complete copy of the proposed contract;
 - (b) Show that the contract meets the requirements of RCW 80.28.090 (Prohibiting unreasonable preference) and RCW 80.28.100 (Prohibiting rate discrimination);
 - (c) Demonstrate, at a minimum, that the contract charges recover all costs resulting from providing the service during its term, and, in addition, provide a contribution to the gas, electric, or water company's fixed costs;
 - (d) Summarize the basis of the charge(s) proposed in the contract and explain the derivation of the proposed charge(s) including all cost computations involved; and
 - (e) Indicate the basis for using a contract rather than a filed tariff for the specific service involved. If the basis for using a contract is the availability of an alternative service provider, identify that provider.

49 In discussing the Company's failure to file contracts, the Order states "[a]llowing Cascade to cancel its tariff schedules does not result in a waiver of statutory requirements to file contracts, or the Commission's rule requiring filing of special contracts," i.e., WAC 480-80-143.³⁹ The Commission ordered Cascade to "file the necessary tariff schedules and appropriate contracts with the Commission."⁴⁰ CMS relies on these statements and a reference to the rule in a footnote to require Cascade to meet the requirements of WAC 480-80-143 when filing the contracts in compliance with the Order.

50 CMS' request to assess penalties or remedies against Cascade for alleged violations of Order 03 is denied. The Order simply required Cascade to file the contracts with the Commission, for review, within 30 days. Cascade did so by bringing them to the

³⁸ Order 03, ¶ 61.

³⁹ *Id.*, ¶ 58.

⁴⁰ *Id.*, ¶ 66; *see also* ¶¶ 73, 93, 95, 98, 99.

Commission's Records Center, which is standard practice for filing documents with the Commission. Cascade appropriately filed the contracts as confidential documents, subject to the protective order, given the competitive nature of gas supply sales. The Order did not require Cascade to file the contracts *for approval*, the process that WAC 480-80-143 addresses, but required the Company to file them for Staff review and investigation. If Staff finds that Cascade violated Commission statutes or rules, including WAC 480-80-143, Staff will bring the matter to the Commission's attention by recommending a penalty assessment or formal complaint be issued against the Company.

E. Staff's role and range of investigation

51 Staff seeks clarification of its role in the matters Order 03 sets for hearing, as well as the extent of the Staff investigation required by the Order.⁴¹ Considering the range of CMS' and Cascade's positions, and the language of Order 03, the need for clarification is reasonable.

52 Paragraph 99 of the Order provides:

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

In its Order, the Commission rejected a formal Staff investigation, but directed Staff to investigate Cascade's competitive activities in reviewing Cascade's tariff and contracts. To clarify, the Commission did not intend Staff to conduct a formal investigation directly *through an adjudicative process*, but to conduct an informal

⁴¹ Staff Motion for Clarification, ¶¶ 1-4.

investigation, after which Staff would determine whether to recommend penalties or a formal complaint.

- 53 Moreover, it is reasonable to find that the Commission did not intend for Staff to conduct its investigation as a part of, or in conjunction with, the hearing contemplated in paragraph 64 of the Order. It would make no sense to order Staff to begin an informal investigation, only to require the investigation be conducted in the midst of an adjudicative proceeding.
- 54 Several paragraphs of the Order – paragraphs 66, 73, 93, 94, 95, and 98, direct Cascade to file its gas supply contracts and contracts for out-of-territory sales. In paragraphs 73 and 98 of the Order, the Commission states that it will review or evaluate the contracts, while paragraph 99 directs Staff to investigate these contracts. Given the broad nature of the investigation directed in paragraph 99, this order clarifies that any Commission review and evaluation referred to in the Order would occur after Staff’s investigation and recommendations.
- 55 Finally, Staff seeks clarification of whether it should investigate the contracts as special contracts under WAC 480-80-143 or contracts filed in accordance with a tariff. Given the facts of this case, Staff should use its best judgment in determining the nature of the contracts and whether they are special contracts or not. The Commission expects Staff to evaluate Cascade’s contracts, whether the contracts have expired or are renewed or whether they are filed under the proposed tariff. Given the issues identified in Order 03, Staff should look carefully in its investigation at Cascade’s competitive gas sales activity.
- 56 Consistent with the discussion above, Staff must conduct an informal investigation of Cascade’s gas supply contracts, for sales both in and out of Cascade’s territory, and whether Cascade engaged in undue preference and discrimination in rates in these sales. Formal hearings on these issues are not appropriate, not would they be effective, until Staff completes its investigation. If there is sufficient evidence to assess penalties or file a formal complaint, Staff must recommend the Commission take the appropriate action.

F. Cascade's use of an affiliate to make gas supply sales

- 57 On March 30, 2007, Cascade filed with the Commission a letter in Docket UG-070639 stating that it was reactivating an affiliate, CGC Energy, Inc. (CGCE), to make retail sales of natural gas to non-core customers, including customers outside of Cascade's service territory. In a revised letter, also dated March 30, Cascade explains that it will make sales through the affiliate because the Company's proposed tariff filing was suspended on March 14 and certain contracts were due to expire at the end of March, such that filing new contracts 30 days in advance was not an option. Further, the Company seeks to avoid violating the terms of Order 03.
- 58 Through a response to motions for clarification, Staff expresses concern about the effect of the filing on the investigation directed in Order 03, and whether the filing negates the Commission's intent in the Order. Given the timing of Cascade's filing, Staff was not able to address the issue in its motion for clarification, so filed a pleading captioned as a "response" to motions for clarification. Cascade moves to strike Staff's response as nonresponsive to Cascade's or CMS' motions. Cascade requests permission to file a reply in the alternative. Further, Cascade asserts that Staff's pleading does not seek clarification of the Commission's Order, but addresses a new issue – Cascade's affiliate relationship with CGCE. Cascade asserts that any issues related to the March 30 letter should be addressed in Docket UG-070639, which was opened to address the filing.
- 59 Cascade's motion to strike Staff's pleading is denied, and the motion to file a reply is granted. Given that Cascade's filing addressed Cascade's retail sales of natural gas, Staff appropriately brought the filing to the Commission's attention. Cascade's filing should be addressed in conjunction with Cascade's tariff filing in Docket UG-070332, not in the complaint proceeding, however. The complaint addresses Cascade's past behavior. Staff's investigation will address past behavior – the nature of Cascade's existing and prior contracts, to determine violation of statutes or Commission rules. The tariff proceeding and Cascade's reactivation of its affiliate concern how Cascade will make gas supply sales in the future. The question of whether to consolidate the

issues in Docket UG-070639 with those in Cascade's tariff filing in Docket UG-070332 will be addressed at the prehearing conference to be held in the tariff proceeding.

III. CMS' Motion to Amend Complaint

60 CMS moves to amend its complaint in response to the Commission's direction for a hearing to build the factual record for whether Cascade's gas sales to non-core customers were unduly discriminatory or preferential. Together with its motion for clarification, CMS filed a motion to amend its complaint to include allegations of undue preference and discrimination in rates between Cascade's core and non-core customers through cross-subsidization. CMS seeks relief for these allegations as well as allegations of violations of statutes governing service outside of a regulated company's service territory (RCW 80.28.190), and requests the Commission order Cascade's contracts to remain in effect without assignment, extension or renewal through CGCE, Cascade's affiliate. Cascade requests the Commission deny CMS' motion based on the limits of the Commission's jurisdiction under *Cole*, and concerns over standing.

61 CMS' motion is denied. CMS' seeks to amend its complaint to address the specific issue of reasonableness of rates – cross-subsidies between core and non-core customers. While there are issues of unduly preferential and discriminatory practices in the allegations of cross-subsidization, the issues of rates and practices in this case cannot be separated easily. CMS has no standing to amend its complaint under the first proviso of RCW 80.04.110(1). Further, CMS is a direct competitor of Cascade in making gas sales to Cascade's customers that take transportation service. Under *Cole*, CMS cannot show a substantial interest in the rates of Cascade's customers to demonstrate standing to bring these additional allegations against Cascade. Further, CMS' agency relationship with Cascade's transportation customers is not sufficient to overcome its interest as one of Cascade's direct competitors. Lastly, the Commission does not have jurisdiction under *Cole*, to entertain claims by an unregulated competitor about a regulated company's activities or rates.

62 Staff should consider CMS' allegations in conducting its informal investigation. If Staff finds merit in the allegations, Staff may pursue a formal complaint against Cascade, in which Public Counsel could intervene. If, in fact, there is sufficient evidence to pursue a complaint, it is not in the Commission's best interest to pursue the allegations in an amended complaint over which it may lack jurisdiction, such that any order entered could be overturned on appeal.

IV. CMS' Violation of the Protective Order

63 When filing its amended complaint, the Schoenbeck affidavit and exhibit with the Commission on April 9, CMS, through its counsel, violated the protective order, Order 02 in Docket UG-061256. CMS submitted electronically to the Commission an unredacted version of the exhibit – one of Cascade's gas supply contracts revealing customer information, as well as ineffectively redacted versions of the amended complaint and affidavit. The confidential information was redacted in Microsoft Word format by highlighting the information in black, so that a reader could access the confidential information by simply removing the highlighter formatting. CMS submitted these documents to the Commission via e-mail, understanding that these documents would be posted to the Commission's website. The e-mail included Douglas Betzold, the President of CMS, as an addressee. Mr. Betzold is not qualified under the protective order to receive confidential information.

64 Cascade became aware that confidential documents were posted on the Commission's website, and alerted Staff in the Commission's Records Center. Staff immediately removed these documents from the Commission's website. While CMS first alleged that the materials were submitted on the instructions of the Records Center, CMS later noted that attaching the unredacted version of the exhibit was inadvertent. CMS resubmitted redacted versions of the exhibit and appropriately redacted versions of the amended complaint and affidavit. CMS also moved to "lodge," or file, the affidavit of Mr. Betzold to explain CMS' efforts to protect the information, as well as that he did not have access to the confidential information.

- 65 Cascade raises concern about CMS’ “repeated” violation of the Commission’s protective orders. Cascade recounts that the Commission admonished CMS in Order 03 for violating the protective order in Docket UG-060256, Cascade’s rate case. Cascade requests that the Commission sanction CMS for its recent violations in filing its amended complaint by denying CMS’ motion to amend and close the docket. In addition, NWIGU expressed concern that however the Commission addresses the issues in CMS’ complaint that customer information remains confidential and protected.⁴²
- 66 CMS has now, for the second time in a year, compromised confidential information in a Commission proceeding and may have shared confidential information with a CMS employee who was clearly not authorized to view the information. Whether the violation was inadvertent or not, it is appropriate to assess penalties for CMS’ violations of the protective order under RCW 80.04.387. The standard of care for handling confidential information is necessarily high, given the nature of the information. This order need not address whether the violations would justify denying CMS’ amended complaint or closing Docket UG-061256, as the order recommends these actions for other reasons.
- 67 Under RCW 80.04.387, the Commission may assess penalties of up to \$1,000 against any corporation that is not a public service company for each failure to comply with a Commission order. Paragraph 22 of the protective order, Order 02, in Docket UG-061256, provides that if any party to the proceeding violates the order, the violation “shall subject such party to penalties as generally provided by law.” CMS has clearly violated the protective order in four instances: (1) Submitting the contract, Exhibit 1 to the Schoenbeck affidavit, in an unredacted format without properly labeling the document as confidential, (2) Failing to properly redact the proposed amended complaint; (3) Failing to properly redact the Schoenbeck affidavit; and (4) Sharing this confidential information with someone not authorized under the protective order. Based on these facts, this order assesses a penalty of \$4,000 against CMS under RCW 80.04.387 directs CMS and its counsel to take stronger measures in the future to

⁴² See NWIGU Response to Motions for Clarification.

protect confidential information or CMS may be subject to additional penalties or other remedies.

FINDINGS OF FACT

68 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

- 69 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including gas companies.
- 70 (2) Cascade Natural Gas Corporation is a “public service company” and a “gas company,” as those terms are defined in RCW 80.04.010, and as those terms otherwise are used in Title 80 RCW. Cascade is engaged in Washington State in the business of supplying utility services and natural gas to the public for compensation.
- 71 (3) Cost Management Services, Inc., is a competitive gas marketer, supplying and selling natural gas to industrial and commercial customers, including Cascade customers who take transportation-only service from Cascade under Schedules 663 and 664. CMS also acts as an agent for these Cascade customers.
- 72 (4) CMS filed a formal complaint against Cascade in Docket UG-061256 on August 1, 2006, asserting that Cascade was violating state law by selling natural gas at retail to non-core customers without tariffs, special contracts or other Commission-regulated mechanisms in place, and was violating RCW

80.28.090 and RCW 80.28.100, concerning undue preferences and discrimination.

- 73 (5) On January 12, 2007, the Commission entered Order 03 in that docket, after considering the parties' cross-motions for summary determination.
- 74 (6) On February 12, 2007, Cascade filed with the Commission in Docket UG-070332 revisions to its Tariff, WN U-3, reflecting gas supply service options available to non-core customers, as required by Order 03.
- 75 (7) Dockets UG-061256 and UG-070332 both relate to Cascade's retail sales of natural gas, but the dockets involve different issues of fact and law.
- 76 (8) Order 03 required Cascade to file its existing gas supply contracts with the Commission for review within 30 days, not for Commission approval.
- 77 (9) Cascade seeks to amend its complaint to address allegations of undue preference and discrimination in rates between Cascade's core and non-core customers through cross-subsidization, as well as violations of statutes governing service outside of a regulated company's service territory.
- 78 (10) When filing its amended complaint, the Schoenbeck affidavit and exhibit with the Commission on April 9, CMS violated the protective order, Order 02 in Docket UG-061256, by allowing the unauthorized release of confidential information.

CONCLUSIONS OF LAW

- 79 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 80 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 81 (2) Under RCW 80.04.110(1), any person or corporation may file a complaint about any violation of law or order of a public service corporation, including a violation of discrimination or undue preference.
- 82 (3) The first proviso of RCW 80.04.110(1) limits the persons who may file a complaint concerning the rates of a public service company.
- 83 (4) CMS has standing under RCW 80.04.110(1) to pursue allegations of discriminatory or unduly preferential practices in its complaint.
- 84 (5) The Commission has jurisdiction under RCW 80.04.110(1) and case law to hear CMS' complaint that Cascade violated Commission rules and statutes as the complaint did not address the rates or economic effects of the Cascade's practices on CMS. *Cole v. Washington Utilities and Transportation Commission*, 79 Wash. 2d 302, 485 P.2d 71 (1971).
- 85 (6) The Commission does not have jurisdiction "to examine the economic effects of practices of a regulated public utility upon unregulated competitors," as the public interest the Commission must protect is that of customers of the regulated utilities. *Cole*, 79 Wash. 2d at 304-6.
- 86 (7) An unregulated competitor of a regulated utility does not have a substantial interest in rates charged to customers of the regulated utility. *Cole*, 79 Wash. 2d at 305.
- 87 (8) CMS' agency relationship with Cascade's customers is not sufficient to establish a substantial interest in Cascade's gas supply tariff filing or to amend its complaint to include allegations of cross-subsidization.

- 88 (9) CMS' agency relationship with Cascade's customers is too tenuous to fall within the Commission's public interest authority over Cascade's rates where CMS is a direct competitor of Cascade.
- 89 (10) CMS' participation in Cascade's proposed tariff proceeding is not essential to adjudication of the issues as other parties and interested persons, i.e., Public Counsel, NWIGU, and Staff, can effectively address CMS' issues without presenting issues of standing or jurisdiction.
- 90 (11) The Commission has discretion under WAC 480-07-320 to consolidate proceedings "in which the facts or principles of law are related."
- 91 (12) To seek review of a matter decided in an interlocutory order, the party must file a petition for review within ten days of service of the order under WAC 480-07-810.
- 92 (13) Where Cascade's motion for clarification of Order 03 requests review or reconsideration of Order 03, an interlocutory order, Cascade's motion is an untimely request for interlocutory review.
- 93 (14) Paragraph 22 of the protective order, Order 02, in Docket UG-061256, provides that any party to the proceeding who divulges confidential information in violation of the order is subject to "penalties as generally provided by law."
- 94 (15) The Commission may assess penalties of up to \$1,000 under RCW 80.04.387 against any company that is not a public service company for violations of any Commission order.

ORDER

THE COMMISSION ORDERS:

- 95 (1) Cost Management Services, Inc.'s, Petition to Intervene in Docket UG-070332 is denied.
- 96 (2) Cost Management Services, Inc.'s, motions to consolidate the issues in Docket UG-061256 with those in Docket UG-070332 are denied.
- 97 (3) Cascade Natural Gas Corporation's Motion for Clarification is granted in part and denied in part, consistent with the terms of this Order.
- 98 (4) Commission Staff's Motion for Clarification is granted consistent with the terms of this Order.
- 99 (5) Cost Management Services, Inc.'s, Motion for Clarification is denied.
- 100 (6) Cost Management Services, Inc.'s, Motion to Amend its Complaint in Docket UG-061256 is denied.
- 101 (7) Cascade Natural Gas Corporation's Motion to Strike Staff's Response to Motions for Clarification is denied, and the Motion for Leave to Reply is granted.
- 102 (8) Cost Management Services, Inc.'s, Motion to Lodge the Affidavit of Douglas Betzold is granted.
- 103 (9) Within 15 days following the effective date of this Order, Cost Management Services, Inc. must pay to the Commission's Public Service Revolving Fund a penalty of \$4,000 for violations of the protective order, Order 02, in Docket UG-061256.

104 (10) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective May 17, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.