

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

COST MANAGEMENT SERVICES,
INC.,

Complainant,

v.

CASCADE NATURAL GAS
CORPORATION,

Respondent.

DOCKET UG-061256

RESPONDENT'S RESPONSE TO
PETITION FOR ADMINISTRATIVE
REVIEW OF INITIAL ORDER (ORDER 05)

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CASCADE NATURAL GAS
CORPORATION,

Respondent.

DOCKET UG-070332

RESPONDENT'S RESPONSE TO
PETITION FOR ADMINISTRATIVE
REVIEW OF INTERLOCUTORY ORDER
DENYING INTERVENTION (ORDER 02)

TABLE OF CONTENTS

INTRODUCTION 1

 A. Summary of the Order 1

 B. Summary of CMS's Petition and Cascade's Response..... 2

DISCUSSION..... 4

 A. Cascade Has Filed All Existing Contracts as Required by Order 03 4

 B. The Order Correctly Denied CMS's Motion to File an Amended
 Complaint 5

 1. CMS lacks standing to complain about Cascade's rates and the
 Commission lacks jurisdiction to entertain CMS's amended
 complaint 5

 2. The Order correctly clarifies the Commission's determination
 in Order 03 that Staff should informally investigate Cascade's
 existing contracts 7

 C. The Order Correctly Denies CMS's Petition to Intervene in Docket
 UG-070332 10

 1. CMS does not show any substantial and irreparable harm 10

 2. The Order correctly denied CMS's petition to intervene 10

 D. CMS's Proposal For Docket UG-070639 Is Irrelevant 12

 E. The Order Correctly Imposes Penalties on CMS 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

Cole v. Washington Utilities and Transportation Commission, 79 Wash. 2d
302, 485 P.2d 71 (1971) 7

Statutes

RCW 80.04.110(1)..... 7

Regulations and Rules

WAC 480-07-305-.307 8
WAC 480-07-810 10
WAC 480-07-810(2)..... 10
WAC 480-07-810(2)(a) 10
WAC 480-07-810(3)..... 10
WAC 480-80-143 4

1. Respondent Cascade Natural Gas Corporation ("Cascade") respectfully submits this response to the petitions for administrative review that Cost Management Services, Inc. ("CMS") filed in these two proceedings on May 29, 2007 (the "Petition"), seeking review of Order 05 in Docket UG-061256 and Order 02 in Docket UG-070332 (generally referred to as the "Order," unless the context requires a specific reference to Order 05 or Order 02).¹ The Commission should deny the petitions and the relief CMS requests.

INTRODUCTION

A. Summary of the Order

2. The Order resolved a number of issues presented by three motions for clarification (filed by Staff, Cascade, and CMS), CMS's motion to file an amended complaint, CMS's petition to intervene, CMS's motion to consolidate these two dockets, and related issues. The Order resolved all of these issues correctly and sets forth a logical process to address the issues that remain before the Commission. The Order concludes that CMS does not have standing to make, and the Commission does not have jurisdiction to consider, new claims challenging the rates in Cascade's existing gas supply contracts on the grounds that they are discriminatory and reflect cross-subsidization. Those claims are to be investigated by Staff who will recommend whether there is any basis for the Commission to pursue these issues further. Because the Commission has resolved all the issues that CMS may legitimately raise in the complaint docket, the Order reasonably concludes that the Commission should deny CMS's motion to amend its Complaint, and close Docket UG-061256.
3. The Order denies CMS's petition to intervene in Docket UG-070332, established to consider Cascade's revised gas supply tariffs, because CMS, as an unregulated competitor of

¹ Although the Commission has not consolidated these proceedings, and Cascade opposes consolidation, Cascade files this response with a consolidated caption, similar to the Order and the Petition.

Cascade, does not have a substantial interest in the tariff filing and its participation is not otherwise in the public interest. That tariff docket will proceed with the participation of other eligible parties. The Order also denies CMS's request to consolidate these two dockets because the issues are not substantially related – the complaint docket is retrospective and CMS has the burden of proof, whereas the tariff docket is prospective and Cascade has the burden of proof. Finally, the Order assesses penalties on CMS for its undisputed violations of the Protective Order.

B. Summary of CMS's Petition and Cascade's Response

4. CMS seeks review of Order 05 in Docket UG-061256, which CMS characterizes as "dismissing CMS' complaint . . . and denying CMS' motion to amend that complaint." Petition, ¶ 1. In fact, the Order does not dismiss CMS's Complaint; to the contrary, in Order 03, the Commission already ordered some of the relief that CMS requested and the Order does not change any of the relief granted. The aspects of Order 05 that CMS appears to challenge are: (1) denying CMS's motion to amend its Complaint; (2) closing the docket; (3) directing Staff to investigate informally CMS's claim that the rates in Cascade's existing gas supply contracts are unduly discriminatory; and (4) imposing penalties in the amount of \$4,000 for CMS's violations of the Protective Order. While CMS continues to ask that the Commission consolidate these dockets (Petition, ¶ 25), the Petition does not argue that there is any error in the portion of the Order that denies CMS's motion to consolidate (Order, ¶¶ 27-29).
5. The Order is correct in each of the respects in which CMS seeks review. With the amended complaint and further proceedings that CMS requested in Docket UG-061256, CMS asked the Commission to review the rates pursuant to which Cascade made sales of gas supply as well as other rates that CMS claimed subsidized those gas sales. The Order

correctly concludes that CMS does not have standing to complain about those rates and that the Commission does not have jurisdiction to hear CMS's complaint about those rates. On this basis, the Order correctly denies CMS's motion to amend its Complaint, and closes this docket. The Order also reasonably directs Staff to investigate on an informal basis whether Cascade violated any laws prohibiting undue discrimination and to recommend whether further Commission proceedings are required. CMS identifies no error in this regard, but argues instead that no other party (besides Cascade) is as capable as CMS to participate in such an investigation. CMS also challenges the level of penalties the Order would impose, but overlooks both the extent and the seriousness of CMS's violations of the Protective Order.

6. With respect to Docket UG-070332, CMS challenges the Order's interlocutory order denying CMS's petition to intervene. CMS does not meet the standard for review of this interlocutory order because CMS does not identify any substantial and irreparable harm that it has suffered. In addition, CMS does not show any error in the Order. For the same reasons that CMS lacks standing to pursue its proposed amended complaint, it also lacks the requisite interest to participate as an intervener in this tariff proceeding that will consider the rates and terms pursuant to which Cascade may sell gas supply to non-core customers. CMS argues that it should be permitted to intervene in the tariff proceeding simply because it is a follow-on to the complaint docket. In fact, the thrust of CMS's arguments in the Petition is that it should be permitted to pursue its new theories, which challenge Cascade's rates, in both proceedings simply because it was the party that brought certain issues "to public light." Petition, ¶ 3. However, this does not permit CMS or the Commission to ignore the legal limitations on a party's standing and the Commission's jurisdiction. CMS refuses to acknowledge the limitations on its standing with respect to the issues that will be addressed

in the tariff docket, which are different from those addressed in the complaint docket. CMS also argues that it is the most competent party to participate in a review of Cascade's proposed tariffs. The Commission should deny CMS's Petition as it identifies no error in the Order.

DISCUSSION

A. Cascade Has Filed All Existing Contracts as Required by Order 03

7. At the outset, Cascade must respond to several misstatements that CMS makes in the Petition. CMS states that Cascade has not complied with the requirement in Order 03 to file its existing gas supply contracts. There are two aspects to CMS's charge. First, CMS states that "Cascade has never complied with the order to file its non-core agreements under WAC 480-80-143." Petition, ¶¶ 5, 16. According to CMS, "Order 05 provides no further guidance on why this violation should be allowed to continue." Petition, ¶ 16.

8. CMS ignores the discussion of this issue in the Order. The Order correctly found that Order 03 did not require Cascade to file its existing agreements for approval pursuant to WAC 480-80-143, but only required Cascade to file them with the Commission for Staff review and investigation. Order, ¶ 50. The Order concluded that Cascade complied with Order 03 by filing its contracts with the Commission. *Id.* CMS does not dispute this aspect of the decision, but nevertheless continues to rail that Cascade violated Order 03 by not filing its contracts pursuant to WAC 480-80-143.

9. Second, CMS continues to claim that Cascade did not submit all of its existing contracts to the Commission. Petition, ¶ 16. CMS claims that one customer voluntarily provided a gas supply contract to CMS that was not among the agreements that Cascade filed pursuant to Order 03. *Id.* Upon reviewing the Petition, Cascade's counsel asked CMS's counsel to identify that customer, which CMS's counsel did. As it turns out, that customer's

gas supply agreement with Cascade terminated as of October 31, 2006.² Thus, this was not an existing contract in January 2007, when the Commission issued Order 03 requiring Cascade to file its "existing" contracts for gas supply, or in February 2007 when Cascade made its filing. Cascade understood that the Commission's order to file "existing contracts" applied only to contracts that were in effect as of the date of Order 03, and not to contracts that had expired or terminated before that date.

B. The Order Correctly Denied CMS's Motion to File an Amended Complaint

1. CMS lacks standing to complain about Cascade's rates and the Commission lacks jurisdiction to entertain CMS's amended complaint

10. CMS's proposed amended complaint sought to expand the scope of the complaint proceeding far beyond that contemplated in CMS's original Complaint.³ CMS's original Complaint claimed that Cascade is required to make its gas sales to non-core customers pursuant to tariffs and/or contracts filed with the Commission. The Commission agreed and ordered Cascade to file tariffs and contracts, which are currently being investigated. Cascade did not challenge CMS's standing or the Commission's jurisdiction to hear this claim.

11. CMS's proposed amended complaint, however, would challenge for the first time the *rates* at which Cascade made its sales of gas supply, on the ground that those rates were subsidized by core customers. The Order correctly characterized CMS's proposed amended complaint as a challenge to Cascade's rates, and correctly concluded both that CMS lacks

² Cascade does not identify the customer in order to protect its confidentiality.

³ CMS incorrectly states that it submitted its proposed amended complaint "in response to directions contained in" Order 03. Petition, ¶ 6. In fact, Order 03 only stated that CMS would need to amend its complaint if it sought to pursue a claim that was not stated in its original complaint, relating to sales outside Cascade's service territory: "Because CMS did not allege Cascade's violation of RCW 80.28.190 in its complaint, CMS must amend its complaint if it seeks to pursue this claim further." Order 03, ¶ 72. This is not a "direction" to CMS to amend its Complaint in any respect, and especially not with regard to its discrimination claim.

standing to bring such a challenge and that the Commission lacks jurisdiction to hear such a challenge when made by CMS, an unregulated competitor of Cascade. Order, ¶ 45.⁴

12. CMS challenges the determination in the Order that its allegation in the amended complaint that Cascade's rates for gas supply to non-core customers are subsidized by core customers puts the reasonableness of Cascade's rates at issue. Petition, ¶ 12.⁵ However, CMS recognizes that "the concept of cross subsidization . . . refers to the practice of charging higher prices to some customers in order to subsidize lower prices to other customers." *Id.*, ¶ 13. There can be no serious dispute that CMS's claim that Cascade's rates for gas supply are discriminatory or subsidized *does* put the reasonableness of Cascade's rates at issue. CMS concedes this point when it states: "These pricing differences may go to the reasonableness of Cascade's various rates. However, these differences also constitute undue discrimination and undue preference under the applicable statutes." Petition, ¶ 14. CMS argues that if a complaint alleges discrimination, it does not matter if it also challenges rates, and as long as its claim is based on alleged discrimination, it has standing to raise any issues it wants, including challenging rates that Cascade's customers (but not CMS) pay; however, the law is clear that CMS, as an unregulated competitor of Cascade, does not have standing to challenge Cascade's rates on the basis that they are discriminatory.

13. The Order recognized CMS's right to make "simple allegations of discrimination." Order, ¶ 42. The Order drew the line, however, when CMS later attempted to make allegations of alleged cross-subsidization of rates. *Id.* The Order correctly concludes that such additional allegations raise issues regarding the reasonableness of Cascade's rates.

⁴ CMS now wants to take its claim even farther, arguing that "Cascade, as a regulated gas company, should not be allowed to sell gas to non-core customers." Petition, ¶ 26.

⁵ CMS goes so far as to state: "the Judge ruled that CMS' complaint did not relate to discrimination or preference at all." Petition, ¶ 12.

These new allegations fall under the second proviso of RCW 80.04.110(1), which allows only a competing public service company or the Commission to bring a complaint that the "rates, charges, rules, regulations or practices" of a public service company are "unreasonable, unremunerative, discriminatory [or] illegal" CMS's proposed amended complaint makes a claim that falls squarely within this proviso, and the Order correctly ruled that CMS lacks standing to bring such a claim.

14. The Order also correctly concludes that CMS lacks standing to bring a claim challenging Cascade's rates under *Cole v. Washington Utilities and Transportation Commission*, 79 Wash. 2d 302, 485 P.2d 71 (1971), and that the Commission lacks jurisdiction to hear such a claim brought by CMS. Order, ¶ 45. CMS does not argue in its Petition that *Cole* is not controlling or that the Order incorrectly applies *Cole*. Nor does CMS challenge the conclusion in the Order that CMS may not represent the interests of Cascade's customers, but may represent only its own interests. Order, ¶ 24. Thus, CMS presents no good reason to upset the conclusion in the Order that CMS lacks standing to challenge Cascade's rates and that the Commission lacks jurisdiction to hear CMS's challenge to Cascade's rates.

2. The Order correctly clarifies the Commission's determination in Order 03 that Staff should informally investigate Cascade's existing contracts

15. Without identifying any error in the Order, CMS complains that the Order leaves it up to Staff to investigate informally whether Cascade's existing contracts improperly discriminated among customers and to recommend to the Commission whether it should pursue a complaint against Cascade for such conduct. Order, ¶ 52-56. CMS would have the Commission conduct formal adjudicative proceedings based on CMS's Complaint, and impose the burden of proof on Cascade even though CMS brought the complaint. CMS

Motion for Clarification at 11-12. CMS argues that the Order "leaves the Commission's regulatory responsibilities . . . in a complete muddle." Petition, ¶ 16. To the contrary, the Order lays out a clear path for investigation of the contracts and further proceedings, if Staff and the Commission deem those necessary. Order, ¶¶ 52-56. The Order correctly determines that formal proceedings are not appropriate until Staff completes its investigation, and that Commission rules require Staff to recommend that the Commission take appropriate action based upon evidence establishing probable cause. Order, ¶ 56; WAC 480-07-305-.307.

16. CMS also argues that the Order "returns Cascade to the *status quo* prior to the time CMS filed its complaint." Petition, ¶ 9. This argument ignores the import of Order 03 in the CMS complaint docket, which requires Cascade to make gas sales pursuant to tariffs and/or contracts that are filed with the Commission. Cascade has already made its compliance filings and the Commission will decide how these sales will be made in the future. Staff is already investigating Cascade's existing contracts. Thus, the principal relief CMS sought has been granted and the issues that CMS raised have been addressed in the manner CMS requested. This can hardly be characterized as a return to the *status quo* prior to the filing of CMS's Complaint.

17. CMS argues that the Order creates an "audit nightmare" for Staff and – making a vague reference to "Staff's other workload, and the rate of Staff turnover" – asserts that Staff will be able to perform "only the most superficial review." Petition, ¶ 17. CMS's argument is based on an erroneous interpretation of Order 03. CMS assumes that the Commission required Staff to review each and every *new* gas supply contract that Cascade may make to ensure there is no improper discrimination; however, Order 03 requires that Staff review

only Cascade's *existing* contracts for discrimination. Under Order 03, new sales by Cascade will be made pursuant to tariff and, thus, will not require review of each agreement.

18. CMS also implies that it is the only party that has the requisite expertise and personnel to effectively review Cascade's gas supply agreements. *See* Petition, ¶ 20. With its stated goal that "Cascade . . . should not be allowed to sell gas to non-core customers" (Petition, ¶ 26), it is clear that CMS has a *motivation* for continuing to pursue its ever-evolving claims against Cascade.⁶ It does not follow, however, that CMS is the only party that is *capable* of doing so. The Order appropriately recognized Staff's responsibility to conduct such an investigation as well as the role that Public Counsel and NWIGU could play if such a proceeding were initiated. Unlike CMS, Cascade has full confidence in the ability of Commission Staff to conduct and complete the investigation that the Commission directed Staff to undertake. There is no basis for CMS to question Staff's ability to do what the Commission has directed.

19. For all of these reasons, the Commission should affirm the decisions in the Order denying CMS's motion to file an amended complaint, closing Docket UG-061256, and directing Staff to informally investigate the contracts that Cascade filed to determine whether further proceedings are required with regard to CMS's allegation that the rates in Cascade's existing gas supply contracts are unlawfully discriminatory.

⁶ CMS cites a 1990 decision by the California Public Utilities Commission in a rulemaking proceeding, which imposed some restrictions on gas marketing activities by utilities and their affiliates, in support of its argument that this Commission should bar Cascade from such activities. Petition, ¶ 15. Cascade notes that the California commission rested its decision on the need, in 1990, to "ease the supply problems posed by pipeline capacity constraints" and stated that it would modify the rules to reflect improvements in that regard "over the next few years." Petition, Ex. A, at 2. What the California PUC ordered in 1990, when competition in the gas industry was nascent, is not what is required in Washington in 2007. In addition, if this Commission were to introduce regulatory requirements for gas companies and their affiliates, they should apply across the board and be adopted in a rulemaking proceeding, like in California, and not apply only to Cascade.

C. The Order Correctly Denies CMS's Petition to Intervene in Docket UG-070332

1. CMS does not show any substantial and irreparable harm

20. CMS seeks review of Order 02 in Docket UG-070332, denying CMS's petition to intervene in that proceeding. CMS correctly filed this as a petition for review of an interlocutory order under WAC 480-07-810; however, CMS does not identify which subsection of WAC 480-07-810(2) it relies upon. CMS asserts that it has been "irreparably harmed" by denial of its petition to intervene (Petition, ¶ 1), thus invoking the ground for review in WAC 480-07-810(2)(a) ("The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm").

21. WAC 480-07-810(3) requires that CMS "must state why the ruling is in error or should be changed and why interlocutory review is necessary, and must cite reasons that support the petition." CMS does not identify any harm that it will suffer as a result of denial of its petition to intervene, let alone harm that can be considered "substantial and irreparable." For this reason alone, the Commission should not grant interlocutory review of Order 02, denying CMS's petition to intervene. In addition, CMS fails to show why this ruling is in error, for the reasons discussed below. Moreover, even if CMS had established grounds for interlocutory review, review of interlocutory orders is still discretionary with the Commission. WAC 480-07-810(2).

2. The Order correctly denied CMS's petition to intervene

22. CMS's petition to intervene in Docket UG-070332 was premised on its assertion that it should be allowed to represent the interests of Cascade's customers. The Order carefully considered CMS's petition to intervene, and denied it on the grounds that CMS may not represent any interest but its own, and that its own interests as an unregulated competitor of

Cascade are insufficient to establish a substantial interest in the tariff filing. Order, ¶ 24. The Order also correctly determined that CMS does not have standing to challenge Cascade's proposed tariff, and the Commission does not have jurisdiction to hear such a challenge. *Id.*, ¶ 25.

23. CMS does not challenge these essential determinations, and thus identifies no error in the Order. Instead, CMS makes a number of other arguments, none of which justifies interlocutory review.

24. CMS first argues that it should be permitted to participate in the tariff docket because that is a follow-on proceeding to the complaint docket. Petition, ¶ 19. CMS fails to address the distinction between its general claim in the complaint proceeding, that Cascade was required to make its gas sales pursuant to tariffs and/or contracts filed with the Commission, and the fact that the tariff docket will consider the terms pursuant to which Cascade may make gas supply sales to its customers. While Cascade did not challenge CMS's standing to make the general claims, CMS's petition to intervene in the tariff proceeding raises entirely different considerations, as the Order correctly found. Order, ¶¶ 24-25.

25. CMS also argues that its participation in the tariff docket would be in the public interest because "[n]o other party [besides Cascade] appears to have the depth of CMS' expertise" (Petition, ¶ 20) and because "CMS would bring to that proceeding a comprehensive understanding – lacking from all other participants [except Cascade] – about gas marketing, competitive gas sales, interstate pipeline capacity release issues and regulatory precedents from California and other state utility commissions" (Petition, ¶ 21). The Order correctly concludes that CMS's participation is not in the public interest, because the Supreme Court has held that the only public interest the Commission must protect is that of customers, and CMS may not represent customers' interests. Order, ¶ 21. The Order also

considered and rejected CMS's argument that its participation in this docket is "essential." Order, ¶ 26. Staff, Public Counsel, and NWIGU may all participate in this proceeding and adequately inform the Commission without CMS's participation. *Id.*

26. CMS argues that if it is not allowed to participate in the tariff docket, issues will "simply be swept under the rug or postponed indefinitely for resolution." Petition, ¶ 22. It also claims to be "the only party to raise substantive issues about the filing." Petition, ¶ 19. This latter point should not be surprising, because the Commission has not yet held a pre-hearing conference in this docket. As the Order found, other parties, including Staff, Public Counsel, and NWIGU, are fully able to raise issues that will inform the Commission's decision in that docket. CMS's participation is not essential. Moreover, the Order correctly rejected CMS's claim that it "has not and would not raise private issues" (Petition, ¶ 20), finding that CMS *is* seeking to advance its own interests by asking the Commission to prohibit Cascade from selling gas in competition with CMS. Order, ¶ 24; *see also* Petition, ¶ 26. The Order does not err in denying CMS's intervention.

D. CMS's Proposal For Docket UG-070639 Is Irrelevant

27. CMS's Petition also addresses Docket UG-070639, which the Commission has assigned to Cascade's filing regarding CGC Energy, Inc. ("CGCE"). CMS even submits a "Code of Conduct" that it proposes to govern gas sales by CGCE. Petition, ¶¶ 27 and Exhibit B. This is not the time or place to address CGCE; rather, Cascade's relationship with CGCE will be addressed in Docket UG-070639. *See* Order, ¶ 39. Moreover, the Commission is perfectly able to protect Cascade's customers from any concerns arising from this affiliate relationship without participation by CMS, whose sole goal is to serve its own interests, not those of Cascade's customers. Order, ¶ 24.

E. The Order Correctly Imposes Penalties on CMS

28. Finally, CMS challenges the imposition of penalties in the amount of \$4,000 for CMS's violations of the Protective Order. CMS's argument is remarkable because it ignores several of the violations the Order specifically found. CMS's Petition asserts that all four violations the Order found "relate to a single clerical error" which resulted in the submission of a "one-page exhibit to the Schoenbeck affidavit." Petition, ¶ 30. Indeed, CMS's filing of a confidential customer contract with no redaction whatsoever was an egregious violation of the Protective Order. However, CMS completely ignores the fact that the Order correctly found *additional* violations of the Protective Order, based on CMS's filing and serving on Mr. Betzold Word versions of both the proposed amended complaint and the Schoenbeck affidavit that ineffectively redacted a large amount of confidential information. Order, ¶ 63. The Order correctly identified four violations of the Protective Order, which CMS does not dispute, and appropriately imposes penalties for each of them. CMS's argument shows that it still has not acknowledged the full extent of its violations of the Protective Order, and confirms that substantial penalties are required to drive home to CMS the seriousness of its violations.

29. CMS also argues that penalties are not appropriate because it allegedly made a "clerical error." Petition, ¶ 32. The Order, however, correctly decided that it is appropriate to assess penalties "[w]hether the violation was inadvertent or not." Order, ¶ 66. This decision was based on the fact that CMS compromised confidential information in Commission proceedings on two separate occasions in the past year and may have shared confidential information with a CMS employee. *Id.* CMS's repeated, serious violations of Commission protective orders, and its continued denial of the extent of its violations in this instance, demonstrate that the penalties imposed in the Order are appropriate.

CONCLUSION

30. For the foregoing reasons, the Commission should deny CMS's Petition and affirm the decisions in the Order that (1) deny CMS's motion to file an amended complaint, (2) close Docket UG-061256, (3) deny CMS's petition to intervene in Docket UG-070332, (4) deny CMS's motion to consolidate the two dockets, and (5) assess penalties on CMS.

DATED: June 8, 2007

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CERTIFICATE OF SERVICE

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

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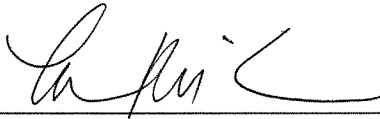
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Dated this 8th day of June, 2007.

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