BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

TREE TOP, INC., Complainant, v. CASCADE NATURAL GAS CORPORATION, Respondent.	DOCKET UG-210745 COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

1. Pursuant to WAC 480-07-370 and 375, and the Washington Utilities and Transportation Commission's ("Commission") Notice Setting Deadline for Response, Tree Top, Inc. ("Tree Top" or "Complainant") files this Response in Opposition to Respondent's Motion to Dismiss[1] by Cascade Natural Gas Corporation ("Cascade" or "Respondent").

2. Cascade relies upon the filed rate doctrine for the proposition that the overrun entitlement penalty that it billed Tree Top is unassailable. Such reliance is misplaced. The filed rate doctrine is a common law rule created by courts to preserve the Commission's sole jurisdiction over the reasonableness of rates. As a result, regulated entities may only charge lawfully filed rates under the filed rate doctrine.

[1] Tree Top notes that Cascade did not file a formal motion to dismiss. Rather, in its Answer, Cascade requested the Commission dismiss the Complaint and determine that Cascade appropriately billed Tree Top for the entitlement overrun penalties, citing the filed rate doctrine and asserting that Tree Top has failed to state a claim for which relief may be granted as affirmative defenses.

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3. Tree Top does not argue that Cascade did not adhere to its filed tariff when assessing the overrun entitlement penalty at issue. Instead, Tree Top asks the Commission to exercise the express power granted to it by RCW 80.04.220 and order Cascade to issue Tree Top reparations due to the excessive and exorbitant rate it was charged. This request does not violate the filed rate doctrine because it is an express power granted to the Commission by the legislature and thus falls squarely within the Commission's jurisdiction and authority.

4. Additionally, to the extent it was intended, Cascade has couched a motion to dismiss within its Answer, which is expressly disallowed by WAC 480-07-375(2).

5. Because the filed rate doctrine does not bar Tree Top's Complaint and because Cascade's motion was improperly included within its Answer, the Commission should deny Cascade's motion to dismiss for failure to state a claim.

II. STATEMENT OF FACTS

6. For the sake of brevity, Tree Top refers the Commission to the facts alleged in its Complaint.

7. In short, it is undisputed that there was an extreme weather event in February 2021 that affected most of the United States. From February 13–16, 2021, pricing at Northwest South of Green River ("Green River") was $119.83/MMBtu and at Sumas was $14.03/MMBtu. Cascade declared an entitlement period during this time and assessed Tree Top an overrun entitlement penalty charge of $198,884.87 based off Green River prices. Cascade did not purchase any gas from Green River on these dates.

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III. ARGUMENT

8. Ruling on a motion to dismiss, the Commission considers the Washington Superior Court Rules applicable under Civil Rule ("CR") 12(b)(6). WAC 480-07-380(1)(a). Dismissal under CR 12(b)(6) is only appropriate if "the plaintiff can prove no set of facts consistent with the complaint to justify recovery." *ADCI Corp. v. Nguyen,* 16 Wash. App.2d 77, 82 (2021). The Commission may consider hypothetical facts in deciding whether to dismiss. *Id.* Additionally, such motions should be granted "sparingly and with care." *Id.*

9. The Commission has a statutory duty to "ensure that all rates, terms, and conditions of service provided to all customers of jurisdictional utilities remain fair, just, and reasonable at all times." *Air Liquide America Corp. v. Puget Sound Energy, Inc.*, UE-001952, 2001 WL 360623 (Wash. U.T.C. Jan. 22, 2001). "Whenever the commission shall find . . . that the rates or charges demanded . . . by any gas company . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law . . . the commission shall determine the just, reasonable, or sufficient rates . . . to be thereafter observed . . . ." RCW 80.28.020.

10. A customer may submit a complaint to the Commission "concerning the reasonableness of any rate." RCW 80.04.220. Upon an investigation by the Commission and finding that a utility has charged an "excessive or exorbitant amount" for service, the Commission "shall order the public service company to pay the complainant the excess amount found to have been charged" with interest. *Id.*

A. The Filed Rate Doctrine Does Not Apply Because the Commission Is Expressly Authorized to Determine the Reasonableness of Past Rates Charged.

11. Cascade seeks to dismiss Tree Top's complaint, alleging it is barred by the filed rate doctrine. The filed rate doctrine is a court-created rule intended to protect an agency's

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jurisdiction over determining the reasonableness of a rate and to ensure that regulated parties only charge approved rates. *Tenore v. AT&T Wireless Service*, 136 Wash.2d 322, 331–32, 962 P.2d 104, 108 (1998). As such, it prevents parties from invoking common-law claims and defenses to attempt to pay or charge a different rate than has been prescribed by an agency-approved tariff. *Id.* For example, courts have found that the filed rate doctrine barred breach of contract and other equitable claims because the complained-of conduct occurred pursuant to an approved tariff. *Breiding v. Eversource Energy*, 939 F.3d 47, 52–53 (1st Cir. 2019). In other words, when parties ask a court to provide remedies based on an agency-approved tariff or contract, courts overwhelmingly invoke the filed rate doctrine to defer such determinations to the exclusive jurisdiction and expertise of the relevant agency. *Breiding v. Eversource Energy*, 344 F.Supp.3d 433, 445 (D. Mass. 2018).

12. The filed rate doctrine, however, does not prevent the Commission *itself* from considering the reasonableness of a past charge because the Washington legislature has granted it specific authority to do so. RCW 80.04.220; *Tuerk v. Department of Licensing*, 123 Wash.2d 120, 124–25, 864 P.2d 1382 (1994) ("Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.").

13. The Commission has jurisdiction over customer complaints concerning acts performed or omitted by any regulated entity in violation "of any provision of this title." RCW 80.04.110(1)(a). Consequently, such complaints may include the reasonableness of rates (RCW 80.04.220), reparations (RCW 80.04.240), and refunds (RCW 80.04.230). Cascade's sparse argument that the filed rate doctrine precludes Tree Top's complaint is undermined by the Commission's express authorization to examine the reasonableness of rates that utilities have charged customers. *See Tuerk*, 123 Wash at 124–25. Because the Commission's authorizing

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statutes grant it express authority to examine *past charges*, Cascade cannot invoke the filed rate doctrine to prevent the Commission from exercising those powers.

14. Here, Tree Top alleges that Cascade's specific application of an overrun entitlement penalty charge resulted in an unreasonable rate. Under RCW 80.04.220, the Commission, after investigation, may determine that the rate is "excessive or exorbitant" and order that the excessive amount be refunded with interest:

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

15. Because Tree Top's complaint is within the Commission's jurisdiction and because the filed rate doctrine does not apply, the Commission should deny Cascade's motion to dismiss Tree Top's complaint.

B. Cascade's Motion to Dismiss Was Improperly Couched Within Its Answer.

16. In paragraph 42 of its Answer, Cascade invokes the filed rate doctrine as an affirmative defense without citation to any legal authority. More problematically, however, in paragraph 43 of its Answer, Cascade invokes the language of a 12(b)(6) motion to dismiss, "Failure to State a Claim for Which Relief May Be Granted" as grounds for an affirmative defense. Couching a motion to dismiss within an answer is not allowed under the Commission's rules and should be denied.

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17. Pursuant to WAC 480-07-375(2), "[p]arties must file motions separately from any pleading or other communication with the commission. The commission will not consider motions that are merely stated in the body of a pleading . . . ." This is precisely what Cascade has done. Cascade filed its Answer on October 25, 2021. Cascade did not file a separate motion to dismiss prior to filing its answer but instead, to the extent it was intentional, has attempted to move the Commission to dismiss Tree Top's complaint within its Answer. This is expressly disallowed under the Commission's rules.

18. Additionally, the Commission considers motions to dismiss under the applicable CR 12(b)(6) standards. In Washington courts, a motion to dismiss must be filed before an answer. P.E. Systems, LLC v. CPI Corp., 176 Wash.2d 198, 203 (2012).

19. Because the motion was not filed separately and before its Answer, the Commission should deny Cascade's "motion to dismiss" for failure to state a claim.

IV. CONCLUSION

20. Extraordinary weather events caused market prices at Green River to spike to unprecedented levels. And while an overrun entitlement penalty should reasonably encourage customers to remain within their daily nominations, the charge assessed to Tree Top in this instance was excessive and exorbitant.

21. Pursuant to RCW 80.04.220, the Commission has express statutory authority to order Cascade to issue refunds if rates it has charged are excessive or exorbitant. Furthermore, Cascade has improperly moved the Commission to dismiss Tree Top's complaint within the body of its answer. Accordingly, the Commission should deny Cascade's motion to dismiss for failure to state a claim upon which relief can be granted.

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Dated in Portland, Oregon, this 9th day of November 2021

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s/ Chad M. Stokes

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