

Docket No. UG-210745 - Vol. I

Tree Top, Inc. v. Cascade Natural Gas Corporation

November 16, 2021



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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

TREE TOP, INC.)
)
Complainant,)
vs.) Docket No. UG-210745
)
CASCADE NATURAL GAS)
CORPORATION,)
)
Respondent.)

VIRTUAL PREHEARING CONFERENCE - VOL. I
PAGES 1-22
ADMINISTRATIVE LAW JUDGE ANDREW O'CONNELL
November 16, 2021
3:04 p.m.

DATE TAKEN: NOVEMBER 16, 2021
REPORTED BY: CARISA KITSSELMAN, RPR, CCR 2018

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* * * * *

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1 NOVEMBER 16, 2021
2 3:04 p.m.
3 * * * * *

4 JUDGE O'CONNELL: Good afternoon. The time
5 is approximately 3:04 p.m. on Tuesday, November 16, 2021.
6 My name is Andrew O'Connell. And I am an administrative
7 law judge with the Washington Utilities and
8 Transportation Commission. And I will be presiding in
9 this matter.

10 We are here today for a virtual prehearing
11 conference in Docket UG-210745, which concerns a formal
12 complaint filed with the Commission on September 24,
13 2021, by Tree Top, Incorporated, against Cascade Natural
14 Gas Corporation.

15 The complaint alleges in general that Cascade
16 imposed an exorbitant over an entitlement penalty on Tree
17 Top that Tree Top asserts is not fair, just, or
18 reasonable.

19 Let's move forward with short form appearances
20 from the parties as I have in the docket all of the
21 information for the representatives.

22 Let's begin with Tree Top.

23 MR. STOKES: Good afternoon, Your Honor.
24 Chad Stokes for Tree Top, Inc.

25 JUDGE O'CONNELL: Okay. And for Cascade?

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1 MS. PEASE: Good afternoon, Your Honor.
2 Jocelyn Pease for Cascade Natural Gas
3 Corporation.

4 JUDGE O'CONNELL: Okay. Thank you.
5 So the first thing I want to address is
6 Cascade's request that the Commission dismiss the
7 complaint for failure to state a claim upon which relief
8 can be granted pursuant to the filed rate doctrine.

9 In its answer to the complaint, Cascade asserted
10 that affirmative defense, including that it followed its
11 filed tariff and its charges to Tree Top. I issued
12 notice allowing Tree Top to respond to this defense and
13 indicated that I would address this issue at this
14 prehearing conference.

15 Let me turn to Cascade. I reviewed your answer,
16 the affirmative defenses that you include, and Tree Top's
17 response. Would you briefly respond to Tree Top's
18 response and address why your request is appropriate at
19 this point and whether the Commission has the authority
20 to examine the past charges that are complained of.

21 MS. PEASE: Yes, Your Honor.

22 So Cascade views this complaint as relatively
23 straightforward. And I think as Your Honor understands,
24 Cascade's perspective is that it charged the rates
25 consistent with its tariff. And for that reason, we had

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1 included an affirmative defense regarding the filed rate
2 doctrine.

3 And Tree Top in its response has asserted that
4 the filed rate doctrine should not apply; that the
5 Commission would not be constrained by the filed rate
6 doctrine.

7 However, the filed rate doctrine is embodied in
8 the Commission statutes. In particular, RCW 80.28.080.
9 And the Commission has previously interpreted and applied
10 the filed rate doctrine in considering its actions.

11 And while Tree Top states in its response that
12 the Commission has express authority under the reparation
13 statute, 80.04.220, to examine past charges, Cascade
14 would urge that the Commission should instead view its
15 authority under RCW 80.042.220, to avoid running afoul of
16 the filed rate doctrine. Or the prohibition on
17 retroactive rate making, which is a corollary of the
18 filed rate doctrine.

19 And from review of the Commission's precedent
20 applying the reparation statute, RCW 80.04.220, it
21 appears that the Commission itself has not applied the
22 reparation statute in a manner that would contravene the
23 filed rate doctrine. And we would urge that the
24 Commission declined to do so here.

25 I would note, as it relates to our motion to

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1 dismiss that was included within our answer, it -- it was
2 Cascade's intention that this issue would be fully
3 briefed through a motion for summary determination to be
4 held at some -- to be provided at some point after the
5 prehearing conference.

6 And so I recognize you're considering this issue
7 without the benefit of having it be fully briefed for you
8 and would offer that that could be something that Cascade
9 could do to provide supplemental briefing on this issue,
10 if Your Honor were inclined to consider it.

11 And as one additional matter related to the
12 application of the -- the reparations statute, Cascade
13 would also seek leave to amend its answer. Because
14 through ongoing investigation following the filing of
15 Cascade's answer, we determined that there is additional
16 affirmative defense that should apply in this case, which
17 is the six-month statute of limitations provided in
18 RCW 80.04.240.

19 So I realize I'm now going beyond the scope of
20 the question that Your Honor had posed as to the filed
21 rate doctrine but had wanted to preview that Cascade
22 would seek leave to amend its answer to include this
23 additional affirmative defense and would seek leave to
24 provide briefing on this matter, if requested -- if
25 allowed by Your Honor.

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1 And, in particular, the relevant statute,
2 RCW 80.04.240, provides for a six-month statute of
3 limitations. And specifically applies to claims brought
4 under RCW 80.04.220, the reparation statute.

5 And the Commission has previously determined
6 that the test for claim accrual for purposes of this
7 statute of limitations runs from the time that the
8 aggrieved party in the exercise of reasonable diligence
9 should have discovered the injury.

10 And while we do not yet have facts in our record
11 concerning the application of the statute of limitations
12 in this case or -- and we do not yet have facts in the
13 record relevant to the time when Tree Top would have
14 known -- would have had notice of this potential claim,
15 Cascade believes that it will be able to demonstrate that
16 Tree Top's complaint was filed too late for the
17 Commission to consider it under the applicable statute of
18 limitations.

19 And on this point, I would add as well that I --
20 that Cascade has consulted with counsel for Tree Top.
21 And we both acknowledge that -- and I will not presume to
22 speak for Mr. Stokes, and, of course, he can speak for
23 himself, but that neither party has briefed this issue at
24 this point.

25 So with that, I would ask, have I -- have I

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1 addressed your question?

2 And if so, I would conclude.

3 JUDGE O'CONNELL: Yes, I think you have.

4 Thank you.

5 I do want to give a chance for Tree Top to
6 respond.

7 If you could, please, address first the request
8 that the Commission dismiss. And then perhaps also --
9 well, let's start with that.

10 Mr. Stokes, go ahead.

11 MR. STOKES: Thank you.

12 So on the filed rate doctrine, first of all, the
13 motion to dismiss, I don't think Cascade intended it to
14 be a motion to dismiss.

15 A motion to dismiss has to be in a separate
16 filing under the Commission's rules. And it actually
17 says the Commission won't even consider a motion to
18 dismiss not in a separate motion. So it was improperly
19 filed to the extent that they were asking for it.

20 But even if you ignore that, the filed rate
21 doctrine clearly does not apply here. The Commission has
22 express authority granted from the State of Washington to
23 consider the just and reasonableness of rates and it
24 includes reparations.

25 The 80.28.080 that was cited, that applies to

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1 the company. So the filed rate doctrine in this context
 2 means that regulated utilities have to file their -- have
 3 to charge their filed rates.
 4 It does not in any way prohibit the Commission
 5 from reviewing those rates charged, and upon a finding
 6 that the charges were unjust and reasonable, the
 7 Commission can look at those rates and determine if there
 8 are damages and order reparations; so, therefore, a
 9 motion to dismiss on this issue should be rejected.
 10 On the issue of filing a motion to dismiss on
 11 this very same issue in a motion for summary
 12 determination, this is a legal issue. Wouldn't require
 13 an affidavit. And so that -- a motion to dismiss on this
 14 issue should have been filed or an answer was filed.
 15 So to key this issue up again at another motion
 16 for summary determination would not only unreasonably
 17 increase the attorney fees in this case, it shouldn't be
 18 allowed because there's no factual issues on a filed
 19 rate -- if the filed rate doctrine rate applies here, it
 20 applies.
 21 So I think the -- the Commission doesn't need to
 22 review an affidavit to determine whether or not we're
 23 seeking to have the Commission look at the just and
 24 reasonableness of the rates that were charged here for
 25 the penalty.

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1 And once I'm done with that, I'll address the
 2 statute of limitations issue.
 3 Do you have a question for me, Your Honor?
 4 JUDGE O'CONNELL: So your argument is that
 5 the filed rate doctrine basically applies to prohibit the
 6 company from going back in time but not the customers?
 7 MR. STOKES: Well, the filed rate
 8 doctrine -- it depends on the context.
 9 So it's a traditionally created doctrine that
 10 prohibits courts from second-guessing an agency's
 11 actions.
 12 So a court -- there's a lot of case law on it.
 13 We cited some. And I will note that we responded to a
 14 motion in a vacuum. So Cascade filed a one-line motion
 15 to dismiss with no legal authority. So I haven't seen
 16 any legal authority that -- where the filed rate doctrine
 17 has been applied by this Commission. I have seen orders
 18 where they have addressed the doctrine against
 19 retroactive rate making, which is a corollary to the
 20 filed rate doctrine, and that's what the Commission
 21 typically looks at.
 22 But that's beyond the scope of Cascade's motion
 23 to dismiss. But it's a traditionally created doctrine
 24 that prohibits courts from second-guessing agencies. The
 25 Commission is -- has express authority that the

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1 Commission is authorized by the State -- so this common
 2 law doctrine was created that the state law, that's
 3 directed that the Commission has express authority.
 4 So it -- I don't think it can be any more clear
 5 than that.
 6 JUDGE O'CONNELL: Okay. Thank you for both
 7 of your presentations on that.
 8 Mr. Stokes, I do want to come back to you in
 9 just a moment on the statute of limitations argument, and
 10 we'll address the question of amending the answer in just
 11 a moment.
 12 Thank you both for your presentations, by the
 13 way, for answering my questions about the request based
 14 upon the filed rate doctrine.
 15 I understand the perspectives and the arguments
 16 at this point. I don't -- I'm going to decide to deny
 17 Cascade's request at this point in time. I tend to agree
 18 with Tree Top on the reasons for denying it. And I'm
 19 going to memorialize that decision in a prehearing
 20 conference order.
 21 However, I do not intend to foreclose the
 22 rationale supporting Cascade's request if it becomes
 23 appropriate. And I am entertaining the idea of having
 24 more information and legal briefing when it becomes
 25 appropriate regarding whether summary judgment is

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1 appropriate after more facts have been fleshed out.
 2 So I do think that if it -- in the future
 3 becomes apparent that the facts as they may develop and
 4 be presented justify the rationale as presented by
 5 Cascade, the Commission will entertain future arguments.
 6 Just find that it's charges were based upon its final
 7 tariff.
 8 MR. STOKES: So --
 9 JUDGE O'CONNELL: And I would like to say
 10 that I'm looking at this a lot. And the fact that we
 11 have a complaint from Tree Top and an answer from the
 12 company, and I'm looking at the Commission's past actions
 13 in terms of these sorts of complaints, and I'm also
 14 thinking about what facts have and have not been
 15 established to this point, and I am looking at this in
 16 terms of we're very early in the process.
 17 And I am, I think, favoring the perspective in
 18 light -- you know, favorable to Cascade -- sorry, to Tree
 19 Top. And in light of the arguments made in its response
 20 that I don't think it's appropriate at this time to grant
 21 Cascade's request.
 22 Mr. Stokes, let me turn back to you.
 23 I want to hear about the statute of limitations
 24 and your perspective. And I'll turn back to Ms. Pease
 25 after I hear from you about whether there is going to be

1 some agreed date between the parties for a motion for
2 summary judgment or some sort of point in time when facts
3 will have been established through discovery or become
4 apparent through discovery that would support arguments
5 from either side.

6 So, Mr. Stokes, let me turn it back over to you.

7 MR. STOKES: Yes, Your Honor. I just want
8 to clarify one of the last things you said.

9 It's not our position that Cascade did not
10 charge rates consistent with this tariff. So we -- we
11 did not allege that. So they were -- they applied their
12 filed tariff rates.

13 I just want to make sure that was understood.

14 That was not one of our arguments that they weren't
15 following their filed rates. I just wanted to clarify
16 that.

17 JUDGE O'CONNELL: My understanding was that
18 your argument is that the Commission has the authority to
19 go back and consider whether the rates charged were
20 reasonable even --

21 MR. STOKES: Correct.

22 JUDGE O'CONNELL: -- in light of whether
23 they were part of company's filed tariff; is that
24 correct?

25 MR. STOKES: Correct. Yes, Your Honor.

1 opening motion for summary determination in our response
2 brief. And then we would seek to have another prehearing
3 conference once we have a ruling on that motion. Because
4 we don't want to -- obviously, if the Commission were to
5 dispose of this case on the statute of limitations issue,
6 we don't want to run up a bunch of legal bills throughout
7 the testimony and that sort of thing.

8 But I think there's pretty strong case law in
9 front of the Washington Supreme Court that indicates when
10 the matter accrues based on that statute. Understand
11 that Cascade will take a different position on that.

12 So we have an issue that needs to be decided by
13 the Commission.

14 JUDGE O'CONNELL: Okay. Very good.

15 Ms. Pease, let me turn it back to you.

16 MS. PEASE: Thank you.

17 To respond to Mr. Stokes, I would agree with his
18 characterization that we do have different views as to
19 how that statute of limitations period may apply here.
20 And we've consulted and agreed upon a schedule for
21 presenting that issue to the Commission for briefing.

22 So I would agree with Mr. Stokes'
23 characterization of our communications.

24 JUDGE O'CONNELL: Okay then.

25 That would be a naturally good transition to

1 So --

2 JUDGE O'CONNELL: Mr. Stokes, when I'm
3 saying about the facts being established, the things that
4 I noted piqued my interest were the market prices at
5 Sumas and at the other hub. And the difference there.
6 And I don't -- I don't think I have enough information
7 around that and what was charged and why to make any sort
8 of determination at this point.

9 So that's --

10 MR. STOKES: Understood.

11 JUDGE O'CONNELL: -- those are some of the
12 facts and the circumstances that I think could become
13 important for the Commission's decision.

14 Go ahead, Mr. Stokes.

15 MR. STOKES: Thank you, Your Honor.

16 As far as a motion for summary determination on
17 the statute of limitations issue, I've been working with
18 Cascade's counsel on developing a traditional schedule.
19 In kind of the negotiation of the schedule, Cascade
20 raised the issue of the six-month statute of limitations
21 which applies. I don't agree that Tree Top is in
22 jeopardy of violating the six-month statute of
23 limitations.

24 But in light of the legal issue that's been
25 raised, we've agreed to a schedule that includes an

1 talking about procedural schedule.

2 But before we do that, I just want to stay on
3 the record, ask, and then inquire on the record about any
4 petitions for intervention. None have been filed with
5 the Commission to this point.

6 Is there anyone on the telephone or on Zoom who
7 intends to intervene in this matter?

8 Okay. Hearing none, let's proceed to talk about
9 the procedural schedule.

10 MR. STOKES: Okay. So this is the schedule
11 that we have agreed to.

12 So Cascade will file their motion to dismiss on
13 or before December -- so on December 17th.

14 MS. PEASE: If I -- if I may, Mr. Stokes.

15 MR. STOKES: Yeah. Go ahead, Jocelyn.

16 MS. PEASE: It would be a motion for
17 summary determination on the statute of limitations
18 issue.

19 And that is a -- and thank you for also raising
20 we did not discuss a deadline for Cascade to amend its
21 answer. But that could be completed fairly quickly. I
22 would think within a week.

23 JUDGE O'CONNELL: Okay.

24 MR. STOKES: And then Tree Top's response
25 brief would be due January 6th.

1 And then we would schedule a prehearing
2 conference once we have a ruling on that to establish the
3 rest of the proceeding.

4 JUDGE O'CONNELL: Okay. Understood.

5 So looking at the calendar and in consideration
6 of Thanksgiving, would -- Ms. Pease, let me ask about
7 your schedule.

8 What is the more appropriate date next week to
9 set as a deadline for an amendment to the answer?

10 MS. PEASE: I think we could aim to set it
11 for the 23rd. I think that should work just fine.

12 JUDGE O'CONNELL: Okay. I will set that
13 date.

14 Mr. Stokes, is there any objection to me setting
15 that date as the date for the amendment to the answer?

16 MR. STOKES: No objection.

17 JUDGE O'CONNELL: Okay. I will memorialize
18 that in the prehearing conference order.

19 And my understanding at this point is that the
20 procedural schedule that's been agreed is November 23rd
21 for Cascade's amendment to the answer.

22 December 17th for Cascade's motion for summary
23 determination.

24 And January 6th for Tree Top's response to that
25 motion for summary determination.

1 MR. STOKES: I think -- the plan is that we
2 will try to -- to negotiate stipulated facts. But
3 understand that Cascade believes that they may need some
4 discovery on this issue. And that discovery request will
5 go out by November 22nd.

6 JUDGE O'CONNELL: And traditionally,
7 according to Commissioner rule, responses are due within
8 ten days.

9 Is that what the parties anticipated?

10 MR. STOKES: Yes.

11 MS. PEASE: Yeah.

12 JUDGE O'CONNELL: Thank you.

13 Okay. Then what I will do is I will include
14 that date for discovery requests in the agreed procedural
15 schedule.

16 Now, I know both parties and their
17 representatives are familiar with the Commission's rules
18 for discovery and the procedures for proceedings at the
19 Commission, just as a brief reminder, we require all
20 filing and service to be done electronically. And if any
21 party wants to add additional people to -- for the
22 service, please send those to my e-mail which is
23 andrew.j.oconnell@utc.wa.gov.

24 And I have one more item I'd like to address
25 before we adjourn for the day. And then I will ask if

1 At that point, depending on what the ruling --
2 what the decision is on that motion, we will set a
3 prehearing conference.

4 Have I accurately captured that?

5 MR. STOKES: Yes, Your Honor.

6 JUDGE O'CONNELL: I'm seeing nods.

7 MS. PEASE: Yes, Your Honor.

8 JUDGE O'CONNELL: So I'm -- do the parties
9 anticipate that there's going to be discovery between now
10 and then, December 17th?

11 MR. STOKES: That is a good question.

12 Could we confer for five minutes maybe offline?

13 JUDGE O'CONNELL: Yes. Sure. Let's be off
14 the record for five minutes. And to give the parties
15 some privacy, I will sign off, and I will sign back on in
16 five minutes.

17 It is currently 3:28 p.m. I will sign back on
18 at 3:33. And we're off the record. Thank you.

19 (A break was taken from
20 3:27 p.m. to 3:39 p.m.)

21 JUDGE O'CONNELL: We're back on the record
22 after a short recess. The time is approximately
23 3:40 p.m.

24 Ms. Pease, Mr. Stokes, let me turn to you and
25 ask what you have come up with.

1 there's anything else that we need to address.

2 So I would like to primarily direct my next
3 question to Cascade.

4 Do the parties anticipate the need at this time
5 for a protective order in this case?

6 And if the proceeding goes on beyond the motion
7 for summary determination, we could also address whether
8 there needs to be a protective order at that point.

9 Ms. Pease, does the company feel like you need a
10 protective order now?

11 MS. PEASE: I believe at this point, no. I
12 have not consulted with the Cascade folks on this
13 particular question, but I don't -- I don't believe so.
14 And to the extent that a protective order may be needed,
15 I would think it would be at the next stage, assuming we
16 arrive there.

17 So I don't believe we need one right now.

18 JUDGE O'CONNELL: Okay. Very good.

19 Ms. Pease, Mr. Stokes, is there anything else
20 that we need to address today?

21 MR. STOKES: Not for Tree Top, Your Honor.
22 Thank you.

23 JUDGE O'CONNELL: Okay.

24 MS. PEASE: No. Nothing from Cascade.

25 JUDGE O'CONNELL: Okay. I will issue the

1 prehearing conference order shortly, containing the
2 agreed procedural schedule, the dates that we have
3 discussed.

4 If there is nothing else, then we are adjourned.
5 Thank you. We'll be off the record.

6 (Adjourned at 3:43 p.m.)
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1 CERTIFICATE
2

3 STATE OF WASHINGTON
4 COUNTY OF KITSAP
5

6 I, Carisa Kitselman, a Certified Court Reporter
7 in and for the State of Washington, do hereby certify
8 that the foregoing transcript of the virtual prehearing
9 conference on NOVEMBER 16, 2021, is true and accurate to
10 the best of my knowledge, skill and ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand
12 and seal this 29th day of November, 2021.
13

14 
15 
16 CARISA KITSELMAN, RPR, CCR #2018
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