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 KITSELMAN, RPR, CCR 2018
APPEARANCES

ADMINISTRATIVE LAW JUDGE:

ANDREW O'CONNELL
RAYNE PEARSON

FOR COMPLAINANT:

CHAD STOKES
Cable Huston
1455 Southwest Broadway
Suite 1500
Portland, Oregon 97201
503.224.3092
cstokes@cablehuston.com

FOR CASCADE NATURAL GAS:

JOCELYN PEASE
McDowell, Rackner & Gibson, PC
419 SW 11th Avenue
Suite 400
Portland, Oregon 97205
503.595.3925
jocelyn@mrg-law.com

MIKE PARVINEN
Director of Regulatory Affairs

ALSO PRESENT: RYAN SMITH

LORI BLATTNER

KYLE MURPHY

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

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

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

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

Let's begin with Tree Top.

MR. STOKES: Good afternoon, Your Honor.

Chad Stokes for Tree Top, Inc.

JUDGE O'CONNELL: Okay. And for Cascade?
MS. PEASE: Good afternoon, Your Honor.

Jocelyn Pease for Cascade Natural Gas Corporation.

JUDGE O'CONNELL: Okay. Thank you.

So the first thing I want to address is Cascade's request that the Commission dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to the filed rate doctrine.

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

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

MS. PEASE: Yes, Your Honor.

So Cascade views this complaint as relatively straightforward. And I think as Your Honor understands, Cascade's perspective is that it charged the rates consistent with its tariff. And for that reason, we had
1 included an affirmative defense regarding the filed rate
document.

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

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

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

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

22 I would note, as it relates to our motion to
dismiss that was included within our answer, it -- it was Cascade's intention that this issue would be fully briefed through a motion for summary determination to be held at some -- to be provided at some point after the prehearing conference.

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

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

So I realize I'm now going beyond the scope of the question that Your Honor had posed as to the filed rate doctrine but had wanted to preview that Cascade would seek leave to amend its answer to include this additional affirmative defense and would seek leave to provide briefing on this matter, if requested -- if allowed by Your Honor.
And, in particular, the relevant statute, RCW 80.04.240, provides for a six-month statute of limitations. And specifically applies to claims brought under RCW 80.04.220, the reparation statute.

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

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

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

So with that, I would ask, have I -- have I
addressed your question?

And if so, I would conclude.

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

Thank you.

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

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

Mr. Stokes, go ahead.

MR. STOKES: Thank you.

So on the filed rate doctrine, first of all, the motion to dismiss, I don't thinkCascade intended it to be a motion to dismiss.

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

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

The 80.28.080 that was cited, that applies to
the company. So the filed rate doctrine in this context means that regulated utilities have to file their -- have to charge their filed rates.

It does not in any way prohibit the Commission from reviewing those rates charged, and upon a finding that the charges were unjust and reasonable, the Commission can look at those rates and determine if there are damages and order reparations; so, therefore, a motion to dismiss on this issue should be rejected.

On the issue of filing a motion to dismiss on this very same issue in a motion for summary determination, this is a legal issue. Wouldn't require an affidavit. And so that -- a motion to dismiss on this issue should have been filed or an answer was filed.

So to key this issue up again at another motion for summary determination would not only unreasonably increase the attorney fees in this case, it shouldn't be allowed because there's no factual issues on a filed rate -- if the filed rate doctrine rate applies here, it applies.

So I think the -- the Commission doesn't need to review an affidavit to determine whether or not we're seeking to have the Commission look at the just and reasonableness of the rates that were charged here for the penalty.
And once I'm done with that, I'll address the statute of limitations issue.

Do you have a question for me, Your Honor?

JUDGE O'CONNELL: So your argument is that the filed rate doctrine basically applies to prohibit the company from going back in time but not the customers?

MR. STOKES: Well, the filed rate doctrine -- it depends on the context.

So it's a traditionally created doctrine that prohibits courts from second-guessing an agency's actions.

So a court -- there's a lot of case law on it. We cited some. And I will note that we responded to a motion in a vacuum. So Cascade filed a one-line motion to dismiss with no legal authority. So I haven't seen any legal authority that -- where the filed rate doctrine has been applied by this Commission. I have seen orders where they have addressed the doctrine against retroactive rate making, which is a corollary to the filed rate doctrine, and that's what the Commission typically looks at.

But that's beyond the scope of Cascade's motion to dismiss. But it's a traditionally created doctrine that prohibits courts from second-guessing agencies. The Commission is -- has express authority that the
Commission is authorized by the State -- so this common law doctrine was created that the state law, that's directed that the Commission has express authority. So it -- I don't think it can be any more clear than that.

JUDGE O'CONNELL: Okay. Thank you for both of your presentations on that.

Mr. Stokes, I do want to come back to you in just a moment on the statute of limitations argument, and we'll address the question of amending the answer in just a moment.

Thank you both for your presentations, by the way, for answering my questions about the request based upon the filed rate doctrine.

I understand the perspectives and the arguments at this point. I don't -- I'm going to decide to deny Cascade's request at this point in time. I tend to agree with Tree Top on the reasons for denying it. And I'm going to memorialize that decision in a prehearing conference order.

However, I do not intend to foreclose the rationale supporting Cascade's request if it becomes appropriate. And I am entertaining the idea of having more information and legal briefing when it becomes appropriate regarding whether summary judgment is
appropriate after more facts have been fleshed out.

So I do think that if it -- in the future becomes apparent that the facts as they may develop and be presented justify the rationale as presented by Cascade, the Commission will entertain future arguments. Just find that it's charges were based upon its final tariff.

MR. STOKES:  So --

JUDGE O'CONNELL:  And I would like to say that I'm looking at this a lot. And the fact that we have a complaint from Tree Top and an answer from the company, and I'm looking at the Commission's past actions in terms of these sorts of complaints, and I'm also thinking about what facts have and have not been established to this point, and I am looking at this in terms of we're very early in the process. And I am, I think, favoring the perspective in light -- you know, favorable to Cascade -- sorry, to Tree Top. And in light of the arguments made in its response that I don't think it's appropriate at this time to grant Cascade's request.

Mr. Stokes, let me turn back to you.

I want to hear about the statute of limitations and your perspective. And I'll turn back to Ms. Pease after I hear from you about whether there is going to be
some agreed date between the parties for a motion for
summary judgment or some sort of point in time when facts
will have been established through discovery or become
apparent through discovery that would support arguments
from either side.

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

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

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

I just want to make sure that was understood.

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

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

MR. STOKES: Correct.

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

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

So that's --

MR. STOKES: Understood.

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

Go ahead, Mr. Stokes.

MR. STOKES: Thank you, Your Honor.

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

But in light of the legal issue that's been raised, we've agreed to a schedule that includes an
opening motion for summary determination in our response brief. And then we would seek to have another prehearing conference once we have a ruling on that motion. Because we don't want to -- obviously, if the Commission were to dispose of this case on the statute of limitations issue, we don't want to run up a bunch of legal bills throughout the testimony and that sort of thing.

But I think there's pretty strong case law in front of the Washington Supreme Court that indicates when the matter accrues based on that statute. Understand that Cascade will take a different position on that. So we have an issue that needs to be decided by the Commission.

JUDGE O'CONNELL: Okay. Very good.

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

MS. PEASE: Thank you.

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

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

JUDGE O'CONNELL: Okay then.

That would be a naturally good transition to
talking about procedural schedule.

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

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

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

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

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

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

MR. STOKES: Yeah. Go ahead, Jocelyn.

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

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

JUDGE O'CONNELL: Okay.

MR. STOKES: And then Tree Top's response brief would be due January 6th.
And then we would schedule a prehearing conference once we have a ruling on that to establish the rest of the proceeding.

JUDGE O'CONNELL: Okay. Understood.

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

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

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

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

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

MR. STOKES: No objection.

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

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

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

And January 6th for Tree Top's response to that motion for summary determination.
At that point, depending on what the ruling --
what the decision is on that motion, we will set a
prehearing conference.

Have I accurately captured that?

MR. STOKES: Yes, Your Honor.

JUDGE O'CONNELL: I'm seeing nods.

MS. PEASE: Yes, Your Honor.

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

MR. STOKES: That is a good question.

Could we confer for five minutes maybe offline?

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

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

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

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

Ms. Pease, Mr. Stokes, let me turn to you and
ask what you have come up with.
MR. STOKES: I think -- the plan is that we will try to -- to negotiate stipulated facts. But understand that Cascade believes that they may need some discovery on this issue. And that discovery request will go out by November 22nd.

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

Is that what the parties anticipated?

MR. STOKES: Yes.

MS. PEASE: Yeah.

JUDGE O'CONNELL: Thank you.

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

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

And I have one more item I'd like to address before we adjourn for the day. And then I will ask if
there's anything else that we need to address.

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

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

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

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

MS. PEASE: I believe at this point, no. I have not consulted with the Cascade folks on this particular question, but I don't -- I don't believe so.

And to the extent that a protective order may be needed, I would think it would be at the next stage, assuming we arrive there.

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

JUDGE O'CONNELL: Okay. Very good.

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

MR. STOKES: Not for Tree Top, Your Honor.

Thank you.

JUDGE O'CONNELL: Okay.

MS. PEASE: No. Nothing from Cascade.

JUDGE O'CONNELL: Okay. I will issue the
prehearing conference order shortly, containing the
agreed procedural schedule, the dates that we have
discussed.

If there is nothing else, then we are adjourned.

Thank you. We'll be off the record.

(Adjourned at 3:43 p.m.)
STATE OF WASHINGTON
COUNTY OF KITSAP

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

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

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CARISA KITSELMAN, RPR, CCR #2018