BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TREE TOP, INC., a Washington Corporation, Complainant v. CASCADE NATURAL GAS CORPORATION, a Washington Corporation, Respondent.	DOCKET UG-210745 CASCADE NATURAL GAS CORPORATION'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

1 Pursuant to WAC 480-07-380(2), Cascade Natural Gas Corporation ("Cascade" or "Company"), files this Motion for Summary Determination because the pleadings filed in this proceeding, along with Cascade's properly admissible evidentiary support, show that there is no genuine issue of material fact and Cascade is entitled to judgment as a matter of law. Tree Top, Inc. ("Tree Top") presents a single claim for relief, arguing that Cascade assessed exorbitant overrun charges against Tree Top for Tree Top's unauthorized use of natural gas during a declared overrun entitlement period, and that Tree Top is therefore entitled to a refund of the allegedly exorbitant amount pursuant to RCW 80.04.220. However, Tree Top's claim under RCW 80.04.220 is barred by the six-month statute of limitations period contained in RCW 80.04.240, which is applicable to RCW 80.04.220 reparations claims, because Tree Top filed its Complaint more than six months after receiving Cascade's invoice for the overrun charges. Therefore, Cascade is entitled to judgment as a matter of law and the Commission should issue an order dismissing Tree

Top's Complaint.[1]

II. FACTUAL BACKGROUND

A. Schedule 663

2 Tree Top is a natural gas transportation customer served by Cascade in the State of Washington.[2] Tree Top receives natural gas transportation service at four different Tree Top facilities under Cascade's tariff Schedule 663, which is attached as Exhibit 1.[3] Schedule 663 includes the following provisions:

- Schedule 663 provides transportation service on Cascade's distribution system for customer-supplied natural gas.[4]
- Schedule 663 also requires customers to provide in writing to Company the name and telephone number of the customer's Agent who has authority to nominate natural gas supplies on Company's distribution system for delivery on the customer's behalf.[5]
- Customers who receive service under Schedule 663 are required to pre-schedule or "nominate" their gas supplies at least one-hour in advance of the applicable

[1] Tree Top's Complaint states that, among other rules and statutes, RCW 80.04.230 may be brought into issue by its Complaint. Complaint at ¶ 24. However, Tree Top did not allege in its Complaint that Cascade charged Tree Top more than rates based on its lawfully filed tariff and acknowledged the same during the prehearing conference – "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." Docket UG-210745 Virtual Prehearing Conference Transcript, Vol I, 13:9-12 (hereinafter "TR.") (Nov. 16, 2021). Therefore, the question of whether Cascade charged "an amount for any service rendered in excess of the lawful rate in force at the time such charge was made" is not at issue in this proceeding. Furthermore, the Commission has held that "all rates published and effective in a company's tariff at a given point in time are lawful rates for purposes of RCW 80.04.230 …" *Wash. State Attorney Gen.'s Off. and the Indus. Customers of Nw. Util. v. PacifiCorp d/b/a Pac. Power & Light Co.*, Docket UE-110070, Order 01 at ¶ 29 (Apr. 27, 2011).
[2] Complaint at ¶ 15.
[3] *See* Declaration of Brian Cunnington at ¶ 2.
[4] Exhibit 1, Schedule 663 at 1.
[5] *Id.* at 4.

upstream pipeline Nomination Deadline.[6]

- Schedule 663 allows Cascade to declare an entitlement on any day the Company, in its sole discretion, reasonably determines that a critical operational condition warrants the action.[7] Cascade may declare *underrun* entitlement periods, during which a customer's total physical quantity of natural gas taken must be equal to or greater than the total quantity of that customer's confirmed nominated amount.[8] Schedule 663 also permits Cascade to declare *overrun* entitlement periods, during which a customer's total physical quantity of natural gas taken cannot exceed the total quantity of that customer's confirmed nomination.[9]
- Customers served under Schedule 663 must pay Cascade for all unauthorized overrun or underrun quantities that exceed the percentage specified by the Company in its declared entitlement.[10] For a general system or customer-specific declared entitlement period, such percentage is, in the Company's sole discretion five percent or, in the case of a declared overrun entitlement period announced on the day it is to be in effect, three percent for that day (Stage I), eight percent (Stage II), or 13 percent (Stage III).[11] Customers' gas usage that exceeds the amount the Company authorized during an overrun entitlement period is considered an unauthorized overrun volume.[12] For example, during a declared eight percent overrun entitlement period, a customer that takes 10 percent more natural gas than

[6] *Id.* at 5.
[7] *Id.* at 8.
[8] *Id.* at 9.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

it nominated must pay the Company for the two (2) percent unauthorized overrun volume.[13]

- Pursuant to Schedule 663, the overrun charge that the Company will apply to an unauthorized overrun volume during an overrun entitlement period will equal the greater of one dollar ($1.00) per therm or one hundred and fifty percent (150%) of the highest midpoint price for the day at one of several named regional natural gas supply pricing points (as published in Gas Daily), converted from dollars per dekatherm to dollars per therm by dividing by ten.[14] This overrun charge is in addition to the incremental costs of any supplemental natural gas supplies the Company purchased to cover the unauthorized overrun volume, and in addition to other regular charges under Schedule 663.[15]

B. February 12, 2021 through February 16, 2021 Overrun Entitlement Period and Charges

3 On February 10, 2021, Cascade notified all its Schedule 663 natural gas transportation customers whose gas is transported through the system of Cascade's upstream provider, Northwest Pipeline, that Cascade was initiating a Stage II (eight percent) overrun entitlement period starting gas day February 12, 2021, and continuing through gas day February 16, 2021, due to weather events and natural gas supply constraints in the region.[16]

4 During the February 12 to February 16, 2021, overrun entitlement period, Tree Top took unauthorized overrun volumes at three Tree Top facilities, and therefore incurred

[13] In other words, the customer can take more gas than they nominated up to the percentage specified by the Company.
[14] Exhibit 1, Schedule 663 at 9.
[15] *Id.*
[16] *See* Declaration of Brian Cunnington at ¶ 4.

overrun charges totaling $198,844.87, pursuant to Schedule 663.[17] Tree Top incurred overrun entitlement charges of $406.38, $28,938.95, and $28,579.46 on February 12, 15, and 16, 2021, respectively, for unauthorized overrun volumes at its Wenatchee facility, and incurred an overrun entitlement charge of $26,063.03 for unauthorized overrun volumes at its Ross facility on February 15, 2021. Tree Top also incurred overrun entitlement charges of $72,976.47 and $41,880.59 on February 15 and 16, 2021, for unauthorized overrun volumes at its Prosser facility.[18] The overrun charges that Tree Top incurred are summarized below in Table 1.

Table 1 – Summary of Tree Top's Overrun Charges

Point Name	Date	Percent of Nominated	Overrun Charge
Tree Top - Wenatchee	2/12/2021	124%	$406.38
Tree Top - Wenatchee	2/15/2021	128%	$28,938.95
Tree Top - Wenatchee	2/16/2021	128%	$28,579.46
Tree Top - Ross	2/15/2021	133%	$26,063.03
Tree Top - Prosser	2/15/2021	152%	$41,880.59
Tree Top - Prosser	2/16/2021	126%	$72,976.47

5 On March 15, 2021, Cascade emailed Tree Top's agent Cost Management Service, Inc. ("CMS"), advising CMS that it was planning to invoice multiple Cascade customers for whom CMS acts as the agent (including Tree Top) for overrun charges related to the February 2021 overrun entitlement period.[19] The email included a spreadsheet detailing the overrun charges by customer, location or facility, date, and amount, and clearly indicated Cascade's intent to bill Tree Top for overrun charges totaling $198,844.87.[20]

[17] *See* Declaration of Brian Cunnington at ¶ 5, Attachment 3 (this spreadsheet has been redacted to protect confidential customer information).
[18] *Id.*
[19] *Id.*
[20] *Id.*

6 On March 16, 2021, Cascade generated and dated the invoices for Tree Top's February 2021 overrun charges, which invoices were received by Tree Top on March 22, 2021.[21]

7 On March 17, 2021, Cascade emailed a letter to Tree Top's agent CMS and advised CMS that Cascade would include the letter—which explained the purpose of the overrun charges—with each of the overrun charge invoices it was sending out.[22]

8 Tree Top remitted payment for the overrun charges on or about June 21, 2021—beyond the 30-day deadline for payment—and included with its payment references to the March 16, 2021, invoices and a letter indicating it was paying the overrun entitlement charges under protest.[23]

C. Tree Top's History of Incurring Charges for Unauthorized Overruns and Underruns

9 Cascade has declared overrun or underrun entitlement periods approximately 18 times since 2016 and Tree Top incurred overrun or underrun charges for at least one of its facilities, and sometimes multiple facilities, during nine of those 18 entitlement periods.[24] Cascade never negotiated or reduced any of these entitlement charges and Tree Top paid the full amount of each of the charges it incurred.[25]

III. STANDARD OF REVIEW

10 A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, along with any properly admissible evidentiary support,

[21] *See* Declaration of Jocelyn Pease at ¶ 6, Attachment 1.
[22] *See* Declaration of Brian Cunnington at ¶ 6, Attachment 4.
[23] *See* Declaration of Brian Cunnington at ¶ 7, Attachment 5.
[24] *See* Declaration of Brian Cunnington at ¶ 8.
[25] *Id.*

reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law.[26] The Commission will consider the standards applicable to a motion for summary judgment made in Washington civil court under CR 56 of the Washington superior court's civil rules when ruling on a motion for summary determination.[27] CR 56 requires the court to issue the judgment sought "if the pleadings … and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[28]

IV. ARGUMENT

A. Tree Top's RCW 80.04.220 Reparations Claim Is Barred by the Applicable Six-Month Statute of Limitations Period

11 Tree Top filed its Complaint under RCW 80.04.220, which authorizes the Commission to order reparations when it determines a public service company has charged "excessive or exorbitant" amounts for service.[29] Actions seeking reparations under RCW 80.04.220 are subject to the six-month statute of limitations period established by RCW

[26] WAC 480-07-380(2)(a).
[27] *Id.*
[28] CR 56(c). Relatedly, the Commission's rules provide that a motion to dismiss (modeled after one that would be made in Superior Court pursuant to Civil Rule 12(b)(6) or 12(c)) is appropriate when the pleading the moving party seeks to have the Commission dismiss (in this case, the Complaint) fails to state a claim upon which the Commission may grant relief. WAC 480-07-380(1)(a). The Commission acknowledged that, in some instances, it is appropriate to consider whether a complaint should go forward—or whether it should be dismissed—under either test. Docket No. UE-110070, Order 01 at ¶ 27.
[29] RCW 80.04.220 provides in full: "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."

80.04.240 for "cases involving the collection of unreasonable rates."[30]

12 Claims for reparations under RCW 80.04.220 accrue—and the RCW 80.04.240 statutory limitations period begins to run—at the time that "the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury."[31] Tree Top was notified by Cascade that it had incurred, and that Cascade would be billing Tree Top, unauthorized overrun charges totaling $198,844.87 through emails sent on March 15, 2021, and March 17, 2021. Cascade sent a bill for those unauthorized overrun charges that was received by Tree Top on March 22, 2021. Therefore, at the very latest, Tree Top became aware of the alleged "injury" on March 22, 2021. Because Tree Top's Complaint was filed over 6 months after March 22, 2021, it is barred by the statute of limitations.

13 Cascade understands that Tree Top disagrees with Cascade's position that the statute of limitations in this case began to run when Tree Top received notice that Cascade had assessed and would bill Tree Top for unauthorized overrun charges. Specifically, Tree Top has indicated that it believes reparations claims accrue—and the statutory limitations period begins to run—when the disputed amount is *paid,* and further believes there is "pretty strong case law in front of the Washington Supreme Court" that supports this "pay first" rule.[32] Specifically, Tree Top advised Cascade that *Northern P. R. Co. v. Dep't of Pub. Works*, 122 Wash. 673 (1923) dictates that reparations claims under RCW 80.04.220

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[30] RCW 80.04.240 provides, in relevant part: "All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues …".

[31] Docket No. UE-110070, Order 01 at ¶ 33 (emphasis in original) (citing the Commission's holding in *AT&T Communications, et al. v. Qwest Corp.,* Docket No. UT-051682, Order 04 Interlocutory Order Reversing Initial Order ¶ 20 (June 8, 2006), which the Commission affirmed in *AT&T Communications, et al. v. Qwest Corp.*, Docket No. UT-051682, Order 06 Affirming Interlocutory Order (Dec. 22, 2006)).

[32] *See* Declaration of Jocelyn Pease at ¶ 4; *also see* TR. 15:8-10.

accrue at time of payment.[33] However, the holding in *Northern P.R. Co*. does not support Tree Top's view that reparations claims under RCW 80.04.220 accrue upon payment, and Tree Top's position should therefore be rejected.

14 In *Northern P.R. Co.,* the Washington Supreme Court held that the public service commission lacked jurisdiction to hear a claim for alleged overcharges after the applicable statutory period of limitations had expired. In so ruling, the Court cited to *Louisville Cement Co. v. Interstate Commerce Comm'n*, 246 U.S. 638 (1918) (superseded by statute), in which the U.S. Supreme Court held that the Interstate Commerce Commission lacked jurisdiction to hear claims brought beyond the period of limitations established by the federal statute upon which the Washington statute was based, and further held that, within the meaning of that federal statute, claims brought thereunder accrue when the reasonable charges are paid.[34] Tree Top's reliance on *Northern P.R. Co.* is misplaced because determining the claim accrual date was not a prerequisite for the court's holding—that is, that court was not considering whether the statutory period had expired; it was considering whether the public service commission had jurisdiction to hear a claim brought after the statutory period had run. Furthermore, *Northern P.R. Co.* does not control here because the Washington Supreme Court was considering a statute different from the one at issue in this proceeding and based its reasoning on the U.S. Supreme Court's holding in *Louisville Cement* looking at the analogous federal statute; that statute has since been amended and indeed the U.S. Supreme Court rejected the "pay first" rule in *Reiter v. Cooper* because of that statutory amendment.[35]

[33] *See* Declaration of Jocelyn Pease at ¶ 4.
[34] *Louisville Cement*, 246 U.S. at 641-42, 644.
[35] *Reiter v. Cooper*, 507 U.S. 258, 267 (1993).

15 Contrary to Tree Top's position, the Commission has repeatedly and consistently dismissed complaints seeking reparations under RCW 80.04.220 that were filed more than six months after the plaintiff discovered or should have discovered the injury. In *The Lummi Nation v. Verizon Nw., Inc., and Qwest Corp.*, the Lummi Nation sought refunds for telecommunications services for which it was billed and for which it had paid, but never received.[36] The Commission considered the Lummi Nation's claim as one for reparations under RCW 80.04.220[37], and determined that the claim accrued at the latest in October 2004 when Verizon stopped billing the Lummi Nation for the subject services and provided partial refunds for past amounts paid. Based on this interpretation, the Commission granted Verizon's motion for summary determination and entered an order dismissing the complaint as time-barred under the applicable statute of limitations period established by RCW 80.04.220.[38] In issuing its ruling, the Commission did not elaborate on its reasoning as to *why* it found that the Lummi Nation's claim accrued on the date that Verizon stopped billing for the service and provided refunds. However, the receipt of a refund would clearly notify the Lummi Nation that it had been wrongly billed in the past, and therefore it makes sense that the refund would serve as the date when the Lummi Nation discovered or should have discovered its injury.

16 The Commission similarly dismissed the complaint of the Washington State Attorney General's Office and the Industrial Customers of Northwest Utilities (collectively, "Complainants") when Complainants sued PacifiCorp seeking reparations or

[36] *The Lummi Nation v. Verizon Nw., Inc., and Qwest Corp.,* Docket No. UT-060147, Order 02 at ¶ 1 (June 7, 2006).
[37] *Id.* at ¶ 36.
[38] *Id.* at ¶ 43. The Commission thereafter reopened the proceeding for purposes of accepting into the record a settlement agreement proposed for adoption in full resolution of the matter to avoid the prospect of additional litigation. Docket UT-060147, Order 03 (Aug. 2, 2006).

refunds under RCW 80.04.220 or RCW 80.04.230, respectively.[39] In that case, Complainants entered into a settlement agreement with PacifiCorp resolving PacifiCorp's 2009 general rate case ("GRC") but later learned that PacifiCorp had allegedly understated its expected revenues from the sale of renewable energy credits ("REC"), which resulted in PacifiCorp overstating its revenue requirement, which in turn resulted in tariffed rates that the Complainants viewed as exorbitant.[40] The Commission held that the Complaint failed to state a claim under RCW 80.04.230 for which it could grant relief because Complainants did not allege that PacifiCorp charged any customer more than the lawful rates then in effect.[41] Furthermore, the Commission held that Complainants' claim accrued at the latest in May 2010 when PacifiCorp filed a subsequent general rate case showing the increased REC revenues because it was at that point that Complainants "knew beyond peradventure" that PacifiCorp had allegedly significantly understated its REC revenue in the prior rate case.[42] In other words, that was when Complainants "in the exercise of reasonable diligence should have discovered the injury."[43] Accordingly, the Commission dismissed the complaint as time barred because it was filed in January 2011, more than six months after Complainants' claim accrued in May 2010.

17 The Commission should also reject Tree Top's reliance on the *Northern P.R. Co.* case because it does not align with the precedent in Washington for determining claim accrual. In Washington, a cause of action generally accrues when the party can apply to a court for relief.[44] The courts have reasoned that an action generally accrues immediately

[39] Docket No. UE-110070, Joint Complaint at ¶ 6 (Jan. 6, 2011).
[40] Docket No. UE-110070, Order 01 at ¶ 19.
[41] *Id.* at ¶ 30.
[42] *Id.* at ¶ 33.
[43] *Id.*
[44] *Gazija v. Nicholas Jerns Co.,* 86 Wn.2d 215, 219 (1975).

when the wrongful act occurs, but that a "literal application of the statute of limitations" could "result in grave injustice" in some circumstances where the plaintiff is unaware of the harm sustained.[45] Therefore, courts have applied a discovery rule to accrual, under which the cause of action accrues "when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action."[46] In short, the claim accrues when the plaintiff "discovers the salient facts underlying the elements of the cause of action."[47] Under this precedent, Tree Top's reliance on *Northern P.R. Co., which interpreted a specific federal statute, is misplaced.*

18 Furthermore, Tree Top's argument that reparations claims accrue when the plaintiff pays the disputed charge fails on policy grounds because it would allow plaintiffs to sit on a claim by not paying the disputed amount, thereby preventing the statutory clock from ever starting. Statutory periods of limitation reflect the State's determination that, "it is unjust to fail to put the adversary on notice to defend within a specified period of time" and "the right to be free of stale clams in time comes to prevail over the right to prosecute them."[48] Furthermore, statutes of limitation assist courts in their pursuit of truth by requiring plaintiffs to bring claims when evidence is more likely to be available and trustworthy.[49] Therefore, it would be inappropriate to allow a plaintiff such as Tree Top to control the date when a claim accrues and thereby unreasonably stretch out the limitations period. Here, Tree Top discovered the salient facts underlying the elements of

[45] *Id.* at 220.
[46] *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 575-76 (2006) (citing *Green v. A.P.C.*, 136 Wn.2d 87, 95 (1998)).
[47] *Id.*
[48] *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (citing O*rder of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).
[49] *See Tyson v. Tyson,* 107 Wn.2d 72, 75-76 (1986).

its cause of action for allegedly exorbitant charges when it received emails informing Tree Top of the unauthorized overrun charges of $198,844.87, or at the very latest when Tree Top received Cascade's invoices on March 22, 2021. Tree Top should not be allowed to unilaterally extend the period during which it could have brought its RCW 80.04.220 reparations claim because doing so would be contrary to the purposes of the statutory limitations period.

V. CONCLUSION

19 Summary determination is proper when the pleadings and any properly admissible evidentiary support show that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law.[50] Here, Tree Top alleges it was injured when Cascade charged it allegedly exorbitant overrun entitlement charges for its use of unauthorized gas volumes during the February 2021 overrun entitlement period. The indisputable facts show that Cascade notified Tree Top's agent CMS of the pending charges on March 15, 2021, and Tree Top received Cascade's invoices for the overrun charges on March 22, 2021. Accordingly, Tree Top knew of its alleged injury at the very latest on March 22, 2021. Therefore, Tree Top's claim for reparations under RCW 80.04.220 accrued on March 22, 2021, and Tree Top could have timely filed its Complaint by or before September 22, 2021. Therefore, the claim is barred by the applicable statute of limitations and Cascade is entitled to judgment as a matter of law.

[50] WAC 480-07-380(2)(a).

WHEREFORE, Cascade asks the Commission to dismiss the Complaint with prejudice.

DATED: December 17, 2021.

Respectfully submitted,

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