

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

COST MANAGEMENT SERVICES, INC.,	)	Docket No. _____
	)	
Complainant,	)	
	)	
v.	)	
	)	
CASCADE NATURAL GAS CORPORATION,	)	<b>COMPLAINT</b>
	)	
Respondent.	)	
_____	)	

1. This Complaint is brought before the Washington Utilities and Transportation Commission (“Commission”) by Cost Management Services, Inc. (“CMS”). The names, addresses, and telephone numbers of the persons to whom communications for CMS should be addressed are:

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**I. INTRODUCTION AND SUMMARY**

2. Pursuant to RCW 80.04.110, RCW 34.05.240 and WAC 480-07-305, CMS brings this Complaint against Cascade Natural Gas Corporation (“Cascade”). CMS respectfully requests the Commission to: (1) order Cascade to cease and desist from making unlawful, unregulated retail sales of natural gas to customers that take transportation-only service under Retail Rate Schedule Nos. 663 and 664, and (2) determine whether all unfiled

contracts previously executed by Cascade for retail sales of natural gas, at prices other than those specified in Cascade's published rate schedules, are void or voidable.<sup>1</sup>

3. The Cascade retail sales in question are not being made by Cascade pursuant to any special contract, banded-rate schedule, or other Commission-regulated mechanism available to regulated gas companies under Washington law. Instead, Cascade claims that these "unregulated" retail sales are authorized by a regulation of the Federal Energy Regulatory Commission ("FERC") relating to "blanket marketing certificates," 18 C.F.R. §284.402. However, as CMS will show in this pleading, that FERC regulation applies, on its face, only to wholesale "sales for resale" within FERC's jurisdiction under the Natural Gas Act ("NGA"), 15 U.S.C. §717, et seq., and not to retail sales by local distribution companies ("LDCs"), which have always been, and continue to be, outside FERC's jurisdiction. Cascade is actively marketing and selling retail natural gas, a commodity regulated by this Commission, without Commission authorization in direct violation of RCW 80.28.050, RCW 80.28.010(1), RCW 80.28.050, RCW 80.28.090 and RCW 80.28.100. Absent Commission action in response to this pleading, CMS believes that Cascade will continue making unlawful retail sales of natural gas.

4. In support of its Complaint, CMS states the following:

## **II. THE PARTIES**

5. Complainant. CMS is a Washington corporation engaged in the sale and supply of natural gas as a competitive gas marketer. CMS markets competitively priced natural gas to industrial and commercial customers, some of which are located within the service

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<sup>1</sup> WAC 480-80-124 states: "Except as provided under WAC 480-80-122, a tariff filing issued without the required statutory notice to the commission and the public has the same status as if the tariff filing had not been issued." The cited exception in WAC 480-80-122 relates to tariff changes that may become effective with less than the statutory notice, but not to situations like this one where there is no notice or filing at all.

territory of Cascade. CMS is not a “gas company” under RCW 80.04.010<sup>2</sup> because it does not own any “gas plant.”<sup>3</sup> Indeed, CMS does not own, control, operate or manage any natural gas property, plant, equipment, or facility of any kind. The only Cascade customers able to do business with CMS are those that take transportation-only services from Cascade under Schedules 663 or 664, i.e., those customers whose access to the gas plant of Cascade allows them to purchase gas from CMS at the Cascade city gate or other delivery point up-stream from the Cascade city gate.

6. CMS focuses its marketing efforts on a market segment consisting of businesses with significant gas consumption, but not sufficiently large to warrant in-house, energy-management expertise. CMS customers comprise a discrete segment of the market for competitive gas supplies. They tend to have gas-consumption levels lower than the entities comprising the Northwest Industrial Gas Users group.

7. Respondent. Cascade is a “gas company” under RCW 80.04.010, subject to the jurisdiction of the Commission. Its principal place of business is 222 Fairview Avenue N., Seattle, WA, 98109-5312.

### **III. JURISDICTION OF THIS COMMISSION**

8. The Commission is an agency of the State of Washington vested by statute with the authority to regulate rates, practices, accounts, securities, and property transfers of

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<sup>2</sup>“Gas company’ includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state.” RCW 80.04.010.

<sup>3</sup> “Gas plant’ includes all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas, or the manufacture, transmission, distribution, sale or furnishing of other type gas, for light, heat or power.” RCW 80.04.010.

public service companies, a statutory term that includes gas companies.<sup>4</sup> The Commission is authorized to entertain complaints against Cascade pursuant to RCW 80.04.110. RCW 80.04.110 authorizes any “person or corporation,” such as CMS, to file a formal complaint against any public service company regarding any violation of law or Commission regulation. The Commission may impose penalties for violations of law by a public services company, or by its officers, agents and employees, pursuant to RCW 80.04.380 and RCW 80.04.385.

#### **IV. RELEVANT STATUTES AND RULES**

9. Cascade’s unlawful retail sales of natural gas implicate the following statutory provisions and Commission rules.

10. The transactions in question involve privately negotiated contracts containing non-published retail natural gas prices, which are not on file with the Commission. Yet, RCW 80.28.050 requires:

Every gas company, electrical company and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electrical company or water company.

11. Rates on file with the Commission are the only rates that Cascade may charge for retail sales of natural gas. RCW 80.28.080 requires:

No gas company, electrical company or water company shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the

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<sup>4</sup> “Public service company’ includes every gas company, electrical company, telecommunications company, and water company.” RCW 80.04.010.

rates and charges applicable to such service as specified in its schedule filed and in effect at the time. [Emphasis supplied.]

12. RCW 80.28.060 requires that rates may only be changed upon filing and publication with the Commission and upon proper public notice:

Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of RCW80.28.50 except after thirty days' notice to the commission and publication for thirty days, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

13. It is the Commission's duty to ensure that no gas company grant any undue or unreasonable preference or advantage to any customer. RCW 80.28.090 states:

No gas company, electrical company or water company shall make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

14. It is also the Commission's duty to ensure that no gas company unduly discriminate against any customer. RCW 80.28.100 states:

No gas company, electrical company or water company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity or water, or for any service rendered or to be rendered, or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions. [Emphasis supplied.]

15. The underscored portion of the quoted statute in the preceding paragraph allows for “special contracts” containing negotiated prices different from tariff rates. However, these arrangements are subject to Commission scrutiny, prior to their effective date, under WAC 480-80-143, which requires:

Gas, electric, and water companies must file with the commission all contracts for the retail sale of regulated utility services to end-use customers that:

- (a) State charges or conditions that do not conform to the company’s existing tariff; or
- (b) Provide for utility services not specifically addressed in the gas, electric, or water company’s existing tariffs. [WAC 480-80-143(1).]

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The contract will become effective on the effective date stated in the contract or thirty days after the filing date, whichever occurs later, unless suspended or rejected by the commission. The commission may approve an earlier effective date if requested by the company, in which event the contract shall not become effective on a date that precedes commission approval. A request for an earlier effective date must include a complete explanation of why an earlier effective date is appropriate. [WAC 480-80-143(4).]

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Each application filed for commission approval of a contract must:

- (a) Include a complete copy of the proposed contract;
- (b) Show that the contract meets the requirements of RCW 80.28.090 (Prohibiting unreasonable preference) and RCW 80.28.100 (Prohibiting rate discrimination);
- (c) Demonstrate, at a minimum, that the contract charges recover all costs resulting from providing the service during its term, and, in addition, provide a contribution to the gas, electric, or water company’s fixed costs;
- (d) Summarize the basis of the charge(s) proposed in the contract and explain the derivation of the proposed charge(s) including all cost computations involved; and

(e) Indicate the basis for using a contract rather than a filed tariff for the specific service involved. If the basis for using a contract is the availability of an alternative service provider, identify that provider. [WAC 480-80-143(5).]

16. RCW 80.04.380 provides:

Every public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this title, so long as the same shall be and remain in force. Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this title shall be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

17. RCW 80.04.385 provides:

Every officer, agent or employee of any public service company, who shall violate or fail to comply with, or who procures, aids or abets any violation by any public service company of any provision of this title, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids or abets any such public service company in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor.

18. WAC 480-80-124 states:

Except as provided under WAC 480-80-122, a tariff filing issued without the required statutory notice to the commission and the public has the same status as if the tariff filing had not been issued.

## V. STATEMENTS OF LAW AND FACT

### A. FERC Lacks Jurisdiction Either to Regulate or Deregulate Retail Sales of Natural Gas by LDCs Like Cascade.

19. The central point of this Complaint concerns the difference between the jurisdiction of this Commission over retail gas sales by Cascade and the jurisdiction that FERC may exercise over Cascade under the NGA. FERC's jurisdiction is specified in NGA Section 1(b), 15 U.S.C. §717(b), which states:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The term "natural-gas company," as used in the NGA, is defined in 15 U.S.C. §717a(6):

"Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale. [Emphasis supplied.]

20. At least since passage of the NGA in 1938, the term "sales for resale," as used in the quoted statute, has meant wholesale transactions subject to FERC jurisdiction, as distinct from retail sales subject to regulatory oversight and control by the states.<sup>5</sup>

21. Cascade received a personalized tutorial on this jurisdictional separation from the U.S. Court of Appeals for the Tenth Circuit in Cascade Natural Gas Corporation v. FERC, 955 F.2d 1412 (10th Cir. 1992), where the court held:

Section 1(b) of the NGA gave the Commission [FERC] plenary jurisdiction over three areas, and three areas only: (1) the "transportation of natural gas in interstate commerce," (2) the "sale

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<sup>5</sup> The Uniform System of Accounts for FERC-regulated natural gas companies includes Account 483, "Sales for resale," which reads "This account shall include the net billing for gas supplied to other gas utilities or to public authorities for resale purposes." 18 C.F.R., Chapter 1, Part 201. The term "sales for resale" is also used in the Federal Power Act, enacted in 1935, to denote wholesale sales of electricity.



in interstate commerce of natural gas for resale,” and (3) “natural-gas companies engaged in such transportation or sale.” 15 U.S.C. § 717(b). See *Panhandle Pipe Line Co. v. Public Serv. Comm’n of Ind.*, 332 U.S. 507, 516, 68 S.Ct. 190, 195, 92 L.Ed. 128 (1947) (“*Panhandle I*”).

Since Congress intended to complement, not supplant, existing forms of state regulation, Congress excluded from the Commission’s jurisdiction “any other transportation or sale of natural gas” and “the local distribution of natural gas.” 15 U.S.C. § 717(b). ...

With this, Congress believed that it had cleanly and completely divided the regulatory universe between those matters granted to the Commission and the excluded matters over which the states exercised authority prior to the NGA.

955 F.2d at 1416-17 (emphasis supplied).

22. Cascade can be, and is, both a “natural-gas company” subject to FERC jurisdiction under the NGA and a “gas company” and “public service company” subject to this Commission’s jurisdiction under RCW Title 80. Using the language of 15 U.S.C. §§717a(6), Cascade is subject to FERC jurisdiction regarding its “sale in interstate commerce of ... gas for resale,” an activity over which this Commission lacks jurisdiction. Using the language of 15 U.S.C. §§717(b), Cascade is subject to this Commission’s jurisdiction regarding “the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas,” an activity expressly excluded from FERC’s jurisdiction by 15 U.S.C. §§717(b).

23. This jurisdictional separation between interstate and local commerce is universally recognized by regulators and the gas-industry participants they regulate. FERC certainly recognizes this jurisdictional separation in its regulation of the interstate gas industry and, to our knowledge, has never attempted to invade the regulatory area reserved to the states regarding retail sales by local distribution companies (“LDCs”).

24. The same parallelism applies regarding the regulation of investor-owned electric utilities. Wholesale sales are subject to FERC jurisdiction under the Federal Power Act; retail sales are subject to state regulatory jurisdiction.

**B. Consistent with the Jurisdictional Separation, FERC's Blanket Marketing Certificates Apply Only to Wholesale Gas Sales for Resale.**

25. When Congress enacted the NGA in 1938, no one contemplated anything other than bundled sales and transportation service at the city gate. However, passage of the Natural Gas Policy Act led to a series of changes in the industry. Wholesale sales of natural gas were largely deregulated and the industry was restructured during the 1990s. A good discussion of these changes may be found in the background statement entitled "Changes in the Natural Gas Industry," found in FERC's Order No. 644, 105 FERC ¶61,217 (2003).

26. Among other actions, FERC sought to encourage natural gas competition at wholesale by making it easier for non-pipeline marketers to engage in wholesale sales for resale of gas (the only portion of the wholesale commodity market still being regulated). FERC did so by promulgating Order No. 547. Regulations Governing Blanket Marketer Sales Certificates, [Statutes & Regulations 1991-1996 Transfer Binder] Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 30,957 (FERC, 1992). Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952, rehearing denied, 62 FERC 61,239 (1992).

27. Order No. 547 establishes a new FERC regulation, 18 C.F.R. §284.402, which provides:

Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas

Act jurisdiction. A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate. [Emphasis supplied.]

This NGA regulation has no application to retail gas sales by LDCs. It is limited by its terms to “interstate commerce” and to “any category of gas that is subject to the Commission’s Natural Gas Act jurisdiction.” FERC’s regulation is clear. It creates absolutely no overlap between federal and state regulatory authorities that might confuse the reader, particularly an industry savvy reader like Cascade.

28. FERC makes the same clear distinction in the explanatory text of Order No. 547.

FERC stated flat-out that the new regulation does not apply to retail sales by LDCs:

Section 1(b) of the NGA [15 U.S.C. §717(b)] provides, in part, that the NGA does not apply “to the local distribution of natural gas or to the facilities used for such distribution.”

Regulations Governing Blanket Marketer Sales Certificates, [Statutes & Regulations 1991-1996 Transfer Binder] Fed. Energy Reg. Comm’n Rep. (CCH) ¶30,957, at p. 30,724, n.34.

29. FERC’s introductory statement to its new rule is also crystal clear:

The Federal Energy Regulatory Commission (Commission) is issuing a final rule governing jurisdictional sales for resale of natural gas by all persons who are not interstate pipelines. The final rule issues blanket certificates of public convenience and necessity authorizing certificate holders to make jurisdictional gas sales for resale at negotiated rates, with pregranted abandonment. [Emphasis supplied.]

Order No. 547, Fed. Energy Reg. Comm’n Rep. (CCH) ¶30,957, at p. 30,718. Order No. 547 does not contain a single reference to retail sales of natural gas.

30. This is not to say that the regulation has no application whatsoever to LDCs, such as Cascade. As noted above, LDCs can make wholesale sales for resale, separate from their retail sales. When an LDC does so, it is subject to FERC's NGA jurisdiction, just like any other entity making wholesale gas sales. In Order No. 547, FERC recognized that LDCs may engage in wholesale sales subject to its jurisdiction under the NGA, as distinct from retail sales not subject to its jurisdiction. FERC included LDCs in the class of wholesale sellers eligible for a blanket marketing certificate under 18 C.F.R. §284.402:

Section 284.402 of the Commission's regulations grants any person who is not an interstate pipeline a blanket certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act to make sales for resale at negotiated rates in interstate commerce of any category of natural gas that is subject to the Commission's NGA jurisdiction. The Commission's NGA sales jurisdiction currently extends to sales for resale of natural gas that are made by pipelines, local distribution companies, and their affiliates. Thus, natural gas marketers who fall into those categories, including the Enron Gas Marketers, require the blanket marketing certificate in order to make sales for resale. [Emphasis supplied.]

Enron Power Marketing, Inc., and Enron Energy Services, Inc., 102 FERC ¶61,316, at p. 62,060 (2003) (numbered paragraph 11). Note again, that FERC's inclusion of LDCs suggests no accretion of federal jurisdiction over LDC retail gas sales. In Enron Power Marketing as in the underlying regulation itself, FERC exclusively addresses wholesale sales for resale. The fact that an LDC may be both a wholesale gas seller subject to the NGA and a retail gas seller subject to state regulation does not mean that FERC NGA jurisdiction in any way pre-empts or displaces state retail regulation.

31. The bright line of jurisdictional separation between wholesale and retail gas sales is evident in FERC case law since establishment of 18 C.F.R. §284.402. For example, in

Coral Energy Resources, L.P., 110 FERC ¶61,205, at p. 61,768 (2005) (numbered paragraph 15), FERC observed:

Wholesale sales of natural gas are within the exclusive jurisdiction of the Commission [FERC] over trading in the wholesale gas market undertaken pursuant to a blanket marketing certificate issued by the Commission. 15 U.S.C. §§717, et seq., and §§3310 et seq.

This simply cannot be construed as applying to any retail sale of natural gas by an LDC.

32. The bright line of jurisdictional separation between wholesale gas sales conducted pursuant to FERC blanket marketing certificates is well understood in the industry. For example, Cascade's own trade association, the American Gas Association ("AGA"), made the following comments in FERC rulemaking Docket No. RM06-3-000:

The American Gas Association represents 195 local energy utility companies that deliver natural gas to more than 56 million homes, businesses and industries throughout the United States. Natural gas meets one-fourth of the United States' energy needs. AGA member companies take service from virtually every interstate natural gas pipeline regulated by the commission under the Natural Gas Act. Additionally, many of AGA's members engage in sales for resale under the blanket marketing certificates issues by this Commission in Order No. 547. These blanket certificates were issued to all person not interstate pipelines and authorized them to make jurisdictional gas sales for resale at negotiated rates with pre-granted abandonment. *See* 18 C.F.R. § 284.401-402 (2002). Importantly, these certificates were limited jurisdiction certificates that did not subject the holders to any other of the Commission's regulations under its Natural Gas Act jurisdiction. 18 C.F.R. § 284.402(a) (2002). [Emphasis supplied.]

The retail and wholesale transactions separately referenced by AGA are distinct, they are not overlapping. A complete copy of these AGA comments is contained in **Exhibit A** to this pleading.

C. Cascade Rate Schedule Nos. 663 and 664.

33. The foregoing paragraphs make clear that it is entirely unreasonable to maintain that a FERC blanket marketing certificate is a license to make unregulated retail sales. Yet, that is precisely what Cascade claims in Schedule Nos. 663 and 664. Identical “Other Services” paragraphs of each of these transportation-only retail rate schedules provide:

Service under this schedule shall include transportation on the Company’s distribution facilities only. Service under this schedule requires customer to secure both gas supply and pipeline transportation capacity services either through the Company or through third party arrangements. Gas Supplies purchased through the Company will be in accordance with the FERC regulations. (18CFR Part 284.402 Blanket Marketing Certificates). [Emphasis supplied.]

See **Exhibit B** to this pleading.

34. Nothing in Schedule Nos. 663 or 664 themselves purports to authorize unregulated retail sales. Instead, each schedule merely presumes – falsely – a completely separate federal authorization in 18 C.F.R. §284.402, wholly apart from the two schedules themselves. Hence, neither schedule may be read to impute Commission approval or authorization of retail rate deregulation for Cascade.

35. Cascade publicizes its parallel retail ratemaking universe and its separate set of private, individualized retail rate schedules on its website. Customers who do not wish to pay Commission-regulated retail gas rates are invited by Cascade to establish a private rate schedule (“RS”) that is never filed with the Commission:

The Pricing Matrix Site for your specific rate schedule (RS). Your specific RS can be found on your distribution transportation contract with Cascade Natural Gas Corporation (CNGC). The following prices are estimates based on current month forward pricing and are priced for delivery at the citygate and the burnertip.

<http://www.cngc.com/business/industrial.asp>. The reference to “your distribution transportation contract” is apparently to transportation-only service under Schedule Nos. 663 and 664 that Cascade rebundles with its “unregulated” gas sale.

36. In its pending rate case before the Commission, Docket No. UG-060256, Cascade has admitted that it “made no sales-for-resale to customers electing Schedule 663 [and 664] service.” See Cascade Response to CMS Date Request Nos. 11 and 24 (prepared May 8, 2006), attached as **Exhibit C** to this pleading. Hence, by its express terms, 18 C.F.R. §284.402 could not possibly apply to any gas sales that Cascade makes to customers taking transportation-only service under either Schedule No. 663 or No. 664.

37. In Docket No. UG-060256, CMS asked Cascade for lists of customers taking transportation-only service under either Schedule No. 663 or No. 664. Cascade’s responses were marked confidential and hence covered by the protective order in UG-060256. Thus, this pleading does not disclose the identity of any customer listed by Cascade in those responses.<sup>6</sup> CMS is prepared to submit this information to the Commission in this case under seal after the Commission issues a protective order.

38. In Docket No. UG-060256, CMS asked Cascade to list the customers taking transportation-only service under either Schedule No. 663 or No. 664 that also purchase natural gas from Cascade. Although Cascade objected to these data requests on grounds of relevance to the rate case, it did respond. Cascade’s responses were marked confidential and hence covered by the protective order in UG-060256. Thus, this pleading does not disclose the contents of those responses.<sup>7</sup> CMS is prepared to submit

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<sup>6</sup> Only Cascade’s lists of applicable customers are confidential, not the fact that CMS made its data requests for those lists. CMS states only that it made data requests and that Cascade responded to them.

<sup>7</sup> See footnote 5, above.

this information to the Commission in this case under seal after the Commission issues a protective order.

39. However, Cascade's publicly available case-in-chief in Docket No. UG-060256 states that it realized \$30,875,879 in revenues from its "unregulated" retail gas sales during the test period for that case. See Prepared Direct Testimony of Jon T. Stoltz, Exhibit JTS-4. This document is reproduced as **Exhibit D** to this pleading. CMS believes that this volume of "unregulated" retail gas revenues evidences continuing, material violations of Washington law.

40. The prepared testimony of Mr. Stoltz (Exhibit JTS-1T) accompanying Cascade's tabulation of "unregulated" retail gas revenues is telling. At page 7, lines 5-14, he states:

FERC Order No. 547 issued on November 30, 1992 authorized jurisdictional gas sales for resale at market rates, with pre-granted abandonment, to all persons who are not interstate pipelines, except marketing affiliates of non-open access pipelines. ... The enactment of Order No. 547 removed the restrictions on local distribution company (LDC) marketing certificates and allows LDCs to freely compete in the sale of gas with other marketers. [Emphasis supplied.]

This document is reproduced as **Exhibit E** to this pleading.

41. After acknowledging that Order No. 547 is limited to "jurisdictional gas sales for resale," Mr. Stoltz baldly asserts in the testimony quoted above that FERC jumped the jurisdictional separation found in NGA Section 1(b), "removed the restrictions on local distribution company (LDC) marketing certificates" and silently deregulated retail gas sales by LDCs. This assertion flies in the face of the holding of the Tenth Circuit in Cascade Natural Gas Corporation v. FERC, quoted in paragraph 21 of this Complaint.

42. Thus, Cascade's "unregulated" retail sales are grounded on the facially untenable position that FERC Order No. 547 somehow pre-empted RCW 80.28.050, RCW



80.28.060, RCW 80.28.080, RCW 80.28.090, RCW 80.28.100 and this Commission's implementing regulations regarding Cascade's retail sales of natural gas to customers eligible for transportation-only service, despite:

- the barrier to FERC regulation, or deregulation, of LDC retail sales erected by NGA Section 1(b),
- the exclusive focus of Order No. 547 and 18 C.F.R. §284.402 on wholesale sales for resale under the NGA,
- the absence of any mention of LDC retail sales (much less any statement about federal pre-emption) in Order No. 547, except for FERC's acknowledgement that "Section 1(b) of the NGA [15 U.S.C. §717(b)] provides, in part, that the NGA does not apply 'to the local distribution of natural gas or to the facilities used for such distribution.'" [See Paragraph 28, above.]

43. To emphasize the illogic of Cascade's claim, there would be no reason to limit FERC's alleged retail deregulation to Schedule 663 and 664 customers. Under Cascade's reading of 18 C.F.R. §284.402, FERC's silent pre-emption of state LDC regulation would also allow Cascade to sell gas to retail residential and small commercial customers without Commission oversight or control.<sup>8</sup>

## VI. INJURY TO RETAIL COMPETITION

44. Cascade is misusing 18 C.F.R. §284.402 and its monopoly position within its service territory to make unregulated retail sales of natural gas at prices below full cost. Cascade is attempting to preserve its market dominance over retail industrial gas sales through anticompetitive means. It has unlawfully carved out for itself a regulatory gap between federal and state regulatory jurisdictions outside the Commission's active supervision over retail sales in accordance with Washington law. See Cost Management Services, Inc. v. Washington Natural Gas Company, 99 F.3d 937 (9th Cir. 1996). This

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<sup>8</sup> And, what applies to Cascade would also apply to Washington State's other LDCs.

necessarily harms the position of Cascade's competitors, such as CMS, and other gas marketers and it is detrimental to competition in Cascade's service territory.

45. This complaint concerns the fundamental unlawfulness of Cascade's non-tariff retail sales of natural gas, not whether Cascade's prices in the relevant agreements are just, reasonable, unduly discriminatory, unduly preferential, or anticompetitive. Such ratemaking issues cannot even be addressed by CMS or the Commission because Cascade has never filed the relevant contracts and prices as it was required to do under the Washington statutes and regulations cited above.

## **VII. CAUSES OF ACTION**

46. Cascade's misuse of 18 C.F.R. §284.402 in making "unregulated" retail gas sales creates the following continuing violations of Washington statutes and Commission regulations:

- Cascade is in violation of RCW 80.28.050, which requires it to file and keep open to public inspection all rates and charges and all forms of contract or agreement relating to its retail sales as a gas company.
- Cascade is in violation of RCW 80.28.060, which prohibits it from charging rates or using forms of contract or agreement relating to its retail sales as a gas company, other than those rates and forms of contract on file and published with the Commission.
- Cascade's use of "unregulated" prices other than tariff prices necessarily violates RCW 80.28.090 and RCW 80.28.100 because it blocks the Commission from carrying out its duties under those provisions to prevent undue preferences and undue discrimination.

- Cascade’s failure to file its “unregulated” retail sales as special contracts violates WAC 480-80-143 and WAC 480-80-124.

### **VIII. PRAYER FOR RELIEF**

47. WHEREFORE, CMS prays for an order of the Commission:

- A. holding that, as a matter of law, and with regard to all its retail sales of natural gas, Cascade has been, and remains, bound by RCW 80.28.050, RCW 80.28.060, RCW 80.28.080, RCW 80.28.090, RCW 80.28.100 and this Commission’s implementing regulations;
- B. directing Cascade to cease and desist from making retail sales of natural gas under purported authority of 18 C.F.R. §284.402 and to refrain from making any non-tariff retail sales of natural gas except in accordance with Washington law and Commission regulations;
- C. directing Cascade to remove all reference to 18 C.F.R. §284.402 in Schedule Nos. 663, 664 and all other retail rate schedules in which it may now appear;
- D. determining whether all unfiled contracts previously executed by Cascade for retail sales of natural gas, at prices other than those specified in Cascade’s published rate schedules, are void or voidable under WAC 480-80-124; and<sup>9</sup>

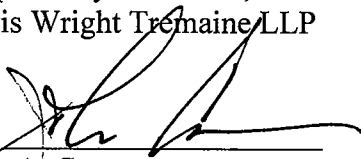
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<sup>9</sup> The reference to 18 C.F.R. §284.402 in the “other services” paragraphs of Schedule Nos. 663 and 664 could be construed as an express representation that Cascade possessed all regulatory approvals necessary to engage in unregulated retail sales of natural gas. In addressing the status of previously executed “unregulated” contracts, CMS would ask the Commission to avoid any hardship to customers who may have relied such a representation by Cascade. Any consequences should be borne by Cascade, not its customers.

- E. providing for such other relief or penalties as the Commission may consider appropriate under the circumstances of this proceeding.

DATED this 31st day of July, 2006.

Respectfully submitted,  
Davis Wright Tremaine LLP

By:   
John A. Cameron  
OSB #92037  
Ryan Flynn  
WSBA #37315  
Attorneys for Complainant

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Prohibition of Energy Market            )**  
**Manipulation                                )**     **RM06-3-000**

**COMMENTS OF THE AMERICAN GAS ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking (NOPR) issued in this docket on October 20, 2005, the American Gas Association (AGA) submits these comments supportive of the proposed rule and seeking the Federal Energy Regulatory Commission (Commission or FERC) to clarify a few items with regard to compliance and enforcement matters.

**I.     CORRESPONDENCE**

All pleadings, correspondence, and other communications filed in this proceeding should be served on the following:

Jane R. Lewis  
Vice President, Regulatory Affairs  
Jeff Petrash  
Senior Managing Counsel  
American Gas Association  
400 North Capitol Street, N.W.  
Washington, D.C. 20001  
202-824-7000  
[jlewis@aga.org](mailto:jlewis@aga.org)  
[jpetrash@aga.org](mailto:jpetrash@aga.org)

## II. EXECUTIVE SUMMARY

AGA shares the fundamental goal the Commission seeks to achieve through this proposed rulemaking – to ensure the integrity of the wholesale gas sales market. AGA too is working hard to ensure this integrity. Accordingly, subject to a few clarifications regarding enforcement and compliance, we are supportive of the rule and expect that its implementation this winter will further deter any market manipulation or abuses.

## III. AGA'S INTEREST IN THIS PROCEEDING

The American Gas Association represents 195 local energy utility companies that deliver natural gas to more than 56 million homes, businesses and industries throughout the United States. Natural gas meets one-fourth of the United States' energy needs. AGA member companies take service from virtually every interstate natural gas pipeline regulated by the Commission under the Natural Gas Act. Additionally, many of AGA's members engage in sales for resale under the blanket marketing certificates issued by this Commission in Order No. 547.<sup>1</sup> These blanket certificates were issued to all persons not interstate pipelines and authorized them to make jurisdictional gas sales for resale at negotiated rates with pre-granted abandonment. See 18 C.F.R. § 284.401-402 (2002). Importantly, these certificates were limited jurisdiction certificates that did not subject the holders to any other of the Commission's

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<sup>1</sup> Regulations Governing Blanket Marketer Sales Certificates, FERC Stats. & Regs. ¶ 30,957 (1992), *order on reh'g and clarification*, 62 FERC ¶ 61,239 (1993) ("Order No. 547").

regulations under its Natural Gas Act jurisdiction. 18 C.F.R. § 284.402(a) (2002).

#### IV. COMMENTS

In this proposed rule, the Commission is implementing new section 4A of the Natural Gas Act that prohibits the employment of manipulative or deceptive devices or contrivances. AGA notes that this proposed rule to prohibit energy market manipulation is closely related to the code of conduct implemented by the Commission in 2003 in a new 18 C.F.R. Section 284.288 and Section 284.403 specifying requirements or prohibitions for interstate pipelines making unbundled gas sales and persons making sales for resale in interstate commerce under blanket marketing certificates<sup>2</sup>.

Overall, AGA is supportive of the Commission's proposal herein and believes that its implementation by December 31, 2005 will be particularly timely. As we head into the winter heating season during unprecedented market conditions, and thereafter, the Commission's authority, regulations and procedures to prosecute market manipulation will be in place. The proposed regulations will thus be an important tool for the Commission to use to ferret out any market abuses this winter. AGA's members are supportive of the Commission's efforts in this regard because on behalf of our customers, who will

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<sup>2</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC ¶ 61,218 (2003), reh'g denied, 107 FERC ¶ 61,175 (2004); Order No. 644, Amendment to Blanket Sales Certificates, FERC Stats. & Regs. ¶ 31,153 (2003), reh'g denied, 107 FERC ¶ 61,174 (2004).

be faced with unprecedented high heating bills, we have a vested interest in the Commission's pursuit of any market abuses.

More specifically, it is important that the rules apply to "any entity" and not just "jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority" as do the Order No. 644 rules. Indeed, the Energy Policy Act of 2005 dictated this result. This breadth of applicability is the only way to ensure that the rule will have its intended effective impact on the market place for natural gas sales.

It is also important that the Commission has expressly stated its intent to not seek duplicative sanctions for the same conduct in the event that the conduct violates both the Code of Conduct rules and the new proposed regulations.

We recognize the Commission's determination that patterning of the rule after SEC rules is intended to provide a benefit to the industry in terms of clarity and certainty as to how the rules will be applied and interpreted. However, there are certain elements of the SEC rules that need to be clarified in order to make meaningful their application to the natural gas commodity and transportation markets. For example, there are SEC regulations that require disclosure of extensive corporate information. Accordingly, nondisclosure issues make up a significant amount of the SEC precedents. In FERC's proposal to broadly apply the SEC rules and precedents, it is unclear how nondisclosure issues will apply to natural gas market transactions.

In addition, it is unclear whether the prohibition on manipulative conduct set forth in §284.403(a) is somehow broader than, or prohibits conduct



undertaken by a jurisdictional seller that would not also be prohibited under the "Prohibition of Energy Market Manipulation" set forth in proposed new § 159.1. AGA believes that the answer to this question should be no. Congress has now articulated the statutory standard for determining market manipulation, and the Commission is correct to codify that standard and no other, and to apply that same standard to all market participants. Additionally, given that the proposed regulations herein are applicable to "any entity" purchasing or selling natural gas or transportation services subject to FERC's jurisdiction and that the Code of Conduct regulations adopted in Order No. 644 are applicable to a far smaller group of entities selling natural gas for resale, there is likely to be confusion as to how the two sets of regulations interact and relate to one another. AGA recognizes that the Commission has opened a separate inquiry into this matter in Docket No. RM06-5-000 and AGA will submit further comments therein.

Finally, when enforcing the rules, it is unclear how the Commission will treat errors that are "inadvertent." Under the analogous SEC rules, "inadvertent" errors do not trigger liability; instead intent to deceive, manipulate or defraud must be shown. Additionally, in related matters, such as with regard to the Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003), the Commission has made clear that it will not prosecute actions that clearly are the result of inadvertent errors. This "safe harbor" consideration is not mentioned in the proposed rule, nor is it mentioned in the companion Policy Statement on Enforcement issued also on October 20, 2005 in Docket No. PL06-1-000. While the Policy Statement does clearly contemplate consideration of the

willfulness of an act or whether it was the result of manipulation, deceit or artifice, PL06-1-000, P 20, AGA encourages the Commission to specifically indicate that in determining intent it will also consider whether an act was inadvertent.

## **V. Conclusion**

AGA appreciates the opportunity to comment on this proposed rulemaking. With the requested clarifications, AGA supports the proposed rule. We look forward, in the near future, to addressing the efficacy of continuing the Order No. 644 regulations in light of the Commission's new rules and authority.

Respectfully submitted,

The American Gas Association

By: /s/ Jane Lewis  
Jane Lewis  
Its Counsel  
400 North Capitol Street, 4<sup>th</sup> Floor  
Washington, D.C. 20001  
202-824-7226  
[jlewis@aga.org](mailto:jlewis@aga.org)

Dated: November 17, 2005

RECEIVED

JAN 30 2004

WASH. UT & TRANS. COMM.

Sixth Revision Sheet No. 663  
Canceling  
Fifth Revision Sheet No. 663

WN U-3

CASCADE NATURAL GAS CORPORATION

DISTRIBUTION SYSTEM TRANSPORTATION SERVICE  
SCHEDULE NO. 663

AVAILABILITY:

This unbundled distribution system transportation service schedule is available throughout the territory served by the Company under the tariff of which this schedule is a part, provided, in the sole judgment of the Company, there are adequate facilities in place at the existing distribution line or as such line may be enhanced by the Company from time to time to provide service.

(D)

RATE:

A. Dispatching Service Charge \$500.00 per month  
All Therms Delivered \$0.0002 per therm  
All customers receiving gas supply service through this schedule will be invoiced a monthly Dispatching Service Charge for each single metering facility.

(D)

B. Delivery Charge For All Therms Delivered Per Month

First 10,000	\$ 0.13313 Per Therm Per Month
Next 10,000	\$ 0.12003 Per Therm Per Month
Next 30,000	\$0.10038 Per Therm Per Month
Next 50,000	\$0.06038 Per Therm Per Month
Over 100,000	\$0.03025 Per Therm Per Month

C. The total of all charges invoiced by Company shall be subject to a Gross Revenue Fee reimbursement charge to cover state utility tax and other governmental levies imposed upon the Company. The current Gross Revenue Fee is 4.633%.

All other terms and conditions of services shall be pursuant to the Rules and Regulations set forth in the Company's filed tariff.

OTHER SERVICES:

Service under this schedule shall include transportation on the Company's distribution facilities only. Service under this schedule requires customer to secure both gas supply and pipeline transportation capacity services either through the Company or through third party arrangements. Gas Supplies purchased through the Company will be in accordance with the FERC regulations (18CFR Part 284.402 Blanket Marketing Certificates)

(T)  
|  
(T)

RATE ADJUSTMENTS:

Rates for service under this schedule are subject to various adjustments as specified in Schedule Nos. 595, 596, 598, and 599 (when applicable) as well as any other applicable adjustments as approved by the Washington Utilities & Transportation Commission.

CONTRACT TERM:

Customers choosing **Distribution System Transportation Service** under this schedule shall execute a service contract with a primary term that has a termination date in any year of September 30 of that year. In no event shall a term of a contract be less than one year. Said contract shall state the Annual Minimum Quantity of gas, the maximum daily volume of gas to be delivered under this distribution system capacity schedule.

(M)  
|  
(D)  
(M)

Continued on Next Page -

(M) Denotes material moved from Sheet No. 663-A

CNGAW04-01-01

ISSUED January 30, 2004

EFFECTIVE March 1, 2004

BY   
Jon T. Stoltz

ISSUED BY CASCADE NATURAL GAS CORPORATION

TITLE Senior Vice President  
Regulatory & Gas Supply

RECEIVED

JAN 30 2004

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION

First Revision Sheet No. 664-A  
Canceling  
Sub. Original Sheet No. 664-A

WN U-3

CASCADE NATURAL GAS CORPORATION

LARGE VOLUME DISTRIBUTION SYSTEM TRANSPORTATION SERVICE  
SCHEDULE NO. 664

(Continued from Previous Page)

**OTHER SERVICES:**

Service under this schedule shall include transportation on the Company's distribution facilities only. Service under this schedule requires customer to secure both gas supply and pipeline transportation capacity services either through the Company or through third party arrangements. Gas Supplies purchased through the Company will be in accordance with the FERC regulations (18CFR Part 284.402 Blanket Marketing Certificates)

(T)  
|  
(T)

**RATE ADJUSTMENTS:**

Rates for service under this schedule are subject to various adjustments as specified in Schedule Nos. 595, 596, 598, and 599 (when applicable) as well as any other applicable adjustments as approved by the Washington Utilities & Transportation Commission.

**CONTRACT TERM:**

Customers choosing **Distribution System Transportation Service** under this schedule shall execute a service contract with a primary term that has a termination date in any year of September 30 of that year. In no event shall a term of a contract be less than one year. Said contract shall state the Annual Minimum Quantity of gas, the maximum daily volume of gas to be delivered under this distribution system capacity schedule as well as the optional gas supply supplemental schedule(s) and the optional pipeline capacity supplemental schedule(s) under which customer will be receiving all gas delivered by the Company.

**ANNUAL MINIMUM CHARGE:**

Annual minimum charge is to be negotiated and included as part of contract between Company and customer and may be in addition to amounts otherwise due under this schedule. This annual minimum charge is separate from the annual minimum bill described above.

**TERM OF PAYMENT:**

Above rates are net. Each monthly bill shall be due and payable fifteen (15) days from the date of rendition.

**WAIVER OF FIRM GAS SUPPLY:**

Customer(s) electing to provide their own gas supplies under this schedule in lieu of firm system supply waive protection from supply failure curtailment of all of their requirements. Company has no obligation to purchase or reserve gas supply or interstate pipeline capacity for customer(s) electing to provide their own gas supplies and/or their own interstate pipeline capacity.

(M)(T)

Customer(s) electing to provide their own gas supplies under this schedule in lieu of firm system supply waive any right to automatically purchase Firm supplies at some future date. Requests for firm gas supplies shall be subject to the effects on service availability or costs to other customers and may require a charge to offset any incremental costs of acquiring additional firm supplies.

(M)(T)

**SPECIAL TERMS AND CONDITIONS:**

1. The application of this rate is subject to the general service provisions of the Company as they may be in effect from time to time and as approved by the Washington Utilities & Transportation Commission.
2. Service under this schedule shall be rendered through metering facility at the single point of delivery.

(K)

-Continued on Next Page-

(M) denotes material moved from Sheet No. 683 and 683-A  
(K) denotes material moved to Sheet No. 664-B

CNG/W04-01-01

ISSUED January 30, 2004

EFFECTIVE March 1, 2004

BY Jon T. Stoltz

ISSUED BY **CASCADE NATURAL GAS CORPORATION**

TITLE Senior Vice President  
Regulatory & Gas Supply

CASCADE NATURAL GAS CORPORATION  
**Cost Management Service**  
**2006 Rate Case Data Request**

**Request No. 11**

Date prepared: May 8, 2006

Preparer: Jon Stoltz

Witness: Jon Stoltz

Telephone: 206-381-6823

**CMS Data Request No. 11:** List by number of customers and volume of sales the sales-for-resale made by the Company to customers electing Schedule 663 service.

**Response:**

Cascade made no sales-for-resale to customers electing Schedule 663 service.

CASCADE NATURAL GAS CORPORATION  
**Cost Management Service**  
**2006 Rate Case Data Request**

**Request No. 24**

Date prepared: May 8, 2006

Preparer: Jon Stoltz

Witness: Jon Stoltz

Telephone: 206-381-6823

**CMS Data Request No. 24:** List by number of customers and volume of sales the sales-for-resale made by the Company to customers electing Schedule 663 664(SIC)service.

**Response:**

Cascade made no sales-for-resale to customers electing Schedule 664 service.

<b>Cascade Natural Gas Corporation</b>			
<b>Removal of Non-Core Competitive Services Revenues and Cost</b>			
State of Washington			
Line No.	Description	Exhibit Reference	Amount
	(a)	(b)	(c)
	<b>Non-Core Competitive Services</b>		
1	Remove Test Period Revenue	Exh JTS-3, Sched 1, Page 1, Line 29 Col (f)	\$ (30,875,879) 1/
2	Remove Test Period Gas Cost	Exh JTS-3, Sched 1, Page 1, Line 29 Col (l)	\$ (28,268,010) 2/
3	Remove Administrative Expense		\$ (165,332) 3/

- 1/ Carried forward to Exhibit \_\_\_\_ (JTS-2), page 2, column (c), line 1.  
 2/ Carried forward to Exhibit \_\_\_\_ (JTS-2), page 2, column (c), line 5.  
 3/ Carried forward to Exhibit \_\_\_\_ (JTS-2), page 2, column (c), line 11.

BEFORE THE  
WASHINGTON UTILITIES & TRANSPORTATION COMMISSION

UG-06 \_\_\_\_\_

GENERAL RATE APPLICATION  
OF



February 14, 2006

**Prepared Direct Testimony of  
Jon T. Stoltz**

**Summary of Rate Application**  
**Restate Revenues and Gas Cost at current Rates**  
**Removal of Non-Core Competitive Services Revenues and Cost**  
**Lost and Unaccounted For Restatement**  
**Weather Normalization Adjustment**  
**Pro forma Industrial Contract Changes**  
**Estimated Rate Case Expense**  
**Revenue Requirements and Revenue Under Proposed Rates**



1 Q. How does Exhibit \_ (JTS-4) pertain to these proceedings?  
2

3 A. This adjustment removes the revenues, administrative expense and gas cost from the non-  
4 core competitive services Cascade provides under a Blanket Marketing Certificate, as  
5 authorized under 18 CFR Part 284.402 of FERC's regulations. FERC Order No. 547 issued  
6 on November 30, 1992 authorized jurisdictional gas sales for resale at market rates, with  
7 pre-granted abandonment, to all persons who are not interstate pipelines, except marketing  
8 affiliates of non-open access pipelines. The certificates are automatically granted (no  
9 application need be filed and no document is issued), and the sale is not restricted by term,  
10 price or category of gas. The certificates are limited jurisdictional certificates that do not  
11 subject the certificate holder to any regulation under the Natural Gas Act jurisdiction of  
12 FERC by virtue of transactions under the certificate. The enactment of Order No. 547  
13 removed the restrictions on local distribution company (LDC) marketing certificates, and  
14 allows LDCs to freely compete in the sale of gas with other marketers. On Exhibit (JTS-4),  
15 the \$30,875,879 for revenue and \$28,268,010 of gas costs and \$165,332 of administrative  
16 expenses are removed from the test period results. These numbers are also contained in  
17 the Summary Exhibit \_ (JTS-2), Schedule 1, Page 2, Lines 1, 5 and 11, Column (c). The  
18 FIT and revenue sensitive taxes and fees are calculated and shown in Column (c).  
19  
20

21 **EXHIBIT \_ (JTS-5)**  
22

23 **Restatement of Gas Cost For Normal Lost & Unaccounted For**  
24

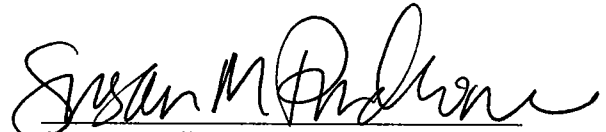
25 Q. Please describe Exhibit \_ (JTS-5) and how it pertains to these proceedings.  
26

27 A. Exhibit \_ (JTS-5) shows the adjustments necessary to restate the Test Period for the  
28 quantity of therms in excess of sales and deliveries of therms to our customers. This

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served this document upon all parties of record in this proceeding, by U.S. Mail.

DATED, at Portland, Oregon this 31st day of July, 2006.



Susan Prudhomme  
Davis Wright Tremaine LLP  
Suite 2300  
1300 SW Fifth Avenue  
Portland, OR 97201-5682  
(503) 241-2300