BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TREE TOP, INC.,	)	DOCKET UG-210745
	)	
Complainant,	)	COMPLAINANT'S RESPONSE IN
	)	OPPOSITION TO RESPONDENT'S
v.	)	MOTION FOR SUMMARY
	)	DETERMINATION
CASCADE NATURAL GAS CORPORATION,	)	**ORAL ARGUMENT REQUESTED**
	)	
Respondent.	)	
	)	
	)	

I. INTRODUCTION

1. Pursuant to WAC 480-07-370 and 375, Tree Top, Inc. ("Tree Top" or "Complainant") files this Response in Opposition to Respondent's Motion for Summary Determination ("Motion") by Cascade Natural Gas Corporation ("Cascade" or "Respondent"). In its Motion, Cascade urges the Commission to ignore the text and context of a statute, to reject established Washington Supreme Court case law, and to adopt a novel and unprecedented legal standard in order to find that Tree Top's complaint is time-barred under RCW 80.04.240.

2. On September 24, 2021, Tree Top filed a Complaint seeking reparations under RCW 80.04.220 for an overrun entitlement penalty collected by Cascade. The basis of Tree Top's reparations claims is not that it owed no entitlement penalty, but that the amount of the penalty as calculated by Cascade was unjust and unreasonable. The amount of the entitlement penalty was

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unjust and unreasonable because it was based on dysfunctional market prices during an extreme weather event at a trading hub in Wyoming from which Cascade had purchased no gas.[1]

3. The heart of this statute of limitations issue concerns when Tree Top's cause of action *accrued* for purposes of RCW 80.04.240. Cascade argues that Tree Top's cause of action began to accrue, at the *latest*, from the moment Tree Top received the overrun entitlement invoice, March 22, 2021.[2] If Cascade is correct, and the claim accrued on March 22, 2021, Tree Top's complaint was filed two days late.[3] However, no Washington law supports Cascade's argument.

4. The text and context of RCW 80.04.240 dictate that a cause of action for reparations accrues when the unreasonable rate is "collected" by the utility. Reparations under RCW 80.04.240 are not tied to "invoicing" for unjust and unreasonable rates--they are specifically tied to "collecting" unreasonable rates. Likewise, the six-month claims period is specifically tied to "the collection of unreasonable rates," and not the invoicing of unreasonable rates. Indeed, the fundamental premise of "reparations" is that money has been paid that should be returned. The remedy for an unreasonable but unpaid invoice would not be "reparations," it would be a request to modify or nullify the invoice.

5. This plain reading of the text and context of RCW 80.04.240 has already been confirmed by judicial interpretation. In construing the predecessor to RCW 80.04.240—which used nearly identical language—the Washington Supreme Court held that a cause of action for reparations

[1] The penalties that Cascade may charge during an "overrun entitlement," if any, must be consistent with its Commission-approved tariffs. Specifically, Schedule 663 states: "The overrun charge that will be applied during any overrun entitlement period will equal the greater of $1.00 per therm or 150% of the highest midpoint price for the day at NW Wyoming Pool, NW south of Green River, Stanfield Oregon, NW Canadian Border (Sumas), Kern River Opal, or El Paso Bondad supply pricing points (as published in Gas Daily) . . . ."

[2] Mot. at ¶ 12.

[3] "It has been held that the term 'months' in a statute of limitations means lunar months." *State v. Levesque*, 5 Wn.2d 631, 634 (1940).

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does not accrue until the unjust and unreasonable charge has been paid and collected.[4] In reaching this decision, the Washington Supreme Court followed United States Supreme Court precedent construing similar statutory language. In this case, Cascade's unreasonable entitlement penalty was paid and collected on June 24, 2021. Tree Top's complaint, filed on September 24, 2021, was well within the six-month limitations period.

6. Even if the Commission were to conclude that a cause of action for reparations could accrue prior to collection of the unreasonable rate, the Commission would apply the "discovery rule," which has not been applied in cases involving discrete events and discrete invoices such as we have here. In fact, in every case cited by Cascade using the discovery rule, the claim accrued *after* the collection of the unreasonable rate. In this case, Tree Top did not discover that the amount of the overrun entitlement penalty was unreasonable until April 14, 2021. This was the date Cascade first disclosed that it had not actually purchased gas at the Green River trading hub, which was used to calculate the overrun entitlement penalties. Again, the basis of Tree Top's complaint is not the fact that it was invoiced for an overrun entitlement penalty, but that it was unreasonable for Cascade to assess a penalty based on dysfunctional prices in a market in which Cascade did not even participate. While Cascade argues that Tree Top should be deemed to have "discovered" a claim for reparations the moment that Tree Top received Cascade's invoice, regardless of when and if such invoice was ever paid or collected, the invoice lacked sufficient information to put Tree Top on notice that the penalty was unreasonable.

[4] *N. Pac. Ry. Co. v. Dep't of Pub. Works*, 122 Wash. 673, 677–78 (1923) (citing *Louisville Cement Co. v. Interstate Commerce Commission*, 246 US 638, 643 (1918)) (emphasis added).

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7. Tree Top discovered that the amount of Cascade's entitlement penalty was unreasonable on April 14, 2021. On June 24, 2021, Tree Top paid under protest, and Cascade collected, the unreasonable penalty. Under either test for accrual, the date the aggrieved party should have discovered the injury or the date the unreasonable charges were paid, Tree Top timely filed its Complaint, and the Commission should deny Cascade's motion.

II. STATEMENT OF FACTS

8. The following chronology of events is relevant to this Response:

- On March 22, 2021, Tree Top received the overrun entitlement invoice by mail. The invoice is dated March 16, 2021.[5] The invoice does not state the basis of the penalty calculation—specifically that the penalty was based on prices at the Green River trading hub in Wyoming. Nor does the invoice state that Cascade purchased no gas at the Green River hub during the overrun entitlement period. [6]

- April 5, 2021. Counsel for Tree Top attempted to contact Cascade to discuss the overrun entitlement penalties. Cascade did not respond.[7]

- April 8, 2021. Having not heard from Cascade, counsel for Tree Top again tried to contact Cascade. Cascade again failed to respond.[8]

- April 12, 2021. Counsel for Tree Top attempted to reach Cascade for a third time.[9]

- April 14, 2021. Counsel for Tree Top and Cascade conference regarding the overrun entitlement penalty. During that call, Cascade discloses to Tree Top for the first time that it did not purchase gas from the Green River hub in Wyoming during the overrun entitlement period. Cascade agrees to discuss treatment of the overrun entitlement penalties internally and follow up with Tree Top. Counsel for Tree Top also forwards to Cascade an order from the Idaho Public Utility Commission where it approved a reduction in an overrun entitlement penalty when neither the utility nor its customers were harmed by a customer's overrun entitlement.[10] In that case, Avista Corporation

[5] *See* Declaration of Brian Cunnington, Attachment 5 at 4, 8, 12.
[6] *Id.*
[7] *See* Declaration of Chad Stokes at ¶ 3.
[8] *Id. at* ¶ 4
[9] *Id. at* ¶ 5
[10] Avista Corporation's Petition for Approval of a Settlement Agreement Between Clearwater Paper Corporation and Avista Corporation, AVUG2002, Order 34712, 2020 WL 3630529, at *3 (Jun 30, 2020, Idaho P.U.C.).

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agreed that strict application of the overrun entitlement penalty was unreasonable and negotiated with the customer to reach a more reasonable penalty.[11]

- April 15, 2021. The due date of the disputed invoice.[12]
- April 30, 2021. Cascade informs counsel for Tree Top by email that it is not taking any action to reduce the overrun entitlement penalty assessed, even though Cascade concedes that "Cascade's core customers may not have been harmed or incurred costs to the levels of the penalties."[13]
- June 24, 2021. Cascade collected payment of the overrun entitlement penalty from Tree Top, which Tree Top pays under protest.[14]
- September 24, 2021. Tree Top files its Complaint—just three months after Cascade collected the unreasonable rate and about five months after Tree Top first discovered the unreasonable basis of the overrun entitlement penalty calculation.

III. ARGUMENT

9. Nothing in Washington's statutes, legal precedent, or Commission practice support the argument that a cause of action under RCW 80.04.220 begins to accrue on the date a customer receives an invoice.

a. A Plain Reading of the Statute Compels That a Cause of Action for an Unreasonable Charge Does Not Accrue Until the Charge Has Been Collected.

10. Cascade's Motion is easily rejected based on a plain reading of RCW 80.04.240.[15] On its face, the basis for action under RCW 80.04.240 is the *collection* of an unreasonable rate or charge. RCW 80.04.240 provides:

> "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

[11] *Id.* at *1.
[12] *See* Declaration of Brian Cunnington, Attachment 5 at 4, 8, 12.
[13] *See* Declaration of Chad Stokes at ¶ 7.
[14] *See* Declaration of Brian Cunnington, Attachment 5 at 2, 3.
[15] Washington rules of statutory construction require that "words must be given their usual and ordinary meaning." *Longview Fire Fighters Union v. City of Longview*, 65 Wn.2d 568, 571 (1965).

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> involving the *collection* of more than lawful rates from the time the cause of action accrues . . .” (emphasis added).

RCW 80.04.240 could hardly be more straightforward. A customer’s cause of action for reparations does not accrue unless and until a regulated entity has *collected* an unreasonable rate or charge.

11. Nor is there *anything* in the text of RCW 80.04.240 that indicates that a mere “invoice” triggers a claim or starts running any time limitations—especially before the invoice is even due. In fact, although the word “collection” is used repeatedly in RCW 80.04.240, the word “invoice” does not appear even once. If RCW 80.04.240 intended for “invoicing” to trigger the cause of action, it could have very easily said so.

12. Ultimately, Cascade violates the most basic cannon of statutory construction by attempting to insert into RCW 80.04.240 language that was omitted.[16] Cascade is asking the Commission to rewrite the pertinent section of RCW 80.04.240 so that it reads as follows:

> “All complaints concerning overcharges resulting from ~~collecting~~ [invoicing] unreasonable rates and charges or from ~~collecting~~ [invoicing] amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the ~~collection~~ [invoicing] of unreasonable rates and two years in cases involving the ~~collection~~ [invoicing] of more than lawful rates from the time the cause of action accrues . . .”

Cascade’s proposed statutory revision is contrary to law and must be rejected.

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/ / /

[16] The court may not read into a statute that which has been omitted. *Strom v. City of Seattle*, 50 Wn.2d 858, 861 (1957) (the court may not “write into [a statute] language which the legislature omitted. This court cannot make laws.”).

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b. The Context of the Reparations Statute Confirms That No Claim Accrues Unless and Until the Unreasonable Rate is Actually Paid and Collected.

13. Cascade's proposed rewrite of RCW 80.04.240 also conflicts with the basic purpose of the statutes at issue in this Compliant proceeding. RCW 80.04.220 concerns *reparations*. Reparations are "something done or given as amends or satisfaction."[17] In this context, "reparations" are "refunds", or the award of damages, for the "*collection* of unreasonable rates . . . ."[18] When the Commission finds that charges *collected* were unreasonable, RCW 80.04.220 directs the Commission to award the complainant damages, which is the excess amount charged "with interest from the *date of the collection* of said excess amount." The whole concept of awarding reparations would make no sense in this context unless and until an unreasonable rate has been paid and collected.

c. The Washington Supreme Court Has Already Determined That a Cause of Action Accrues When Unreasonable Charges Have Been Paid and Collected.

14. The Washington Supreme Court has already determined that a cause of action "accrues . . . when the unreasonable charges are ***paid***."[19] In *N. Pac. Ry. Co.*, the issue was whether a lumber shipper had filed a complaint for reparations with the Commission within the statutory period.[20] Importantly, *N. Pac. Ry. Co.* involved a discrete invoice for services—similar to the discrete invoice for the overrun entitlement penalties at issue here.

15. The statute at issue in *N. Pac. Ry. Co.*, Rem. Code 1915 § 8626-91, is the direct predecessor to RCW 80.04.240. *Compare* "All complaints concerning overcharges shall be filed

[17] *Merriam-Webster.com Dictionary*, Merriam-Webster, https://merriam-webster.com/dictionary/reparations. (Accessed Dec. 13, 2021).
[18] RCW 80.04.240 (emphasis added).
[19] *N. Pac. Ry. Co.*, 122 Wash. at 677–78 (citing *Louisville Cement Co. v. Interstate Commerce Commission*, 246 US 638, 643 (1918)) (emphasis added).
[20] *Id.* at 676.

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with the commission within two years from the time the cause of action accrues . . .” (Rem. Code 1915 § 8626-91) *with* “All complaints concerning overcharges resulting from collecting unreasonable rates . . . shall be filed with the commission within six months in cases involving the collection of unreasonable rates . . . from the time the cause of action accrues.” (RCW 80.04.240).[21]

16. The Washington Supreme Court looked to the “corresponding provision of the federal statutes” and United States Supreme Court guidance.[22] The Washington Court noted that “the [U.S. Supreme C]ourt held that the cause of action accrues . . . when the unreasonable charges are paid . . . .”[23] In reaching the same conclusion, the *N. Pac. Ry. Co.* Court also noted that “[t]here is no difference between the language of our statute . . . and the federal statute [, except for some minor word choice.]”[24]

17. Cascade argues that the Commission should disregard Washington Supreme Court precedent because *N. Pac. Ry. Co.* (1) considered a “different statute” and (2) because “determining the claim accrual date was not a prerequisite for the court’s holding.”[25] Cascade’s arguments have no merit.

18. First, as noted above, the statute at issue in *N. Pac. Ry. Co.*, Rem. Code 1915 § 8626-91, was the direct predecessor to RCW 80.04.240. Section 8626-91 is found under Chapter I, “Public Service Commission,” of Title LXX, “Railroads and *Public Utilities*” of the 1915 code.[26] RCW 80.04.240 is found under the “Public Utilities” title of the RCW, and the Washington Public

[21] See Declaration of Chad Stokes at ¶ 8, Attachment 3 pages 9-10.
[22] *N. Pac. Ry. Co.*, 122 Wash. at 677.
[23] *Id.* at 677–78.
[24] *Id.* at 678.
[25] Mot. at ¶ 14.
[26] See Declaration of Chad Stokes at ¶ 8, Attachment 3 pages 9-10.

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Service Commission was the direct predecessor to the Commission in its current form.[27] The current statutory structure also mirrors the structure of the 1915 code, providing for claims for unreasonable charges and a statutory period within which to bring such a claim, save for the fact that later amendments bifurcated section 8626-91 into claims for reparations for "unreasonable" charges and refunds for charges "in excess of the lawful rate."

19. Notwithstanding this structural change, the limitation or accrual language contained in the 1915 code is nearly identical to the current RCW 80.04.240,[28] save for the specification of different limitation periods based on the type of claim asserted. Cascade has not, and cannot, provide any reason why RCW 80.04.240 and Rem. Code 1915 § 8626-91 are "different" statutes in any meaningful way applicable to this issue.[29] The fact is that, for over one hundred years, Washington has allowed customers to file complaints against regulated utilities to seek reparations for unreasonable charges with no material change in the statutes that grant that right.

20. Second, Cascade's argument that *N. Pac. Ry. Co.*'s discussion of claim accrual was merely incidental to the court's holding is similarly misguided.[30] In that case, complainants initially sought refunds for the railroad's allegedly discriminatory practices, which the Commission dismissed because the complaint did not actually attack "the reasonableness of a rule and rate."[31] Four years after the Commission's order, and after successfully arguing that rates it was charged were unreasonable in a later federal proceeding, the complainant sought to

[27] *History of the Commission*, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, https://www.utc.wa.gov/about-us/about-commission/history-commission (accessed Dec. 20, 2021).
[28] *See* ¶ 16 *supra*.
[29] Mot. at ¶ 14.
[30] Mot. at ¶ 14.
[31] *N. Pac. Ry. Co.*, 122 Wash. at 674.

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reopen the initial proceeding.[32] The Commission granted the customer's request, citing Rem. Code 1915 § 8626-90 for the proposition that it had "broad discretionary power . . . in matters of this kind."[33] The railroad appealed, arguing that the Commission lacked jurisdiction to reopen the claim.[34]

21. The question of when the customer's cause of action accrued was central to the court's analysis because it determined whether the Commission had jurisdiction to consider reopening the complaint.[35] The Court cited *Louisville Cement* not only for the rule that a cause of action accrues upon payment of an unreasonable charge but also for the rule that the "two-year provision of the act is not a mere statute of limitation, but is jurisdictional, is a limit set to the power of the Commission . . . ."[36] The court could not determine that the Commission lacked jurisdiction to entertain the customer's complaint without first determining if the customer filed its complaints within the statutory period. The court could not have done this analysis without determining *when the customer's cause of action arose*. Consequently, the accrual issue was inherently central to *N. Pac. Ry. Co.*'s analysis and Cascade's argument should be rejected.

d. Even Under the "Discovery Rule," Tree Top's Complaint Was Timely Filed.

22. The Commission has not applied the "discovery rule" in cases involving unreasonable charges on discrete bills such as the overrun entitlement invoice at issue here. In such cases, for the reasons explained above, the cause of action accrues when the unreasonable charges are paid

[32] *Id.* at 675.
[33] *Id.* at 678.
[34] *Id.* at 676.
[35] *Id.* at 679.
[36] *Id.* at 678 (quoting *Louisville Cement*, 246 US at 642).

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and collected. Even if the Commission were to apply the discovery rule in this case, however, Tree Top's complaint was still timely filed.

23. Under the discovery rule, a claim begins to accrue on the date that "the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury."[37] In other words, for a claim to begin to accrue, there must have been: (1) an actual injury; and (2) the injured party must have been able to reasonably discover that injury.

24. In this case, the injury is not merely the overrun entitlement penalty itself, it is Tree Top's payment of an *unreasonable* entitlement penalty. Without payment, there is no injury. Further, as Cascade points out, Tree Top has been assessed and paid uncontested overrun entitlement penalties prior to the overrun entitlement penalties at issue here.[38] Indeed, for transportation customers like Tree Top, overrun entitlement penalties are ordinary course and happen from time to time especially during cold weather events because daily balancing (rather than monthly balancing) is required. The simple fact of receiving an invoice with an overrun entitlement penalty is not a *de-facto* injury, it is just part of being a transportation customer. So, while Tree Top was aware of the existence of a penalty by March 22, 2021, Tree Top was not yet aware that the amount of the penalty was unjust and unreasonable. The invoice that Cascade sent to Tree Top on March 22, 2021, simply says "Entitlement Penalty" and states a dollar amount. It does not explain how or why the amount of the penalty was calculated. Based on the information provided, no reasonable person could "discover" from the invoice alone whether the penalty

[37] *AT&T Communications, et al. v. Qwest Corp.*, Docket No. UT-051682, Order 04 Interlocutory Order Reversing Initial Order ¶ 20 (June 8, 2006) (hereafter *AT&T*).
[38] Mot. at ¶ 9.

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amount was reasonable or unreasonable. Following receipt of the invoice, Tree Top diligently inquired with Cascade concerning the calculation of the penalty before the due date.

25. Tree Top did not "discover" that the penalty amount was unreasonable until April 14, 2021. It was not until April 14, 2021, that Cascade disclosed to Tree Top that it calculated the entitlement penalty based on a dysfunctional Wyoming trading hub—in which Cascade had made no purchases. Tree Top timely filed its claim within six months after discovering these facts.

e. Cascade's Proposed Accrual Date Would Undermine Commission Policy.

26. Policy considerations also disfavor treating an invoice as the accrual date under RCW 80.04.220. When billing disputes arise, the Commission encourages customers first to contact their utility prior to filing a complaint. The Commission's policy objective is to try to reduce complaints by allowing the parties a reasonable opportunity to resolve the dispute on their own. This is exactly what Tree Top did in this case.[39] Instead of racing to the Commission with a complaint, Tree Top first engaged in dialogue with Cascade to better understand the basis on which the penalties were calculated. Cascade's ultra-aggressive application of the discovery rule would, however, have an unfortunate chilling effect on such bilateral dialogue in future cases. Cascade's approach could increase Commission complaints by forcing customers to file first before seeking resolution with the utility. Notably, Tree Top reached out to Cascade three times to discuss the penalty before Cascade responded nine days later.[40]

[39] *File a Complaint*, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, https://www.utc.wa.gov/FileComplaint (accessed Dec. 16, 2021).
[40] *See* Declaration of Chad Stokes *at* ¶ 3,4,5.

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27. Finally, Cascade's argues that allowing a statute of limitations to toll until charges have been paid would enable a customer to potentially sit on claims indefinitely. First, in the context of utility regulation, most complaint proceedings will not involve a discrete invoice and payment such as at issue in this case—so Cascade's argument is not compelling. Indeed, all of the cases cited by Cascade involve unreasonable charges that have already been paid and collected. More importantly, Cascade's argument ignores the fact that failing to pay utility bills comes with *serious consequences*: including incurring interest charges and potentially having gas service disconnected. These are consequences transportation customers are not likely to risk.

f. None of the Cases Cited by Cascade Equate "Discovery" with Invoicing.

28. Cascade cites a handful of Commission decisions in support of *its* version of the discovery rule. First, none of the cases indicate that the discovery rule applies in this case. Moreover, none of the cases upon which Cascade relies actually holds that a claim for reparations accrued immediately upon invoicing, and none of the cases involve a discrete event and a discrete invoice such as we have here.

29. In *AT&T*, a group of competitive local exchange carriers ("CLEC") sought to receive service from Qwest at the same rate as it was providing service to other customers under certain unfiled agreements.[41] Prior to filing their reparations complaint, the CLEC customers had initially filed a complaint alleging that Qwest violated the law by entering and failing to file the contested agreements.[42] The Commission declined to pursue that complaint. The date the

[41] *AT&T* at ¶ 12.
[42] *Id.* at ¶ 11.

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Commission declined to pursue AT&T's initial complaint was the date of accrual for reparations under RCW 80.04.220:

> It was then common knowledge that possible violations had occurred; that the violations could have affected complainants; that the Commission refused to take up the matter at that time; and that Commission action of an indefinite nature would occur only at some indefinite point in the future. Complainants knew that Commission action was not imminent, and that a six-month limitation period could potentially bar their actions. A reasonable CLEC at that point would have begun serious inquiries, particularly given the possibility of considerable damages.[43]

30. If anything, the accrual date in *AT&T* is much later than the dates of the invoices received by customers. The customers were actively receiving interconnection service from Qwest but wanted to receive more favorable rates than Qwest was offering under other unfiled agreements. The relevant accrual dates considered by the Commission in *AT&T* included: February 2002 (complaint filed against Qwest for failing to file agreements); July 15, 2002 (Commission declined to pursue the matter); and June 8, 2004 (Commission Staff released unfiled agreements to the public).[44] If accrual under RCW 80.04.220 were to begin on the date an invoice containing unreasonable rates was received, the Commission in *AT&T* would have had no cause to consider the legal effect of subsequent Commission actions. The analysis simply would have been that the *AT&T* customers knew Qwest was providing others with better rates when they *received* their invoices; consequently, their reparations complaints would have begun to accrue on those invoice dates. That was not the case, however, because the customers in *AT&T* should have been aware of the *injury* when the Commission alerted them that they would not pursue the matter regarding unlawfully filed agreements against Qwest. The same is true here against

[43] *Id.* at ¶ 20.
[44] *Id.* at ¶¶ 19–20.

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Cascade: Tree Top did not know it suffered an actual injury until April 14, when it learned that Cascade was not exposed to Green River pricing. Under the *AT&T* holding, however, it would also be appropriate to use April 30, 2021, as the accrual date. This was the date that Cascade informs counsel for Tree Top by email that it is not taking any action to reduce the entitlement penalty assessed, even though Cascade concedes that "Cascade's core customers may not have been harmed or incurred costs to the levels of the penalties."[45]

31. The *Industrial Customers of Northwest Utilities ("ICNU") et al. v. PacifiCorp* decision is of no help to Cascade either.[46] In that case, ICNU and the Office of the Attorney General Public Counsel Unit ("Public Counsel") settled on certain renewable energy credit (REC) revenues in PacifiCorp's 2009 general rate case. Later fillings revealed that PacifiCorp's REC revenues greatly outperformed projections and the settlement figure.[47] ICNU and Public Counsel filed a complaint on January 7, 2011, seeking reparations. ICNU and Public Counsel argued that their reparations claim accrued on July 8, 2010, the date it received the actual REC contracts.[48] The Commission disagreed, finding that the cause of action accrued on the date that PacifiCorp filed its 2010 general rate case—which showed REC revenues that greatly exceeded the 2009 settlement.[49]

32. But this decision does not support Cascade's argument. Under Cascade's proposed application of the discovery rules, the cause of action would have accrued on the dates PacifiCorp's customers received their utility bills containing 2009 REC settlement rates, which is

[45] *See* Declaration of Chad Stokes at ¶ 7.
[46] *Industrial Customers of Northwest Utilities et al. v. PacifiCorp*, Docket No. UE-110070, Initial Order (Order No. 01), ¶¶ 31-33 (Apr. 27, 2011) (hereafter *ICNU*).
[47] *Id.* at ¶ 19.
[48] *Id.* at ¶ 31.
[49] *Id.* at ¶ 33.

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untenable. The Commission determined that ICNU and Public Counsel had *knowledge* that the invoices were unreasonable when PacifiCorp filed its 2010 general rate case. Applied here, Tree Top did not suffer an actual harm until April 14, when it learned the basis of the penalty calculation and that Cascade was not exposed to Green River pricing.[50]

33. Finally, Cascade's reliance on *The Lummi Nation* is also misplaced.[51] There, the Lummi Nation sought to recover charges for services it did not actually receive between January 1995 – September 2004.[52] In October 2004, Verizon refunded the Lummi Nation six months' worth of charges, and the Lummi Nation thereafter filed its complaint before the Commission on January 23, 2006.[53] The Commission found that the Lummi Nation's "cause of action against Verizon matured at the latest on October 4, 2004, when Verizon stopped billing for the questioned services and refunded what it had charged Lummi back to March 2004."[54] Cascade attempts to equate this date, the date the Lummi Nation received a refund from Verizon, to the date Tree Top received the invoice in question as both being dates that "the plaintiff discovered or should have discovered the injury."[55] What Cascade ignores, however, is that the Commission states that the date the Lummi Nation received a refund was the date its claim "matured," and the Lummi Nation was seeking refunds for charges dating back *nine years*. Were the Commission in *The Lummi Nation* to apply the version of the discovery rule that Cascade advocates for here, the Lummi Nation would only have ever been able to seek reparations on six months' worth of

[50] *See* Declaration of Chad Stokes at ¶ 6.
[51] Mot. at ¶ 15.
[52] *The Lummi Nation v. Verizon Nw., Inc., and Qwest Corp.,* Docket No. UT-060147, Initial Order (Order No. 02) ¶ 5 (June 7, 2006) (hereafter *The Lummi Nation*).
[53] *Id.* at ¶ 17.
[54] *Id.* at ¶ 43.
[55] Mot. at ¶ 15.

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charges. If anything, the Commission's finding that a customer did not know it was harmed until after the harm was directly communicated to it by a utility supports Tree Top's position that it did not know it was harmed until April 14th, 2021, when Cascade informed Tree Top that it did not purchase gas from Green River, or on April 30th when Cascade informed Tree Top that its customers "may not have been harmed or incurred costs to the levels of the penalties," and it would not jointly request the Commission mitigate the penalties.[56]

34. This is how the discovery rule operates, to protect injured claimants until they know, or should know, that they have been harmed.[57] Because Tree Top did not know it was harmed by Cascade's imposition of entitlement penalties based off exorbitant market rates until April 14, 2021, at the earliest, its complaint filed on September 24, 2021, is timely and Cascade's motion should be denied.

IV. CONCLUSION

35. Tree Top's complaint was timely filed. The plain language of RCW 80.04.240 states that Tree Top's claim accrued when the unreasonable rates were "collected" by Cascade. By contrast, there is *nothing* in the text of RCW 80.04.240 that states that claims accrue upon invoicing—especially before the invoice is even due. This reading of the statute was confirmed by the Washington Supreme Court in *N. Pac. Ry. Co.*, which held that a cause of action does not accrue until an unreasonable charge has been paid. Tree Top remitted payment under protest on

[56] *See* Declaration of Chad Stokes at ¶ 7.
[57] *See Beard v. King County*, 76 Wn. App. 863, 867 (1995) ("the [discovery] rule [is] necessary to balance the injured claimant's right to legal remedies against the threat of defending stale claims, and to avoid the injustice of having a statute of limitation terminate legal remedies before the claimant knows he or she has been injured.") (citations omitted).

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June 24, 2021, well within the six-month statute of limitations prior to filing its complaint on September 24, 2021.

36. The Commission's discovery rule does not apply in this case because it involves a discrete event and a discrete invoice, and RCW 80.04.240 provides the date a cause of action accrues. Even if the discovery rule did apply, however, Tree Top's claim was timely. Under the discovery rule, a cause of action does not accrue until the complainant *knows* it has been *injured*. Tree Top did not know it had been injured by an unreasonably penalty calculation based solely on the March 22 invoice. Tree Top did not know it was injured until Cascade admitted, on April 14, 2021, that the penalty was based on a dysfunctional gas market in which Cascade did not participate.

37. Tree Top's complaint was timely filed within the six-month limitations period as required by RCW 80.04.240. Accordingly, the Commission should deny Cascade's Motion for Summary Determination.

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Respectfully submitted,

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