BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of the Application of CASCADE NATURAL GAS CORPORATION, for a Certificate of Public Convenience and Necessity to Operate a Gas Plant for Hire in the General Area of Grant County.	DOCKET NO. UG-001119 **PETITION FOR DETERMINATION THAT CASCADE DOES NOT REQUIRE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR SERVICES DESCRIBED IN RATE SCHEDULE 700**

I. INTRODUCTION

Cascade Natural Gas Corporation ("Cascade") petitions for a determination that it does not need a Certificate of Public Convenience and Necessity ("Certificate") to provide the gas line design, maintenance, inspection, and repair services in Grant County identified in Cascade's Rate Schedule 700 ("Rate Schedule 700"). Because Cascade seeks only to provide these services, and not to operate a "gas plant" in the county, as that term is defined in the relevant statutes, the relief sought by Cascade should be granted.

II. BACKGROUND FACTS

Both Cascade and the Avista Corporation ("Avista") are engaged in the business of furnishing gas service within the state of Washington as public service companies. Avista currently holds a Certificate for gas service in the portion of Grant County in

which Cascade has proposed to provide the specific services described in its Rate Schedule 700.

Basin Frozen Foods, Inc. ("Basin") is a business located in Grant County. Due to the nature of its business, Basin consumes significant amounts of energy, and demands a reliable source. It has chosen to run its operations with natural gas; however, as a result of Avista's limited pipeline capacity in Grant County, Basin has determined to construct its own bypass line to the interstate pipeline.

Basin asked Cascade to assist with the design and subsequent supervision of the line Basin intended to construct. Cascade agreed to assist Basin. For the purpose of this proceeding, the parties have stipulated that the services Cascade seeks to provide in Grant County are limited to those listed in Rate Schedule 700. These services include: (1) pipeline and facility design; (2) equipment and material specification; construction inspection; (4) employee or operator certification; (5) facility maintenance and repair; (6) leak detection and repair; (7) Cathodic protection design, installation, inspection, and maintenance; (8) line coating; and (9) other activities related to Basin's operation of its facility as requested by Basin. A true and correct copy of Rate Schedule 700 is attached hereto for the Commission's convenience.

Basin submitted its plans to construct and operate its own gas system to the Staff of the Commission. Upon review of the plans, the Commission Staff advised Basin that it had determined that Cascade required a Certificate in order to assist Basin with its gas system plans. Thereafter, Cascade applied for a Certificate in this proceeding. However, because Cascade believes the Commission Staff's determination is incorrect, and that, in

fact, a Certificate is not required by Washington law, it seeks declaratory relief in this proceeding from the Commission.

III. QUESTIONS PRESENTED

I. Does Cascade need a Certificate to provide gas line design, maintenance, inspection, and repair services in Grant County when such services plainly do not involve operation of a "gas plant" in the county and other companies currently are providing identical services in the state without Certificates?

IV. ARGUMENT

A. The Commission is Without Authority to Require Cascade to Obtain a Certificate in This Case Because Cascade Does Not Seek to Operate a "Gas Plant" in Grant County in its Application.

The Commission Staff has taken the position that Cascade must secure a Certificate to provide the design, maintenance, inspection, and repair services Basin has asked Cascade to provide in connection with the gas system Basin intends to privately own and operate. Requiring a Certificate to provide Rate Schedule 700 services as described in this proceeding exceeds the Commission's authority under Washington law.

1. Based on a plain reading of the relevant statutes, the Commission lacks authority to require a Certificate for services that do not involve operation of a "gas plant" in Grant County.

As has often been repeated by courts in Washington, the "primary objective" of statutory interpretation is to "find the intent of the legislature." *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045, 1049 (1994). "That intent must be determined primarily from the statutory language." *Id.* (quoting *State Dep't of Transp. V. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458-59, 645 P.2d 1076 (1982). When the language

of a statute is plain and unambiguous, "words must be given their usual and ordinary meaning." *Cole v. Washington Utils. & Transp. Comm'n*, 79 Wn.2d 302, 308, 485 P.2d 71, 74 (1971). As the court explained in *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351, 354 (1997): "When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written." *Id.*

A plain reading of the relevant statutes in this case reveals that the Commission is without authority to require Cascade to seek a Certificate to provide the services described in its application. RCW 80.28.190 provides, in part:

> No gas company shall . . . operate in this state any *gas plant* for hire without first having obtained from the commission under the provisions of this chapter a certificate declaring that public convenience and necessity requires or will require such operation. . . .

Id. (emphasis added). "Gas Plant" is defined by RCW 80.04.010 as:

> 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 of gas, for light, hear or power.

Id.

The Rate Schedule 700 services that Cascade intends to provide in Grant County cannot under any reasonable reading of the statute be considered the operation of a "gas plant" as defined by the statute. Cascade does not, and does not intend to, own, lease, control, or use any real estate, fixtures, or personal property for or in connection with the transmission, distribution, sale or furnishing of any type of gas for light, heat, or power in Grant County. On the contrary, Cascade only seeks to provide pipeline *services* to lines that are privately owned and operated in the County. The services are limited to the design, maintenance, inspection, and repair activities described in Cascade's application and Rate Schedule 700. Had the legislature wished the Commission to regulate these

services, as well as to regulate the operation of "gas plant," it easily could have provided this authority to the Commission. However, the legislature opted instead for a narrower statute. Because the statute *as written* does not authorize the Commission to require a Certificate for the delivery of the services described in Rate Schedule 700, the Commission Staff's recommendation that a Certificate is necessary in this case should not be accepted by the Commission. *See Cole*, 79 Wn.2d at 307, 485 P.2d at 74 (noting that "[a]n administrative agency cannot amend its statutory framework under the guise of interpretation") (citation omitted). Therefore, the Commission should grant the relief sought by Cascade in this proceeding.

2. The Commission may not expand the scope of its authority beyond that provided by the legislature.

To the best of Cascade's knowledge, neither the Commission, nor any Washington court has ruled on efforts by the Commission to regulate the types of services Cascade seeks to provide in this case. However, cases are legion in which the courts, and the Commission, itself, have rejected attempts to expand the authority of the Commission beyond that which is clearly provided by statute. These decisions are based on the principle that agencies "possess only those powers granted by statute." *Cole*, 537 Wn.2d at 306, 485 P.2d at 73. As expressed in *Washington Indep. Tel. Ass'n v. Telecomm. Ratepayers Ass'n for Cost-Based and Equitable Rates (Tracer)*, 75 Wn. App. 356, 363, 880 P.2d 50, 54 (1994), "[a]dministrative agencies are 'creatures of the legislature without inherent or common law powers', and they may exercise only those powers conferred on them 'either expressly or by necessary implication.'" *Id.* (citations omitted). If there is any doubt as to whether the power is granted, it must be denied.

Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947).

Consistent with this principle, in *Cole*, the Washington Supreme Court rejected an effort by an association of independent fuel oil dealers to intervene in a rate complaint between a regulated gas company and a residential customer arising out of the gas company's promotional campaign. The association sought to demonstrate that the campaign negatively impacted the fuel oil business, an industry that was not regulated by the Commission . However, the Commission determined that it did not have jurisdiction to consider this effect. Noting that the association could not identify any provision of Title 80 that "suggested" that nonregulated fuel dealers were "within the jurisdictional concern of the commission," the court affirmed the Commission's decision. *Id.*, 79 Wn.2d at 306, 485 P.2d at 74. The court explained, "[a]n administrative agency must be strictly limited in its operations to those powers granted by the legislature." *Id.*

Similarly, in *Pierce County Housing Auth. v. Murrey's Disposal Co., Inc.*, 86 Wn. App. 138, 936 P.2d 1 (1996), the court affirmed the trial court's dismissal of plaintiff's effort to preclude the housing authority from collecting and hauling its own garbage. Plaintiff had sought a declaratory judgment against the Commission as a result of the Commission's refusal to require the housing authority to obtain a certificate pursuant to the "Solid Waste Collection Companies" statute. *Id.* at 141, 936 P.2d at 2. The statute required all "solid waste companies" to be certified by the Commission . *Id.* The court held that the housing authority was not subject to the Commission's jurisdiction, despite its garbage collection activities, because it was not a "solid waste collection company" as defined by the statute. *Id.* at 143-44, 936 P.2d at 3.

In numerous other cases as well, Washington courts have looked carefully at the jurisdictional reach provided by Title 80, and have limited the Commission's authority accordingly. *See Washington Indep. Tel. Ass'n*, 75 Wn. App. at 368, 880 P.2d at 57 (affirming trial court's rejection of rule created by the Commission that established "community calling fund" to which all local exchange companies ("LEC") were required to contribute). The court invalidated the rule because the relevant statutes did not on their face authorize the Commission to establish the fund. *Id.*; *In re Electric Lightwave, Inc.*, 123 Wn.2d at 536, 869 P.2d at 1049 (affirming trial court decision that the Commission lacks authority to grant monopolies or exclusive rights to LECs, as Title 80 did not confer this power on the Commission); *Inland Empire Rural Electrification, Inc. v. Public Serv. Comm'n*, 199 Wash. 527, 538, 92 P.2d 258, 263 (1939) (finding that private "electrification" corporation is not subject to Commission's jurisdiction because it is not a "public service corporation" as defined by statute). In *Inland Empire*, the court carefully considered the specific activities of the corporation in order to determine whether, "in fact, and in law" the corporation engaged in conduct regulated by the Commission. *Id.*

Here, as well, it is appropriate for the Commission to limit itself to those powers granted by the legislature. As in *Cole* and *Electric Lightwave*, there is no provision of Title 80 that authorizes the Commission to regulate the design, maintenance, inspection, and repair services Cascade seeks to provide in this case. RCW 80.28.190 simply does not address these activities.

As articulated in the above authorities, the Commission must be "strictly limited" in its operations to the authority provided by the legislature. Vigilance in this regard is

particularly appropriate in this case because the statutes at issue concern the authority of the Commission to create and regulate monopolies and exclusive rights. *See In re Electric Lightwave, Inc.*, 123 Wn.2d at 538, 869 P.2d at 1050 (noting the State Constitution "manifest[s] the state's abhorrence of monopolies," and holding that the "legislature must expressly grant to the Commission the authority to grant monopolies before the Commission may exercise such rights"). RCW 80.28.190 expressly provides the Commission with the power to grant exclusive rights to gas companies operating "gas plants" in defined areas. The statute does not, however, also empower the Commission to grant such rights to companies providing gas line design, maintenance, inspection, and repair services. The inference to be drawn from this is that the legislature intended for there to be competition among providers of such services. The court should reject the Commission Staff's initiation to inhibit this competition through the exercise of authority that it lacks under Washington law. Accordingly, the Commission should rule that a Certificate is not required in this case.

3. A Certificate is not appropriate in this case because other companies deliver similar services in Washington without Certificates.

Several companies currently provide design, maintenance, inspection and repair services to gas lines in Washington without Certificates. These companies include major corporations that own and operate or contract with others to operate gas facilities in areas in which Cascade does possess Certificates. The Commission Staff's recommendation to regulate the Rate Schedule 700 services Cascade seeks to provide in this proceeding, while at the same time other companies engage in identical activities without regulation, lacks apparent fairness. An administrative agency owes a duty of consistency to those who are subject to its control. *Vergeyle v. Employment Sec. Dep't*, 28 Wn. App. 399,

404, 623 P.2d 736, *review denied*, 95 Wn.2d 1021 (1981), *overruled on other grounds, Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 737 P.2d 1262 (1987). If the Commission imposes the requirement for a Certificate on Cascade to perform Rate Schedule 700 services while other companies perform similar services without similar regulations, it puts Cascade at a substantial competitive disadvantage. Obviously, Cascade cannot effectively compete in the gas services market in the state if it is constrained by Commission certification requirements, but its competitors and potential competitors are not. The public has an interest in free competition for service offerings, such as Rate Schedule 700, that are not required by statute to be regulated. This interest in competition typifies why the Commission should exercise regulatory restraint and decline to require a Certificate in this proceeding. It should instead accept the plain meaning of the words of RCW 80.04.010 as determined by the legislative enactment. (Regulatory jurisdiction of the Commission over safety of gas facilities is not an issue in this proceeding, whether or not a Certificate is necessary.)

V. CONCLUSION

Cascade is not, and does not intend to operate a "gas plant" in Grant County by offering its Rate Schedule 700 services. It seeks only to provide gas line design, maintenance, inspection, and repair services upon the request of customers in the County. Because the Commission lacks authority to require a Certificate for such services, and may not consistent with Washington law expand the authority it has been provided by statute, the Commission should decide that Cascade does not need a Certificate in this case. This result is supported as well by the fact that other companies currently are providing identical services in the state without Certificates and requiring a Certificate for

Cascade would reduce the competitiveness of Cascade's services, to the detriment of the public. For the foregoing reasons, Cascade respectfully requests that the Commission decide that Cascade may provide the Rate Schedule 700 services without a Certificate.

RESPECTFULLY SUBMITTED this 15th day of November, 2000.

HILLIS CLARK MARTIN & PETERSON, P.S.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to WAC 480-09-120, I have caused this day to be served the original plus fifteen (15) copies, by UPS, of the foregoing **PETITION FOR DETERMINATION THAT CASCADE DOES NOT REQUIRE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR SERVICES DESCRIBED IN RATE SCHEDULE 700** on Carole Washburn, Executive Secretary for the Washington Utilities and Transportation Commission, 1300 S. Evergreen Park Drive S.W., P.O. Box 47250, Olympia, WA 98504-7250, for filing and have served a copy by first-class mail, postage duly prepaid thereon, upon each person designated on the following service list:

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