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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

COST MANAGEMENT SERVICES,
INC.,

Complainant,

v.

CASCADE NATURAL GAS
CORPORATION,

Respondent.

No. UG-061256

CASCADE'S MOTION FOR SUMMARY
DETERMINATION AND MEMORANDUM
IN SUPPORT

MOTION

Respondent, Cascade Natural Gas Corporation ("Cascade"), respectfully moves the Commission pursuant to WAC 480-07-380(2) to grant summary determination in Cascade's favor, dismissing the Complaint of Complainant, Cost Management Services, Inc. ("CMS"). This motion is supported by the Stipulated Facts filed November 8, 2006, the Declaration of Jon T. Stoltz filed herewith, and the following memorandum.

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MEMORANDUM

I. INTRODUCTION AND SUMMARY

CMS claims that Cascade's sales of natural gas commodity to its transportation customers are "unlawful" because they are not made at prices specified in Cascade's published rate schedules. Complaint, ¶ 2. CMS asks the Commission to order Cascade to cease making these sales and to determine whether Cascade's existing contracts for such sales are void or voidable. *Id.* CMS also asks the Commission to order Cascade to remove from its rate schedules for transportation service (Rate Schedule Nos. 663 and 664) any references to 18 C.F.R. § 284.402, a FERC rule which authorizes companies like Cascade to engage in certain natural gas transactions pursuant to a blanket marketing certificate. *Id.*, ¶ 47.C.

The Commission should deny the relief requested in CMS's Complaint.¹ Cascade's sales of natural gas commodity to non-core transportation customers have been authorized by the Commission since 1988, when Cascade unbundled the transportation of natural gas from the sale of natural gas to its non-core customers. At all times since 1988, Cascade has made its unbundled sales of natural gas pursuant to filed rate schedules.

Since 1988, and pursuant to approved rate schedules, Cascade has not been required to set forth its charges for the gas commodity for these unbundled gas sales. Rather, those rates are based either on an index and are communicated to the customers at the beginning of each month, or are fixed prices based on a specific contract Cascade secures to provide gas to a particular customer. Thus, the Commission has authorized Cascade to sell unbundled gas supply without listing the commodity prices in its tariff.

¹ As discussed below, Cascade has already agreed in its current rate case to remove language from Rate Schedule Nos. 663 and 664 as requested by CMS, so this requested relief is moot.

1 At all times since 1988, Cascade's tariff has set forth the fees that Cascade charges
2 for services provided in connection with supplying the gas commodity. From 1988 through
3 March 1, 2004, those fees were set forth in Rate Schedule Nos. 681 through 684, and their
4 predecessors. Cascade canceled those four rate schedules for unbundled gas sales in 2004
5 because those transactions were authorized by its FERC blanket marketing certificate,
6 pursuant to 18 C.F.R. § 284.402. However, Cascade continued to charge for its services in
7 supplying unbundled gas under Rate Schedule No. 687. The Commission authorized
8 Cascade to charge pursuant to a banded rate for these services. This provides Cascade with
9 flexibility to negotiate a customer's specific rate; however, the fact that these rates are
10 negotiated and not filed with the Commission is consistent with Cascade's authority and not
11 unlawful. Cascade also accounted for and reported all revenue from these sales under Rate
12 Schedule No. 687.
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24 In addition to being authorized by the Commission, Cascade's unbundled sales of
25 natural gas to non-core customers are authorized by its FERC blanket marketing certificate.²
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27 Nevertheless, Cascade has already agreed to remove references to 18 C.F.R. § 284.402 in
28 Rate Schedule Nos. 663 and 664, as CMS requested.³ Accordingly, Cascade does not ask
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33 ² Cascade's non-core customers purchase gas from Cascade in the same wholesale market in
34 which Cascade makes its purchases. Declaration of Jon T. Stoltz ("Stoltz. Decl."), ¶ 2. The
35 boundaries between federal and state jurisdiction over the natural gas industry are not as narrow and
36 circumscribed as CMS portrays in its Complaint. Section 4(a) of the NGA gives FERC jurisdiction
37 over "[a]ll rates and charges made, demanded or received by any natural-gas company for or *in*
38 *connection with* the transportation or sale of natural gas." 15 U.S.C. § 717c(a) (emphasis added).
39 Using its section 4(a) "in connection with" authority, FERC has asserted jurisdiction over services
40 and facilities that would otherwise be excluded from its jurisdiction by the plain language of the
41 NGA. *See, e.g., Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991); *Nicole Gas*
42 *Production Ltd.*, 103 FERC ¶ 61,328 (2003), *rev'd on other grounds*, 404 F.3d 459 (D.C. Cir. 2005).
43 Cascade discusses in more detail in its Answer, ¶¶ 9-12, the reasons that Cascade's activities are
44 authorized by its FERC blanket marketing certificate.

45 ³ Settlement Agreement filed October 11, 2006 in Cascade's current general rate case,
46 Docket UG-060256 ("Settlement Agreement"), ¶ 12.b(iii)(Exhibit 22). All references to "Exhibits"
47 are to the Exhibits to the Stipulated Facts, filed November 8, 2006.

1 the Commission to decide in this proceeding whether its unbundled sales of natural gas are
2 authorized by its FERC blanket marketing certificate.⁴ Instead, Cascade will show that its
3 sales of unbundled natural gas have been authorized by the Commission, and made pursuant
4 to Cascade's tariff, since 1988. Cascade's sales of unbundled natural gas are not unlawful
5 and the Commission should not order Cascade to cease making such sales.
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10 Not only does CMS fail to establish that Cascade has violated any applicable law or
11 regulation, it also advances no good reason why the Commission should grant it relief in this
12 case. CMS fails to identify harm to any customer interest from Cascade's unbundled gas
13 sales to non-core customers. Instead, CMS is advancing only its own commercial interests
14 in this proceeding. CMS's Complaint is a transparent effort to remove Cascade as a
15 competitor in this market; however, Cascade's customers would suffer if the Commission
16 were to order Cascade to cease making unbundled sales of natural gas. First, customers with
17 current contracts would be prejudiced if their contracts were declared void and the
18 customers were required to obtain new gas supplies at the peak of the winter supply season.
19 Second, Cascade's non-core customers would lose a competitive option, which many of
20 them have found attractive. Third, rates for all Cascade customers would be higher.
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32 In settling disputed issues in its current rate case, Docket UG-060256, Cascade
33 recently agreed (a) that the Commission should include \$200,000 of net revenue from these
34 unbundled gas sales in calculating Cascade's revenue requirement and (b) to share
35 50 percent of its net margin from these sales with its customers on an ongoing basis.⁵ It
36 would be inconsistent for the Commission to conclude that these sales are unauthorized and
37 unlawful and, at the same time, to include revenues from these sales in Cascade's revenue
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45 ⁴ In addition, as asserted in its Answer, Cascade believes that only FERC has jurisdiction to
46 decide questions about the scope of authority that FERC has granted. Answer, ¶ 13.

47 ⁵ Settlement Agreement, ¶ 12.b(i) and (ii)(Exhibit 22).

1 requirement and require Cascade to share future revenue from such sales with its customers.
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3 Thus, if the Commission grants CMS's requested relief, it should also exclude the \$200,000
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5 from Cascade's revenue requirement in the rate case and delete the requirement from the rate
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7 case settlement that Cascade share its net revenue from these sales, thus depriving Cascade's
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9 core and non-core customers of these financial benefits. Instead, Cascade thinks that the
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11 proper course is for the Commission to dismiss CMS's Complaint and to approve all aspects
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13 of the rate case settlement.

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15 Moreover, CMS's Complaint is based on information, including confidential
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17 information, that CMS requested and Cascade produced during discovery in Cascade's
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19 current rate case. CMS's use of the discovery process in one proceeding in order to pursue a
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21 claim in a separate proceeding is an abuse of discovery, a violation of the Commission's
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23 rules, and inconsistent with paragraph 7 of the Protective Order issued in the rate case. In
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25 addition to dismissing CMS's Complaint because it is baseless, the Commission should also
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27 dismiss it because it is based on CMS's misconduct.

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29 For all of these reasons, the Commission should dismiss CMS's Complaint. At most,
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31 if the Commission thinks that Cascade's challenged sales are not adequately covered in Rate
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33 Schedule No. 687, then the Commission should require Cascade to revise that rate schedule
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35 to clarify that it also covers the sale of gas. The Commission should not, however, void any
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37 existing contracts, as that relief is unwarranted and would serve only to punish Cascade's
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39 customers and unfairly reward CMS.
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II. FACTUAL BACKGROUND

A. Commission Authorization of Cascade's Unbundled Gas Sales

1. Unbundling of Gas Sales and Transportation in the 1980's

Cascade unbundled local distribution system transportation from the sale of natural gas to its non-core customers in the 1980's in order to provide these customers access to the competitive market for natural gas commodity, which, in turn, would provide non-core customers with more options for obtaining gas at the lowest possible cost. Stoltz. Decl., ¶ 2. This permitted Cascade's non-core customers to purchase gas and pipeline transportation services in the same wholesale markets in which Cascade makes its purchases. *Id.* In addition to providing a regulated distribution system transportation service, Cascade began to compete in the market for gas supply in 1988. *Id.* Cascade's unbundled gas supply options have continually been offered under tariff from 1988 through the present.

Cascade first introduced a limited transportation-only service in 1980 under Rate Schedule No. 583 (Exhibit 2). Stipulated Facts, ¶ 12. In 1988, Cascade introduced three options for unbundled gas supply for customers taking transportation-only service. *Id.* The Commission approved rate schedules for Optional Firm Gas Supply (Rate Schedule No. 586)(Exhibit 3), Optional Best Efforts Spot Market Gas Supply (Rate Schedule No. 587) (Exhibit 4), and Optional Customer Specific Gas Supply (Rate Schedule No. 588)(Exhibit 5), effective December 2, 1988. *Id.*

Cascade updated its unbundled transportation service and gas supply offerings in 1989. Stipulated Facts, ¶ 13. The Commission approved a rate schedule for Distribution System Transportation Service effective December 1, 1989 (Rate Schedule No. 663)(Exhibit 6). Also effective December 1, 1989, the Commission approved new and updated rate schedules for Cascade which authorized the provision of optional, non-core gas supply and

1 related services: Optional Firm Gas Supply (Supplemental Schedule No. 681)(Exhibit 8),
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3 Optional Best Efforts Spot Market Gas Supply (Supplemental Schedule No. 682)(Exhibit 9),
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5 Optional Customer Owned Gas Supply (Supplemental Schedule No. 683)(Exhibit 10),
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7 Optional Customer Specific Gas Supply (Supplemental Schedule No. 684)(Exhibit 11),
8
9 Optional Firm Pipeline Capacity (Supplemental Schedule No. 685)(Exhibit 12), Optional
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11 Interruptible Pipeline Capacity (Supplemental Schedule No. 686)(Exhibit 13), Optional Best
12
13 Efforts Balancing Service (Schedule No. 687)(Exhibit 14), and Optional Underground Gas
14
15 Storage (Schedule No. 688)(Exhibit 15). *Id.* The Commission approved a rate schedule for
16
17 Large Volume Distribution System Transportation Service (Rate Schedule No. 664)(Exhibit
18
19 7), effective August 1, 1996.⁶ Cascade started to offer Optional Gas Management Services
20
21 pursuant to Schedule No. 687 when it filed substitute sheets for that Rate Schedule effective
22
23 May 11, 2000 (Exhibit 14 at 3). *Id.*

24
25 Since 1989, Cascade filed with the Commission the form of contracts that it utilized
26
27 for its unbundled gas sales. Stipulated Facts, ¶ 18. Since March 1, 2004, Cascade no longer
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29 filed form contracts with the Commission because it was informed by Commission Staff that
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31 it is no longer necessary to file updated forms of these contracts. *Id.*; Stoltz Decl., ¶ 7.

32
33 **2. Cascade's Cancellation of Several of its Optional Gas Supply Rate**
34 **Schedules in 2004**

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36 In 2004, Cascade understood that many of the gas sales and other services it
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38 provided to non-core customers located in Washington were also authorized pursuant to
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40 federal authority by the blanket marketing certificate FERC granted to Cascade pursuant to
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42 18 C.F.R. § 284.402. Stoltz Decl., ¶ 3. In addition, Cascade believed that several of its
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46 ⁶ The Stipulated Facts incorrectly state that Rate Schedule No. 664 became effective on
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effective December 1, 1989. A review of Exhibit 7 at 5 shows that the original Rate Schedule No. 664 was
effective August 1, 1996. This difference is not material in this case.

1 existing tariffs contained both state jurisdictional and federal jurisdictional services, thereby
2 creating an overlap of state and federal authority and the potential for confusion. *Id.*
3
4 Accordingly, Cascade canceled Supplemental Schedule Nos. 681, 682, 683, and 684 by
5
6 tariff filings effective March 1, 2004 (see Exhibits 8-11). Stipulated Facts, ¶ 14. At the
7
8 same time, Cascade added the following language to Rate Schedule Nos. 663 and 664: "Gas
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10 Supplies purchased through the Company will be in accordance with the FERC regulations
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12 (18 CFR Part 284.402 Blanket Marketing Certificates)." *Id.*; Exhibit 6 at 1; Exhibit 7 at 6.
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15 After March 1, 2004, Cascade accounted for and reported its revenue from
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17 unbundled gas sales under Rate Schedule No. 687. Stipulated Facts, ¶ 17. For the test year
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19 utilized in Cascade's current rate case, October 1, 2004 through September 30, 2005,
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21 Cascade accounted for \$30,404,867.18 in revenue from gas supply and related activities
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23 under Rate Schedule No. 687. *Id.*; Exhibit 17.
24

25 **B. Prices of Cascade's Unbundled Gas Sales**

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27 The sales that Cascade made pursuant to its optional gas supply rate schedules were
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29 at prices based upon Cascade's costs. Stoltz Decl., ¶ 4. From the inception of these sales,
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31 with express Commission authority, the specific prices Cascade charged to non-core
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33 customers for gas commodity were never listed in its rate schedules or otherwise filed with
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35 the Commission.
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38 Cascade's standard practice when a customer requests to purchase unbundled gas
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40 supply has been to enter into a supply contract that matches the needs of a specific customer
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42 or group of customers. Stoltz Decl., ¶ 4. Cascade enters into either a variable index price or
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44 fixed price supply arrangement, depending upon whether the customer wants a variable
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46 index or a fixed price. *Id.* Prior to March 1, 2004, Cascade charged its customers based on
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the price it paid for the gas commodity, as stated in Rate Schedule No. 681 ("The charges

1 for the commodity cost of gas for customers electing this option shall include all the cost of
2 such supply at the city gate (excluding pipeline transportation charges.)" *Id.*; Exhibit 8 at
3
4 2. For customers with published *Inside FERC* index-price contracts, Cascade communicated
5 the published index price to the customers on a monthly basis, as reflected in Rate Schedule
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7 No. 681. Stoltz Decl., ¶ 4. Cascade charged its fixed-price customers the cost established
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9 by their specific supply contracts, as stated in Rate Schedule No. 684. *Id.*; Exhibit 11 at 2.
10
11 These customers also obtained access to pipeline transportation either from the pipeline
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13 through the capacity release mechanism or from Cascade pursuant to Rate Schedule Nos.
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15 685 or 686. Stoltz Decl., ¶ 4; Exhibit 8 at 2; Exhibit 11 at 2. Cascade also charged its
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17 customers fees and other charges as set forth in the applicable rate schedules. Stoltz Decl.,
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19 ¶ 4.
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23 Since March 1, 2004, Cascade has conducted and priced its sales of non-core gas
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25 supply and related services in largely the same manner as it did prior to that date. Stoltz
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27 Decl., ¶ 5. The majority of Cascade's unbundled gas sales to its transportation customers are
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29 priced based on a published *Inside FERC* index, with the published *Inside FERC* price
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31 communicated to customers on a monthly basis. Stipulated Facts, ¶ 16; Stoltz Decl., ¶ 5.
32
33 Whether the customer selects an index price or a fixed price, Cascade includes the price for
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35 gas commodity that Cascade pays in the price negotiated with the customer. Stoltz Decl.,
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37 ¶ 5. Cascade also includes in the price offered to the customer a component to cover the
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39 various risks to Cascade inherent in the transaction, including the risk that the customer will
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41 purchase less than its anticipated volume of gas. *Id.* If the customer obtains pipeline
42
43 capacity from Cascade, Cascade also includes the market price for released pipeline capacity
44
45 and the rate Cascade pays pursuant to pipeline fuel reimbursement provisions. *Id.*
46
47

1 In establishing the price offered to the customer, Cascade also includes an amount
2 for its Gas Management Fee. Stoltz Decl., ¶ 6. This fee covers the nomination process,
3 daily monitoring and balancing, and other services Cascade performs in connection with
4 providing unbundled gas supply, and ranges between \$.005 and \$.10 per MMBTU, as set
5 forth in Rate Schedule No. 687. *Id.* Cascade also charges a Gross Revenue Fee
6 reimbursement charge to cover state utility tax and other governmental levies imposed upon
7 Cascade, as set forth in Rate Schedule No. 687. *Id.*

14 III. ARGUMENT

15 A. Cascade's Unbundled Gas Sales Have Been Authorized by the Commission

16 1. Cascade's unbundled gas sales have been authorized by the Commission 17 and made pursuant to filed rate schedules since 1988

18 As the facts set forth above show, the Commission authorized Cascade's unbundled
19 sales of natural gas from the inception of those sales in 1988. For over 15 years, Cascade
20 had specific rate schedules on file that pertained to those sales. Even so, with full
21 Commission authority, those rate schedules never set forth the prices at which Cascade sold
22 the gas commodity. This allowed Cascade the flexibility to compete in a highly competitive
23 market, unconstrained by the requirement to file updated gas prices. In fact, the majority of
24 Cascade's sales were based on index prices and all sales reflected the competitive market.
25 The Commission was fully aware of the fact that Cascade's tariffs did not set forth its prices
26 for gas commodity. In addition, Cascade's tariff has always set forth the fees that Cascade
27 would charge in connection with supplying unbundled gas.

28 Cascade canceled four of its rate schedules for unbundled gas sales in 2004, because
29 those activities were fully authorized by its FERC blanket marketing certificate and this
30 Commission. Nevertheless, even after Cascade canceled Rate Schedule Nos. 681 through
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1 684, Cascade continues to charge for gas commodity in largely the same way it did between
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3 1988 and March 1, 2004.

4
5 Moreover, Cascade continues to charge for its gas supply services pursuant to Rate
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7 Schedule No. 687. Cascade currently includes in its price a tariffed Gas Management Fee
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9 for the services it performs in connection with providing unbundled gas supply. This fee
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11 ranges between \$.005 and \$.10 per MMBTU of gas purchased, as set forth in Rate Schedule
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13 No. 687, and is included in the price set forth in each customer's contract. Cascade also
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15 charges a Gross Revenue Fee reimbursement charge to cover state utility tax and other
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17 governmental levies imposed upon Cascade, as set forth in Rate Schedule No. 687. Cascade
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19 also continues to account for and report all revenue from these sales under Rate Schedule
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21 No. 687. Thus, Cascade's current provision of unbundled gas supply is pursuant to and
22
23 authorized by Rate Schedule No. 687.

24
25 Commission Staff has recognized that Cascade's current unbundled gas sales are
26
27 made pursuant to Rate Schedule No. 687. In its current rate case, Cascade had proposed that
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29 all of its revenue and expenses from Gas Management Services, which include the sale of
30
31 unbundled gas, be considered "below the line;" in other words, such revenue and expenses
32
33 would not be considered revenue and expenses of Cascade for rate-making purposes.
34
35 Stipulated Facts, ¶ 21. Staff opposed Cascade's position and asserted that all of Cascade's
36
37 revenue and expenses from Gas Management Services should be considered "above the line"
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39 for ratemaking purposes. Stipulated Facts, ¶ 22.

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41 Staff witness Michael P. Parvinen testified that the Commission should include all of
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43 Cascade's revenue from Gas Management Services, including the sale of unbundled gas, in
44
45 determining Cascade's revenue requirement *because* this service is provided under tariff.
46
47 "[E]ven though this Commission deemed this service under rate schedule 687 as

1 competitive, the service is provided under a Commission-approved tariff." Exhibit 21 at 2.
2
3 Mr. Parvinen also testified that "The company has been operating under this premise by
4 including all revenue and expense above the line. In other words, the revenues and expenses
5 have been included in the regulated operating accounts as they should be." *Id.*
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8
9 The exhibits to Mr. Parvinen's testimony show that the Commission authorized
10 Cascade to provide optional gas management services pursuant to Rate Schedule No. 687 in
11 May 2000. Exhibit 21 at 5. The Commission authorized Cascade to charge for services
12 provided in connection with supplying gas under a banded rate between \$0.005 and \$0.10
13 per MMBTU; the specific charge a given customer would pay would be negotiated and set
14 forth in a contract. *Id.* The Commission authorized a banded rate tariff because it
15 concluded that the proposed services are "subject to effective competition from energy
16 suppliers not regulated by the commission." *Id.* at 8. The Staff memo stated that the
17 competitors for these services "include the many marketers that provide capacity and
18 commodity services to transportation customers." *Id.* at 6 (emphasis added). It also stated
19 that Cascade "is responsible to demonstrate that revenues generated under this tariff are
20 optimized in favor of the core services provided by CNG." *Id.*
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23
24 Staff's understanding that Cascade provides gas supply pursuant to Rate Schedule
25 No. 687 is implemented in the settlement that several parties have made in Cascade's current
26 rate case. In settling disputed issues in the rate case, Cascade and Staff agreed that the
27 Commission should include \$200,000 of net revenue from these unbundled gas sales in
28 determining Cascade's revenue requirement. Exhibit 22 at 4. All parties to the rate case,
29 including CMS, also agreed that Cascade should share 50 percent of its net margin from
30 these sales with its customers on an ongoing basis. *Id.* at 5. The Commission has not yet
31 approved this settlement; however, if the Commission does approve these aspects of the
32
33

1 settlement, it would be agreeing that these sales are authorized pursuant to tariff and it
2 should also, for that reason, dismiss CMS's Complaint.
3

4
5 **2. Cascade's negotiated rates for gas supply services are within a lawful**
6 **banded rate**
7

8 The Commission has established the level of the Gas Management Fee that Cascade
9 may charge for the services it provides in connection with supplying gas, and that fee is
10 currently set forth in Rate Schedule No. 687. This fee is a banded rate as authorized by
11 RCW 80.28.075. Cascade has full authority to negotiate the level of its Gas Management
12 Fee within the range established in Rate Schedule No. 687, and Cascade keeps its charges
13 within that range.
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20 Both the legislature and the Commission recognize that banded rates are appropriate
21 for competitive services. The Commission's statement from 1994 is even more pertinent
22 today:
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26 Natural gas companies face a rapidly evolving competitive
27 and regulatory environment. Local distribution companies
28 (LDCs) face increasing competition at both ends of their pipe.
29

30 . . .

31 Both the banded rates statute (RCW 81.28.075 [*sic*]) and the
32 special contracts rule (WAC 480-80-335) were intended to be
33 tools for gas companies to use in responding to these
34 competitive pressures. They are designed to encourage
35 flexible pricing, a necessary step for them to meet competition
36 and retain high volume customers. In the larger sense, a high
37 degree of regulation, such as reflected in strict guidelines,
38 formalized feasibility studies, contested cases, and disclosure
39 of pricing information, may be incompatible with a
40 competitive industry which can require quick decisions and
41 confidentiality of price and cost information.
42

43 *Washington Utilities and Transportation Commission v. Cascade Natural Gas Corporation*,
44 152 P.U.R. 4th 76, 1994 WL 287751 (Wash. U.T.C. 1994). Allowing Cascade to negotiate
45 the rate for services it provides in connection with providing gas supply to non-core
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1 customers is consistent with the Commission's pro-competitive policies and the terms of
2
3 Cascade's Rate Schedule No. 687.

4
5 **3. Cascade is not required to tariff its gas commodity prices**

6 CMS complains because Cascade's tariff does not establish the prices Cascade
7
8 charges for unbundled gas commodity. However, the Commission authorized Cascade to
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10 sell unbundled gas supply without tariffed gas prices by approving Cascade's rate schedules
11
12 that were effective from 1988 through 2004. Moreover, because this is a competitive
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14 product, there is no reason for Cascade's tariff to reflect Commission-approved commodity
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16 prices. Imposing a tariff requirement on these sales would significantly inhibit Cascade's
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18 ability to compete in a very competitive and price-sensitive market, to the detriment of
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20 Cascade's customers.
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22
23 There is no basis whatsoever for CMS's allegation that Cascade makes its unbundled
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25 sales of gas "at prices below full cost." Complaint, ¶ 44. Cascade fully recovers its costs of
26
27 selling unbundled gas to non-core customers in its prices for that gas supply. Stoltz Decl.,
28
29 ¶ 6. Thus, there is no pro-competitive reason to require the Commission to review and
30
31 approve Cascade's unbundled gas prices to ensure that they are above cost. In fact,
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33 subjecting Cascade's unbundled gas sales to a tariff requirement would only inhibit
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35 competition in this market.

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37 Cascade must ask why CMS is *now* challenging the fact that Cascade does not set
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39 forth unbundled gas commodity prices in its tariff. Cascade's tariff has not established the
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41 prices for unbundled gas commodity at any time since Cascade initiated such sales in 1988.
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43 Nothing material has changed about the manner in which Cascade makes or prices these
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45 sales in the entire period since 1988, and there is no conceivable harm to any party's interest
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47 by virtue of the fact that the prices are not established in the tariffs. These rates are based on

1 Cascade's costs and reflect market prices. Cascade generally bases its prices on the *Inside*
2
3 *FERC* index, so there is nothing secret about these prices. Moreover, no non-core customer
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5 that purchases unbundled gas from Cascade has ever claimed to have been harmed by the
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7 fact that the gas prices are not tariffed. For all these reasons, the Commission should decline
8
9 to conclude that Cascade has improperly charged non-tariffed rates for gas commodity.

10
11 **4. Cascade should be allowed to make minor tariff revisions**

12 In the rate case Settlement Agreement, Cascade agreed with CMS to remove the
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14 language from Rate Schedule Nos. 663 and 664 to which CMS objected in its Complaint in
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16 this proceeding. The Commission should approve the Settlement Agreement, which would
17
18 moot this relief that CMS requests in this proceeding.
19

20 In addition, CMS may argue that the literal terms of Rate Schedule No. 687 do not
21
22 cover the supply of gas. Cascade thinks that the terms of Rate Schedule No. 687 are
23
24 sufficiently broad to include these sales, and this is consistent with Staff's rate case
25
26 testimony discussed above. Nevertheless, even if the Commission thinks that Rate Schedule
27
28 No. 687 does not literally apply to unbundled gas sales, the Commission still should not
29
30 conclude that these sales since 2004 are unlawful. To do so would simply elevate form over
31
32 substance. Rate Schedule Nos. 681 through 684 did not establish prices for the gas
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34 commodity and, therefore, the substance of these sales is no different in the period since
35
36 those schedules were canceled. Moreover, the fees Cascade charges for its services continue
37
38 to be set forth in its tariff.
39

40 The Commission should permit Cascade to continue to conduct its unbundled sales
41
42 activity without filing any new tariffs. At most, if the Commission thinks that Rate
43
44 Schedule No. 687 does not clearly cover the sale of gas commodity, it should simply require
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1 Cascade to revise the terms of Rate Schedule No. 687 to clarify that it expressly covers the
2 sale of gas commodity to transportation customers.
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5 **B. Cascade's Customers Would Be Harmed if the Commission Orders Cascade to**
6 **Cease Making its Unbundled Gas Sales**
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8 It is worth noting that no customer has ever made a complaint against Cascade
9 relating to its unbundled gas sales and that the only complaint ever made is from a
10 competitor, CMS. Thus, the Commission may safely assume that the only party that would
11 benefit if the Commission grants relief in this case is CMS; however, Cascade's customers
12 would be harmed. Cascade's customers would be harmed in three ways: from the
13 interruption of contracts; from the loss of a competitive provider; and from higher rates.
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16 First, Cascade's non-core customers who purchase unbundled gas from Cascade
17 would be harmed if the Commission were to grant CMS's requested relief and declare all
18 such contracts "void or voidable." The Commission is expected to issue a decision in this
19 case prior to or at the same time as it issues its order in Cascade's pending rate case, in
20 January 2007, which is right in the middle of the peak gas season covered by current
21 contracts. Stipulated Facts, ¶ 25. Declaring these contracts void would place these
22 customers in a vulnerable position in the peak of the gas season. Requiring such customers
23 to locate new supplies of gas would not only cause them serious inconvenience, it would
24 also quite likely increase their cost of gas. There is no reason to put Cascade's customers
25 through such inconvenience and expense. The vast majority of these customers take service
26 under contracts that last one year or less. Stoltz Decl., ¶ 8. CMS has the opportunity to
27 compete for these customers' business at any time, and can seek to enter new contracts with
28 these customers when their current arrangements with Cascade expire within the year. The
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1 Commission should not disrupt gas supply to these customers mid-year and permit CMS to
2 profit from these customers' distress.
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5 Second, CMS appears intent on eliminating Cascade as a competitor: CMS seeks an
6 order "directing Cascade to cease and desist from making retail sales of natural gas . . ."
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8 Complaint, ¶ 47.B. While the benefit to CMS of such a decision is apparent, it is virtually
9 certain that a decision that requires Cascade to cease making unbundled gas sales would
10 harm Cascade's non-core customers by depriving the market of a significant player. In
11 addition, requiring Cascade to tariff its prices for this competitive commodity would
12 effectively destroy its ability to compete in this highly competitive market. CMS should be
13 required to compete to win customers' business, and should not be allowed to utilize
14 regulatory proceedings to obtain a commercial advantage.
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23 Third, determining that these sales are unlawful would increase all customers' rates.
24 In settling disputed issues in its current rate case, Cascade and Staff agreed that the
25 Commission should include \$200,000 of net revenue from these unbundled gas sales in
26 determining Cascade's revenue requirement. In addition, all parties in the rate case,
27 including CMS, agreed that Cascade should share 50 percent of its net margin from these
28 sales with its customers on an ongoing basis. If the Commission determines that these sales
29 are unlawful, as CMS claims, all of Cascade's customers will be deprived of both of these
30 financial benefits. It would be fundamentally inconsistent for the Commission to conclude
31 that these sales are unlawful, but at the same time to include revenue from these sales in
32 Cascade's revenue requirement and require Cascade to share its profit from these sales.
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43 Thus, if the Commission grants CMS's requested relief, the Commission should also
44 reject both inclusion of \$200,000 of the revenue from these sales in setting Cascade's
45 ongoing rates as well as the agreement to share the profits from these sales with customers
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1 in the future. The amount of financial benefit that customers would be deprived of if the
2 Commission grants Cascade's requested relief is substantial. For example, if this margin-
3 sharing arrangement had been in effect during the test year used in Cascade's current rate
4 case, Cascade's customers would have received a benefit in excess of \$630,000.⁷ Thus,
5 requiring Cascade to cease these activities would harm all of Cascade's customers by
6 increasing their rates.
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13 **C. CMS Improperly Based Its Complaint on Discovery Obtained in Cascade's**
14 **Rate Case**

15 CMS intervened in Cascade's 2006 Washington rate case, Docket No. UG-060256,
16 and issued discovery requests relating to Cascade's gas supply activities. Stipulated Facts,
17 ¶ 20, Exhibit 19. Cascade responded to CMS's two sets of data requests on May 9 and June
18 27, 2006. Exhibit 20. CMS filed its Complaint on July 31, 2006. CMS based its Complaint
19 in this case, in large part, on Cascade's discovery responses in the rate case. For example, in
20 its Complaint CMS discusses alleged "admissions" that Cascade made in responding to
21 CMS's data requests in the rate case, and attaches Cascade's responses as an exhibit to the
22 Complaint. Complaint, ¶ 36. In addition, CMS discusses in its Complaint Cascade's
23 response to other rate case data requests, which included information marked "confidential"
24 and subject to the protective order in the rate case. Complaint, ¶¶ 37-38.
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35 CMS's use of the discovery process in one proceeding in order to pursue a claim in a
36 separate proceeding is an abuse of discovery in violation of the Commission's rules. The
37 version of WAC 480-07-400(4) in effect at the time CMS issued its discovery requests in
38 Cascade's rate case provided: "Data requests must seek only information that is relevant to
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44 ⁷ In its current rate case, Cascade had proposed removing \$30,875,879 in revenue,
45 \$28,268,010 of gas costs, \$1,339,418 of gross revenue taxes, and \$165,332 of administrative expense
46 from the test period results. Exhibit 1 at 4. The net margin associated with these revenue and
47 expense figures is \$1,268,451, and 50 percent of that figure is \$634,226.

1 the issues in the adjudicative proceeding or that may lead to the production of information
2 that is relevant."⁸ CMS issued data requests seeking information that is relevant to a matter
3 outside the rate case, namely its desire to file a complaint seeking to oust Cascade from a
4 competitive market, which is an improper use of discovery under the Commission's rules.
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9 Perhaps even more troubling is CMS's use of confidential information that Cascade
10 produced in response to CMS's rate case discovery to launch this proceeding. Paragraph 7
11 of the Protective Order issued in the rate case, Order 02, provides: "No Confidential
12 Information . . . may be requested, reviewed, used or disclosed . . . except for purposes of
13 this proceeding." Exhibit 18 at 3. While CMS did not disclose the confidential information
14 Cascade produced in discovery in the rate case, CMS did base its allegations in the
15 Complaint upon such confidential information. Complaint, ¶¶ 37-38.
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23 CMS based its Complaint on discovery it took in Cascade's rate case, including
24 confidential information Cascade produced. This is improper under the Commission's
25 procedural rules as well as under the rate case Protective Order. For this additional reason,
26 the Commission should dismiss CMS's Complaint.
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30 IV. CONCLUSION

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32 CMS's Complaint is unfounded because, since 1988, the Commission has authorized
33 Cascade to sell unbundled gas at prices that are not established in its tariff. Cascade
34 currently makes these sales consistent with Rate Schedule No. 687, charging under a banded
35 rate for its services in connection with providing gas supply. Cascade also accounts for and
36 reports all revenue from these sales under Rate Schedule No. 687. Further, the parties to
37 Cascade's current rate case, including Staff in its testimony, have acknowledged that these
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⁸ The new version of WAC 480-07-400(3), effective August 27, 2006, provides that "[d]iscovery through data requests or otherwise must not be used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation."

1 sales are covered by Rate Schedule No. 687 in the settlement they reached and proposed for
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3 Commission approval. The Commission should dismiss CMS's Complaint and affirm the
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5 proposed rate treatment of these sales pursuant to Rate Schedule No. 687, as set forth in the
6
7 rate case Settlement Agreement.

8
9 The sale of gas by CMS is not regulated by the Commission. By requesting that the
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11 Commission void Cascade's existing gas supply contracts with its non-core customers and
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13 direct Cascade to "cease and desist from making retail sales of natural gas", CMS is seeking
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15 to eliminate an option that currently exists for Cascade's customers and thereby improve
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17 CMS's competitive position, to the detriment of Cascade and the customers currently
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19 obtaining this service from Cascade. CMS's request would impose price regulation on an
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21 activity that the Commission has allowed to proceed on a largely unregulated basis for
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23 almost 18 years, and would impose regulatory compliance requirements on Cascade with
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25 which CMS would not be required to comply.

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27 Granting CMS's requested relief would deprive Cascade's Washington non-core
28
29 customers of a competitive option and increase their cost of gas. This would be contrary to
30
31 the pro-competitive policies that the Commission has encouraged for many years. Granting
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33 CMS's requested relief would also harm Cascade's core customers because it would require
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35 the Commission to reject both inclusion of \$200,000 in revenue from these sales in
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37 Cascade's annual revenue requirement and the term in the rate case settlement that would
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39 require Cascade to share 50 percent of its revenue from these sales with its customers.
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41 CMS's Complaint is a transparent attempt by one competitor to use the regulatory process to
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43 gain an advantage in a competitive market. Granting CMS's Complaint would not only do
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45 nothing to serve any of Cascade's customers, it would actually harm Cascade's customers.
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1 Cascade has already agreed to remove the language CMS complains about from Rate
2 Schedule Nos. 663 and 664, so CMS's request for this relief is moot. Finally, if the
3 Commission thinks that Rate Schedule No. 687 does not clearly cover the sale of gas
4 commodity, it should at most simply require Cascade to revise the terms of Rate Schedule
5 No. 687 to clarify that it expressly covers the sale of gas commodity to non-core customers.
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10 For these reasons, the Commission should dismiss CMS's Complaint.
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12 DATED: November 15, 2006
13

Respectfully submitted,
14

PERKINS COIE LLP
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By: 
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Lawrence H. Reichman, OSB No. 86083
James M. Van Nostrand, WSBA No.
79428
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Attorneys for Respondent
Cascade Natural Gas Corporation
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this **DECLARATION OF JON T. STOLTZ IN SUPPORT OF CASCADE'S MOTION FOR SUMMARY DETERMINATION** upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and U.S. mail to:

John Cameron
Ryan Flynn
Davis Wright Tremaine LLP
Suite 2300
1300 SW Fifth Avenue
Portland, OR 97201

Doug Betzold
Cost Management Services, Inc.
2737 - 78th Avenue SE, Suite 101
Mercer Island, WA 98040

Edward A. Finklea
Chad M. Stokes
Cable Huston Benedict
Haagensen & Lloyd LLP
Suite 2000
1001 SW Fifth Avenue
Portland, OR 97204

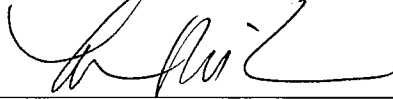
Judy Krebs
Public Counsel Section
Office of Attorney General
Suite 2000
800 Fifth Avenue
Seattle, WA 98104

Greg Trautman
Assistant Attorney General
1400 S. Evergreen Park Dr. SW
P.O. Box 40128
Olympia, WA 98504

Ann Rendahl
Kippi Walker
Washington Utilities and
Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

Dated this 15th day of November, 2006.

PERKINS COIE LLP

By 
James M. Van Nostrand, WSBA #15897
Lawrence H. Reichman, OSB #86083
Attorneys for Cascade Natural Gas Corporation