

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR-23

In the Matter of the Petition of Northwest Natural Gas Company For a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass by Two or More Industrial Customers Violates ORS 758.400 Et Seq.)	WAH CHANG AND THE NORTHWEST INDUSTRIAL GAS USERS' RESPONSE TO NW NATURAL'S STATEMENT OF LEGAL ISSUES
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Pursuant to the procedural schedule established in this proceeding, Wah Chang and the Northwest Industrial Gas Users (“NWIGU”) submit the following response¹ to the statement of legal issues and response filed by Northwest Natural Gas Company (“NW Natural”).

NW Natural seeks to narrow the scope of this proceeding to one issue—“Is the distribution system described in Paragraph 7 of the Amended Petition for Declaratory Ruling one that is ‘connected and interrelated’ within the meaning of the definition of ‘utility service’ under ORS 758.400(3)?” Wah Chang and NWIGU agree that this is one of the issues, but disagrees that it is the only question, or that the hypothetical must assume that the arrangement describes a distribution system, since whether or not the assumed facts describes a distribution system² is a legal question. Accordingly, Wah

¹ NW Natural filed an issues list and a detailed response to the issues list of Wah Chang and NWIGU. The pleading and certificate of service was dated July 5, 2005. Wah Chang and NWIGU also filed its issues list on July 5, 2005 and emailed courtesy copies to the parties a few minutes before 5 p.m. NW Natural did not email or postmark copies of its issues list on July 5, 2005. On July 6, 2005, Counsel for Wah Chang and NWIGU received an email copy of NW Natural’s filing late in the afternoon, and the PUC’s website shows that the hard copy of NW Natural’s filing was received on July 7, 2005, and the electronic version was received July 8, 2005. Accordingly, Wah Chang and NWIGU request that the PUC order NW Natural to explain why its issues list should not be considered untimely. NW Natural’s detailed response included as part of its issues list, however, was filed 10 days early.

² In the gas industry, a distribution system has a specific meaning. One of the issues raised by the assumed facts is whether the “distribution” of gas occurs once it is delivered to the measurement meter.

Chang and NWIGU do not agree that the word “distribution” should be removed from Paragraph 5 of their statement of legal issues. *See* NW Natural Response at P. 8.

NW Natural’s attempt to limit the scope of this proceeding is misplaced. The Court of Appeals did not limit the scope of remand, but rather “Reversed and Remanded [to the Marion County Circuit Court] with instructions to remand to the Public Utility Commission for reconsideration” *See NW Natural Gas Company v. OPUC*, 195 Or App 547, 560, 99 P.3d 292 (2004). No other limiting instructions were included in the Opinion.

It is well established that a court may “limit the scope of their remand to an administrative agency, and when the scope of remand is limited, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court’s mandate”. *See* 2 Am Jur 2d Administrative Law § 576 (2005). NW Natural may attempt to parse the language of the opinion to support the single issue it seeks to have the Oregon Public Utility Commission (“OPUC” or “Commission”) review on remand, but, “unless the remand to an agency limits the issues to be considered, the case should be viewed in its entirety.” *Id.* While the Court does direct the Commission to consider “...whether the bypass and lateral pipelines constitute a connected and interrelated system,” the Court’s opinion does not limit the remand to only this issue. *See NW Natural*, 195 Or App at 559-560.

The Court of Appeals knows how to draft an order that limits the scope of remand to an administrative agency. In fact, a simple search of opinions from the Court of Appeals demonstrates the bright line demarcation between orders that limit the scope of remand and those that don’t. For example, in *1000 Friends of Oregon v. Land*

Conservation and Development, 77 Or App 590, 714 P2d 252 (1986), the Court's remand contained the following remand instruction:

On the appeal, reversed and remanded with instructions to remand to LCDC for reconsideration of compliance of the EFU and F/F zoning ordinance provision with Goal 3; affirmed on the cross appeal.

In *Spray v. Board of Medical Examiners*, 50 Or App 311, 624 P2d 125 (1981), the Court's described the scope of the proceeding to be held on remand:

The only remaining question is the scope of the proceedings to be held on remand. As we have indicated, the Board's order in this case both misapplies the law and lacks necessary factual findings. Some of the Board's assumption about its statutory authority have been show to be invalid. Under such circumstances, we think it is appropriate to reopen the hearing to permit both parties to address, by relevant evidence, the issues as they are now framed. Reversed and remanded for further proceedings consistent with this opinion.

Similarly, in *Montez v. Roloff Farms, Inc.*, 175 Or App 532, 28 P 3d 1255 (2001), the Court's remand contained the following descriptive footnote describing the scope of review:

Reversed and Remanded. FN1. The Board's order affirmed both SAIF's denial of the claim against Roloff Farms, Inc. as well as a separate denial by PAULA Insurance of a claim against Roloff Bros., Inc. Claimant has not challenged PAULA's denial. On remand, the Board should limit the scope of its order to reconsideration of the claim against Roloff Farms, Inc.

In contrast, the Court's remand here was general and contained no specific instructions. The Court could have limited the remand to only one issue, but

chose not to. Accordingly, the Commission’s review should not be limited as NW Natural desires.

In addition to the question of whether or not the assumed facts constitute a connected and interrelated distribution system, the Court of Appeals determined that there were several deficiencies with the Orders of the Commission. The Court of Appeals noted:

The most significant aspect of the PUC’s explanation is its failure to recognize the ordinary meaning of the words that the legislature used in ORS 748.400 (2). Rather, it appears to have relied entirely on its understanding of the purposes for the Territorial Allocation Law as the basis for its interpretation of who constitute a “person” under the statute. While, in general, the purpose underlying a statute constitutes important context for determining what the legislature intended a statute to mean, agencies and courts are without authority to put policy considerations into the meaning of statutes in place of the words that the legislature has chosen to use.

NW Natural, 195 Or App at 556. In other words, the Court determined that the Commission did not “analyze the meaning of crucial statutory language.” *Id.* at 557. Accordingly, the Commission should now review the assumed facts as presented by NW Natural and determine whether the facts presented constitute a violation of Oregon law. This will require the Commission to look at the relevant statutes, under the standards articulated in *PGE v. BOLI*, 317 Or 606, 859 P2d 1143(1993). This also requires the Commission to look beyond the narrow issue presented by NW Natural.

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If adopted, the issues list presented by Wah Chang and NWIGU ensures that the Commission has a chance to thoroughly review the assumed facts, relevant statutes and that the record created in this remanded proceeding is adequate to withstand review.

DATED this 15th day of July, 2005

Respectfully Submitted,



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Of Attorneys for Wah Chang and the
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **WAH CHANG AND THE NORTHWEST INDUSTRIAL GAS USERS' RESPONSE TO NW NATURAL'S STATEMENT OF LEGAL ISSUES** upon the parties on the following current Service List in DR-23, via e-mail and U.S. Mail, postage prepaid.

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