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March 1, 2005

**VIA HAND DELIVERY**

Ms. Annette Taylor
Oregon Public Utility Commission
550 Capitol St. NE, Suite 215
PO Box 2148
Salem, OR 97308-2148

Re: DR-23 NW Natural
Petition for a Declaratory Ruling

Dear Ms. Taylor:

Enclosed for filing in the above-referenced docket are the original and five copies of the Wah Chang Motion to Stay.

Please date stamp the extra copy of the brief and return it in the self-addressed envelope provided.

Thank you for your assistance in this matter. Should you have any questions regarding this matter, please feel free to contact me. Thank you.

Very truly yours,

Edward A Finklea

Edward A. Finklea

EAF/ls
cc: DR-23 Service List (via U.S. Mail)

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR 23

| | |
|---|---|
| In The Matter of<br><br>NORTHWEST NATURAL GAS COMPANY, d/b/a NW NATURAL,<br><br>Petition for a Declaratory Ruling Regarding Whether Joint Bypass By Two Or More Industrial Customers Violates ORS 758.400 *Et Seq.* | WAH CHANG MOTION TO STAY |

## INTRODUCTION

On October 13, 2004, the Oregon Court of Appeals reversed and remanded the decisions of the Oregon Public Utility Commission ("OPUC" or "Commission") regarding the legality of hypothetical, jointly-owned gas piping directly connecting to the interstate pipeline. *See Northwest Natural Gas Company v. Oregon Public Utility Commission*, 195 Or. App. 547, 99 P.3d 292 (2004). On remand, the Commission is to determine, among other things, whether activities by hypothetical entities conducting themselves as described under Northwest Natural Gas Company's ("NW Natural") hypothetical facts would, if true, violate NW Natural's exclusive service territory.

As described below, the Commission should stay this proceeding pending the outcome of Wah Chang's Motion to Recall and Dismiss the Judgment and Order of Remand ("Motion") filed with the Oregon Court of Appeals. The Court lacked subject matter jurisdiction over the


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Commission's orders and its Judgment and Order of Remand are therefore void. Because the Court's remand order is void, this Commission should wait for the Court's resolution of Wah Chang's Motion before continuing with this proceeding.

## BACKGROUND

On March 19, 1999, NW Natural filed a petition with the Commission seeking an advisory opinion under ORS 756.450. Specifically, NW Natural asked the Commission to determine, based on its description of hypothetical facts, whether hypothetical entities that owned and operated facilities as described in its petition would violate the utility's exclusive service territory. NW Natural made up the term "condominium bypass" to describe the arrangement in its hypothetical. NW Natural's Amended Petition describes a "condominium bypass" as follows:

a. Two or more privately-owned industrial consumers of natural gas obtain natural gas from a single connection to the WGPW interstate pipeline.

b. The natural gas flows through a single transfer meter at the point of interconnection with the WGPW interstate pipeline to a designated "receiving party" as defined by WGPW's tariff. The receiving party is accountable to WGPW for the imbalances that occur at the meter.

c. The natural gas is transported through a bypass pipeline. The bypass pipeline may be owned by one or more of the condominium bypass participants.

d. Two or more lateral pipelines are connected to the bypass pipeline and transport natural gas to individual industrial consumers of natural gas. These industrial consumers are separate legal entities. These lateral pipelines may be constructed after the construction and initial operation of the bypass line and provide an extension of utility service.

e. The consumption of natural gas by each of the condominium bypass participants is measured by meters attached to the lateral pipelines. Daily gas flows and the imbalances between the participant's actual gas consumption and its nomination on the WGPW pipeline are allocated by the receiving party to each participant.



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f. The bypass pipeline and lateral pipelines are not directly connected to another natural gas distribution plant or facility. The lateral pipelines have not functional value except as connected or related to the bypass pipeline.

g. The condominium bypass distribution system is located within NW Natural's allocated territory and in an area served by distribution facilities owned and operated by NW Natural.

On June 9, 2000 the Commission ruled that the hypothetical posed by NW Natural would not violate Oregon law. *See In re NW Natural*, OPUC Docket No. DR-23, Order No. 00-306 (June 9, 2000). NW Natural then filed an Application for Reconsideration. On August 9, 2001, the Commission reconsidered and affirmed its earlier advisory decision. *See In re NW Natural*, OPUC Docket No. DR 23, Order No. 01-719 (Aug. 9, 2001).

NW Natural appealed the decision to the Marion County Circuit Court. The Circuit Court decided the case without considering whether it had subject matter jurisdiction—despite its obligation to do so. *Hood River County v. Stevenson*, 177 Or. App. 78, 33 P.3d 325 (2001) (Courts have an obligation to consider jurisdictional issues sua sponte, because courts lack ability to enter judgments in cases where no justiciable controversy exists). The Marion County Court determined, based on the same hypothetical facts presented to the Commission, that the arrangement would be lawful.

NW Natural then appealed and the Oregon Court of Appeals reversed and remanded. The Court of Appeals also failed to address whether it had subject matter jurisdiction over the advisory decisions rendered by the Commission.

The Commission has scheduled a prehearing conference for March 2, 2005. As described below, however, the Marion County Circuit Court and Oregon Court of Appeals never had subject matter jurisdiction over the advisory opinions of the Commission. The Judgment and Order of Remand of the Court of Appeals are therefore invalid.



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## MOTION

Wah Chang hereby moves for an order staying all proceedings in this matter until after the Oregon Court of Appeals rules on Wah Chang's Motion. The Marion County Circuit Court and Oregon Court of Appeals never had jurisdiction to hear the appeal of the Commission's orders in this proceeding because those orders were purely advisory.

Staying this proceeding until after Oregon Court of Appeals rules on Wah Chang's Motion will promote efficiency and conserve the resources of the Commission, OPUC Staff and the parties. A copy of the motion and memorandum in support of the motion filed with the Oregon Court of Appeals is attached as Exhibit A.

## DISCUSSION

Wah Chang filed a Motion with the Oregon Court of Appeals to recall its judgment. The Oregon Court of Appeals and Marion County Court did not have subject matter jurisdiction to review the orders of the Commission because the facts were purely hypothetical and the resulting opinions were advisory. Oregon courts do not have constitutional authority to make advisory opinions that do not resolve real, justiciable controversies. *See 1000 Friends of Oregon v. Clackamas County*, 194 Or. App. 212, 217, 94 P.3d 160, 162 (2004) (Oregon courts may not issue advisory opinions). In Oregon, courts do not have subject matter jurisdiction to hear a case unless it involves a justiciable controversy involving actual facts. *Id.* at 216. *See also US West Communications, Inc. v. City of Eugene*, 336 Or. 181, 81 P.3d 702 (2003) (A justiciable controversy must involve present facts rather than contingent or hypothetical events). No actual facts were presented to the Courts or the Commission. Accordingly the orders of the court, including the order remanding the case to the Commission, are void as a matter of law. The



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Court of Appeals should have dismissed this case as it did in *1000 Friends of Oregon v. Clackamas County.*[1]

### A. The Court Lacked Jurisdiction to Remand the Case Because No Real Facts Were Ever Adjudicated.

NW Natural requested an advisory opinion under the Commission's declaratory ruling statute. The facts were purely hypothetical. In fact, the Commission rejected attempts to insert real world facts into this case. Order No. 00-306 at 11. Instead, the Commission determined that a declaratory ruling proceeding is not the proper forum to decide disputed facts. *Id.* Moreover, the parties adamantly disagreed whether NW Natural's hypothetical facts described any actual gas piping arrangement. *Id.* In the end, the Commission gave an advisory opinion based on NW Natural's made up facts.

The Commission and other Oregon agencies can make advisory rulings, but Oregon courts may not. *1000 Friends of Oregon*, 194 Or. App. at 217. Indeed, the Commission's statutory authority to issue advisory decisions under ORS 756.450 does not expand the power of the courts to hear matters that don't involve a real case and controversy. *See Utsey v. Coos County*, 176 Or. App. 524, 548, 32 P.3d 933 (2001), *rev. dismissed*, 355 Or. 217 (2003) (regardless of what the legislature provides regarding the standing of litigants to obtain judicial relief, the courts always must determine whether the constitutional requirements of justiciability are satisfied). The statutory authority of a party aggrieved by a final Commission order to appeal cannot expand the powers of the court to preside over cases involving hypothetical questions and to issue the resulting advisory opinions. Such a delegation by the legislature would violate basic constitutional principals of separation of powers. *Id.*

It is clear that the Commission did not consider any actual facts and only considered the legal question raised by NW Natural's self-serving hypothetical. The opinions were therefore

[1] In *1000 Friends of Oregon v. Clackamas County*, the Court of Appeals held that it had no jurisdiction to review a decision of the Land Use Board of Appeals unless it involved present facts rather than a hypothetical. Here, the question is not whether actual gas piping arrangements similar to the hypothetical exist, but rather whether the court can review a purely advisory decision that doesn't involve any real facts.



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advisory. The Courts have no subject matter jurisdiction over such opinions. *1000 Friends of Oregon,* 194 Or. App. at 216. A judgment by a court lacking subject matter jurisdiction is void. *Polygon Northwest Company v. NSP Development, Inc.*, 194 Or. App. 661, 666, 96 P.3d 837 (2004) (an order or judgment entered by a court that lacks subject matter jurisdiction is void and not merely voidable). The Court's judgment and order to remand are therefore invalid. *See e.g. Gonzalez v. Schrock Cabinet Co.*, 168 Or. App. 36, 42, 4 P.3d 74 (2000), *rev. den.*, 331 Or. 674, (2001)(an order or judgment entered at a time when the agency or court lacks jurisdiction is void and hence a nullity).

**B. Staying This Proceeding Until The Court Rules On Wah Chang's Motion Will Conserve Resources And Will Not Prejudice Any Party.**

Staying these proceedings until the Court rules on Wah Chang's Motion will further efficiency and conserve the resources of the OPUC Staff, the parties and the Commission. If the Oregon Court of Appeals recalls and vacates its judgment, this proceeding will be dismissed. Accordingly, any hearings, briefing or argument submitted to the Commission prior to the Oregon Court of Appeal's decision may be unnecessary. In order to avoid the potential waste of resources, therefore, these proceedings should be stayed while the Oregon Court of Appeals considers Wah Chang's Motion.

NW Natural cannot claim that it will be prejudiced in any way by the delay necessary to allow the Court to rule on Wah Chang's Motion because this case involves only hypothetical facts and all NW Natural can obtain in this remanded proceeding is another advisory opinion. Finally, the Commission should not proceed until the Court rules on the Motion to resolve whether the courts may exercise jurisdiction over a purely advisory opinion of the Commission.

## CONCLUSION

In order to economize the Commission's resources and to avoid the potentially unnecessary expenditures of time and resources by the OPUC Staff and parties, Wah Chang's



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motion to stay these proceedings until after the Oregon Court of Appeals rules on its motion to recall should be granted.

DATED March 1, 2005.

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP

Edward A. Finklea, OSB No. 84216
Chad M. Stokes, OSB No. 00400

Of Attorneys for Wah Chang



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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Wah Chang Motion to Stay on:

| | |
|---|---|
| PAMELA M ALMAGUER<br>NORTHWEST NATURAL<br>220 NW 2ND AVE<br>PORTLAND OR 97209<br>pma@nwnatural.com | RANDALL DAHLGREN<br>PORTLAND GENERAL ELECTRIC<br>121 SW SALMON ST 1WTC 0702<br>PORTLAND OR 97204<br>randy.dahlgren@pgn.com |
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| JERRY RICHARTZ<br>OREGON STEEL MILLS INC<br>PO BOX 2760<br>PORTLAND OR 97208 | TIMOTHY SERCOMBE<br>PRESTON/GATES/ELLIS LLP<br>222 SW COLUMBIA ST STE 1400<br>PORTLAND OR 97201-6632<br>tsercomb@prestongates.com |
| | |

[X] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown above, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;

[] by causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party, at the address listed above on the date set forth below;

[] by **FAXING** a full, true and correct copy thereof to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

DATED Tuesday, March 01, 2005.

Edward A. Finklea, OSB No. 84216
Chad M. Stokes, OSB No. 00400

Of Attorneys for Wah Chang


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**EXHIBIT A**

**TO WAH CHANG MOTION TO STAY**

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation,

Plaintiff/Appellant,

v.

OREGON PUBLIC UTILITY COMMISSION, an agency of the State of Oregon,

Defendant/Respondent.

and

WAH CHANG and the NORTHWEST INDUSTRIAL GAS USERS ("NWIGU"),

Intervenors-Respondents.

Marion County Circuit Court
No. 01C-18514

CA No. A119010

1. MOTION TO RECALL APPELLATE JUDGMENT

2. MOTION TO VACATE APPELLATE JUDGMENT & RELATED WRITTEN OPINION

3. MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

(COLLECTIVELY, THE "JURISDICTIONAL MOTIONS")

Timothy J. Sercombe, OSB #76311
PRESTON GATES & ELLIS, LLP
222 SW Columbia Street, Suite 1400
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Telephone: (503) 228-3200
Of Attorneys for Plaintiff/Appellant
Northwest Natural Gas Company

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Edward A. Finklea, OSB #84216
Chad M. Stokes, OSB #00400
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Telephone: (503) 224-3092
Of Attorneys for Intervenors/Respondents
Wah Chang and the Northwest Industrial Gas Users ("NWIGU")

Hardy Myers, Attorney General, OSB #64077
Mary H. Williams, Solicitor General, OSB #91124
Judy C. Lucas, Assistant Attorney General, OSB #90328
400 Justice Building, 1162 Court Street, NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
Of Attorneys for Defendant/Respondent
Oregon Public Utility Commission

## THE JURISDICTIONAL MOTIONS

On October 13, 2004, this Court issued a written opinion making an advisory decision on hypothetical facts. (*See* Memorandum in Support of the Jurisdictional Motions ("Memorandum") at pp. 1-3.) The Court then entered the Appellate Judgment on December 13, 2004, (Exhibit 1 to these Motions) and mailed the Appellate Judgment to the Circuit Court. At the time this Court entered the Appellate Judgment and for all other relevant times, this Court did not have jurisdiction over the subject matter of this action, but neither the parties nor the Court thought to raise the issue. (*See* Memorandum at pp. 4-8.) To correct this mistake, Intervenor/Respondent Wah Chang now moves the Court as follows:

1. The Court should enter an order recalling its Appellate Judgment pursuant to ORS 19.270(6)(a) ("Jurisdiction over a cause ends when a copy of the appellate judgment is mailed by the State Court Administrator to the court from which the appeal was taken pursuant to ORS 19.450, except that the appellate court may: (a) Recall the appellate judgment as justice may require.").

2. The Court should enter an order vacating the Appellate Judgment and the related written opinion. And

3. The Court should enter an order dismissing this appeal because the Court always has been without jurisdiction over the subject matter.



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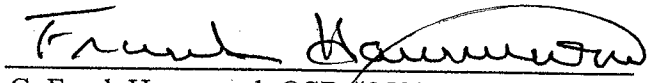
In support of these Jurisdictional Motions, Intervenor/Respondent Wah Chang relies on the accompanying Memorandum in Support of the Jurisdictional Motions and the Court's record and file herein.

DATED Tuesday, March 01, 2005.

CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP



G. Frank Hammond, OSB #85223
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Chad M. Stokes, OSB #00400
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FILED: October 13, 2004

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation,

Appellant,

v.

OREGON PUBLIC UTILITY COMMISSION, an agency of the State of Oregon,

Respondent,

and

WAH CHANG and NORTHWEST INDUSTRIAL GAS USERS (NWIGU),

Intervenors-Respondents.

01C-18514; A119010

Appeal from Circuit Court, Marion County.

Joseph V. Ochoa, Judge.

Argued and submitted November 24, 2003.

Timothy J. Sercombe argued the cause for appellant.

Judy Carol Lucas, Assistant Attorney General, argued the cause for respondent.

Edward A. Finklea argued the cause for intervenors-respondents.

Before Edmonds, Presiding Judge, and Haselton and Wollheim, Judges

**APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT**

EDMONDS, P. J.

Reversed and remanded with instructions to remand to the PUC for reconsideration.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellant

[X] Costs allowed, payable by: Respondent and intervenor-respondents

---

**MONEY AWARD**

Judgment #1

Creditor(s): Northwest Natural Gas Company

Attorney: Timothy J. Sercombe
222 SW Columbia #1400
Portland, OR 97201

Debtor(s): Oregon Public Utility Commission; Wah Chang; Northwest Industrial Gas Users (NWIGU)

Attorney: Judy C. Lucas; Edward A. Finklea

Costs: $ 1,264.50

Attorney fees: $ -0-

TOTAL AMOUNT: $ 1,264.50

Interest: Simple, 9% per annum, from the date of this appellate judgment.

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Appellate Judgment
Effective Date: December 13, 2004

COURT OF APPEALS

THIS IS THE APPELLATE JUDGMENT OF THE APPELLATE COURTS AND SHOULD BE ENTERED PURSUANT TO ORS 19.450.

**FILED: October 13, 2004**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation.

Appellant,

v.

OREGON PUBLIC UTILITY COMMISSION, an agency of the State of Oregon,

Respondent,

and

WAH CHANG and NORTHWEST INDUSTRIAL GAS USERS (NWIGU),

Intervenors-Respondents.

01C-18514; A119010

Appeal from Circuit Court, Marion County.

Joseph V. Ochoa, Judge.

Argued and submitted November 24, 2003.

Timothy J. Sercombe argued the cause for appellant. With him on the briefs was Preston Gates & Ellis, LLP.

Judy Carol Lucas, Assistant Attorney General, argued the cause for respondent. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Edward A. Finklea argued the cause for intervenors-respondents. With him on the brief were Chad M. Stokes, and Energy Advocates, LLP.

Before Edmonds, Presiding Judge, and Haselton and Wollheim, Judges

EDMONDS, P. J.

Reversed and remanded with instructions to remand to the PUC for reconsideration.

## DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

[X] Costs allowed, payable by: Respondent and intervenor-respondents

EDMONDS, P. J.

Appellant Northwest Natural Gas Company (Northwest) is a public utility that has the exclusive right to provide natural gas service to consumers in much of Oregon, including the Albany-Millersburg area. It filed a petition with respondent Oregon Public Utilities Commission (the PUC) for a declaratory proceeding under ORS 756.450, asking the PUC to determine whether actions that several industries contemplated taking were consistent with Northwest's exclusive right to serve the area involved. Respondents Wah Chang and Northwest Industrial Gas Users intervened to defend those actions. After the PUC gave an unfavorable declaratory ruling, Northwest filed a complaint in Marion County Circuit Court to challenge that decision. *See* ORS 756.580. That court affirmed the PUC's decision, and Northwest appeals. ORS 756.610. We reverse and remand.

On appeal, we review the PUC's order, not the circuit court's judgment. Unless the statutory terms at issue are delegative in nature, we review for errors of law. *Utility Reform Project v. PUC*, 171 Or App 349, 353, 16 P3d 516 (2000); *see also* ORS 756.594. Because Northwest sought a declaratory ruling, we state the relevant facts as Northwest described them in its petition; the PUC assumed those facts to be true for the purposes of its decision. Williams Gas Pipeline--West (Williams) owns and operates an interstate natural gas pipeline. The Grants Pass Lateral is a portion of the Williams system that connects to the primary pipeline in Washougal, Washington, and runs to Grants Pass, Oregon, passing through Northwest's allocated territory in the Willamette

Valley. Eight of Northwest's former customers have made direct individual connections to the Williams pipeline and receive their gas service from it, bypassing Northwest's system, despite Northwest's offer of discounted rates. Northwest has entered into approximately 20 contracts at discounted rates with other customers who were considering establishing their own direct connections to the Williams pipeline.

Two of Northwest's other current customers have constructed or are considering constructing pipelines to their facilities that will not connect directly to the Williams pipeline but, rather, will connect to existing bypass pipelines that other customers have constructed. Northwest described the proposed arrangement as a "condominium bypass distribution system" with the following characteristics:

> "a. Two or more privately-owned industrial consumers of natural gas obtain natural gas from a single connection to the [Williams] interstate pipeline.
>
> "b. The natural gas flows through a single transfer meter at the point of interconnection with the [Williams] interstate pipeline to a designated 'receiving party' as defined by [Williams's] tariff. The receiving party is accountable to [Williams] for the imbalances that occur at the meter.
>
> "c. The natural gas is transported through a bypass pipeline. This bypass pipeline may be owned by one or more of the condominium bypass participants.
>
> "d. Two or more lateral pipelines are connected to the bypass pipeline and transport natural gas to individual industrial consumers of natural gas. These industrial consumers are separate legal entities. These lateral pipelines may be constructed after the construction and initial operation of the bypass line and provide an extension of utility service.
>
> "e. The consumption of natural gas by each of the condominium bypass

participants is measured by meters attached to the lateral pipelines. Daily gas flows and the imbalances between the participant's actual gas consumption and its nomination on the [Williams] pipeline are allocated by the receiving party to each participant.

"f. The bypass pipeline and lateral pipelines are not directly connected to another natural gas distribution plant or facility. The lateral pipelines have no functional value except as connected or related to the bypass pipeline.

"g. The condominium bypass distribution system is located within [Northwest's] allocated territory and in an area served by distribution facilities owned and operated by [Northwest]."

The essential aspect of the arrangement that Northwest describes is that two or more independent industrial consumers receive natural gas through the same direct connection to the Williams pipeline.[1] They do so through a single bypass pipeline that connects with the Williams pipeline at a single location. Two or more lateral pipelines connect with the bypass pipeline, at some distance from its connection with the Williams pipeline. Each lateral pipeline and many share in its ownership, serves a different industrial consumer. The consumers share in costs of the bypass pipeline, and each consumer pays for the gas that it uses. One or more of the participants keeps track of individual gas use and allocates the costs involved among the participating parties. The arrangement requires operational and accountability policies and central management. The fundamental issue in this case is whether such a multi-user direct connection with the Williams pipeline is consistent with Northwest's exclusive right to provide utility service

[1] The PUC found that it was likely that the owner of one of the bypass pipelines would offer service on these conditions to five other nearby industrial customers of Northwest.

to the same geographical area.

Northwest argued to the PUC that this arrangement violates the Territorial Allocation Law, ORS 758.400 to 758.475, because it permits industrial consumers to receive utility service from connections to the mutually owned bypass pipeline rather than from Northwest. ORS 758.410 and ORS 758.440 authorize the PUC to allocate the exclusive right to serve a particular territory to a public utility. ORS 758.450(2) provides that, once the PUC does so, "[e]xcept as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory."[2] ORS 758.400 defines two of the crucial terms in that prohibition. First, ORS 758.400(2) defines "person" as including "individuals, firms, partnerships, corporations, associations, cooperatives and municipalities, or their agent, lessee, trustee or referee." Secondly, ORS 758.400(3) defines "utility service" to mean:

> "service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. 'Utility service' does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service."

Northwest argued to the PUC that a condominium bypass distribution system provides utility service under the statutory definition and that the two or more industrial consumers who jointly own and operate it are a "person" within the meaning of ORS 758.400(2). As

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[2] ORS 758.450(4) establishes four exceptions to the prohibition, none of which applies to this case.

a result, according to Northwest, the bypass system violates the statutory prohibition on any person providing utility service in territory allocated to Northwest. The PUC rejected that argument.

The PUC issued its first order in the case on June 9, 2000. In that order, it began by noting that the parties agreed that a single consumer could construct a bypass pipeline for its sole use without violating Northwest's exclusive right to provide utility service. The PUC then described the arrangement in this case as simply involving a number of single consumers working jointly:

> "Under the Assumed Facts, the participants in a so-called condominium bypass system are co-owners of part of the facilities involved and may be sole owners of other parts. The co-owners are not employed by each other, but are operating to provide service to themselves through a mutually beneficial arrangement. They do not sell utility product or service to each other. They are not offering service of any sort to the general public. The facilities they have created do not benefit or serve anybody but themselves. The fact that they may appoint one of the co-owners as the receiving party or that one of the co-owners may perform management duties does not change the fact that the arrangement is one involving co-owners and not a utility and its customers. Each of the co-owners is, in fact, a sole customer who happens to have arranged for service to itself through an arrangement with another coequal customer."

The PUC therefore concluded that the arrangement did not violate the purposes of ORS 758.405 because it did not constitute the wasteful duplication of utility facilities. It explained, "The statute is aimed at preventing wasteful duplication of facilities used by utilities, not at preventing duplication of facilities that customers may use to provide service to themselves."

On Northwest's motion, the PUC reconsidered its first order and issued an

order on reconsideration on August 9, 2001. In that order, it discussed the relevant statutes in more detail.[3] It began by stating that there are four elements to prove a violation of ORS 758.450: (1) the entity must be a "person" or "persons" as defined in ORS 758.400(2); (2) the arrangement must involve "utility service" as defined in ORS 758.400(3); (3) the utility service must be in an allocated territory; and (4) none of the exemptions in ORS 758.450(4) can apply. The PUC explained that, in its original order, it determined that the arrangement did not involve utility service, and, therefore, it did not consider any of the other factors. After discussing a number of Northwest's objections to the original order, the PUC discussed the relevant statutes, emphasizing again that its opinion focused exclusively on whether the arrangements involved "utility service." It explained,

> "We do not agree with [Northwest's] textual or contextual analyses. They do not, in our view, properly consider the statutory context of the territorial allocation law as a whole. We conclude that our analysis of text and context is more thoroughgoing and objective. We reiterate it here.
>
> "First, the key terms in ORS 758.400 and 758.450 are not 'clear' on their face, as [Northwest] argues. Several of them are general terms which have several meanings, depending on the situation: 'utility,' 'service,' 'distribution,' 'system,' 'facilities,' interrelated,' and others. Mere reference to a dictionary to determine their meaning, as [Northwest] proposes, although potentially useful, will not necessarily provide a sound answer. For example, the Company uses a dictionary definition of 'interrelated' (having a 'mutual or reciprocal relation or parallelism') to conclude that the system in the Assumed Facts is interrelated because 'the lateral pipelines have no functional value except as connected or related to the bypass pipeline and individual plant meters are used to apportion consumption with

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[3] Because the PUC treated its order on reconsideration as explaining its original order rather than modifying or replacing it, we treat both orders as together expressing the PUC's decision and the reasons for it.

the system.' We do not find this argument responsive to the issues in the case. To avoid an arbitrary conclusion as to the meaning of these terms, it is absolutely necessary to refer to their context to determine legislative intent.

"Context for interpreting a statute, as the Court states in *PGE v. BOLI*, [317 Or 606, 859 P2d 1143 (1993)] is provided by the entirety of the statute in question and by related statutes. In this case, the statutes in question, ORS 758.400 and 758.450, are part of a distinct and unified set of statutes relating to territorial allocation (ORS 758.400 through 758.475; called 'territorial allocation law' herein). That coherent structure gives us an explicit framework for our contextual analysis. Any conclusion we arrive at as to the specific statutes in question must be consistent with the function and purposes of the territorial allocation law. Moreover, some of the key terms at issue in this case, such as those referred to above, are used in more than one place in the territorial allocation law. Since it is reasonable to assume (absent legislative direction otherwise) that the meaning intended for a term is consistent throughout a discrete set of statutes, any meaning adopted for a term used in the key statutes must not result in incongruous results when applied in other portions of that statutory scheme.

"The territorial allocation law sets out a process by which allocation of territory and customers may be carried out in an orderly fashion. In ORS 758.400, the statute providing definitions for the remainder of the territorial allocation law, 'allocated territory' is an area established by contract approved by the Commission between persons providing a similar 'utility service' or established by order of the Commission approving an application for the allocation of territory. Other portions of the territorial allocation law then set out the process by which the allocation occurs: how amendments may be effected, how contracts may be enforced, and the import of the allocation, among other related matters. The 'purpose' statute, ORS 758.405, explains the goals of this comprehensive scheme: to avoid duplication of utility facilities; to promote efficient, economic, and safe utility service; and to provide adequate and reasonable service 'to all territories and customers.' This provision concludes that to achieve these purposes, it is necessary to 'regulate' all persons and entities providing utility service as provided in the territorial allocation law.

"Thus, the territorial allocation law, as reflected in the structure of the law and the explicit purposes noted, allows the commission to decide two of the paramount issues it must deal with: who serves what area and which customers. We recognized that goal in Order No. 92-557, where we

noted that the territorial allocation law was created to address the duplication of services by PP&L and PGE in Portland (at 2). We noted that the territorial allocation statutes:

> "'. . . establish two ways in which the commission may approve exclusive service territory allocations. ORS 758.410 to 758.425 establish the first method: a utility and its neighboring utility may agree to a mutual service territory boundary and execute a contract allocating territories and customers between them . . . ORS 758.435 to 758.440 establish the second method: if a utility is the exclusive provider of utility service in an area, the utility may unilaterally file an application with the commission to obtain exclusive service territory (at 3).'

"We see nothing in this statutory scheme that indicates it was designed to allow, or require, the commission to prevent consumers from arranging for service to themselves. That is what [Northwest] is asking us to do in this case, however, it couches its position. As we said in Order No. 00-306:

> "'Under the Assumed Facts, the participants in a so-called condominium bypass system are co-owners of part of the facilities involved and may be sole owners of other parts. The co-owners are not employed by each other, but are operating to provide service to themselves through a mutually beneficial arrangement. They do not sell utility product or service to each other. They are not offering service of any sort to the general public. The facilities they have created do not benefit or serve anybody but themselves. The fact that they may appoint one of the co-owners as the receiving party or that one of the co-owners may perform management duties does not change the fact that the arrangement is one involving co-owners and not a utility and its customers. Each of the co-owners is, in fact, a sole customer who happens to have arranged for service to itself through an arrangement with another coequal customer.'"

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 constitutes 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.

> "Statutes and rules often contain statements of general policy * * *. Such expressions *can* serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can. At the same time, the use of expressions of policy as context is subject to the same limitations as any other proffered type of context: *they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed.* Moreover, when legislative or administrative expressions of policy are offered as context, courts must be cautious not to *make* policy in the guise of interpretation, or to allow agencies or other parties to achieve through a court's interpretation policy objectives that the enactment as promulgated was not meant to or failed to embody."

*DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997), *rev den*, 327 Or 620 (1998) (first and third emphases in original; second emphasis added); *see also* ORS 174.010. Although we may give some weight to an agency's construction of inexact terms in statutes that the agency is charged with enforcing, *see Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 354, 15 P3d 29 (2000), here, the PUC did not analyze the meaning of the crucial statutory language. That is something that we must do as part of determining whether the PUC's order is unreasonable or unlawful. *See* ORS 756.594.

In its reasoning, the PUC implicitly decided that the joint ownership of the

bypass pipeline involved in the condominium bypass system did not constitute a separate entity or "person" for purposes of ORS 758.400(2). Rather, it described those interests as belonging to co-owners who were "operating to provide services to themselves through a mutually beneficial arrangement." As a result, it stated that each co-owner "is, in fact, a sole customer who happens to have arranged for service to itself through an arrangement with another coequal customer." That conclusion led it to find no significant difference between the system that Northwest described and an individual business that connected directly to the Williams pipeline, something that all parties agree is permissible under the Territorial Allocation Law.

The problem with the PUC's analysis is that it does not engage with the language of ORS 758.400(2), which provides that cooperatives and associations are discrete "persons" within the meaning of the act. Even assuming that the statute's meaning is limited to cooperatives that are incorporated under ORS chapter 62, the arrangement among users that the record describes is an "association" within the commonly understood meaning of the word. It is therefore an entity separate from the individual users who use the bypass pipeline in conjunction with their individual lateral pipelines to receive gas. The relevant definition in *Webster's* is: "a body of persons organized for the prosecution of some purpose, having no charter from the state but having the general form and mode of procedure of a corporation." *Webster's Third New Int'l Dictionary* 133 (unabridged ed 1993). A condominium bypass distribution system, as described by the record in this case, is an arrangement that requires that separate

entities join together to create a different entity, which owns the bypass pipeline and jointly administers it, appointing one or more of its members for that purpose. Those circumstances satisfy the ordinary definition of the meaning of the word "association" because the participants in the system constitute a body of persons organized for the prosecution of a particular purpose. Thus, by statutory definition, the control of the bypass pipeline lies with an "association," which for the purposes of the Territorial Allocation Law is a "person" discrete from the business entities that make up the association. Contrary to the PUC's reasoning, for a number of business entities to join together to obtain a supply of gas is not the same as each one obtaining services individually, and the PUC ignored the meaning of the words that the legislature used when it interpreted the statute to the contrary.[4]

The PUC also erred in its explicit determination that a condominium bypass distribution system does not involve the provision of utility service and thus does not violate Northwest's right, under ORS 758.450(2) and the PUC's allocation order, to be the exclusive provider of natural gas utility service in the area. ORS 758.400(3) defines "utility service" as meaning "service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system." The focus of the definition in the statute is on the use of facilities to distribute natural gas to those who use it that is, "consumers." It is the physical act of distribution to more than one user of

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[4] Because of our conclusion, we do not need to consider whether the co-owners constitute a *de facto* partnership or joint venture.

electricity or more than one consumer of natural gas that constitutes utility service; the contractual or other relationship between the entity that provides the electricity or gas and the entity that uses or consumes it is irrelevant under the statutory definition. Thus, unlike other portions of the territorial allocation law, *see, e.g.*, ORS 758.410, the definition of "utility service" does not refer to the "customers" of a utility but to the "users" or "consumers" of the product.[5]

In sum, the fundamental problem with the PUC's analysis is that it fails to apply correctly the statutory definitions that establish the contours of who is a person subject to the act and what services are subject to it.[6] Because of the statutory definitions, it does not matter under the act that the facilities are co-owned by the consumers of the gas or that the owners do not offer service to the general public. It also does not matter that they operate jointly and are not customers of each other. What does matter is that the business entities involved do not each connect independently to the Williams pipeline but, rather, jointly operate a system as a separate entity, an entity that has a common

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[5] The PUC and intervenors argue that the legislature used "consumers" and "customer" interchangeably in the Territorial Allocation Law. That argument ignores, among other things, the statutory reference to "users" of electricity. It appears that the legislature carefully distinguished between "users" of electricity and "consumers" of natural gas, on the one hand, and "customers" of a utility on the other. Although all customers of a utility are necessarily users or consumers of the utility's product, the opposite is not true.

[6] Although the PUC states that a number of statutory words are general terms with several meanings, it does not attempt to analyze how the words and their various possible meanings relate to each other in the context of the statute as a whole. Rather, in its decision it relies on the policy issues that it discusses in the guise of considering the statutory context.

connection to the pipeline.

The trial court did not accept the PUC's statutory analysis but affirmed its decision on the ground that the system was not sufficiently complex to be "connected and interrelated" under the statutory definition of "utility service." However, the court's role on judicial review is to determine whether the order is "unreasonable or unlawful," ORS 756.594, and, in case of modification or reversal, to indicate the respects in which the order is erroneous, ORS 756.598(2). It is not a court's task to create a basis for the PUC's ultimate conclusion that is different from the basis that the PUC itself expressed. Rather, it is for the PUC on remand to reconsider the issues involved.

In their briefs, the parties discuss whether the bypass and lateral pipelines constitute a connected and interrelated system. Intervenors essentially adopt the trial court's approach, while Northwest suggests that a system that serves only a few consumers will necessarily be less complex than one that serves many but will still satisfy the statutory definition. It points out that ORS 758.450(4)(b) exempts utilities that serve fewer than 20 residential customers and no industrial customers from the restrictions of the Territorial Allocation Law and argues that that exemption suggests that the legislature intended relatively simple systems that serve industrial customers to come within the statutory prohibition. Those are issues for the PUC to consider on remand in light of the controlling statutory definitions.

Reversed and remanded with instructions to remand to the PUC for reconsideration.

CERTIFICATE OF FILING

I certify that, on February 28th, 2005, I filed the original of the foregoing Motion to Recall Appellate Judgment, Motion to Vacate Appellate Judgment & Related Written Opinion, and Motion to Dismiss Appeal for Lack of Jurisdiction over the Subject Matter (the "Jurisdictional Motions") with the Oregon State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, by causing it to be hand delivered.

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Motion to Recall Appellate Judgment, Motion to Vacate Appellate Judgment & Related Written Opinion, and Motion to Dismiss Appeal for Lack of Jurisdiction over the Subject Matter (the "Jurisdictional Motions") on:

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by hand delivery to those persons a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth on Tuesday, March 01, 2005.

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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation,

Plaintiff/Appellant,

v.

OREGON PUBLIC UTILITY COMMISSION, an agency of the State of Oregon,

Defendant/Respondent.

and

WAH CHANG and the NORTHWEST INDUSTRIAL GAS USERS ("NWIGU"),

Intervenors-Respondents.

Marion County Circuit Court
No. 01C-18514

CA No. A119010

MEMORANDUM IN SUPPORT OF THE JURISDICTIONAL MOTIONS

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# MEMORANDUM IN SUPPORT OF THE JURISDICTIONAL MOTIONS

## I. INTRODUCTION

Northwest Natural Gas Company ("NW Natural") started this case by requesting an advisory opinion from the Oregon Public Utilities Commission (the "PUC" or the "Commission"). The PUC's advisory opinion was based solely on assumed, hypothetical "facts" supplied by NW Natural. NW Natural did not like the advisory decision, so it appealed to the Circuit Court and then to this Court. Neither the parties nor this Court questioned jurisdiction during the proceedings, but now this issue should be addressed because this Court did not have jurisdiction.

The Court does not have jurisdiction unless it is presented with an actual controversy. Opinions of this Court establish that an actual controversy does not exist where the facts under consideration are merely hypothetical. In that circumstance, the Court does not have jurisdiction to render an advisory opinion, and any judgment entered without jurisdiction is void.

Here, the facts were totally hypothetical. There was not an actual controversy, and the Court did not have jurisdiction. The appellate judgment is void. The Court should therefore recall and vacate the appellate judgment and accompanying advisory opinion, and then dismiss the appeal.

## II. FACTS & PROCEDURAL POSTURE

On March 19, 1999, NW Natural filed a petition under ORS 756.450 for a declaratory ruling with the PUC asking for a determination, based on NW Natural's made up "facts," that directly connecting to an interstate gas pipeline by two or more industrial

customers violates ORS 758.400 *et seq.*, Oregon's territory allocation statutes. NW Natural deliberately chose not to seek an injunction based on any actual gas piping arrangement. Rather, NW Natural requested that the Commission issue an advisory opinion based on assumed hypothetical "facts" posed by NW Natural.

The Commission explained this process as follows:

> The Commission will limit its ruling to the scenario set out in the Assumed Facts. Declaratory rulings have the function of allowing an agency to determine how laws under the agency's authority apply to a given set of facts. The "facts" considered by the agency are those supplied by the petitioner. A declaratory ruling proceeding does not allow for fact finding regarding disputed facts. We also note that the declaratory ruling statute quoted above in this order specifically states that a ruling is "binding between the commission and the *petitioner* on the stated facts alleged * * *" (emphasis added [by PUC]). That wording, we believe, strongly suggests that the declaratory ruling procedure is intended to be a means by which an entity can get some assurance about the legality of its own behavior from an agency. Whether it is intended to be a means for an entity to have the actions of third parties adjudicated is, at the least, uncertain.
>
> The request for a declaratory ruling in this case was filed by [NW Natural], which is thus the petitioner. The intervenors are not petitioners. The impact of a declaratory ruling on them is open to question. We also note that the facts relating to the actual pipelines are not agreed upon by the participants in this case. These factual disputes involving the existing or proposed bypass arrangements by Oremet/Wah Chang, Oregon Steel, Oregon Freeze Dry, and others, and the nature of the declaratory ruling statute itself lead us to the conclusion that this declaratory ruling will be applicable only to the Assumed Facts set out by [NW Natural] in its petition. Because we do not make rulings relating to the particular "real life" factual contexts, the enforcement action requested by [NW Natural] would be inappropriate.

*In re Northwest Natural*, PUC Docket No. DR-23, Order No. 00-306 at p. 11 (June 9, 2000) (*hereinafter* Order No. 00-306) (Exhibit A to this Memorandum).

On June 9, 2000, the Commission decided that NW Natural's hypothetical facts, if true, would not result in a violation of ORS 758.450(2). Exhibit A, Order No. 00-306 at 13. On August 7, 2000, NW Natural filed an Application for Reconsideration with the Commission. On August 9, 2001, the Commission reconsidered and affirmed its earlier ruling. *In re Northwest Natural*, PUC Docket No. DR-23, Order No. 01-719 (August 9, 2001) (*hereinafter* Order No. 01-719) (Exhibit B to this Memorandum).

On October 8, 2001, NW Natural filed a Complaint with the Marion County Circuit Court requesting the Court to modify, vacate or set aside PUC Order Nos. 00-306 and 01-719. On July 23, 2002, the Marion County Circuit Court, relying on NW Natural's fictitious facts, affirmed the Commission.

NW Natural then sought review before this Court, relying on the same story as below. On October 13, 2004, this Court reversed and remanded with instructions to the Commission for reconsideration. The Court directed the Commission to decide, among other things, whether NW Natural's hypothetical rises to the level of a connected and interrelated distribution system. *Northwest Natural Gas Co. v. Oregon Pub. Util. Comm'n*, 195 Or App 547, 559-60, 99 P3d 292 (2004).

## III. ISSUES

1. Did this Court lack subject matter jurisdiction to enter the appellate judgment where the decision was based on hypothetical facts, not an actual case or controversy, and was thus merely an advisory opinion?

2. If this Court did not have subject matter jurisdiction, should it recall and vacate the void appellate judgment and dismiss this appeal?

## IV. ARGUMENT

### A. THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION

This Court did not have jurisdiction to review the orders of the Commission because the facts were hypothetical and the resulting opinion of this court was purely advisory. Oregon courts do not have constitutional authority to make advisory decisions, which do not resolve real, justiciable controversies. *1000 Friends of Oregon v. Clackamas County,* 194 Or App 212, 217, 94 P3d 160, 162 (2004) (justiciability is a constitutionally imposed jurisdictional requirement). Here, no party submitted real-world facts to any of the decision-making bodies for adjudication. Indeed, the PUC expressly limited itself to the consideration of assumed facts and disregarded any others. Exhibit A, Order No. 00-306 at 11. Although the PUC may consider such hypothetical facts under ORS 756.450, this Court (and the Circuit Court) had no such power.

NW Natural petitioned the Commission for an advisory opinion based on hypothetical facts under ORS 756.450. ORS 756.450 provides:

> On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission. A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, vacated or set aside by a court. However, the commission may review the ruling and modify, vacate or set it aside if requested by the petitioner or other party to the proceeding. Binding rulings provided by this section are subject to review in the circuit court in the manner provided in ORS 756.580 for the review of orders.

The Commission issued an order pursuant to its statutory powers to issue advisory declarations. The Commission entered an order on June 9, 2000, finding that NW

Natural's hypothetical facts did not violate ORS 758.450(2). Specifically, the Commission determined that NW Natural's made up facts, where two or more industrial gas users jointly connected to an interstate pipeline, did not violate the utility's exclusive service territory. *See* Exhibit A, Order No. 00-306. On reconsideration, the Commission reached the same conclusion. *See* Exhibit B, Order No. 01-719.

The Commission's declaratory ruling statute allows the PUC to rule on the application of a statute or rule to an assumed set of facts presented by the petitioner. Exhibit A, Order No. 00-306 at p. 11. As the Commission said, the statute is not a means to adjudicate disputed facts. *Id.* Here, the parties vigorously disputed whether NW Natural's hypothetical facts described any real world facts. *Id.* In the end, the Commission did not decide whether NW Natural's hypothetical was based in reality. Rather, the Commission explained that because this was a declaratory ruling proceeding, it would not assume the accuracy of the factual claims of NW Natural or any other party. *Id.* The Commission ruled only on NW Natural's assumed facts. The Commission did not make any factual findings, and the Commission's statutory power to issue advisory opinions cannot enlarge this Court's constitutional authority. *See Utsey v. Coos County*, 176 Or App 524, 548, 32 P3d 933 (2001) (regardless of what the legislature provides regarding the standing of litigants to obtain judicial relief, the courts always must determine whether the constitutional requirements of justiciability are satisfied).

In *1000 Friends of Oregon*, this court held that its power to review decisions of LUBA does not give it the power to review and opine on advisory opinions. 194 Or App 212. In *1000 Friends of Oregon*, a church requested the Clackamas County Planning Department provide an advisory opinion regarding whether an ordinance that prohibited

the construction of churches on land zoned for exclusive farm use violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Board of County Commissioners, reversing the planning department, issued an opinion concluding that the ordinance in conjunction with RLUIPA required that the proposed church be considered a permitted use on the property. 1000 Friends of Oregon then appealed to LUBA. LUBA remanded the case back to the county, and the church filed a petition for judicial review in the Court of Appeals.

The *1000 Friends of Oregon* court found that it did not have jurisdiction because the case did not resolve a justiciable controversy. The church had not requested a building permit, and the county had not determined whether the church fit within a permitted use or qualified for an exception. In other words, the parties were seeking an advisory opinion based on hypothetical or contingent facts.

Here, the Court recognized the hypothetical or contingent nature of NW Natural's appeal when it described NW Natural's made up facts and stated: "Two of Northwest's other current customers have constructed or are considering constructing pipelines to their facilities that will not connect directly to the Williams pipeline, but, rather, will connect to existing bypass pipelines that other customers have constructed." *Northwest Natural Gas Co.*, 195 Or App at 549-550 (emphasis added). This Court's rendition of NW Natural's assumed facts—"or are considering constructing pipelines"—described a contingent set of facts, just as the hypothetical church being built in the exclusive farm use zone in the *1000 Friends of Oregon*. Such a controversy is not justiciable. *US West Communications, Inc. v. City of Eugene*, 336 Or 181, 191, 81 P3d 702 (2003) (to be

justiciable, a controversy must involve a dispute based on present facts rather than on contingent or hypothetical events).

This Court then went on to describe NW Natural's hypothetical facts as presented to the Commission. As previously mentioned, the parties vigorously disputed whether NW Natural's facts described an actual gas piping arrangement, and the Commission specifically refused to make such a determination. Exhibit A, Order No. 00-306 at 11. Accordingly, this controversy is not justiciable. This Court had no way to determine whether NW Natural's hypothetical facts mirror a real world set of facts.

NW Natural may respond by alleging that actual arrangements similar to its made up facts exist. Whether there are similar arrangements, however, is a factual question that was never presented to the Commission or the Court. As the Commission explained, a declaratory ruling is not the proper forum to decide disputed facts. *Id.*

Dismissal of this appeal will not leave NW Natural without a remedy. First, NW Natural has already enjoyed the right to present its case to the Commission for an advisory opinion. Second, NW Natural can seek an injunction in Circuit Court under ORS 758.465 against any party that violates its exclusive service territory.[1] Courts would have jurisdiction over an injunctive action involving an actual case and controversy. The Commission's decision, however, was based solely on NW Natural's hypothetical facts over which the courts have no jurisdiction.

[1] ORS 758.465 provides: "In the event a contract approved by the Public Utility Commission is breached or in the event an allocated territory is served by a person not authorized by such contract, or order of the commission, the aggrieved person or the commission may file an action in the circuit court for any county in which is located some or all of the allocated territory allegedly involved in said breach or invasion, for an injunction against said alleged breach or invasion. The trial of such action shall proceed as in an action not triable by right to a jury. Any party may appeal to the Court of Appeals from the court's judgment, as in other equity cases. The remedy provided in this section shall be in addition to any other remedy provided by law."

In summary, this Court did not have jurisdiction to hear an appeal of an advisory opinion issued by the Commission based on hypothetical facts. The Appellate Judgment is therefore void. *Polygon Northwest Co. v. NSP Dev., Inc.*, 194 Or App 661, 666, 96 P3d 837 (2004) (an order or judgment entered by a court that lacks subject matter jurisdiction is void and not merely voidable).

**B. THE COURT SHOULD RECALL ITS VOID JUDGMENT**

This Court can recall an improvidently entered appellate judgment "as justice may require[.]" ORS 19.270(6)(a); *see also Int'l Brotherhood of Electrical Workers Local No. 48 v. Oregon Steel Mills, Inc.*, 180 Or App 265, 270, 44 P3d 600 (2002) (same). ORS 19.270(6)(a) codifies this Court's inherent power to recall its appellate judgment, which "exists as part of the court's power to protect the integrity of its own process." *Zipfel v. Halliburton Co.*, 861 F2d 565, 567 (9th Cir 1988).

Justice requires recall of the appellate judgment entered in this case for at least two reasons.

First, the Court did not have jurisdiction to issue the judgment. As explained above, an appellate judgment entered without jurisdiction is void. Recalling the judgment is therefore necessary to protect the integrity of the Court's process. Otherwise, the judgment would be left to govern the parties and lower courts, undermining this Court's constitutional foundation, which requires it to only adjudicate actual cases and controversies. A void judgment should not be allowed to have effect. Hence, courts in similar circumstances have held that "[l]ack of jurisdiction to entertain the * * * appeal in the first instance [thus] more than justifies the exercise of [the appellate court's] discretionary power to recall the mandate." *Florida v. Interest of D.I.*,

477 So2d 71, 72 (Fl Ct App 1985) (recalling mandate and withdrawing original opinion).[2]

Second, the Court must vacate the opinion to prevent its misuse to establish jurisdiction in future, similar cases. As explained by the US Supreme Court in *Snow v. United States*,

> [W]e have decided to vacate our judgment, and recall the mandate, and dismiss the writ of error for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this court in a case of the kind.

118 US 346, 354-55, 6 S Ct 1059 (1886). This Court should follow suit.

## V. CONCLUSION

This Court did not have subject matter jurisdiction under the Oregon Constitution when it entered the appellate judgment. The Court should therefore recall and vacate that judgment and then dismiss this appeal.

Dated March 1, 2005.

CABLE HUSTON BENEDICT
HAAGENSEN & LLOYD LLP

By: _____
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[2] Courts in other jurisdictions agree that appellate judgments should be recalled and vacated when entered without jurisdiction. *See, e.g., IAL Aircraft Holding, Inc. v. Fed. Aviation Admin.*, 216 F3d 1304 n.2 (11th Cir 2000) ("[C]ourts of appeals always have jurisdiction to determine mootness and recall their mandates."); *Bumpus v. Clark*, 702 F2d 826 (9th Cir 1983) ("withdrawing" an earlier decision on grounds that the decision had become moot prior to its issuance).

ORDER NO. 00-306

ENTERED JUN 09 2000

# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

DR 23

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| In the Matter of the Petition of Northwest Natural Gas Company for a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass to Two or More Industrial Customers Violates ORS 758.400 *et seq.* | ) ) ) ) ) | ORDER |

DISPOSITION: NO VIOLATION OF ORS 758.450(2) FOUND

On March 19, 1999, Northwest Natural Gas Company (NNG) filed a petition 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.* The specific rulings requested are as follows: (1) whether the operation of a condominium bypass distribution system violates ORS 758.400 *et seq.;* and (2) whether the operator of such a system is a "public utility" under ORS 757.005. NNG filed errata pages to the petition on March 24, 1999. At its April 20, 1999, Public Meeting, the Commission adopted Staff's report recommending that the Commission grant NNG's request for a declaratory ruling.

A prehearing conference was held in this matter on May 19, 1999, to set a procedural schedule. After the conference, the Commission received and granted petitions to intervene from Oregon Steel Rolling Mills, Inc. (Oregon Steel); Oremet-Wah Chang (Wah Chang)[1] and Northwest Industrial Gas Users (NWIGU); and Portland General Electric (PGE).

On July 6, 1999, NNG filed an amended petition, dropping its request that the Commission issue a ruling as to whether the operator of a condominium bypass is a "public utility" under ORS 757.005. Wah Chang and NWIGU moved to suspend the schedule pending further direction from the Commission, since NNG's revised petition significantly changed the issues originally raised in this docket. That motion was denied on July 23, 1999.

NNG, Oregon Steel, Wah Chang and NWIGU, and PGE filed opening briefs. NNG, Wah Chang and NWIGU, and Oregon Steel filed responsive memoranda or comments. NNG and Wah Chang/NWIGU filed final briefs on November 24, 1999.

[1] Another entity mentioned in this order is Oregon Metallurgical Corp., which will be denominated as Oremet.

Oregon Steel and NNG filed a stipulation on November 23, 1999, resolving ambiguities with respect to NNG's intended treatment of the Oregon Steel/Ash Grove Lime (Ash Grove) bypass. Oregon Steel therefore did not file a final brief, but requests that the Commission acknowledge the stipulation in its final order. We acknowledge the fact that Oregon Steel and NNG filed such a stipulation.

## OPINION

### Applicable Law

ORS 756.450 authorizes the Commission to issue declaratory rulings:

> On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission. A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, vacated or set aside by a court. However, the commission may review the ruling and modify, vacate or set it aside if requested by the petitioner or other party to the proceeding. Binding rulings provided by this section are subject to review in the circuit court in the manner provided in ORS 756.580 for the review of orders.

The Oregon Territorial Allocation Law is contained in ORS 758.400 *et seq.* The purpose of the law is set out at ORS 758.405:

> The elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the manner provided in ORS 758.400 to 758.475 all persons and entities providing utility services.

Subsections (1) and (2) of ORS 758.450 govern this dispute:

> (1) Territory served by more than one person providing similar utility service may only become an allocated territory by a contract approved by the Public Utility Commission.
> (2) Except as provided in subsection (4) of this section [not relevant in this case], no other person shall offer, construct or extend utility service in or into an allocated territory.

"Utility service" is defined in ORS 758.400(3):

> "Utility service" means service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service.

Commission Order No. 40972 (1965) allocated to NNG the exclusive right to provide utility service for the distribution of natural gas to the territory described in the order.

**NNG's Amended Petition**

NNG's amended petition, filed July 6, 1999, is the relevant document for purposes of this declaratory ruling. It seeks a declaratory ruling "that the construction and operation of an interstate pipeline bypass, that is shared by privately owned industrial consumers and is within the territory allocated to [NNG] by Commission Order No. 40972, violates ORS 758.450(2). [NNG] seeks declaratory rulings on the applicability of ORS 758.450(2) to two particular statements of fact concerning condominium bypass distribution systems, as well as the generic fact pattern for a condominium bypass distribution system as set forth below."

**Statement of Facts in Amended Petition.** Williams Gas Pipeline (Williams), formerly known as Northwest Pipeline Corporation, owns and operates an interstate natural gas pipeline and provides natural gas transportation services. Portions of the interstate pipeline and a lateral connection to the pipeline known as the "Grants Pass Lateral" lie within NNG's allocated territory. The Grants Pass Lateral runs from Washougal, Washington, to Grants Pass, Oregon, in a north-south direction through the Willamette Valley.

Williams' interstate pipeline facilities are located near the facilities of many of NNG's industrial customers. Eight of NNG's former industrial customers have established bypass connections to the Williams pipeline rather than take local distribution service from NNG. Among these are Oregon Steel, Ash Grove, and Oremet. NNG offered each of the bypassers service at discounted rates before they left the NNG distribution system. These rates were designed to compete with the bypass options of customers. NNG has approximately 20 special service contracts with customers who are bypass candidates because of their proximity to the Williams interstate pipeline.

Two of NNG's current industrial customers, Wah Chang and Oregon Freeze Dry, have constructed or are considering construction of pipelines that will not directly connect to the Williams pipeline but connect to previously existing bypass pipelines owned and used by former NNG industrial customers, Willamette Industries (Willamette) and Oremet, respectively. Wah Chang has taken service from Willamette, and Oregon Freeze Dry and others would likely take service from Oremet.

"Condominium bypass distribution system" here means construction and operation of a lateral pipeline for the benefit of a privately owned industrial consumer of natural gas that is connected to a new or existing bypass pipeline constructed and operated in whole or in part for the benefit of a separate privately owned industrial consumer.

NNG seeks a declaratory ruling from the Commission that the operation, construction, or extension of condominium bypass distribution systems as described below violates ORS 758.450(2).

**General Characteristics of a Condominium Bypass System**[2]

a. Two or more privately owned industrial consumers of natural gas obtain natural gas from a single connection to the Williams pipeline.
b. The natural gas flows through a single transfer meter at the point of interconnection with the Williams interstate pipeline to a designated receiving party (as defined by Williams' tariff). The receiving party is accountable to Williams for imbalances that occur at the meter.
c. The natural gas is transported through a bypass pipeline that may be owned by one or more of the condominium bypass participants.[3]
d. Two or more lateral pipelines are connected to the bypass pipeline and transport natural gas to individual industrial consumers of natural gas. These industrial consumers are separate legal entities. The lateral pipelines may be constructed after the construction and initial operation of the bypass line and provide an extension of utility service.
e. The consumption of natural gas by each of the condominium bypass participants is measured by meters attached to the lateral pipelines. Daily gas flows and the imbalances between the participant's actual gas consumption and its nomination on the Williams pipeline are allocated by the receiving party to each participant.

[2] These facts are, for convenience, called the "Assumed Facts" later in this order.
[3] There is some ambiguity in the wording of this section. We assume for purposes of this ruling that all of the jointly-used portions of the bypass line are jointly owned by the condominium bypass participants. As NNG said in its Response Memorandum, page 2: "The issue is whether a *combination* of a jointly-owned bypass pipeline, together with lateral pipelines connecting more than one industrial facility to the bypass pipeline, is a "distribution system," and "utility service" under ORS 758.400(3) (italics in original; underlining added).

f. The bypass pipeline and lateral pipelines are not directly connected to another natural gas distribution plant or facility. The lateral pipelines have no functional value except as connected or related to the bypass pipeline.
g. The condominium bypass distribution system is located within NNG's allocated territory and in an area served by distribution facilities owned and operated by NNG.

NNG also seeks a ruling that the particular Willamette Industries/Oremet-Wah Chang and Oremet/Oregon Freeze Dry condominium bypass distribution systems, described below, violate ORS 758.450(2).

**Willamette Industries Condominium Bypass Distribution System.** Willamette operates two facilities in Millersburg, Oregon: the Willamette Kraft Paper Mill and the Duraflake plant. Before 1993, these facilities were served by NNG. The Duraflake plant took service under Rate Schedules 5 and 91 and the Kraft Paper Mill took service under Rate Schedules 4 and 91.

In 1993, Willamette finished constructing a 5.5-mile 10-inch pipeline connecting its facilities to the Williams Grants Pass Lateral at the Williams Santiam meter station. Willamette intended this line to serve both the firm natural gas requirements of its facilities and a proposed electric turbine. The projected increase in gas usage and Willamette's desire to have total control and firm pipeline capacity for its requirements outweighed the economies that NNG was able to offer Willamette.

Wah Chang is an industrial customer of NNG and took interruptible transportation service under Rate Schedule 91. The Wah Chang facilities at issue are located in Millersburg, Oregon, on property that is contiguous to property owned by Willamette. Wah Chang purchased or transported approximately 3,127,000 therms per year of throughput for its facility. On October 6, 1998, NNG received a letter from Wah Chang requesting termination of service under Rate Schedule 91 for the facility and stating its intention to bypass NNG's system via direct connection to Williams.

In June 1999, Wah Chang informed NNG that it had completed its connection to the Willamette pipeline. The connection occurs thorough a short lateral pipeline that connects the Wah Chang plant to the Willamette pipeline, which is located approximately 1,800 feet away. Wah Chang asserts it owns an "undivided interest in the Santiam Pipeline facilities."[4] Wah Chang now receives natural gas through this condominium bypass distribution system, although it continues to receive a small amount of firm service from NNG under Rate Schedule 4. As a result of the connection of the Wah Chang lateral pipeline to the Willamette bypass pipeline, the Willamette condominium bypass distribution system has the characteristics set out above.

[4] We assume the "Santiam Pipeline facilities" are the Willamette bypass pipeline.

NNG odorizes the natural gas delivered through the Willamette bypass pipeline. NNG has no contractual relationship with Wah Chang to odorize Wah Chang's purchased natural gas.

**The Oremet Condominium Bypass Distribution System**. Oremet appears to be about to construct a second condominium bypass distribution system. Oremet and Wah Chang are part of the same corporate family, Allegheny Teledyne Company. Until recently, Oremet purchased or transported about 5,400,000 therms per year of natural gas. Oremet was the second largest customer taking firm service from NNG in its Oregon operations. After attempting to negotiate a special contract for a competitive rate with NNG, and to gain Commission approval of the contract, Oremet decided to pursue direct connection to the Williams Grants Pass Lateral. On April 17, 1998, Oremet instructed NNG to seek termination of the contract approval proceedings.

Oremet constructed a six-inch pipeline connecting its titanium mill in Albany, Oregon, to the Williams Grants Pass Lateral. On January 30, 1998, Oremet and Williams (then Northwest Pipeline Corporation) entered into a facility agreement under which new tap and meter facilities were constructed on the Grants Pass Lateral. On November 12, 1998, Oremet began receiving natural gas through its bypass pipeline.

During the special contract negotiations, Oremet indicated that it would contact the other industrial customers in the vicinity to participate in a condominium bypass. If Willamette is allowed to open up its facilities to other industrial customers, it is likely that Oremet would do the same for the five current NNG customers located near the new bypass line (Smokecraft, Oregon Freeze Dry, National Frozen Foods, Panalam, and American Cemwood). Together these five customers account for over 2.7 million therms per year of throughput on the NNG distribution system. Oregon Freeze Dry has informed NNG that it is considering terminating its service agreement with NNG to pursue bypass to Oremet's line. If the Oregon Freeze Dry connection is made, the resulting Oremet condominium bypass distribution facilities would have the general characteristics of a condominium bypass distribution system set out above.

**Contentions of Law**

NNG argues that the operation, construction, or extension of a condominium bypass distribution system is inconsistent with the purposes of the Oregon Territorial Allocation Law, set out at ORS 758.405 above. According to NNG, the operation, construction, or extension of a condominium bypass distribution system in place of local distribution company (LDC) facilities encourages rather than prevents the duplication of gas distribution facilities. It does not promote the efficient and economic use of the LDC facilities in place, raises safety issues about inspection and maintenance of the condominium bypass distribution system, and ultimately harms core customers if loss of industrial load results in higher rates to cover the local distribution company's fixed costs of service.

NNG takes the position that the operation, construction, or extension of a condominium bypass distribution system in general, and the Willamette and proposed Oremet systems in particular, violate ORS 758.450(2). Under this statute, no one other than NNG can offer, construct, or extend utility service in or into the territory exclusively allocated to NNG. According to NNG, the systems it describes violate ORS 758.450(2) for the following reasons:

NNG argues that the provision of natural gas through a condominium bypass distribution system is "utility service" for purposes of ORS 758.450(2). The interstate pipeline tap and meter, the bypass pipelines, and the lateral connection pipelines constitute a "distribution system" since the facilities operate to distribute natural gas to more than one consumer. The parts of the facilities are connected to each other and not to any other distribution system and are thus a "connected . . . system" under ORS 758.450(2). The system is also "interrelated" under the same statute because the lateral pipelines have no functional value except as connected or related to the bypass pipeline and the individual plant meters are used to apportion consumption within the system.

According to NNG, the operation of a condominium bypass distribution system by a receiving party for the benefit of another entity, including operation of their systems by Willamette and Oremet, is an "offer" of "utility service" under ORS 758.450(2). These operational activities include allocation of the costs of natural gas based on the consumption of the individual participants, provision of odorization, inspection and maintenance, and other activities. Hence, NNG concludes that any person who constructs or completes construction of a condominium bypass distribution system in whole or in part of a size or capacity greater than needed for a single consumer of natural gas has constructed utility service within the meaning of ORS 758.450(2). Any person who connects facilities for the provision of natural gas onto a bypass pipeline serving another person has extended utility service within the meaning of the same statutory provision.

The territory involved in the Willamette and Oremet condominium bypass distribution systems is within NNG's exclusively allocated service territory, and none of the exemptions under ORS 758.450(4) apply to these facts.

NNG argues that to the extent the provisions of ORS 758.450(2) are ambiguous in their application to a condominium bypass distribution facility in general or the Willamette and Oremet facilities in particular, the Commission should construe the statute in light of its purpose as stated in ORS 758.405 and "other public policies recognized by the Commission." Those considerations include the policy to avoid duplication of utility facilities, the policy to ensure that all pipelines are maintained and operated safely, and the impact that the loss of load of groups of industrial customers will have on the rates of the core customers who must cover the fixed costs of utility service. A decision to allow condominium bypass distribution systems would open the flood gates

to other groups of customers, including commercial customers, subdivisions, or other aggregations, who would seek the same type of bypass services.

Oregon Steel and Ash Grove form a condominium bypass distribution system within NNG's allocated territory. NNG distinguishes this system from those it here challenges. Oregon Steel and Ash Grove jointly constructed a two-mile bypass to Williams and placed that facility in service in April 1991. Litigation before the Commission and in state and federal courts ensued. In 1992, the parties entered into a stipulation and settlement agreement regarding the various lawsuits and proceedings. The settlement was approved by the Commission in Order No. 92-762. According to NNG, the approval of this agreement certifies the allocation of utility territory among these parties under ORS 758.415. The provision of utility services by Oregon Steel or Ash Grove is not "in or into an allocated territory" of NNG under ORS 758.450(2).

If the Commission declares that condominium bypass distribution facilities violate ORS 758.450(2), any person responsible for the operation, construction, or extension of such a system is subject to injunctive remedies under ORS 758.465 and enforcement actions by the Commission under ORS 756.160 and 756.180. In addition, if a receiving party operating a condominium bypass distribution facility is a public utility under ORS 757.005(1)(a)(A), that party is liable for treble damages under ORS 756.185.

NNG summarizes its position by stating that this case concerns more than simply a bypass system. It concerns a bypass distribution system, and one that is condominium in nature. By condominium, NNG means that part of the system is owned in common and other parts are owned by a single owner. Specifically, parts of a system for distributing natural gas to consumers are owned by Williams (the interstate pipeline tap and meter), by tenants in common or joint venturers (bypass pipeline), and by individual industries (lateral pipelines and meters). What makes the system subject to state regulation and violative of ORS 758.450(2), according to NNG, is the extension of the bypass pipeline to more than one consumer by the addition of individually owned service pipelines. Once a supply facility serves more than one consumer, and includes separately owned lateral pipelines and meters, NNG argues that it becomes a distribution system.

NNG also argues that the need for operational and accountability policies and central management, features that NWIGU admits are needed for the Willamette Industries bypass, make a condominium system qualitatively different from a single-user supply system.

NNG seeks as relief a declaratory ruling that the construction, operation, or extension of a condominium bypass distribution system as described above violates ORS 758.450(2); a declaratory ruling that the construction, operation, or extension of the Willamette Industries condominium bypass distribution system as described above violates ORS 758.450(2); a declaratory ruling that the construction, operation, or extension of the Oremet condominium bypass distribution system described above would

violate ORS 758.450(2); and initiation of enforcement actions by the Commission seeking injunctions against any violations of ORS 758.450(2) found in this proceeding.

**Responses by Wah Chang and NWIGU**

Wah Chang and NWIGU argue that the arrangement described by NNG does not constitute "utility service." It is merely an attempt by the participants to obtain cost-effective natural gas service. That is the same motive that is behind single industrial consumer bypasses. These facilities do not constitute a connected and interrelated distribution system. They do not serve a distribution function, as the participants do not distribute gas to third parties. The participants serve only themselves by what amounts to one pipeline, not a network. Tie-in facilities alone, such as valves and meters, are not local distribution facilities.

These intervenors also argue that the arrangement does not constitute an offer of utility services. The participants are joint owners and have the responsibility to plan, operate and maintain the lines. Moreover, the participants have nothing to do with the utility industry, except as customers, and do not resemble utilities. The details of the arrangement are determined by the participants and can be changed by them. The participants may designate that one of them is to act as operator, but they can change that arrangement.

The provision in the statute regarding duplication of facilities is aimed at utilities, not at customers, and was designed to prevent two or more utilities from providing duplicative service in the same geographic territory. In Order No. 92-557 (UA 37), the Commission discussed the history of the allocation statutes. It noted that prior to the 1961 enactment of those statutes, PGE and PP&L

> served overlapping and scattered territories in Portland. Where two or more electric utilities serve the same area, each must build substations, install transformers, and string lines to customers. The result is an inefficient and unsightly duplication of facilities. In some areas of Portland, for instance, utility poles bore eight or nine power lines, several from each company. The density of those lines also created a safety hazard for utility employees who had to repair them. (At 2.)

The Commission noted in that order that the statutes provide a mechanism for utilities to agree to provide service to certain areas or to ask the Commission to make that determination. They are designed to protect regulated utilities from competition from unregulated companies who would sell competitive distribution service. End users are not the target of these provisions. Moreover, NWIGU argues, the purpose of the duplication provision is to prevent "ratepayer paid duplication"—that is, situations in which the public pays for duplicative facilities. Under the arrangements involved in this ruling, the utilities would not pay for the facilities involved.

These intervenors also argue that these arrangements do not present a safety issue, as the connection is subject to existing safety requirements. They also assert that these arrangements do not violate the express aim of the statute of preventing interference with the economic use of the existing distribution facilities.

Oremet/Wah Chang and NWIGU also argue that NNG has in the past at least tacitly acknowledged the legality of similar arrangements by seeking approval of special contracts to prevent bypass.

The intervenors assert that arrangements such as those set out by NNG are common in other states. They argue that federal law should be considered. They cite cases in which the federal courts have upheld these arrangements or have determined that FERC has jurisdiction over them.

**Position of Oregon Steel**

The arguments of Oregon Steel regarding the meaning and intent of the relevant statutes are similar to those of Wah Chang and NWIGU. Oregon Steel contends that the statute does not prohibit customer-owned bypasses. It is not a bar to all duplication. And, joint owners do not provide utility service to one another. They are not employed by each other to operate the bypass. They are not dealers or manufacturers providing services such as installation, maintenance, or repairs. There is no provision of service or product to the public. The end users do not operate for the benefit of another. All are joint owners and share in the benefits and costs. The customers remaining with the utility will not suffer as a result of the bypass. Industrial end users are discretionary customers. The Commission gave utilities price flexibility in Order No. 87-402 to keep these customers. They have a right to bypass the local distribution company when its service is not economically efficient.

Oregon Steel also argues that an existing pipeline agreement between Oregon Steel and Ash Grove should be grandfathered if the Commission adopts NNG's position. Oregon Steel also maintains that the Commission must consider federal law in this case and that NNG's position conflicts with federal law. It asserts that the matter is preempted by the Natural Gas Act (NGA), which, in Oregon Steel's view, prohibits states from interfering with the construction or operation of a bypass facility.

## DISPOSITION

**Scope of Decision**

NNG has requested that we issue the following declaratory rulings: that a pipeline system as described in its Assumed Facts (p. 4 of this order) violates ORS 758.452(2); that the existing pipeline arrangement involving Willamette Industries/Wah Chang violates ORS 758.450(2); and that the proposed Oremet/Oregon Freeze Dry pipeline arrangement would violate ORS 758.450(2). It also asks that the

Commission initiate enforcement action seeking injunctions against any violations of ORS 758.450(2) found in this proceeding.[5]

The Commission will limit its ruling to the scenario set out in the Assumed Facts. Declaratory rulings have the function of allowing an agency to determine how laws under the agency's authority apply to a given set of facts. The "facts" considered by the agency are those supplied by the petitioner. A declaratory ruling proceeding does not allow for fact finding regarding disputed facts. We also note that the declaratory ruling statute quoted above in this order specifically states that a ruling is "binding between the commission and the *petitioner* on the stated facts alleged..." (emphasis added). That wording, we believe, strongly suggests that the declaratory ruling procedure is intended to be a means by which an entity can get some assurance about the legality of its own behavior from an agency. Whether it is intended to be a means for an entity to have the actions of third parties adjudicated is, at the least, uncertain.

The request for a declaratory ruling in this case was filed by NNG, which is thus the petitioner. The intervenors are not petitioners. The impact of a declaratory ruling on them is open to question. We also note that the facts relating to the actual pipelines are not agreed upon by the participants in this case. These factual disputes involving the existing or proposed bypass arrangements by Oremet/Wah Chang, Oregon Steel, Oregon Freeze Dry, and others, and the nature of the declaratory ruling statute itself lead us to the conclusion that this declaratory ruling will be applicable only to the Assumed Facts set out by NNG in its petition. Because we do not make rulings relating to the particular "real life" factual contexts, the enforcement action requested by NNG would be inappropriate.

The intervenors argue at length that federal law controls this case and that it requires a decision in their favor. In a July 24, 1999, Ruling, the Administrative Law Judge denied a motion by the intervenors to broaden the issues in this case to include federal law and other issues suggested by the intervenors. The ruling was based on the Administrative Law Judge's conclusion that such issues are outside the scope of NNG's petition. We agree with that conclusion and thus do not consider the impact of federal law on the Assumed Facts.

**Decision**

The parties agree that bypass of a utility's service by a sole industrial customer through construction and operation of a pipeline is not a violation of ORS 758.405(2). Indeed, the Commission has recognized the legality of bypass in Order No. 87-402 (UG 23/UE 50) and through many other proceedings in which a utility has

[5] We note that NNG withdrew its request that we determine whether the operators of the type of bypass arrangements set out in its Assumed Facts are "public utilities" under ORS 757.005. We therefore will not consider the applicability of that statute to the Assumed Facts.

sought to enter into a special contract with an industrial customer as a way of heading off such bypass. The only distinction between this case and those is that the bypass here is effected by two (or potentially more) customers working in concert through the sort of arrangement described by NNG in its Assumed Facts. The question before us is whether the number of customers and the details of the arrangements between them change the legal status of the bypass.

The Commission concludes that the arrangements described in NNG's Assumed Facts do not violate ORS 758.405.[6] The key portion of that statute for purposes of this ruling is subsection (2): "No other person shall offer, construct or extend utility service in or into an allocated territory." "Utility service" is defined in ORS 758.400(3) as "service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system."

Wah-Chang/NWIGU, and Oregon Steel Mills argue that what is described in the Assumed Facts does not constitute utility service. They believe that the territorial allocation scheme set out in ORS 758.450 and the other portions of ORS Chapter 758 is designed to allow utility companies to resolve allocation disputes and to provide that once allocations have occurred, they can be enforced. We agree and conclude that these statutes are not aimed at the provision by customers of utility products to themselves as set out in the Assumed Facts.[7]

Under the Assumed Facts, the participants in a so-called condominium bypass system are co-owners of part of the facilities involved and may be sole owners of other parts. The co-owners are not employed by each other, but are operating to provide service to themselves through a mutually beneficial arrangement. They do not sell utility product or service to each other. They are not offering service of any sort to the general public. The facilities they have created do not benefit or serve anybody but themselves. The fact that they may appoint one of the co-owners as the receiving party or that one of the co-owners may perform management duties does not change the fact that the arrangement is one involving co-owners and not a utility and its customers. Each of the co-owners is, in fact, a sole customer who happens to have arranged for service to itself through an arrangement with another coequal customer. We conclude that provision by two customers of service to themselves by the arrangements described in the Assumed Facts does not violate the statutes involved.

We also conclude that this sort of arrangement is not inconsistent with the purposes of ORS 758.405: the "elimination and future prevention of duplication of utility facilities," and the promotion of "the efficient and economic use and development and the

[6] We note that NNG asserts as a "fact" in its Assumed Facts that the lateral pipelines provide an "extension of utility service." Since the determination of whether the service constitutes "utility service" is at the heart of the dispute, and thus of this order, we ignore NNG's assertion.

[7] As noted above, NNG does not request that we rule on whether the participants in a condominium bypass are "public utilities" under ORS 757.005. We therefore assume they are not for purposes of this ruling.

safety of operation of utility services while providing adequate and reasonable service to all territories and customers."

We agree with the intervenors in this case that these arrangements described in the Assumed Facts do not duplicate "utility facilities" because the pipeline arrangements created by customers are not utility facilities. The statute is aimed at preventing wasteful duplication of facilities used by utilities, not at preventing duplication of facilities that customers may use to provide service to themselves. As we noted in Order No. 98-546 (UA 58/UA 60), these statutes "reflect a desire to avoid contests between utilities." (At 6.) Even if we were to consider the customer's facilities to be utility facilities, there is insufficient basis in the record for us to conclude that the arrangements described in the Assumed Facts would involve greater duplication of facilities than would sole-bypass by individual customers. We also find persuasive the argument made by intervenors that the purpose of the antiduplication provision is to protect the customers of utilities from having to pay for duplicate facilities which do not benefit them. No such risk of direct customer/ratepayer loss exists in the scenario set out by NNG, although there might be some loss of contribution to fixed costs.

We also conclude that the arrangement described in the Assumed Facts would not interfere with the efficient and economic use of utility services. NNG's facilities are still useful despite these bypass arrangements and may even be used again to serve the bypassing customers in the future.

We also do not agree with NNG that the safety of the operation of utility services will be compromised by the arrangement described. The bypass arrangements are subject to safety provisions, as the intervenors argue. In any event, the customers involved have an overriding incentive as well as a legal duty to make sure that the facilities do not create a safety hazard. We do not think that the safety issue is of significance in this case.

## CONCLUSIONS

The Commission concludes for the reasons set out above that the facts set out in the petition filed by NNG do not constitute a violation of ORS 758.450(2).

## ORDER

IT IS ORDERED that the facts described in the Amended Petition filed by Northwest Natural Gas for a declaratory ruling do not constitute a violation of ORS 758.450(2).

Made, entered, and effective JUN 09 2000.

**Ron Eachus**
Chairman

**Roger Hamilton**
Commissioner

PUBLIC UTILITY COMMISSION OF OREGON

**Joan H. Smith**
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

DR23fo

ORDER NO. 01-719

ENTERED AUG 09 2001

# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

DR 23

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|---|---|---|
| In the Matter of the Petition of NW Natural Gas Company for a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass to Two or More Industrial Customers Violates ORS 758.400 *et seq.* | ) ) ) ) ) | ORDER |

DISPOSITION: ORDER RECONSIDERED AND AFFIRMED

On June 9, 2000, the Commission issued Order No. 00-306 in this docket concluding that a pipeline arrangement described in an assumed set of facts presented by NW Natural Gas Company (NW Natural or the Company) does not violate ORS 758.450(2). On August 7, 2000, NW Natural filed an Application for Reconsideration and a request for oral argument before the Commission. PUC Staff filed a response supporting reconsideration but opposing the request for oral argument. Oremet-Wah Chang and Northwest Industrial Gas Users filed a response opposing the application.

On October 5, 2000, we issued Order No. 00-617 granting reconsideration of Order No. 00-306. The Administrative Law Judge conducted a conference on November 13, 2000, to resolve procedural issues. On February 26, 2001, NW Natural renewed its request for oral argument. The Administrative Law Judge granted the request on March 23, 2001. Oral argument was presented to the Commission and the Administrative Law Judge on April 12, 2001.

## Discussion

In its Amended Petition for Declaratory Ruling, NW Natural asked the Commission to rule that "the construction and operation of an interstate pipeline bypass, that is shared by privately-owned industrial consumers and is within the territory allocated to NW Natural . . . violates ORS 758.450(2). NW Natural seeks declaratory rulings on the applicability of ORS 758.450(2) to two particular states of fact concerning condominium bypass distribution systems, as well as the generic fact pattern [referred to as the Assumed Facts in Order No. 00-360 and in this order] for a condominium bypass distribution system as set forth below."

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As we noted in Order No. 00-306, the participants in this matter did not agree on the "facts" set out by NW Natural in the "two particular states of facts" referred to in the Amended Petition. Thus, we limited our ruling to the Assumed Facts asserted by NW Natural. Our reconsideration is limited to the Assumed Facts.

**Review of Order No. 00-306**

For a violation of ORS 758.450 to occur, four elements must be established by the Assumed Facts: The entity or entities must be "persons" as defined in Subsection (2) of ORS 758.400; the arrangement involved must constitute "utility service" as defined in Subsection (3) of ORS 758.400; the "utility service" must be in an allocated territory; and none of the exemptions set out in Subsection (4) of ORS 758.450 must apply. We concluded in Order No. 00-360 that the Assumed Facts do not violate ORS 758.450(2) because the arrangement is not "utility service." We did not base it on any of the other factors noted above.

We explained our decision at some length. First, we discussed the territorial allocation law. We noted that it is designed to allow utility companies to resolve allocation disputes and to provide for enforcement of agreed-upon allocations. We further concluded that the territorial allocation scheme is "not aimed at the provision by customers of utility products to themselves as set out in the Assumed Facts."

We then explained in detail our conclusion regarding the "utility service." We noted that the participants are co-owners of part of the condominium bypass and may be sole owners of other parts. The co-owners are not employed by each other, but are involved in a mutually beneficial arrangement. They do not sell utility product or service to each other or anyone else. They offer no service to the general public or to each other. The facilities do not benefit or serve anybody but the co-owners. The co-owners are not a utility and its customers. Each is a sole customer who happens to have arranged for service to itself through an arrangement with another coequal customer.

Next, the order concludes that the arrangement is "not inconsistent with the purposes of ORS 758.405: 'the elimination and future prevention of duplication of utility facilities,' and the promotion of the 'efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers.'"

The next paragraph of our order notes that the pipeline arrangement does not duplicate utility facilities "because the pipeline arrangements created by customers are not utility facilities. The statute is aimed at preventing wasteful duplication of facilities used by utilities, not at preventing duplication of facilities that customers may use to provide service to themselves." We noted that in Order No. 98-546, we stated that the statutes "reflect a desire to avoid contests between utilities." The next sentence of Order No. 00-306 says that even if these facilities were utility facilities, the record would not establish that these arrangements would involve "greater duplication of facilities than would sole-bypass by individual customers."[1] The next sentences state that the

[1] NW Natural seriously misrepresents the import of this sentence, as we note below.

purpose of the duplication provision is to guard against utility customers having to pay for duplication of facilities which do not benefit them and that there is no risk of that here.

The next paragraph states that the pipeline arrangements described in the Assumed Facts do not interfere with the efficient and economic use of utility services because NW Natural's facilities are still useful. The final paragraph dismisses the safety issue by noting that these arrangements are subject to safety requirements and that the customers involved have an "overriding incentive as well as a legal duty to make sure that the facilities do not create a safety hazard."

## Commission Disposition on Reconsideration

We conclude that Order No. 00-306 reached the correct conclusion on the facts presented. We incorporate in this order the bases for the conclusions we set out in that order. We address in this order new or amplified arguments made by NW Natural in its application for reconsideration.

NW Natural states four bases for reconsideration. First, that the order sets "a dangerous precedent"; second, that it "fails to give guidance"; third, that the procedure followed did not allow for "adequate consideration of the issue"; fourth, that the order is "wrong." We will briefly comment on the second and third of these, then focus on the key issue: whether the order is right or wrong. We will then return to the first issue: the supposed "precedent" represented by our order.

### The Issuance of "Guidance"

We believe the second ground, that the order fails to give guidance, needs no lengthy response. NW Natural claims that the Commission failed to provide "a declaration on the meaning" of the relevant statutes, and that the Commission's conclusions are not "moored" to the words of the statutes.

NW Natural's claim in this regard does not take into account the purpose of a declaratory ruling. As requested by NW Natural in this case, the declaratory ruling procedure is designed to obtain from the Commission a ruling on the application of a statute or rule to an assumed set of facts presented by the petitioner. It is not a vehicle for the agency to announce abstract interpretations of statutes and rules. NW Natural's request was specifically whether the operation of a condominium bypass system as described in the Assumed Facts violates ORS 758.400 et seq. We answered that question quite clearly, although not as NW Natural had hoped. In doing so, we applied the statutes to the Assumed Facts. We also remind NW Natural that a declaratory ruling is not a vehicle for determining disputed facts. In this case, NW Natural's description of the Willamette and Oremet systems was challenged on factual grounds by the other parties. The Commission will not assume the accuracy of the factual claims of one or the other participant in a declaratory ruling case. We will, instead, as we did in Order No. 00-306, rule on an assumed set of facts, as the statute dictates. If the Assumed Facts do not mirror a real world set of facts, the declaratory ruling may be of little use to the petitioner.

The order very explicitly applies ORS 758.450(2) and ORS 758.400(3) to the Assumed Facts presented by NW Natural. The order explains why the arrangement presented is not utility service under 758.400(3). We understand that NW Natural does not like that explanation. However, it is not at all accurate to assert that it is not "moored" to the statute. We believe it is indeed tightly moored and that it does provide a "test," although not one that NW Natural would prefer. NW Natural's claim that the order only applies to "two" participants and not to *"more"* than two seems a bit disingenuous. The Commission clearly stated that it was ruling on the Assumed Facts. The Assumed Facts apply to *two or more* participants (that is what the Assumed Facts state), and that is the fact situation to which the Commission intended its decision to apply.

**The Issue of "Adequate Consideration"**

NW Natural's third claim, that the procedure did not allow for adequate consideration of the issue, is apparently moot. It is based on a claim that the order "was not issued in proposed form, with an opportunity for exceptions." NW Natural is advised that it has not been Commission practice to issue proposed or draft orders. We have done so on occasion, usually in cases that involve pure policy issues or where requested by a party, and we may do so in the future. However, we find no request from NW Natural that we issue a proposed order in this case. In any event, the request for reconsideration by NW Natural provides essentially the same opportunity to challenge an order as would exceptions to a proposed order.

**Is the Order "Wrong"**

We turn to the question of whether the order is "wrong." First, we will restate the issue posed in this case. NW Natural has alleged that the arrangement described in the Assumed Facts violates ORS 758.450(2). As we noted above, for a violation to occur, four elements must be established: The entity or entities must be "persons"; the arrangement involved must constitute "utility service"; the utility service must be in an allocated territory; and none of the exemptions set out in Subsection (4) can apply. We concluded in Order No. 00-360 that the Assumed Facts do not violate ORS 758.450(2) because the arrangement is not "utility service." We did not base our conclusion on any of the other elements set out in the statute. We did not, as NW Natural argues, base it on a determination that the participants in the condominium bypass were not "persons"; nor, contrary to NW Natural's assertions, did we base it on a conclusion that the arrangement fits into one of the exemptions or into some sort of "new" exemption created by the Commission.

Our conclusion was arrived at through application of the principles of statutory construction. Before we turn to that analysis in detail, however, we will respond to a specific criticism made by NW Natural. NW Natural claims that the statutes are "barely quoted, much less analyzed." Then, it asserts the following:

> Most astonishingly, the Order states that "[e]ven if we were to consider the customer's facilities to be utility facilities," *no violation of ORS 758.450(2) would exist because there would be*

> *no* "greater duplication of facilities than would [be the case with] sole-bypass by individual customers. (Italics added.)

NW Natural summarizes its analysis of this paragraph as follows: "To put it boldly, the Order seems to say that even if a violation of the statute existed, there would be no violation of the statute."

This is a serious mischaracterization of the order, one which cannot easily be rationalized. What the order actually says is this:

> Even if we were to consider the customer's facilities to be utility facilities, *there is insufficient basis in the record for us to conclude that the arrangements described in the Assumed Facts would involve* greater duplication of facilities than would sole-bypass by individual customers. (Italics added.)

A comparison of the emphasized portion of our sentence with NW Natural's italicized remake of it exposes the Company's distortion. The order at this point is analyzing the purposes of the territorial allocation law, one of which is the avoidance of duplication. Our discussion of the issue of duplication at this point merely supports our conclusion that our interpretation of the term "utility service" is not in conflict with the purposes established in ORS 758.405: avoidance of duplication and the economic and efficient use of utility services. If, however, the service were utility service, and the other elements of the violation were present, a violation of the statute would exist, regardless of whether there were a duplication of utility facilities.

We now turn to the application of the principles of statutory construction. As NW Natural notes, the Oregon Supreme Court has set out the process for statutory construction in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993). To determine legislative intent, the court first looks at the text of the statute, using rules of construction which bear directly on how to read the text. At this first level, the court also considers the context of the statute, including the total statute itself and related statutes, using rules of construction which relate to context. If the intent is clear from the text and context, the analysis goes no further. If the court's review of the text and context does not resolve the matter, however, the court will consider legislative history, along with the text and context, to determine legislative intent. If the intent is still unclear, the court will refer to general maxims of construction to make its decision on legislative intent.

NW Natural appears to allege that our conclusion in Order No. 00-306 did not apply the *PGE v. BOLI* analysis, as described above. However, our decision in that order was based on an analysis of the text and context of the statutes in question, in conformance with that case. We concluded that the text and context establish that the arrangement described in the Assumed Facts does not constitute a violation of the statute in question. We have considered NW Natural's arguments upon reconsideration and conclude that our original analysis and conclusion were correct. We will restate that analysis here and amplify it to specifically respond to NW Natural's petition for reconsideration and its oral argument.

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We turn first to the text of the statute. NW Natural assures us that the meaning of ORS 758.450(2) is "clear from its text" and requires a conclusion that the arrangement described in the Assumed Facts is a violation of ORS 758.450(2). It notes that the term "person" is used broadly in ORS 758.400(2) and encompasses the entities involved in the arrangement described in the Assumed Facts. From this, NW Natural moves to what it acknowledges is the key to this case: the term "utility service." It notes that that term is defined under the statute as service provided by "any" equipment, plant, or facility. Thus, it claims, the statute does not apply just to facilities owned by public utilities. NW Natural also observes that the statute uses the word "consumers," which it defines as "one who consumes." Therefore, the Company asserts, one can provide utility service to oneself and still be a "consumer."

NW Natural then moves to what it believes to be the two "critical" issues in determining if the arrangement provides utility service: whether the facilities constitute a "distribution system" and, if so, whether that distribution system is "connected or interrelated." Distribution occurs, NW Natural claims, when gas which has come from a transmission or other common source is divided and distributed to more than one user. The distribution system, according to the Company, is connected or interrelated if it is a "stand alone" system; that is, it works by itself, is not connected to some other distribution system, and its parts have a mutual or reciprocal relation to each other. NW Natural relies on *Webster's Third New International Dictionary* for its interpretation of "interrelated" and notes that the Oregon Supreme Court has approved such use to ascertain the meaning of statutory terms.

From this, and other textual clues, NW Natural asserts that utility service is defined by the characteristics of the facilities involved, not by the "characteristics of who provides the service." Accordingly, NW Natural claims, the arrangements set out in the Assumed Facts provide utility service and thus violate the statute.

NW Natural buttresses its conclusions by reference to the "context" of the provision in question. It notes that there are several exceptions to the statute set out in Subsection (4) of ORS 758.450, including certain associations of individuals. The inclusion of certain associations, NW Natural argues, means that no other "associations of individuals" are exempted. Moreover, since (4)(b) exempts associations providing energy to "fewer than 20 residential customers" so long as it serves "only residential customers," the service provided in the Assumed Facts cannot be lawful because it involves industrial customers. NW Natural also notes that (5) of ORS 758.450 provides that the exceptions do not prohibit third party financing of acquisition or development by a customer of energy resources. This provision, according to NW Natural, makes clear that a particular combination of two entities—a financing entity and a provider of utility service—is not subject to the restrictions of the statute. Therefore, according to NW Natural, other two-entity combinations are within the scope of the prohibition.

NW Natural also asserts that the explicit purposes of the territorial allocation law, as set out in ORS 758.405, support its conclusions. All the stated purposes—prevention of duplication and promotion of efficient, safe, and economic use of facilities to provide adequate and reasonable service—are served, according to NW Natural, by its interpretation of ORS 758.450. Finally, the Company claims that its arguments are supported by the very

*raison d'être* of the territorial allocation law: maintenance of the integrity of Oregon's system of regulating public utilities as monopoly providers of heat, light, water, or power. Bypass arrangements such as those at issue in this case conflict with the exclusive character of allocated territories and monopoly status and therefore must be within the prohibition intended by the Legislature in ORS 758.450.

We are not persuaded. We first reiterate that our decision was not based on a conclusion that the entities described in the Assumed Facts were not "persons" as defined under ORS 758.400(2) or on a conclusion that the arrangement constitutes an exception under ORS 758.450(4). Thus, we focus on the issue of whether the arrangement is "utility service" under ORS 758.400(3).

We do not agree with NW Natural's textual or contextual analyses. They do not, in our view, properly consider the statutory context of the territorial allocation law as a whole. We conclude that our analysis of text and context is more thoroughgoing and objective. We reiterate it here.

First, the key terms in ORS 758.400 and 758.450 are not "clear" on their face, as NW Natural argues. Several of them are general terms which have several meanings, depending on the situation: "utility," "service," "distribution," "system," "facilities," "interrelated," and others. Mere reference to a dictionary to determine their meaning, as NW Natural proposes, although potentially useful, will not necessarily provide a sound answer. For example, the Company uses a dictionary definition of "interrelated" (having a "mutual or reciprocal relation or parallelism") to conclude that the system in the Assumed Facts is interrelated because "the lateral pipelines have no functional value except as connected or related to the bypass pipeline and individual plant meters are used to apportion consumption with the system." We do not find this argument responsive to the issues in the case. To avoid an arbitrary conclusion as to the meaning of these terms, it is absolutely necessary to refer to their context to determine legislative intent.

Context for interpreting a statute, as the Court states in *PGE v. BOLI, supra,* is provided by the entirety of the statute in question and by related statutes. In this case, the statutes in question, ORS 758.400 and 758.450, are part of a distinct and unified set of statutes relating to territorial allocation (ORS 758.400 through 758.475; called "territorial allocation law" herein). That coherent structure gives us an explicit framework for our contextual analysis. Any conclusion we arrive at as to the specific statutes in question must be consistent with the function and purposes of the territorial allocation law. Moreover, some of the key terms at issue in this case, such as those referred to above, are used in more than one place in the territorial allocation law. Since it is reasonable to assume (absent legislative direction otherwise) that the meaning intended for a term is consistent throughout a discrete set of statutes, any meaning adopted for a term used in the key statutes must not result in incongruous results when applied in other portions of that statutory scheme.

The territorial allocation law sets out a process by which allocation of territory and customers may be carried out in an orderly fashion. In ORS 758.400, the statute providing definitions for the remainder of the territorial allocation law, "allocated territory" is an area

established by contract approved by the Commission between persons providing a similar "utility service" or established by order of the Commission approving an application for the allocation of territory. Other portions of the territorial allocation law then set out the process by which the allocation occurs: how amendments may be effected, how contracts may be enforced, and the import of the allocation, among other related matters. The "purpose" statute, ORS 758.405, explains the goals of this comprehensive scheme: to avoid duplication of utility facilities; to promote efficient, economic, and safe utility service; and to provide adequate and reasonable service "to all territories and customers." This provision concludes that to achieve these purposes, it is necessary to "regulate" all persons and entities providing utility service as provided in the territorial allocation law.

Thus, the territorial allocation law, as reflected in the structure of the law and the explicit purposes noted, allows the Commission to decide two of the paramount issues it must deal with: who serves what area and which customers. We recognized that goal in Order No. 92-557, where we noted that the territorial allocation law was created to address the duplication of services by PP&L and PGE in Portland (at 2). We noted that the territorial allocation statutes:

> . . . establish two ways in which the Commission may approve exclusive service territory allocations. ORS 758.410 to 758.425 establish the first method: a utility and its neighboring utility may agree to a mutual service territory boundary and execute a contract allocating territories and customers between them. . . . ORS 758.435 to 758.440 establish the second method: if a utility is the exclusive provider of utility service in an area, the utility may unilaterally file an application with the Commission to obtain exclusive service territory (at 3).

We see nothing in this statutory scheme that indicates it was designed to allow, or require, the Commission to prevent consumers from arranging for service to themselves. That is what NW Natural is asking us to do in this case, however it couches its position. As we said in Order No. 00-306:

> Under the Assumed Facts, the participants in a so-called condominium bypass system are co-owners of part of the facilities involved and may be sole owners of other parts. The co-owners are not employed by each other, but are operating to provide service to themselves through a mutually beneficial arrangement. They do not sell utility product or service to each other. They are not offering service of any sort to the general public. The facilities they have created do not benefit or serve anybody but themselves. The fact that they may appoint one of the co-owners as the receiving party or that one of the co-owners may perform management duties does not change the fact that the arrangement is one involving co-owners and not a utility and its customers. Each of the co-owners is, in fact, a sole customer who happens to

have arranged for service to itself through an arrangement with another coequal customer.

Acceptance of NW Natural's view would mean that customers who provide service to themselves under the circumstances set out in the Assumed Facts would be subject to all the provisions of the territorial allocation law in which the term "utility service" is used, including those relating to contracts between persons who provide utility service (ORS 758.410), and applications for allocation of exclusively served territory. It would mean that ORS 758.405 authorizes the Commission to "regulate" those who are serving only themselves and who otherwise have no connection to the Commission's regulation except as customers of those who are under regulation. We do not accept these propositions.

As we pointed out in Order No. 00-306, at 12-13, our conclusions are not inconsistent with the purposes stated in ORS 758.405 and with the overall structure of the territorial allocation law as we described it above. Our conclusions are also consistent with the common usage of terms such as "utility," "utility service," "utility facilities," "distribution," and "service" that are used in the relevant statutes. Our view of the statute and key terms also does not lead to unreasonable results when applied throughout the territorial allocation law. In contrast, NW Natural's interpretations of terms used in ORS 758.400 and 758.450 would, in some cases, lead to unquestionably dubious results if applied in other portions of this statutory scheme. The term "utility service" provides an example. ORS 758.400(1) defines an allocated territory as an area "established by a contract between persons furnishing a similar utility service and approved by the Public Utility Commission . . . ." ORS 758.410 permits a person providing a utility service to contract with another person providing a similar utility service to allocate territories. ORS 758.450(1) requires that territories serviced by more than one person providing similar utility service may "only become an allocated territory by a contract approved by the Public Utility Commission." If NW Natural's interpretation of "utility service" is correct, the participants in a condominium bypass are providing utility service and are thus subject to all these statutory provisions, and others in territorial allocation law. They could therefore contract with NW Natural, or whatever public utility was operating in the territory in question, to divide up the allocated territory. This is a farfetched and unacceptable result and indicates that NW Natural's analysis has not properly considered the context of the statutes in question.

The interpretation we make leads to a more sensible reading of the intent behind the purposes set out in ORS 758.405 than does NW Natural's. Under NW Natural's view, for example, the "elimination and future prevention of utility facilities," would include privately owned facilities, such as those described in the Assumed Facts, operated by customers or consumers only for their own benefit and use. It is implausible that such a task would be assigned to the Commission. Similarly, the statutory purpose of promoting "the efficient and economic use and development and the safety of operation of 'utility service' while providing adequate and reasonable service to all territories and customers . . ." cannot reasonably be viewed as authorizing interference by the Commission in arrangements among customers to obtain service for themselves, as NW Natural's view would require.

We do not find persuasive NW Natural's argument that we should interfere with the arrangements described in the Assumed Facts because they could lead to a loss of revenues to the Company. We have not viewed protection of utilities from self-provision of utility service as one of the aims of our regulation. As we note above, the territorial allocation law has the aim of regulating the division of territories and customers among utilities, not the protection of utilities from loss of customers who provide service to themselves.

For the reasons stated in this order and Order No. 00-306, we conclude that the arrangements described in the Assumed Facts do not violate ORS 758.405.

**Is the Order a "Dangerous Precedent"**

We now turn to NW Natural's claim that Order No. 00-306 sets a "dangerous precedent." The Company asserts that the order would allow "cooperative utilities" to impinge on the allocated territory of a utility. The Company even goes so far as to say that the order "suggests that these utilities [cooperatives] can now extend services into the allocated territory of a competitor . . ." This claim is without merit. Cooperatives were not discussed at all in the order. To say that we "suggested" that cooperatives were included in our ruling is farfetched. We find no such "suggestion" in the order.

NW Natural, here, as throughout its filings, seems to have forgotten that the effect of a declaratory ruling is limited to the agency and the petitioner. ORS 756.450. Moreover, our analysis of the matter is narrow. The determinative issue in Order No. 00-306 was whether the service described in the Assumed Facts is utility service. Any entity claiming to come within the ambit of the conclusions set out in that order (and this order) would have to show that it is not providing "utility service." As we noted in our summary of the order set out above, the issue of service to the "public" (which NW Natural focuses on in its claim regarding cooperatives) is only one of the facts we mentioned in our conclusions. A cooperative or any other entity claiming that an arrangement it is involved in is not utility service would have to show that what it is doing is materially the same as what is described in the Assumed Facts or is otherwise outside the definition of utility service. Thus, NW Natural's apocalyptic claim that cooperatives would be able to ignore the territorial allocation law if Order No. 00-306 stands is false.

We note here NW Natural's argument that allowing condominium bypass systems to operate would raise other customers' rates because of loss of contribution by the bypassing customers. It is clear, however, that if our application of the statutes is correct, we must do as they direct us and cannot ignore their meaning because of such potential consequences. Of course, the potential loss of industrial load is an issue that comes before the Commission frequently where a utility requests permission to enter into a special contract to retain an industrial customer. In those situations, we are performing our regulatory role of deciding how a public utility may act to retain load. Here, NW Natural is suggesting something quite different: that we limit what customers may do to serve themselves based on the impact on the utility's other customers. That same economic issue may, of course, arise any time a customer leaves a utility, for whatever reason. We do not have the authority to attempt to prevent such a departure simply because it may have an impact on the utility's rates.

In a related matter, the Commission acknowledges the issues raised by the existence of a condominium bypass system involving Oregon Steel Mills. It appears from what has been presented in this case that that system is materially the same as the hypothetical systems described in the Assumed Facts. Even if that is true, it has no impact on our decision here. We make no comment on what action we might take with respect to the Oregon Steel Mills condominium bypass if our decision on the law were different. Similarly, the fact that NW Natural may have argued to the Commission that it should be permitted to enter into a special contract with an industrial user on the basis that the customer could lawfully bypass the utility through a condominium bypass arrangement does not enter into our decision. We do not believe that any such arguments by NW Natural are binding on the Company in this proceeding.

NW Natural asserts that the legislative history of the statutes in question, including the 1985 amendment to ORS 758.450(4) discussed above, supports its position. Of course, NW Natural notes that, under *PGE v. BOLI, supra,* legislative history is not consulted if the first analytic steps, reference to text and context, reveal legislative intent. NW Natural asserts that the text and context are clear. It thus provides the argument based on legislative history as an alternative should the Commission feel that text and context are not sufficient for the task. We have, however, concluded that the text and context do tell us how to apply the statute. Nevertheless, we have reviewed the arguments made by the Company and conclude that nothing it has shown us indicates that the conclusions we reached above are suspect.

NW Natural argues that the legislative history of SB 487, which created the territorial allocation law, indicates that it was designed to prohibit invasion of allocated territories by other "serving agencies." It then argues that the change in the exemptions in ORS 758.450(4) made in 1985 was requested by the Commission and was designed "to prevent loss of industrial loads by competing serving agencies," by ensuring that "when a number of industrial customers combine to jointly create a serving agency within allocated territory, they violate ORS 758.450(2)." Assuming that this is an accurate summary by the Company, it does not help its cause, because, as we have stated above, the entities involved are not providing utility service.

Northwest Industrial Gas Users has argued that cases in other jurisdictions support its position that the arrangements described in the Assumed Facts do not violate the territorial allocation law. These cases, based upon different statutory schemes, have limited bearing on the case at hand. It appears that the conclusions in those cases center on the question of whether the entities involved are "public utilities." We have not drawn such a conclusion. Moreover, in its amended petition, NW Natural withdrew from our consideration the question as to "whether the operator of such a system [as described in the petition] is a 'public utility' under ORS 757.005." For these reasons, those cases are not helpful to us in deciding this matter.

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## ORDER

IT IS ORDERED that Order No. 00-306 is affirmed.

Made, entered, and effective AUG 09 2001

CHAIRMAN HEMMINGWAY DECIDED NOT TO TAKE PART IN THIS DECISION BECAUSE HE HAD NO ROLE IN THE ORIGINAL ORDER.

**Roy Hemmingway**
Chairman

**Roger Hamilton**
Commissioner

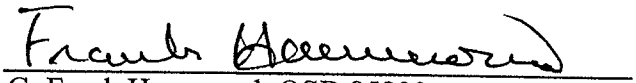
**Joan H. Smith**
Commissioner

A party may appeal this order to a court pursuant to applicable law.

DR23FORecon

## CERTIFICATE OF FILING

I certify that, on February 28th, 2005, I filed the original of the foregoing Memorandum In Support of the Jurisdictional Motions with the Oregon State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, by causing it to be hand delivered.



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## CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Memorandum In Support of the Jurisdictional Motions on:

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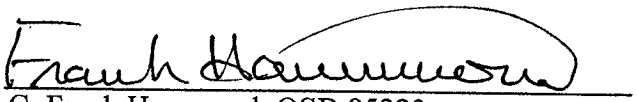
by hand delivery to those persons a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth on Tuesday, March 01, 2005.



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