BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 23

In the matter of the petition of Northwest Natural Gas Company For a Declaratory Ruling Pursuant to ORS 756.450 Regarding Whether Joint Bypass by Two or More Industrial Customers Violates ORS 758.400 *Et Seq.*

OPENING MEMORANDUM OF PETITIONER NW NATURAL

A. Introduction.

The Territorial Allocation Law, ORS 758.400 to 758.475, was adopted in 1961. The law gives the Public Utility Commission the authority to create exclusive service territories for providers of electrical or gas services. Territories are allocated either through a territorial division agreement among service providers that is approved by the Commission under ORS 758.410 to 758.430, or by Commission approval of an application for allocation of territory already being served under ORS 758.435 and 758.440.

The purpose of the law is to keep utility rates low by protecting the investment of a utility's customers in a distribution system for the allocated territory. This proceeding tests whether the law prevents the invasion of exclusive service territories by distribution systems serving small groups of industrial consumers.

Once territory is allocated by a Commission order, ORS 758.450(2) prevents other persons from invading the territory. It provides that,

> (2) Except as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.

The ultimate issue in this case is the scope of ORS 758.450(2), a function of the meaning of "utility service." "Utility service" is defined by ORS 758.400(3) to be,

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> "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.

But the *particular* issues in the case are more discrete. This case has been litigated for over six years. In prior proceedings before the Commission and the Court of Appeals, NWIGU and Wah Chang suggested two limitations on the protections of ORS 758.450(2) – a form of ownership test (no limitation on self-service by groups of consumers) and a system size requirement (restriction applies only to systems with hundreds of consumers). Neither limitation is faithful to the text of the statute or the policies behind the law. Both limitations were rejected by the Court of Appeals.

On remand from the Court of Appeals, Judge Smith framed the "question to be resolved in this case" as,

> . . . whether the arrangement set forth in paragraph 7 of NW Natural's Amended Petition for Declaratory Ruling (filed July 7, 1999) ("the Assumed Facts") constitutes a "utility service" as defined in ORS 758.400(3). . . .
>
> This issue is a combination of issues 3 and 5 set forth by Wah Chang and NWIGU, and issue 1 set forth by OSM.[1]

July 20, 2005 Ruling, p. 1.

With respect to this issue, NW Natural submits that,

1. The Commission does not write on a clean slate in interpreting the meaning of ORS 758.450(2) and its application to the assumed facts. The Court of Appeals found that the Commission erred in its earlier orders in deciding that an association of industries is not a "person"

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[1] Issue 3 as framed by Wah Chang/NWIGU is "[d]oes the arrangement described in Northwest Natural Gas Company ('NW Natural') assumed facts constitute 'utility service'?" Their Issue 5 is "[d]oes the arrangement described in NW Natural's assumed facts constitute a 'connected and interrelated distribution system' under ORS 758.400?" Oregon Steel Mill frames the issue as "[d]o the facts alleged in the Amended Petition constitute 'the distribution of natural or manufactured gas

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limited by ORS 758.450(2). But the Court further held that "the PUC also erred" in its determination of the meaning of "utility service" under ORS 758.400(3). The Court found that "service" means "the use of facilities to distribute natural gas to . . . 'consumers.'" It stated that "distribution" means "the physical act of distribution to more than one user of electricity or more than one consumer of natural gas." The assumed facts describe facilities that provide service and distribute gas to "two or more privately-owned industrial consumers of natural gas."

2. No one has seriously disputed whether the assumed facts described a "connected and interrelated distribution system." The core dispute until recently was whether self-service systems were covered. The ORS 758.400(3) definition of "utility service," on its face, applies to "consumers" and "users," i.e., *any* system providing service to more than one consumer or user. The words in ORS 758.400(3), "connected," "interrelated" and "distribution system," should be interpreted according to their plain and ordinary meaning. The assumed facts describe a "connected" system in the sense of lateral pipelines or service lines that are joined or linked to a bypass pipeline. The described system is "interrelated" because it is mutual and reciprocal in nature. And the facts state a "distribution system," i.e., the part of a supply system for electricity or natural gas that is between generation or transmission facilities and the end user.

3. The words in ORS 758.400(3), "connected," "interrelated" and "distribution system," should be interpreted in light of their statutory context. ORS 758.400(3) defines "utility service" as *not* including service "provided through or by 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." It follows that "utility service" *is* any system that is not subject to this exclusion –

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to consumers through a connected and interrelated distribution system' under ORS § 758.400(3)?"

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systems that "provide service" or "terminate" in an allocated territory. The assumed facts describe a system that provides natural gas to two or more consumers and that terminates within an allocated territory.

4. The determinative statutory context, as noted by the Court of Appeals, is the ORS 758.450(4) exceptions to the limitations in ORS 758.450(2). On its face, ORS 758.450(2) applies to distribution systems to small numbers of users. The exceptions in ORS 758.450(4) limit its operation to systems serving fewer than 20 residential customers, and implicitly cover facilities serving 20 or more residential customers. The exemptions were narrowed in 1985 to allow the restriction to apply to systems serving less than 20 industrial customers. This change was done to ensure that small industrial distribution systems, like the one described in the assumed facts, were covered by the law.

5. The third statutory context is the parallel regulation of exclusive service territories for water utilities under ORS 758.300 to 758.320. These statutes provide for the allocation of territory for the provision of "utility service." OAR 860-036-0900(1)(c) defines "utility service" to mean the "distribution of water to users through a connected and interrelated distribution system." The Commission has interpreted this definition in a series of allocation orders to include small distribution systems to two or more users.

6. The final statutory context is in the purpose of the Territorial Allocation Law as stated in ORS 758.405. The stated purposes are the promotion of "the efficient and economic use and development" of utility services, "safety of operation," and "adequate and reasonable service to all territories and customers affected thereby." For these reasons, it is necessary to "regulate . . . all persons and entities providing utility services." These purposes are served by reading ORS 758.450 to inhibit the construction and use of *all* unauthorized distribution systems for gas or electricity.

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The law creates monopolies in order to spread the costs of the distribution system to all available users, keeping the overall rates low. The qualitative effect of allowing a competing distribution system is the same no matter what the form of the ownership or size of the competing system. The competing system and loss of customers strands investments in the incumbent system, and forces the costs of the incumbent system to be spread among fewer users, increasing the utility rates. The law should be construed to prevent these consequences in all cases.

7. To the extent any ambiguity remains about the application of ORS 758.450(2) to small distribution systems for natural gas consumers, clarity is provided by the legislative history of the Territorial Allocation Law. The Public Utility Commissioner advocated the 1985 narrowing of the exceptions to ORS 758.450(2) from systems for "less than 20 customers" to those for "fewer than 20 residential customers." He testified to the Legislative Assembly that the purpose of this change was "to avoid the kind of disruption that could be caused by an industrial customer tapping into a gas pipeline, serving not only himself, but other nearby industrial customers." In short, the PUC testified that the Territorial Allocation Law restricts the very systems described in the assumed facts.

Thus, the assumed facts describe the provision of "utility service" and a violation of ORS 758.450(2). Before detailing these arguments further, a review of the history of this proceeding is in order.

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B. Statement of Material Facts.

1. Proceedings Before the Agency.

NW Natural filed an amended petition for declaratory rulings in July, 1999.[2] It sought declaratory rulings from the OPUC on the applicability of ORS 758.450(2) to the facts alleged in the amended petition. NW Natural sought these determinations with respect to two particular factual scenarios set out in the amended petition, as well as a generic fact pattern describing a "condominium bypass distribution system."

Paragraph 7 of the amended petition alleges a "state of facts" constituting a generic "condominium bypass distribution system." After alleging the existence and location of the Grants Pass Lateral interstate pipeline owned by Williams Gas Pipeline – West ("WGPW" also known as "Northwest Pipeline Corporation"), and the construction of a "bypass" pipeline connection to this interstate pipeline, the amended petition describes a "condominium bypass distribution system" 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.
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> 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.
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> 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.
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> 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.

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[2] To avoid confusion, the amended petition dropped a declaratory ruling request on whether the operator of a condominium bypass distribution system is a "public utility" under ORS 757.005(1), confining the question only to whether such an operator is a "person" under ORS 758.400(2).

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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.

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 NW Natural's allocated territory and in an area served by distribution facilities owned and operated by NW Natural.[3]

The parties briefed the issue of whether the construction, extension or offering of this "condominium bypass distribution system" would violate ORS 758.450(2). On June 9, 2000, the Commission issued Order No. 00-306 concluding that the presented or "assumed" facts created no violation of ORS 758.450(2).

The Commission concluded that the described condominium bypass distribution system was outside the restriction of ORS 758.450(2) because the association of industries that own the bypass pipeline provides distribution services to itself and not the public. The OPUC reasoned that,

> 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.

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[3] The assumed facts should be read in the context of the rest of the amended petition, including the particular allegations regarding the Willamette Industries and Oremet systems, and the contentions of law.

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Order No. 00-306, p. 12.

The Commission concluded that the provision of service by owners of a distribution system to themselves is not "utility service" because the purpose of the Territorial Allocation Law was to prevent duplication of facilities by public utilities, "not . . . preventing duplication of facilities that customers may use to provide service to themselves." *Id.* at 13. Since a condominium bypass distribution system did not violate this purported purpose of the law, there was no violation of ORS 758.450(2) by a consumer-owned distribution system. The Commission held that,

> We agree with the interveners 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 use 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 interveners 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.

Id.

NW Natural sought and obtained reconsideration of the order. Following oral argument before the Commission, the OPUC issued Order 01-719 on August 9, 2001. The Commission upheld its earlier determination and rejected NW Natural's arguments on reconsideration. It found the statutory definition in ORS 758.400 of "utility service" to be ambiguous. The meaning could only be determined from the "context" of the statute, from looking at the purpose of the Territorial Allocation Law as expressed in ORS 758.405 and from other parts of the law where the term "utility service" is used. If consumer-owned distribution systems are restricted by ORS 758.450(2),

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according to the Commission, 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." Order No. 01-719, p. 9. The Commission was unwilling to hold that these consumer-owned entities and systems could contract with other providers of utility services under the Territorial Allocation Law. *Id.* Thus, it concluded that these types of entities are outside the scope of the law.

The Commission again relied upon the "purposes set out in ORS 758.405" rather than analysis of the text of ORS 758.400 or 758.450(2). It held that,

> 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.

Id. at p. 10.[4]

2. The Court of Appeals Opinion.

NW Natural argued before the Court of Appeals that the analysis of ORS 758.450(2) adopted by the Commission was wrong. It contended that the Commission was wrong in its gloss that the statute does not restrict co-owners of facilities from providing service to themselves because:

a. ORS 758.450(2) states, "no other person shall offer, construct or extend utility service in or into an allocated territory." ORS 758.400 (2) defines "person" as including "associations" and "cooperatives." The statute prevents a cooperative or association from constructing a distribution

[4] The Commission orders were appealed to Marion County Circuit Court under ORS 756.580. The circuit court found that the "Commission failed to demonstrate how these unclear terms might be interpreted within the statute to reach the conclusion they gleaned from context – utility service does not encompass service by two or more consumers to themselves." June 10, 2002 Opinion Letter, p. 2. The court found that the assumed facts did not describe a "distribution system" because caselaw interpreting "distribution" under the Natural Gas Act require a larger, more

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system within an allocated territory and serving its members.[5] Yet this would be "operating to provide service to themselves through a mutually beneficial arrangement" in the words of the Commission. Surely, the Territorial Allocation Law applies to electrical cooperatives even if the members jointly own portions of the distribution system.

b. ORS 758.400 (3) speaks of the distribution of electricity "to users" and the distribution of gas "to consumers." Other parts of the Territorial Allocation Law talk about service to "customers," defined by ORS 756.010(3) to be "users of the service and consumers of the product of a public utility." The use of "consumers" of the service provided by particular equipment, instead of "customers," suggests that "utility service" does not depend upon legally distinct sellers and buyers. It merely requires the consumption of distribution services.

c. ORS 758.400 (2) defines "person" as including "individuals, firms, partnerships, corporations, associations, cooperatives and municipalities, *or their agent, lessee, trustee or referee.*" ORS 758.450(2) prevents this "agent" from offering, constructing or extending utility service. Thus, if an association nominates a member of the group to construct, extend or offer utility services to the members of the association (such as a "receiving party" as alleged in the assumed facts), the law restricts that agent. If an agent is providing utility service to someone other than its principal, it is not an "agent" but an "individual" otherwise included in the definition of "person" and limited by the law. The only reason to include "agent" in the definition of "person" is to cover situations where parties serve themselves through their agent.

d. ORS 758.405 states the purpose of the Territorial Allocation Law "to regulate in the manner provided in ORS 758.400 to 758.475 *all persons and entities providing utility services.*"

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complex system. Neither the Commission nor Wah Chang/NWIGU defended this rationale on appeal.

[5] There are dozens of electrical cooperatives in this state that provide electrical service to their

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The Commission's inferred limitation on ORS 758.450(2), that it does not operate against associations of persons providing service to themselves, runs against the statutory aim to regulate "all persons and entities providing utility services."

NW Natural also argued that the text of the statute suggests that ORS 758.450(2) applies to all connected and interrelated distribution systems, without regard to the form of ownership or size. All distribution systems are within the scope of ORS 758.450(2), if they use the type of equipment described in ORS 758.400(3). If the equipment could supply energy distribution services and is part of a "connected and interrelated system," then the supplied service is "utility service." Who owns the facilities is beside the point. NW Natural argued this because,

a. ORS 758.450(2) proscribes the "construct[ion]" of "utility service." The particulars of the service arrangements are not known at the time of construction of the distribution system. The *only* way of determining whether "utility service" is being constructed or extended is by looking at how the equipment would function – whether the stand-alone facilities could operate to transmit and distribute energy to more than one user. The nature of the equipment is the linchpin to the operation of the statute.

b. ORS 758.400(3) reveals that "utility service" is defined by the nature of the facilities, rather than the identity of the owner of the facilities or their size, with the following clues:

1) "'Utility service' means *service* . . . ." ORS 756.010(8) defines "service" by the nature of the equipment. It states, "'service' is used in its broadest and most inclusive sense *and includes equipment and facilities related to providing the service or the product served.*"

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members.

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b. ". . . service *provided by any equipment, plant or facility . . . .*" The text of the statute states that provision of "service" is "by any equipment, plant or facility," not as intervenors argued, provision of service "by a legally distinct seller of distribution services." "Service" is rooted to the functioning of "*any* equipment, plant or facility," and is not limited to non-consumer-owned equipment, plant or facility.

c. "*. . . 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 functioning of the "equipment, plant or facility" is circumscribed in two ways. First, the equipment must provide "service . . . for the distribution" of electricity or gas. It must function to transmit and distribute these energy commodities. Second, the facilities must be integrated and identifiable as part of a separate and mutual "system," i.e., not related to a different distribution system.

d. *"Utility service' does not include service provided through or by the use of any equipment, plant or facilities . . . .*" Again, the reference is to the function of the facilities -- service provided "through or by the use of any equipment, plant or facilities." "Service provided by any equipment" appears to be synonymous with "service provided through or by the use of equipment. . . *[that] are not used to provide service in . . . an area allocated to another person . . . .*" This is the final linkage of "utility service" to the function or use of particular equipment, plant or facilities.

The Court of Appeals agreed with these arguments and reversed the rulings of the Commission, and found the circuit court determination to be improper. *Northwest Natural Gas Co. v. PUC,* 195 Or App 547, 99 P3d 292 (2004). In the earlier proceedings, as recounted by the Court of Appeals, "Northwest argued . . . that . . . the two or more industrial consumers who jointly own

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and operate [a condominium bypass pipeline] are a 'person' within the meaning of ORS 758.400(2)." *Northwest Natural Gas Co. v. PUC, supra,* at 552. In the orders under review, "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)." *Id.* at 557.

The Court of Appeals rejected the position of the PUC and Intervenors on the meaning of "person." The Court held,

> . . . [T]he 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. . . . 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 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.

Id. at 557-58.

The second question in the case was whether "service" is provided when joint entities provide gas to their members. The Commission's earlier orders concluded that self-service was not "service" within the definition of "utility service" at ORS 758.400(3). This determination was reversed by the Court of Appeals:

> The PUC also erred in its explicit determination that a condominium bypass distribution system does not involve the provision of utility service . . . . 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

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> of distribution to more than one user of electricity or more that 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.
>
> 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. 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 connection to the pipeline.

Id. at 558-59 (footnotes omitted).

The final issue decided by the Court was what constitutes the "distribution . . . of natural or manufactured gas to consumers" under the ORS 758.400(3) definition of "utility service." The word "distribution" is used twice in the definition of "utility service," first to require that the "equipment, plant or facility" can be used for the "distribution . . . of natural or manufactured gas to consumers," and, second, to require that this provision be "through a connected and interrelated distribution system."

The meaning of the first phrase was decided by the Court of Appeals. The Court found that '[i]t is the physical act of distribution to more than one user or electricity or more than one consumer of natural gas that constitutes utility service." 195 Or App at 558. This means that "distribution" occurs when the natural gas is divided among two or more consumers.

What remains for decision under the July 20 Ruling is whether a "connected and interrelated distribution system" includes facilities where, as alleged in the assumed facts, a bypass pipeline is connected to the WGPW interstate pipeline and "natural gas is transported through [this] bypass

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pipeline" and "two or more lateral pipelines" to "two or more privately-owned industrial consumers of natural gas," and 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." The "lateral pipelines may be constructed after the construction and initial operation of the bypass line and provide an extension of utility service." Amended Petition, ¶ 7.

The answer is apparent. The assumed facts describe a system where gas is distributed to two or more users, and the system is mutual and self-contained and a part of a different distribution system. This is plainly a "connected and interrelated distribution system." The only contrary argument raised by Intervenors is that "distribution system" means a system providing service to a very large number of consumers.[6] That contention is contrary to the text, context and legislative history of the statute.

C. Framework for Interpretation of ORS 758.450(2).

The remaining question requires the application of the statutory construction principles of *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1995). There, the Oregon Supreme Court dictated that "the text of the statutory provision itself is the best evidence of the legislature's intent" together with "rules of construction of the statutory text that bear directly on how to read the text," as well as "the context of the statutory provision at issue, which includes other provisions of the same statute and related statutes . . . ." If the intent is not clear from this examination, then a court or agency should consider "legislative history" of the statute. If the meaning is still unclear, a court or agency "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty . . . ." One of the "general maxims of statutory construction" used in this third level of *PGE* analysis is that language of a statute should be

[6] Note that the assumed facts describe a system with a very large number of users as well, depicting a system with "two or more" consumers.

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construed in a manner consistent with its assumed purposes. *Bartz v. State of Oregon,* 314 Or 353, 358, 839 P2d 217 (1992); *Linn-Benton-Lincoln Educ. Assn. v. Linn-Benton-Lincoln ESD,* 163 Or App 558, 570, 989 P2d 25 (1999).

This methodology was modified by amendments to ORS 174.020, enacted in 2001. ORS 174.020(1)(b) and (3) now provide that "To assist a court in its construction of a statute, a party may offer the legislative history of the statute. . . . A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

D. The Text of the Statute.

Again, "utility service" is defined by ORS 758.400(3) to be,

> "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.

The commonly understood meaning of "distribution system" in this context pertains to the functioning of the equipment. "Distribution" is defined by *Webster's Third New International Dictionary*, p. 660 (3d ed. 1960), as it pertains to a "system" as,

> [A] device, mechanism, or system by which something is distributed (as from a main source): as a : the operations regulating the passage of the working fluid (as steam) through an engine cylinder including admission, cutoff, release, exhaust, and compression b : the pattern of branching and termination of a nerve, artery, or other ramifying structure c : the part of an electric supply system between bulk power sources (as generating stations or transformation stations tapped from transmission lines) and the consumers' service switches.

Within this context, a "distribution system" is simply the part of the gas supplier transportation chain that carries and delivers the gas to consumers' meters after it leaves the natural gas source and following transportation on interstate pipelines. That is what is described in the

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assumed facts. The text of the statute also supports defining "distribution system" by its function, rather than its size.

First, "utility service" is defined by what it is not – something other than the excluded "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." This implies that transmission facilities that *are* used to provide service or that terminate in an allocated territory are within the meaning of "utility service." Thus, *any* equipment or facility located in an allocated territory that is used to provide natural gas to consumers, or terminates in an allocated area, is within the scope of "utility service."

Second, "utility service" is defined as the distribution of gas to "users" or "consumers." The definition is met when the system distributes gas to *more than one* user or consumer. ORS 758.400(3) does not qualify the number of users of consumers to several or many. If the equipment, plant or facility allocates gas to "consumers," to more than one consumer, it comes within the meaning of the "distribution of natural . . . gas" and "distribution system."

The ordinary meaning of "connected" is the state of being "joined or linked together." *Webster's Third New Int'l Dictionary,* at p. 480. Here, the assumed facts describe a system where the bypass pipeline is joined to the interstate pipeline, and linked to two or more lateral pipelines. The system is "connected."

"Interrelated" is defined as ""having a mutual or reciprocal relation or parallelism." *Id.* at 1182. Each of the descriptors in this definition, "mutual," "reciprocal," and "parallelism," describe some common shared interest. "Mutual" is defined as "possessed, experienced, or done by two or more persons at the same time: joint;" and "of or relating to a plan whereby the members of an organization share in the profit, benefits, expenses, and liabilities." *Id.* at 1493. "Parallelism" is defined as "resemblance, correspondence, similarity < ~ of interests>." *Id.* at 1637. "Reciprocal" is defined as "corresponding to each other: being equivalent or complementary." *Id.* at 1895.

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Synonyms of "reciprocal" include "mutual" and "common." *Id.* In addition, *Webster's* states that "reciprocal" may include two or more parties: "[c]ommon conveys no suggestion of reciprocity between two parties or agencies; instead it indicates the fact of joint participation or possession among any number." *Id.*

Regardless of the descriptor considered, the assumed facts fit within the definition of "interrelated." Each of the industries served "obtain[s] natural gas from a single connection to the WGPW interstate pipeline" through a mutual "bypass pipeline" that is intended for use by all of the connected users. Amended Petition, ¶ 7. Of course, without the lateral lines leading to industrial plants, a bypass pipeline is useless. It is this mutuality or commonness that makes the system "interrelated."

Putting this together, the text of ORS 758.400(3) states that a "connected and interrelated distribution system" is one that serves two or more users, is composed of equipment that functions to supply natural gas to end users, where parts of the system are joined with each other, and other parts function to provide common or mutual benefit. That is what the assumed facts describe.

E. Context of the Statute.

This meaning of ORS 758.400(3) is supported by the context of the statute. The first clue about the scope of "utility service" comes from the ORS 758.450(4) exceptions to the restriction in ORS 758.450(2) on offering, constructing or extending a "utility service." ORS 758.450(4)(b) exempts from the application of ORS 758.450(2), the provision of heat, light or power by any corporation, company, individual or association of individuals,

> From any energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers.

This exemption makes clear that the restriction is intended to apply to the provision of utility services to small groups *of industrial* customers by an association of individuals.

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This exception was revised and narrowed in 1985 from its prior form to only allow service to less than 20 "residential" customers in an allocated territory. Previously, the Territorial Allocation Law was amended in 1981 to exclude certain renewable energy facilities from its scope. A parallel amendment excluding these facilities from the definition of "public utility" at ORS 757.005 was enacted. The 1981 law exempted any entity serving 20 or fewer customers from utility regulation and the restrictions of the Territory Allocation Law.[7]

The Oregon Public Utility Commissioner became concerned that some entity might begin serving 19 or fewer large industrial customers and sought to narrow the exemptions created by the 1981 law. He introduced HB 2202 in the 1985 Legislative Assembly and lobbied in its support. According to a statement provided to the House Committee on Environment and Energy on February 15, 1985, the Commissioner explained that ". . . if the energy supplier exempted as a utility under the law because it serves less than 20 larger commercial and industrial customers, which the current law permits, a sizable amount of a serving utility's load would cease. This could cause other utility customers to pay higher rates to cover the utility's fixed costs of service as the loss of revenues occurs." The measure, adopted as Oregon Laws, 1985, chapter 779 limited the exemption to certain energy renewable resources or service "to fewer than 20 *residential* customers."

Thus, the narrowed scope of the exceptions to the limitations of ORS 758.450(2) suggest that the statute covers associations of individuals who provide utility services to fewer than 20 industrial consumers. There is no exception for service to small groups of industrial consumers. If the intent is to include systems supplying fewer than 20 industrial consumers, and two or more

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[7] Oregon Laws, 1981, ch. 360 amended ORS 757.005(2) and ORS 758.450(4) to exclude from the definition of "public utility" and from the scope of the Territory Allocation Law "any corporation, company, individual or association of individuals providing heat, light or power to less than 20 customers."

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consumers is not the test for "distribution system," then where should the line be drawn? What part of the text and context of the statute allows the Commission to say that 12 industrial consumers constitute a "distribution system," but 11 consumers do not? The only logical line to draw is to give literal effect to ORS 758.400(3) and conclude that a distribution system is one that serves more than one consumer.

The second statutory context comes from the parallel territorial allocation scheme for water utilities under ORS 758.300 to 758.320. The Commission can allocate territory to a "water utility" under ORS 758.302. Other persons are prohibited from providing water "utility service" within this territory. The Commission adopted a nearly identical definition of "utility service" for this regulation as set out in ORS 758.400(3). OAR 860-036-0900(1)(c) provides:

> "Utility service" means service provided by a water utility as defined in subsection (1)(d) of this rule, any equipment, plant, or facility for *the distribution of water to users 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 solely for the production and sale of water to other water utilities. (Emphasis added.)

To qualify for allocation of service territory, it is necessary that the applicant show that it does, in fact, provide "utility service" to the proposed service territory. In many cases, the Commission has recognized that applications to serve less than 20 customers qualify as "utility service," and a "connected and interrelated distribution system." In *Matter of the Application by T J Water System*, Or PUC Order 01-1103, the Commission granted an application to provide exclusive water service to two customers in the Salem area. The Order does not describe the size or extent of the infrastructure for the exclusive service; however, it does recognize that the consumption in the service area is small—with an average monthly water bill of $15 for each of the customers in the service area. There are several Commission decisions recognizing exclusive service areas

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containing relatively few customers.[8] The size or complexity of utility infrastructure (as opposed to its function or use) does not appear to have any bearing on whether there is a sufficiently "connected and interrelated distribution system."

The final contextual observation comes from the stated purposes of the Territorial Allocation Law. ORS 758.405 states the purposes of the Territorial Allocation Law to be,

> 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.

The purpose of the law is not precisely the "elimination and future prevention of duplication of utility facilities" as suggested by the Commission earlier. That is the condition that is the matter of "statewide concern." Instead, the purposes of the law are the promotion of "the efficient and economic use and development" of utility services, "safety of operation," and "adequate and reasonable service to all territories and customers affected thereby."

Here, the allowance of competing distribution systems within the allocated territory of NW Natural not only duplicates its existing distribution facilities, it also raises the rates of NW Natural's core customers by removing customers from the utility revenue stream, thus increasing the contribution to fixed costs by the remaining customers. This affects the "reasonable service," i.e., the cost of service to these remaining customers and the "efficient and economic use" of the NW Natural distribution system.

Thus, the Territorial Allocation Law operates to keep utility rates low. Those rates are set by the Commission at a level sufficient to pay for capital facilities and operational expenses and

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[8] *See e.g., Matter of the Application by Little Jack Falls Water System*, Or PUC Order No. 01-498 (6 customers); *Matter of the Application by Labish Gardens Water System*, Or PUC Order No. 01-863 (same); *Matter of Moran Water System Application*, Or PUC Order No. 02-427 (7 customers); *Matter of the Application by Lunnville Water District*, Or PUC Order No. 02-098 (14 customers). There are at least 12 other granted applications to water providers serving less than 20 customers.

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provide a reasonable rate of return to public utility investors. When a utility invests in a distribution system, it earns a return on that investment through the revenues received from customers served by the facilities. The Territorial Allocation Law assures that return by creating exclusive service territories.

The vice of "duplication of utility facilities" is that a utility's investment is soured by construction of duplicative facilities that allows otherwise assured customer revenues to be paid to a competitor. When that happens, the remaining customers of the utility pay for the oversized or unused facilities through higher rates. The costs of the facility are spread over fewer customers. To the extent the competing distribution system is oversized, the customers of the competitor may pay higher rates as well.

The reason why the Territorial Allocation Law avoids the duplication of utility facilities is not because the duplication is untidy or confusing. It is because public utility customers pay for the duplication by paying higher rates for facilities stranded by the duplication. This happens whether or not the competing system is owned by a public utility or owned by the customers it serves. It happens when the competing system serves two large industrial consumers or 25 residential customers. The purpose of the law, in the words of ORS 758.405, is to promote the "efficient and economic use" of existing utility facilities.

These effects occur without regard to whether the competing system sells natural gas to a limited group of consumers, or to the public at large. It is consistent with the purposes of the Territory Allocation Law to conclude that the construction and operation of a condominium bypass distribution system of any size violates ORS 758.450(2).[9]

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[9] Order 00-306 curiously concludes that construction and extension of an alternative distribution system within an area already served by an incumbent utility's distribution facilities is not "duplicative," because the duplicative facilities are not paid for by the customers of the incumbent utility. (". . . [T]he purpose of the antiduplication *(sic)* provision is to protect the customers of

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Thus, the context of the statute supports the view that a "utility system" is any mutual or shared system that could function to deliver and parcel out or distribute natural gas to two or more consumers.

F. Legislative History.

To the extent any ambiguity remains, the legislative history of the law confirms that it covers small-scale distribution systems to two industries. As noted earlier, the exceptions to ORS 758.450(2) were narrowed in 1985 (from systems for "less than 20 customers" to "fewer than 20 residential customers") in order to preclude the sale of co-generated power by one industrial concern to another. As suggested in the testimony before the Senate Committee on Energy and Natural Resources on June 6, 1985, the changes were to "address the concern of pirating industrial customers from an existing utility by people involved in co-generation or in the development of other resources." Minutes, p. 2.

Representative Verner Anderson, a sponsor of the bill, testified that changes were necessary to prevent industrial customers and small utilities from violating exclusive service territory allocations. He noted that,

> SENATOR BRADBURY asked if the bill was attempting to address the concern of pirating industrial customers from an existing utility by people involved in co-generation or in the development of other resources. REPRESENTATIVE ANDERSON responded that this was the basic concern.

Minutes, Senate Committee on Energy and Natural Resources, HB 2202, June 6, 2005 (statement of Rep. Anderson).

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utilities from having to pay for duplicate facilities which do not benefit them." Order, p. 13, R. 409.) But overlapping and duplicative facilities of an alternative provider of service in an allocated territory are *always* paid for by the new competitor. The policy of the statute is not to prevent duplicative facilities by a single provider. It is to prevent alternative distribution systems for the same area by *different* providers of service. That is what happens when a condominium bypass distribution system is built to serve present or former customers of NW Natural.

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Most significantly, Public Utility Commissioner Gene Maudlin explained that the reduction of shared infrastructure costs motivated the change:

> MAUDLIN then testified that it was possible to get power from BC HYDRO, a Canadian state-owned corporation, into this territory by using mostly Bonneville Power lines. They are anxious to sell the surplus power; it could do so to someone down here *who can then use some of it for personal purposes and sell the rest to an adjoining industrial utility, under the present law. PUC would not like to see that happen.* SENATOR BRADBURY asked why not. It seemed that the benefits are that the people would get the lower cost power that is available to industrial customers, which would help in their ability to continue to survive. *MAUDLIN stated that it would also result in higher cost power to the remaining customers who continue to pay the embedded costs of the existing utilities.* He added that, at the present time, it was a balancing act with a stabilization of prices due to the competitive market.
>
> SENATOR BRADBURY clarified that there is competition which presumably either keeps prices stable or drops them. He asked if this had the effect of shifting the embedded cost on to other customers. MAUDLIN stated that if the utilities, or the oil companies, want to lower the rates to industrial customers who have alternative sources, other customers would not be disadvantaged. The same assurance could not be given if an industrial customer was to be served by anyone. *He added that PUC was trying to avoid the kind of disruption that could be caused by an industrial customer tapping into a gas pipeline, serving not only himself, but other nearby industrial customers.*

Minutes, Senate Committee on Energy and Natural Resources, HB 2202, June 6, 2005 (testimony of Public Utility Commissioner Gene Maudlin) (emphasis added).

So the OPUC itself sponsored a change to the Territorial Allocation Law to expand its effect, in order to assure that the law covers "an industrial customer tapping into a gas pipeline, serving not only himself, but other nearby industrial customers." That is exactly the scenario described in the assumed facts. Indeed, a catalyst for filing the declaratory ruling petition was Oremet's solicitation of other consumers to connect to its bypass pipeline – the very "kind of disruption" the law was intended to prevent! *See*, Amended Petition, ¶¶ 15-17. To whatever extent it is unclear, the legislative history of ORS 758.450(2) supports its application to small distribution systems to two or more industries.

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Finally, the legislative history makes it clear that the intent was have the Territorial Allocation Law apply to small systems of two or more consumers, even if those systems were not otherwise subject to regulation as "public utilities" under ORS 757.005. Before the House Committee on Environment and Energy, the legislators and the committee administrator clarified that,

> [Administrator] SARA BAKER, questioned who else would be included in the legislation in addition to the well established utilities and said *she felt any small power producer, if they operate a renewable resource generation project, and serve only one industrial customer, under the legislation they would become subject to PUC regulation.* BAKER asked whether there is concern about the ability to see alternative energy generation projects to begin or succeed under this proposed legislation. REPRESENTATIVE EACHUS agreed with BAKER stating that he felt the amendments on page 2 deal with the territorial problem and the amendments provide that if you have a commercial or industrial customer than you are subject to existing territorial and allocation provisions in existing law; *REPRESENTATIVE EACHUS noted that the previous witness had indicated that it was not necessary to regulate someone who only has one commercial or industrial client making them a public utility regulated by the PUC but that it is necessary that they are subject to the territorial provisions.*

Minutes, House Committee on Environment & Energy, HB 2202, February 15, 1985 (emphasis added). In other words, the amendments in 1985 were intended to be applied broadly to "distribution systems" that served only one additional industrial customer, as well as to entities that are not otherwise utilities subject to PUC regulation.

G. Conclusions.

The assumed facts describe a "connected and interrelated distribution system." The preliminary issues of whether a "person" is violating ORS 758.450(2), whether a "service" is provided, and whether "distribution" occurs, were decided by the Court of Appeals. The remaining issue has not been particularly contested in the past six years, because the meaning of "connected and interrelated distribution system" is fairly obvious.

A "connected and interrelated distribution system" is one that serves two or more users, composed of equipment that functions to deliver natural gas to end users, where parts of the system

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are joined with each other, and other parts function to provide common or mutual benefit. This is what the plain meaning of the words suggests.

It is also the meaning implied by the context of the statute – by its intended application to small-scale systems of fewer than 20 consumers, by categorizing "distribution system" as a matter of the system's function or terminus, and by the purpose of the regulation as avoiding stranded capital investments.

Finally and significantly, it is the formal view of the OPUC, and the stated purpose for legislation it sponsored to expand the reach of the Territorial Allocation Law, that the law works to "avoid the kind of disruption that would be caused by an industrial customer tapping into a gas pipeline, serving not only himself, but other nearby industrial customers."

In order to avoid this kind of disruption, the Commission should determine that the assumed facts describe a "utility system" and a violation of ORS 758.450(2) by that system's construction, operation or extension.

DATED this 30 day of August, 2005.

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CERTIFICATE OF SERVICE

I certify that on August 30, 2005, I served the foregoing **OPENING MEMORANDUM OF PETITIONER NW NATURAL** on the parties listed below, by mailing, postage prepaid, a true, complete and correct copy by U.S. mail and electronic mail.

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