

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

DR 23

In The Matter of	)	
	)	
NORTHWEST NATURAL GAS	)	
COMPANY,d/b/a NW Natural,	)	
	)	
Petition for a Declaratory Ruling	)	RULING
Regarding Whether Joint Bypass By Two	)	
Or More Industrial Customers Violates	)	
ORS 758.400 Et Seq.	)	

**DISPOSITION: ISSUES LIST ESTABLISHED**

On July 5, 2005, Wah Chang and Northwest Industrial Gas Users (NWIGU) submitted a statement of legal issues. On July 7, Northwest Natural Gas (NW Natural) submitted a statement of legal issues and replied to the July 5 filing. On July 15, Oregon Steel Mills (OSM), Commission Staff (Staff), and Wah Chang and NWIGU filed additional comments on an issues list to be set in this case.

The question to be resolved in this case is whether the arrangement set forth in paragraph 7 of NW Natural’s Amended Petition for Declaratory Rulings (filed July 7, 1999) (“the Assumed Facts”) constitutes a “utility service” as defined in ORS 758.400(3). The statute defines “utility service” as “service provided by any equipment, plant or facility for the distribution of \* \* \* natural or manufactured gas to consumers though a connected and interrelated distribution system.” 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. The remaining issues proposed by the parties are addressed below.

**Relevant Facts For a Declaratory Ruling**

Under ORS 756.450, the 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.” The Commission discussed the practical

application of the declaratory ruling statute when it refused to resolve factual disputes regarding real situations and enforcing a ruling against parties that were not the petitioner for the declaratory ruling. *See* Order No. 00-306 at 11. The Commission revisited the subject in the order on reconsideration:

[A] declaratory ruling is not a vehicle for determining disputed facts. \* \* \* 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.

Order No. 01-719 at 3. Those fundamental principles of declaratory rulings remain unchanged: A ruling must be based on assumed facts set forth by the petitioner, and any ruling is binding only on the petitioner to the extent the actual situation resembles the assumed facts. To the extent that Wah Chang and NWIGU's proposed issues 1, 2, 4, 9, rely on facts different from those in the Assumed Facts, they will not be considered in this case. In addition, Wah Chang and NWIGU's issues 11, 12, and 13, and OSM issue 3 appear to rely on factual disputes set forth by those parties. For the same reasons, those issues also will not be considered.

This case shall be based on the Assumed Facts in NW Natural's Amended Petition of Declaratory Ruling, DR 23 (July 2, 1999): "The construction and operation of a lateral pipeline for the benefit of a privately-owned industrial consumer of natural gas which is connected to a new or existing bypass pipeline constructed operated in whole or in part for the benefit of a separate privately-owned industrial consumer," and having characteristics set forth in detail in the Court of Appeals opinion, *Northwest Natural Gas Co. PUC*, 195 Or App 547, 550-51, 99 P3d 292 (2004).

## **Federal Law**

At the beginning of this case, intervenors raised an issue as to the "interrelationship between federal and state law as they relate to jointly owned direct connection facilities." A ruling stated that the Commission would only consider issues within the scope of the declaratory ruling petition, and issues outside the petition could be the subject of a declaratory ruling petition filed by intervenors. *See* Ruling, DR 23 (July 24, 1999). In its order, the Commission also rejected intervenors' arguments that federal law controlled the case. *See* Order No. 00-306 at 11.

The intervenors raised the issue again on remand: Wah Chang and NWIGU ask, "If the Commission reverses its earlier decisions, will this create a conflict between state and federal law?" OSM also inquired whether the Commission's decision is preempted by federal law, and a declaratory ruling should not be issued in this case.

NW Natural notes that intervenors did not appeal or seek reconsideration of the Commission's decision not to address federal law.

NW Natural's petition only raises questions of state law, so issues of federal law are not suited to this proceeding. As noted above, the decision made in a declaratory ruling binds only the petitioner, and this decision is only helpful to petitioner to the extent that it resolves all relevant issues that would arise in an actual situation.

### **Interpretation of Territory Allocation Laws**

Wah Chang and NWIGU also argue for inclusion for issues 6 and 8, which consider the intention of the Territory Allocation Law. In its decision remanding this case to the Commission, the Court of Appeals noted that the Commission failed to interpret the words of the statute, and instead relied heavily on the purposes of the Territorial Allocation Law. *See Northwest Natural Gas Co.*, 195 Or App at 556. Consideration of the intention of the law is appropriate only through the steps of statutory interpretation set out in *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1995). We will examine the intentions behind the law if we reach that step in our analysis of the statute in the issue set out for consideration in this docket, but not separately address the intentions behind the law.

### **Issues Decided by Court of Appeals**

Wah Chang and NWIGU also proposed issue 10, whether the arrangement in NW Natural's assumed facts constitutes "a cooperative, partnership or other legal arrangement providing utility service." The Court of Appeals identified the entity in the assumed facts as an association under ORS 758.400(2). *See Northwest Natural Gas Co.*, 195 Or App at 557. We will not revisit the matter. As to whether "utility service" is provided, that shall be addressed in briefing as discussed above.

NW Natural argues that the only issue on remand is whether the stated facts in the amended petition constitute a distribution system that is "connected and interrelated" within the meaning of the definition of "utility service" under ORS 758.400(3). NW Natural would omit the word "distribution" from argument, asserting that the Court of Appeals decided that matter. Staff agrees with NW Natural. OSM and Wah Chang and NWIGU argue that NW Natural reads the Court of Appeals decision too narrowly and that the scope of the remand by the Court of Appeals is broad and require review of the assumed facts and a determination as to whether those facts constitute a violation of Oregon law.

The Court of Appeals focused on the Commission's failure to recognize the entity in the Assumed Facts as a person or subject to which the statute applies. *See Northwest Natural Gas Co.*, 195 Or App at 558. After its discussion of the entity as an association, the Court states:

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

The Court appears to define "utility service" in that paragraph, not just "distribution." However, it remanded this case to the Commission for reconsideration. That would have been unnecessary if the Court had determined the definition of both "person" and "utility service" in light of NW Natural's petition.<sup>1</sup> The Court ends its discussion by noting the distinctions between customers and consumers.

It appears that the Court's opinion does not determine the meaning of "distribution" in the context of NW Natural's petition. Accordingly, subsequent briefing should address the entire definition of "utility service" as set forth in ORS 758.400(3).

Dated at Salem, Oregon, this 20th day of July, 2005.

---

Christina M. Smith  
Administrative Law Judge

---

<sup>1</sup> The Court also noted that none of the exceptions in ORS 758.450(4) apply to this petition. *See* Northwest Natural Gas Co., 195 Or App at 551 n 2.