

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR-23

In the matter of the petition of)	
Northwest Natural Gas Company For)	NW NATURAL'S STATEMENT OF
a Declaratory Ruling Pursuant to)	LEGAL ISSUES AND RESPONSE
ORS 756.450 Regarding Whether)	TO WAH CHANG AND
Joint Bypass by Two or More)	NORTHWEST INDUSTRIAL GAS
Industrial Customers Violates ORS)	USER'S STATEMENT OF LEGAL
758.400 Et Seq.)	ISSUES
)	

Statement of Legal Issue on Remand:

There is only one issue before the Commission on remand:

1. Is the distribution system described in Paragraph 7 of the Amended Petition for Declaratory Ruling one that is "connected and interrelated" within the meaning of the definition of "utility service" under ORS 758.400(3)?

Response to Wah Chang/NWIGU Statement of Legal Issues:

The decision in *Northwest Natural Gas Co. v. PUC*, 195 Or App 547, 99 P3d 292 (2004) was the culmination of five years of litigation on the meaning of "utility service" under ORS 758.400(3). The Court of Appeals decided the core issues litigated by the parties, leaving a discrete issue to be decided on remand. The core issues in that litigation were whether:

1. The mutual or joint operation of a bypass pipeline creates an accountable entity under the Territorial Allocation Law, a "person" as defined by ORS 758.400(2);
2. The system described in the assumed facts in the declaratory ruling petition was one for the provision of "service" within the statutory meaning of "utility service;" and,

3. The system described in the assumed facts in the declaratory ruling petition was one for the “distribution” of natural gas within the statutory meaning of “utility service;”

These questions were argued and briefed before the Commission and the Court of Appeals. These same issues were decided by the Court of Appeals. Intervenors lost. Intervenors’ statement of legal issues revisits these decided issues, expands the scope of the proceedings beyond the question raised in the amended petition for declaratory ruling, and seeks to snatch victory from the jaws of defeat.

The Issues Are Limited To Those Raised in the Amended Petition for Declaratory Ruling.

This case arises from an amended petition for declaratory ruling under ORS 756.450. That statute provides that,

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.

This proceeding, then, is limited to rulings on “the state of facts alleged” in the amended petition for declaratory ruling, i.e., whether the facts alleged in paragraph 7 of the amended petition describe a violation of ORS 758.450(2).

In their statement of legal issues, Intervenors pose issues based on different facts and raise legal questions not addressed in the amended petition. For example, Paragraph 7 asks the Commission to determine whether the construction of “utility service” adopted by the Court of Appeals conflicts with federal law. In its earlier order, the Commission determined that impact of federal law was immaterial in this proceeding. The Commission held that,

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, (sic) 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.

Order No. 00-306, p. 11.

Intervenors did not seek reconsideration of this holding or appeal from the order. The Commission's conclusion was correct and is the law of this case. The proceeding is confined to the legal questions and assumed facts stated in the declaratory ruling petition.

In addition to attempting to inject the federal question back into the case, Intervenors rephrase the assumed facts in "Paragraph 1" of their statement of legal issues, and seek determinations based on these different factual parameters. Again, the relevant factual premises are the assumed facts, the "state of facts alleged," nothing more and nothing less. Paragraphs 1, 2, 4, 9, 11, and 12 of Intervenors' statement of legal issues recast the questions in this case beyond the confines of ORS 756.450 and the earlier rulings of the Commission.

The Meaning of "Person" Under ORS 758.400(2)

The sole issue before the Commission, the focus of its two earlier orders and the decision of the Court of Appeals, was whether the facts described in paragraph 7 of the amended petition for declaratory ruling stated a violation of ORS 758.450(2). That statute provides that, with exceptions, "no other person shall offer, construct or extend utility service in or into an allocated territory." "Person" is defined by ORS 758.400(3) to include "individuals, firms, partnerships, corporations, associations, cooperatives and municipalities, or their agent, lessee, trustee or referee."

In the earlier proceedings, as recounted by the Court of Appeals, “Northwest argued . . . that . . . the two or more industrial consumers who jointly own 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.

Intervenors seek a different decision from the Commission. Paragraph 1 asks whether the circumstance of “two or more privately-owned end use consumers [that] own natural gas piping directly connected to an interstate natural gas pipeline” create a potential violation of the Territorial Allocation Law. Paragraph 6 asks whether the law is “intended to prevent the self-provision of natural gas via privately-owned pipes.” Paragraph 8 questions whether the result reached by the Court of Appeals is “consistent

with the purpose of the territory allocation law – to prevent the duplication of service.”

Paragraph 9 questions whether “two or more privately-owned end use consumers [that] own natural gas piping directly connected to an interstate natural gas pipeline” is the “equivalent to a cooperative, partnership or other legal arrangement providing utility service.” Paragraph 10 states the issue to be whether the assumed facts describe “a cooperative, partnership or other legal arrangement providing utility service.”

This issue – whether joint ownership and operation of a bypass pipeline creates an “association” and “person” providing utility service – was decided by the Court of Appeals. Intervenor did not appeal that decision and it is the law of the case. The issue is not before the Commission on remand.

The Meaning of “Service”

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:

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 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.

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.

The Court decided that the alleged joint operation and ownership of a bypass pipeline and provision of natural gas to more than one consumer was “service” within the meaning of “utility service.” Intervenors’ statements of issues in Paragraphs 1, 2, 3, 6, and 8 seek a different determination from the Commission and stray beyond the law of the case.

The Meaning of “Distribution . . . of Natural Gas”

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. To whatever extent Intervenors’ statement of legal issues in Paragraphs 1, 2, 3, 6, 8, 11 and 13 seek to re-litigate this issue, they go beyond the law of the case.

“Connected and Interrelated System”

The sole issue on remand is whether the described system is “connected and interrelated” under the ORS 758.400(3) definition of “utility service.” The Court of Appeals phrased this issue by noting that 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.’” *Id.* at 559. It then stated that the parties had briefed “whether the bypass and lateral pipelines constitute a *connected and interrelated system*.” (Emphasis supplied.) The Court then remanded the issue “for the PUC to consider on remand in light of the controlling statutory definitions.” *Id.* at 560.

The Court was particular in its statement of the remand issue. The issue is not whether the described system is a “connected and interrelated *distribution* system,” but rather whether it is a “connected and interrelated system.” The issue of whether the described system functions to distribute gas was decided in the earlier holding that the facilities were for “distribution . . . of natural or manufactured gas to consumers.” The only remaining issue was whether the system described in the assumed facts was “connected and interrelated.” To the extent Intervenors’ statement of legal issues in Paragraphs 1, 2, 3, 4, 5, 6, 8, 11, 12, and 13 seek to litigate the meaning of “distribution,” they are beyond the scope of the remand.

The meaning of “connected and interrelated” is the sole issue on remand. The assumed facts described the system in paragraph 7(f) as,

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.

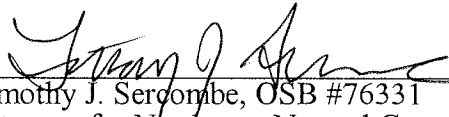
This description and other facts in the amended petition set the sole context for determining whether the system is “connected and interrelated.” The other parameters raised in Intervenor’s statement of legal issues at Paragraphs 1, 2, 4, 11, 12, and 13 are beyond the scope of the proceedings.

Conclusion

The remand issue is limited to whether the assumed facts describe a system that is “connected and interrelated” within the definition of “utility service” at ORS 758.400(3). NW Natural accepts Intervenor’s statement of legal issues in their Paragraph 5 with the omission of the word “distribution” from the statement.

DATED this 5th day of July, 2005.

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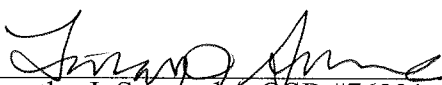
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NW NATURAL'S STATEMENT OF LEGAL ISSUES AND RESPONSE TO WAH CHANG AND NORTHWEST INDUSTRIAL GAS USER'S STATEMENT OF LEGAL ISSUES on the parties on the following current Service List in DR-23, via email and U.S. Mail, postage prepaid

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DATED this 5th day of July, 2005.

RESPECTFULLY SUBMITTED,

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