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August 30, 2005

VIA ELECTRONIC FILING

Oregon Public Utility Commission
Attn: Filing Center
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Re: 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.*
Docket No. DR-23

Dear Filing Center:

Enclosed for filing is the original and five (5) copies of Wah Chang and the Northwest Industrial Gas Users' Opening Brief in the above-referenced Docket.

Respectfully submitted,

Edward A. Finklea

Edward A. Finklea

:rls
Enclosures

cc w/enc: Current Service List

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 Regarding Whether Joint Bypass By Two Or More Industrial Customers Violates ORS 758.400, *Et Seq.*	WAH CHANG AND THE NORTHWEST INDUSTRIAL GAS USERS' OPENING BRIEF

I. 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 P3d 292 (2004). The Court of Appeals found legal deficiencies in the Commission's Orders and therefore remanded this case to the Commission for further consideration. On remand, the Commission must determine, among other things, whether activities by hypothetical entities conducting themselves as described under Northwest Natural Gas Company's ("NW Natural") hypothetical facts violate NW Natural's exclusive service territory.

II. PROCEDURAL HISTORY

On March 19, 1999, NW Natural filed a petition for a declaratory ruling with the Commission pursuant to ORS § 756.450. NW Natural asked whether two or more industrial gas consumers operating what NW Natural coined a "condominium bypass distribution

system" violates NW Natural's exclusive service territory under ORS § 758.400 *et seq.* On June 9, 2000, the Commission determined that the facts described in the Amended Petition did not constitute a violation of ORS § 758.450(2). *In re Northwest Natural*, OPUC Docket No. DR 23, Order No. 00-306 (June 9, 2000) ("Order No. 00-306"). On August 7, 2000, NW Natural filed an Application for Reconsideration. On August 9, 2001, the Commission reconsidered and affirmed Order No. 00-306, determining that the facts described in the Amended Petition do not constitute a violation of ORS § 758.450(2). *In re Northwest Natural*, OPUC Docket No. DR 23, Order No. 01-719 (August 9, 2001) ("Order No. 01-719.") In that Order the Commission concluded:

> 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 and arrangement with another coequal customer. Order No. 01-719 at 8-9.

On October 8, 2001, NW Natural filed a Complaint with the Marion County Court requesting the Court to modify, vacate or set aside OPUC Order Nos. 00-306 and 01-719. The Marion County Court affirmed the Commission's decision.

NW Natural then appealed to the Oregon Court of Appeals. The Court of Appeals reversed the Commission's Orders and determined that to constitute a violation of ORS 758.420(2), the "persons" -- found by the Court to exist by virtue of the joint ownership

aspect of the Assumed Facts -- must be found to be "distributing" natural gas through a "connected and interrelated distribution system." *NW Natural,* 195 Or App 558-560. The Court of Appeals remanded the case to the Commission for further consideration.

In this remanded proceeding, the Commission must determine if NW Natural's hypothetical facts describe a violation of its exclusive service territory as a matter of law. By order dated July 20, 2005, an issues list was established setting forth the issue of whether the described hypothetical activity constitutes the provision of "utility service."[1] There are two distinct sub-issues that must both be resolved in NW Natural's favor in order for the hypothetical activity to rise to the level of providing utility service:

(1) The persons operating the jointly owned lateral pipeline must be engaged in the "distribution" of natural gas; and

(2) The distribution must be occurring through a "connected and interrelated distribution system."

III. NW NATURAL'S ASSUMED FACTS

The Assumed Facts describe a hypothetical arrangement NW Natural calls a "condominium bypass distribution system." The precise hypothetical posed by NW Natural is as follows:[2]

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[1] The Commission has refused to consider federal law as requested by intervenors, even though federal law is relevant to this proceeding. Courts have ruled that a state's attempt to regulate the construction or operation of facilities directly connected to interstate pipelines is preempted by federal law. *See Cascade Natural Gas Corp. v. FERC,* 955 F2d 1412, 1417 (10th Cir 1992). *See also Midwestern Gas Transmission v. McCarty,* 270 F.3d 536 (7th Cir 2001). While the Commission has the authority to interpret a state statute, the Commission does not have jurisdiction to enjoin operation of FERC jurisdictional facilities. The situation described in the Assumed Facts falls under FERC's jurisdiction. *See Cascade,* 955 F2d at 1421. In *Cascade Natural Gas Corp.*, the 10th Circuit determined that FERC's approval of a bypass pipeline constructed by two industrial natural gas consumers was within the agency's jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). *Id.* If the Natural Gas Act grants jurisdiction to FERC over a matter, its jurisdiction is exclusive. *Id.* at 1421. The 10th Circuit also rejected the argument that a jointly owned bypass pipeline was the functional equivalent of local distribution. *Id.*

[2] While Wah Chang has actively participated in this proceeding since the outset, it has also always noted that NW Natural's hypothetical facts differ in material ways from the manner in which Wah Chang and

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.

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.

ORS § 758.450(2) provides that "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 question of whether the Assumed Facts described above constitute a violation

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Weyerhaeuser jointly own and operate gas piping directly connecting the two plants with the interstate pipeline. *See* Wah Chang and the Northwest Industrial Gas Users' Answer to Amended Petition for Declaratory Rulings, DR 23, pp 15-16; Wah Chang and the Northwest Industrial Gas Users' Reply Comments to 9/3/99 filings, p. 3 and Attachment A (Oct. 15, 1999).

of NW Natural's exclusive service territory revolves around the definition of "utility service," and requires the application of the guidelines for statutory construction provided in *Portland General Electric v. Bureau of Labor and Indus.*, 317 Or 606, 859 P2d 1143 (1993) (*"PGE v. BOLI"*).

IV. ARGUMENT

Under Oregon Statutes, utility service is defined as:

> [S]ervice 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 similar utility service. ORS § 758.400(3) (emphasis added).

Under the statute and the Court of Appeals' ruling, to find a violation of an exclusive service territory, the OPUC must determine that any service provided by a *person*: (1) is for the "distribution of natural gas;" and (2) that distribution must occur through a "connected and interrelated distribution system." Thus, a legal determination must first be made regarding whether the arrangement described in the Assumed Facts constitutes "distribution" of natural gas. If the Commission determines that distribution service is provided in the Assumed Facts, the Commission must then determine if the distribution occurs through a "connected and interrelated distribution system." This determination is technical, fact-based and depends primarily on the configuration of the gas piping involved. Not every gas pipe connected to an interstate pipeline rises to the level of being a "connected and interrelated distribution system."

A. The Text and Context of ORS 758.400(3) Demonstrates that the Arrangement Described in the Assumed Facts Does Not Violate ORS 758.450(2).

The first step in the analysis of whether or not the arrangement set forth in the Assumed Facts constitutes utility service is an examination of the statute defining the term. The Supreme Court announced the template for statutory construction in *PGE v. BOLI,* 317 Or 606, 611-12 (1993). The guidelines articulated in *PGE v. BOLI* state that the intent of the Legislature is first discerned by examining the text and context of the statute. *PGE v. BOLI*, 317 Or at 610. If the language and immediate context alone are not enough, then the court may "consider legislative history to inform the court's inquiry into legislative intent." *Id.* at 610-11. If the intent is still unclear, the court will refer to general maxims of construction to divine the Legislature's intent. *Id. PGE v. BOLI's* methodology has been modified by amendments to ORS § 174.020. Parties may also offer legislative history of a statute to assist a court in its construction. *See* ORS § 174.020.

B. The Language of ORS § 758.400(3) Contemplates a Distinct Separation Between the Provider of the Distribution Service and the Recipient of Those Services.

The language of ORS § 758.400(3) contemplates a distinct separation between the provider of the distribution services and the recipient of those services. The definition requires that there be someone who, through their equipment or facilities, provides the service of distributing "natural gas... *to* consumers." ORS § 758.400(3) (emphasis added).

The statutes use of the terms "*service provided by* any equipment, plants or facilities for the *distribution* of electricity *to users* or the *distribution* of natural or manufactured gas *to consumers*" in the definition of "utility service," demonstrates its intent to restrict *third parties* from offering, constructing or extending distribution service through or by

equipment, plants or facilities into an allocated territory of a competing utility. ORS § 758.400(3) (emphasis added).

"Service" requires more than simply placing equipment on property; there must be an action, as indicated by the plain and ordinary meaning of the term. Webster's Dictionary defines service as, among other things, "the occupation or function of serving," "the work performed by one that serves," or "the act of serving."[3] All of these definitions indicate an act conducted by one party for the benefit of another. No entity in the Assumed Facts is providing distribution service to the other party. This reading of the statute is consistent with the Court of Appeals' decision that a separate "person" exists by virtue of the joint ownership of the lateral pipe because the statute requires more than the existence of a person and equipment.

C. No "Distribution" of Natural Gas Occurs Under NW Natural's Assumed Facts.

The entities described in NW Natural's Assumed Facts are not engaged in the "distribution" of natural gas, as that term is commonly used in utility and commercial statutes. "Distribution" is a legal term of art that refers to the act of facilitating the movement of a commodity by one entity to another through a resale of that good to the final consumer. In the Assumed Facts, the two industrial consumers are not engaged in the distribution or reselling of the gas commodity. Therefore, even if the joint owners of the so-called bypass pipeline are considered to be a *person* under the statute, the person does not distribute gas and thus is not providing "utility service."

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[3] *Webster's 9th New College Dictionary*, 1076 (ed 1986). *See also Webster's Third New Int'l Dictionary*, 2075 (unabridged ed 1993) – "action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental toward some object[;] ... useful labor that does not produce a tangible commodity--usu. used in pl. <railroads, telephone companies, and physicians perform services although they produce no goods>[; or] the provision, organization, or apparatus for conducting a public utility or meeting a general demand <telephone ~> <air freight ~>."

1. "Distribution" Facilitates Goods for Resale.

"Distribution" is the facilitation of a commodity for resale to a retail entity or end user. The Assumed Facts do not describe entities engaged in the "distribution" of gas, as that term is used in ORS 758.400. Rather, the hypothetical describes two or more industrial consumers serving themselves, and no entity is engaged in the resale of gas to a third party or any other service consistent with the act of "distributing" gas.

The term "distribution" is not defined in ORS 758.400(3) or elsewhere in Chapter 758. The terms "distribution" and "distributor" are, however, defined throughout the Oregon Revised Statutes. Part of the textual analysis of a statute includes an examination of the well-established meanings for the term established by the Legislature elsewhere in the Oregon Statutes. *McIntire v. Forbes*, 322 Or 426, 431 (1996).

Most relevant to this textual analysis are the definitions of "distribution" and "distribution utility" in Chapter 757, which generally governs public utility regulation. ORS 757.600(8) and (9) provide that "'Distribution' means the delivery of electricity to ***retail*** electricity consumers through a distribution system" and "'Distribution utility' means an electric utility that owns and operates a distribution system connecting the transmission grid to the ***retail*** electricity consumer." (Emphasis added.) An electric utility is also defined as "an electric company or consumer owned utility that is engaged in the business of distributing electricity to ***retail*** electricity consumers," and an electric company is defined as "an entity engaged in the business of distributing electricity to ***retail*** electricity consumers * * *." ORS 757.600 (13). These definitions clearly contemplate that for the activity of a person to rise to the level of "distribution," some retailing must occur. Here, in the Assumed Facts, no retail transaction takes place, and no retail service is provided.

The only other Oregon statute to define the term "distribution" in a context involving an energy commodity also uses the term to describe a relationship in which the distributing entity holds or transfers a product for ultimate use by a retail customer. ORS 319.010(8) defines distribution as "the delivery of motor vehicle fuel or aircraft fuel by a dealer * * * for sale or for delivery into the fuel tanks of motor vehicles whether or not the service station, tank or storage facility is owned, operated or controlled by the dealer." Again, this statute defines the act of "distribution" in the context of the ultimate resale of the energy commodity by the party engaged in distribution to the retail consumer.

The definition the Legislature has given to the term "distributor," in contexts not involving energy, also involves one who engages in the act of "distribution" by facilitating a good for resale to a retail entity or end user. The term "distributor" is repeatedly defined by the Oregon Revised Statutes in this manner. *See* ORS 72.8010(4) ("Distributor" means any person who stands between manufacturer and retail seller in purchases, consignments or contracts for sale of consumer goods); ORS 446.003(11) ("Distributor" means any person engaged in selling and distributing for resale) ORS 453.075(4)(b) ("Distributor" includes a dealer who sells at wholesale an article or substance with respect to that sale.); ORS 459.431(5) ("Distributor" means a seller of batteries); ORS 459A.700(6) ("Distributor" means person who engages in the sale of beverages in beverage containers to a dealer); ORS 633.311(9) ("Distributor" means a person who imports, consigns, sells or offers for sale, barters, exchanges or otherwise facilitates supply); ORS 646.415(7) ("Distributor" means a person who sells or distributes to retailer); ORS 646.890(1)(a) ("Distributor" means any person engaged in the business of distributing or supplying by rental, sales, license or any other agreement to sell); ORS 650.120(3) ("Distributor" means a person who sells or

distributes to dealers); ORS 650.300(6) ("Distributor" means a person that purchases for resale to a dealer).[4] Noticeably absent from Oregon statutes is the term "distribution" or "distributor" used to describe someone who arranged for service to itself through an arrangement with another coequal customer.

2. No Distribution of Gas Occurs After It Is Delivered to the Tap and Meter by the Interstate Pipeline.

In NW Natural's Assumed Facts, the industrial customers arrange for the gas to be transported and are responsible for the payment of gas received at a single transfer meter on the interstate pipeline. The industrial customers are accountable to the interstate pipeline for imbalances that occur at that single transfer meter. No allocations are made. The so-called bypass pipeline used to transport gas from the interstate pipeline to the industrial consumers is owned by the industrial consumers even though the bypass pipeline under the Court of Appeals' analysis is a *person* that stands between the pipeline and the ultimate consumers. The entities operating the bypass, however, are not engaged in the act of distributing the natural gas.

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[4] Other states similarly use the term "distribution" or "distributor" to refer to the activity that takes place before the product is bought and used by the ultimate consumer or consumers. See Alaska Stat. § 45.50.840 ("Distributor" means one engaged in sale and distribution of gasoline to retail outlets); Ariz. Rev. Stat. § 40-0201 ("Distributor" means any legal relationship that stands between manufacturer and retail seller); Ariz. Rev. Stat. § 44-1551 ("Distributor" means any person selling or otherwise distributing gasoline to retail outlets); Cal. Civ. Code § 1791 & Cal. Pub. Res. Code § 25953 ("Distributor" means any legal relationship that stands between manufacturer and retail seller); Del. Code Ann. tit. 6 § 2551 (a "franchised distributor" is one that purchases a product for the primary purpose of sale to retailers); Haw. Rev. Stat. § 486H-1 ("Petroleum Distributor" means any person engaged in sale or distribution to retail outlets); Ill. Comp. Stat. 5/12-18.1 ("Distributor" means any legal relationship that stands between manufacturer and retail seller); Mich. Comp. Laws § 255.572 ("Distributor" is one that offers for sale or sells to another for resale at retail); Miss. Code Ann. § 69-7-605 ("Distributor" means any person offering a product destined for retail sale); N.J. Stat. § 13:1E-99.46 ("Distribution" means the practice of taking title to a good for "promotional purposes or resale"); Ohio Rev. Code Ann. § 1333.82 ("Distributor" means person who sells to retailer outlets); Utah Code Ann. § 13-12-2 ("Distributor" means any person engaged in sale of oil products to retail outlets); Wash. Rev. Code § 82.36.010 ("Distribution" means delivery to retail outlets); Wis. Stat. Ann. § 94.67 ("Distribution" means person engaged in sale of good for resale).

This arrangement can be compared to following scenario. A and B are sitting in front of the TV and want to order a pizza. Because they don't have a car, A and B ask their neighbor, C, to go the restaurant to pick up the pizza and give C money for gas. A and B call the restaurant, place an order and pay for the pizza over the phone. C drives to the restaurant, picks up the pizza and delivers it to A and B. A and B split and then consume the pizza between themselves and only themselves.

In this scenario, C is not a "distributor" under the law. C merely facilitated the transfer of pizza from the restaurant to A and B. C is not selling the pizza to A and B. A and B are not selling the pizza to any third parties.

In this analogy, C is the bypass pipeline and the restaurant is the transfer meter. In both scenarios, the point of sale takes place before the good is placed in the "custody" of the transporting entity. The commodity is never resold, but is simply consumed by the entities that paid for it. There is no further division of the product by Party C, or the bypass pipeline, as the amount being transferred to each individual entity is clearly delineated. Therefore, both C and the bypass pipeline in the hypothetical are not distributors, they are merely conduits for the transportation of a previously purchased good to a party that has paid for that transportation.

D. The Term "Distribution" Is Used Twice in the Territorial Allocation Statutes.

The Legislature's use of the term "distribution" twice in ORS 758.400(3) is significant. In order to constitute the provision of utility service under ORS 758.400(3), a person must both be distributing natural gas, and the distribution must occur through a "connected and interrelated distribution system." Thus, there must be activity that legally constitutes distribution, but those actions must be taking place through a "connected and

interrelated distribution system." Accordingly, both the actions of the "person" and the nature of the piping equipment must be examined. Under NW Natural's hypothetical, neither the actions described nor the hypothetical piping system meets the statutory definition of "utility service."

1. The Determination of Whether the Assumed Facts Constitutes a Connected and Interrelated Distribution System Should Not Be Made in a Declaratory Proceeding With Assumed Facts.

If the Commission determines that no "distribution" of gas occurs once it is delivered to the tap and meter on the interstate pipeline, the Assumed Facts do not describe a violation of Oregon law. If, however, the Commission determines that distribution takes place, it still must determine that such distribution takes place through a "connected and interrelated distribution system." If the outcome of this declaratory proceeding turns on a determination of what piping system constitutes a "connected and interrelated distribution system," then that determination should be made in a rulemaking and not in a declaratory proceeding with Assumed Facts.

A declaratory proceeding is an inappropriate forum to make the fine, technical distinctions necessary to decide what constitutes a "connected and interrelated distribution system." Traditionally, declaratory proceedings are deemed appropriate when they deal with a petitioner's particular factual situation, but not appropriate when they would result in an agency's statement of general statutory interpretation that would apply to an entire class of persons. *Sutton v. Dep't of Envtl. Protection,* 654 So2d 1047 (Fla App 1995) (declaratory statement cannot be issued for statement of general applicability); *Florida Optometric Ass'n v. Dept. of Prof'l Regulation,* 567 So2d 928 (Fla App 1990) (agency should decline to issue declaratory statement when asked to respond to question that would require response of such general and consistent nature as to meet definition of rule). Therefore, when an agency is

presented with a petition for a declaratory ruling requiring a response that amounts to previously unarticulated statutory interpretation, such as the one presented here, the agency should decline to issue the statement and initiate a rulemaking. *Chiles v. Dept. of State,* 711 So2d 151 (Fla App 1998) (if agency is presented with petition for declaratory statement requiring response that amounts to rule, agency should decline to issue statement and initiate rulemaking).

Under ORS 756.450, the OPUC has considerable discretion to either issue or refuse to issue a ruling on the application of agency law to a particular set of hypothetical facts. *In the Matter of the Petition of PGE Co.*, OPUC Docket No. DR 25, Order No. 00-159 (March 17, 2000). Petitions for declaratory relief should be denied when the Commission finds that the facts are not sufficiently clear or the application of agency law to the facts presented is not readily apparent.

The OPUC recently noted that "[a] subject is appropriate for declaratory ruling where the facts of the matter are clear, and where the petitioner has established an unambiguous connection between the facts and a statute, rule, or prior Commission decision." If the decision on this declaratory petition turns on what constitutes a "connected and interrelated distribution system" the petition should be dismissed. *See generally In the Matter of Oregon Telecommunications Association* ("OTA"), OPUC Docket No. DR 31, Order No. 02-542 (August 8, 2002). In *OTA,* the OTA filed a petition seeking a declaratory ruling that a specific emerging telecommunications practice did not constitute a "local exchange telecommunications practice." The Commission rejected OTA's request and adopted the Staff recommendation that a general investigation would be more appropriate to examine the

proper classification of an emerging practice in the telecommunications industry. *OTA*, Order No. 02-542. This approach should be applied here.

NW Natural has described a hypothetical system in its Assumed Facts, not an actual system. In this proceeding there can neither be a careful examination of a specific system, nor the promulgation of a rule of general applicability developed after notice and comment. This Commission should decline to interpret the meaning of the term "connected and interrelated distribution system" in the context of this declaratory proceeding with limited, made-up facts. A declaratory judgment in this proceeding would, in effect, amount to a rulemaking on the issue of what constitutes a "connected and interrelated distribution system," without the benefit of a fully developed record.

Determining factually what constitutes a "connected and interrelated distribution system" involves the development of a previously unarticulated standard, an action that is more appropriately undertaken during a formal rulemaking proceeding than a declaratory petition. Making that determination in this proceeding would be improper because the Commission would, in effect, articulate a previously unarticulated and broadly applicable legal standard. Moreover, the Commission would be making what is essentially a binding interpretation of ORS 758.450 based on NW Natural's self-serving facts, instead of interpreting the statute through a rulemaking that would allow consideration of actual gas piping arrangements that exist in Oregon.

A rulemaking would allow the Commission to apply the language and policy of the Territorial Allocation Law to actual gas piping arrangements in Oregon. In such a proceeding, the Commission could develop a clear, precise and generally applicable standard for determining when a "connected and interrelated distribution system" exists. Future parties

would be given a clear understanding about which pipeline arrangements would violate Oregon's exclusive territory laws. The need for case-by-case adjudication would be eliminated.

As was the situation in *OTA*, NW Natural is attempting to use the declaratory judgment mechanism to compel the Commission to, in effect, promulgate a rule where a proper investigation or formal rulemaking proceeding would be more appropriate. If the decision turns on interpreting the technical term "connected and interrelated distribution system," the declaratory petition should be dismissed.

2. A "Connected and Interrelated Distribution System" Requires More Than a Bypass Pipeline and a Lateral.

If the Commission decides not to engage in a rulemaking, and limits its ruling to the Assumed Facts presented by NW Natural, it is clear that the arrangement described in NW Natural's Assumed Facts does not constitute "a connected and interrelated distribution system" under Oregon law. ORS § 758.400(3). If any equipment through which gas is transported was intended to be covered by the law, the words "connected" and interrelated" would not have been needed to modify "distribution system." As previously described, utility service is defined 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*." ORS § 758.400(3) (emphasis added).

The words "connected" and "interrelated" as applied in the statute reveals the Legislature's intent to have the statute apply to a network of small gas lines serving many customers in a local geographic area, not to any gas piping connected to the interstate pipeline. Under NW Natural's Assumed Facts, there is no network of multiple lines connected and interrelated to each other such that it creates a "distribution system."

This conclusion is buttressed by the fact that in 1961, when the law was passed, the law applied to only utilities, municipalities and cooperatives, which do have "connected and interrelated distribution systems." The Legislature could not have intended that the law apply to the self-provision of natural gas as described in the Assumed Facts because this was not an option for end use consumers when the Oregon law was enacted.[5]

Webster's Dictionary defines "connected" as, among other things, "joined or linked together," "having the parts or elements logically linked together," or "incapable of being separated into two or more closed disjoint subsets."[6] "Interrelated" is defined at "having a mutual or reciprocal relationship or parallelism."[7] "Distribution" is defined, among other things, as "the act or process of distributing" or "the pattern of branching and termination of a ramifying structure."

These definitions provide two clues to the Legislature's intent. First, the various definitions of the terms indicate that the true intent of the Legislature depends on a reading of the statute in context, rather than relying on disconnected definitions. In *Beaver Creek Coop. Tel. Co.*, 182 Or App at 585, 50 P3d at 1244, the court determined that plain meaning plausibly could support either a broader view or a limited reading of the term service. Similarly, the same analysis should apply here. Second, if the Legislature intended to include *any* "equipment, plant or facility" it would not have modified the term "distribution system."

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[5] The regulation of the natural gas industry is very different from the regulatory framework that governed the natural gas industry in 1961. The natural gas industry has been opened to competition and many more parties participate in the procurement and transport of natural gas. In contrast to the world before the Territorial Allocation Law was enacted, end-users may now contract directly with pipelines to transport and deliver gas, securing those services from entities other than existing local distribution companies, like NW Natural. *See* Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, FERC Statutes & Regulations, Regulations Preambles, ¶ 30,939, 57 Fed Reg 13267 (Apr 16, 1992); *See also* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Statutes & Regulations, Regulation Preambles, ¶ 30,665, 50 Fed Reg 42408 (Oct 18, 1985).

[6] *Webster's 9th New College Dictionary*, 278.

Instead, the Legislature specifically required a "connected and interrelated distribution system," thereby narrowing the laws scope to apply only to a significant and complex network of pipes or wires. This type of distribution system would only be used by "individuals, firms, partnerships, corporations, associations, cooperatives and municipalities" that would be providing "utility service" as a third party competitor to the incumbent utility.

Federal law provides useful context. The Federal Energy Regulatory Commission ("FERC") has on many occasions taken the opportunity to define "local distribution" of natural gas, which is exempt from FERC's jurisdiction under Section 1(c) of the Natural Gas Act, 15 U.S.C. § 717(b) (2000). Local distribution is exempt from FERC's jurisdiction because it is a matter of local concern and, therefore, under state regulatory jurisdiction. FERC has been called upon to define "local distribution" in order to distinguish it from interstate transportation of natural gas on several occasions. To that end, FERC has held that the local distribution of gas "connotes a network of small lines that transmit the gas from large interstate pipelines to individual consumers spread out in a local geographic area." *KN Wattenberg Transmission Ltd. Liab. Co.*, 81 FERC ¶ 61,167 (1997), *rev'd on other grounds*, *City of Fort Morgan v. FERC*, 181 F3d 1155 (10th Cir 1999) *citing Mojave Pipeline Co.*, 42 FERC ¶ 61,351, 62,002 (1988).

Federal courts have upheld this definition stating that "local distribution" requires dividing the gas and supplying it at retail through a network of branch lines. *Cascade Natural Gas Corp. v. FERC*, 955 F2d 1412, 1421 (10th Cir 1992). FERC has also concluded that "tie-in facilities alone, like valves, meters, and lateral lines could not be considered local distribution facilities," and that service to two discrete end users through a single lateral, as opposed to a network of pipelines facilities serving many customers, does not constitute a

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[7] *Id.* at 633.

local distribution system. *KN Wattenberg Transmission Ltd. Liab. Co.*, 81 FERC ¶ 61,167 at 61,739, *rev'd on other grounds*, *citing Mojave Pipeline Co.*, 42 FERC ¶ 61,351, 62,002 (1988); *See also Cascade Natural Gas Corp.*, 955 F2d 1412. Therefore, federal precedent supports the conclusion that more than a bypass pipeline and a lateral are needed to constitute a "connected and interrelated distribution system."

E. The Context of the Territorial Allocation Law.

Words generally have little meaning without reference to the context in which they are used. This fact is particularly true when the words are used in a complex regulatory scheme, governing a highly technical field or industry. Evidence of this is provided by the variety of definitions presented in this proceeding for a single term – "utility service." This is precisely why the principles of statutory interpretation delineated in *PGE v. BOLI* require that a court analyze both the text and context at its first level of analysis. *PGE v. BOLI*, 317 at 611, 859 P2d at 1146; *Beaver Creek Coop. Tel. Co. v. OPUC*, 182 Or App at 584, 50 P3d at 1244.

Context for interpreting a statute is provided by the entirety of the statute in question and by related statutes. *PGE v. BOLI*, 317 at 611. Courts "do not look at one subsection of a statute in a vacuum; rather, [they] construe each part together with the other parts in an attempt to produce a harmonious whole." *Lane County v. Land Conservation & Dev. Comm'n*, 325 Or 569, 578, 942 P2d 278 (1997) *citing Davis v. Wasco IED*, 286 Or 261, 593 P2d 1152 (1979). ORS §§ 758.400 and 758.450 are part of a distinct and unified set of statutes related to territorial allocation. Order No 01-719 at 7.

The context of the Territory Allocation Law supports a reading of "utility service" such that ORS § 758.450(2) is violated when a third party provides "utility service," "to

customers" within an allocated territory. The self-provision of utility products does not trigger application of the law.

The definition of "utility service" contemplates a distinct separation between the provider of the distribution service and the recipient of the service. The "service" must be for the "distribution of electricity *to users* or the distribution of natural or manufactured gas *to consumers*..." *Id.* (emphasis added). Thus, the definition of "utility service," read as a whole, indicates the intent to prohibit third-party competitors from invading an allocated territory and taking customers from the incumbent utility.

Other provisions in the Territory Allocation Law rely on the third-party provider distinction as well, and so provide contextual clarity. The exceptions to the statute, set out in ORS § 758.450(4), exclude entities providing "service" "*to*... [certain types of] customers." *See* ORS §§ 758.450(4)(a)-(c) (emphasis added).

Furthermore, "customer" is defined in the general statutory provisions regulating the OPUC. ORS § 756.010. "Customer" includes "patrons, passengers, shippers, subscribers, users of the service and consumers of the product of a public utility or telecommunications utility." ORS § 756.010(3) (emphasis added). Thus, the statute recognizes a difference between the provider and the recipient.

As previously noted by the Commission, using NW Natural's interpretation of "utility service" would lead to absurd results in other parts of the statute. Order No 01-719 at 9. For example, as the Commission noted, among the stated purposes of the statute, "'the elimination and future prevention of duplication 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 the

Legislature intended to delegate such a task to the Commission." *Id.* In addition, 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 gas consumers to obtain service for themselves, as NW Natural's view would require. *Id.*

1. The Enumerated Statement of Purpose of the Territory Allocation Law Shows That the Law Was Not Intended to Prevent the Arrangement Described in the Assumed Facts.

The purpose of the statute is explicitly articulated in the text of the Territory Allocation Law. Oregon courts have recognized that:

> [S]tatutes 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. *DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997), *rev den* 327 Or 620, 971 P2d 412 (1998).

Any enumerated statement of purpose helps illuminate the intent of the Legislature. Therefore, considering the stated purpose as part of the contextual analysis is entirely consistent with *PGE v. BOLI.*

The Territory Allocation Law articulates its intended purpose in ORS § 758.405. ORS § 758.405 states:

> [T]he 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.

Allowing the arrangement described in the Assumed Facts to exist within a utility's service territory is entirely consistent with the purpose of the law. The arrangement described in the Assumed Facts does not duplicate "utility facilities" because the pipeline arrangements created by customers are not utility facilities. Order No 00-306 at 13. The Territorial Allocation Law is aimed at preventing wasteful duplication of facilities used by utilities, not at preventing customers from owning their own facilities to provide service to themselves. Order No 00-306 at 13. Moreover, the statutes "reflect a desire to avoid contests between utilities." Order No 00-306 at 13; *citing* Order No 98-546 (UA 58/UA 60). The Assumed Facts do not describe a hypothetical that would involve greater duplication than two separate direct connects owned by two individual industrial customers. Finally, as the Commission previously noted, the purpose of the anti-duplication provision in the statute is to protect the customers of utilities from having to pay for duplicate facilities that do not benefit them. Order No 00-306 at 13. No such risk of direct customer/ratepayer loss exists in the scenario set out by NW Natural, although there might be some loss of contribution to fixed costs. *Id.*

The Commission also correctly concluded in its previous orders that the "arrangement described in the Assumed Facts would not interfere with the efficient and economic use of utility services." Order No 00-306 at 13. The Commission specifically noted that NW Natural's facilities are still useful despite these customer-owned direct connect arrangements and may even be used again to serve industrial gas consumers in the future. *Id.* Thus, finding no violation of NW Natural's exclusive service territory is consistent with the purpose of the Territorial Allocation Law.

2. Legislative History of the Territorial Allocation Law Demonstrates that the Intent of the Legislature Was to Prevent Competition Between Utilities and the Piracy of Customers from an Allocated Territory by Another Utility or Similar Entity.

The legislative history of the Territorial Allocation Law contains repeated references to competition between utilities, not customers, consumers or end-users, because the law applied to utilities, municipalities and cooperatives. Commissioner Hill helped draft SB 487 and testified in support of the Bill. Minutes, House Planning and Development Committee, April 6, 1961. Commissioner Hill testified that he felt consumers were paying more in rates than they should because rates were based on the cost of installation of equipment. *Id.* at 2. Commissioner Hill continued that elimination of future duplication could keep rates lower by keeping initial investments lower, and that duplication amounts to little wars between utilities, but did not benefit ratepayers. *Id.* In response to a question by Representative Carol Howe regarding what type of utility is a regulated facility, Commissioner Hill responded one where a Board of Directors regulates its rates. *Id.* SB 487 was intended to provide for determination of utility service areas by providing a mechanism for *utilities* to voluntarily agree to provide service to particular territories or to request that the Commission determine respective territories. Another motivation for passing the legislation was to reduce rate-sponsored duplication of facilities – that is, to prevent the public from paying for duplicative facilities. Duplication of utility services was explicitly cited in testimony supporting SB 487 as a reason for unnecessarily high utility rates. For example, testimony by Commissioner Hill noted that customers were paying twice what they should for duplicated facilities. House Planning and Development Committee, April 6, 1961, Minutes at 2.

Another witness commented that:

> Since the cost of electricity is predicated on the cost of the plant installation... it can be seen that duplication of this installation

> doubles the cost of this investment and the customer has to pick up the bill. Minutes, House Planning and Development Committee, April 6, 1961 at 6 (Testimony of Ed Smith, Business Representative for the International Brotherhood of Electrical Workers).

Discussions regarding the economic effects from the duplication of utility facilities were done in the context of massive investments in distribution system infrastructure, not individual consumer's investments in their own facilities.

Exhibits presented by witnesses at the Public Hearings show the level of investment leading up to the introduction of SB 487. Exhibits, House Planning and Development Committee, April 6, 1961 (Photos of Power Lines in Rufus, Eugene-Springfield, Portland and Salem, offered by Commissioner Hill). Commissioner Hill presented photos showing the extent of competition between utilities' connected and interrelated distribution systems. *Id.* This evidence, however, does not support NW Natural's argument that small, privately owned facilities that only delivered the owners gas are outlawed by the Territory Allocation Law. Nothing in the legislative history indicates that the Legislature intended to prohibit self-service through a discreet set of privately owned gas pipes.

The only comment regarding customers in the legislative history, referenced a situation where a group of individuals started a business and acquired utility facilities, presumably for the purpose of providing "utility service." Representative Richard Eymann asked Commissioner Hill if the Bill would restrict individuals from forming a business that would *provide* "utility service." House Planning and Development Committee, April 6, 1961, Minutes at 3 (emphasis added). Commissioner Hill responded that the individuals could form the business but would be prevented from duplication in an allocated service area. *Id.* This situation, however, is inapposite to the situation in the Assumed Facts presented to the

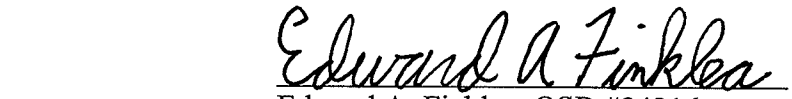
Commission because Representative Eymann's hypothetical involved the creation of a business specifically for the *provision* of "utility service" to consumers.

V. CONCLUSION

The Assumed Facts presented by NW Natural do not describe a violation of Oregon law. There is no provision of utility service because there is no distribution of natural gas. Even if distribution is deemed to occur, the Commission must then determine if the Assumed Facts describe a connected and interrelated distribution system. Such a determination, however, should be made in rulemaking and not in a declaratory proceeding with limited made up facts. If the Commission fails to conduct a rulemaking on this issue, it still must find that the Assumed Facts do not constitute utility service because there is no connected and interrelated distribution system.

DATED this 30th day of August, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Attached for filing is WAH CHANG AND THE NORTHWEST INDUSTRIAL GAS USERS' OPENING BRIEF, pertaining to Docket No. DR 23. The said OPENING BRIEF will also be transmitted to the OPUC and all parties via First Class Mail.

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