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August 30, 2005

***Via Electronically and U.S. Mail***

Public Utility Commission  
Attn: Filing Center  
550 Capitol Street N.E. #215  
PO Box 2148  
Salem OR 97308-2148

Re: In the Matter NORTHWEST NATURAL GAS COMPANY Petition for a  
Declaratory Ruling pursuant to ORS 756.450 Regarding Whether Joint Bypass to  
Two or More Industrial Customers Violates ORS 758.400 et seq.  
**Docket No. DR 23**

Dear Filing Center:

Enclosed please find an original and six copies of the Opening Brief on behalf of  
Oregon Steel Mills, Inc. in the above-captioned docket.

Please return one file-stamped copy of the Opening Brief in the self-addressed,  
stamped envelope provided.

Thank you for your assistance.

Sincerely yours,

*/s/ Sheila R. Ho*  
Sheila R. Ho

Enclosures  
cc: Service List

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Opening Brief on behalf of Oregon Steel Mills, Inc. upon the parties, on the official service list for Docket No. DR 23, by causing the same to be electronically served, to those parties who have an email address, as well as mailed postage-prepaid through the U.S. Mail.

Dated at Portland, Oregon this 30th day of August, 2005.

/s/ Sheila R. Ho

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**DR 23**

In the Matter of	)	
	)	
NORTHWEST NATURAL GAS COMPANY,	)	OPENING BRIEF OF OREGON STEEL
d/b/a NW Natural	)	MILLS, INC.
	)	
Petition for a Declaratory Ruling Regarding	)	
Whether Joint Bypass by Two or More	)	
Industrial Customers Violates ORS 758.400 et	)	
seq.	)	
_____	)	

Pursuant to Administrative Law Judge Smith’s July 20, 2005 ruling, Oregon Steel Mills, Inc. (“Oregon Steel”) submits this Opening Brief regarding the issues remanded to the Oregon Public Utility Commission (“OPUC” or “Commission”) by the Oregon Court of Appeals in NW Natural Gas Co. v. OPUC, 195 Or. App. 547 (2004).

Oregon Steel respectfully requests that the Commission decline to issue the declaratory ruling requested by Northwest Natural Gas Company (“NW Natural”) in this docket. An examination of the text and context of the statutes at issue reveals that jointly owned natural gas bypass facilities do not violate Oregon law. In addition, to the extent that Oregon law was interpreted to make construction and operation of joint bypass facilities illegal, Oregon law would be preempted by federal law. In the alternative, if the Commission does rule that joint bypass facilities violate Oregon law, Oregon Steel requests that the Commission exempt Oregon Steel from such ruling.

## I. BACKGROUND

On March 19, 1999, NW Natural petitioned the OPUC for a declaratory ruling interpreting ORS §§ 758.400-758.475 (the “Territorial Allocation Law”), as applied to the joint ownership of customer-owned gas distribution facilities. Re Petition of NW Natural Gas Co., OPUC Docket No. DR 23, Order No. 00-306 at 1 (June 9, 2000). The original Petition asked the Commission to rule on two issues: (1) whether joint ownership of gas distribution bypass facilities violates the Territorial Allocation Law; and (2) whether joint ownership of gas distribution bypass facilities constitutes public utility service subject to Commission regulation. Id. On July 6, 1999, NW Natural filed an Amended Petition that narrowed the inquiry to whether “the construction and operation of an interstate pipeline bypass, that is shared by privately owned industrial consumers and is within the territory allocated to [NW Natural] . . . violates ORS 758.450(2).” Id. at 3. Specifically, NW Natural argued that operating a joint bypass system constituted “utility service” for purposes of the Territorial Allocation Law. Id. at 7.

On June 9, 2000, the Commission issued an order finding that the joint bypass facilities described in NW Natural’s petition did not violate ORS § 758.450(2). Id. at 14. The Commission’s decision was based on the purposes behind the Territorial Allocation Law, particularly the fact that it “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.” Id. at 13.

NW Natural asked the Commission to reconsider its order, and on August 9, 2001, the Commission issued a second order that reconsidered and affirmed its conclusion that the joint bypass facilities do not violate the Territorial Allocation Law. Re Petition of NW Natural Gas Co., OPUC Docket No. DR 23, Order No. 01-719 (Aug. 9, 2001). Using the framework for statutory interpretation set out in PGE v. Bureau of Labor & Industries, 317 Or. 606 (1993) (“PGE v. BOLI”), the Commission found that the key terms in the Territorial Allocation Law, including the term “utility service,” were not clear on their face; therefore, it was necessary for the Commission to examine the context of the law. OPUC Docket No. DR 23, Order No. 01-719 at 7. The Commission concluded that it was consistent with the purposes and overall structure of the Territorial Allocation Law to find that operation of joint bypass facilities does not constitute utility service. Id. at 9.

NW Natural appealed the Commission’s decision to the Marion County Circuit Court. NW Natural Gas v. OPUC, Case No. 01C18514, Opinion Letter (June 10, 2002). The Circuit Court affirmed the Commission’s conclusion, but its reasoning differed from that applied by the Commission. The Circuit Court criticized the Commission for failing to “adequately examine the text of the statute,” noting that before it analyzed the statute’s context, the Commission should have examined how the key textual terms “might be interpreted within the statute.” Id. at 4. Nevertheless, the Circuit Court upheld the Commission’s conclusion on the grounds that the Territorial Allocation Law defines “utility service” as involving distribution, and “under the assumed facts, no distribution is taking place.” Id. at 5.

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NW Natural once again appealed, this time to the Oregon Court of Appeals. The Court of Appeals reversed and remanded the Commission's order. NW Natural Gas v. OPUC, 195 Or. App. 547, 549 (2004). According to the Court of Appeals, the Commission erred because it "did not analyze the meaning of the crucial statutory language." Id. at 557. The Court of Appeals found that the Commission's reliance on the purpose of the Territorial Allocation Law was improper in the absence of analysis of the text itself. Id. at 556.

The Court of Appeals stated that when two or more entities jointly own and administer a bypass pipeline, they constitute an "association," which is a "person" under the Territorial Allocation Law. Id. at 557-58. Thus, the court held that the Commission erred because it failed to consider whether such an "association," as described in NW Natural's petition, offers "utility service" for purposes of the statute. Id. at 558. On remand, the Court of Appeals directed the Commission to analyze the text of the statute to determine whether operation of a joint bypass is "utility service." Id. at 559-60.

### **Background Regarding Oregon Steel/Ash Grove Bypass**

In 1991, Oregon Steel and Ash Grove Lime ("Ash Grove") entered into an agreement for the joint construction and operation of a natural gas pipeline to provide a direct connection to the interstate pipeline owned and operated by Williams Gas Pipeline-West, formerly known as Northwest Pipeline ("Williams"). The purpose of the pipeline was to allow Oregon Steel and Ash Grove to receive natural gas transportation service

directly from Williams, thereby bypassing the gas distribution system of NW Natural. The pipeline is referred to herein as the “Oregon Steel Bypass.”

There was extensive litigation surrounding the Oregon Steel Bypass in four separate forums—the OPUC, the Multnomah County Circuit Court, the Oregon Court of Appeals, and the U.S. Court of Appeals for the District of Columbia. In addition, the Federal Energy Regulatory Commission (“FERC”) authorized the construction and operation of the Oregon Steel Bypass. Northwest Pipeline Corporation, 52 FERC ¶ 61,053 at 61,223 (1990). The litigation regarding the Oregon Steel Bypass culminated in mediation, after which the parties, including NW Natural, signed a stipulated settlement agreement (“Release Agreement”) in April 1992. Pursuant to the Release Agreement, Oregon Steel and Ash Grove were allowed to operate the Oregon Steel Bypass. The Commission approved the Release Agreement on May 27, 1992. NW Natural Gas Co. v. Oregon Steel Mills, OPUC Docket No. UM 367, Order No. 92-762 (May 27, 1992).

On November 22, 1999, while the DR 23 proceedings were pending before the OPUC, NW Natural and Oregon Steel entered into a stipulation in which NW Natural agreed that it was not its intent to seek declaratory relief regarding the Oregon Steel Bypass. The parties further agreed that any decision entered in DR 23 would not apply to the Oregon Steel Bypass. The Commission acknowledged the stipulation in Order No. 00-306. OPUC Docket No. DR 23, Order No. 00-306 at 2.

For approximately thirteen years, Oregon Steel and Ash Grove have operated the Oregon Steel Bypass in accordance with the regulatory approval of FERC



and this Commission, and the Release Agreement with NW Natural. In addition, the Commission has recognized NW Natural's stipulation that NW Natural does not seek declaratory relief with respect to the Oregon Steel Bypass. The Oregon Steel Bypass should, therefore, be excluded from the declaratory ruling sought by NW Natural in this proceeding.

## II. ARGUMENT

### 1. **NW Natural's Statement of the Facts Includes Improper Legal Conclusions**

The issue on remand is whether the joint bypass facilities described in NW Natural's petition constitute "utility service" for purposes of the Territorial Allocation Law. NW Natural alleges that joint bypass facilities have the following "general characteristics":

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

OPUC Docket No. DR 23, Order No. 00-306 at 4-5. Some of the “facts” that NW Natural asks the Commission to assume are in fact legal conclusions. NW Natural describes operation of a bypass pipeline as “an extension of utility service,” and it says that a bypass pipeline is a “distribution system.” In this proceeding, the Commission is required to answer the legal question of whether owners of joint bypass facilities engage in “distribution” of natural gas, which would mean that operation of such facilities constitutes “utility service.” Therefore, to the extent that NW Natural’s “assumed facts” presuppose these legal conclusions, the Commission should disregard them. See ORS § 756.450 (allowing the Commission to issue declaratory rulings as to any “state of facts”).

2. **Operation of Joint Bypass Facilities Does Not Constitute “Utility Service” under the Territorial Allocation Law**

The Territorial Allocation Law provides that no “person” shall “offer, construct or extend utility service in or into an allocated territory.” ORS § 758.450(2). As noted above, the Oregon Court of Appeals has previously stated that two or more business entities that jointly own and operate a bypass facility constitute an “association,” which is a “person” under the statute. NW Natural Gas Co. v. OPUC, 195 Or. App. at 557-58. The issue that the Court of Appeals remanded to the Commission for consideration is whether operation of a joint bypass constitutes “utility service” under the statute. Re Petition of NW Natural Gas Co., OPUC Docket No. Dr 23, Ruling (July 20, 2005).

To answer this question, the Commission must interpret the meaning of “utility service” under the Territorial Allocation Law. The Commission’s task in interpreting a statute is to determine the legislature’s intent. PGE v. BOLI, 317 Or. at 610. At the first level of analysis, the Commission must examine the text of the statutory provision. Id. At this level, it may employ “rules of statutory construction that bear directly on how to read the text.” Id. at 611. It should also examine the context of the provision, including other provisions in the same statute and provisions in related statutes, along with related rules of construction. Id. If the legislature’s intent is clear upon examination of the text and context, the Commission’s inquiry is at an end. Id.

**A. The Plain Meaning of the Text of the Territorial Allocation Law Indicates That Operating a Joint Bypass Is Not “Utility Service”**

The Territorial Allocation Law defines “utility service” as “service provided by any equipment, plant or facility for . . . the *distribution* of natural or manufactured gas to consumers through a *connected and interrelated distribution system*.” ORS § 758.400(3) (emphasis added). Therefore, to determine whether the delivery of gas through a joint bypass facility constitutes “utility service,” the Commission must first interpret the meaning of the term “distribution,” which the statute itself does not define. When a court considers the text of a statute, “words of common usage typically should be given their plain, natural, and ordinary meaning.” PGE v. BOLI, 317 Or. at 611. The ordinary meaning of distribution “implies an apportioning of something among many by separating it into parts, units, or amounts and assigning each

part, etc., to its appropriate person or place.” Webster’s Third New International Dictionary 660 (1993) (defining “distribute”).

Based upon this ordinary meaning, operation of a joint bypass facility does not involve distribution. When natural gas travels from a bypass pipeline to one or more lateral pipelines, no person or thing divides it up or apportions it and assigns parts to a particular end user. Instead, the gas flows from the bypass pipeline to the lateral pipelines as the gas is needed by the end user. Similarly, when gas flows from an interstate pipeline to separate bypass pipelines, it also flows through the bypass pipelines as needed by the end user. All parties agree that this does not involve distribution. OPUC Docket No. DR 23, Order No. 00-306 at 11. The only difference here is that instead of having two bypass pipelines, each of which transports gas to a separate end user, there is one bypass pipeline that transports to both end users. It would be nonsensical to say that when separate bypasses are involved, transportation takes place, but when only one bypass is involved, distribution takes place.

**B. The Context of the Territorial Allocation Law Further Supports the Conclusion That Joint Bypass Facilities Do Not “Distribute” Natural Gas**

The interpretation of the term “distribution” described above is consistent with the context of the Territorial Allocation Law, which includes related Oregon statutes and the federal Natural Gas Act. See PGE v. BOLI, 317 Or. at 611 (context “includes other provisions of the same statute and other related statutes”). One such related provision is ORS § 758.410(1), which states: “Any person providing a utility service may contract with any other person providing a similar utility service for the purpose of

allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties.” The clear implication of this provision is that “utility service” means service provided by a utility to a customer.

A fundamental rule of statutory construction is that “use of the same term throughout a statute indicates that the term has the same meaning throughout the statute.” PGE v. BOLI, 317 Or. at 611. Moreover, the definition of “utility service” is the same for purposes of both ORS § 758.410 and ORS § 758.450(2). ORS § 758.400(3). If Oregon Steel provides “utility service” by virtue of its ownership of a joint bypass facility, it could contract with NW Natural to provide gas service to NW Natural’s existing customers in the area. This would produce an absurd result—Oregon Steel is not a utility, and the Commission could not approve such an agreement. See ORS § 757.005(1); Re PGE, OPUC Docket No. DR 22, Order No. 99-748 at 2 (Dec. 12, 1999) (discussing the findings the Commission must make before approving an application or contract regarding territory allocation). It would therefore be inconsistent with other provisions of the Territorial Allocation Law to hold that joint bypass facilities involve “distribution” and therefore constitute “utility service.”

In its opinion on review of the Commission’s earlier orders in this Docket, the Circuit Court explained that federal courts’ interpretations of the term “local distribution” under the Natural Gas Act (“NGA”) also provide context for the meaning of

“distribution” in ORS § 758.400(3).<sup>1/</sup> NW Natural Gas v. OPUC, Case No. 01C18514, Opinion Letter at 4-5. The NGA is relevant because it allows states to regulate “local distribution” of gas. Id. Interstate transportation of gas, on the other hand, is subject to FERC’s exclusive jurisdiction. General Motors v. Tracy, 519 U.S. 278, 290-92 (1997). As a result, to the extent that Oregon regulates “distribution” through the Territorial Allocation Law, it can only regulate those activities that are considered “local distribution” under federal law. NW Natural Gas v. OPUC, Case No. 01C18514, Opinion Letter at 4-5.

As discussed below, the NGA preempts states’ jurisdiction over interstate transportation of natural gas. General Motors v. Tracy, 519 U.S. at 290. The Territorial Allocation Law was enacted in 1961, long after the NGA was enacted in 1938. Re Central Lincoln People’s Utility Dist., Docket Nos. UA 58/UA 60, Order No. 98-546 at 2 (Dec. 31, 1998); General Motors v. Tracy, 519 U.S. at 283. It is reasonable to conclude that the Oregon legislature would have intended the meaning of “distribution” in the Territorial Allocation Law to coincide with the meaning of “local distribution,” which the NGA explicitly allowed states to regulate.

The United States Supreme Court has interpreted “local distribution” as involving in-state retail sales of natural gas. See General Motors v. Tracy, 519 U.S. at 291-92 (explaining that the Court has construed Section 1(b) of the NGA, which exempts “local distribution of natural gas” from federal regulation, as exempting all in-state retail

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<sup>1/</sup> The Court of Appeals did not pass on the validity of the Circuit’s Court reasoning. Instead, it ruled that it could not base its opinion on reasoning that was different from that actually expressed by the OPUC. NW Natural v. OPUC, 195 Or. App. at 559.

sales of natural gas from federal regulation). Consistent with this interpretation, federal courts of appeals have interpreted local distribution as meaning sales to local consumers at retail. Cascade Natural Gas v. FERC, 955 F.2d 1412, 1419 (10th Cir. 1992); Public Util. Comm'n of Cal. v. FERC, 900 F.2d 269, 276 (D.C. Cir. 1990); Michigan Consol. Gas v. FERC, 883 F.2d 117, 121 (D.C. Cir. 1989). Michigan Consol. Gas v. Panhandle E. Pipe Line Co., 887 F.2d 1295, 1300 (6th Cir. 1989). This is consistent with the plain meaning of distribution, as discussed above, which “conjures up receiving a large quantity of some good and parcelling it out among many takers.” Pub. Util. Comm'n of Cal. v. FERC, 900 F.2d at 276.

This interpretation of the meaning of “local distribution” leads to the conclusion under the NGA that when gas flows through a bypass facility to an end user, it involves transportation in interstate commerce, not local distribution. Michigan Consolidated Gas v. Panhandle E. Pipe Line Co., 887 F.2d at 1300; Michigan Consolidated Gas v. FERC, 883 F.2d at 121. The joint bypass facilities described in NW Natural’s petition do not involve retail sales to local consumers. As the Tenth Circuit has explained in the context of reviewing a FERC approval of a jointly owned bypass, “the bypass transactions do not entail the realm of local retail sales that Congress intended to reserve to the states.” Cascade Natural Gas v. FERC, 955 F.2d at 1419. Because joint bypass facilities do not meet the definition of “local distribution” under the NGA, it follows that they do not fit within the meaning of “distribution” under the Territorial Allocation Law.

Finally, a finding that jointly owned bypass facilities “distribute” natural gas would be inconsistent with one of the main purposes of the Territory Allocation Law, which is the “elimination and future prevention of duplication of utility facilities.” ORS § 758.405. A ruling against jointly owned bypass facilities will only encourage the proliferation of single-owner bypass facilities for those end users that are prevented from jointly owning a bypass. Dissatisfied end users would build multiple pipelines, side by side, when only one pipeline was necessary. Ultimately, this would undermine a fundamental purpose of the Territorial Allocation Law.

**3. The Commission’s Jurisdiction over Bypass Facilities Is Preempted by Federal Law**

Federal law preempts the Commission from issuing a declaratory ruling in this proceeding. See Midwestern Gas Transmission v. McCarty, 270 F.3d 536, 540 (7th Cir. 2001) (enjoining action for declaratory ruling before state commission because the Natural Gas Act preempts state regulatory law regarding bypass pipelines). However, throughout the DR 23 proceedings, the Commission has consistently declined to address the issue of preemption. Re Petition of NW Natural Gas Co., OPUC Docket No. DR 23, Ruling (July 24, 1999); OPUC Docket No. DR 23, Order No. 00-306 at 11; OPUC Docket No. DR 23, Ruling at 2-3 (July 20, 2005). Although the Commission has not included preemption on its list of issues to be addressed in this proceeding, Oregon Steel addresses the issue briefly here to reiterate its position that the Commission lacks jurisdiction to issue the declaratory ruling that NW Natural requests. See Waddill v.



Anchor Hocking, 330 Or. 376, 384 (2000) (lack of subject matter jurisdiction may be raised at any time).

The Commission's refusal to address preemption appears to be based on the fact that NW Natural only discusses issues of state law, not federal law, in its petition. OPUC Docket No. DR 23, Ruling at 3 (July 20, 2005). Nevertheless, the Commission is fully capable of addressing federal preemption even though NW Natural's petition fails to directly raise the issue. See Re Hermiston Generating Co., OPUC Docket No. DR 16, Order No. 96-141 at 6-7 (June 4, 1996) (addressing federal preemption in the context of a petition for declaratory ruling regarding the applicability of state law). Indeed, it is improper for the Commission to fail to recognize that insofar as the Territorial Allocation Law could possibly apply to invalidate the bypass facilities described in NW Natural's petition, the state law would be preempted by the NGA.

The NGA grants FERC exclusive jurisdiction over the transportation and sale of gas in interstate commerce. General Motors v. Tracy, 519 U.S. at 290; Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n, 894 F.2d 571, 576 (2d Cir. 1990). Because bypass facilities involve interstate transportation of natural gas, they are subject to FERC's exclusive jurisdiction. See Maryland v. Louisiana, 451 U.S. 725, 755 (1981); Midwestern Gas Transmission Co., 85 FERC ¶ 61,358 at 62,396 (1998). The NGA therefore preempts state regulation of the construction and operation of bypass facilities. Michigan Consol. Gas v. Panhandle E. Pipe Line, 887 F.2d at 1300-02; Pub. Util. Comm'n of Cal. v. FERC, 900 F.2d at 276; Cascade Natural Gas v. FERC, 955 F.2d at 1419; Midwestern Gas Transmission v. McCarty, 270 F.3d at 540.

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NW Natural seeks a ruling as to whether joint bypass facilities violate Oregon's Territorial Allocation Law. FERC, however, has already approved the Oregon Steel Bypass, which is a joint bypass similar to those described in NW Natural's petition. Northwest Pipeline Corp., 52 FERC ¶ 61,053. To the extent that application of the Territorial Allocation Law would make construction and operation of joint bypass facilities illegal in Oregon, the law is preempted by the NGA. See Michigan Consol. Gas v. Panhandle E. Pipe Line, 887 F.2d at 1301. In other words, the Commission cannot issue a declaratory ruling that joint bypass facilities violate the Territorial Allocation Law, because such a ruling would conflict with the federal policy of allowing joint bypass facilities and, indeed, FERC's specific approval of the Oregon Steel Bypass. Id.; Midwestern Gas Transmission v. McCarty, 270 F.3d at 540. Because of the preemptive effect of the NGA on the Commission's jurisdiction, the Commission should decline to issue the declaratory ruling requested by NW Natural.

4. **All Issues Surrounding the Oregon Steel Bypass Have Been Resolved Pursuant to a Binding Settlement Agreement Approved by the Commission**

Oregon Steel and NW Natural have fully litigated and resolved all issues surrounding the Oregon Steel Bypass, as evidenced by the Release Agreement. The Release Agreement and the subsequent Commission approval constitute a final determination regarding the Oregon Steel Bypass. To litigate again, directly or indirectly, the legal propriety of the Oregon Steel Bypass thirteen years into its operation would violate the doctrine of issue preclusion. North Clackamas School Dist. v. White, 305 Or. 48, 51-52 (1988).

NW Natural's original Petition for Declaratory Ruling correctly advocates that the Oregon Steel Bypass should be grandfathered, thereby avoiding a result that is inconsistent with the original Oregon Steel/Ash Grove litigation and Release Agreement.<sup>2/</sup> Original Petition for Declaratory Ruling at 16. The Commission's ruling should exempt the Oregon Steel Bypass because: 1) NW Natural is precluded from relitigating the issues presented in the original litigation; 2) the issues surrounding the bypass have been fully litigated; 3) the parties reached a full and binding settlement; and 4) the Commission approved the Release Agreement and allowed the Oregon Steel Bypass to be constructed and operated.

Under the doctrine of issue preclusion, NW Natural cannot relitigate the legality of the Oregon Steel Bypass. North Clackamas School Dist., 305 Or. at 50-52 (*res judicata* rules should be applied in administrative proceedings where they facilitate prompt, orderly and fair problem resolution; *res judicata* includes both issue preclusion and claim preclusion). "Issue preclusion arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding." Nelson v. Emerald People's Util. Dist., 318 Or. 99, 103 (1994); see North Clackamas School Dist., 305 Or. at 52. Under Oregon law, four factors control whether an administrative decision has a preclusive effect:

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<sup>2/</sup> The Amended Petition for Declaratory Ruling incorrectly states that the owners of the Oregon Steel Bypass provide "utility services," and that the Release Agreement "certifies the allocation of utility territory among these parties under ORS 758.415." Amended Petition at 13. This is incorrect because, as explained above, an operator of a joint bypass facility does not provide "utility service." However, if the Commission determines that operating a joint bypass facility does constitute "utility service," then it could arguably conclude that territory was allocated to Oregon Steel and Ash Grove.

(1) whether the administrative forum maintains procedures that are ‘sufficiently formal and comprehensive’; (2) whether the proceedings are ‘trustworthy’; (3) whether the application of issue preclusion would ‘facilitate prompt, orderly and fair problem resolution’; and (4) whether the ‘same quality of proceedings and the opportunity to litigate is present in both proceedings.’

Nelson, 318 Or. at 104 n.4 (citations omitted).

In this case, the issue of ultimate fact—the legality of the Oregon Steel Bypass—was resolved by the Release Agreement, which was in turn approved by the Commission. The process leading to the Release Agreement was formal, comprehensive, and trustworthy. The Release Agreement resolved any claims, known or unknown, that could have been asserted against either party by the other.<sup>3/</sup> The Release Agreement constituted a full settlement of all claims pending in litigation at that time. The Commission’s approval of the Release Agreement is, likewise, trustworthy because the Commission reviewed the terms of the Release Agreement and found them reasonable. OPUC Docket No. UM 367, Order No. 92-762.

The Release Agreement, coupled with the Commission’s approval, is a final determination regarding the legality of the Oregon Steel Bypass. Deaton v. Hunt-Elder, 145 Or. App. 110, 116 (1996). In Deaton, the Oregon Court of Appeals found that an administratively approved settlement agreement carried the weight of an administrative decision on the merits. Id. Under the doctrine of issue preclusion, the

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<sup>3/</sup> While the parties are contractually bound to maintain the confidentiality of the Release Agreement, the portions of the Release Agreement cited herein are not confidential, and counsel for Oregon Steel obtained the Release Agreement from the OPUC’s public files.

final administrative determination embodied in OPUC Order No. 92-762 bars both NW Natural and the Commission from revisiting the legality of the Oregon Steel Bypass.

Furthermore, a party cannot relitigate an issue (or ignore the provisions of a settlement agreement) simply because they have devised a new legal theory. Legore v. Self-Insured Mgmt. Servs., 157 Or. App. 229, 235-236 (1998) (in workers' compensation claim, Workers' Compensation Board's initial order was final and binding, barring relitigation of same factual transaction by raising a new legal theory available in the first proceeding). Any new theories raised in NW Natural's Amended Petition are, therefore, of no legal significance as they relate to Oregon Steel, so the Commission should exempt the Oregon Steel Bypass from the declaratory ruling sought in this case.

### **CONCLUSION**

The Commission should not issue the declaratory ruling requested by NW Natural because it is preempted from doing so by federal law. Assuming that the Commission does nevertheless rule on NW Natural's request, it should rule that the joint bypass facilities described in NW Natural's petition do not violate the Territorial Allocation Law because they do not provide "utility service." This conclusion is consistent with the plain meaning of the text of the law and the Oregon and federal law that provides context for the law's meaning. Finally, because the Commission has already approved the NW Natural-Oregon Steel Release Agreement and recognized the parties' stipulation, the Oregon Steel Bypass should explicitly be exempted from any Commission ruling that finds that joint bypass facilities violate the Territorial Allocation Law.

Dated this 30th day of August, 2005.

Respectfully submitted,

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