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**BEFORE THE PUBLIC UTILITY COMMISSION**  
**OF OREGON**

UA 93/DR 30

In the Matter of	)	
	)	
NORTHWEST NATURAL GAS	)	
COMPANY	)	
	)	
Request for Approval of Agreement to	)	ORDER
Allocate Customers and Territory. (UA 93)	)	
	)	
Petition for Declaratory Ruling Regarding	)	
Statewide Rate Allocation of Costs. (DR 30)	)	

**DISPOSITION: TERRITORY APPLICATION DENIED;  
DECLARATORY RULING HELD IN ABEYANCE**

On December 31, 2001, Northwest Natural Gas Company (NW Natural) filed an application under ORS 758.400 to 758.475, asking the Public Utility Commission of Oregon (Commission) to approve a Transportation Service Agreement (Agreement) between NW Natural and Coos County and to acknowledge two exceptions to NW Natural's exclusive service territory in Coos County (Docket UA 93). Notice of the application was published.

On February 6, 2002, a prehearing conference was held. Further scheduling of UA 93 was held in abeyance pending NW Natural's filing of a declaratory ruling regarding statewide rate allocation of costs for constructing a distribution system in Coos County.

On February 19, 2002, NW Natural filed a petition for a declaratory ruling pursuant to ORS 756.450, asking the Commission to approve NW Natural's rate proposal for a distribution system within Coos County (Docket DR 30). Specifically, NW Natural asked the Commission to determine that it had authority under ORS 756.040 and ORS 757.125 to approve statewide rate treatment of capital costs incurred during the initial construction period of the distribution system, and to allow NW Natural to collect excess pipeline capacity charges from Oregon customers.

Petitions to intervene were filed in both dockets by the Northwest Industrial Gas Users (NWIGU), City of Bandon, Coos County and Pat Simpson. Ron La Franchi, doing business as Ron's Oil Company (Ron's Oil), filed a petition to intervene in DR 30 only. All of the petitions were granted.

Prehearing conferences were held on February 27, March 11, March 25, April 3, and May 1, 2002.<sup>1</sup> On April 18, 2002, the parties filed stipulated facts in DR 30. On April 22, Administrative Law Judge (ALJ) Kathryn Logan asked the parties whether they would agree to modify the stipulated facts. NW Natural, along with the other parties, agreed to the modifications suggested by the ALJ.

NW Natural, Staff, NWIGU, City of Bandon, Coos County, Ron's Oil and Pat Simpson filed timely briefs in May 2002.

On June 7, 2002, ALJ Logan issued a memorandum and interrogatory, informing NW Natural that the application was not legally sufficient. NW Natural was asked whether it was willing to proceed with the Coos County project if the territory allocation application was denied. NW Natural was also asked under what circumstances it would be willing to proceed.

On June 12, 2002, NW Natural stated that it would not be willing to proceed on the project without Commission approval of the territory allocation application. In addition, NW Natural asked for permission to submit an explanation of its proposed solutions to address the concerns raised in the June 7, 2002, ALJ memorandum. NW Natural submitted its explanation on June 25, 2002.

On July 19, ALJ Logan issued another memorandum, asking NW Natural if it was willing to convert UA 93 to a declaratory ruling docket. On July 25, 2002, NW Natural filed its response, stating that it did not agree to change the UA 93 docket to a declaratory ruling docket. NW Natural also submitted additional explanation in support of its application.

On July 26, 2002, Coos County filed a memorandum in support of NW Natural's application. On July 29, 2002, NWIGU submitted a letter in response to NW Natural's July 25, 2002 filing. NWIGU asked the Commission to deny the application.

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<sup>1</sup> Although the two dockets were not consolidated, the parties agreed that due to the interrelated facts and issues, the two dockets should be processed on a parallel track.

## **Background**

In Order No. 00-274 (Docket UA 76), the Commission approved NW Natural's application to exclusively serve unserved territory in Coos County. We stated:

This application is made as part of an economic development project undertaken by Coos County with support from the State of Oregon. The plan is for a natural gas pipeline to be built from the Williams Pipeline Corporation's lateral to serve Coos Bay, Myrtle Point and Coquille. Coos County voters passed a \$27 million bond measure in 1999 to finance the County's portion of this project. Order No. 00-274 at 2.

Once the initial territory application was approved, it was anticipated that NW Natural and Coos County would negotiate an agreement outlining the terms and conditions for transporting the natural gas purchased by NW Natural to the distribution systems constructed by NW Natural.

## **Contents of Agreement**

The Agreement entered into by Coos County and NW Natural addresses multiple subjects, including details for constructing the pipeline and distribution system; marketing; fees and payment; receipt, transport and delivery of natural gas; and management, operation and repair of the pipeline and distribution system.

Article 8 of the Agreement, entitled *Negotiation with Industrial Customers*, outlines a procedure for providing gas to potential industrial customers. First, NW Natural would negotiate with prospective industrial customers. If after such negotiations an eligible prospective customer determined not to locate in Coos County, then both Coos County and NW Natural will negotiate with the customer. If the three parties cannot agree on a special contract for gas distribution, and after NW Natural and Coos County determine whether other economic incentives are available, then Coos County may offer the eligible prospective customer a direct connection to the county's pipeline. The Agreement does not outline the transfer or allocation of any of NW Natural's exclusive service territory to Coos County, except for the possible allocation of an eligible industrial customer pursuant to this process.

Further, in Article 9, the Agreement requires that the Commission must approve the entire Agreement without qualification, limitation or condition (except as may be approved by NW Natural in writing), and that the Commission must agree to retain jurisdiction over the Agreement to supervise and enforce its terms and conditions.

**Issues**

NW Natural has presented the Agreement between itself and Coos County to the Commission, asking for Commission approval. The issues before us are whether the Commission has the authority to approve such agreement, in whole or in part, and if so, whether the agreement should be approved.

NW Natural has also presented certain assumed facts. The issues are whether the Commission should issue a declaratory ruling that (a) recognizes the applicability of ORS 756.040 and ORS 757.125 to NW Natural's construction of a distribution system in Coos County, and (b) provides for Commission approval of NW Natural's rate proposal as set forth in its petition.

**Positions of the Parties (UA 93)**

NW Natural and Coos County

NW Natural and Coos County entered into an Agreement that provides limited exceptions to NW Natural's exclusive territory allocation. Under the Agreement, Coos County could directly serve some customers under certain circumstances. NW Natural and Coos County want the Commission to approve the Agreement by using the territory allocation statutes.

NW Natural concedes that many provisions of the Agreement do not relate specifically to the allocation of territory and customers. However, NW Natural wants the entire Agreement to be approved to provide sufficient protection from federal antitrust liability,<sup>2</sup> and to make the Agreement enforceable under Oregon law. According to NW Natural, there is no legal obstacle to granting approval of the entire contract.

NW Natural acknowledges that this is not a typical territory allocation situation. However, NW Natural contends that the territory allocation laws are sufficiently broad to apply to these factual circumstances, where gas utility service and actual customers do not, as yet, exist. According to NW Natural, the Agreement sufficiently defines the customers and the circumstances under which an allocation of customers and territory may occur. Further, the Agreement fulfills the statutory purposes outlined in ORS 758.415, and should be approved by the Commission.

Staff

Staff recommended that the Commission use a four-step analysis in making its determination. These steps are as follows:

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<sup>2</sup> Commission approval, according to NW Natural, would provide the requisite state action needed to shield NW Natural from violation of federal antitrust laws.

1. Did NW Natural assign rights under ORS 758.410 and 758.460 when it granted to Coos County the right to 1) construct a lateral, intrastate pipeline terminating in NW Natural's exclusive territory, and 2) allow customers to connect directly to the pipeline under the Agreement? If the answer is no, then the analysis is complete.
2. If NW Natural assigned rights pursuant to ORS 758.460, and the Agreement is a contract pursuant to ORS 758.410, does federal law, specifically, the Natural Gas Act and the "dormant" Commerce Clause, preempt Commission review?
3. Does the Agreement satisfy the purpose and criteria of the territory allocation statutes?
4. If NW Natural has assigned rights under ORS 758.460, is that assignment contrary to the public interest?

Using this analysis, Staff recommends that the Commission find that the Agreement encompasses a partial assignment to Coos County by NW Natural of its exclusive right to provide utility service to Coos County customers, that federal law does not preempt Commission review, that the Agreement satisfies the purpose and criteria of the territory allocation statutes, and that NW Natural assignment of rights is not contrary to the public interest. In sum, Staff recommends that the Commission approve the Agreement under the territory allocation statutes.

#### NWIGU

NWIGU argues that the Commission does not have the authority to approve the Agreement as it is currently written. NW Natural has not provided the Commission with a permissible territory allocation petition. Further, ORS 758.460 does not grant authority to the Commission to recognize exceptions to NW Natural's exclusive service territory.

NWIGU contends that the Agreement to divide customers between NW Natural and Coos County based on the potential customer's size and location is an unlawful restraint of trade. The Commission should, according to NWIGU, declare these anticompetitive aspects of the Agreement as contrary to public policy.

As its final assertion, NWIGU does not believe NW Natural should be able to prevent a "legally recognized option for industrial facilities to construct a jointly owned direct connection to the Coos County Pipeline."<sup>3</sup> NWIGU Opening Brief at 3.

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<sup>3</sup> This issue, known as "Condo Bypass" was addressed in DR 23.

City of Bandon

The City of Bandon urges the Commission to reject NW Natural's territory allocation application. According to the City of Bandon, NW Natural is seeking to have the entire Agreement approved rather than the portions of the Agreement that arguably fall within the scope of ORS 758.410 to ORS 758.425. The City of Bandon also argues that the application only addresses the allocation of future customers without adequately describing the geographic territories NW Natural is assigning to Coos Bay.

Pat Simpson

Pat Simpson is a concerned resident of Coos County. She raised various "items of concern" regarding the Agreement, and generally opposes the application.

**Applicable Law (UA 93)**

**ORS 758.400 Definitions for ORS 758.015 and 758.400 to 758.475.** As used in ORS 758.015 and 758.400 to 758.475 unless the context requires otherwise:

(1) "Allocated territory" means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the Public Utility Commission or established by an order of the commission approving an application for the allocation of territory.

\* \* \* \* \*

(3) "Utility service" means service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service.

**ORS 768.405 Purpose of ORS 758.400 to 758.475.** The elimination and future prevention of duplication of utility facilities is a matter of statewide concern; and in order to promote the efficient and economic use and development and the safety of operation of utility services while providing adequate and reasonable service to all territories and customers affected thereby, it is necessary to regulate in the matter provided in ORS 758.400 to 758.475 all persons and entities providing utility services.

**ORS 758.410 Contracts for allocation of territories and customers between suppliers of utility service and for transfer of facilities.**

(1) 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; and the territories and customers so allocated and designated may include all or any portion of the territories and customers which are being serviced by either or both of the parties at the time the contract is entered into, or which could be economically serviced by the then existing facilities of either party, or by reasonable and economic extensions thereto.

\* \* \* \* \*

**ORS 758.415 Contract enforceable if approved by commission; conditions for approval.** Notwithstanding any other provisions of law, a contract entered into pursuant to ORS 758.410, when approved by the Public Utility Commission as provided in ORS 758.420 to 758.475, shall be valid and enforceable; provided, that the commission shall approve such a contract only if the commission finds, after a hearing as provided in ORS 758.420 to 758.475, that the contract will eliminate or avoid unnecessary duplicating facilities, and will promote the efficient and economic use and development and the safety of operation of the utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby.

**ORS 758.460 Assignment or transfer of rights acquired by allocation; approval of commission.** (1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the Public Utility Commission after a finding that such assignment or transfer is not contrary to the public interest. However, no hearing is required if all affected customers agree to the proposed assignment or transfer.

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**Discussion (UA 93)**

NW Natural has asked the Commission to approve an agreement between NW Natural and Coos County under the territory allocation statutes. We address only one of the issues raised by the application, as it is dispositive of the case: Does the Commission have the legal authority to approve a territory allocation application when the applicant is not actually transferring any territory? We hold that we cannot approve an application for territory allocation without an actual allocation of an "area with boundaries" as provided in ORS 758.400(1).

The purpose of the territory allocation statutes (ORS 758.400 to 758.475) is to prevent and eliminate duplication of utility facilities, promote economic use and development, and maintain safe operation of service while providing adequate and reasonable service. *See*, ORS 758.405. In a territory allocation docket, we are usually presented with a request to allow a utility to exclusively serve unserved territory, as NW Natural did in docket UA 76, or a request to approve a contract for allocation of territory and customers between two similar utilities. In either instance, under our administrative rules, the application must contain a map showing the general location and boundaries of the applicant's service territory, and the territory to be added or allocated between similar utilities. *See*, OAR 860-025-0010 through 860-025-0027.

NW Natural, in its application, asked the Commission to waive the rule requirements regarding the filing of maps and metes and bounds descriptions. We understand NW Natural's difficulty in complying with the rule requirements. The Agreement between NW Natural and Coos County only delineates a procedure under which future customers might be allocated to Coos County. There are no assurances that any territory or customers will actually be allocated to Coos County.

NW Natural argues that although this is not a typical territory allocation case, the Commission has authority to grant the application and approve the contract. We are not particularly concerned that the proposed allocation occurs in the future.<sup>4</sup> However, to use the territory allocation statutes to approve a contract without actually allocating territory, either now or in the future, is not within our authority. As stated in the memorandum to the parties on June 7, 2002:

Commission legal counsel has advised the Commission that the territory allocation petition in UA 93 is not legally sufficient. As defined in ORS 758.400(1), allocated territory is an area with boundaries. In its petition, Northwest Natural Gas Company (NW Natural) has not defined any area within boundaries that is to be allocated to Coos County.<sup>5</sup>

NW Natural is asking this Commission to provide antitrust protection by approving the Agreement under the territory allocation statutes. These statutes were not designed for that purpose. We are bound by the authority delegated to us by the legislature. In this instance, we simply do not have the authority to grant the application presented to us by NW Natural.

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<sup>4</sup> For example, we could approve a contract to allocate territory and customers on a specific future date.

<sup>5</sup> The memorandum continued with our concerns about the legality of requiring the Commission to enforce terms and conditions of the Agreement. We do not address those issues further in this order.



**State-wide rate treatment and capacity charges (DR 30)**

In the June 7, 2002, memorandum to NW Natural, we asked the following:

Assuming that the territory allocation petition is denied, is NW Natural willing to proceed with the project? If so, under what circumstances is NW Natural willing to proceed?

NW Natural responded by stating that it was unwilling to proceed with the project absent Commission approval of the territory allocation application. In light of NW Natural's position, we do not see a reason to proceed with the declaratory ruling docket at this time. The declaratory ruling docket will be held in abeyance pending notification by NW Natural that it wants a declaratory ruling issued, and how such a ruling would affect this project. Such notification should be submitted within 30 days of the date this order is issued. If we do not hear from NW Natural within the 30-day period, we will close the DR 30 docket.

**ORDER**

IT IS ORDERED that:

1. The territory allocation application is denied.
2. NW Natural is to inform us, within 30 days of the date this order is issued, whether it wants a declaratory ruling issued, and if so, how such a ruling would affect this project.
3. If NW Natural does not ask for a declaratory ruling to be issued in DR 30 within the 30-day period, the DR 30 docket is closed.

Made, entered, and effective \_\_\_\_\_.

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**Roy Hemmingway**  
Chairman

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**Lee Beyer**  
Commissioner

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**Joan H. Smith**  
Commissioner

ORDER NO. 02-678

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.