STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	): SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

In the Matter of Commission Staff's Petition for Declaratory Ruling Regarding Farm Tap Customers (NG 16-014)	32-CIV-17-71 32-CIV-17-83

NORTHWESTERN ENERGY'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Section 1-26-15 of South Dakota Codified Laws grants declaratory rulings "the same status as agency decisions or orders in contested cases." Therefore, this Court has jurisdiction over this administrative appeal under SDCL § 1-26-30. The South Dakota Public Utilities Commission ("PUC" or "Commission") entered its declaratory ruling in Docket No. NG16-014 on January 24, 2017. Northern Natural Gas Company ("Northern") filed a timely petition for rehearing and NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") filed a timely petition for reconsideration. The Commission denied all the petitions on March 20, 2017. Northern timely filed its notice of appeal on March 22, 2017 (32-CIV-17-71). NorthWestern timely filed its notice of appeal on April 3, 2017 (32-CIV-17-83).

STATEMENT OF ISSUES

1. The declaratory-ruling process, which allows discovery, is available to anyone wanting the Commission to determine the applicability of its authority; the presence of disputed facts does not make a matter a contested case. Northern did not avail itself of any discovery methods and did not object to the declaratory-ruling process until after the Commission issued its ruling. If this matter did qualify as a contested case, did Northern waive its right to object?

   The Commission denied Northern's petition for rehearing – the first instance in which Northern raised an objection – thus implicitly finding that Northern had waived its objection.

2. When utility services are not required by law, a state utility regulatory commission generally lacks jurisdiction to regulate an organization that privately contracts to provide some type of service for a defined group—something less than the general public. The farm-tap services here are not required by law and are provided to a limited group (farm-tap landowners), defined and governed solely by private contracts. Did the Commission have jurisdiction over NorthWestern regarding those private contractual services?

The Commission decided as a matter of law that it did have jurisdiction.

3. SDCL Chapter 49 defines a "public utility" as a "person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part." Northern's approximately 200 easement parties are not the "public," and NorthWestern does not operate, maintain, or control any farm-tap equipment for those 200 easement parties. Is NorthWestern a public utility for the parties to Northern's private easement agreements?

The Commission ruled that NorthWestern is a public utility with respect to farm taps.

STATEMENT OF THE CASE

This case involves an appeal of the Commission's declaratory ruling on January 24, 2017, and the Commission's orders on March 20, 2017, denying petitions for rehearing and reconsideration. This matter began on November 9, 2016, when the PUC Staff filed a petition for a declaratory ruling to determine the scope of the Commission's jurisdiction over farm taps taking natural gas from a transmission line owned and operated by Northern. (AR 11.) After providing notice of the petition, Northern, Northwestern, and Montana-Dakota Utilities Co. ("MDU") petitioned to intervene, requesting party status. (AR 25, 30.) Northern petitioned to intervene only "to provide comments and oral argument, if appropriate." (AR 28.) The Commission granted all the petitions to intervene on November 23, 2016. (AR 47.)

After a first hearing on December 14, 2016, and a second hearing on January 17, 2017, the Commission issued a declaratory ruling holding: (1) that the Commission has jurisdiction over the farm taps; (2) that NorthWestern is a public utility as defined by

SDCL Chapter 49 with respect to the farm-tap customers; and (3) that the farm taps are not subject to state jurisdiction for the purpose of pipeline safety. (AR 829.) NorthWestern petitioned for reconsideration of the first two issues. (AR 983-997.) Northern petitioned for rehearing, arguing for the first time, on February 17, 2017, that the matter should have been treated as a contested case. (AR 1004-1005.) On March 20, 2017, in two separate orders, the Commission denied the petitions for reconsideration and rehearing. (AR 1125-1128.) Both Northern and NorthWestern appeal.

STATEMENT OF FACTS

I. A short history of Northern's farm taps and its easement obligations.

Beginning in the 1950s, Northern acquired easements from private landowners in east South Dakota so it could install an interstate natural-gas transmission line. (AR 157.) Northern continues to own and operate that interstate transmission line today, under the benefit of the easements it obtained approximately seventy years ago. (AR 155.) In exchange for the landowners' consents to the easements, Northern agreed, among other things, to provide the landowners with a farm tap (complete with a meter supplied by Northern) that branches out from the transmission line, for the purpose of Northern (or any vendee of Northern) furnishing natural-gas service to the individual landowners.[1] The example of an easement that Northern placed in the record with the

[1] "As a further consideration for this grant, [Northern] agrees as follows: . . . . (3) That [Northern], upon written application by the [landowner], will make, or cause to be made, a tap in any gas pipe line constructed by grantee upon the above described premises for the purpose of supplying gas to [the landowner], for domestic purposes only and not for re-sale, and for use upon the above described premises only. All connections required, shall be furnished and paid

Commission shows that Northern's obligations continue as long as its pipeline runs through a landowner's property.[2]

II. NorthWestern's limited role in servicing Northern's farm taps.

Since obtaining the easements, Northern has been responsible for furnishing natural-gas service to the farm taps. Initially, Northern directly served the farm taps, but eventually it began contracting for various servicing aspects through other entities, as vendees of Northern under the easements.

In 1987, Northern entered into an agreement with Peoples Natural Gas ("Peoples"), under which Peoples agreed to service the farm taps for thirty years, through 2017. (AR 159.) Peoples' successor in interest was Minnesota Energy Resources Company, which eventually assigned part of its obligation to service the farm taps to NorthWestern in May 2011. (AR 179.) This partial assignment was part of a larger agreement for NorthWestern's purchase of what is known as the "Milbank Pipeline" from Northern around the same time, though the duties that NorthWestern assumed were completely unrelated to the Milbank Pipeline. (AR 160.)

Specifically, NorthWestern agreed to assume responsibility for a portion of Northern's farm-tap servicing responsibilities in South Dakota. (AR 179.) But

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for by [the landowner] with the exception of the meter, which is to be furnished and owned by [Northern]. Said tap will be provided by [Northern] from a convenient point on its main line or some lateral as [Northern] may determine, and gas to be taken under this provision shall be measured and furnished to the [landowner] at the rates and upon the terms as may be established by [Northern], or by any vendee of [Northern], from time to time." (AR 155.)

[2] "TO HAVE AND TO HOLD unto said [Northern] its successors and assigns, so long as such pipe lines, and appurtenances thereto, shall be maintained . . . ." *Id.*

NorthWestern did not assume any direct obligation to the farm-tap customers or members of the public. *Id.* (NorthWestern does not own any part of the farm-tap infrastructure; the company has a servicing role only.) By the terms of the partial assignment, NorthWestern's obligation expires December 31, 2017. *Id.*

III. The PUC Staff files a declaratory petition.

In anticipation of the expiration of NorthWestern's contractual obligation to provide services for Northern, the PUC Staff filed a petition, on November 9, 2016, requesting a declaratory ruling on three questions: (1) "Does the Commission have jurisdiction over the utility providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by [Northern]?"; (2) "If so, which entity, [NorthWestern or Northern], if either, is a public utility as defined by SDCL Chapter 49 with respect to [those] farm tap customers?"; and (3) "[A]re the farm taps in whole or in part subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?" (AR 11.)

Before filing its petition, PUC Staff "engaged in numerous conversations in-person, over the phone, and via email" with both NorthWestern and Northern. (AR 15.) Today, Northern makes no claim that it ever requested of or even suggested to the PUC Staff in those communications that this matter should be noticed as a contested case under Sections 1-26-16 and 1-26-17 of South Dakota Codified Laws.

IV. Northern files a tentative petition for limited intervention.

After the PUC Staff served Northern and NorthWestern with the petition, both companies (and MDU) petitioned to intervene, requesting party status. (AR 25, 30.) Northern filed a tentative petition, seeking to intervene for the purpose of "provid[ing] comments and oral argument, if appropriate"—nothing more. (AR 28.) None of the petitioners, including Northern, requested a contested hearing or questioned the declaratory-ruling process. On November 23, 2016, the Commission granted all of the petitions to intervene. (AR 47.)

From the outset, the Commission followed the procedures set forth in Sections 20:10:01:34 and 20:10:01:35 of the Administrative Rules of South Dakota, for petitions seeking a declaratory ruling. Those procedures generally require the Commission to issue a declaratory ruling within sixty days after the filing of the petition, unless some additional time is requested (and Northern never requested additional time). ARSD 20:10:01:35. During the time a petition for declaratory ruling is pending, parties can develop evidence for their positions in a variety of ways. The rules, for example, allow parties to obtain discovery from another party without commission approval. *See* ARSD 20:10:01:22.01 (stating, without limitation to contested cases, that "[a] party may obtain discovery from another party without commission approval."). Northern did not avail itself of any discovery methods.

V. Following an extensive hearing, the PUC issued a declaratory judgment.

The Commission held a hearing on the PUC Staff's petition for a declaratory ruling on December 14, 2016. Before the hearing, all of the parties submitted briefs and other materials. (AR 48-51; 116-79; 205-34; 257-70).) Northern submitted a copy of an affidavit signed many months earlier by one of its operations managers. (AR 148-49.) And along with its briefs, Northern filed copies of several documents to support its position, including agreements, an annotated photograph of a farm-tap site, and an example of the company's sixty-year-old easement with a landowner. (AR 137-54.) On the eve of the hearing—to support its assertion that federal law allows Northern to "abandon" its farm-tap obligations—Northern filed still more documents, including copies of emails and a portion of its annual report. (AR 257-70.)

During the hearing, which was attended by three representatives of Northern, Northern's lawyer argued the company's position at length and without time restriction. (AR 282-433.) At no point during the hearing did Northern suggest that the Commission should handle the matter as a contested case nor, for that matter, did Northern offer any evidence to the Commission. (*Id.*) The Commission did not limit the form or substance of Northern's presentation in any way. At various points during the hearing, individual commissioners seemed to express doubts about the Commission's jurisdiction over a private contractual matter. (*See, e.g.,* AR 421 (Commissioner Nelson: ". . . I dearly wish we had the authority today to waive the magic wand and solve this

problem for those folks today"); AR 341 (Commissioner Fiegen: ". . . this might, unfortunately, be a circuit court situation instead of a commission situation.")).

After the hearing, on December 23, 2016, Northern moved to reopen the record and asked the Commission to take judicial notice of a transcript of a PUC hearing several years earlier, a proceeding in which Northern did not seek party status. Northern said the transcript was a necessary part of the record because Northern now wanted the Commission to "enter a finding . . . that [Northern did] not have an obligation to provide public utility service to the farm tap customers after December 31, 2017"—thus, belatedly adding another issue to the matter. (AR 596.) On January 17, 2017, the Commission held another hearing to consider this motion, and the motion was denied. (AR 826-827.)[3]

On January 24, 2017, the Commission issued its ruling declaring: (1) "that the Commission has jurisdiction over utilities providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern"; (2) "that NorthWestern is a public utility as defined in SDCL [Chapter] 49 with respect to these farm tap customers"; and (3) "that farm taps in whole or in part are not subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B." (AR 829.)

[3] In its brief to this Court, Northern complains that, "[o]nce again, at the January 17, 2017, meeting [*sic*] [(it was a hearing)], the PUC never heard any testimony or accepted any 'evidence.'" Northern Brief at 8. Northern neglects to mention that in January, Northern told the Commission that it had, in fact, presented a good evidentiary record for the Commission: "The record developed in this docket is supported with objective and verifiable evidence." (AR [__].)

VI. Northern petitions for rehearing but cannot explain why it was only now objecting to the process.

Following the Commission's ruling, Northern filed a petition for rehearing, arguing, among other things, for the first time, that the entire matter should have been treated by the Commission as a contested case. (AR 1004-1005.) NorthWestern opposed Northern's petition and also petitioned the Commission for reconsideration of the first two points of the Commission's declaratory ruling: that the Commission has jurisdiction over utilities providing natural gas to the farm-tap end users; and that NorthWestern is a public utility with respect to farm-tap services. (AR 983-997.)

During the hearing on March 14, 2017, on the petitions for rehearing and reconsideration, one of the commissioners for the PUC asked Northern's counsel why Northern was only *now* objecting to the Commission's process and claiming this matter should have been treated as a contested case. Northern had no explanation for its silence and simply maintained (without authority) that it never had to object:

> [COMMISSIONER]: . . . So help me understand why Northern did not come in front of us and ask for a contested case so then you could have got a procedural schedule? . . . .
>
> [NORTHERN'S LAWYER]: The answer is it was always a contested case. Northern doesn't have to tell you what the law is, Commissioner. It's always a contested case if you meet the definition of a contested case under the Administrative Procedures Act. . . .
> It just—it ended up being more difficult than people thought it was going to be. But it always was a contested case, as a matter of law.

Trans. 32-33.[4] Three days later, on March 20, 2017, the Commission denied both Northern and NorthWestern's petitions. (AR 1125-1128.)

Northern and NorthWestern now both appeal the declaratory rulings, but Northern does not actually challenge the particulars of any of the Commission's rulings or offer any criticism of the substance of the Commission's rulings. Instead, Northern simply seeks reversal because the Commission's "procedural errors," in Northern's view, "affect the entire Docket NG 16-014." Northern Brief at 10.

ARGUMENT

I. Northern's belated demand for a contested hearing—only after deciding it did not like something about the Commission's ruling—should fail.

Northern presented its arguments to the Commission at a lengthy public hearing, and it had months before then to ask that this matter be treated as a contested case, but never did. Northern never availed itself of any discovery methods and gave every indication that it was content to allow this matter to follow the procedures for declaratory rulings. In its own petition to intervene, Northern said it merely sought to "*provide comments and oral argument, if appropriate*." Northern has thus waived any right it might have had to demand a contested hearing.

[4] When Northern said this matter "ended up being more difficult," Northern appeared to be employing a euphemism. Northern, after all, only objected to the process after the Commission issued its ruling. How did the "difficulty" of the matter—whatever that undefined difficulty was—only become apparent to Northern after Northern had filed multiple briefs and other materials and argued its position exhaustively? The only thing that became apparent after the Commission's ruling was, of course, the ruling itself—which Northern did not like in some unspecified respect—so Northern decided to object, retroactively, to the Commission's process.

The Commission properly handled this matter as a declaratory ruling. Petitions for declaratory rulings do not require separate findings of fact and conclusions of law. Remanding this matter for a "do over" when Northern cannot even identify a disagreement with the Commission's rulings would be a waste of everyone's time and resources, including the Commission's—to say nothing of the terrible precedent this would set for future parties who participate in the Commission's proceedings and then decide, after the fact, that they do not like something about the result.

A. This matter was never a contested case, and the presence of disputed facts does not change that or require formal findings and conclusions.

The PUC Staff began this action to determine the scope of the Commission's regulatory authority, which is declaratory in nature, raising three issues regarding either the Commission's own jurisdiction or regarding the public-utility status of Northern and NorthWestern. *See* AR 11; SDCL § 1-26-15. The limited scope of the issues raised as formulated by the PUC Staff's petition determined that this matter was properly set for a declaratory ruling. The Commission's scope of inquiry determines whether a matter is a contested case.

State statute defines a "contested case" as "a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . . ." SDCL § 1-26-1(2). Courts typically view this distinction in terms of whether an agency is acting more in its adjudicatory or rulemaking capacity. *See In re Union Carbide Corp*., 308 N.W.2d 753, 757 (S.D. 1981) ("Numerous cases hold and the commentaries of the drafters of the

Model Administrative Procedures Act of 1961 state that 'contested case' is synonymous with 'adjudication.'"). By contrast, declaratory rulings exist to determine "the applicability of any statutory provision or of any rule or order of the agency." SDCL 1-26-15. The process is available to "[a]ny person wishing the commission to issue its ruling as to the applicability to that person of any statutory provision or rule or order of the commission . . . ." ARSD 20:10:01:34.

Here, the petition itself—which sought a declaration on the applicability of the Commission's jurisdiction—demonstrates that the PUC Staff and the Commission properly viewed the scope of the inquiry as declaratory in nature. The matter was never a contested case as defined by South Dakota law. Northern's argument that the presence of disputed facts made this a contested case does not align with the statutory definition of a "contested case hearing." *See, e.g., In re W. River Elec. Ass'n, Inc.*, 675 N.W.2d 222, 225 (S.D. 2004) (the Commission, on a petition for declaratory ruling, determined that one utility had the right to provide service to new service points after another utility claimed the sole right to do the same).

The Commission decides matters seeking declaratory rulings differently than it decides contested cases. But in either instance, litigants have the right to conduct discovery and develop a record. Northern chose not to use any discovery methods, and it has not identified any evidence, in any event, that it would have sought by discovery. If Northern had wanted to pursue some discovery methods, it could have sought more time in the proceedings, and the Commission, historically, has accommodated those

types of requests. *See e.g. In the Matter of the Petition of West River Electric Association, Inc.*, EL02-003; *In the Matter of Application of Widevoice Communications, Inc.*, TC 09-083.

Northern's argument that the Commission should have entered separate findings of fact and conclusions of law is to no avail. Declaratory rulings do not need to contain specific findings. *See* ARSD 20:10:01:34. Because the Commission is not a court, it is not held to the same requirements as a court. A recent decision by the South Dakota Supreme Court reiterated that the statutes governing agency declaratory rulings do not even require a case or controversy. *In re Petition for Declaratory Ruling re: SDCL 62-1-1(6)*, 2016 SD 21, 877 N.W.2d 340, 344 (2016) ("Thus, the Department [of Labor] has routinely issued declaratory rulings based on hypothetical facts."). Like the Department of Labor, the Commission's administrative rules allow a petition simply to set forth "[t]he facts and circumstances which give rise to the issue to be answered by the commission." ARSD 20:10:01:34.

The requirement of findings and conclusions only applies to contested cases and not declaratory actions. With declaratory rulings, South Dakota law requires an agency to "provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." SDCL § 1-26-15; *see also* SDCL § 49-1-11(5) (empowering the PUC to establish procedures to decide petitions for declaratory rulings). Here, the Commission has an established procedure by which it decides declaratory matters quickly and efficiently, and it followed those procedures. *See* ARSD 20:10:01:34.

B. Northern waived its right to present additional evidence or to have this matter deemed a contested case.

Even if Northern were entitled to a contested-case hearing, it waived that right many months ago. When PUC Staff filed its Petition for Declaratory Hearing, it served both NorthWestern and Northern with notice. Both companies chose to intervene. AR 28-32. Northern conspicuously limited the scope of its requested intervention to "provid[ing] comments and oral argument, if appropriate" and did not contest the hearing as declaratory or affirmatively request a contested-case hearing. (AR 28.)

A party who fails to invoke a right to a contested case waives its right to do so after the fact. This is well-established law in other jurisdictions. *See e.g. Krentz v. Robertson Fire Protection Dist.*, 228 F.3d 897, 904 (8th Cir. 2000) (citing cases in which parties to administrative proceedings "were found to have waived their due process claims because they were aware of the available administrative procedures, yet they did not pursue relief thereunder"; "Krentz's case is analogous. Krentz could have sought a contested case hearing under the MAPA, but he did not."); *see also Buckingham v. McAfee*, 393 S.W.3d 372, 375 (Tex. Ct. App., 7th Dist., 2012) ("the failure to complain about the use of a declaratory proceeding to adjudicate title waives the complaint on appeal"). The South Dakota Supreme Court has affirmed the general principle that a party cannot sit on its right to present evidence and expect to correct the error on appeal. *See e.g. Link v. L.S.I., Inc.*, 2010 SD 103, 793 N.W.2d 44, 52 n.6 (2010) (party who wished to have an affidavit considered at trial waived the right to argue the matter after failing to request an evidentiary hearing on the issue).

Northern explicitly waived any right to an evidentiary hearing when it moved to intervene. In its petition, Northern did not ask to present evidence, to convert the matter to a contested case, or for permission to do anything other than "provide comments and oral argument, if appropriate." (AR 28.) Northern implicitly continued its waiver by failing to demand an evidentiary hearing at any point in the proceedings before its petition for rehearing. Northern made no attempt to present live or pre-filed testimony, conduct discovery, or otherwise further supplement the factual record before the Commission issued its ruling. The Commission did not restrict these activities. As a matter of law and in fundamental fairness to the parties, this Court should affirm the Commission's implicit finding, in denying Northern's petition for rehearing, that Northern waived any right it had for a contested hearing.

II. The Commission erred as a matter of law in declaring that it had jurisdiction over this private contractual matter.

The Commission incorrectly ruled that it has jurisdiction over utilities providing natural gas to farm-tap customers taking natural gas from the transmission line owned and operated by Northern. This is a legal issue that this Court reviews de novo. The right to farm-tap services arises from private contracts—including Northern's easements with landowners and Northern's contracts with various parties over the years, including NorthWestern in 2011—not from any public-utility obligations. The Commission is not a court of general jurisdiction, and its limited jurisdiction does not include private contracts of this nature. South Dakota courts apparently have not considered this jurisdictional issue before, but other courts—examining services that

arise under similar, private contracts—have concluded that private contractual services are not subject to regulatory jurisdiction.

For example, in *Medic-Call, Inc. v. Public Service Commission*, 470 P.2d 258 (Utah 1970), a company provided a beeper/paging service to approximately 100 licensed physicians who subscribed to the service. The Utah Public Service Commission ("UPSC") sought to regulate the service as a telephone corporation. *Id. at* 258-59. The Utah Supreme Court disagreed. In concluding that the UPSC did not have jurisdiction over the paging service, the court explained that a regulatory commission cannot make private contracts subject to its jurisdiction merely by fiat, if the business involved in a private contract is not open to "an indefinite public":

> "[T]he state may not, by mere legislative fiat or edict, or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. . . . [W]here the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission."

Id. at 259-60 (quoting *State ex rel. Public Utilities Comm. of Utah v. Nelson*, 238 P. 237, 239 (Utah 1925)).

The Iowa Supreme Court reached a similar conclusion in *City of Des Moines v. City of West Des Moines*, 239 Iowa 1, 30 N.W.2d 500 (1948). There, the court decided that a private business contract between two municipalities, involving sewer service, was not subject to rate regulation. *Id.* at 9, 30 N.W.2d at 505. The city of Des Moines had agreed to provide access to its sewer system for the nearby city of West Des Moines in

perpetuity at an agreed rate, based on the population of West Des Moines. Des Moines sought to invalidate the agreement because it fixed rates for public utility service in perpetuity, contrary to state law. The court concluded that this private business contract did not involve public-utility services. In *City of Des Moines*, the operative question was whether Des Moines was required to provide the service. A "public utility can practice no discrimination" concerning the users who must depend on it for service and to whom it must render service upon request. *Id.* at 505. With respect to West Des Moines, the city of Des Moines "owed no duty to" West Des Moines and "could have refused to render it any service." *Id*. The court concluded that "the agreement is a business contract, in no way subject to legislative rate regulation. In that respect it is private. Not public." *Id. See also, e.g., Adams v. PUC*, 819 A.2d 631 (Pa. Commw. 2003) (declining to require the Pennsylvania PUC to enforce an agreement between private landowners and a natural gas company).

Here, no statute or rule obligates Northern (or NorthWestern or any other entity) to provide farm-tap services to an indefinite public. Farm-tap services are available only to specific landowners (or their successors in interest) by virtue of long-ago easements they granted to Northern, which are private contracts. And NorthWestern only provides (limited) services on Northern's behalf to those landowners or successors in interest in accordance with yet another private contract—between Northern and NorthWestern in 2011. There simply is no public duty or obligation to provide farm-tap services; the obligation is entirely contractual. NorthWestern does not hold itself out to

the public as a provider of farm-tap services, and farm-tap services are not available to the general public.

The commissioners of the PUC seemed to recognize this, initially, when they repeatedly expressed doubts that the Commission had any jurisdiction over these private contractual relationships. (AR 294-301.) But then, without explanation and in conclusory fashion, the commissioners decided, in the end, that the Commission did, indeed, have jurisdiction over the farm-tap services. This was an incorrect legal conclusion, one this Court should reverse.

III. The Commission erred as a matter of law in concluding that NorthWestern is a public utility for the landowner-parties to Northern's easements.

The Commission also incorrectly ruled on the related issue of NorthWestern's public-utility status with respect to the farm-tap parties to Northern's easements. The Commission concluded that "NorthWestern is a public utility as defined in SDCL 49 with respect to these farm tap customers." The mere fact that NorthWestern is a public utility in South Dakota with respect to other services and other customers in South Dakota does not change the nature of the private contracts for farm-tap services. NorthWestern is not a public utility to the farm-tap parties to Northern's easements.

In South Dakota, a public utility is a "person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part, in this state." SDCL § 49-34A-1(12). Here, NorthWestern is not providing services to or for the public or even for the farm-tap parties to Northern's easements. NorthWestern's only obligation is to

Northern itself, under undisputed terms of People's contract with Northern in 1987 (which was partially assigned to NorthWestern in 2011): "Northern has requested [NorthWestern] to perform certain services *for Northern* in connection with the natural gas sales to said existing and future customers, and [NorthWestern] has agreed to provide the services *on behalf of Northern*." (AR 166.) (emphasis added.) NorthWestern's agreement, in other words, requires NorthWestern to perform services for *Northern*, and not for the farm-tap parties to Northern's easements. (AR 179.) So under the plain statutory language of SDCL 49, NorthWestern is not a public utility.

Even if this Court were to find that NorthWestern is somehow serving farm-tap end-users, the farm-tap obligations that Northern took on under the terms of its easements with landowners are not a service held out, indiscriminately, to the public. Only a few select landowners entered into easements, so Northern could install its interstate pipeline. In a decision involving Northern many years ago, the Eighth Circuit held that whether an entity is a public utility "'depends upon whether the operation has been held out as a public service, upon whether the service is in fact of a public character and whether it may be demanded on a basis of equality and without discrimination by all members of the public or obtained by permission only.'" *Northern Natural Gas Co. v. Roth Packing Co.*, 323 F.2d 922, 928-29 (8th Cir. 1963) (quoting *Johnson City v. Milligan Utility District*, 276 S.W.2d 748, 753 (Tenn. App. 1954)). Courts ask whether the service is held out "to the public, as a class, or to any limited portion of it,

as contradistinguished from holding himself out as serving or ready to serve only particular individuals." *Medic-Call, Inc.*, 470 P.2d 258 (1970).

The service provided to farm tap end users is highly discriminatory and is available only to particular landowners for services specified in the easement under terms established by the easement. There is no equality to the public regarding farm-tap services. A landowner adjacent to a farm-tap end-user, for example, has no right to the farm-tap service, unless that owner's land also is subject to a farm-tap easement with Northern. Northern can discriminate against anyone whose land is not subject to a farm-tap easement or anyone who is subject to an easement but who wants to consume gas for purposes beyond those allowed in the easement. Accordingly, providing service to a farm-tap end-user cannot be deemed to be providing public utility service within the meaning of SDCL 49-34A-1(12), and NorthWestern cannot be a public utility with respect to the farm-tap customers.

NorthWestern's obligation, moreover, arises from a private contractual obligation, and not from its status as a public utility. As the Eighth Circuit explained in *Northern Natural Gas* in 1963, "a public utility can enter into [a] private contract in fields not covered by its utility obligations." 323 F.2d at 928. "The fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by it a public service." *Id.* at 929. Here, as in *Northern Natural Gas*, NorthWestern has undertaken to provide services under a private contract with Northern. Some of these services, such as purchasing gas for use by the farm-tap parties

to Northern's easements, can be performed by any number of service providers, including natural gas marketers or even the farm-tap parties themselves. While NorthWestern may be a public utility with respect to many of its customers, NorthWestern does not even have contractual obligations to the landowners who are parties to Northern's easements. NorthWestern's contractual obligations are only to Northern, and that contractual relationship does not make NorthWestern a public utility for the farm-tap parties to Northern's easements.

Finally, the record before the Commission established that NorthWestern does not own any part of the farm-tap facilities. Northern owns the farm-tap facility from the transmission pipeline up to and through the farm-tap meter outlet. The farm-tap end-user owns everything downstream from that point. NorthWestern owns nothing. A "public utility" is "any person operating, maintaining, or controlling in this state equipment or facilities" to provide gas service to the public. SDCL 49-34A-1(12). The Commission appears to have based its ruling on the mistaken premise that NorthWestern controls the farm-tap facilities because it could shut off a valve owned by the farm-tap end-user in the event of non-payment or perhaps a leak. But NorthWestern's ability to take such action arises under and is defined (and limited) by NorthWestern's private contract with Northern. Moreover, NorthWestern does not own that valve, and the farm-tap end-user has the ultimate control over its property. There would be nothing NorthWestern could do if the farm-tap end-user prevented access to

either the valve or the land on which the valve is located. NorthWestern has no control absent permission from the farm-tap end-user.

In short, the limited role and control that NorthWestern is permitted under its contract with Northern is quite different from the control NorthWestern has over its public-utility assets that it owns and uses to serve its 46,000 public-utility customers in South Dakota, and the Commission was wrong to conclude that NorthWestern is a public utility as defined by SDCL Chapter 49 with respect the farm-tap parties to Northern's easements.

CONCLUSION

Northern waived any objection to the Commission handling this matter as a declaratory ruling, but the Commission did reach two erroneous legal conclusions. Thus, for the reasons given above, the Court should (1) deny Northern's request to remand this matter for a contested-case proceeding; (2) reverse the Commission's legal determination that it has jurisdiction over utilities providing natural gas to Northern's farm-tap customers; and (3) reverse the Commission's legal determination that NorthWestern is a public utility as defined by SDCL Chapter 49 with respect to Northern's farm-tap customers. None of this relief requires remanding this matter to the Commission.

Respectfully submitted this 2nd day of June, 2017.

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