IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

* * * *

IN THE MATTER OF COMMISSION STAFF'S PETITION FOR DECLARATORY RULING REGARDING FARM TAP CUSTOMERS

* * * *

CIV17-71 (32CIV17-000071)
CIV17-83 (32CIV17-000083)

* * * *

REPLY BRIEF TO NORTHERN NATURAL GAS COMPANY'S OPENING BRIEF AND NORTHWESTERN ENERGY'S OPENING BRIEF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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The Notice of Appeal in CIV17-71was filed on March 22, 2017,
and in CIV17-83 was filed on April 3, 2017

TABLE OF CONTENTS

Cases – continued:

Cases – continued:

Cases – continued:

Statutes:

Statutes – continued:

Administrative Rules:

Other Materials:

PRELIMINARY STATEMENT

The Appellant, Northern Natural Gas Company, will be referred to as "Northern." The Appellant, NorthWestern Corporation dba NorthWestern Energy, will be referred to as "NorthWestern." Appellee, the South Dakota Public Utilities Commission, will be referred to as the "Commission." The Petition for Declaratory Ruling under ARSD 20:10:01:34 filed by the South Dakota Public Utilities Commission Staff (Staff) on November 9, 2016, will be referred to as the "Petition." The term "farm tap" will refer to the natural gas piping connection to Northern's transmission pipeline that is made available to a farm tap customer. The term "farm tap customer" will refer to a person who receives natural gas through a farm tap distribution system. The term "farm tap distribution system" will refer to a customer owned pipeline system that extends from Northern's transmission pipeline to deliver natural gas to a farm tap customer. The term "farm tap service provider" will refer to NorthWestern as a third party provider of farm tap distribution system services to either a farm tap customer or Northern as an interstate natural gas transmission pipeline holding one or more farm tap easements.[1] The Appendix to this brief will be referred to as "Apx" with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as "AR" followed by the appropriate page number(s). The transcript of the hearing held before the Commission on December 14, 2016, will be referred to as "TR" followed by the applicable page number(s). The Declaratory Ruling Regarding Farm Taps issued by the Commission in Docket NG16-014 on January 24, 2017, will be referred to as the "Declaratory Ruling." The entirety of the administrative record

[1] During the 2017 Legislative Session, the South Dakota Legislature began crafting Senate Bill 104 which clarified for the Commission, in part, some of the issues addressed in Staff's Petition by narrowing the request for a declaratory ruling to farm taps only as stated in the Petition. The terms used above are the definitions signed into law under Senate Bill 104. Senate Bill 104 does not address, however, the issue of who must provide the farm tap services. A copy of Senate Bill 104 is attached to this appendix for the Court's ease of reference at Apx6-Apx8.

for Docket CIV17-71, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Civil Dockets, 2017 Civil Dockets, CIV17-71 at the following link: http://puc.sd.gov/Dockets/Civil/2017/civ17-71.aspx. The entirety of the administrative record for Docket CIV17-83, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Civil Dockets, 2017 Civil Dockets, CIV17-83 at the following link: http://puc.sd.gov/Dockets/Civil/2017/civ17-83.aspx. The entirety of the administrative record for Docket NG16-014, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Natural Gas Dockets, 2016 Natural Gas Dockets, Docket NG16-014 at the following link: http://puc.sd.gov/Dockets/NaturalGas/2016/ng16-014.aspx. The Appendix to this brief includes the following documents: (1) NG16-014 Declaratory Ruling Regarding Farm Taps, (2) Senate Bill 104, (3) NG16-014 Petition for Declaratory Ruling Regarding Farm Tap Customers, (4) SDCL 1-26-15, SDCL 49-34A-1 and SDCL 49-34A-2.1, (5) ARSD 20:10:01:30.01, ARSD 20:10:01:34, and ARSD 20:10:01:35, and (6) fifteen declaratory rulings issued by the Commission in the last fifteen years.

JURISDICTIONAL STATEMENT

Intervenors, Northern and NorthWestern, appealed to this Court from the Commission's Declaratory Ruling Regarding Farm Taps in Docket NG16-014, issued January 24, 2017. These appeals are taken pursuant to SDCL 1-26-30 and 1-26-30.2. The Circuit Court has jurisdiction over this case pursuant to SDCL 1-26-30.2 and 1-26-30.4. The venue of this action properly lies in Hughes County pursuant to SDCL 1-26-31.1.

STATEMENT OF ISSUES

1. Should the Commission's declaratory ruling be reversed and remanded for failure to comply with the Administrative Procedures Act?

   This request for a declaratory ruling was not a contested case under the Administrative Procedures Act and the Commission complied with basic notice-and-comment procedures during the informal adjudication process.

2. Did the Commission improperly deny Northern's Petition for Rehearing?

   Sufficient reasons for rehearing as stated by Northern which are based upon a contested case standard are inapplicable to this declaratory ruling and Northern presented no newly discovered evidence, facts and circumstances arising subsequent to the hearing, or consequences resulting from compliance as required by ARSD 20:10:01:30.01.

3. Did the Commission err by declaring NorthWestern is a public utility as defined by SDCL Chapter 49-34A with respect to the farm tap services?

   The 197 farm tap customers are members of South Dakota's public and NorthWestern meets SDCL's definition of both a gas utility and a public utility with respect to the farm tap services NorthWestern provides.

The Commission properly issued a declaratory ruling through an informal adjudication. The most relevant authorities are SDCL 1-26-15, 49-1-11(5), 49-34A-1, ARSD 20:10:01:34, 20:10:01:35, and *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, 877 N.W.2d 340.

STATEMENT OF THE CASE AND FACTS

It's the 1950's, you're a South Dakota landowner; and one day Northern knocks on your door telling you that they'd like to run a large pipeline through your fields. They ask you to sign an easement, the terms of which are clear, they'll make a farm tap available for you so long as you build your own farm tap distribution system. That they or a farm tap service provider of theirs will measure and furnish the gas and that you will be charged accordingly. You sign the easement and enjoy gas service for decades to come. Unexpectedly, in 2016, through a letter in the mail, you find out that your gas service is going to be shut off.

There are currently 197 farm taps in South Dakota owned and operated by Northern with distribution services currently being provided by NorthWestern. Somewhat surprisingly, for sixty plus years, these farm taps have operated without scrutiny and have evaded any type of judicial review in South Dakota. Despite looking like a breach of contract case best addressed in court, this scenario is why on November 9, 2016, Staff filed a petition with the Commission for a declaratory ruling to resolve the following issues: 1) Does the Commission have jurisdiction over any 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 these farm tap customers? 3) Are the farm taps in whole or in part subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?

The Commission accepted the Petition and a Notice of the filing was issued November 10, 2016. Intervention was granted to Northern, NorthWestern, and Montana-Dakota Utilities Co. on November 23, 2016. A Notice of Hearing was issued on November 30, 2016. The hearing was held as scheduled on December 14, 2016. Staff, Northern, NorthWestern, and Montana-Dakota Utilities Co. gave oral arguments at the hearing.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-34A, and 49-34B, and ARSD 20:10:01:29, 20:10:01:30.01, 20:10:01:34, and 20:10:01:35. On January 24, 2017, the Commission issued a declaratory ruling regarding farm taps. The Commission declared: 1) The Commission does have jurisdiction over a utility 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 by SDCL Chapter 49. 3) That farm

taps in whole or in part, are not subject to state jurisdiction for the purposes of pipeline safety pursuant to SDCL Chapter 49-34B.

On February 17, 2017, Northern filed a Petition for Rehearing and a Motion for Judicial Notice. On February 23, 2017, NorthWestern filed a Petition for Reconsideration of Declaratory Ruling. On March 20, 2017, the Commission denied the requests.

The declaratory ruling is not determinative of the landowners' rights under their easement.

ARGUMENT

STANDARD OF REVIEW

Whether the Commission properly issued a declaratory ruling and whether a declaratory ruling is a contested case, are issues of law, so the standard of review is de novo. This Court gives no deference to the Commission's conclusions. *Pesall v. Montana Dakota Util. Co., et al.*, 2015 S.D. 81, ¶ 6, 871 N.W.2d 649. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, "[a]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or *when the agency interpretation is one of long standing." Krsnak v. S. Dakota Dep't of Env't & Natural Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2d 907, 916. (emphasis added).

Further, courts generally give substantial deference to the legal interpretations that an agency provides in a declaratory order.[2] Such deference has been extended to an agency's

[2] *See Clark-Cowlitz Joint Operating Agency v. FERC,* 826 F.2d 1074, *(D.C. Cir. 1987) (en banc)* at 1086-92.

interpretation of any legal document within that agency's special competence, including: the statute the agency is responsible for administering,[3] the agency's own regulations,[4] the terms of art that are used within the agency's regulatory regime,[5] and certificates or other authorizations that the agency has itself issued.[6] In addition, courts generally defer to an agency's jurisdictional determination.[7] Courts have afforded *Chevron* deference to declaratory orders issued through both formal and informal adjudications.[8] With respect to orders issued through informal proceedings, a basic petitioning process that includes notice and the opportunity for comment has been sufficient to warrant *Chevron* deference.[9]

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[3] *See, e.g., Central Freight Lines v. ICC*, 899 F.2d 413, (5th Cir. 1990) at 423 (citing *Chevron* and noting that a court "must honor the [agency's] interpretation of its statute so long as that interpretation is a reasonable one").

[4] *See, e.g., Loveday v. FCC,* 707 F.2d 1443, (D.C. Cir. 1983) at 1459 (affirming FCC declaratory ruling and holding that "[t]he Commission's interpretation of its own regulations as applied in this case is reasonable and consistent with section 317 of the Communications Act").

[5] *See, e.g., Ill. Terminal R.R. Co. v. ICC,* 671 F.2d 1214, (8th Cir. 1982) at 1217 ("We also note that courts should defer to ICC interpretation of technical terms.").

[6] *See, e.g., Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458 (8th Cir. 1989) ("We hold the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation.").

[7] *See City of Arlington v. FCC*, 668 F.3d 229, (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013) at 1871; *see also, e.g.*, N. C. Utils. Comm'n v. FCC, 537 F.2d 787, 794 (4th Cir. 1976) (holding that the FCC's "declaratory statement of its primary authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the [Communications] Act").

[8] *See, e.g., City of Arlington v. FCC*, 668 F.3d 229, (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013) at 1874-75 (giving *Chevron* deference to a declaratory ruling issued by the FCC through informal adjudication); *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 87 F. Supp. 2d 820, (S.D. Ohio 2000)* at 828 ("This Court finds that the ICC . . . opinion, a formal adjudication, is entitled to *Chevron* deference.").

[9] *See City of Chicago v. FCC*, 199 F.3d 424, 428-29 (7th Cir. 1999) at 429. The court's discussion does not make clear whether the basic notice-and-comment procedures used by the FCC were necessary, only that they were sufficient. See *Id.* Part IV, which explores in greater detail the procedures that agencies use in declaratory proceedings, suggests that most meet the minimum degree of formality needed to secure *Chevron* deference.

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the decision is inter alia, affected by error of law, arbitrary, or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion,* 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

1.

SHOULD THE COMMISSION'S DECLARATORY RULING BE REVERSED AND REMANDED FOR FAILURE TO COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT?

Under the Commission's Rules a Declaratory Ruling Cannot be a Contested Case

The primary issue in this appeal is whether a petition for a declaratory ruling triggers the contested case procedure found in the APA. SDCL 1-26-15 explicitly allows such a petition. It says: "Each agency shall 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." Through SDCL 49-1-11(5), the Commission promulgated rules pursuant to SDCL Chapter 1-26 concerning "[p]rocedures for obtaining a declaratory ruling and action on petitions for a declaratory ruling[.]" The Commission implemented this command in ARSD 20:10:01:34, which allows a petition for declaratory ruling to be filed as to the applicability "of any statutory provision or rule" of the Commission.

The primary answer to whether a declaratory ruling is a contested case is found in the Commission's subsequent administrative rule. ARSD 20:10:01:35 makes it clear that a declaratory ruling before the Commission is not a contested case. It states, "the commission shall issue its declaratory ruling within 60 days after the filing of the petition[.]"

The sixty day deadline for the Commission to issue its decision affirms that a declaratory ruling before the Commission is not a contested case. Sixty days is wholly inadequate to conduct pretrial procedure.[10] No scheduling order can be devised to meet other timelines such as interventions and discovery where parties are allowed thirty days to respond. Additionally, motions, preparation of testimony, hearings, briefs, oral arguments, and issuing a decision cannot and should not be done in sixty days. Instead, ARSD 20:10:01:35 provides for an informal adjudication procedure.

Informal adjudication is the Commission's tool for handling declaratory rulings. Staff's Petition did not address an actual case or controversy alleging that an administrative rule or its threatened application, interferes with or impairs, or threatens to interfere with or impairs, the legal rights or privileges of a party. In contrast and in accord with SDCL 1-26-15, Staff's Petition requested a declaratory ruling as to the applicability of statutory provisions by which the Commission governs.

By excluding the case or controversy language from SDCL 1-26-15, the Legislature excluded an actual case or controversy requirement in agency declaratory proceedings. Additionally, the Legislature allowed agencies to craft their own rules governing declaratory rulings. In doing so, they closed the door on this Commission's declaratory rulings ever being a contested case. ARSD 20:10:01:35 demands it be handled differently.

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[10] *See* National Center for State Courts Model Time Standards for State Trial Courts, 2011, p. 3 http://www.ncsc.org/Services-and-Experts/Technology-tools/~/media/Files/PDF/CourtMD/Model-Time-Standards-for-State-Trial-Courts.ashx (Stating that the ABA Standard for a general civil case in the first tier is 90% of the filed cases should be disposed within 12 months and that the Model Standard is 75% of the filed cases should be disposed within 180 days).

> "Upon receipt of the petition for declaratory ruling, the commission may request from petitioner further information as may be required for the issuance of its ruling. Unless the petitioner agrees to a longer period of time, the commission shall issue its declaratory ruling within 60 days after the filing of the petition or within 60 days following the receipt of further requested information."

As noted above, this rule eviscerates the possibility of having a contested case without trampling upon the due process rights of the participants. The language is clear. The Commission "shall issue its declaratory ruling within 60 days" and "the commission may request from petitioner further information as may be required for the issuance of its ruling." This discretion, the ability to issue a declaratory ruling with as much or as little information as the Commission requests in sixty days, separates a declaratory ruling from a contested case by allowing the Commission to make a declaration upon a petition after opportunity for comment only.

The Commission and other agencies have alternative avenues available for litigants wishing to proceed in a contested case setting. In the instant case, all it would have taken was a motion to dismiss and a new filing with an explanation of why the matter should be heard in the form of a contested case as opposed to a declaratory ruling regarding the applicability of statutory provisions that merely contained "facts and circumstances which give rise to the issue." ARSD 20:10:01:34. The Commission could have then at least considered this option. However, Northern did not make any such request and the declaratory ruling simply proceeded without objection. Northern's request to read an actual case or controversy possibility into SDCL 1-26-15 would require that the Court insert SDCL 1-26-14's case or controversy language into SDCL 1-26-15 when such language has been intentionally omitted by Legislature and rewrite ARSD 20:10:01:35 to allow for a contested case proceeding under a petition for a declaratory ruling.

Long Standing Practice of the Commission

In the past fifteen years, the Commission has issued fifteen declaratory rulings. Apx19-Apx47 has copies.

In each of these rulings the Commission assumed facts, applied the law, and reached a conclusion, just as in the present case. None of the decisions contained findings of fact or conclusions of law. All of the dockets were handled by way of informal adjudication.

These rulings are similar to the ruling that Staff sought here. In each matter, the question is how a statute, rule, or order applies in a particular situation. The rulings all involve an interest orientated or seemingly controversial outcome. Examples are:

- Apx43-Apx44, CenturyLink must continue to make a printed directory available.
- Apx32, Classifying NorthWestern's natural gas line as a distribution line.
- Apx27-Apx28, Burke Housing Authority isn't a master metered facility.
- Apx39-Apx40, NorthWestern's power purchase agreement is lawful.
- Apx37-Apx38, that electric territory belongs to Charles Mix, not NorthWestern.
- Apx34-Apx35, that electric territory belongs to NorthWestern, not Codington-Clark.
- Apx33, Dream Designs may master meter.
- Apx19-Apx20, Beresford's proposed transmission line is exempt from the Commission's siting jurisdiction.

Under South Dakota law, if there were a "case or controversy" between two litigants, the matter would be a contested case under SDCL 1-26-16 to 1-26-25, not a declaratory ruling under SDCL 1-26-15. The problem, in the Commission's view, is a concrete controversy between competing litigants – in other words, a contested case, didn't exist. All participants wanted the same thing; for the Commission to declare an outcome by assuming facts, applying the law, and reaching a conclusion.

This common sense understanding of all participants wanting the same thing in a declaratory ruling distinguishes a declaratory ruling from a contested case. Declaratory rulings are not adversarial in nature, a usual characteristic of contested cases. Per the Commission's informal adjudication framework, witnesses are not ordinarily called, sworn, and subject to cross-examination. The rules of evidence are inapplicable, as the Commission may consider any matter bearing on the precise issue asked. To make a declaratory ruling is a discretionary function of the Commission. In a declaratory ruling the ultimate request is to have the Commission issue a ruling based on "[t]he precise issue to be answered[.]"ARSD 20:10:01:34. No party is adverse to this ultimate request. All parties involved are seeking the Commission's advice and expect the Commission to render a declaration to provide a level of certainty. Although parties have different desires for the outcome, it does not defeat the fact they are all seeking certainty going forward provided by a declaratory ruling. If a participant is indeed truly adverse to the Commission making a decision under a declaratory ruling in an informal adjudication, they need to do something about it. They can't fully participate and complain after the fact when the declaration fails to win universal acclaim.

SDCL Chapter 1-26 provides alternative avenues for resolving legal issues. It distinguishes a declaratory ruling from a contested case and addresses the two in separate and distinct sections of the code. They are not coupled together or referenced as one and the same. They are different animals. For example, SDCL 1-26-15 gives agencies rule making authority which could include the ability to dispose of a declaratory ruling by declining to hear the matter. By giving the agency the authority to "provide by rule for the filing and prompt disposition of petitions for declaratory rulings," the Legislature has left the door open to creating rules that allow the agency to implement a discretionary declination rule. Many courts conclude that

administrative agencies retain discretion to deny requests for declaratory rulings.[11] This is another important distinction that separates a declaratory ruling from a contested case.

SDCL 1-26-1(2) defines a contested case:

> (2) "Contested case," 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 but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in § 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents[.] (emphasis added)

A declaratory ruling from the Commission is not "required by law [...] after an opportunity for hearing." *Id.* Courts have held that agencies may issue declaratory orders in informal adjudicatory proceedings, to address matters not subject to formal adjudication under the APA

[11] *See Yale Broad. Co. et al. v. Fed. Commc'n Comm'n,* 478 F.2d 594, 602 (D.C.Cir.1973) (holding that the F.C.C. had discretion to refuse to issue a declaratory ruling regarding a broadcaster's license because it would be impossible for the Commission to rule on every petition that could come before it); *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu,* 114 Hawai'i 184, 159 P.3d 143, 154 (2007) (holding that the Legislature intended agencies to have discretion regarding issuing declaratory rulings); *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice,* 867 N.W.2d 58, 68 (Iowa 2015) ("Whether or not [Petitioner] would be aggrieved or adversely affected if its request for a declaratory order were denied, the commissioner could have concluded 'the importance and nature of the questions [to be] decided' would justify dispensing with a strict standing requirement." (quoting *City of Des Moines,* 275 N.W.2d at 759)); *Teleconnect Co. v. Iowa State Commerce Comm'n,* 366 N.W.2d 515, 518 (Iowa 1985) (" 'Agency action' includes a declaratory ruling or a refusal to issue such a ruling."); *Md.-Nat'l Capital Park v. Anderson,* 179 Md.App. 613, 947 A.2d 149, 160 (Md.Ct.Spec.App.2008) ("The decision to issue a declaratory ruling is a discretionary act of the agency."); *Humane Soc'y of U.S., Inc. v. Brennan,* 63 A.D.3d 1419, 1420, 881 N.Y.S.2d 533 (N.Y.App.Div.2009) ("There is no requirement that the agency issue a declaratory ruling when requested and a petitioner has no rights under the statute other than a timely response by the agency[.]"); *Wis. Fertilizer Ass'n v. Karns,* 39 Wis.2d 95, 158 N.W.2d 294, 300 (1968) (holding that an agency has discretion whether to issue a declaratory ruling).

and without first conducting a hearing on the record.[12] The Supreme Court's decision in *Weinberger v. Hynson, Westcott & Dunning*[13] paved the way for this approach. In *Weinberger*, the Court rejected an argument that the Food and Drug Administration could not issue a declaratory order to address a matter that the parties argued was susceptible of resolution "only in a court proceeding where there is an adjudication 'on the record of [a] hearing.'"[14] Concluding that the APA "does not place administrative proceedings in that straitjacket," the Court reasoned that "paralysis would result if case-by-case battles in the courts were the only way [for an agency] to protect the public."[15] Subsequent courts have read *Weinberger* more expansively to mean that agencies may issue declaratory orders through informal adjudication.[16]

This approach is in accord with background principles of administrative law that recognize substantial agency discretion over procedural matters. One such principle holds that "[a]gencies have discretion to choose between adjudication and rulemaking as a means of setting policy."[17] At a more granular level, agencies also have substantial discretion to define the procedures they will use to conduct specific kinds of proceedings.[18]

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[12] Another way that agencies may lawfully streamline adjudication is by using summary decision procedures. See Admin. Conf. of the U.S., Recommendation 70-3, Summary Decision in Agency Adjudication, 38 Fed. Reg. 19,785 (July 23, 1973).

[13] 412 U.S. 609 (1973)

[14] *Id.* at 625-26.

[15] *Id.* at 626. The Court further observed that "great inequities might well result" if the FDA was required to proceed individually as "competitors selling drugs in the same category would go scot-free until the tedious and laborious procedures of litigation reached them."

[16] See *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson v. A.H. Belo Corp., 87 F.3d 393, (1996)* at 397; *Texas v. United States*, 866 F.2d 1546, (5th Cir. 1989) at 1555.

[17] *Am. Airlines*, 202 F.2d at 797 (citing *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974)); see also *Cent. Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, (D.C. Cir. 2005) (applying this principle to FCC's use of declaratory ruling); *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, (1978) at 987 (explaining that "[w]hile rulemaking

The Commission's rule for action on a petition, ARSD 20:10:01:35 does not require an opportunity for hearing. In fact, the rule allows the Commission to act upon the petition without further formal hearing or further information. The language of the rule, "the commission may request from petitioner further information as may be required" confirms that a hearing is not required. It is this discretion; the ability to issue a declaratory ruling with as much or as little information as the Commission deems appropriate, that separates a declaratory ruling from a contested case. This breadth of information discretion coupled with, as discussed above, the discretion which gives agencies the choice to implement a declination rule makes it obvious that a declaratory ruling is not a proceeding "in which the legal rights, duties, or privileges of a party are *required by law* to be determined by an agency [.]" (emphasis added) SDCL 1-26-1(2). *See In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 12, 877 N.W.2d 340 (stating agencies may not be required to rule on every conceivable question someone may have and leaving the scope of that discretion for another day when that issue has been squarely presented.)

Further, we know the Legislature intended an agency declaratory ruling to be a different procedure than a contested case, because it provided that rulings on petitions "have the same status as agency decisions or orders in contested cases." SDCL 1-26-15. And it provides that all

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might well be advisable, or even required, when mandating the filing of information not plainly within the comprehension of extant statutes and regulations, the Board was well within the bounds of procedural propriety in using a declaratory order" to clarify filing requirements (citing *Yale Broad. Co. v. FCC*, 478 F.2d 594, 599-601 (1973))).

[18] *E.g.*, *Climax Molbdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) ("[A]dministrative agencies retain substantial discretion in formulating, interpreting, and applying their own procedural rules." (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970))).

such declaratory rulings - but not contested case rulings - shall be filed for publication in the Administrative Rules of South Dakota. *Id.*

Northern criticized the Commission for not hearing any actual testimony. But public notice was given, and all parties had the opportunity to offer unsworn testimony as comment for Commission consideration. Northern objects that no one testified under oath. Well, ARSD 20:10:01:35 doesn't require it and there was no need for testimony under oath on a legal question brought before the Commission in the form of a petition for a declaratory ruling. The Commission is under no obligation to do the parties' job during a declaratory ruling. Northern made no effort to ask for the things that they are now requesting and have therefore waived the right to do so now.

Furthermore, Northern never made any attempt to dismiss the request for a declaratory ruling. During the hearing, no one suggested that the declaratory ruling should be dismissed. No one alleged that this matter would be better resolved in a contested case setting. The matter moved forward as a request for a declaratory ruling without any inclination that the process was incorrect. If Northern thought that the process was wrong, Northern should have presented that to the Commission, or at the very least, lodged an objection on the record to preserve the complaint for appeal. Instead, Northern presented argument, because the issue was one of law brought forth in a request for a declaratory ruling. Northern had ample opportunity to complain.

Jurisdiction of this Court to Review a Declaratory Ruling

Northern points out that the right to appeal language on the bottom of the declaratory ruling indicates that this was a contested case and that the declaratory ruling is unreviewable as written, but Northern misreads the law.

This was not an actual case. It was a request by Staff to substantively declare the meaning of the law in the absence of an actual case. An actual case would have been titled, "In the Matter of the Complaint by Northern against NorthWestern," or the like. It could be argued that this appeal should be dismissed because Northern and NorthWestern have no right to appeal an uncontested case. *See In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 29 - ¶ 36 , 877 N.W.2d 340 (stating SDCL 1-26-30 was not intended to authorize appeals that question rules adopted by administrative agencies *in other than contested cases*. In other words, SDCL 1-26-30 provides appellate jurisdiction to the circuit court to hear only a case involving a contested case procedure.) However, the South Dakota Supreme Court held otherwise. *See supra* ¶ 13. Hence, the Commission included the right to appeal language for this reason.

There is No Injury

Neither Northern nor NorthWestern has presented a case or controversy. "A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction. First, the plaintiff must establish that he suffered an injury in fact...." *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825 (citation omitted). Standing cannot be established unless the alleged injury is "actual or imminent" and not "hypothetical[.]" *Id.*

Neither party is claiming to have been injured by the Commission's ruling. In practical terms, the declaratory ruling simply clarifies the law and maintains the status quo. Apparently, Northern has overlooked the fact that the Commission ruled on a petition for a declaratory ruling with specific issues for resolution identified and, as admitted by Northern, decided the issues involved satisfactorily to Northern. As argued before the Commission, Northern is not asking to

be a public utility, they are not asking for NorthWestern to not be a public utility, and they are not asking the Commission to say the Commission has pipeline safety jurisdiction over the farm taps. Instead, Northern received everything they could ask for when in a 2 to 1 vote, the Commission declared that Northern is not a public utility and that the Commission does not have pipeline safety jurisdiction over farm taps. Northern Brief 12. "The right of appeal is limited to aggrieved parties and when a judgment is rendered in a party's favor, that person cannot be an aggrieved party unless the adjudication is, in some way, prejudicial to that party." *Quinn v. Mouw-Quinn*, 1996 SD 103, ¶ 20, 552 N.W.2d 843, 847. Now, Northern is before the Court mistakenly protesting matters that were never included in the precise questions to be answered in the Petition. ARSD 20:10:01:34 specifically states that the petition shall contain "the precise issue to be answered." They are improperly asking the Commission to say it has jurisdiction over the farm tap distribution systems, a precise question never asked in the Petition.[19] Northern Brief 12 – 13.

Perhaps the Petition was not as specific as intended, but the language was clear and the only term used was "farm tap" and that is what the Commission addressed. Unasked questions not found within the four corners of the Petition were not addressed in the Declaratory Ruling and resultantly they are not before the Court for review. No party moved to amend the Petition. The matter proceeded with the original language despite all parties participating in the legislative process that instrumentally guided the Commission's final declaration. Northern has no ground to stand upon and complain that they were deprived of notice, the right to discovery and to

[19] If Northern would like answers to questions such as whether the Commission has pipeline safety jurisdiction over farm tap distribution systems, whether NorthWestern must still serve as farm tap service provider, or any other issue not precisely identified in the Petition, Northern is free to seek a declaratory ruling or simply appeal an adverse decision in an actual contested case.

present evidence, or separately stated findings of fact and conclusions of law when Northern willingly participated in a declaratory ruling without objection. Citing case law arising from actual contested cases does not afford Northern the procedural relief it is seeking and is irrelevant to the Court's review of this declaratory ruling docket. *See In re B.Y. Development, Inc.*, 2000 S.D. 102, ¶19, 615 N.W.2d 604 (concluding "that SDCL 1-26-25 does not apply to the Commission's preparation of its written decision; rather, that statute applies to contested cases.") In short, there was no fundamental procedural mistake by failing to treat the docket as a contested case proceeding, because it was a declaratory ruling brought forth under the Commission's rules governing a declaratory ruling and no party asked to change its course.

Likewise, NorthWestern is not harmed by the declaration that it is a public utility, because the Commission imposed no additional conditions upon NorthWestern. Nothing changes and no new regulatory burdens are imposed upon either party by the declaratory ruling. In other words, Staff asked the Commission to interpret the law and declare the state of the farm tap situation in terms of three precise issues. Therefore, without further regulations, obligations, or restrictions being placed upon either party, the parties have not been aggrieved by the Declaratory Ruling.

Despite this lack of actual injury, as recent precedent has presented, the Court should review the declaratory ruling. *See supra* ¶ 20. SDCL 1-26-15 provides that "[r]ulings disposing of petitions have the same status as agency decisions or orders in contested cases." SDCL 1-26-30 states that "[a] person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."

The circuit court's appellate jurisdiction to review agency decisions is governed by SDCL 1-26-30. That statute authorizes appeals of agency decisions by non-aggrieved parties if the party has exhausted administrative remedies and the decision was not rendered in a contested case. The statute provides: "A person who has exhausted all administrative remedies available within any agency *or* a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." *Id.* (emphasis added). Notably, the Legislature's 1977 amendment of this statute replaced the word "and" with the emphasized word "or." 1977 S.D. Sess. Laws ch. 13, § 12. The now disjunctive language is a significant departure from the Model State Administrative Procedure Act, which required exhaustion of administrative remedies and aggrieved party status to appeal to the courts. *See* Revised Model State Admin. Procedure Act § 15 (Unif. Law Comm'n 1961).

Thus, under the disjunctive 1977 amendment, the Legislature authorized parties in agency proceedings to appeal to circuit court if they had either exhausted their remedies within the agency or if they were aggrieved by the agency's decision in a contested case. In this case, following the declaratory ruling, the intervenors had exhausted all available agency remedies. Therefore, under SDCL 1-26-30, the circuit court has jurisdiction to entertain this appeal despite being an uncontested case.

Not only do the intervenors have a right to appeal under this first prong of SDCL 1-26-30 (the part before the "or"), in that they exhausted all administrative remedies, the intervenors also have a right of appeal under the second prong of SDCL 1-26-30, because SDCL 1-26-15 gives a ruling disposing of a petition for declaratory ruling the "same status" as a contested case

decision. It does not however, give a petition for declaratory ruling the same procedural conditions as a contested case.

In an attempt to suggest otherwise, Northern improperly relies on two contested case court decisions. Northern's Brief 11 – 12. These cases are inapplicable to a declaratory ruling. Northern cites no case law that requires the Commission to explain how the Commission reached its declaration. Nor does Northern provide any case law that requires the Commission to indicate what facts were determined to support each of the Commission's declarations. Here, the Court must review the record to make sure that the Commission's procedures were in accord with the minimum requirements established by the APA.[20] This means, for example, that the Commission must provide parties with adequate notice of the proceeding[21] and observe the APA's separation of functions requirements[22] and prohibitions on ex parte communications.[23] The ability to issue a declaratory order prior to conducting a full hearing provides a significant advantage—it is an efficient way for an agency to give regulated parties guidance through a non-coercive, but legally binding order. This approach provides the regulatory certainty that some regulated parties need in order to carry out their business. On judicial review of declaratory orders issued through informal adjudication, however, the courts typically note, with apparent approval, an agency's use of basic notice-and-comment procedures.[24] Indeed, some courts have suggested that agencies must provide at least a basic form of notice and an opportunity for comment.[25]

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[20] *See* 5 U.S.C. §§ 554, 556, 557.
[21] *See* id. § 554(b).
[22] *See* id. §§ 556(b), 557(b).
[23] *See id.* § 557(d)(1); *Am. Airlines*, 202 F.2d at 798.
[24] *See, e.g., State Corp. Comm'n*, 787 F.2d at 1428.
[25] *See Am. Airlines*, 202 F.2d at 797; *but see Radiofone, Inc. v. FCC*, 759 F.2d 936, (D.C. Cir. 1985) at 940 n.4 (explaining that in informal adjudication, the APA does not require an agency to

A right to appeal was intended by the Model State Administrative Procedure Act on which SDCL 1-26-15 and SDCL 1-26-30 are based: "Of course, to the extent an agency ruling runs counter to the interests of the applicant, and the applicant finds it worthwhile to seek its modification by higher authority, the judicial process may need to be invoked." [26]Courts have the duty to review properly-appealed agency decisions. Only a powerful showing of explicit non-reviewability could justify the counter-intuitive conclusion that agency declaratory rulings are a law unto themselves that courts are powerless to review. SDCL 1-26-30 and the record in this matter suggest nothing of the sort. Northern's allegation that adequate review is not possible because the Commission "eviscerates that right by making no findings of fact or conclusions of law" is wholly incorrect. Northern's Brief 12. The true source of Northern's difficulty is that the scope of the Commission's authority to issue the declaratory order is broader than the scope of the Court's authority to review the action. All the Court can do is hold that the Commission's decision was a properly issued declaratory order with binding legal effect.[27]

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give notice to other parties before issuing a declaratory order requested by a single entity); *cf. State Corp. Comm'n v. FCC*, 787 F.2d 1421, (10th Cir. 1986) at 1428 ("The FCC's preemption order [issued as a declaratory ruling] enacted no new regime of rights and duties which would warrant the procedural safeguards of formal rulemaking." (citing Batterton v. Marshall, 648 F.2d 694, 705 n.58 (D.C. Cir. 1980))).

[26] Arthur Earl Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 806 (1975), quoted in *Sierra Club Iowa Chapter v. Iowa Dept. of Transportation*, 832 N.W.2d 636, 646 (Iowa 2013).

[27] *Am. Airlines*, 202 F.2d at 797 ("While the APA does not expressly require notice in informal adjudications, courts have inferred a requirement that there be "some sort of procedures for notice [and] comment ... as a necessary means of carrying out our responsibility for a thorough and searching review [of agency action]." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923 (D.C.Cir.1982). Here the DOT issued an order in which it specified the legal issues on which it would rule, allowed the parties to submit comments on these issues, and extended the comment period at the request of several parties. It then ruled on precisely the issues that it identified. We find that DOT's actions satisfied the minimum procedural notice requirements. *See id.*"

The bottom line is that the Commission's declaratory ruling here is authorized by SDCL 1-26-15. And it is completely consistent with the language and purpose of the Uniform Law Commissioners' Model State Administrative Procedures Act, Section 8 (1966), from which SDCL 1-26-15 is copied.

2.

DID THE COMMISSION IMPROPERLY DENY NORTHERN'S PETITION FOR REHEARING?

There is No Redoing Something that Never Happened

As discussed, a declaratory ruling is a different animal than a contested case. As demonstrated over the last fifteen years, the Commission chooses to handle declaratory requests through informal adjudication. Northern's motion for rehearing, in the form of a contested case, is an immediate red herring. Northern is seeking a contested case that they never asked for and never received. Northern is blatantly confusing the matter by asking for a redo of a contested case. There was never a contested case hearing to be redone.

The only hearing that occurred was an informal adjudication hearing where the parties submitted written argument and presented oral argument. Despite this, Northern's request for a rehearing in no way requests another round of this informal adjudication process. Northern is asking for an evidentiary hearing and Northern is improperly attaching the prefix "re" to the beginning of the request. The only rehearing possible in this matter is a re-informal adjudication hearing because it is the only hearing the Commission held. The Commission cannot redo something that was never done in the first place.

Asking for a new different type of hearing at the conclusion of the proceedings is improper. Northern's opportunity to raise this objection and change the course of the proceedings

was from November 9, 2016, when the Petition was filed, through January 24, 2017, when the Declaratory Ruling was issued. No such notion was ever presented to the Commission for consideration.

Rehearing is a Two Prong Rule

ARSD 20:10:01:30.01 allows for an application for rehearing or reconsideration. It states:

> An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. *An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous* with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding. (emphasis added)

As identified by the emphasized language above, ARSD 20:10:01:30.01 is a two part rule. Unfortunately for Northern, only the second part of the rule is an available road to relief in a declaratory ruling issued through an informal adjudication. The first part, "[a]n application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous," is inapplicable in this setting.

As previously discussed, the Commission's declaration contained no findings of fact or conclusions of law, nor was it required by law to do so. Northern's entire request for rehearing is based upon the first part of the rule. Nothing in Northern's request so much as touched upon the available relief for rehearing in an informal adjudication, which is, "[a]n application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order[.]"ARSD 20:10:01:30.01. A rehearing will only be

allowed "when it is made to appear that some question which might have been controlling in the case has been overlooked by the [Commission], or where it is made to appear that [the Commission] has probably committed an error in the decision of a question raised and argued." *Grigsby v. Minnehaha County*, 7 S.D. 421, (1895) 64 N.W. 179.

In order to request a rehearing in an uncontested informal adjudication, since there are no findings of fact or conclusions of law, an applicant must apply for rehearing under the second part of ARSD 20:10:01:30.01. Northern failed to bring forth any newly discovered evidence, facts and circumstances subsequent to the hearing, or consequences resulting from compliance with the declaratory ruling. For this reason alone, the Commission properly denied Northern's request to retry the matter.

Furthermore, a motion for rehearing is "'an invitation to the [Commission] to consider exercising its inherent power to vacate or modify its own judgment.'" *Jensen v. Lincoln County Bd. Of Com'rs*, 2006 S.D. 61, 718 N.W.2d 606, *citing People ex rel. S.M.D.N.,* 2004 SD 5, ¶ 7, 674 N.W.2d 516, 517. The Commission declined Northern's request, and the Court should "not second guess the [Commission's] decision. It appears the [Commission] had all the information [it] needed to make a decision. Consequently, this issue is without merit." *Id.*

3.

DID THE PUBLIC UTILITIES COMMISSION ERR IN ITS RULING DECLARING NORTHWESTERN IS A PUBLIC UTILITY AS DEFINED BY SDCL CHAPTER 49-34A WITH RESPECT TO THE FARM TAP SERVICES?

Due Process is the Extent of this Review

NorthWestern's request for reconsideration failed Commission approval because no new facts and circumstances subsequent to the hearing, no newly discovered evidence, or consequences resulting from compliance with the declaratory ruling were presented as required

by ARSD 20:10:01:30.01. NorthWestern simply brought another round of arguments. "[W]here the petition for rehearing only restates the positions taken, and reiterates the claims made on the original argument, whether oral or printed, a rehearing will not be allowed upon the suggestion that upon a reargument the petitioner could satisfy the [Commission] that its former decision was wrong." *Grigsby Supra* 179. As thoroughly mentioned, a declaratory ruling is a different animal than a contested case. It is strictly a question of law, capable of resolution through processes that lay within the discretion of the Commission. The Court does not need to deduce how the Commission arrived at the declarations. The Court's only role is to ensure the Commission provided proper due process along the way. The review does not consist of understanding the rationale for the declarations made. Those rationales will be reviewed another day, in another forum, through the findings and conclusions of a contested case.

The important issue in this declaratory ruling review is not the results, but the procedural protections afforded to the parties along the way. All parties assert that this declaratory ruling is a legal issue which this Court should review de novo. Despite the parties' agreement, "[o]nce appellate jurisdiction is established ... *the court has to decide* ... under what framework, scrutiny, or division of labor it will review [the issues]." *Oldham–Ramona Sch. Dist. No. 39–5* v. Ust, 502 N.W.2d 574, 580 (S.D.1993) (emphasis added) (quoting Steven A. Childress & Martha S. Davis, Federal Standards of Review § 1.03 (1992)). In deciding the appropriate standard of review, "[w]e repeatedly define or refine standards of review as new issues come before us and apply those standards to the cases in controversy we are reviewing." *Id.*

Beyond Due Process

If however the Court deems it necessary to consider the reasoning behind the Commission's declaration that NorthWestern is a public utility, the answer is quite simple and is understood by examining four definitions in SDCL 49-34A-1:

> (12) "Public utility," any 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. [...]
>
> (3) "Customer," any person contracting for or purchasing gas or electric service from a utility[.]
>
> (8) "Gas service," retail sale of natural gas or manufactured gas distributed through a pipeline to fifty or more customers or the sale of transportation services by an intrastate natural gas pipeline[.]
>
> (9) "Gas utility," any person operating, maintaining, or controlling in this state equipment or facilities for providing gas service to or for the public[.]

The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "Further, the Legislature has commanded that '[w]ords used [in the South Dakota Codified Laws] are to be understood in their

ordinary sense [.]'" SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. Here, there are 197 farm tap customers, (i.e., citizens of South Dakota, members of the public) that now depend on NorthWestern for gas service. NorthWestern, during the hearing on December 14, 2016, explained:

[NorthWestern's Lawyer]:	If we would not have acquired that Milbank Pipeline, we would not be in front of the Commission today. We would not have an obligation to publicly serve these customers. We have a contractual obligation to serve those customers through the end of 2017. TR 98 (AR 000379)
[NorthWestern's Lawyer]:	We do provide a number of services pursuant to the 1987 Agreement that's been discussed, and the assignment of a portion of those services to us. We fill the odorant receptacle every year. We bill Northern's farm tap customers on a monthly basis. We read the meter once a year, and, as has been discussed earlier, the farm tap customer is required to read it on a monthly basis. When that doesn't happen we estimate usage based on prior usage. We also are a first call responder for the farm tap customers. If they believe there is a problem with their service, we are called to determine what that problem is. But if we discover the problem, a leak or something else, we cannot fix it. TR 99 – 100 (AR 000380 – 000381)
[Commissioner]:	So fair to say that you've had to shut some of these off; is that correct?
[NorthWestern's Lawyer]:	Yes. TR 105 (AR 000386)

By filling odorizers, billing monthly, reading meters, and responding to phone calls for a community of farm tap customers, clearly, NorthWestern utilizes trucks, phones, computers, and other resources to provide these services. Thereby, meeting SDCL 49-34A-1(9)'s definition of a gas utility, "any person operating, maintaining, or controlling in this state equipment or facilities for providing gas service to or for the public" and SDCL 49-34A-1(12)'s definition of public utility, "any 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."

The fact that NorthWestern provides these services to the public under an obligation to Northern does not diminish the fact that they meet the statutory requirements that allow the Commission to regulate them as a public utility. Although the language of the agreement between NorthWestern and Northern "requires NorthWestern to perform services for *Northern,*" it does not defeat the fact that NorthWestern is performing services by operating, maintaining, or controlling equipment for the purpose of providing service to the farm tap community in this state, regardless of how that service came to be. NorthWestern's Brief 19.

NorthWestern attempts to portray farm-tap services as a sort of unique private contract, exempt from regulation. First of all, as described above, as a matter of definitional understanding, these contracts and the services being provided meet SDCL's requirements of utility status. And, second of all, every gas service contract in this state is a private contract between a customer and a gas utility. When a customer decides they want to purchase gas service, it is a private contract between the individual and the utility company. Utilities couldn't serve a customer if the customer didn't agree to it. Each and every customer contracts privately with its gas provider. The only difference here is that these gas service contracts were entered into many years ago with a non-utility that hires a utility to provide utility service to a part of the public and this service has remained unnoticed, unchanged, and unchallenged. Yet, the fact remains, the service, no matter the provider, has always been subject to the Commission's jurisdictional reach ever since the legislature said so.

As required by law, once the customer accepts service, the utility must continue providing that service until, under SDCL 49-34A-2.1, they get permission to, "discontinue, reduce or impair service to a community, or a part of a community," from the Commission. The question here is not as NorthWestern states, "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." NorthWestern Brief 19-20. Nor is it whether, "[t]he 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." NorthWestern Brief 20. The only question is whether NorthWestern meets the definitional requirements of a public utility under SDCL Chapter 49-34A as they provide this critical service to 197 members of the public.

CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court hold that the Commission's decision was a properly issued declaratory order with binding legal effect and affirm the Commission's Declaratory Ruling.

Dated this 20th day of June, 2017

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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