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)	32CIV17-000071 32CIV17-000083 **NORTHERN NATURAL GAS COMPANY'S REPLY BRIEF**

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Northern Natural Gas Company ("Northern") respectfully submits this reply brief in response to the brief dated June 2, 2017, from NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") and the brief dated June 20, 2017, from the South Dakota Public Utilities Commission ("Commission"). Because the Commission failed to explain how and why it reached the decisions it did, failed to issue any findings of fact or conclusions of law, and failed to procedurally treat this matter as a contested case, Northern requests that the Court reverse the Declaratory Ruling and remand for a proper contested case proceeding consistent with SDCL Chapter 1-26.

NorthWestern's opposition to Northern's arguments in this appeal are essentially twofold, namely, (1) that the parties should be spared the time and expense of following the law and having the Commission explain its decisions through findings of fact and conclusions of law, and (2) that Northern waived any rights it may have had to a contested case proceeding. The Commission, in addition to parroting NorthWestern's waiver argument, contends that (1) it has sweeping, nearly unlimited power to handle matters however it wants, regardless of South Dakota's Administrative Procedures Act, and (2) that the matter was not a contested case. Because South Dakota law clearly provides otherwise, and because NorthWestern's and the Commission's arguments are intrinsically flawed, the Court should reject their arguments and remand this matter for a contested case proceeding.

I. RESPONSE TO THE COMMISSION'S BRIEF

A. THE ADMINISTRATIVE PROCEDURE ACT AND THE RIGHT TO AN APPEAL

The main issue raised by Northern in this appeal is the lack of any explanation as to how and why the Commission reached its decisions. The Declaratory Ruling merely answered "yes" or "no" to three critically important questions. The Commission provided no explanation, rationale

or analysis in support of the answers. Thus, the parties are left to speculate as to why the Commission believes it has jurisdiction over utilities providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern, why NorthWestern is a public utility as defined in SDCL 49 as to the farm tap customers, and why the 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. Amazingly, the Commission, on page 11 of its brief, claims that the bare answers provided by the Commission without any explanation, rationale or analysis provide certainty to the issues. Without findings of fact and conclusions of law or an explanation of some kind, no certainty exists. Consequently, the parties to this proceeding and countless other interested entities who may review it for years to come know nothing as to how or why the Commission answered the questions the way it did.[1] If certainty was the goal, the Commission missed the mark.

The South Dakota Supreme Court recently made clear that a party to a declaratory proceeding under SDCL 1-26-15 has the right to appeal to circuit court pursuant to SDCL 1-26-30. *See In re Petition for Declaratory Ruling Re SDCL 62-1-1(6)*, 2016 S.D. 21, 877 N.W.2d 340. Importantly, in that decision, the South Dakota Supreme Court stated that the appeal authorized in SDCL 1-26-30 is to be on the merits.[2] *Id.* at ¶ 11, 350. The only way this Court may review the

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[1] SDCL 1-26-15 requires that the Commission's ruling be filed with the director for publication in the Administrative Rules of South Dakota. Publication of the decision is obviously for precedential purposes. But without any findings of fact or conclusions of law or any other explanation for the decision, there is no precedential benefit of any kind. The fact that the decision is to be published strongly supports the conclusion that the Commission must explain its decision.
[2] The Supreme Court's pronouncement that the appeal under SDCL 1-26-30 is to be on the merits completely negates the Commission's argument on page 20 of its brief that the scope of the appeal is limited to only due process concerns. The Commission's argument in that regard completely ignores the Supreme Court's discussion of the issue in *In re Petition for Declaratory Ruling* and should be rejected. The argument is even more out of place as the citations in support of it are all to federal statutes and federal decisions interpreting those statutes. *See* footnotes 20-25 on page

merits of the Commission's decisions is to know how and why the Commission ruled the way it did. Without findings of fact and conclusions of law, this Court cannot fulfill its statutory obligation to properly review the agency decision. *See Dep't of Public Safety v. Eastman*, 273 N.W.2d 159, 161 (S.D. 1978) (stating that a court cannot review an agency decision without findings of fact and conclusions of law).

Here, the Commission made no findings of fact or conclusions of law. The Commission, in its brief to this Court, argues that it is not required to do so. How can a party exercise its right to an appeal on the merits as granted by SDCL 1-26-30 and *In re Petition for Declaratory Relief, supra*, if findings and conclusions are not made? The Commission never addresses that open and obvious hole in its argument. The right to appeal set forth in SDCL 1-26-30, by its very nature, requires the agency to issue findings of fact and conclusions of law. Without findings of fact and conclusions of law, any appeal is futile. *See Wiswell v. Wiswell*, 2010 SD 32, ¶ 6, 781 N.W.2d 479, 481 (stating that findings of fact and conclusions of law are necessary so the appellate court can review the decision).

The disconnect in the Commission's position between the right to an appeal on the merits as set forth in SDCL 1-26-30 and its argument that it need not issue findings of fact or conclusions of law (or offer any other explanation for its decision) is the primary issue in this appeal. Because there is no question that parties have a right to appeal pursuant to SDCL 1-26-30, and because that appeal is on the merits and not merely limited to procedural or due process concerns, the agency

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20. Those statutes and cases provide no guidance of any kind as to South Dakota law. And as noted above, the South Dakota Supreme Court made clear in *In re Petition for Declaratory Ruling* that the appeal is substantive and on the merits. It is alarming that the Commission would rely upon inapposite federal law and ignore binding precedent from the South Dakota Supreme Court in making that flawed argument to this Court.

must issue findings of fact and conclusions of law. Without them, no appellate review is possible. Because they were not issued here, the matter must be remanded to the Commission.

Further support for the requirement for findings of fact and conclusions of law in a declaratory ruling proceeding is found in SDCL 1-26-15 and in SDCL 1-26-36. First, nothing in SDCL 1-26-15 says that findings of fact and conclusions of law are not necessary or required. It is only the Commission's interpretation of the statute that eliminates the need; there is nothing textual in the statute to support it. Additionally, in SDCL 1-26-15, the statute provides that "[r]ulings disposing of petitions have the same status as agency decisions or orders in contested cases." Indisputably, findings of fact and conclusions of law are required in contested cases. *See* SDCL 1-26-23, 1-26-24, and 1-26-25. To achieve "the same status" of an order from a contested case as required by SDCL 1-26-15, a ruling on a petition in a declaratory proceeding must likewise have findings of fact and conclusions of law. Without them, they cannot have the same status, especially to a reviewing court in an appeal pursuant to SDCL 1-26-30. Thus, the Commission's interpretation of SDCL 1-26-15 ignores the "same status" language in the statute itself.

The language of SDCL 1-26-36 is even more compelling. That statute, by its plain terms, sets forth this Court's standard of review in an appeal pursuant to SDCL 1-26-30. It states

> The court shall give great weight **to the findings made** and inferences drawn **by an agency** on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of the **administrative findings**, inferences, **conclusions**, or decisions are:
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> (1) In violation of constitution or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

> A court shall enter its own findings of fact and conclusions of law or **may affirm the findings and conclusions entered by the agency** as part of its judgment. The circuit court may award costs in the amount and manner as specified in chapter 15-17.

(Emphasis added). The first sentence of SDCL 1-26-36 states that this Court is to give great weight "to the findings made and inferences drawn by an agency on questions of fact." For this Court to do so, the Commission needed to make findings of fact. Similarly, the second sentence of SDCL 1-26-36 provides that this Court may reverse or modify the Commission's decision if substantial rights have been prejudiced on account of the Commission's findings, inferences, conclusions or decisions. Again, for this Court to do so, the Commission first needed to make and articulate its findings and conclusions. Without them, this Court cannot reverse or modify anything as there is nothing to reverse or modify.

Most telling is the last paragraph of SDCL 1-26-36: "A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment." Such language requires that this Court have findings of fact and conclusions of law from the Commission when this Court performs its appellate function under SDCL 1-26-30 and SDCL 1-26-36; without them, this Court cannot affirm anything. The Commission never explains how this Court could perform its duties under SDCL 1-26-36 without having the Commission's findings of fact and conclusions of law.

This Court's standard of review for agency appeals pursuant to SDCL 1-26-30 is set forth at SDCL 1-26-36. As determined by the South Dakota Supreme Court in *In re Petition for Declaratory Relief, supra*, SDCL 15-6-30 authorizes appeals from declaratory proceedings under SDCL 1-26-15. Thus, in order for this Court to do its job under SDCL 1-26-30 and SDCL 1-26-36, it must have findings of fact and conclusions of law. There is simply no other way for this Court to meet its obligations as an appellate court pursuant to SDCL 1-26-30 and SDCL 1 26-36

without them. The statutory framework and express language is in accord with the well-accepted law set forth above that a court cannot review an agency decision without the agency's findings of fact and conclusions of law. *See Dep't of Public Safety*, 273 N.W.2d at 161, *Wiswell*, 2010 SD 32, ¶ 6, 781 N.W.2d at 481.

Both SDCL 1-26-15 and SDCL 1-26-30 safeguard and protect procedural rights. *See In re Petition for Declaratory Relief,* 2016 S.D. 21, ¶18, 877 N.W.2d at 350. The Commission, by failing to issue findings of fact or conclusions of law, or otherwise explain its decisions, eviscerated those rights, especially the right to appeal given to Northern in SDCL 1-26-30. In order to exercise that right in a meaningful way, and in order for this Court to perform is statutory obligation set forth in SDCL 1-26-36, findings of fact and conclusions of law were necessary.[3] The Commission's failure to issue them are violations of law requiring remand. *See* SDCL 1-26-36(1), (2), (3) and (4).

B. ADMINISTRATIVE REGULATIONS DO NOT SUPERCEDE STATUTES

To divert attention away from the inconsistency of its positions that (1) the Commission has no obligation to issue findings of fact or conclusions of law and (2) a party has a right to an appeal under SDCL 1-26-30, the Commission erroneously relies upon its own regulations and, in

[3] In footnote 26 on page 21 of its brief, the Commission cites Arthur Earl Bonfield's Iowa Law Review article for the proposition that, if a party does not like an answer received by an agency, the party may always appeal. As noted above, however, the absence of any findings of fact or conclusions of law makes any appeal impossible. Moreover, the case the Iowa Law Review article was about, *Sierra Club Iowa Chapter v. Iowa Dept. of Transportation*, 832 N.W.2d 636 (Iowa 2013), directly contradicts the Commission's position in this appeal. In *Sierra Club*, the court stated that "in a declaratory order proceeding, the agency must state in its order the facts it relied upon and the basis for its decision. *Id*. at 647. Further, the case discussed Iowa Code Section 17A.9(7), and the court noted that the statute "ensures the agency will make a complete record and the parties will know the rationale supporting the agency's decision." *Id*. at 647. That is precisely what Northern hopes to achieve in this appeal.

addition, claims that deference should be paid to its incorrect interpretations of the statutes at issue. This Court should reject both contentions.

"[W]hen a regulation implements a statute, '[t]he rule can in no way expand upon the statute that it purports to implement.'" *Citibank, N.A. v. South Dakota Dept. of Revenue*, 2015 SD 16 at ¶ 17 (citing *State Div. of Human Rights, ex rel. Ewing v. Prudential Ins. Co. of Am.*, 273 N.W.2d 111, 114 (S.D.1978)). "The power of an administrative officer or board to administer a ... statute and prescribe rules and regulations to that end is not the power to make law ... but the power to adopt regulations to carry into effect the will of [the legislative body] as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Id.* (citing *Dixon v. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965)). Thus, the Commission cannot do something in an administrative rule that contravenes other statutes. As noted above, SDCL 1-26-15, SDCL 1-26-30, and especially SDCL 1-26-36 make plain that findings of fact and conclusions of law are required for this Court to review the merits of the Commission's decisions. Accordingly, if the regulations relied upon by the Commission (or the Commission's interpretation of the regulations) violate those statutes, they are a nullity and do not excuse the Commission's failure to issue findings of fact and conclusions of law.

Here, the regulation relied upon by the Commission is ARSD 20:10:01:35. The Commission, incorrectly, views the 60-day decision language in that regulation as absolute and binding, concluding that it would be impossible to conduct a contested case in that short timeframe.[4] Thus, the Commission wants to use the arbitrary 60-day timeframe from the

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[4] In making that argument, the Commission conveniently overlooks the fact that the Commission may extend that time period. Moreover, there is nothing about a 60-day deadline that negates or prohibits findings of fact and conclusions of law.

administrative rule to supersede the rights afforded by the Legislature in SDCL 1-26-15 and SDCL 1-26-30. As noted above, however, a regulation that creates a rule out of harmony with a statute is a nullity. *Citibank, N.A. v. South Dakota Dept. of Revenue*, 2015 S.D. 16 at ¶ 17. There is no timeframe or deadline in SDCL 1-26-15. Thus, the Commission's arbitrary creation of the timeframe in the regulation usurps and eviscerates the substantive rights of the parties.[5]

The Commission's strict adherence to an administrative rule that violates the parties' due process rights in SDCL 1-26-15 and SDCL 1-26-30 demonstrates the Commission's belief that its power in a declaratory ruling proceeding is essentially unlimited. In fact, despite the South Dakota Supreme Court's recent and clear pronouncement in *In Re Petition for Declaratory Ruling*, the Commission on page 16 of its brief states that neither Northern nor NorthWestern should even have the right to appeal. The Commission only begrudgingly admits that the Supreme Court said otherwise. The Commission, therefore, clearly believes that it alone gets to decide how a declaratory ruling proceeding under SDCL 1-26-15 is to occur, regardless, it seems, of what the Administrative Procedures Act actually says or the South Dakota Supreme Court's interpretation of it.

The seemingly unlimited power the Commission believes it has under SDCL 1-26-15 is best illustrated by its comment on page 21 of its brief 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." In other words, the Commission claims it may take action that is beyond judicial review. There is nothing in SDCL 1-26-15, SDCL 1-26-30, or SDCL 1-26-36 that supports any argument

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[5] As made plain in ARSD 20:10:01:35, the 60 day timeframe may be extended. The Commission, at the December 14, 2016, hearing, was aware of the possibility to extend it as the Commission Staff informed the Commission that it could be extended if the Commission needed more information. The Commission declined to do so.

that the Commission's actions in a declaratory ruling proceeding is beyond judicial review. In fact, the South Dakota Supreme Court in *In re Petition for Declaratory Ruling* said the exact opposite. Nonetheless, it is telling that the Commission believes that Commission Staff may commence a proceeding under SDCL 1-26-15 and the Commission may then take action that avoids judicial review. There is no statutory support for that sweeping assertion of any kind.

Further evidencing that point is the argument on pages 16 – 17 of its brief regarding standing and the alleged absence of an injury. Again, the South Dakota Supreme Court in *In re Petition for Declaratory Ruling* extensively discussed the issue of injury and standing and clearly held that a party may assert a hypothetical injury for standing purposes under both SDCL 1-26-15 and SDCL 1-26-30. *See* 2016 S.D. 21, ¶9, 877 N.W.2d at 344. Moreover, if neither Northern nor NorthWestern were proper parties to the proceeding, why did the Commission expressly allow them to intervene? Once they were allowed to intervene, there is no question that they were proper parties to the proceeding.

The Commission, therefore, manufactured a procedure for use in this matter. It chose to follow some of the contested case procedures. *See, e.g.*, SDCL 1-26-16 (providing notice and a hearing), SDCL 1-26-17.1 (allowing intervention), SDCL 1-26-30 (advisement of right to appeal to circuit court). But the Commission chose not to follow all of Administrate Procedures Act due to a strict adherence to the 60-day deadline found only in the administrative rule. Reliance on that rule, however, cannot supersede SDCL 1-26-15 or SDCL 1-26-30 and the rights those statutes give the parties. *See In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, ¶18, 877 N.W.2d at 350. Accordingly, this Court should reject the Commission's position that ARSD 20:10:01:35 or any other regulation supersedes either SDCL 1-26-15 or SDCL 1-26-30.

C. NO DEFERENCE IS DUE WHEN THE AGENCY DOES NOT EXPLAIN ITS DECISION

Contrary to the Commission's argument, deference to an agency interpretation or determination is not always warranted. The Supreme Court of South Dakota "may 'interpret statutes without any assistance from the administrative agency.'" *Matter of State Sales and Use Tax Liability of Pam Oil, Inc.*, 459 N.W.2d 251, 255 (SD 1990)(quoting *Deuschle v. Bak Const. Co.,* 443 N.W.2d 5, 6 (S.D.1989)). Thus, the Commission's discussion on pages 5-6 of its brief that *Chevron* deference applies and somehow saves the Commission from its legal missteps is incorrect. Noticeably missing from those pages is any citation by the Commission to any decision from the South Dakota Supreme Court formally adopting *Chevron*. Thus, the myriad of federal court decisions contained in footnotes 3-9 are inapplicable. The Commission simply does not have the nearly unlimited power it believes it has to misread South Dakota's Administrative Procedures Act with impunity.

However, it is interesting that the Commission would cling to *Chevron* in this appeal. Deference to an agency decision would make intuitive sense if the agency explained its decision and issued findings of fact and conclusions law. In such an instance, a reviewing court would know how and why the agency arrived at the decision the agency made. Armed with knowing how and why an agency made a decision, it makes sense that a court would afford deference to it. In fact, the cases noted in footnotes 3-9 of the Commission's brief aptly demonstrate that point as the agencies in those cases issued detailed decisions, many with findings of fact and conclusions of law, explaining how and why it made the decisions it made. For example, from footnote 7 of the Commission's brief, in *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) aff'd 133 S. Ct. 1863 (2013), the Federal Communications Commission ("FCC") issued a Declaratory Ruling granting in part and denying in part the initial petition. This declaratory ruling made extensive

findings of facts, legal analysis, and conclusions of law. *See* 24 FCC Rcd. 13994 (2009). Similarly, from footnote 4 of the brief, in *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983), a declaratory decision of the FCC was embodied in lengthy opinion that engaged in finding facts and conclusions of law. *See In re Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections*, 87 F.C.C.2d 492, 493 (1981). Likewise, from footnote 9 of the brief, in *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), the FCC issued a declaratory ruling that engaged in legal analysis, findings of fact, and conclusions of law. *See In the Matter of Entertainment Connections, Inc., Motion for Declaratory Ruling*, FCC 98–111, 13 FCC Rcd. 14277 (1998) (JA 418–61). *See also Central Freight Lines v. I.C.C.*, 899 F.2d 413 (5th Cir. 1990) (Interstate Commerce Commission ("ICC") issued a slip opinion whereby the ICC engaged in substantive legal analysis in developing its legal conclusions). Thus, the Commission's discussion of *Chevron* and the cases cited in its brief contradict the Commission's position. Those cases demonstrate that deference may apply, but only in instances where the agency actually explained its decision. Without such an explanation, there is nothing in South Dakota law requiring any such deference. No deference is especially warranted when, as noted above, the Commission's interpretation of its obligations under the Administrative Procedures Act is simply wrong.

D. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED

For this Court to discharge its obligations under SDCL 1 26-30 and SDCL 1-26-36, the Commission needed to issue findings of fact and conclusions of law. Failure to do so violated Northern's and NorthWestern's procedural rights recognized and protected by the South Dakota Supreme Court in *In re Petition for Declaratory Ruling, supra*. Failure to do so also prevents this Court from reviewing the merits of the Commission's decision. Deference is not warranted to an

agency decision made with no explanation, nor does the Commission's reliance upon its own regulations permit it to violate South Dakota's Administrative Procedures Act. Thus, the Declaratory Ruling must be reversed.[6]

E. THE COMMISSION ERRED WHEN IT SUMMARILY DENIED THE PETITION FOR REHEARING AND FAILED TO REMEDY THE PROCEDURAL DEFECTS IN THIS MATTER

Prior to the commencement of these appeals, Northern identified the procedural errors committed by the Commission in its Petition for Rehearing. The Commission denied the Petition in the Rehearing Order. AR 1127-28. Unfortunately, the Commission in the Rehearing Order never explained why it was denying the Petition, and never explained why the procedural defects detailed in the Petition did not require correction in a rehearing. The Commission abused its discretion in denying rehearing because the procedural defects in Docket NG 16-014 were an error of law. *See Corcoran v. McCarthy*, 2010 SD 7, ¶ 13, 778 N.W.2d 141, 147 (stating that a mistake of law is an abuse of discretion).

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[6] On page 10 of its brief, the Commission claims that it has issued 15 declaratory rulings in the past 15 years similar to what it issued here, intimating that its history somehow justifies or excuses the faulty procedure at issue in this matter. However, a review of those previous 15 rulings indicate that the Declaratory Ruling at issue in this appeal is quite different. While it appears that the previous 15 rulings used varying procedures, the Commission nevertheless attempted to explain its decisions in those previous 15 rulings based upon the facts, except for two, Docket PS08-004 (Appendix 27) and Docket EL12-057 (Appendix 36). Notably, those two exceptions were truly uncontested matters: the Commission simply considered the Staff's argument in PS08-004 and NorthWestern's in EL12-057 and made a decision. The other 13, however, contained efforts by the Commission to explain its decision. The decision, and its explanation, is what will guide future understanding and applicability of the declaratory ruling and its precedential effect. Without any recitation or statement of facts, let alone findings of fact, simply stating the Commission's vote provides no guidance or value. Thus, review of those 13 previous declaratory rulings makes plain that the Declaratory Ruling at issue here is a departure from past practice and, at a minimum, fails to provide useful guidance and precedent for the future because the Declaratory Ruling sets forth no facts or legal analysis.

The rejection of Northern's Petition for Rehearing without any explanation is troubling, especially when one of the main issues in the Petition for Rehearing was the Commission's failure to explain its underlying decisions. Such a summary rejection of the Petition violates the formality for the rehearing process in the Commission's own regulations. In ARSD 20:10:01:29, the regulation specifically grants parties to the proceeding the right to petition for rehearing or reconsideration in a written application. Pursuant to ARSD 20:10:01:30.01, the application must identify the errors the party believed the Commission made and must also specify all findings of fact and conclusions of law the party believes are erroneous, along with a brief statement of the ground of error. In ARSD 20:10:01:30.02, other parties to the proceeding are given the opportunity to file written answers to the petition. The Commission is to grant the petition if there appears to be sufficient reason for rehearing or reconsideration. *See* ARSD 20:10:01:29.

The requirement that the Commission assess whether there appears to be sufficient reason for rehearing or reconsideration includes an inherent obligation to explain its decision. *See, e.g.*, *AgFirst Farmers Co-op. v. Diamond C Diary, LLC*, 2013 SD 19, ¶ 13 ("Findings must be entered with sufficient specificity to permit meaningful review"). It makes little sense that the parties involved – in the application for rehearing and in any answers to the application – must be in writing, formally served, detailing the various allegations of error, but the Commission may reject an application with no explanation of any kind. It makes even less sense when, in this case, the main error pointed out to the Commission by Northern in its Petition for Rehearing was its failure to explain its underlying decisions and issue findings of fact and conclusions of law.

The Commission's regulations as to rehearing and reconsideration are unique and quite formal in South Dakota's administrative law. For example, the only other agencies that have regulations that authorize rehearing are the Board of Nursing (ARSD 20:48:11:05), Gaming

Commission (ARSD 20:04:01:31), South Dakota Real Estate Commission (ARSD 20:69:02:08) and Abstractor's Board of Examiners (ARSD 20:36:05:12). In all of those instances, there is virtually no formality; each agency is given broad discretion to even consider the rehearing requests, and other parties, for example, are not allowed to submit answers. Thus, the uniqueness of the Commission's rehearing regulations is in their formality, and a written decision detailing the acceptance or rejection of an application for rehearing is an obvious necessity. Accordingly, the Commission's failure to substantively explain its rejection of Northern's Petition for Rehearing is an error of law that should be reversed by this Court.

F. THE PETITION FOR DECLARATORY RULING COMMENCED A CONTESTED CASE UNDER THE ADMINISTRATIVE PROCEDURES ACT

As Northern explained in its opening brief, the Petition for Declaratory Ruling filed in this matter created a contested case under South Dakota's Administrative Procedures Act. When considering Northern's argument, it is important to stress that the issue in this appeal is not whether every petition for declaratory ruling pursuant to SDCL 1-26-15 results in a contested case. The Court need not address that sweeping issue in this appeal as the Petition for Declaratory Ruling at issue in this particular matter created a contested case proceeding. The Petition for Declaratory Ruling created a contested case because the questions posed in the Petition had the potential to determine what utility services must be provided by NorthWestern and Northern to farm tap customers and to what extent the Commission had jurisdiction over Northern and NorthWestern. By directly addressing these specific rights and responsibilities of specific utilities, the Petition for Declaratory Ruling created a contested case. Thus, the issue in this appeal is not whether all petitions for a declaratory ruling result in contested cases; rather, the issue is whether the Petition

for Declaratory Ruling at issue in this matter created a contested case. Because of the questions and the ramifications of the answers at issue in the Petition, it unquestionably did.

1. Defining What Constitutes a "Contested Case" Under South Dakota's Administrative Procedures Act

The definition of a contested case comes from SDCL 1-26-1(2), which states:

> "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

SDCL 1-26-1(2) (emphasis added). Thus, under the plain language of SDCL 1-26-1(2), the definition of a contested case is a proceeding, other than a rule making proceeding, in which the legal right, duty, or privileges of a party are required to be determined by an agency after an opportunity for hearing.

SDCL 1-26-1(8)(b) expressly excludes declaratory rulings from the definition of a rule:

> "Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:
> . . . .
> (b) Declaratory rules issued pursuant to § 1-26-15:

SDCL 1-26-1(8).

Both in South Dakota, and in other jurisdictions, there appear to be two different analyses to determine whether a matter constitutes a contested case: (1) whether a hearing must be held as a matter of law; or (2) whether the proceeding is quasi-judicial in nature.

i. A Hearing Must Be Held as a Matter of Law

In defining a contested case, the South Dakota Supreme Court has stated that "[t]he key to identifying a contested case is whether 'rights, duties, or privileges of a party are required by law

to be determined by an agency after an opportunity for hearing . . . .'" *Moulton v. State*, 412 N.W.2d 487, 494 (S.D. 1987) (quoting SDCL 1-26-1(2)). "There are three methods by which a hearing may be "required by law": (1) statute; (2) agency rule; or (3) due process constitutional mandate." *Id.* Thus, under *Moulton*, the Supreme Court's analysis turns on whether there is a legal requirement that a hearing be held.

Other jurisdictions employ a similar test. For instance, in *Chevy Chase Citizens Ass'n v. District of Columbia Council*, the court found that the term 'contested case' meant a proceeding before the agency "in which the legal rights, duties, or privileges of specific parties are required by law, or by constitutional right, to be determined after a hearing." 327 A.2d 310 (App. Ct. D.C. 1974) (emphasis added). The court reasoned that an administrative proceeding is governed by contested case procedural requirements if it is "concerned basically with weighing particular information and arriving at a decision directed at the rights of specific parties." *Id*. at 313. "On the other hand, an administrative proceeding is not subject to contested case procedural requirements if it is acting in a legislative capacity, making policy decisions directed toward the general public." *Id*. However, the court did hold that in order for there to be a contested case, there must be a hearing that is implicitly "required by either the organic act or constitutional right." *Id.* at 314.

In *Summit Hydropower Partnership v. Commissioner of Environmental Protection*, the court found that "the test for determining contested case status has been well established and requires an inquiry into three criteria, to wit: (1) whether a legal right, duty or privilege is at issue, (2) and is statutorily required to be determined by the agency, (3) through an opportunity for a hearing or in which a hearing is in fact held." 226 Conn. 792 at 801 (1993). In a case "where a hearing is in fact held, in order to constitute a contested case, a party to that hearing must have

enjoyed a statutory right to have his legal rights, duties, or privileges determined by that agency holding the hearing…" *Id. See also Stoneman v. United Nebraska Bank*, 254 Neb. 477 (2006)("A proceeding becomes a contested case when a hearing is required"); *Interstate Nav. Co. v. Division of Public Utilities*, 2002 WL 1804072 (R.I. 2002)("Because a hearing in this administrative matter was not required, this cannot be considered a contested case"); *Carlson v. Bratton,* 681 P.2d 1333 (WY 1984) ("a contested case as one where a hearing is otherwise required by law).

One particularly noteworthy decision is *Sheridan County Com'n v. V.O Gold Properties, LLC*, 247 P.3d 48, 50 (Wyo. 2011). In this decision, the Wyoming Supreme Court stated "that if no statute or other law requires the 'legal right, duties or privileges of a party' to be determined at a trial type hearing, no contested case proceeding is required." *Id* at 50. Notably, in defining what constitutes "other law" requiring a contested case hearing, the Wyoming Supreme Court stated "the determination of 'adjudicative facts' requires a contested case hearing, but the determination of 'legislative facts' does not." *Id.* "Generally speaking, legislative action "produces a general rule or policy," while adjudicatory action applies to "identifiable persons and specific situations." *Id.* Thus, under *Sheridan County Commission*, if the administrative agency is determining "adjudicative facts," then there is a right to a hearing and the proceeding is a contested case. *Id.* Given the factual disputes between the Commission and NorthWestern detailed at length in their briefs in this appeal, it is clear the Commission determined adjudicative facts which made the proceeding before the Commission a contested case.[7]

[7] It is hard to imagine a proceeding not constituting a contested case when the Commission, during the January 17, 2017, hearing, at page 32, states that the farm tap customers should simply sue Northern for breach of contract.

ii. **<u>All Proceedings Other than Rule-Making are a Contested Case</u>**

Other case law in South Dakota applies a slightly different definition of a contested case. In *Application of Union Carbide Corp.*, 308 N.W.2d 753, 757 (S.D. 1981), the South Dakota Supreme Court noted that South Dakota's APA is based upon the Model Administrative Procedures Act of 1961. *Id.* at 757. The South Dakota Supreme Court quoted at length from *Debruhl v. Dist. Of Columbia Hackers License*, 384 A.2d 421, 425 (D.C. App. 1978), in which the District of Columbia Appellate Court interpreted the same version of the model administrative procedures act. According to the *Debruhl* Court, there are two types of proceedings under the model act: "adjudicatory proceedings ('contested case') and rule making proceedings." *Application of Union Carbide Corp.*, 308 N.W.2d at 757 (quoting *Debruhl*, 384 A.2d at 425).

> The principal manifestation of a 'contested case' is its character as a quasi-judicial process based upon particular facts and information, and immediately affecting the interests of specific parties in the proceeding. Consequently, when a proceeding before an agency assumes primarily a quasi-judicial nature, the proceeding is governed by the 'contested case' provision of the APA.

Application of Union Carbide Corp., 308 N.W.2d at 757 (quoting *Citizens Ass'n of Georgetown, Inc. v. Washington*, 291 A.2d 699, 703-04 (D.C. App. 1972)). *See also Stoneman v. United Nebraska Bank*, 252 Neb. 477 (1998) (finding that "when an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings").

The South Dakota Supreme Court in *Application of Union Carbide Corp.*, thus stated that "the term 'contested case' as used in SDCL 1-26-1(2) means an adjudicatory hearing as opposed to a quasi-legislative or rule making proceeding." *Id.* Thus, under *Application of Union Carbide Corp.*, a proceeding under the South Dakota APA is either a rule making **or** a contested case. As

discussed above, a declaratory judgment ruling is statutorily excluded from the definition of rule, confirming that the declaratory judgment proceeding is outside the rulemaking process.

Notably, *Application of Union Carbide Corp*. describes what process is triggered as part of a contested case, namely an adjudicatory hearing. At the same time, in the decision, the Supreme Court directly defined what constitutes a "contested case." That definition is obviously controlling here.[8]

2. Whether the Petition for Declaratory Ruling at Issue in this Appeal Commenced a Contested Case

In analyzing whether the filing of the Petition for Declaratory Ruling in this matter commenced a contested case, the first inquiry is which definition of contested case applies: the *Union Carbide* test; or the *Moulton* test. While the South Dakota Supreme Court has not selected one test over the other and has used both, use of either test makes plain that the Petition at issue created a contested case.

Under the *Union Carbide* test, any adjudicatory matter is a contested case, and all proceedings are either "rulemaking" or "adjudicatory." The Petition for Declaratory Ruling cannot, as a matter of law, commence a "rulemaking" docket. *See* SDCL 1-26-1(8) (excluding declaratory rulings from the definition of a "rule"). Thus, under *Union Carbide,* this matter is a contested case.

Under the *Moulton* test, the analysis is different and involves two inquiries. First, were the "rights, duties, or privileges of a party" determined in the declaratory proceeding? The specific

[8] In *NorthWestern Bell Telephone Co., Inc. v. Stofferhahn*, the South Dakota Supreme Court reiterated that agency actions are either adjudicatory or rule-making, noting that agency action is "adjudicatory in character if it is particular and immediate[.]" 461 N.W.2d 129, 133 (S.D. 1990). There is no question that the Declaratory Ruling is both particular and immediate, further making clear that the proceeding at issue in this case was adjudicatory in nature, thus resulting in a contested case.

questions posed in the Petition for Declaratory Ruling asks whether Northern and NorthWestern are "public utilities" regarding farm taps. Such questions satisfy this first requirement because, at a minimum, the determination affects whether Northern or NorthWestern has the duties imposed by SDCL Chapter 49 on public utilities. Consequently, the "rights, duties or privileges" of Northern and NorthWestern were implicated and determined. Specifically, NorthWestern was determined to be a utility as to the farm taps.

The second inquiry under the *Moulton* test asks whether there must be an opportunity for a hearing before the issuance of declaratory ruling. According to *Moulton*, "[t]here are three methods by which a hearing may be 'required by law:' (1) statute; (2) agency rule; or (3) due process constitutional mandate." *Moulton*, 412 N.W.2d at 494.

In this case, Northern and NorthWestern have due process rights that require a hearing.[9] As discussed at length below, the South Dakota Supreme Court has expressly held that both SDCL 1-26-15 and SDCL 1-26-30 afford procedural rights. *See In re Petition for Declaratory Ruling re SDCL* 62-1-1(6), 2016 S.D. 21, ¶18, 877 N.W.2d 350, 350. In addition, the appeal to circuit court authorized by SDCL 1-26-30 is to be substantive and on the merits. *Id.* at ¶19, 877 N.W.2d at 350. The issues raised by the Petition for Declaratory Ruling include important safety, jurisdictional, regulatory and operational questions for Northern and NorthWestern. Thus, important rights needing protection were at issue.

Accordingly, under both the *Union Carbide* test and the *Moulton* test, the Petition for Declaratory Ruling at issue in this matter created a contested case. The proceeding before the Commission was adjudicatory in nature (*Union Carbide* test), and the rights, duties and privileges

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[9] The fact that the Commission held a hearing in this matter further underscores the point that important due process considerations were triggered for both Northern and NorthWestern.

of the parties were determined, and considerations of due process required a hearing (*Moulton* test). Because the Commission failed to treat the proceeding as a contested case, the Declaratory Ruling must be reversed and the matter remanded to the Commission for a contested case proceeding consistent with SDCL Chapter 1-26.

G. THE COMMISSION'S OWN CONDUCT DEMONSTRATES THAT IT WAS A CONTESTED CASE

The language of the Declaratory Ruling itself confirms that this matter was a contested case proceeding. In the portion of the Declaratory Ruling providing notice of entry and advising the parties of their appeal rights, the Commission cited, among other things, SDCL 1-26-32 addressing the procedure for a stay of the Declaratory Ruling. AR 829. By its plain language, this statute only applies to stays pending appeals from contested case proceedings. *See* SDCL 1-26-32 ("Any agency decision *in a contested case* is effective ten days after the date of receipt or failure to accept delivery of the decision by the parties. . . ."). *See also Dale v. Young*, 2015 SD 96, ¶ 6, 873 N.W.2d 72, 74 (stating that statutes are interpreted based upon their plain language). Similarly, the Commission allowed both Northern and NorthWestern to intervene. *See* SDCL 1 - 26-17.1 (authorizing an agency to allow nonparties to intervene in contested cases). Notice of the proceeding was provided to the parties and a hearing was held, mirroring the requirements of SDCL 1-26-16 for contested cases. Thus, the Commission's own conduct demonstrates that it was a contested case.

Lastly, it is interesting that the Commission's brief to this Court is silent on the Commission Staff's attorney's concession that this was a contested case. When questioned by the Commission at the hearing on March 14, 2017, counsel for Commission Staff admitted this matter was a contested case. (3-14-17 HT at p.27). Commission Staff conceded it was a contested case because the Declaratory Ruling required the Commission to determine factual issues. (*Id.* at pp.27-

28). Thus, the entity that began this entire proceeding – the Commission Staff – rightly understood and conceded that the proceeding was a contested case. Such a concession by its own staff speaks volumes.

While not every proceeding begun under SDCL 1-26-15 results in a contested case, this particular proceeding did.[10] The hearing was adjudicatory in nature, with the Commission having to resolve factual disputes between the parties, and make legal conclusions that affected the parties' rights. NorthWestern's appeal in this matter aptly evidences the point that important rights were determined and adjudicated in this process. Accordingly, this particular matter constituted a contested case and the Declaratory Ruling should be reversed and remanded for a proper contested case proceeding under SDCL 1-26-16 *et seq*.

II. RESPONSE TO NORTHWESTERN'S BRIEF

As noted above, NorthWestern makes two arguments in opposition to Northern's arguments in this appeal: (1) Northern has waived any claim or right to a contested case proceeding, and (2) the parties should be spared the time and expense of doing it over. There is no merit to either contention.

A. THE COMMISSION NEVER DETERMINED THAT A WAIVER OCCURRED

Most of NorthWestern's opposition to Northern's appeal focuses upon the doctrine of waiver. Noticeably missing from NorthWestern's argument, however, is anything in the record evidencing that the Commission found that Northern waived anything. In fact, NorthWestern's

[10] Because the Commission failed to treat this proceeding as a contested case, Northern and NorthWestern did not receive many of the procedural rights set forth in the Administrative Procedures Act. *See, e.g.*, SDCL 1-26-17 (contents of the notice), SDCL 1-26-19 (rules of evidence at the hearing), SDCL 1-26-19.1 (subpoena power), SDCL 1-26-19.2 (depositions and other discovery).

argument regarding waiver actually underscores Northern's argument in this appeal: no one knows how or why the Commission reached any of the decisions it made in this matter for the simple reason that the Commission never explained any of them. Thus, NorthWestern is asking this Court – sitting in an appellate capacity – to make factual and legal determinations that the Commission itself never made, *i.e.*, that Northern waived its arguments as to the contested case procedure.

The last sentence of NorthWestern's argument on waiver on page 15 of its brief clearly demonstrates both the oddity of NorthWestern's argument and the predicament the Commission left the parties in by making no findings of fact and no conclusions of law. NorthWestern, in that last sentence, asks this Court to affirm an "implicit finding" that the Commission made that Northern waived its rights to a contested hearing. "Implicit," of course, means that NorthWestern is speculating as to what the Commission believed when it denied Northern's petition for rehearing. And "implicit" means that NorthWestern wants this Court to guess as well. This Court's standard of review set forth at SDCL 1-26-36 does not allow for guesswork; instead, it requires this Court to review the findings and conclusions made by the Commission. Because no such findings or conclusions were made as to waiver – or anything else – the Court should reject NorthWestern's invitation to affirm an "implicit" finding that simply does not exist.

The Commission's silence on waiver notwithstanding, waiver also does not apply for two additional reasons. First, as noted above, this was a contested case and the procedural safeguards set forth in the APA, including proper notice, were required. Without proper notice, any "implicit" determination that Northern knowingly and intelligently waived anything would be wrong. Without receiving proper notice as required by SDCL 1-26-17, Northern did not and could not knowingly or intelligently waive anything.

Second, Northern, in its petition for rehearing, raised these issues directly with the Commission. By filing a petition for rehearing, Northern (1) gave the Commission an opportunity to fix the procedural errors made, and (2) preserved the issue for consideration by this Court. In other words, by filing the petition for rehearing, Northern affirmatively argued that it was not waiving anything, and brought the procedural defects directly to the Commission's attention. An argument cannot be waived when it was made directly to the Commission and the Commission was given the opportunity to consider it. *See, e.g., City of Watertown v. Dakota, Minnesota & Eastern R. Co.*, 1996 S.D. 82, ¶26 (holding that waiver occurs on appeal when a party fails to assert a claim to the trial court). Here, there is no question that the Commission had that opportunity, but the Commission rejected it for unknown reasons as the Commission explained nothing as to its denial of Northern's petition for rehearing. Accordingly, waiver does not apply and does not prohibit this Court from discharging its statutory obligations to review the merits of this appeal. *See* SDCL 1-26-30; SDCL 1-26-36.

In parroting NorthWestern's waiver argument, the Commission at page 15 of its brief puts an odd twist on the argument, claiming that Northern is to blame for the procedural irregularities at issue in this appeal, arguing that Northern is somehow at fault for not filing a motion to dismiss the Petition for Declaratory Ruling or formally asking that a different procedure be used. This Court must reject that contention. First, the argument completely ignores the Petition for Rehearing filed by Northern wherein Northern expressly raised all of the procedural problems as issues in this case. Second, it is obviously not Northern's role to tell the Commission how to proceed. Lastly, this argument ignores SDCL 1-26-30 and SDCL 1-26-36. Those statutes make clear that it is the Commission and its decisions that are at issue in this appeal, not Northern or NorthWestern. Just as NorthWestern's waiver argument should be rejected, so too should the

Commission's attempt to blame Northern for the procedural problems caused by the Commission that the Commission refused to address.

B. EXPEDIENCY CANNOT AND SHOULD NOT TRUMP THE PARTIES' PROCEDURAL RIGHTS

NorthWestern's argument that the parties should be spared the time and expense of starting over should be rejected as well. First, had the Commission accepted Northern's Petition for Rehearing and fixed the procedural errors it made, Northern's appeal could well have been avoided. More importantly, however, the rights afforded to the parties in SDCL 1-26-15 and 1-26-30 are real and deserving of protection. *See In re Petition for Declaratory Relief,* 2016 S.D. 21, ¶18, 877 N.W.2d at 350. Those important procedural rights should not be sacrificed on the altar of expediency. In fact, had those procedural rights not been ignored by the Commission, and had the Commission issued findings of fact and conclusions of law, NorthWestern's own appeal in this matter would be far more ripe and ready for this Court's consideration. As it stands now, however, and as made clear in NorthWestern's brief and in the Commission's brief, they have no idea how or why the Commission determined that NorthWestern is a utility under South Dakota law. Both sides guess and intimate as to what the Commission thought and believed, but neither side actually knows for the simple reason that the Commission issued no findings of fact or conclusions of law. Consequently, all of the effort expended by NorthWestern and the Commission on NorthWestern's appeal is for naught as no one knows how or why the Commission made the determinations it did. The safeguarding of the parties' procedural rights is therefore vital to this and any other proceeding; without it, courts cannot perform a substantive review on the merits as required by SDCL 1-26-30, SDCL 1-26-36, and *See In re Petition for Declaratory Relief,* 2016 S.D. 21, ¶18, 877 N.W.2d at 350. Thus, the parties have no choice but to start over and have

an appropriate contested case under SDCL Chapter 1-26. Without it, this Court cannot consider NorthWestern's appeal.

NorthWestern's appeal raises important questions. Clearly, NorthWestern wants to know why the Commission determined it is a utility as to the farm taps at issue. Northern would like to know too. So, too, are other entities – both now and in the future – interested in knowing the logic, rationale and reasoning of the Commission on these important issues.[11] The critical condition precedent to all of that is having the Commission issue findings of fact and conclusions of law detailing the logic, reasoning and rationale it used in arriving at its decision. Without it, virtually nothing is gained. Accordingly, this Court should reject NorthWestern's request to sacrifice the parties' important procedural rights in the name of efficiency. Starting over in a contested proceeding is necessary for a full consideration and review of the merits of the Commission's decisions and the parties' appeals, including NorthWestern's appeal.

III. FAILURE TO FOLLOW THE CORRECT PROCEDURE RESULTED IN SIGNIFICANT SUBSTANTIVE PROBLEMS

Contrary to NorthWestern's and the Commission's briefs, Northern's appeal in this matter is not merely academic. To the contrary, the Commission's failure to follow South Dakota's Administrative Procedures Act and explain through findings of fact and conclusions of law its rationale created numerous questions without any answers. For example, the Commission's answer to the third question regarding pipeline safety is especially troublesome without some justification or explanation, especially given the Commission Staff's concerns as to explosions, pipeline safety and other important safety considerations set forth in their memorandum that

[11] As noted above, SDCL 1-26-15 requires that the declaratory ruling be published, presumably for the benefit and edification of others looking for clarity as to how and why an entity may be deemed a utility in the realm of natural gas in South Dakota. Without findings of fact and conclusions of law, any such entity will learn nothing by the Commission's decisions in this matter.

accompanied the Petition for Declaratory Ruling. *See* AR 14-19. In answering the third question, the Commission held "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. The only rationale for that conclusion is the statement in the Declaratory Ruling that "Northern is a federally regulated interstate pipeline and is not subject to state jurisdiction for the purpose of pipeline safety." Although this is a correct statement regarding **Northern and its facilities**, it ignores that there are farm tap facilities downstream of Northern's facilities, such as the distribution service line and odorization equipment. Furthermore, the question posed in the Petition is not limited to Northern's facilities but instead inquires whether the Commission has safety jurisdiction "in whole ***or in part***" over farm taps.[12] AR 829. Thus, when ruling on the third question, the Declaratory Ruling concluded that there is no state pipeline safety jurisdiction over farm tap facilities downstream from Northern's facilities, and did not even acknowledge the safety issues raised by the Commission Staff. The Declaratory Ruling remains silent, however, regarding why the Commission lacks pipeline safety jurisdiction in whole or in part over the intrastate facilities downstream from Northern's facilities.

Logically, the Commission cannot reach its conclusion about downstream facilities without making factual determinations. The Commission has authority to regulate pipelines pursuant to SDCL Chapter 49-34B. SDCL 49-34B-4 states the Commission "may . . . establish safety standards for . . . gas pipeline facilities." In turn, gas pipeline facilities are statutorily defined as:

> new and existing pipelines, rights-of-way, master meter systems, pipeline facilities within this state which transport gas from an interstate gas pipeline to a direct sales customer within this state purchasing gas for its own consumption, and any

[12] In footnote 1 of its memorandum attached to the Petition, Commission Staff broadly defines "farm tap" as a "pipeline that branches from a transmission or gathering line to deliver gas to a farmer or other landowner." AR 14. The Commission, in its decision, never defined the term or stated that it agreed with the Commission Staff's broad definition.

> equipment, facility, or building used in the transportation of gas or in the treatment of gas during the course of transportation.

SDCL 49-41B-1(5). Thus, in reaching the legal conclusion that it lacked safety jurisdiction over the downstream facilities, the Commission apparently concluded that the downstream facilities do not meet the statutory definition of a gas pipeline facility.[13] The Declaratory Ruling never explains **how** the Commission reached that determination, or what facts support this conclusion. Why are the downstream facilities not considered an existing pipeline or pipeline facility transporting gas from Northern's interstate transmission line to the direct sales customer (a/k/a the farm tap customer)? Why are the downstream facilities not considered equipment or facilities used in the transportation of gas? What does the PUC mean when it refers to the term "farm tap and is its meaning the same as what Commission Staff meant in asking the questions framed in the Petition for Declaratory Ruling?" Without findings of fact and conclusions of law, this Court cannot know how the Commission decided these questions. In turn, this Court cannot properly review the Declaratory Ruling, and remand must occur.

Similarly, the arguments asserted by NorthWestern in its appeal confirm the inherently factual nature of the Commission's declaratory ruling. In the Declaratory Ruling, the Commission ruled that "NorthWestern is a public utility as defined in SDCL Chapter 49 with respect to these farm tap customers." AR 829.

In its arguments regarding rehearing and reconsideration, as well as in its appellate brief to this Court, NorthWestern argues that various "facts" establish it is **not** a utility regarding farm tap customers:

[13] Although no supporting evidence was admitted, the allegations by the Commission Staff in their memorandum attached to the Petition describe the real safety concerns associated with the farm tap facilities downstream from Northern's facilities. AR 15-16.

- Farm tap components are only owned by Northern or the farm tap customer. AR 1031-32.

- Farm tap customers own all facilities downstream from the farm-tap meter. AR 1032.

- Farm tap facilities are outside the scope of the *intended* purpose of South Dakota's pipeline safety inspection program. AR 1031.

- "Gathering," "transmission" and "distribution" are well known terms of art in the utility and energy industries. NorthWestern then implies these terms of art support their position that Customer-Owned Facilities[14] are not involved in the transportation of gas. AR 1032.

- The movement of gas within a customer-owned farm tap facility does not involve a gathering line, a transmission line, or a distribution line. AR 1032-33.

- The right to receive farm tap service only arises pursuant to a private easement contract. AR 987.

By arguing these factual issues, NorthWestern's arguments confirm that the Commission must have found at least some facts that were in dispute when issuing the Declaratory Ruling. Without written findings of fact, however, this Court cannot properly review those decisions and determine whether they are supported by the evidence (of which none was received by the Commission)[15] or

[14] According to NorthWestern, "Customer-Owned Facilities" are all the facilities downstream from Northern's facilities.

[15] The Commission's failure to receive evidence at the hearing is but another procedural flaw that remand for a contested case proceeding will fix. As this Court knows, factual findings are reviewed on the clearly erroneous standard. *See Sauder v. Parkview Care Center*, 2007 SD 103, ¶ 11, 740 N.W.2d 878, 882. The clearly erroneous standard of review for agency factual findings inquires "whether there is substantial evidence" to support the findings. *Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (S.D. 1996). Without evidence to support its findings, an agency decision is arbitrary and capricious. *See In re Jarman*, 2015 SD 8, ¶ 19, 860 N.W.2d 1, 9 ("An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken."). Arguments and briefs of counsel are not, however, considered "evidence." *See In re Mehrer*, 252 N.W.2d 22, 23 (S.D. 1977) (reversing decision of Circuit Court revoking driver's license in civil proceeding because the only submissions to the Court were briefs and there was no testimony or evidence to support the decision); *cf. Ward v. Lange*, 1996 SD 113, ¶ 28, 553

clearly erroneous. These are all important, substantive issues, to Northern, NorthWestern, and the 200 farm tap customers. Without findings of fact and conclusions of law, and by failing to follow the appropriate procedures set forth in the APA, the important answers the Commission believed it was providing are empty and unexplained. Following the contested case procedure at SDCL 1-26-16 *et seq*. will cure those deficiencies and give the parties, the farm tap customers and the public at large the substantive, detailed decisions they need. Accordingly, Northern's appeal is no mere academic exercise. Correcting the multitude of procedural errors on remand will actually result in a more solid and substantive decision. Northern, NorthWestern, the farm tap customers and the public deserve nothing less.

CONCLUSION

Based on the foregoing, Northern requests that the Court reverse the Declaratory Ruling and remand for a proper contested case proceeding to be held pursuant to SDCL Chapter 1-26.

REQUEST FOR ORAL ARGUMENT

Northern respectfully requests oral argument, which has already been scheduled for September 18, 2017.

N.W.2d 246, 253 (stating that an attorney cannot testify regarding a contested matter and continue to represent that client in that matter).

Dated this 19th day of July, 2017.

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