

**Before the Public Utilities Commission
of the State of South Dakota**

**In the Matter of
Commission Staff's Petition
for Declaratory Ruling
Regarding Farm Tap Customers**

Docket No. NG16-014
**NorthWestern Energy's Reply to
Staff's Response and Northern Natural
Gas Company's Answer**

NorthWestern Corporation d/b/a NorthWestern Energy replies to (1) Staff's Response to Motions for Rehearing and Reconsideration, and (2) Northern Natural Gas Company's Answer to NorthWestern Energy's Petition for Reconsideration of Declaratory Ruling (*Answer*). Staff has taken no position on NorthWestern Energy's petition, while Northern Natural Gas Company (*NNG*) continues to push for a rehearing of determinations it has not challenged. For the reasons provided below and in NorthWestern Energy's petition for reconsideration, NorthWestern Energy asks the Commission to grant reconsideration.

Reply to Staff's Response

Although Staff "does not take a position" on whether the Commission should reconsider its ruling, Staff's response raises the issue of the Commission's jurisdiction over contractual matters. NorthWestern Energy agrees with Staff that the Commission has jurisdiction over limited contractual matters (such as the approval of contracts for deviation from established tariff rates). However, as Staff indicated, the Commission does not have plenary jurisdiction over all aspects of all contracts, like the easements. Nor does the Commission have jurisdiction over every contract NorthWestern Energy enters into simply because NorthWestern Energy is, with respect to a portion of its business, a public utility regulated by the Commission.

Staff's response also points out that the *Medi-Call* case (which NorthWestern cited in its petition) reached two determinations: (1) that the state cannot convert private contractual arrangements into public utility obligations; and (2) the service in question in *Medi-Call* was not a public utility service because it did not have the elements of the public utility.¹ Staff is correct that the *Medi-Call* court concluded that the paging service did not have the elements of a public utility. But Staff did not mention that the *Medi-Call* court reached that conclusion after examining a series of cases and other authorities holding that services are not public utility services if the general public does not have a legal right to use the services.²

The farm-tap services that NorthWestern Energy provides on behalf of NNG pursuant to a private contractual arrangement are not available to the general public. Such services are **only available** to a landowner who (a) owns property subject to an NNG farm-tap easement, **and** (b) has an NNG farm tap. Substantially all of the general public cannot meet these two requirements for farm-tap services. NorthWestern Energy is not providing public utility services with respect to these farm-tap customers associated with NNG.

The Commission should reconsider its determination that NorthWestern is a public utility with respect to the farm-tap customers that hold easements with NNG. NorthWestern Energy only serves those specific customers, on behalf of NNG, as a result of NNG's obligations to provide such services under the farm-tap easements. Absent a private contractual arrangement between NNG and NorthWestern Energy, NorthWestern Energy would have no obligation to serve as NNG's vendee under the easements.

¹ *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970)

² *Id.* at 275-277, 470 P. 2d at 259-261.

Reply to NNG's Answer

1. *NorthWestern Energy requested reconsideration, not a rehearing.*

NorthWestern Energy filed a petition requesting this Commission to reconsider its decision based on the legal arguments and authorities cited in the petition. The petition specifically identified the two Commission determinations that NorthWestern Energy found to be erroneous and the reason why those determinations were in error. NorthWestern Energy did not ask the Commission to rehear the issues and does not believe a rehearing is necessary for the Commission to reach the proper conclusion concerning these questions of a jurisdictional nature from Staff's petition for declaratory ruling.

NNG, on the other hand, has not challenged the two determinations that NorthWestern Energy has asked this Commission to reconsider. NNG has not specifically identified or even intimated that these two determinations are erroneous. Nevertheless, NNG would have this Commission and the parties engage in a lengthy and costly rehearing process, apparently, to have the Commission reach the same determination. It is time for NNG to take responsibility for the issues it created with its easements.

2. *NNG has argued that its own Petition for Rehearing should be denied.*

While arguing against NorthWestern Energy's petition for reconsideration, NNG has provided a basis for this Commission to deny NNG's petition for rehearing. In its answer, NNG argues that the Commission should deny NorthWestern Energy's petition because NorthWestern Energy cannot satisfy the requirements of the administrative rules. "[T]he PUC never issued findings of fact or conclusions of law. Thus there is no way to specify which findings of fact or conclusions of law are erroneous."³

³ See Answer, p. 4.

Setting aside for the moment that NorthWestern Energy's petition identified the conclusions that were erroneous and why they were in error, *if NNG's argument is true* – that there is no way to specify and meet the requirements of the administrative rule – *then NNG's petition for rehearing must also be denied* on the same basis. NNG's argument is even more interesting because, although NNG has identified as erroneous the Commission's determination regarding pipeline-safety jurisdiction, NNG has not identified as erroneous the two other determinations made by the Commission.

The Commission should grant NorthWestern Energy's petition for reconsideration.

For the reasons stated in this reply and in NorthWestern Energy's Petition for Reconsideration, the Commission should reconsider its declaratory rulings in this proceeding that ruled that (1) the Commission has jurisdiction over utilities providing natural gas to farm tap end users taking natural gas from the transmission line owned and operated by NNG, and (2) NorthWestern Energy is a public utility with respect to the farm-tap services. NorthWestern Energy's service to the farm-tap customers arises not from an obligation to serve the general public, but from an obligation to serve as NNG's vendee under the NNG farm-tap easements.

Dated at Sioux Falls, South Dakota, March 10, 2017.

**NORTHWESTERN CORPORATION,
d/b/a NORTHWESTERN ENERGY**



Timothy P. Olson
3010 West 69th Street
Sioux Falls, SD 57108
Phone: (605) 978-2924
tim.olson@northwestern.com

and

Brendan V. Johnson
Robins Kaplan LLP
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
Phone: (605) 335-1300
bjohnson@robinskaplan.com

Sam E. Khoroosi
Robins Kaplan LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Phone: (612) 349-8500
ekhoroosi@robinskaplan.com

*Attorneys for NorthWestern Corporation
d/b/a NorthWestern Energy*

Certificate of Service

I the undersigned hereby certify that on March 10, 2017, a true and correct copy of *NorthWestern Energy's Reply to Staff's Response and Northern Natural Gas Company's Answer*, was served upon the service list on the following page.

**NORTHWESTERN CORPORATION,
d/b/a NORTHWESTERN ENERGY**



Timothy P. Olson

Service List

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us
(605) 773-3201 - voice

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us
(605) 773-3201 - voice

Ms. Brittany Mehlhaff
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
brittany.mehlhaff@state.sd.us
(605) 773-3201 - voice

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patrick.steffensen@state.sd.us
(605) 773-3201 - voice

Ms. Mary Zanter
Pipeline Safety Program Manager
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
mary.zanter@state.sd.us
(605) 773-3201 - voice

Ms. Pamela Bonrud
NorthWestern Energy
3010 West 69th St.
Sioux Falls, SD 57108
Pam.Bonrud@northwesternenergy.com
(605) 978-2990 - voice

Mr. Timothy P. Olson
Senior Corporate Counsel and Corporate Secretary
NorthWestern Energy
3010 W. 69th St.
Sioux Falls, SD 57108
tim.olson@northwesternenergy.com
(605) 978-2924 - voice

Ms. Laura Demman
Vice President, Regulatory and
Government Affairs
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
laura.demman@nngco.com
(402) 398-7278 - voice

Mr. J. Gregory Porter
Vice President and General Counsel
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
greg.porter@nngco.com
(402) 398-7406 - voice

Ms. Dari Dornan
Senior Counsel
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
dari.dornan@nngco.com
(402) 398-7007 - voice

Mr. Brett Koenecke - Representing:
Montana-Dakota Utilities Co.
Attorney
503 South Pierre Street
PO Box 160
Pierre, SD 57501-0160
brett@mayadam.net
(605) 224-8803 - voice

Mr. Thomas J. Welk - Representing
Northern Natural Gas
Boyce Law Firm, LLP
PO Box 5015
Sioux Falls, SD 57117-5015
tjwelk@boycelaw.com
(605) 336-2424 - voice

Mr. Jason R. Sutton - Representing
Northern Natural Gas
Boyce Law Firm, LLP
PO Box 5015
Sioux Falls, SD 57117-5015
jrsutton@boycelaw.com
(605) 336-2424 - voice