

**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

NG16-014

**NORTHERN NATURAL GAS
COMPANY'S REPLY TO
NORTHWESTERN ENERGY'S
ANSWER TO NORTHERN NATURAL
GAS COMPANY'S PETITION FOR
REHEARING**

INTRODUCTION

Northern Natural Gas Company ("Northern") petitioned for rehearing of the **entire** Declaratory Ruling ("Northern's Petition") for three separate reasons. First, the PUC committed procedural errors affecting the **entire** docket because it failed to treat the docket as a contested case proceeding. Second, the PUC erred in concluding NorthWestern can terminate service to farm tap customers without holding a proper hearing or considering evidence on the issue. Third, the PUC erred in concluding the gas pipeline facilities downstream of Northern's facilities are not subject to the PUC's jurisdiction for the purpose of pipeline safety. In response, relying on misdirection, NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") answered, cited to "facts" allegedly established, and argued that rehearing is not warranted. NorthWestern's arguments all fail.

I. Northern's Petition Seeking Rehearing of the Entire Declaratory Ruling Complies with the Applicable Administrative Rules.

NorthWestern argues that Northern's Petition fails to comply with the applicable administrative rules when it seeks rehearing of the entire Declaratory Ruling. As an initial

matter, the parties agree that ARSD 20:10:01:29 and 20:10:01:30.01 apply to Northern's Petition. (*Compare* Northern's Petition at p.3 *with* NorthWestern Energy's Answer to Northern Natural Gas Company's Petition for Rehearing ("NorthWestern's Answer") at p.2). Although unclear, NorthWestern appears to be arguing Northern's Petition fails to comply with the applicable regulations for two separate reasons: (1) Northern's Petition allegedly seeks rehearing on issues Northern claims were not in error; and (2) Northern's Petition fails to specify the findings and conclusions claimed to be erroneous. (NorthWestern's Answer at pp.2-5). To make these arguments, NorthWestern misstates the arguments made in Northern's Petition.

A. Northern's Petition Properly Seeks Rehearing of the Entire Docket Because the PUC's Procedural Errors Affect the Entire Declaratory Ruling, Not Just the Decision Regarding Jurisdiction to Regulate Pipeline Safety.

In the Declaratory Ruling, the PUC voted on three questions posed by Staff and ruled (without explanation): (1) the PUC has jurisdiction over utilities providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern; (2) NorthWestern is a public utility as defined by SDCL Ch. 49 with respect to those farm tap customers; and (3) that farm taps in whole or in part are not subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Ch. 49-34B. (Declaratory Ruling).

In opposing rehearing, NorthWestern claims Northern only challenges the PUC's question on the third question, and thus, Northern's Petition seeking rehearing of the entire Declaratory Ruling violates the applicable administrative rules. (NorthWestern's Answer at pp.2-3). This is simply wrong.

NorthWestern's argument is based upon a fundamental misunderstanding of Northern's Petition and the basis for rehearing for the entire Declaratory Ruling. Northern is not claiming the PUC's ruling on all questions addressed in the Declaratory Ruling is **substantively**

erroneous. Instead, the **procedural errors** committed in this docket impact the entire proceeding. The complete void of an administrative record and no separately stated findings of facts and conclusions of law prevent an appellate review and understanding of the PUC's order. Unless these procedural errors are remedied, the Declaratory Ruling will be reversed on appeal. *See Dep't of Public Safety v. Eastman*, 273 N.W.2d 159, 161 (S.D. 1978) (holding that failure to adopt findings of fact and conclusions of law required remand to administrative agency).

Consistent with the applicable administrative rule, Northern's Petition alleges that these procedural mistakes affect the **entire** Declaratory Ruling (and indeed the entire docket). (Northern's Petition at pp.7-8). Because the procedural error affects the entire docket, Northern properly seeks rehearing of the entire Declaratory Ruling, including those issues in which Northern may agree the PUC answered correctly as a matter of substantive law.

NorthWestern's Answer ignores the procedural errors affecting this docket. As stated in Northern's Petition, the petition for declaratory ruling commenced a contested case proceeding. (Northern's Petition at pp.4-5). That is critical because there are specific procedural requirements for a contested case. The procedure in this docket failed to comply with requirements for a contested case because: (1) improper notice was provided; (2) the docket denied the parties the right to engage in discovery and admit evidence; and (3) the PUC failed to issue findings of fact and conclusions of law. (Northern's Petition at pp.5-7). Each of these separate, procedural missteps was an error providing a basis for reconsideration under ARSD 20:10:01:30.01.

Rather than addressing these procedural errors, NorthWestern simply argues that Northern chose not to engage in discovery or present evidence. (Northern's Petition at pp.5-7). According to NorthWestern, "there is nothing in the Commission's administrative rules that

require the Commission to notify the parties that they can engage in discovery or present evidence or testimony or that prohibit a party from taking such actions.” (NorthWestern’s Answer at p.4). This argument overlooks the specific notice requirements for a contested case hearing imposed by SDCL 1-26-17(6), which requires the notice of hearing to include a “statement that the hearing is an adversary proceeding” This is a specific notice requirement advising parties of their right to discovery and present evidence.

Here, as explained in Northern’s Petition, the notice only advised the parties of their ability to present **oral argument** at the hearing. (Order For and Notice of Hearing dated November 30, 2016). Notice of ability to present oral argument, rather than an evidentiary hearing, is inconsistent with the parties’ rights in a contested case proceeding. SDCL 1-26-17(6) requires notice of an “adversary proceeding” so that parties know they have the right to discovery and to call witnesses. As a result, the defective notice provided here is a procedural defect requiring rehearing regardless of whether Northern could have requested discovery or witnesses.

Moreover, NorthWestern ignores the other, undisputed procedural errors made in this docket. As noted above, the PUC failed to provide the proper notice for this contested case proceeding. At the two hearings held in this matter, no “evidence” was offered or ruled upon by the PUC, and no “evidence” was admitted into the record. Without “evidence,” the PUC cannot make factual determinations, and no appellate Court can determine if factual determinations are supported by substantial evidence. Finally, the PUC failed to enter formal findings of fact and conclusions of law as statutorily required. Each of these errors separately require rehearing, and the Petition properly identified these procedural errors.

B. Northern's Petition Could Not Be More Specific In Specifying the Findings of Fact and Conclusions of Law Because the PUC Failed to Enter Any Findings of Fact and Conclusions of Law.

NorthWestern argues that Northern's Petition fails to specify the findings and conclusions claimed to be erroneous. (NorthWestern's Answer at p.2). NorthWestern disregards that one of the very errors identified in Northern's Petition is the failure to enter findings of fact and conclusions of law. (Northern's Petition at pp.6-7). Because there are no findings of fact and conclusions of law, Northern cannot identify with any greater specificity the erroneous findings of fact or conclusions of law. Requiring Northern to provide further specificity as a prerequisite to rehearing would be nonsensical.

II. The Lack of Findings of Fact and Conclusions of Law Make It Impossible to Determine if the PUC Actually Found in this Docket that NorthWestern Can Terminate Farm Tap Services on December 31, 2017. But, if This Conclusion Was Made, The PUC Committed Procedural Error in Doing So Without Holding a Proper Contested Case Hearing.

NorthWestern argues that the PUC's decision agreeing to discontinue service to farm tap customers on December 31, 2017, does not warrant rehearing because that decision was made in 2011 rather than in this docket. (NorthWestern's Answer at p.6). NorthWestern then argues that Northern's failure to intervene or appeal in the 2011 docket prevents it from seeking rehearing here.

Once again, the lack of findings of fact and conclusions of law prevents the parties from understanding the reach of the Declaratory Ruling. On its face, the Declaratory Ruling does not address whether NorthWestern can terminate service to farm tap customers, and this issue remains undetermined after the Declaratory Ruling. If, however, the PUC believes it somehow determined when NorthWestern could terminate service as part of the answers to the three

questions posed in the Declaratory Ruling, then that decision must be reheard for the same procedural defects affecting the entire Declaratory Ruling.

NorthWestern argues that the PUC decided the issue of whether NorthWestern can terminate service in the 2011 docket, and that Northern's failure to appeal that decision prevents it from contesting the issue in this docket. As recognized by Staff at the December 14, 2016, Hearing, the 2011 decision does not prohibit the PUC from revisiting the issue and changing its mind in this docket. (December 14, 2016, Hearing at pp.28-29). *See also In re W. River Elec. Ass'n, Inc.*, 2004 SD 11, ¶ 25, 675 N.W.2d 222, 229-30 (stating that PUC is not bound by prior decisions because the doctrine of *stare decisis* does not apply to administrative agencies); *Union State Bank v. Galecki*, 417 N.W.2d 60, 63 (Wisc. Ct. App. 1987) (“[N]ot only may an agency reopen and reconsider its orders on a particular problem, but it may also adopt or entertain a different view of the law in subsequent cases.” (internal citation omitted)). To the extent the issue was in fact reached in this docket, rehearing on that issue should occur.

III. The PUC Erred in Concluding It Lack's Pipeline Safety Jurisdiction.

Northern seeks rehearing on the issue of whether the PUC has pipeline safety jurisdiction. Importantly, Northern not only sought rehearing under ARSD 20:10:01:30.01 because the PUC erred in making this decision but **also because** the safety consequence of compliance with the Declaratory Ruling on this issue.¹ As explained in Northern's Petition, compliance with the Declaratory Ruling on this issue creates a regulatory void and substantial public safety risks.

¹ In addition to an allegation of error, ARSD 20:10:01:30.01 recognizes that rehearing can be granted when there are “consequences resulting from compliance with the decision or order”

Rather than disputing the existence of these safety risks, NorthWestern argues that the PUC correctly determined it lacked pipeline safety jurisdiction over the farm taps. (NorthWestern's Answer at pp.7-11). As pointed out in Northern's Petition, the PUC apparently reached this conclusion by determining the Customer-Owned Facilities do not fit within the statutory definition of "gas pipeline facilities" in SDCL 49-34B-1(5). (Northern's Petition at p.12). NorthWestern argues the PUC correctly determined the Customer-Owned Facilities do not fit the definition of "gas pipeline facilities." (NorthWestern's Answer at pp.7-11). NorthWestern's argument assumes the PUC made certain factual determinations:

- Farm tap components are only owned by Northern or the farm tap customer. (NorthWestern's Answer at pp.7-8).
- Farm tap customers own all facilities downstream from the farm-tap meter. (NorthWestern's Answer at p.8).
- Farm tap facilities are outside the scope of the *intended* purpose of South Dakota's pipeline safety inspection program (NorthWestern's Answer at p.7)
- "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 are not involved in the transportation of gas. Other than NorthWestern's ipso facto definition, there is no evidentiary basis for concluding these are terms of art in the industry supporting NorthWestern's interpretation. (NorthWestern's Answer at p.8).
- The movement of gas within a customer-owned farm tap facility does not involve a gathering line, a transmission line, or a distribution line. (NorthWestern's Answer at pp.8-9).

- NorthWestern contends that the right to right to receive farm tap service only arises pursuant to a private easement contract (NorthWestern’s Petition for Reconsideration at. p.5). NorthWestern invites the PUC to interpret the easement when it helps their position (such as claiming the right to farm taps arise from the easement) but at other times, NorthWestern’s claims that the PUC does not have jurisdiction over contracts like easements (NorthWestern Answer at p.3).

NorthWestern ignores, however, that none of these “facts” have been properly determined in this proceeding. There was no evidentiary hearing. The PUC has not ruled upon or accepted any evidence, and no findings of fact were entered. Due to these procedural irregularities, neither NorthWestern nor the PUC can rely on these “facts” to support their argument. Further, as developed, the record cannot support determination that there is no pipeline safety jurisdiction.²

CONCLUSION

For the reasons stated above, the PUC should grant rehearing of the Declaratory Ruling.

Dated: March 13, 2017.



Thomas J. Welk
Jason K. Sutton
Boyce Law Firm, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424

² Northern disputes that the Customer-Owned Facilities do not meet the statutory definition of “gas pipeline facilities” for the reasons stated in Northern’s Petition. Because the evidence will need to be further developed before this issue can be decided through a proper, contested case proceeding, Northern is not arguing the merits here but instead refers to Northern’s Petition and the briefing filed by Northern before the Declaratory Ruling in this matter.

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CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of the law firm of Boyce Law Firm, LLP, attorneys for Northern Natural Gas Company and that on the 13th day of March, 2017 a true and correct copy of (1) Northern Natural Gas Company's Reply to Northwestern Energy's Answer to Northern Natural Gas Company's Petition for Rehearing; (2) Northern Natural Gas Company's Reply Brief In Support Of Motion For Judicial Notice and this Certificate of Service was served via email to the following addresses listed:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us

Ms. Brittany Mehlhaff
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
brittany.mehlhaff@state.sd.us

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patrick.steffensen@state.sd.us

Ms. Mary Zanter
Pipeline Safety Program Manager
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
mary.zanter@state.sd.us

Ms. Pamela Bonrud
NorthWestern Energy
3010 West 69th St.
Sioux Falls, SD 57108
Pam.Bonrud@northwestern.com

Mr. Timothy P. Olson
Senior Corporate Counsel and Corporate
Secretary
NorthWestern Corporation dba NorthWestern
Energy
3010 W. 69th St.
Sioux Falls, SD 57108

Ms. Laura Demman
Vice President, Regulatory and Government
Affairs
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
laura.demman@nngco.com

tim.olson@northwestern.com

Mr. J. Gregory Porter
Vice President and General Counsel
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
greg.porter@nngco.com

Ms. Dari Dornan
Senior Counsel
Northern Natural Gas
1111 South 103rd St.
Omaha, NE 68124
dari.dornan@nngco.com

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

Brendan V. Johnson
Robins Kaplan, LLP
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
bjohnson@robinskaplan.com

Sam E. Khorroosi
Robins Kaplan, LLP
101 South Main Avenue, Suite 100
Sioux Falls, SD 57104
Ekhorroosi@robinskaplan.com



Thomas J. Welk
Jason R. Sutton
BOYCE LAW FIRM, LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015
(605)336-2424