BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF COMMISSION	)	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF NORTHERN NATURAL GAS COMPANY**
STAFF'S PETITION FOR DECLARATORY RULING REGARDING FARM TAP CUSTOMERS	)	**NG16-014**

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF NORTHERN NATURAL GAS COMPANY

I.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Northern Natural Gas Company ("Northern"), to the extent leave is required, hereby moves the South Dakota Public Utilities Commission ("SDPUC" or "Commission") for leave to file a supplemental brief in the above captioned proceeding. The supplemental brief responds to NorthWestern Energy's ("NorthWestern") Brief in Response to South Dakota Public Utility Commission Staff's ("SDPUC Staff") Petition for Declaratory Ruling filed December 7, 2016 ("NorthWestern's Brief"). A response to NorthWestern's Brief is necessary in order to correct the record in this proceeding. NorthWestern's Brief contains egregious and factually incorrect statements that must be addressed in order for the Commission to have a thorough and correct understanding of the facts and issues. Northern's supplemental brief corrects the misstatements in NorthWestern's Brief and will assist the Commission in its decision-making process.

The Commission should allow Northern to file its supplemental brief in order to have a complete and accurate record in the proceeding.

For the reasons set forth above, Northern requests it be allowed to file its supplemental brief in the above captioned proceeding.

II.

SUPPLEMENTAL BRIEF

In this declaratory ruling action, the SDPUC must first decide whether facts matter. One would naturally consider they should; however, based on the brief filed by NorthWestern in this docket December 7, 2017, the question must be seriously raised. NorthWestern's Brief contains one unsupported claim after another, a large number of factual misstatements and characterizations that would have been recognized as inaccurate with minimal research. Furthermore, NorthWestern glosses over historical facts, ignores the relevance of corporate structure, and ironically, failed to even address the three questions actually posed by the SDPUC.

What was missing from NorthWestern's Brief may be as important as what was selected to be included. NorthWestern spent most of its brief attempting to disparage Northern; however, in doing so, NorthWestern failed to address the actual questions presented by the SDPUC. In fact, NorthWestern completely ignored the first question regarding SDPUC jurisdiction over the utility providing farm tap service, as well as the third question regarding the SDPUC's authority over pipeline safety. NorthWestern chose only to answer the question whether NorthWestern was a public utility (choosing to be silent on the fact that Northern is not[1]). Rather than addressing the SDPUC's questions or demonstrating an understanding of the well-documented factual and legal difference in legal standing and function served by Northern (as the interstate

[1] Northern's Initial Brief at 14.

pipeline) and NorthWestern and its predecessors (as the utility), NorthWestern attempted to spin an interpretation of Northern's easements; easements that are not before the SDPUC. Failing to understand and appreciate the relevant history and corporate structure of Northern and Peoples, NorthWestern completely missed the most important fact in this inquiry: InterNorth Inc. ("InterNorth") sold the assets and liabilities of Peoples related to the farm taps to UtiliCorp United Inc. ("UtiliCorp") in 1985. Accordingly, in 1985 the obligation to provide utility service to the farm tap customer's was solely Peoples, a division of UtiliCorp.

NorthWestern's Brief essentially made three points: (1) NorthWestern argues the responsibility to provide farm tap service is Northern's because of Northern's easements with each of NorthWestern's farm tap customers; (2) NorthWestern asserts the obligation to provide farm tap service is Northern's because it "has been NNG's responsibility since the 1950s" when Northern offered to furnish gas to the landowner at the delivery point on its interstate pipeline; and (3) NorthWestern concludes it is not a public utility with respect to certain farm tap customers. Each of these points will be addressed below.

1. NorthWestern Fixation on Northern's Easements is Misplaced

NorthWestern spends a considerable portion of its brief discussing Northern's easements that (i) NorthWestern demonstrated it has no understanding of, (ii) are not relevant to the questions asked by the SDPUC and (iii) cannot jurisdictionally be interpreted and enforced by the SDPUC.

Northern has easement agreements with each of the approximately 200 farm tap customers currently receiving gas utility service from NorthWestern, including 195 farm tap customers NorthWestern has given notice of termination to and five farm tap customers that

NorthWestern plans to continue to serve.[2] *NorthWestern is not a party to the easement agreements*. Although the easement agreements are important legal documents to Northern and the landowner, they are not relevant to this proceeding or to the questions the SDPUC has been asked to decide (and that NorthWestern mostly ignored). The SDPUC's job is not to interpret private easement agreements. Staff Memorandum at 6.

Nonetheless, since the purpose and effect of the easements were so badly misrepresented in NorthWestern's Brief, Northern is compelled to correct the record. Northern has attached an easement hereto (Attachment 1),[3] so the SDPUC can read the language for itself and put NorthWestern's mischaracterizations in context. Additionally, review of the actual easement language may be informative as the SDPUC considers Northern's response to NorthWestern below. As indicated, the easements require Northern to "make, or cause to be made, a tap in any gas pipeline constructed by grantee … for the purpose of supplying gas to grantor…." The easement further provides, "gas to be taken under this provision shall be measured and furnished to the grantor at the rates and upon the terms as may be established by grantee, or by any vendee of grantee, from time to time."[4]

Northern Stands Ready to Provide Interstate Transportation Service

Northern has provided the tap, and as Northern has consistently stated, Northern stands ready to provide the interstate transportation service it is required to provide pursuant to the easements and Northern's Federal Energy Regulatory Gas Tariff ("FERC Tariff"). If a shipper on Northern's system nominates receipt/delivery of gas, Northern will provide the interstate transportation service. This is precisely the obligation Northern has to the easement grantor.

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[2] These five farm taps were served by NorthWestern prior to its acceptance of the assignment of the agreement with Minnesota Energy Resources Corporation.

[3] The easement attached hereto, is the same easement previously provided to the SDPUC. See Attachment 1 to Northern's May 4, 2016 letter to Kristen Edwards, SDPUC Staff Attorney.

[4] In the language of the easements, the landowner is referred to as "grantor" and Northern is referred to as "grantee."

However, if no nomination is received, there is no service to provide, and the valve will be closed to avoid an unsafe condition.[5] NorthWestern distorts these straightforward facts by implying Northern is not being transparent with the easement grantors (NorthWestern's Brief at 2). Such an implication is without support. Every communication of Northern's, whether it has been with the easement grantors, NorthWestern or the SDPUC, has been direct and transparent. In fact, if Northern had not raised the utility service issues to the SDPUC, NorthWestern may have simply mailed a six-month termination notice to the farm tap customers (i.e., easement grantors) informing them that utility service would be terminated in the middle of winter 2017-18. It is disingenuous for NorthWestern to wrongly accuse Northern of not being transparent.

2. NorthWestern's Conjecture Regarding Northern's Obligations is Irresponsible

NorthWestern's claim that Northern is not willing to live up to the obligations made to easement grantors (NorthWestern's Brief at 4), is tenuously strung on a litany of uninformed conjecture. It is completely false. NorthWestern states Northern is obligated to (i) provide a tap and (ii) furnish gas. Without a shred of evidence, NorthWestern infers Northern is failing the obligation *to furnish gas*. Northern disagrees. NorthWestern is conflating the term "furnish" to a requirement that Northern must provide utility service, including the purchase and sale of gas. Northern has never provided the utility service or sold gas to farm tap customers in South Dakota. Peoples, or one of its successors, i.e., a "vendee," has always provided the utility service. Pursuant to the terms of the easements, Northern is *furnishing* gas through the provision

[5] Staff recommends *only* a public utility be allowed to provide service to farm taps due to public safety risks. (Staff Memorandum at 2). The Iowa Utilities Board ("IUB") and the Minnesota Public Utilities Commission ("MPUC") have actively regulated utility service to farm taps. The IUB has found, "Farm tap customers are part of a community and it is in the public interest for the Board to ensure that farm tap customers are provide the same protections as are provided to customers directly served by local distribution companies." *In Re Black Hills/Iowa Gas,* Order Granting Application to Abandon, Docket No. SPU-210-0005 (IUB 2010). The MPUC has also required service to be provided by a utility regulated by MPUC (Northern's Initial Brief at 15-16).

of interstate transportation; the same interstate service it has always provided. When the hyperbole of NorthWestern's brief is set aside, and the actual facts are considered, the absurdity of NorthWestern's claim is understood:

> *Even though Northern has never provided retail gas service in South Dakota, if Northern does not enter the distribution utility business and commence providing retail gas service upon NorthWestern's termination, Northern is not living up to its obligation.*

Northern has always *furnished* gas to the vendee providing utility service to the farm tap customer at the delivery point on Northern's system. In South Dakota, a gas utility (People's, one of its successors or NorthWestern), has always been the retail provider between Northern's interstate service and the farm tap customer. NorthWestern's view of Northern's obligations to the easement grantors is unsupported and flies in the face of the entire history of farm tap service in South Dakota.

Facts Matter!

NorthWestern reaches its faulty conclusion because of its misunderstanding of the facts. Although there are many factual errors in NorthWestern's Brief at 2-5, the most important to correct are:

- **NorthWestern's Claim:** Northern failed to inform the easement grantors that Northern has an obligation to furnish gas to them.
- **Truth:** Northern has consistently said: Northern's obligation under the easements is to provide a tap and to furnish (i.e., transport) gas nominated to the delivery point by the gas utility providing the service to the farm tap customers, i.e., NorthWestern, or another successor to Peoples interest (Minnesota Energy Resources Corporation or Aquila Inc.).

- **NorthWestern's Claim:** Northern failed to tell easement grantors "that [Northern], in fact, provided the [utility] service to farm tap customers for well over 30 years."
- **Truth:** Any claim, or even inference, that Northern sold gas or provided any other utility service to South Dakota farm tap customers is false. Peoples provided the utility service to farm tap customers. *Peoples corporate history* is as follows:

1930	Originally incorporated
1930-1952	Peoples was a wholly owned subsidiary of Northern
1952-1980	Peoples was a division of Northern
1980-1985	Peoples was a division of InterNorth Inc.
1985	Peoples was sold to UtiliCorp United Inc.
2002	UtiliCorp United Inc. changed its name to Aquila Inc. (Tariff on file with SDPUC changed to reflect new name "Aquila")
2006-2011	Peoples (Aquila) in South Dakota and Minnesota sold to MERC
2011	South Dakota properties of MERC assigned to NorthWestern

Northern was functionally separate and distinct from Peoples. The two entities had separate employees, operations and purposes. Peoples was a wholly owned subsidiary of Northern (1930-1952) and a division of Northern (1952-1980). **Peoples**, not Northern, was *always the utility* providing utility service to the farm tap customers in South Dakota. Peoples had a tariff regulated by, and on file with, the SDPUC. Any assertion by NorthWestern that Peoples, as a division or subsidiary of Northern, is for all practical

purposes Northern, is legally unsupportable.[6] Furthermore, even if Peoples as a utility division of Northern, made Northern a gas utility, everything changed in 1985 when the assets and liabilities of Peoples were acquired by UtiliCorp. Northern's Initial Brief at 5-8.

- **NorthWestern's Claim:** If Northern did not agree to the farm tap provision in the easement, Northern would not have been able to build the pipeline. NorthWestern's Brief at 3.
- **Truth:** Again, NorthWestern's claim is belied by the facts. Only a small portion of the easements Northern owns across its approximate 15,000 miles of pipeline have farm tap provisions. At issue in this proceeding are approximately 200 farm taps. Northern owns roughly 56,000 easements over its entire system. Moreover, Northern is a "natural gas company" under the federal Natural Gas Act ("NGA"). As such, upon receipt of a certificate of public convenience from the FERC pursuant to Section 7 of the NGA, Northern can use eminent domain to acquire property needed to construct its pipeline; offering of a farm tap is not a requirement nor even contemplated in the body of law on eminent domain. Therefore, not only is NorthWestern's claim based on complete speculation, it is wrong as a matter of law.

[6] The Iowa Supreme Court has found on several occasions, the Iowa Utilities Board has never considered its jurisdiction over the actions of a subsidiary or division of a corporation to be broad enough to reach a parent corporation when a subsidiary company or division of the corporation actually operates the facility that supplies gas to retail consumers. See *In re Peoples Natural Gas Co.*, 59 P.U.R.4th 93, 102 (Iowa S.C.C.1984). Thus, it has treated divisions of the corporation as separate entities, and limits the imposition of its jurisdiction over the division or entity that provides the direct sale to the user. Id. Likewise, the FERC does not recognize jurisdiction over intradivision transfers within a corporation. The FERC does not consider such transfers within the same corporation to be sales or resales under the NGPA. See *Northern Natural Gas*, 101 F.E.R.C. ¶ 61,382, at 62,591; *Northern Natural Gas Co. v. Iowa Utilities Bd.* 679 N.W.2d 629 (2004)

- **NorthWestern's Claim:** "[O]n April 1, 1987, NNG entered into an agreement [] *with its own subsidiary*, Peoples Natural Gas Company (Peoples), to provide the local services to NNG's farm tap customers." (emphasis added) NorthWestern's Brief at 3.
- **Truth:** Peoples was not a subsidiary of Northern in 1987. See, Peoples history above. In fact, Peoples was owned by UtiliCorp, a completely different organization. This distinction is critical to understanding why the obligation to provide utility farm tap service in South Dakota belongs to NorthWestern, or one of the other utilities that are successors to Peoples. In 1985, InterNorth sold Peoples, including the obligation of Peoples to provide utility service to farm tap customers in South Dakota, to UtiliCorp.[7]
- **NorthWestern's Claim:** "As [NNG] was exiting the local natural gas distribution business …." NorthWestern's Brief at 4.
- **Truth:** Northern was never in the "local distribution business." Local distribution companies are, by definition, involved in the provision of gas utility services at retail and are regulated in South Dakota by the SDPUC.[8] NorthWestern's obvious effort to cloak Northern with the status of a utility responsible for providing utility service to the farm tap customers is irresponsible.

3. NorthWestern's Argument that it is not a Public Utility is Fatally Flawed

NorthWestern argues it is not a public utility as to farm tap customers because "farm tap service is not available to the public."[9] This argument is not supportable. First, NorthWestern cites no authority for the proposition that an entity that has been found to be a "gas utility" under SDCL § 49-34A-1 can be something other than a "gas utility" as to other "gas service"[10] that it

[7] Northern's Initial Brief at 7-8.
[8] SDCL § 49-34A.
[9] NorthWestern's Brief at 7.
[10] SDCL § 49-34A-1(8).

provides. Second, NorthWestern, and its predecessors, MERC, Aquila and Peoples, have been providing service to the farm tap customers pursuant to a tariff approved by the Commission in its role as regulator of public utilities. Third, even if NorthWestern is correct that the service provided to farm tap customers is a separate service not available to the public, the service to the farm tap customers is "gas service" as defined by SDCL § 49-34A-1(8). "Gas Service" is defined as retail sale of natural gas or manufactured gas distributed through a pipeline to fifty or more customers …." SDCL § 49-34A-1(8). There are approximately 200 farm tap customers being served by NorthWestern including five that will continue to receive gas utility service from NorthWestern after December 31, 2017, even if the other are terminated as currently planned by NorthWestern. Therefore, even if service to the farm tap customers is a separate service from NorthWestern's other retail service, the service is still "gas service" regulated by the SDPUC. Curiously, NorthWestern did not address the fact that it will continue to provide gas service to five of the 200 farm tap customers it currently serves. NorthWestern's argument that it is not a public utility to farm tap customers falls apart when it is understood that they will be providing utility service to farm tap customers whether it walks away from its existing customers or not.

NorthWestern cites *Krenning v. Heart Mountain Irr. Dist.*, 200 P.3d 774 (Wyo. 2009) as support for its proposition that the service to the farm tap customers is not service to the public. The facts in *Krenning* are so far off the mark as to the service to the farm tap customers, the order should have no probative effect. NorthWestern picked snippets of the order in the hopes that the sound bite will resonate with the SDPUC. In fact, other quotes from the order work against NorthWestern's argument. *Krenning* involved a personal injury lawsuit under the Wyoming Governmental Claims Act against a water district that provided irrigation service only to its members. The issue was whether the district was a public utility and therefore had waived

its governmental immunity from suit. The court found that because the district did not solicit "practically everyone to become members" or that it did not accept "substantially all requests for its commodity" and because the district had never been regulated by the Wyoming Public Service Commission, the district did not supply water "to or for the public" and was not a public utility. NorthWestern is regulated by the SDPUC and the utility service to the farm taps has been (and is) regulated by the SDPUC. The rate for service to the farm tap customers may be different from the rate charged to other retail customers of NorthWestern, but the rate has been expressly approved by the SDPUC.[11] The court in *Krenning* noted (at ¶24), "We have previously explained that the statutory phrase 'to or for the public' refers to sales to sufficient of the public to clothe the operation with a public interest" and the court further noted (at ¶25), "We have also explained that a test for a public utility is not the absolute number of persons it serves, but whether it is devoted to public use …." Two hundred customers receiving service under the tariff for domestic use would appear to be sufficient to qualify as public use in light of the fact that "gas service" is defined as service to only 50 or more customers. The South Dakota legislature had already determined the number of customers that is sufficient to qualify as public service.

III.

CONCLUSION

For the reasons set forth above, Northern respectfully requests the SDPUC to grant Northern's motion and to accept this Supplemental Brief to assist its decision-making. Furthermore, the SDPUC should conclude (i) the obligation to provide gas utility service to the approximately 200 farm tap customers at issue in this proceeding is NorthWestern's or one of the other successors in interest to Peoples and (ii) NorthWestern is a public utility with respect to

[11] *NorthWestern Corporation d/b/a NorthWestern Energy For Its Purchase of the Milbank Northern Natural Gas Pipeline* 2011 WL 11820331 (March 11, 2011, SDPUC).

utility service provided to farm tap customers (without regard to whether NorthWestern provided service prior to, or as a result of, the 2011 assignment with MERC).

Respectfully submitted,

Northern Natural Gas Company,

By: _____

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Counsel for Intervenor

Dated this 12th day of December, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of December 2016, a true and correct copy of the foregoing "Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company," was served upon the service list of this Commission by electronic means, or by mailing a copy by first-class mail, postage prepaid.

_____
J. Gregory Porter

Attachment 1

Form 401 Rev. 1M 3-54 R. & Co.

912-1-28

Know All Men by These Presents:

That Isabel Denbow , widow

of the County of Minnehaha and State of South Dakota, for and in consideration of the sum of One Dollar ($1.00) per lineal rod, receipt of One Dollar ($1.00) of which consideration is hereby acknowledged and balance of which is to be paid when and as the location of pipe lines over and through the lands hereinafter described shall be established, surveyed and measured, and the further consideration of the performance of the covenants and agreements by the grantee, as hereinafter set out and expressed, do hereby GRANT, REMISE and RELINQUISH unto NORTHERN NATURAL GAS COMPANY, a Delaware corporation, its successors or assigns, the RIGHT, PRIVILEGE and EASEMENT to construct, maintain and operate pipe lines, and appurtenances thereto, over and through the following described lands and appurtenances thereunto belonging, including riparian rights, situated in the County of McCook and State of South Dakota, to-wit:

Northwest Quarter (NW¼) Section 19, Township 103, Range 53

TO HAVE AND TO HOLD unto said NORTHERN NATURAL GAS COMPANY, its successors and assigns, so long as such pipe lines, and appurtenances thereto, shall be maintained, together with the right of ingress to and egress from said premises, for the purpose of constructing, inspecting, repairing, maintaining and replacing the property of the grantee located thereon, or the removal thereof, in whole or in part, at the will of the grantee; it being the intention of the parties hereto that grantor is hereby granting the uses herein specified without divesting grantor of the rights to use and enjoy said above described premises, subject only to the right of the grantee to use the same for the purposes herein expressed.

As a further consideration for this grant, the grantee herein agrees as follows:

(1) That it will bury all line pipe laid upon said land to a sufficient depth so as not to interfere with the cultivation of the soil.

(2) That it will pay to grantor any damages which may arise to growing crops, trees, shrubbery, fences or buildings from the construction, maintenance or operation of said pipe lines, said damages, if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one of whom shall be appointed by the grantor, one by the grantee, and the third to be selected by the two appointed as aforesaid, and the written award of such three persons shall be final, conclusive and binding upon the parties hereto.

(3) That grantee, upon written application by the grantor, will make, or cause to be made, a tap in any gas pipe line constructed by grantee upon the above described premises for the purpose of supplying gas to grantor, for domestic purposes only and not for re-sale, and for use upon the above described premises only. All connections required, shall be furnished and paid for by Grantor with the exception of the meter, which is to be furnished and owned by the Grantee. Said tap will be provided by grantee from a convenient point on its main line or some lateral as the grantee may determine, and gas to be taken under this provision shall be measured and furnished to the grantor at the rates and upon the terms as may be established by grantee, or by any vendee of grantee, from time to time.

(4) That grantee will replace or rebuild to the satisfaction of grantor or of her representative any and all damaged parts of all drainage systems, the damage to which shall be occasioned by the construction of said pipe lines under and through the above described premises.

This instrument, and the covenants and agreements herein contained, shall inure to the benefit of and be binding and obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties.

IN WITNESS WHEREOF we have hereunto set our hands this 23rd day of August, 1956

Isabel Denbow

C. Blakeman
Right of Way Agent.

000217

912-1-28 (5)(1952)

912-1-28 (2 of 2)

STATE OF SOUTH DAKOTA,
Minnehaha COUNTY, } ss.

On this 23 day of August, in the year 19 56
before me Leonard E Schmitt a Notary Public
in and for said County and State, personally appeared
Isabel ~~Dunbar~~ Genlow
known to me to be the person who is described in and who executed the within and foregoing instrument, and acknowledged to me that she executed the same.

My Com Expires 1-24-1960

L E Schmitt
Notary Public

STATE OF SOUTH DAKOTA,
_____ COUNTY, } ss.

On this _____ day of _____, in the year 19___,
before me _____ a _____
in and for said County and State, personally appeared _____

known to me to be the person who _____ described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

EASEMENT GRANT

FROM

TO NORTHERN NATURAL GAS COMPANY

STATE OF SOUTH DAKOTA } ss.
Moody COUNTY,
Filed for record the 7th day of September 1956 at 10:20 o'clock A. M., and recorded in Book 118 at Page 211
M J Stange Recorder.
Fee $1.00
Deputy.

COMPARED
Indexed

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STATE OF SOUTH DAKOTA,
COUNTY OF _____ } ss.

On this _____ day of _____ in the year 19___,
before me, _____
personally appeared _____
known to me to be the _____ of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, the day and year last above written.

Notary Public _____

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