

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF COMMISSION)	NORTHERN NATURAL GAS
)	COMPANY’S MOTION
)	TO REOPEN THE RECORD,
STAFF’S PETITION FOR)	TAKE JUDICIAL NOTICE
DECLARATORY RULING REGARDING)	AND CORRECT THE RECORD
FARM TAP CUSTOMERS)	
)	
)	NG16-014
)	

NORTHERN NATURAL GAS COMPANY’S MOTION

Northern Natural Gas Company (“Northern Natural Gas”) hereby moves the South Dakota Public Utility Commission (“Commission”) to (i) reopen the record in the above referenced matter, (ii) take judicial notice of the recorded transcript of the March 8, 2011, hearing before the Commission in Docket NG11-001 (“Transcript”) and (iii) based on the record in this docket, enter a finding in this proceeding that Northern Natural Gas does not have an obligation to provide public utility service to the farm tap customers¹ after December 31, 2017, and that any prior finding to the contrary, based in whole or in part on the unsupported and materially erroneous testimony given at the March 8, 2011, hearing in Docket NG11-001, is vacated and shall be prospectively interpreted consistent with the finding issued in this Docket NG16-014. At the hearing in Docket NG11-001, even though the Commission asked the right questions, the Commission was misled by the oral testimony that the obligation being assumed by NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) terminated December 31, 2017, and, thereafter, Northern Natural Gas assumed such obligation. In light of the uncontroverted evidence presented in this proceeding, it is clear the testimony provided to the

¹ The approximately 200 farm tap customers along Northern Natural Gas’ pipeline in eastern South Dakota (“farm tap customers”).

Commission in the Docket NG11-001 hearing was uninformed, inaccurate and false. The Commission determinately relied upon the misrepresentations. In this proceeding, for the first time, the Commission has been provided with an accurate record regarding the obligation to provide utility service. The record developed in this docket is supported with objective and verifiable evidence. Northern Natural Gas respectfully requests the Commission use the record developed in this docket and prospectively establish the responsibility to provide utility service to the farm tap customers is NorthWestern's (or Minnesota Energy Resources Corporation's ("MERC")). The public interest requires the Commission to correct the factual and legal record to properly reflect the public utility service provided to farm tap customers continues past the termination of the 1987 Agreement. Repudiation of the inaccurate testimony and correction of the record prospectively is necessary for the proper and lawful regulation of the utility service provided to farm tap customers.

I. Background

This declaratory action proceeding was brought by the South Dakota Public Utility Commission Staff ("Staff") to address certain issues related to the utility service currently provided by NorthWestern to the farm tap customers. NorthWestern has been serving the farm tap customers as a public utility since it acquired the obligation to do so from MERC in Docket NG11-001.² Prior to MERC, Aquila, Inc. (f/k/a UtiliCorp United Inc.) and Peoples Natural Gas Company provided the utility service. NorthWestern claims, in this docket, *inter alia*, that (i) its obligation to provide utility service to the farm tap customers is based on contract and not statute

²Northern Natural Gas Brief at 12. NorthWestern, like its predecessors MERC, Aquila Inc. and Peoples Natural Gas Company, is a gas utility subject to the Commission's exclusive jurisdiction pursuant to SDCL § 49-34A-1(12). NorthWestern operates, maintains or controls equipment or facilities for the purpose of providing gas service to the public, in whole or in part, in the state of South Dakota.

(i.e., SDCL § 49-34A)³ and (ii) the utility service NorthWestern is currently providing can be discontinued December 31, 2017, without statutory approval required by the Commission pursuant to SDCL § 49-34A-2.1.

NorthWestern's application for approval to purchase the Milbank Pipeline and the assumption of the obligation to provide utility service to the farm tap customers in Docket NG11-001, was set for hearing before the Commission March 8, 2011 ("Milbank Hearing"). Northern Natural Gas was neither an intervener in Docket NG11-001, nor was it present for the hearing. Northern Natural Gas recently learned the Commission specifically asked NorthWestern at the Milbank Hearing who had the obligation to serve the farm tap customers after December 31, 2017, and that NorthWestern repeatedly answered Northern Natural Gas had the obligation.⁴ Later in the hearing, Staff provided similar testimony.

In this docket, Northern Natural Gas' evidence demonstrates the testimony provided to the Commission in Docket NG11-001 was factually and legally incorrect.⁵ The witnesses providing the testimony in the Milbank Hearing did not know the facts. Northern Natural Gas has demonstrated:

Organizationally, Peoples and Northern were different businesses, corporately structured so that the state-regulated utility business (Peoples) was conducted separate and distinct from the federally-regulated interstate business (Northern). Peoples was responsible for gas procurement, leak detection and repair, gas nominations, odorization, meter reading and billing. []

³ NorthWestern Brief at 8.

⁴ E.g., During the December 14, 2016, hearing in Docket NG16-014, Chairman Nelson raised the 2011 hearing and specifically the answers NorthWestern and Staff provided to questions asked by the Commission regarding the obligation to provide service after December 31, 2017 (Draft Transcript at __).

⁵ The testimony provided in Docket NG11-001 was inaccurate at the time offered and, for the same reasons, remains inaccurate today. Northern Natural Gas is aware of no effort to correct the misrepresentations until this proceeding, and specifically, this motion.

In 1985, Northern's owner, InterNorth, sold Peoples to UtiliCorp. UtiliCorp assumed all of the rights, duties and obligations related to the farm tap customers served by Peoples. Thereafter, as shown in [], UtiliCorp changed its name to Aquila Inc. ("Aquila") in 2002, and in 2006 Aquila sold the South Dakota utility operation to MERC. Finally in 2011, MERC assigned its obligation to serve the South Dakota farm tap customers to NorthWestern. The purchasers and assignees of UtiliCorp's gas utility business (not Northern) are responsible for providing the farm tap services expressly acquired by UtiliCorp in the 1985 acquisition.⁶

The extensive corporate structure and transactional history evidence submitted by Northern Natural Gas in this Docket NG16-014 is uncontroverted and must be used to correct and replace the completely unsupported and erroneous statements made, *and relied upon*, at the time the Commission approved NorthWestern's assumption of MERC's obligation to serve the farm tap customers.

II. Reopen the Record

The Commission Should Reopen the Record Pursuant to SDCL § 20:10:01:27.01

On December 14, 2016, the Commission held a hearing in the above-captioned docket, during which the decisions and evidence in Docket NG11-001 were addressed. On March 8, 2011, the Commission held a hearing in Docket NG11-001 to consider the application of NorthWestern to purchase Northern Natural Gas' 55-mile pipeline located in Northeastern South Dakota ("Milbank Pipeline") and assume MERC's responsibility to "maintain and operate approximately 200 farm taps located along Northern Natural Gas' pipeline in eastern South Dakota until December 31, 2017" ("Milbank Order"). At the Milbank Hearing, the Commission repeatedly asked NorthWestern and Staff who was going to serve the farm tap customers after December 31, 2017. Without hesitation and *without any inquiry*, NorthWestern and Staff represented that Northern Natural Gas would provide utility service to the farm tap customers

⁶ Northern Natural Gas Brief at 6.

after that date (Transcript recording at 40:16-43:22). NorthWestern and Staff were uninformed and, as shown by the evidence in this proceeding, legally and factually wrong. Accordingly, Northern Natural Gas requests the Commission reopen the record in the instant proceeding, so that evidence of the Commission's questions and the incorrect answers thereto can be admitted in the record of this docket. Including the erroneous testimony is important context for understanding the flawed nature of NorthWestern's claim that neither NorthWestern nor MERC have the obligation to provide utility service to the farm tap customers.

SDCL § 20:10:01:27.01 provides:

20:10:01:27.01. Reopening of the record. Any time after any matter is taken under advisement and before a decision of the commission is entered, the commission may, on its own motion or for good cause shown by a party to the proceeding, order that the record be reopened and the matter set for further hearing.

At the conclusion of the December 14, 2016, hearing in this Docket NG16-014, the Commission took the matter under advisement and said it intended to make a decision at the January 3, 2017, Commission meeting. Now that the matter has been "taken under advisement" and it is "before a decision," it is timely for the Commission to reopen the record to take judicial notice of the Transcript and to accept the discussion herein related to the Transcript. It is imperative for the Commission to have reliable evidence to carry out its statutory obligation to make just and reasonable decisions.⁷ The provision of unsupported and inaccurate information in Docket NG11-001 prevented the Commission from properly analyzing the issue before them and, as known today, ensured a flawed conclusion. By reopening the record and reflecting the erroneous nature of the testimony from 2011 in this record, the Commission will have what it needs to correct any findings made on the misleading testimony and to ensure utility service to

⁷ SDCL § 49-34A-8.

the farm tap customers. For these reasons, good cause exists for the Commission to reopen the record in accordance with SDCL § 20:10:01:27.01.

III. Judicial Notice

The Commission Should Take Judicial Notice of the Transcript

Northern Natural Gas requests the Commission reopen the record in the instant docket and, in accordance with South Dakota Rules of Evidence, take judicial notice of the Transcript so that it may be corrected in this docket in light of the clear and convincing evidence presented. Pursuant to the South Dakota Rules of Evidence, a court “must” take judicial notice of a “fact that is not subject to reasonable dispute because it: (i) is generally known within the trial court's territorial jurisdiction; or (ii) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” SDCL § 19-19-201. The Transcript is a recording of the March 8, 2011, hearing before the Commission. The authenticity is readily verifiable. The recording is available on the Commission’s website; a source whose accuracy cannot reasonably be questioned. The Transcript meets both of the above requirements and, as further described below, should be considered by the Commission in the current proceeding.

IV. Correction of Error

The unsupported and erroneous testimony given at the hearing in which the Commission approved NorthWestern’s assumption of MERC’s obligations to serve the farm tap customers needs to be understood, corrected and not perpetuated in the instant declaratory action proceeding. To do so, the Commission should repudiate the testimony given at the Docket NG11-001 hearing that it would be Northern Natural Gas’ responsibility to provide utility service to the farm tap customers upon termination of the 1987 Agreement. The Commission

should affirmatively find the testimony given at the Milbank Hearing is erroneous. The unsupported testimony offered during the Milbank Hearing is inconsistent with the uncontroverted evidence presented in this proceeding, is materially flawed and cannot be relied upon for at least three dispositive reasons: (i) in 1985, UtiliCorp purchased the assets of Peoples and assumed all of the rights, duties, liabilities and obligations of Peoples in regard to farm taps along Northern Natural Gas' pipeline system; (ii) SDCL § 49-34A-2.1 requires NorthWestern (or MERC) to provide the required utility service until the Commission authorizes service to be discontinued; and (iii) termination of the 1987 Agreement alone cannot change the nature of the farm tap service from utility service to non-utility service. Each of these individually dispositive reasons will be addressed below.

The False Testimony Given in Docket NG11-001 Materially Misled the Commission

Chairman Nelson and Commissioner Hanson were on the Commission in 2011 when the decision was made to approve NorthWestern's acquisition of the Milbank Pipeline and to assume MERC's obligation to provide utility service to farm tap customers. Both Commissioners actively participated in the March 8, 2011, hearing. In regard to the farm taps, the Commissioners asked NorthWestern and Staff the question: who was responsible for providing utility service to the farm tap customers after the 1987 Agreement being assigned from MERC to NorthWestern terminated on December 31, 2017? However, despite asking the correct question, the testimony provided by NorthWestern and Staff was uninformed. The relevant exchange during the hearing was:⁸

⁸ The audio recording of the full 2011 hearing in Docket NG11-001 is available on the Commission's website. <http://puc.sd.gov/Dockets/NaturalGas/2011/ng11-001.aspx> (last visited Dec. 21, 2016). This transcription of the recording reflects immaterial and non-substantive grammatical edits.

Chairman Kolbeck: I'll ask the big question, (laughter) what happens on December 31, 2017? Is that like the Aztec thing where the... the world's going to [].

NorthWestern (LaFave): Chairman, the current contract Northern Natural has for contract for those services with MERC and all the other people that take care of those farm taps for them expires on that date. So, at that time Northern Natural would have to decide exactly how they would proceed with those customers at that time.

Chairman Kolbeck: Okay, Commissioner Nelson are you back on?

Commissioner Nelson: On for a moment. And so, I am not clear that I understood exactly what is going to happen [December 31, 2017]. Who is responsible for serving [farm tap customers] at that point?

NorthWestern (LaFave): Northern Natural has the responsibility [inaudible] and they have contracted those responsibilities out to various parties and that is the termination date of the existing contract and so they between now and then they will have to decide how they will pursue that [inaudible]

Chairman Kolbeck: Okay.

Commissioner Nelson: I guess, the follow-up question then, I don't know if this is necessarily for you or if it is for one of our staff, but can we in our motion in this particular issue put a date something other than 2017?

NorthWestern (LaFave): NorthWestern cannot. That's the contract that we have with Northern Natural, so I don't know how else we can go around, go through that.

Staff (Jacobsen): Commissioner, this is Dave Jacobsen, the underlying responsibility to provide service to those customers is within the easement between Northern Natural and those customers legally, I am not a lawyer, but legally that is the contract that has existed. There has been about what 4 or 5 different companies that have contracted out to do the billing for these customers, similar to what Northern, NorthWestern is, is doing in this case. Um, you know, I... it's a legitimate question. I really don't know the answer to it, other than to tell you that ultimately Northern Natural Gas has that obligation through those easements to keep providing that service. [...]

Staff (Jacobsen): There has always been service provided since the 50s when this initially took place. Northern Natural themselves served these customers for many, many years, had to be decades because they were serving them when I

started working here at the Commission, and since that time it's been you know different billing entities that provided that service, but yeah it's difficult for me to say what will actually take place at that time. [...]

Commissioner Hanson: However, [if the service obligation passed to Northern Natural Gas] it would have to come before the PUC again and go through the process wouldn't it?

Staff (Jacobsen): Not if Northern themselves took it back because they are an interstate pipeline beyond our jurisdiction.

Commissioner Hanson: How would the tariff be determined, how would the cost of service be determined then ... a rate?

Staff (Jacobsen): It's regulated by the Federal Energy Regulatory Commission.

The answers provided by NorthWestern and Staff during the Milbank Hearing are not reconcilable with the record established in the instant proceeding. The 2011 testimony during the Milbank Hearing may not have been offered with the intent to mislead the Commission, but that is the effect. The answers were offered without adequate (if any) investigation.⁹ NorthWestern and Staff expressly testified or incorrectly inferred that Northern Natural Gas has the obligation to provide utility service, once the 1987 Agreement terminates; the 1987 Agreement, and not SDCL § 49-34A-2.1, controls discontinuation of service; Northern has historically provided utility service in South Dakota; there is no difference between the contractual obligation under the 1987 Agreement and the statutory obligation in SDCL § 49-34A; and Northern Natural Gas has an obligation under its easements to provide utility service to farm tap customers. Each of these claims is contrary to the record in this proceeding and has been demonstrated by the evidence and extensive briefing to be erroneous.

⁹ The intent of the witnesses providing the unsupported and inaccurate testimony is not relevant. The testimony is objectively false. An intention to be accurate, without sufficient fact finding, is worthless. The witnesses should have investigated the accuracy of their assumptions prior to the Milbank Hearing, but they did not. The proper remedy is to ensure decisions are not based on the unsupported testimony.

Based on the unsupported and erroneous testimony proffered at the Milbank Hearing, the Commission approved “NorthWestern’s assumption of the obligation to maintain and operate the farm taps...**until December 31, 2017.**”¹⁰ (Emphasis added) As the Commission is aware, it is the “until December 31, 2017,” that NorthWestern has made an issue. NorthWestern cites the language in the Milbank Order, and specifically the date, to suggest December 31, 2017, is the termination date of NorthWestern’s obligation under the 1987 Agreement and the date upon which the Commission authorized NorthWestern and MERC to discontinue providing utility service to the farm tap customers pursuant to SDCL § 49-34A-2.1. The language used in the Commission’s order is based on the incorrect and unsupported testimony provided by NorthWestern and Staff. The termination date of the 1987 Agreement may be December 31, 2017, but the obligation for NorthWestern (or MERC) to provide utility service neither terminates nor does it pass to Northern Natural Gas on December 31, 2017. There is no evidence, in the instant docket or in Docket NG11-001, other than the fatally flawed testimony provided by NorthWestern and Staff and the Commission’s Milbank Order, which was based on the same flawed testimony that supports the claim that NorthWestern and MERC’s public utility obligation to serve the farm taps terminates December 31, 2017. The only proper answer pursuant to SDCL § 49-34A-2.1 is NorthWestern (or MERC) is a public utility and will remain one until the Commission approves any discontinuation of service as required by South Dakota law.

¹⁰ *NorthWestern Corporation d/b/a NorthWestern Energy for Its Purchase of the Milbank Northern Natural Gas Pipeline* 2011 WL 11820331 (March 11, 2011, SDPUC).

(i) UtiliCorp purchased the assets of Peoples in 1985 and assumed all of the rights, duties, liabilities and obligations of Peoples in regard to farm taps

Northern Natural Gas demonstrated in this proceeding that InterNorth sold all the assets of Peoples to UtiliCorp in 1985 and thereby UtiliCorp\Peoples assumed all of the rights, duties, liabilities and obligations in regard to farm taps along Northern's pipeline system.¹¹ In support of the 1985 sale, Northern Natural Gas provided the sworn affidavit of Keith L. Petersen, a 41-year employee of Northern Natural Gas. Mr. Petersen testified that Peoples was responsible for providing and maintaining equipment for the odorization of gas, and all of the aspects of retail service of natural gas to the farm tap customers, including natural gas procurement and sale, meter reading and billing.¹² The services provided by Peoples were the same after the sale as they were before. The evidence demonstrating UtiliCorp affirmatively acquired all of the rights, duties, liabilities and obligations in regard to farm taps, including the affidavit of Mr. Petersen, has not been challenged.¹³

Given the fact the obligation to provide utility service to farm tap customers was transferred, along with Peoples, to UtiliCorp in 1985, the testimony at the Milbank hearing that Northern Natural Gas was responsible for service after December 31, 2017, is nothing more than legal fiction. NorthWestern could not support its testimony in 2011 and it cannot, in light of the 1985 transfer, support the same position in the instant proceeding. NorthWestern's reliance on its partial assignment with MERC may put the responsibility to provide utility service back on MERC, but any testimony or representation that the responsibility passes to Northern Natural Gas is unsupported, false and should be stricken, and any portion of the Milbank Order relying on the false testimony should be vacated from the record in this docket.

¹¹ Northern Natural Gas Brief at 7-8.

¹² Affidavit of Northern Natural Gas witness Keith L. Petersen at 2.

¹³ The Staff acknowledged during the December 14, 2016, hearing on this matter, "[T]he agreement signed in 1985 effectively transferred all obligations from Northern to Peoples, which was purchased by UtiliCorp, later known as Aquila." Draft Transcript at 7, line 3-6).

(ii) SDCL § 49-34A-2.1 requires NorthWestern (or MERC) to provide the required utility service until the Commission authorizes service to be discontinued

Under South Dakota law, a public utility cannot, through private contract or otherwise, avoid its statutory obligation to “furnish adequate, efficient, and reasonable service.” SDCL § 49-34A-2.1. Indeed, no public utility can “fail to provide, discontinue, reduce or impair service to a community, or a part of a community, except for nonpayment of account or violation of rules and regulations, unless permission has been first obtained from the Public Utilities Commission to do so.” *Id.* It is settled law in the United States that private parties cannot contractually agree to trump a statutorily mandated obligation. *Cole v. Wellmark of S. Dakota, Inc.*, 2009 S.D. 108, ¶ 24, 776 N.W.2d 240, 249 (“It is the general rule that a contract [that] is contrary to statutory or constitutional law is invalid and unenforceable.”).

Similarly here, NorthWestern (or MERC) is attempting to avoid its public utility obligations to “furnish adequate” utility service to the farm tap customers by contractually transferring its obligation to provide utility service to the farm tap customers without obtaining explicit Commission approval to effectively discontinue service. In misrepresenting the status of service that farm tap customers would receive after December 31, 2017, NorthWestern failed to inform the Commission that the effect of limited assignment would be discontinuation of service. Rather, NorthWestern represented the obligation to serve would be Northern Natural Gas’ without conducting due diligence. NorthWestern’s misrepresentation was successful in getting approval of its purchase of the Milbank Pipeline, but it cannot relieve NorthWestern (and MERC) from the obligation to provide utility service to the far tap customers. Accordingly, either NorthWestern or MERC, continue to hold the obligation to provide service to the farm tap

customers. SDCL § 49-34A-2.1 requires permission of the Commission to discontinue public utility service.

(iii) Termination of the 1987 Agreement does not convert utility service to nonutility service

The obligation to provide utility service to farm tap customers does not terminate December 31, 2017. Although the 1987 Agreement may be terminated pursuant to its terms effective December 31, 2017, termination of the 1987 Agreement does not change the nature of the farm tap service from utility service (subject to the Commission’s jurisdiction) to non-utility service (not subject to the Commission’s jurisdiction). Each of the entities in the “chain” of successors to Peoples utility obligations in South Dakota (Aquila, MERC and NorthWestern) have been regulated by the Commission as public utilities. In fact, the retail utility service to farm taps in South Dakota has always been provided by a public utility.¹⁴

Ignoring this long history of utility service to farm taps, NorthWestern represented to the Commission during the Milbank Hearing that the public utility nature of the service evaporates after December 31, 2017. NorthWestern and Staff testified the obligation would pass to Northern Natural Gas who has never been a public utility in South Dakota¹⁵ and which Mr. Jacobsen of Staff acknowledged “was an interstate pipeline beyond [SDPUC] jurisdiction.”¹⁶ If NorthWestern and Staff were correct, after December 31, 2017, the obligation to serve farm taps passed to Northern Natural Gas, the result would be the public utility nature of the service would abruptly end without the protections normally afforded recipients of public utility service. Such a result is illogical and contrary to SDCL § 49-34A-2.1.

¹⁴ Northern Natural Gas Supplemental Brief at 5.

¹⁵ *Id.*

¹⁶ Transcript recording at 43:43

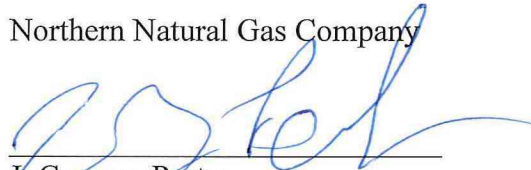
V. Conclusion

For the reasons set forth above, the Commission should (i) reopen the record of this proceeding, (ii) take judicial notice of the Transcript of the March 8, 2011, hearing before the Commission in Docket NG11-001 and (iii) based on the record in this docket, enter a finding in this proceeding that Northern Natural Gas does not have an obligation to provide public utility service to the farm tap customers after December 31, 2017, and that any prior finding to the contrary, based in whole or in part on the unsupported and materially erroneous testimony given at the March 8, 2011, hearing in Docket NG11-001, is vacated and shall be prospectively interpreted consistent with the finding issued in this Docket NG16-014.

Respectfully submitted,

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Dated this 22nd day of December, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December 2016, a true and correct copy of the foregoing "Motion to Reopen the Record, Take Judicial Notice and Correct the Record," 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