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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF COMMISSION
STAFF'S PETITION FOR DECLARATORY
RULING REGARDING FARM TAP
CUSTOMERS

NG16-014

=====

Transcript of Proceedings
January 17, 2017

ORIGINAL

=====

BEFORE THE PUBLIC UTILITIES COMMISSION,
KRISTIE FIEGEN, CHAIRMAN (telephonically)
GARY HANSON, VICE CHAIRMAN
CHRIS NELSON, COMMISSIONER

COMMISSION STAFF

Adam de Hueck, Commission Attorney
Karen Cremer, Commission Attorney
Greg Rislov, Staff Advisor
Patrick Steffensen, Staff Analyst
Brittany Mehlhaff, Staff Analyst
Joseph Rezac, Staff Analyst
Eric Paulson, Staff Analyst
Mary Zanter
Katlyn Gustafson

RECEIVED
JAN 19 2017
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

APPEARANCES

Kristen Edwards, appearing on behalf of Commission Staff

Gregory Porter, appearing on behalf of
Northern Natural Gas (telephonically)

Timothy P. Olson, appearing on behalf of NorthWestern

Brett Koenecke, appearing on behalf of Montana-Dakota
Utilities

Reported By Cheri McComsey Wittler, RPR, CRR
Precision Reporting, Onida, South Dakota

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the Matthew Training Center,
Foss Building, 523 East Capitol Avenue, Pierre,
South Dakota, on the 17th day of January, 2017,
commencing at 1:40 p.m.

1 COMMISSIONER HANSON: NG16-014, In the Matter of
2 Commission Staff's Petition For a Declaratory Ruling
3 Regarding Farm Tap Customers.

4 We have a number of questions before us. I
5 counted six. And we have a variety of letters going to
6 legislators and other folks over the past couple of
7 weeks. A lot of information going back and forth. So
8 I'm going to state what I believe to be the questions,
9 and then I will listen to all of the parties to find out
10 if I am correct as to those questions.

11 Question 1, 2, and 3 are part of the original
12 Staff's Request for a Declaratory Ruling. One would be
13 does the Commission have jurisdiction? Two, if so, which
14 entity is a public utility? Three, are the farm taps in
15 whole or in part subject to state jurisdiction?
16 Understanding I'm not reading the entire question.

17 Four would be Northern Natural Gas Company filed
18 a Motion to Reopen the Record, take Judicial Notice, and
19 Correct the Record. Five would be staff filed a Motion
20 for Judicial Notice. And six would be the Request for
21 Deferral.

22 Are there any other questions on this docket
23 before the Commission that any of the parties are aware
24 of?

25 Thank you. If not, it would be my suggestion to

1 take the sixth question first, the Request for Deferral,
2 because that needs to be decided before we go to the
3 others. Two would be -- this is presumptuous, that the
4 Request for Deferral is denied. Second would be Staff
5 filed a Motion for Judicial Notice, which really needs to
6 be decided prior to the others. And number four would be
7 Northern Natural -- excuse me. Third would be the fourth
8 question that I stated, Northern Natural Gas Company
9 filed a Motion to Reopen the Record, Take Judicial
10 Notice, and Correct the Record. And then the next three
11 questions would be the original first three questions.

12 Is there any concern with taking them in that
13 order?

14 MR. OLSON: No.

15 COMMISSIONER HANSON: Hearing none, then the
16 questions pending before the Commission are those that I
17 stated. The first is the Request for Deferral.

18 Do the Commissioners have any questions that
19 they wish to ask at this juncture on the Request for
20 Deferral?

21 Hearing none, I will move that the Request for
22 Deferral be denied.

23 Speaking to that motion, I believe that
24 deferring it doesn't accomplish anything. We either need
25 to take this matter under hand or we just prolong it.

1 And so I -- as simple as that, I've moved to defer.

2 Any discussion on the --

3 COMMISSIONER NELSON: Move to deny.

4 COMMISSIONER HANSON: Excuse me. I move to deny
5 the Request for Deferral.

6 Any further discussion on the motion?

7 COMMISSIONER NELSON: Mr. Chairman, I intend to
8 support your motion, but I want to maybe talk just a
9 little bit about why I think we need to move forward with
10 this.

11 And I'm going to be pretty blunt, and that's the
12 fact that regardless of what we do, this obviously is
13 going to be litigated. It's got to go through Circuit
14 Court. It will probably end up in the Supreme Court.

15 And if at the end of that day the ruling ends up
16 adverse to the folks that have granted these easements,
17 those folks are going to have to make arrangements to get
18 a new fuel supply and finance it and all of those types
19 of things within the next 11 and a half months. And
20 that's a very, very short time frame for all of those
21 things to be accomplished.

22 And I think it behooves us to make our decisions
23 today so that the rest of this can play out as it needs
24 to.

25 The second thing that I would say is the

1 legislature is meeting, and we have no idea whether there
2 will be some attempted legislative action regarding this
3 particular matter. And so in order to give time for any
4 of that to play out, based on what we decide today, I
5 think it is very prudent for us to move forward.

6 COMMISSIONER HANSON: Thank you.

7 Any further discussion?

8 Hearing none, Commissioner Nelson.

9 COMMISSIONER NELSON: Aye.

10 COMMISSIONER HANSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes Aye.

12 COMMISSIONER HANSON: Hanson votes Aye. The
13 motion carries.

14 The second question before the Commission is
15 that staff filed a Motion for Judicial Notice.

16 Is there a motion or discussion on Staff's
17 Motion for Judicial Notice?

18 COMMISSIONER NELSON: I will move to grant the
19 motion, Staff's Motion for Judicial Notice.

20 COMMISSIONER HANSON: Thank you.

21 Discussion on the motion?

22 Hearing none, Commissioner Nelson.

23 COMMISSIONER NELSON: Aye.

24 COMMISSIONER HANSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.

1 COMMISSIONER HANSON: Hanson votes aye. The
2 motion carries.

3 The third question before the Commission today
4 is Northern Natural Gas Company filed a Motion to Reopen
5 the Record, Take Judicial Notice, and Correct the Record.

6 Is there a discussion or a motion on that
7 question?

8 COMMISSIONER NELSON: Go ahead.

9 COMMISSIONER HANSON: In NG16-014 the question
10 of Northern Natural Gas Company filed a Motion to Reopen
11 the Record, Take Judicial Notice, and Correct the Record,
12 I move that the Commission deny their motion.

13 Discussion on that motion. I think that
14 Ms. Edwards filed an excellent rebuttal to that paper --
15 to those three items making one motion, and I would refer
16 anyone to that particular paper from the standpoint of
17 the arguments that I would make, that I cannot make them
18 more succinct than what she did and more articulate than
19 what was in that Brief.

20 Any further discussion on the question?

21 Commissioner Nelson.

22 COMMISSIONER NELSON: I'm going to support your
23 Motion to Deny. And a lot of the motion revolves around
24 the answers to the questions that Commissioners asked in
25 that 2011 hearing when we asked specific questions of

1 both Staff and NorthWestern about whose responsibility it
2 was to continue to serve if we granted the motion to
3 allow NorthWestern to cease serving at the end of 2017.

4 And both of those parties clearly answered that
5 it was Northern's responsibility going forward. And I
6 asked some questions about that when we had our hearing
7 this year and I've thought through that a lot and there
8 was, frankly, a little bit of point of frustration on my
9 part as a Commissioner wondering did we get the wrong
10 answer back in 2011.

11 But as I've looked at it and dug through it,
12 frankly, I think we got the right answer from both
13 parties, both from Staff and from NorthWestern. And
14 based on that conclusion, I see no reason to open that
15 issue once again.

16 COMMISSIONER HANSON: Thank you.

17 Any further discussion on the motion?

18 Hearing none, Commissioner Nelson.

19 COMMISSIONER NELSON: Aye.

20 COMMISSIONER HANSON: Commissioner Fiegen.

21 COMMISSIONER FIEGEN: Fiegen votes aye.

22 COMMISSIONER HANSON: Hanson votes aye. The
23 motion carries.

24 That brings us to the question does the
25 Commission have jurisdiction over the utility providing

1 natural gas to farm tap customers taking natural gas from
2 the transmission line owned and operated by Northern
3 Natural Gas Company?

4 Is there a discussion or a motion on that
5 question?

6 I will make the motion in NG16-014 that the
7 Commission does have jurisdiction over the utility
8 providing natural gas to farm tap customers taking
9 natural gas from the transmission line owned and operated
10 by Northern Natural Gas Company.

11 Certainly there's a lot of discussion that can
12 take place surrounding this, but I would ask who else
13 would have responsibility other than the Commission at
14 this juncture?

15 Obviously the courts will have their say, but I
16 think it's very important that we recognize that one of
17 these entities, if not both, have a responsibility and
18 that the Commission does have jurisdiction over the
19 utility as stated in 49-34A-1 and other areas of SDCL.

20 I'm trying to make my remarks brief on these
21 items. There's certainly a lot more that can be
22 discussed.

23 I'll open it for further discussion at this
24 juncture. Is there any further discussion?

25 Hearing none, on the question, Commissioner

1 Nelson.

2 COMMISSIONER NELSON: Aye.

3 COMMISSIONER HANSON: Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Fiegen votes aye.

5 COMMISSIONER HANSON: Hanson votes aye. The
6 motion carries.

7 The second question in NG16-014, which entity,
8 NorthWestern Corporation doing business as NorthWestern
9 Energy or Northern Natural Gas Company, if either, or
10 both, is a public utility as defined by SDCL Chapter 49
11 with respect to these farm tap customers?

12 Is there a discussion or a motion?

13 I will move in NG16-014 that Northern Natural
14 Gas Company is a public utility as defined by
15 SDCL Chapter 49 with respect to these farm tap customers.

16 Discussion on the motion.

17 This is where we get into a great deal of -- so
18 to speak, in the weeds and trying to ascertain the
19 particulars. I turn to looking at certainly Northern is
20 a interstate gas pipeline company in some respects.
21 However, when they operate a line that is dedicated as a
22 distribution line in the State of South Dakota, even if
23 they are regulated by PHMSA and PHMSA has in any way
24 intimated or through their rulings required that Northern
25 is an intrastate pipeline, when they operate a

1 distribution system and they can turn on and turn off
2 taps in the State of South Dakota then they become a
3 public utility within the State of South Dakota.
4 Regardless of whether they're supposed to be or not, they
5 are one.

6 Additionally, when one looks at the definition
7 of terms in 49-34A-1.3 it states that a customer is any
8 person contracting for or purchasing gas or electric
9 service from the utility. And certainly the farm tap
10 customers contracted for gas service from Northern.
11 Regardless of whether or not it states in Northern's
12 Briefs and Easement that it is a taking of gas, that it
13 gives the farm tap customer the right to take gas, the
14 fact is that within that Easement it also states that
15 the -- it states that Northern may charge rates for the
16 gas that is taken.

17 And in no way would anyone interpreting a
18 contract of that nature would think that there was any
19 other way that a consumer, a farm family, would obtain
20 gas other than through a pipeline and pay for that gas.
21 So taking is an interesting term, but it cannot be used
22 to hide the fact that the Easement is a written
23 contractual agreement between the farm family and
24 Northern Natural and that the definition of terms for the
25 State of South Dakota states that a customer is any

1 person contracted for gas purpose.

2 And clearly the Easement is a contract that
3 provides that the farm family is allowing the Easement
4 and that is their consideration in the contract, and the
5 consideration by Northern is to provide gas to the farm
6 family.

7 Additionally, laws are interpreted on behalf of
8 the party that did not write the contract. Ambiguities
9 are interpreted to the benefit of those who did not write
10 the contract. And in this instance you have Northern
11 Natural which wrote easements for the purpose of
12 obtaining an easement and by simply saying taking of gas
13 does not excuse them from the fact that they did enter
14 into a contract so that the customer may purchase the gas
15 and receive the gas and they stated that they had the
16 right in the Easement at the rates and upon the terms as
17 may be established by the grantee or by any vendee of
18 grantee from time to time.

19 So the consumers must purchase the gas. There's
20 no free gas and, therefore, no taking. The actions of
21 the parties prove that the gas is being purchased over
22 the life of that contract thus far.

23 I have a number of other arguments that I would
24 use at this time to go over; however, I feel I've
25 explained it enough. There's a variety of other areas to

1 touch upon. I will acquiescent to my fellow
2 Commissioners at this time to hear any additional
3 discussion.

4 Commissioners Fiegen or Nelson.

5 COMMISSIONER NELSON: If I might, I'm
6 reluctantly not able to support your motion.

7 I guess I'd just say a couple of things. You've
8 relied heavily upon the definition of customers. I
9 understand that. But when the easements were written
10 that definition didn't exist. The statute came into play
11 after that.

12 And I think in a hearing it's clearly
13 demonstrated that Northern is regulated entirely at the
14 federal level. I mean, whether we like it or not, I
15 think our jurisdiction, if we had any, has been usurped
16 by the Feds, and I'm not sure that we as the Commission
17 have any jurisdiction left there.

18 COMMISSIONER HANSON: Any further discussion?

19 COMMISSIONER FIEGEN: Mr. Chairman.

20 COMMISSIONER HANSON: Yes.

21 COMMISSIONER FIEGEN: Very interesting
22 discussion today that we're having. When I look at
23 public utility, and, you know, we look at it so many
24 times in so many different ways, I look at retail sales
25 and 49-34A, Subsection 1.8 it talks about retail sales.

1 And when I look at that it looks like NorthWestern would
2 be the public utility.

3 Although there are so many issues with these
4 farm taps and the citizens in the state that have been
5 impacted, I believe most of these issues are going to be
6 litigated in Circuit Court, unfortunately. And it's a
7 shame that our citizens have to spend their money -- hard
8 working citizens have to spend their money to take these
9 issues to court, but I don't believe the PUC has
10 jurisdiction certainly over the easements or the
11 contracts or the agreements.

12 And, unfortunately, FERC became involved since
13 1952. And when I look at FERC jurisdiction, if this was
14 a vote in 1952, I believe I would be with Commissioner
15 Hanson. Since it's not 1952, I will be probably
16 supporting a substitute amendment talking about the
17 public utility of NorthWestern.

18 Thank you.

19 COMMISSIONER HANSON: Thank you.

20 I'll continue then. I know that someone has a
21 motion, but I'll continue with some of the other items
22 that I was going to talk about.

23 The fact is that NorthWestern Energy is, in my
24 opinion, a public utility. Obviously, they are.
25 However, that does not preclude Northern from being a

1 public utility as well.

2 Additionally, these arrangements may have been
3 entered into before our regulatory laws were placed in
4 effect. That does not preclude the PUC from regulating
5 the practice once the law or regulation is passed and
6 takes effect.

7 Additionally, I think it's imperative that we
8 keep our powder dry, so to speak, because if this is
9 litigated and the Court decides that we do have authority
10 over Northern, then it's -- then we are placed in a
11 situation where we have stated that we are not, and that
12 makes it challenging for us.

13 There's a host of issues here. NorthWestern
14 Energy may be a public utility, but they don't have any
15 responsibility after December 31 of this year. And we
16 can state that they're a public utility, but the grantee
17 in this instance has the ability to turn off the farm tap
18 customers.

19 And it behooves us to recognize that a company
20 that has a distribution system in South Dakota that has
21 the ability to turn on and off the tap to the consumer,
22 albeit that they also are attached to their own
23 interstate line, the fact is they have a distribution
24 system in South Dakota.

25 They have farm taps that are not being examined

1 by PHMSA or by our own pipeline group. And they're
2 basically, through all of the information that we have
3 received, abdicating all responsibility to provide
4 services to the farm tap customers. And we are the only
5 ones left to protect the farm tap customers, except for
6 the farm tap customers having to go through a
7 considerable expense on a lawsuit.

8 That lawsuit will probably take place regardless
9 of what our decision is. But, as I say, it behooves us
10 to maintain that position to protect our own Public
11 Utilities Commission's integrity.

12 So I'd ask for you to reconsider the motion that
13 you are considering making.

14 COMMISSIONER FIEGEN: Mr. Chairman, are you
15 looking at -- so you're looking at making both of those
16 utilities a public utility, not just Northern Natural
17 Gas?

18 COMMISSIONER HANSON: There's no question that
19 NorthWestern Energy is a utility. But that utility has
20 the ability to walk away from this agreement -- or this
21 arrangement that they have with the farm tap customers.

22 And if we give Northern Natural that ability to
23 step away, then we're saying that our farm tap customers
24 are being provided gas and paying for gas by a company
25 that's no longer responsible to provide them anything.

1 And, yes, I am saying both of them are a
2 utility, to answer your question.

3 COMMISSIONER FIEGEN: Thank you.

4 COMMISSIONER HANSON: Any further discussion?

5 COMMISSIONER NELSON: Mr. Chair, I'm going to
6 move a substitute motion to find that NorthWestern Energy
7 is a public utility as defined by SDCL Chapter 49.

8 COMMISSIONER HANSON: That's an interesting
9 motion. Do you wish to speak to it?

10 COMMISSIONER NELSON: If I might.

11 COMMISSIONER HANSON: Please.

12 COMMISSIONER NELSON: As I have stated, as much
13 as we might want to find that Northern Natural Gas is a
14 public utility so they would fall underneath our statutes
15 and underneath our jurisdiction, legally I just don't
16 think that it's there. I don't think we can do that. I
17 don't think we've got the ability or the jurisdiction to
18 do that.

19 So let me spend a little bit of time -- and
20 obviously I wrestle with this question, is NorthWestern a
21 public utility. And I've spent a lot of time wrestling
22 with this, and ultimately came to the determination that
23 based on the language in our statute, they are, in fact,
24 a public utility.

25 And when you look at the definition of public

1 utility and you pick it apart it talks about a person. A
2 person's a corporation. There is no question
3 NorthWestern is a corporation. They are a person for
4 that purpose.

5 It talks about operating, maintaining, or
6 controlling in the state equipment or facilities.
7 There's no question NorthWestern does all of that in this
8 state.

9 The definition talks about doing it for the
10 public in whole or in part. There is no question that in
11 this case it is in part. Not public in whole, but it is
12 in part.

13 NorthWestern will meet that definition of public
14 utility not only today in 2017, but they're going to meet
15 it in 2018. They are a public utility in the State of
16 South Dakota.

17 What does change between 2017 and 2018 for this
18 public utility is the fact that at the end of 2017 they
19 will cease being Northern's vendee. Unless some miracle
20 takes place, they will cease to be Northern's vendee.

21 Now because I believe NorthWestern is, in fact,
22 a public utility, that means that SDCL 49-34A-2.1
23 applies. And that section of state law says that a
24 public utility cannot cease service without permission
25 from the Public Utilities Commission. And I think that

1 statute's put in for a reason. It's to provide
2 protection so that public utilities can't just abandon
3 customers.

4 Now the unfortunate part of that is -- and
5 Commissioner Hanson delved into this in our previous
6 hearing. The unfortunate part of that is that in
7 Docket NG11-001 this Commission did, in fact, grant
8 NorthWestern the ability to cease providing that public
9 utilities service at the end of 2017.

10 And, as I have already mentioned, you know, so
11 why on earth did the Commission do that back in 2011?
12 What on earth were we thinking?

13 Well, we asked and we did our due diligence and
14 we asked the question to both Staff and NorthWestern
15 whose responsibility is it following 2017 to make sure
16 that our farm tap customers continue receiving service?
17 And both of them clearly said it is clearly Northern's
18 responsibility.

19 Let me speak to that for just a moment. And
20 what I'm about to say doesn't impact on the decision to
21 make NorthWestern a public utility. But I think it's
22 important that folks know where I'm coming from.

23 As anybody that listened to the public hearing
24 that we did, you know that I spent a great amount of time
25 asking Northern questions about the Easement itself. And

1 in the responses to those questions it was acknowledged
2 that Northern has the ability -- the requirement to
3 either serve or have a vendee, and today that vendee is
4 NorthWestern. Just because the calendar flips from 2017
5 to 2018 doesn't mean that Northern's responsibility to
6 have a vendee goes away.

7 And, ultimately, I think that question is going
8 to be litigated in Circuit Court. Because that is a
9 contractual relationship between the folks -- the good
10 landowners that allowed their land to be used for that
11 pipeline back in the '50s said, yeah, we're willing to do
12 our part. Bring this infrastructure into the state.

13 They did their part, and in return for that they
14 were given a promise in that Easement that natural gas
15 would be available to them. Not just some hole in a
16 pipe, but they would actually have natural gas to heat
17 their houses and run grain dryers and heat their barns,
18 et cetera.

19 So, ultimately, that easement contractual
20 relationship is going to be litigated in the court system
21 in this state. And just like I don't think we have the
22 jurisdiction to find Northern to be a public utility, we
23 also don't have the jurisdiction to deal with the
24 easement arrangements. I wish we did, but we don't.

25 And so for those reasons, I believe that in this

1 case NorthWestern is, in fact, a public utility.

2 COMMISSIONER HANSON: Thank you.

3 If I may address that, as I stated earlier, I
4 believe NorthWestern Energy is a utility. I have no --
5 as a matter of fact, I refer to the same subsections that
6 you referred to in your discussion.

7 However, they also have the right to close down
8 on December 31 of this year and walk away. And that
9 provides that in my estimation that Northern becomes a
10 utility because they have the ability at that point,
11 whether they serve or don't serve.

12 So on December 31, 2017, when NorthWestern turns
13 off gas with our permission, then we have, in essence,
14 allowed Northern, if we don't treat Northern as a public
15 utility, to shut off the gas to all of these farm taps.
16 And I know that will be litigated, but I don't want that
17 as a crutch for us.

18 Your motion's interesting because it states that
19 NorthWestern -- it's a substitute motion. It states that
20 NorthWestern Corporation is a utility, which I don't have
21 any problem with. You did not state in your motion that
22 Northern is not a public utility, which was my motion,
23 which I would then render again if -- and I assume your
24 motion will pass. Then we'll deal with my motion all
25 over again.

1 COMMISSIONER NELSON: And that's fair.

2 COMMISSIONER HANSON: Commissioner Fiegen, did
3 you have anything you wish to add?

4 COMMISSIONER FIEGEN: No.

5 COMMISSIONER HANSON: Thank you.

6 Commissioner Nelson, did you have anything
7 further?

8 COMMISSIONER NELSON: I don't think so.

9 COMMISSIONER HANSON: Thank you.

10 Then the question being on Commissioner Nelson's
11 substitute motion stating that NorthWestern Corporation
12 doing business as NorthWestern Energy is a public
13 utility, and the vote is those in favor vote aye; those
14 opposed, nay.

15 Commissioner Nelson.

16 COMMISSIONER NELSON: Aye.

17 COMMISSIONER HANSON: Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Fiegen votes aye.

19 COMMISSIONER HANSON: Hanson votes aye. The
20 motion carries.

21 I move at this time in NG16-014 that the
22 Commission find that Northern Natural Gas has made itself
23 a -- by its actions made itself a public utility in the
24 State of South Dakota for the providing of natural gas to
25 the farm tap customers.

1 Discussion on that motion.

2 I won't go over the arguments that I went over
3 previously. I just believe that it's imperative for us
4 to protect the farm tap customers. I feel like we're
5 abandoning them if we don't provide that Northern is a
6 natural gas purveyor in South Dakota by their actions, by
7 their contractual relationships, and if this needs to go
8 to court to be decided, then let the court decide that,
9 but let's not have us abandon this and leave the farm tap
10 customers without that protection.

11 Any further discussion on the motion?

12 COMMISSIONER NELSON: Can we take a five-minute
13 recess?

14 COMMISSIONER HANSON: There's a request for a
15 five-minute recess. And that's fine.

16 COMMISSIONER NELSON: Thank you.

17 (A short recess is taken)

18 COMMISSIONER HANSON: I'm going to reconvene the
19 meeting, and Commissioner Nelson has asked to ask some
20 questions of some other parties.

21 Commissioner Nelson, you have the floor.

22 COMMISSIONER NELSON: Thank you.

23 I'd like to ask a singular question, and I'd
24 like to ask all three parties -- and, MDU, you can bounce
25 out of this. The three active parties to answer this

1 question if you can. And I'll start with Northern.

2 You've heard Commissioner Hanson's motion.
3 You've heard me talk about my hesitancy because I think
4 we're trumped by federal law. And I'd like to know, is
5 there a specific federal law or FERC order that clearly
6 removes our jurisdiction from being able to find Northern
7 as a public utility?

8 And, Mr. Porter, I'll let you take the first
9 shot at it.

10 MR. PORTER: Thank you, Chairman.

11 Yeah. I would say it's the Natural Gas Act,
12 1938 Act, that made -- put Federal Power Commission and
13 the Federal Energy Regulatory Commission as the --

14 First off, can you hear me okay?

15 COMMISSIONER NELSON: Yes.

16 MR. PORTER: Okay. The Federal Energy
17 Regulatory Commission, under the Natural Gas Act, has
18 exclusive jurisdiction of interstate natural gas sales,
19 transmission. And so anything that is transmitted or
20 sold in interstate commerce is subject to the Federal
21 Energy Regulatory Commission's exclusive jurisdiction.

22 So I would say that that is the law that --
23 there's a long series of cases that support interstate
24 pipelines which are natural gas companies under the
25 Natural Gas Act -- defined as natural gas companies under

1 the Natural Gas Act, are under exclusive jurisdiction of
2 the Federal Energy Regulatory Commission in regard to the
3 interstate transmission of natural gas.

4 COMMISSIONER NELSON: Thank you. I appreciate
5 that.

6 I'll go to NorthWestern. Same question.

7 MR. OLSON: Thank you. Tim Olson, senior
8 corporate counsel and corporate secretary for
9 NorthWestern.

10 I wouldn't disagree with Mr. Porter, but I would
11 add that I believe it is a choice of the structure that
12 they have chosen. And I will take NorthWestern, for
13 example.

14 In Nebraska and Montana we have transmission
15 pipelines. We also are a local distribution company.
16 And so it is an option in a way that a company has
17 structured itself. It is not a prohibition.

18 COMMISSIONER NELSON: Thank you.

19 And Staff.

20 MS. EDWARDS: Thank you. I would have to agree
21 with both parties that Order 636 would preclude them from
22 being both interstate transmission and a local
23 distribution company under the same entity.

24 I know that case was litigated in -- or that
25 order was litigated in 1996, but I don't have that case

1 with me so I can't look it up and see what the decision
2 was off the top of my head. But I do know that other
3 companies have structured themselves to make it work.
4 NorthWestern.

5 COMMISSIONER NELSON: Okay. Thank you.

6 That's all the questions that I've got.

7 Mr. Chairman, if I might continue.

8 COMMISSIONER HANSON: Please.

9 COMMISSIONER NELSON: So I was curious about the
10 federal law question, but at the end of the day it comes
11 back to our state law. And I've spent -- and I
12 appreciate the opportunity for recess. I spent a little
13 bit more time looking at our state law.

14 And you all heard me spend a lot of time
15 stepping through the definition of public utility. And a
16 part of that definition talks about providing gas
17 service. A public utility is providing gas service.

18 So we look at the definition of gas service in
19 Sub 8, and it talks about by an intrastate natural gas
20 pipeline. And we move down to Sub 9A, and we've got a
21 definition of intrastate natural gas pipeline. And I
22 don't think Northern meets the definition of intrastate
23 natural gas pipeline.

24 And so, Mr. Chairman, while I appreciate your
25 argument and I appreciate your desire to do whatever we

1 can to help the folks out there, legally I don't think we
2 can do that as it relates to Northern in this setting.

3 COMMISSIONER HANSON: Thank you, Commissioner
4 Nelson. I appreciate the question you asked of the three
5 parties. I'd bring everyone's attention to the response
6 by Mr. Porter.

7 Mr. Porter, in essence -- well, he flat out said
8 and reiterated that the Feds have exclusive authority of
9 interstate transmission of natural gas. And we are not
10 talking about interstate transmission of natural gas. We
11 are talking about the distribution of natural gas in a
12 line to a farm tap that they had -- that they required to
13 be constructed so that they could provide to a consumer
14 at what they call rates and upon terms as may be
15 established by them or their vendee from time to time.

16 So when they talk about and he reiterated
17 exclusive control of interstate transmission, if Northern
18 is acting as a public utility in South Dakota by having a
19 distribution line to a farm tap that they required to be
20 constructed, then they have, in essence, made themselves
21 a public utility in South Dakota.

22 Rightly or wrongly, whether they should have or
23 should not have, they did that. And if Northern did not
24 believe they had a responsibility to provide gas, then
25 they would not have gone through the process even one

1 time to provide gas to the consumers.

2 However, they went through it several times in
3 the contractual relationships that they made and they
4 went through the process of making certain that farm taps
5 were constructed so that those folks would receive the
6 gas and they entered into a contractual relationship with
7 those farm tap customers to assure those farm tap
8 customers that they would be provided gas by Northern
9 Natural.

10 So I think by his words alone he has shown --
11 and by the actions of Northern over an extended period of
12 time, a protracted period of time, they have shown that
13 they are, in fact, a public utility in South Dakota.

14 So I don't think -- well, any further
15 discussion?

16 Commissioner Fiegen?

17 COMMISSIONER FIEGEN: No. It's very -- you
18 know, this is a very hard decision because we want to
19 make sure we protect our farm taps. And, unfortunately,
20 I believe a lot of their issues will be in Circuit Court.

21 Northern Natural Gas has always looked at
22 vendees from people -- and now most recently just the
23 last couple of years NorthWestern Public Service. But I
24 want to vote that Northern Natural Gas is a public
25 utility, but I just can't get there today.

1 Thank you.

2 COMMISSIONER HANSON: Thank you very much.

3 Any further discussion?

4 On the question -- does anyone need to have the
5 question repeated? I don't think so.

6 Commissioner Nelson.

7 COMMISSIONER NELSON: Nay.

8 COMMISSIONER HANSON: Commissioner Fiegen.

9 COMMISSIONER FIEGEN: Fiegen votes nay.

10 COMMISSIONER HANSON: Hanson votes aye. The
11 motion is lost.

12 Is there any further business on this docket to
13 come before us at this time?

14 COMMISSIONER NELSON: Yes. Question number
15 three.

16 COMMISSIONER HANSON: Commissioner Nelson, are
17 you going to make a motion?

18 COMMISSIONER NELSON: I am.

19 As relates to NG16-014, the third question,
20 which is are farm taps in whole or in part subject to
21 state jurisdiction for the purposes of pipeline safety
22 pursuant to SDCL Chapter 49-34B, I move that we find that
23 they are not subject to state jurisdiction.

24 COMMISSIONER HANSON: Discussion on the motion.

25 COMMISSIONER NELSON: We had during the hearing

1 what I thought was a fascinating discussion, an
2 illumination to me of the hardware that's involved in a
3 farm tap and talking about where that demarcation line is
4 and, more importantly, who owns what pieces of the
5 puzzle.

6 And it became very clear to me that Northern
7 owns the pieces of the puzzle up to the three-way valve,
8 and the landowner owns the rest of it. It also became
9 clear in that hearing that Northern is -- for their
10 pipeline safety is regulated by PHMSA, and so that's not
11 our deal.

12 But perhaps more importantly is the portion of
13 the line after the three-way valve and after that is
14 owned by the landowner. I find nothing in our state law
15 that gives us the authority to go out there and be
16 inspecting private property, private lines. If the
17 legislature had intended that, they would have said it.

18 Similarly, I don't believe that we go out and
19 inspect master metering on natural gas situations where
20 those are private lines on private property. And so
21 while I certainly don't minimize the importance of making
22 sure that those lines are safe, I think it's also
23 important that we understand clearly how far the
24 legislature has intended state jurisdiction to go. And I
25 don't believe it goes past the three-way valve.

1 And so that obviously begs the question, if
2 there are issues beyond that three-way valve in the
3 customer owned line, how do those gets resolved? And
4 that's the customer's responsibility.

5 Just like my propane tank. If I've got a
6 problem with my propane line, it's not somebody else's
7 job to fix it. It's my job to either find a contractor
8 or somebody else to fix it. Same with these particular
9 lines.

10 COMMISSIONER HANSON: Thank you.

11 Any further discussion on the motion?

12 On the motion, Commissioner Nelson.

13 COMMISSIONER NELSON: Aye.

14 COMMISSIONER HANSON: Commissioner Fiegen.

15 COMMISSIONER FIEGEN: Fiegen votes aye.

16 COMMISSIONER HANSON: Hanson votes aye. Motion
17 carries.

18 Any further business on NG16-014?

19 COMMISSIONER NELSON: Might I make just a
20 statement?

21 COMMISSIONER HANSON: Get it off your chest?

22 Sure.

23 COMMISSIONER NELSON: And I make this statement
24 not for my fellow Commissioners or staff or anybody here,
25 but this is basically a statement to the 195 folks that

1 are affected by this.

2 We've made the determinations today that we were
3 asked by Staff to make. Whether or not any of our
4 determinations end up being litigated, time will tell,
5 and we will deal with that if, in fact, they are.

6 But, more importantly, as I have studied the
7 easement that you all and your forefathers made to grant
8 pipeline -- the opportunity to come across this state, I
9 am absolutely convinced that Northern has a
10 responsibility to find a vendee to continue providing
11 this service at the end of 2017. I think that is
12 absolutely guaranteed in those easements.

13 The unfortunate part of that is this Public
14 Utilities Commission does not have the authority to
15 enforce that. It's outside of our jurisdiction. And I
16 believe probably unless Northern steps up to the plate
17 and does what is the right thing, your only option is to
18 go through Circuit Court to enforce the rights that I
19 believe that you have under your easement.

20 And so, with that, I just wanted to make that
21 very, very clear to the 195 folks out there, that that, I
22 believe, is going to be your avenue to continue receiving
23 gas service.

24 Thank you, Mr. Chairman.

25 COMMISSIONER HANSON: You're welcome.

1 Commissioner Fiegen, did you have anything to
2 add?

3 COMMISSIONER FIEGEN: No, Mr. Chairman.

4 (The proceedings are concluded at 2:33 p.m.)

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1 STATE OF SOUTH DAKOTA)

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CERTIFICATE

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5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

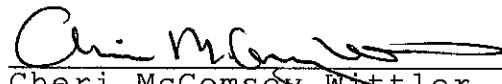
8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 17th day of
11 January, 2017, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 18th day
14 of January, 2017.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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