

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

IN THE MATTER OF THE COMPLAINT OF)	
MONTANA-DAKOTA UTILITIES CO., A)	STAFF'S RESPONSE TO
DIVISION OF MDU RESOURCES GROUP, INC.,)	SDIP'S MOTION TO
REGARDING SOUTH DAKOTA INTRASTATE)	DISMISS COMPLAINT
PIPELINE COMPANY'S RATE FOR PIPELINE)	
TRANSPORTATION SERVICE)	NG16-006

COMES NOW Commission Staff, by and through one of its attorneys, and hereby responds to the Motion to Dismiss (Motion) of South Dakota Intrastate Pipeline Company (SDIP) filed on July 14, 2016. SDIP has moved the Commission for dismissal of the Complaint filed on June 10, 2016 by Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (MDU) regarding SDIP's Rates for Pipeline Transportation Service.

FACTS

On June 10, 2016, MDU filed a Complaint with the Public Utilities Commission pursuant to SDCL 49-34A-26 alleging that the "rates previously established by the Commission and being charged by SDIP are not supported by SDIP's investment and operating expenses and are therefore unjust and unreasonable." (Complaint at paragraph VIII). The Complaint stems from the terms of the Transportation Agreement for natural gas that MDU and SDIP entered into, effective as of September 1, 1993. The Transportation Agreement established a rate for SDIP to transport natural gas and covered a period of twenty-five years, expiring on August 31, 2018. The original Transportation Agreement established the transportation charge as not to exceed \$2.34 per Dk during the first ten contract years. Upon motion by SDIP in Docket NG00-001, the Commission approved an increase in the rate to \$2.398 per Dk, effective January 10, 2001. This rate is currently in effect. The Transportation Agreement provides that MDU has

the option to extend the term of the Transportation Agreement for additional five-year periods after the initial term is complete and MDU alleges that it is unable to determine whether it is prudent to exercise its option. On July 14, 2016, SDIP filed a Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

SDIP's Motion to Dismiss challenges the legal sufficiency of MDU's complaint. *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 8 754 N.W.2d 804, 809. This motion "tests the law of a plaintiff's claim and not the facts which support it." *Hunt v. Hunt*, 309 N.W.2d 818, 820 (S.D.1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Schlosser v. Norwest Bank South Dakota, N.A.*, 506 N.W.2d 416, 418, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). Under this rationale, the pleading's material allegations are accepted as true and they are construed in a light most favorable to the pleader to determine whether the allegations allow relief. *Sisney* at 809. As such, the Commission may grant SDIP's Motion to Dismiss only if it believes beyond a doubt that MDU's Complaint sets forth no facts to support a claim for relief. *Schlosser* at 418.

ANALYSIS

In its Motion to Dismiss, SDIP claims that the Complaint filed pursuant to SDCL 49-34A-26 fails to state a claim upon which relief can be granted and requests that the Commission dismiss the Complaint with prejudice. SDIP's motion relies on the argument that the Complaint does not meet the statutory requirements of SDCL 49-34A-26 because the MDU does not "take issue with the rate currently in effect" (Motion at paragraph 4B) and that MDU does not seek to breach the Transportation Agreement. SDIP argues that the Complaint merely "[seeks] to start the process now so that rates are in place in a

timely manner” *Id.* when the contract ends. SDIP also claims that the appropriate for establishing a rate is through the process established in SDCL 49-34A-13 and 13.1. (Motion, paragraph 4C).

Staff disagrees with SDIP’s statement that “SDCL 49-34A-26 is inapplicable to the allegations made by MDU.” *Id.*

SDCL 49-34A-26 provides as follows:

On its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, or by any twenty-five consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act or omission affecting or relating to the transmission, delivery or furnishing of natural gas or electricity or any service in connection therewith is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the Public Utilities Commission shall proceed, with notice, to make such investigation as it may deem necessary and take such action as deemed necessary and appropriate.

Staff believes that MDU’s complaint does meet the requirements for a claim under SDCL 49-34A-26. MDU’s Complaint clearly states that the rates in effect are “unjust and unreasonable.” (Complaint at paragraph VIII). To support this allegation, MDU argues that it “is not aware that any material investments have been made to the SDIP natural gas transportation system since September 1, 1993” (Complaint at paragraph VI) and that the “rates are not supported by SDIP’s investment and operating expenses.”(Complaint at paragraph VIII). The conclusion of the Complaint specifically requests the Commission initiate an investigation and grant relief as the Commission shall deem just and proper. The Commission has broad authority and jurisdiction to regulate and approve gas rates under SDCL Chapter 49-34A. Specifically, SDCL 49-34A-6 empowers and directs the Commission to regulate rates, fees and charges “to the end that the public shall pay only just and reasonable rates for service rendered.”

Staff recognizes that MDU's Complaint acknowledges that the Transportation Agreement is currently in force and that MDU does not explicitly request a breach of contract. However, Staff does not agree that this precludes MDU's complaint. SDCL 49-34A-26 provides that any public utility can file a complaint against another public utility for examination of unreasonable rates. In this docket, MDU's complaint alleges the tariffed rate is unreasonable and requests the Commission investigate the rate. The fact that MDU, a public utility, is also a customer under a contracted rate with SDIP is irrelevant to whether MDU's Complaint states a claim pursuant to SDCL 49-34A-26.

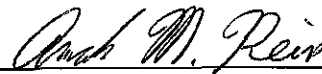
SDIP further suggests that "the appropriate method in which to proceed is under SDCL 49-34A-13 and 13.1." (Motion, paragraph 4C). Staff recognizes that SDCL 49-34A-13 and 13.1 establishes a procedure to establish or change a rate, but disagrees with SDIP's suggestion that this is "the appropriate method" to change a rate. There is well established case law that recognizes that statutes are to be read to give effect to all provisions. *State v. Heisinger*, 252 N.W.2d 899 (S.D.1977). SDCL 49-34A-13 and 13.1 and SDCL 49-34A-26 establish two different procedures to change a rate and, if possible, should be read to give effect to both statutes. As such, the mere fact that there is an alternate statutory procedure available does not preclude a complaint filed pursuant to the provisions of SDCL 49-34A-26.

Taking the claims and allegations in MDU's Complaint as true and viewed in the light most favorable to MDU for the purpose of the motion to dismiss, Staff believes MDU does state a claim upon which relief could be granted pursuant to SDCL 49-34A-26.

CONCLUSION

Wherefore, Staff respectfully recommends that the Commission deny South Dakota Intrastate Pipeline Company's Motion to Dismiss the Complaint.

Dated at Pierre, South Dakota, this 20th day of September, 2016

A handwritten signature in cursive script, reading "Amanda M. Reiss".

Amanda M. Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Ave
Pierre, SD 57501
(605)773-3201