
From: Michael J. McGill

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To: PUC

Subject: NG16-014 Petition for a Declaratory Ruling Regarding Farm Tap Customers

January 1, 2017

To South Dakota Public Utilities Commission:

I am writing at the request of and on the behalf of Robert Lynch of Vermillion, South Dakota to comment on the hearing set for January 17, 2017 to address the three questions submitted to the Commission by the PUC staff relative to the matter of the regulation of farm tap customers created as the result of the grant of easements in favor of Northern Natural Gas (NNG). Mr. Lynch granted an easement to NNG in the early 1950s to permit and allow NNG to construct and install an interstate natural gas pipeline over and across his farm land in Clay County, South Dakota. In consideration for the grant of the easement, NNG agreed to create a tap and supply natural gas to Mr. Lynch for as long as the pipeline was maintained. I will order my comments in a series of numbered paragraphs.

1. Mr. Lynch is distressed at the prospect as stated in the response brief submitted by the Staff of the PUC that the PUC does not have jurisdiction over either of the major players in this dispute. Like all the other 197 farm tap customers interested in this case, Mr. Lynch has detrimentally relied upon the arrangement with NNG and invested a considerable sum of money on improvements on their infrastructure to facilitate the delivery of natural gas from NNG's interstate line to his farm residence and outbuildings, including dryer facilities for his grain bins. Mr. Lynch has complied with the obligations imposed upon him by the easement contract with NNG. I have reviewed several of the comments made by the other farm tap customers and Mr. Lynch's situation is similar to all the others. He has expended money to install and maintain his gas line and would have to incur significant expense to retrofit his appliances, furnace and grain dryer facilities to accommodate a switch to lp. If NNG would discontinue the service Mr. Lynch will incur economic damages as the result of the breach of the easement agreement by NNG or NNG successors in interest. In addition, if the terms of the easement are breached by NNG the next logical step would be a class action suit asking that the pipeline be capped at the South Dakota border at the request of the farm gas tap customers. In the event that the South Dakota PUC does not have jurisdiction over the transporter as NNG has argued or the merchant as NorthWestern Natural Gas (NWNG) has argued, the only remedy left to the farm tap customers would be to seek redress pursuant to state or federal law and seek to terminate the easement and to sue for damages for breach of contract. No one wants to go that level as it would be expensive and complicated. If the SD PUC has no jurisdiction in this case, that is the only remedy that would be available to the farm tap customers. Therefore, it is best if a settlement can be arranged. One would think that NNG would have the most interest in resolving this matter without an interruption of service to the farm tap customers by making arrangements for a new merchant to step in the shoes of NWNG and MERC prior to December 31, 2017. Mr. Lynch would like to see the PUC assert jurisdiction

or the parties resolve this matter without forcing the farm tap customers to expend considerable legal fees to enforce their contractual rights to natural gas to attempt to terminate the easement

2. The regulatory framework that was in existence in 1952 when Mr. Lynch granted NNG the easement to install the pipeline has changed significantly. Today, as a result of the evolution of regulation of the natural gas industry and due to the volatile nature of the natural gas market, interstate pipelines are under Federal regulation and local merchants that provide the sale, distribution and bundled services to the end user consumer are subject to regulation by the South Dakota PUC. However, at the time that Mr. Lynch granted the easement in 1952 NNG was both the transporter and the merchant that served the lines and dealt with Mr. Lynch. As time went by, NNG created a subsidiary or affiliate named Peoples Natural Gas (PNG) to serve the merchant role in the transaction. Peoples provided the servicing of the transaction, all pursuant to the terms of the easement that stated that NNG would allow Mr. Lynch to tap into the line and NNG would supply Mr. Lynch natural gas for as long as the interstate line is maintained. The terms of the easement are binding on successors in interest and assigns of both parties to the agreement.
3. It is the height of presumption for me to comment to the staff, the PUC and the parties in this case regarding the evolution of state and federal regulation of natural gas. However, it appears to me that as a result of how that regulation has evolved we are left with a very anomalous situation where we have "orphan gas lines". NNG disclaims paternity due to Federal Energy Regulatory Commission (FERC) orders 436, 636 and 637. NWNG disclaims paternity because it states that it did not acquire any infrastructure and is a mere contractor. FERC order 436 was adopted in 1985 and changed how interstate pipelines were regulated. This order established a voluntary framework under which interstate pipelines could act solely as a transporter of natural gas, rather than filling the role of a natural gas merchant. Prior to that time NNG and Peoples fulfilled both the transport function and the merchant function. On December 20, 1985 NNG either sold or spun off Peoples as an affiliated entity and sold the South Dakota farm tap customers to Utilicorp United, Inc. such that Utilicorp United Inc. would fulfill the necessary merchant role to the South Dakota farm tap customers. Pursuant to the terms of this agreement NNG assigned to Utilicorp the responsibility to service the farm tap customers that were People's responsibility. NNG therefore had complied with the regulatory framework and would avoid state regulation. For reasons not apparent in the documents that I have examined in the docket, NNG subsequently entered into a second contract in 1987 in which it agreed to a sunset of merchant status and responsibility to Utilicorp's subsidiary NWNG such that NWNG had the legal right to terminate its merchant status with respect to the farm tap customers after 2017.
4. NWNG now states that it seeks to be relieved of the farm tap lines because it lacks a grid map to locate and properly service the lines and that it is inequitable to assess the costs of servicing these lines on their network of customers. It appears as if this is a calculation that should have been built into the prior transactions that have occurred with respect to the farm tap lines in the several assignments that have taken place in this case and that it is a little late to play that card now. As Senator Rusch points out in his comments, the farm tap customers were not party to any of the transactions between the parade of entities that have been involved in this case. It is unusual that at some point between 1952 and 1985, when the farm tap customers were sold that a map would not have been created by Peoples or that Utilicorp United would not have demanded one be made as part of the 1985 agreement in which it purchased the customers.
5. It appears that we are confronted with a very unusual regulatory situation. NNG is not subject to South Dakota PUC jurisdiction. However, as the result of the 1987 contract that NNG signed that allowed NWNG to terminate its merchant status on the farm tap customer lines at the end of 2017, NNG will have 197 South Dakota farm tap customers on January 1, 2018. Due to federal regulation, NNG cannot fulfill the merchant role in the transaction with the farm tap customers on January, 2018. Accordingly, unless NNG can successfully shift legal ownership and responsibility of the lines to NWNG or MERC, NNG will have to contract with an alternative entity to act as merchant in this case prior to that date. It appears that if it fails to do this NNG will be in violation of the private contracts with the farm tap customers. The farm tap customers should not be made to suffer economically because of the unique set of facts in this case where NNG has agreed to certain things without consideration

of the legal obligation that they owe to the farm tap customers. NNG has to better explain why it agreed to the sunset provision in the 1987 agreement with NWNG or why the offending provision of the 1987 agreement with NWNG does not apply to the farm tap customers

6. If NNG can establish that the sunset provision does not apply to relieve NWNG of the merchant status on the farm tap customers, then it appears that pursuant to the 1985 agreement the assignees of Utilicorp United, Inc. (MERC and NWNG) would be contractually obligated to fulfill the merchant role in this case and as Kristin Edwards pointed out, NWNL retains the right to turn off the pipeline if farm tap customers fail to pay their account or otherwise fulfill their obligations under the contract. That right to operate or control the infrastructure would appear to subject NWNG to South Dakota PUC jurisdiction. Accordingly, if NNG can show that the sunset provision does not apply to the farm tap customers, pursuant to the applicable South Dakota statute NWNG cannot terminate service without the approval of the SD PUC.
7. In order to avoid a very complex and protracted legal proceeding it would be best for all concerned to reach a mediated settlement of this matter

Respectfully submitted this 1st day of January, 2017.

Michael J. McGill
Attorney at Law
P. O. Box 32
Beresford, SD 57004
605-763-2057
605-261-5635 cell
605-763-2201 fax
mjmc@bmtc.net