

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

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

DOCKET NO. NG16-014

**NorthWestern Energy's Brief in Response to
Commission Staff's Petition for Declaratory Ruling**

NorthWestern Corporation d/b/a NorthWestern Energy (*NorthWestern Energy*) submits this brief in response to the three issues raised in Commission Staff's petition (*Petition*) for declaratory ruling:

1. Does the South Dakota Public Utilities Commission (the *Commission*) have jurisdiction over the utility providing natural gas to the farm tap customers of Northern Natural Gas Company (*NNG*) who are taking gas from the transmission line owned and operated by NNG?
2. If so, which entity, NorthWestern Energy or NNG, if either, is a public utility as defined by SDCL Chapter 49 with respect to NNG's farm tap customers?
3. Are the farm taps in whole or in part subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?

NNG recently attempted to redirect its responsibility to its farm tap customers by sending them a letter which places blame on NorthWestern and the Commission for the situation NNG currently finds itself in. The letter, which NNG filed as part of this Docket, ignores the promises NNG made to its farm tap customers in exchange for the easements that allowed NNG to construct a transmission pipeline.

NNG made two promises to these customers. First, NNG promised to provide a tap (*farm tap*) so that the landowners could access the transmission line NNG wanted to build. The NNG letter

clearly communicates that NNG “stands ready and willing to provide the same interstate natural gas transportation service that [it has] provided for decades.” At least NNG’s farm tap customers received that message loud and clear.

However, NNG wasn’t as clear in communicating with its farm tap customers regarding the second promise it made to obtain the necessary easements – namely, to furnish gas to its customers. In fact, NNG completely fails to mention in the letter that it made this second promise. Instead, NNG describes “a long history” of NorthWestern “and its predecessors” providing this service. But NNG knows this isn’t the complete story. NNG does not remind its farm tap customers that the benefits it received from the easements required NNG to provide this service. NNG also does not inform its customers that *it*, in fact, provided this service for well over 30 years. In other words, NNG does not tell its farm tap customers that the “predecessors” with “a long history” include NNG, either directly or through one of its divisions or subsidiaries. Further, NNG’s letter ignores the reality that NorthWestern only recently, in 2011, began providing assistance to NNG with NNG’s farm tap customers and instead embellishes NorthWestern’s involvement “since Northern Natural Gas first constructed the tap.”

As summarized in this brief, NorthWestern’s relationship to NNG with respect to NNG’s farm tap customers is contractual. In 2011, NorthWestern agreed to provide services to NNG to assist NNG with NNG’s farm tap customers until the contractual term expires at the end of 2017. As part of the agreement to provide these services to NNG, NorthWestern did not acquire any property related to NNG’s farm tap customers or their farm taps.

Furnishing gas to NNG’s farm tap customers has been NNG’s responsibility since the 1950s when NNG offered such services in exchange for easements that allowed NNG the benefit of constructing a natural gas transmission line across the property of NNG’s farm tap customers. NNG continues to operate the natural gas transmission line for which it acquired the easements. Unlike NorthWestern’s contractual obligation to assist NNG, which has a specific termination date, NNG’s

responsibility to its farm tap customers continues, along with the benefits of its easement, for as long as NNG's pipe is in the ground. Finally, NorthWestern is not a "public utility" with respect to NNG's farm tap customers because NorthWestern's assistance to NNG lacks many of the key indicia of being a public utility.

NNG's obligations to its farm tap customers

The issues from the Petition arise out of a natural gas transmission line owned and operated by NNG. In the 1950s, NNG wanted to build this line. But NNG couldn't build it without the consent of many landowners to bury the line on their land. To obtain consent of the landowners, NNG agreed to (1) provide the landowner with a farm tap *and* (2) furnish gas to the landowners for use on their premises. In other words, to build the transmission line, NNG promised these landowners that it would serve them as its farm tap customers. For many years, NNG lived up to both of these promises – NNG provided its farm tap customers with both interstate gas transmission and, through NNG's Peoples Natural Gas division, furnished the farm tap customers with gas. Without NNG's promise to provide *both of those services*, the line likely would not have been possible. NNG likely would not have obtained the required easements from its farm tap customers to construct the transmission line. Its pipe never would have gone in the ground.

Recognizing both obligations, on April 1, 1987, NNG entered into an agreement (*Agreement*, attached as **Exhibit A** to this Brief) with its own subsidiary, Peoples Natural Gas Company (*Peoples*), to provide the local services to NNG's farm tap customers. As part of the Agreement, NNG paid Peoples (its own subsidiary) nearly \$2 million to perform services on behalf of NNG for 30 years until 2017. It is unknown why NNG chose to limit the Agreement to

a 30-year term when there is no such limitations on the easements NNG received from its farm tap customers.

Through various corporate machinations, NNG ultimately exited the local natural gas distribution business. As NNG likes to remind us, today it is in the business of providing interstate natural gas transmission service and “stands ready” to provide that (*and only that*) service to NNG’s farm tap customers. NNG also stands ready to continue to enjoy the benefits of its easements that provide access for its transmission line. But NNG appears to be unwilling to live up to *both* of the obligations it agreed to when it was seeking to carve up the property of its farm tap customers and construct its interstate transmission line.

Despite NNG’s current interstate-only protests, NNG understands its obligations to its farm tap customers arising from the easements. Why else would NNG continue to enter into long-term agreements to have others assist it with providing service to farm tap customers *on its behalf*?

As it was exiting the local natural gas distribution business, NNG ensured that the service its subsidiary Peoples provided to its farm tap customers in the Agreement would continue to be provided by the successor to Peoples – Minnesota Energy Resources Company (*MERC*). Then, on June 1, 2011, NNG again acknowledged its obligations to its farm tap customers when it signed a partial assignment of agreement (*Assignment*, attached as **Exhibit B** to this Brief), in which it agreed to allow MERC to partially assign its obligations under the Agreement to NorthWestern.

NNG has understood its obligations to its farm tap customers all along. Yet, it has not made arrangements to continue its required service to its farm tap customers beyond the 2017 term of the Agreement. NNG has done nothing to fulfill its promises to its customers going

forward and instead is seeking to lay the blame for its lack of action on NorthWestern and the Commission, all while continuing to enjoy the benefits of its easements.

NorthWestern's contractual role assisting with NNG's farm tap customers

NorthWestern is currently assisting NNG with providing services to NNG's farm tap customers pursuant to the Agreement and the Assignment. The assistance NorthWestern is providing is purely for contracted services. As part of that contract, NorthWestern did not acquire any of the property or infrastructure related to NNG's farm tap customers, and NorthWestern does not own any of that property or infrastructure today.

NorthWestern's contractual obligation originated in 2011 when NorthWestern acquired an entirely separate pipeline (*Milbank Pipeline*) from NNG (*See Commission Docket NG11-001*). As a condition of agreeing to the Milbank Pipeline acquisition, MERC required NorthWestern to assist NNG with providing services pursuant to the Agreement to NNG's farm tap customers (even though NNG's farm tap customers are unrelated to the Milbank Pipeline). Conspicuously, when consenting to the Assignment, NNG did not require NorthWestern to continue such assistance beyond 2017 as a condition of the Milbank Pipeline acquisition.

The Commission approved NorthWestern's acquisition of the Milbank Pipeline on March 11, 2011, pursuant to its Final Decision and Order in NG11-001. Notably, the Commission's Order included approval of the December 31, 2017, termination of NorthWestern's contractual commitment to assist NNG with serving NNG's farm tap customers.

Consistent with the Final Decision and Order and pursuant to the Agreement and the Assignment, NorthWestern provided notice to NNG on November 15, 2016, that NorthWestern would be terminating its obligations under the Agreement effective December 31, 2017, in

accordance with the Agreement's terms. NorthWestern filed a copy of such notice in this proceeding.

This is not the first time that NorthWestern has agreed to provide such services on behalf of others pursuant to a contract with a limited term. In fact, NorthWestern's assistance to NNG with its farm tap customers is similar to the assistance NorthWestern previously provided to the cities of Humboldt, Crooks, and Garretson pursuant to natural gas distribution services agreements. Although the agreements with those cities did not cover services identical to those NorthWestern is providing to NNG with respect to NNG's farm tap customers, there are similarities. For instance, NorthWestern contractually agreed to provide the annual inspection and maintenance of the applicable odorizer receptacles for these parties. NorthWestern also acts as a first responder for NNG and acted as a backup first responder for the cities.

As the Commission is aware, NorthWestern ultimately discontinued its assistance to these cities after several years. As with NNG, NorthWestern had a contractual obligation to these cities with a limited term. When the term expired, so too did NorthWestern's contractual obligations.

NNG knows NorthWestern's assistance began a short time ago in 2011 with the acquisition of the unrelated Milbank Pipeline and that NorthWestern's assistance was for a contractually limited duration. NNG knows that NorthWestern had nothing to do with NNG's farm tap customers prior to the Milbank Pipeline acquisition. However, NNG chose to deliver embellishments to its farm tap customers when NNG indicated in the letter that NorthWestern had "a long history" of serving natural gas to NNG's farm tap customers and that NorthWestern "and its predecessors, have provided utility service to your farm tap since Northern Natural Gas first constructed the tap."

It is unknown why NNG used these embellishments in its communication to its farm tap customers or why it used the generic term “predecessors” to obscure the fact that it and its subsidiary Peoples previously furnished gas to NNG’s farm tap customers. NorthWestern only contracted to provide service to NNG with respect to NNG’s farm tap customers. NorthWestern did not acquire any property or infrastructure concerning the farm taps as part of the contract.

NorthWestern is not a public utility with respect to NNG’s farm tap customers

A gas utility is “any person operating, maintaining, or controlling in this state equipment or facilities for providing gas service to or for *the public*.” SDCL 49-34A-1(9). A public utility, by statute, provides “gas or electric service to or for the public in whole or in part, in [South Dakota].” SDCL 49-34A-1(12). A hallmark of service to the public is that any member of the public has a right to and may demand service. *See, Krenning v. Heart Mountain Irr. Dist.* 200 P.3d 774, 782 (Wyo. 2009) (“a public utility is ‘open to the use and service of all members of the public who may require it’”), *quoting* 73B C.J.S. *Public Utilities* § 2 (2008): *Pennsylvania v. Lafferty*, 233 A.2d 256, 260 (Penn. 1967) (“a public utility holds itself out to the public generally and may not refuse legitimate demand for service”).

NNG’s farm tap service is not available to the public. The only customers that can be an NNG farm tap customer are those persons that own land subject to an easement in favor of NNG, which was granted in exchange for NNG’s agreement to provide farm tap service for use on that land.

In addition, NorthWestern is not providing gas service “to or for the public” by assisting NNG with providing the services NNG agreed to provide to its farm tap customers in exchange for the easements. NorthWestern, through the Assignment, only undertook to perform certain functions for NNG that previously were performed by NNG, then Peoples, then MERC. The

Agreement restricts to whom NorthWestern could provide service. NorthWestern could not permit a member of the public, even one who owned property along the pipeline to install a new tap into NNG's pipeline. No one, other than a person approved by NNG, may receive farm tap service pursuant to the Agreement and Assignment.

A public utility has many characteristics or criteria defined by statute. However, NorthWestern's assistance to NNG in serving NNG's farm tap customers fails to meet several of those characteristics/criteria. NNG, through the Agreement and Assignment controls the services that NorthWestern provides on NNG's behalf. The Agreement, in its Exhibit 1, limited NNG's subsidiary, Peoples, to providing 12 services. The Assignment further limited NorthWestern to providing only 10 of the 12 services that Peoples/MERC provided. These services do not include all of the rights and obligations of a public utility and prevent NorthWestern from acting as a public utility serving NNG's farm tap customers. Moreover, unlike a public utility, NorthWestern does not own any of the infrastructure that is used in connection with these farm taps. Either NNG or NNG's farm tap customers owns the related infrastructure.

Finally, NorthWestern has never professed to serve the public along NNG's pipeline. NorthWestern is a public utility in several areas, but NWE has limited its operation as a public utility to those areas in which it has an obligation to serve. A utility may limit the territory in which it operates. *See, Crawford v. City of Billings*, 297 P.2d 292, 295 (Mont. 1956) ("It is not to be denied that a privately owned utility may limit the territory it professes to serve").

NorthWestern has no statutory obligation to provide public utility services to NNG's farm tap customers. However, NNG has a contractual obligation to serve its farm tap customers as long as its pipe is in their ground. NorthWestern, on the other hand, has a contractual obligation to serve NNG until December 31, 2017.

Accordingly, NorthWestern requests that the Commission recognize that NorthWestern is not a "public utility" with regard to the assistance it is providing NNG with NNG's farm tap customers.

Dated at Sioux Falls, South Dakota, December 7, 2016.

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CERTIFICATE OF SERVICE

I the undersigned hereby certify that on the December 7, 2016, a true and correct copy of the foregoing *NorthWestern Energy's Brief in Response to Commission Staff's Petition for Declaratory Ruling*, was served upon the following by electronic mail:

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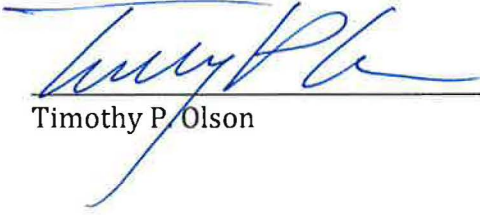
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