

**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 Answer to
Northern Natural Gas Company's
Petition for Rehearing**

NorthWestern Corporation d/b/a NorthWestern Energy answers the petition of Northern Natural Gas Company (*NNG*) for a rehearing. The Commission Staff's Petition, in November 2016, identified three issues to be determined, and the Commission determined those three issues. NNG's Petition for rehearing does not challenge the resolution of two of those issues: whether the Commission has jurisdiction over the utilities providing natural gas to the farm-tap customers; and, whether NNG or NorthWestern Energy is a public utility with respect to those customers. NNG only seeks rehearing on the third issue: whether the farm taps are subject to state jurisdiction for the purpose of pipeline safety. But NNG's petition also (erroneously) assumes that the Commission took up the question whether NorthWestern Energy can discontinue service to the farm-tap customers on December 31, 2017.

NNG's Petition is procedurally deficient and would result in a waste of the Commission's time and resources (to say nothing of the parties'). NNG's Petition seeks a rehearing of the Commission's entire "Declaratory Ruling," but NNG is not entitled to a rehearing on determinations it is not challenging. The administrative rules make this clear. With respect to the one actual determination that NNG identifies in its Petition as being erroneous, the Commission decided correctly that customer-owned farm-tap facilities do not meet the definitional requirements and are outside of the scope of the intended purpose of South

Dakota's pipeline safety-compliance program. Any evidence of safety risk is irrelevant to the issue of pipeline-safety jurisdiction. And finally, the time for challenging the Commission's decision that NorthWestern Energy can discontinue service to the farm-tap customers on December 31, 2017, passed six years ago, when the Commission actually decided that issue.

In short, the Commission should deny NNG's Petition for Rehearing.

NNG is not entitled to rehearing on determinations it is not challenging.

NNG's Petition challenges the entire "Declaratory Ruling" of the Commission on January 24, 2017. But nothing in the content of NNG's Petition disputes two of the Commission's three determinations: (1) that the Commission has jurisdiction over utilities providing natural gas to farm-tap customers; and (2) that NorthWestern Energy is a public utility with respect to farm-tap customers. Despite apparently agreeing with those two determinations, NNG asks the Commission to conduct a full new hearing, so NNG can conduct discovery, submit testimony, offer evidence, introduce exhibits, and cross-examine witnesses. To what end? So the Commission can rehear the same issues and reach the same determinations? NNG's overreaching Petition is contrary to the administrative rules and a wasteful proposition.

There are at least two procedural requirements for rehearing under the Commission's administrative rules, neither of which are met by NNG's Petition. First, a party may apply for a rehearing only "as to any matter determined by the commission and specified in the application for the rehearing or reconsideration." ARSD 20:10:01:29. Second, an application for a rehearing must "specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error." ARSD 20:10:01:30.01. NNG's Petition meets neither of those requirements.

In its Petition, NNG specifically seeks rehearing on only one determination that the Commission actually considered: whether the farm-tap facilities are subject to state jurisdiction

for the purpose of pipeline safety under SDCL Chapter 49-34B. NNG does not assert in its Petition that the other two determinations are erroneous. Accordingly, under the administrative rules, the Commission cannot grant a rehearing with respect to the other two determinations; those issues are not “specified in the application for the rehearing.”

In addition to not specifying those two determinations as erroneous, NNG provides no statement of why either of those determinations was erroneous. NNG would have the Commission and parties devote considerable time and resources to conducting discovery, submitting testimony, offering exhibits, and cross-examining witnesses to reach the same outcome the Commission already has reached. This would be folly. NNG seems simply to want another opportunity to ignore the language of the easements and present alternate facts about the 1985 Agreement—all when the Commission does not even have jurisdiction over the contractual matters at issue here.

While the Commission may have jurisdiction over limited contractual matters (such as the approval of contracts for deviation from established tariff rates), the Commission does not have plenary jurisdiction over all aspects of all contracts like the easements or the 1985 transaction and related agreements. Nor does the Commission have jurisdiction over every contract NorthWestern Energy enters into simply because NorthWestern Energy is, with respect to a portion of its business, a public utility regulated by the Commission. The Commission should not approve a rehearing to expend valuable time and resources to consider (or in this instance, reconsider) contractual matters beyond the Commission’s authority.

NNG elected not to engage in discovery or provide evidence.

NNG argues that the entire docket and Declaratory Ruling were procedurally deficient because NNG was not aware that it could engage in discovery and “the PUC did not advise the

parties they could present evidence or testimony.”¹ But there is nothing in the Commission’s administrative rules that require the Commission to notify the parties that they can engage in discovery or present evidence or testimony or that prohibit a party from taking such actions.

As to discovery, the administrative rules state, “A party may obtain discovery from another party *without commission approval*.” ARSD 20:10:01:22.01 (emphasis added). NNG did not need to be informed of a right that is plainly stated in the Commission’s administrative rules. As to evidence and testimony (and other matters), “the rules of civil procedure as used in the circuit courts of this state” apply, unless “not appropriately applied to an agency proceeding” or “in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules.” ARSD 20:10:01:01.02.

While *written* testimony may require an order from the Commission (ARSD 20:10:01:22.06), there is nothing in the administrative rules prohibiting a party from offering *oral* testimony at a hearing. In addition, other evidentiary matters, such as exhibits at the hearing (ARSD 20:10:01:22.07) and other documentary evidence (ARSD 20:10:01:23), do not require an order from the Commission. Most importantly, there also is nothing in the Commission’s administrative rules that prevents a party from asking the Commission to enter an order regarding procedures for taking discovery and offering testimony and evidence.

NNG did not avail itself of any of these avenues. NorthWestern Energy did not receive any discovery requests from NNG. NNG did not offer (or bring) any witnesses at any of the hearings in this docket. NNG did not offer any documents into evidence at any of the hearings in this docket. Now, NNG is requesting a second bite at the apple, to offer evidence that is not new, and to reach a determination that the Commission already has decided.

¹ See Petition, p. 6.

NNG's pattern of not participating and then later seeking redress is predictable. In this proceeding, for example, after the December 14, 2016, hearing, NNG sought to reopen the record in an unsuccessful attempt to change the outcome of the 2011 Milbank pipeline docket (NG11-001), raising arguments in that motion to reopen the record that are similar to this Petition. The Commission denied that request to reopen the record.

In addition, NNG did not participate in the 2011 Milbank pipeline docket, even though NNG was the party selling the Milbank pipeline to NorthWestern Energy and even though the Commission's notice initiating that 2011 docket indicated that the Commission would determine whether NorthWestern Energy could discontinue its service, on behalf of NNG, to the farm-tap customers on December 31, 2017.

Similarly, in the Black Hills Energy farm-tap docket currently pending before the Iowa Utilities Board, NNG did not participate in the proceeding for over a year after intervening. NNG "issued no discovery, did not participate in any of the joint filings, provided no pre-filed testimony, filed no responses to the [Iowa Utility] Board's requests for additional information, and did not participate" in the February 2, 2017, hearing, until filing a post-hearing brief on February 22, 2017, seeking to insert into the record the two-page 1985 Agreement, along with a two-page Affidavit of Keith Petersen.² On February 24, 2017, the Iowa Office of Consumer Advocate sought to strike that brief and those documents from the record as untimely, lacking foundation, and violative of due process rights. The Consumer Advocate's motion to strike is pending.

Likewise, in the Black Hills Energy farm-tap docket currently pending before the Nebraska Public Service Commission, NNG did not intervene within the thirty days required by

² See Paragraphs 1-12 of Motion to Strike Northern Natural Gas Company's Brief, filed by the Iowa Office of Consumer Advocate on February 24, 2017, in Docket SPU-2015-0039 before the Iowa Utilities Board. This pleading is attached as *Attachment 1* to this Answer. Interestingly, the two-page Affidavit of Keith Petersen is the exact same affidavit NNG sought to introduce in this proceeding.

that commission's rules of procedure and was forced to file a Petition for Formal Intervention Out-of-Time, 71 days after Black Hills Energy initiated the docket. The Nebraska Public Service Commission has not ruled on NNG's late intervention request.³

This pattern should not be countenanced, and the Commission should deny the Petition.

The Commission ordered *in 2011* that Northwestern Energy could discontinue services to farm-tap customers on December 31, 2017.

In the Petition, NNG also argues that sufficient reasons exist for rehearing because the Commission *in this docket* "concluded that NorthWestern could terminate its provision of farm tap services to customers after December 31, 2017." The Commission reached that conclusion *six years ago*, on March 11, 2011, in the Milbank pipeline docket (NG11-001). The time for appeal, rehearing, or reconsideration of that decision *expired on April 10, 2011*.

Parties are permitted 30 days to appeal a determination by the Commission or to request a rehearing or reconsideration. SDCL § 1-26-31 and ARSD 20:10:01:30.01. NNG elected not to participate in the Milbank pipeline docket, and there is nothing in the Commission's Declaratory Ruling on January 24, 2017, that changes its 2011 decision. The time for appealing or seeking a rehearing or reconsideration of that 2011 decision has long since passed. The Commission should deny the Petition and not permit rehearing regarding the 2011 decision.

The farm taps are not subject to state jurisdiction for the purpose of pipeline safety.

The Commission correctly ruled that the farm taps are not subject to state jurisdiction for the purpose of pipeline safety. Of the three determinations in the Commission's declaratory ruling, the pipeline-safety ruling is the *only Commission determination* NNG has challenged.

³ See Petition of Formal Intervention Out-of-Time, filed by Northern Natural Gas Company on February 14, 2017, in Docket NG-0090 before the Nebraska Public Service Commission. This pleading is attached as *Attachment 2* to this Answer.

NNG argues that rehearing on the pipeline-safety determination is necessary because (1) the legislature gave the Commission the authority to regulate the customer-owned farm-tap facilities and (2) the evidence will demonstrate the safety risks associated with the farm-tap facilities.

The customer-owned farm-tap facilities are not involved in the “transportation of gas” and thus do not meet the definitional requirements of SDCL Chapter 49-34B. In addition, these farm-tap facilities are outside the scope of the intended purpose of South Dakota’s pipeline safety-inspection program, created by SDCL Chapter 49-34B. There is no need for a rehearing of this determination because any evidence concerning safety risks cannot overcome the lack of statutory jurisdiction to regulate customer-owned facilities. Accordingly, NNG cannot establish “sufficient reason” for rehearing, and the Commission should deny the Petition.

1. *The customer-owned farm-tap facilities do not meet the definitional requirements of South Dakota’s pipeline-safety compliance program.*

The customer-owned farm-tap facilities do not meet the definitional requirements of the program. “Gas pipeline facilities” are defined as “pipeline facilities within this state *which transport gas* from an interstate gas pipeline to a direct sales customer.” SDCL § 49-34B-1(5) (emphasis added). NNG argues that the facilities owned by the farm-tap customers are subject to the pipeline-safety standards because the facilities “transport gas from Northern (the interstate pipeline) *to the customers’ homes or buildings* (the direct sales customer).”⁴ NNG’s argument ignores the physical reality of farm-tap facilities and the definition of “transportation of gas” set forth in SDCL § 49-34B-1(13).

A farm tap consists of various components owned by either NNG or the farm-tap customer. NNG owns the farm-tap meter and every component *upstream* from the farm-tap

⁴ See Petition, pp. 11-12 (emphasis added).

meter. The farm-tap customer owns every component *downstream* from the farm-tap meter. The image included as *Attachment 3* to this Response depicts typical farm-tap components.⁵ With a farm tap, the gas delivered by NNG goes directly from the NNG-owned farm-tap meter to a customer-owned component. In other words, NNG delivers the gas directly to the farm-tap customer (and the farm-tap customer receives the gas) at the outlet of the farm-tap meter.

The customer-owned farm-tap facilities do not “transport” the gas to the “direct sales customer”; the facilities *are* the direct-sales customer. It is irrelevant whether the farm-tap customer uses the gas at the location of the meter or at some other location within the same farm tap system. NNG delivers the gas to the farm-tap customer (the direct-sales customer) at the outlet of the farm-tap meter. The customer-owned farm-tap facilities are not involved in the transportation of gas.

“Transportation of gas” is defined by statute as “the gathering, transmission, or distribution of gas by pipeline or the storage of gas.” SDCL § 49-34B-1(13). The movement of gas within the customer-owned farm-tap system does not fall within that definition. Although not defined in the South Dakota statutes, the terms “gathering,” “transmission,” and “distribution” are well known in the utility and energy industries. Inherent within the meanings of these terms is the transportation of gas from one system or user to another system or user. A gathering line transports gas from a production facility to a transmission line. A transmission line transports gas from a gathering line or storage facility to a distribution center, storage facility, or large volume customer. A distribution line transports gas from a transmission line to a customer.

⁵ The image included as *Attachment 3* was offered by NNG in connection with its testimony regarding Senate Bill 104 in front of the Senate Commerce and Energy Committee, State of South Dakota, Ninety-Second Session Legislative Assembly 2017. NNG’s image indicates that NNG knows that the farm-tap customers own the facilities downstream of NNG’s farm-tap meter. NorthWestern Energy does not service any “odorant pots” as depicted on the image. Instead, the farm-tap facilities that NorthWestern Energy serves on behalf of NNG use “wick odorizers.”

The movement of gas *inside* a customer-owned farm-tap system does not involve the transportation of gas. There is no transportation from one system or user to another system or user. The gas stays with the farm-tap customer entirely within the customer's own farm-tap system. Although the gas moves, this does not meet the statutory definition for transportation of gas because there is no gathering, transmission, or distribution of the gas. SDCL §§ 49-34B-1(13). Thus, the customer-owned farm-tap facilities cannot meet the statutory definitions of "gas pipeline" or "gas pipeline facilities" (SDCL §§ 49-34B-1(4) and (5)) because such definitions are predicated on the transportation of gas.⁶

The Commission's determination was correct. The farm taps are not subject to state jurisdiction with respect to pipeline safety because the farm-tap facilities do not meet the statutory definitions for transportation of gas by a gas pipeline facility. Accordingly, NNG cannot establish sufficient reason for rehearing, and the Commission should deny the Petition.

2. *The farm tap facilities are outside of the scope of the intended purpose of South Dakota's pipeline-safety compliance program.*

South Dakota's pipeline-safety compliance program was created to implement and enforce certain pipeline-safety standards. SDCL § 49-34B-3. South Dakota's program adopted the same pipeline-safety standards that originally were adopted "as Code of Federal Regulations, title 49 appendix, parts 191, 192, 193, and 199 as amended to January 1, 2016." *Id.* The scope of these standards exclude from the pipeline-safety requirements customer-owned farm-tap facilities downstream from the meter if the customer is consuming all the gas received.

⁶ The statutes define "gas pipeline" as "all parts of those physical facilities through which gas moves *in transportation*" and "gas pipeline facilities" as "new and existing pipelines, rights-of-way, master meter systems, pipeline facilities within this state which *transport gas* from an interstate gas pipeline to a direct sales customer" SDCL §§ 49-34B-1(4) and (5) (emphasis added).

Part 192 of the Code of Federal Regulations sets forth the minimum federal safety standards applicable to the transportation of natural gas by pipeline. 49 C.F.R. Part 192. The Department of Transportation has interpreted the Part 192 safety standards as being inapplicable to a customer-owned piping system downstream from a service line when the customer consumes all the gas received.⁷

Section 192.3 of Part 192 defines a “service line” as:

a distribution line that transports gas from a common source of supply to an individual customer *A service line ends at the outlet of the customer meter or at the connection to a customer’s piping, whichever is further downstream.*

Section 192.3 further defines a “customer meter” as “the meter that measures the transfer of gas from an operator to a consumer.”

In summary, according to the Department of Transportation’s interpretation, Part 192 does not apply to a customer-owned piping system downstream of a service line. The definitions within Part 192 indicate that the service line ends at the outlet of the customer meter or the connection to a customer’s piping, whichever is further downstream.

Applying the interpretation and these definitions to the customer-owned farm-tap facilities demonstrates that such facilities are excluded from the minimum federal-safety standards. With the farm taps, the outlet of the customer meter (the farm-tap meter) and the connection to the farm-tap customer’s piping is the same location. Thus the “service line” ends at the outlet of the farm-tap meter, along with the jurisdiction of Part 192.

Under the easements that obligate NNG to provide gas to farm-tap customers, the customers may receive gas from NNG “*for domestic purposes only and not for re-sale, and for use*

⁷ See Department of Transportation Interpretation 192.1 1988 4 (November 10, 1988), available at http://www.windot.com/docs/federal/192ci/192I001Yr1998/Interpretation_192_1_1998_4.htm.

upon the above-described premises only.”⁸ Thus, a farm-tap customer may receive gas for use by that customer only—or, stated in terms of Part 192, a farm-tap customer is a landowner whose system receives gas for the landowner’s use only and not for use by anyone else.

Accordingly, based on the express scope of Part 192, the federal pipeline-safety standards do not apply to customer-owned farm-tap facilities because such facilities are downstream of the outlet of the customer meter and the landowner consumes all the gas received and is not allowed to resell it. In turn, the facilities are not subject to South Dakota’s pipeline-safety-compliance program implemented by SDCL Chapter 49-34B, because that program adopted those same federal pipeline-safety standards. SDCL § 49-34B-3. Thus, the Commission was correct in determining that the farm taps are not subject to state jurisdiction with respect to pipeline safety, and NNG cannot establish sufficient reason for rehearing.

3. Evidence of safety risk is irrelevant to pipeline-safety jurisdiction.

The Commission’s pipeline-safety jurisdiction determination is the *only Commission determination* NNG has challenged. NNG argues that a rehearing is warranted so that it can present evidence of the safety risks associated with the farm-tap facilities. But evidence of that nature is irrelevant to the question of jurisdiction with respect to pipeline safety.

The pipeline-safety statutes authorize the Commission to “establish safety standards . . . for the intrastate *transportation of gas and gas pipeline facilities.*” SDCL §§ 49-34B-3. By statute, the Commission’s authority extends only to the transportation of gas and gas pipeline facilities. As demonstrated above, the customer-owned farm-tap facilities do not involve the transportation of gas and are not gas pipeline facilities within the statutory definitions.

⁸ See Easement, Paragraph (3) (emphasis added), included in this docket as Attachment 1 to NNG’s Motion for Leave to File Supplemental Brief and Supplemental Brief (December 12, 2016).

The legislature limited the Commission's authority to those precisely defined terms. The legislature did not include the ability for the Commission to extend that regulatory authority to other situations involving pipes that may present an element of safety risk, such as customer-owned propane systems or customer-owned farm-tap facilities. Evidence concerning the safety risk is irrelevant to the jurisdiction determination.

The Commission was correct in determining that it did not have jurisdiction over customer-owned farm-tap facilities with respect to pipeline safety. That determination was the one and only determination from the Commission's declaratory ruling that NNG has challenged. NNG's petition proposes to offer evidence concerning safety risks (and does not mention any other evidence that would be offered) to demonstrate NNG's belief that the Commission's determination on this issue was erroneous. But evidence of safety risks will not establish statutory jurisdiction regarding pipeline safety.

Accordingly, NNG cannot establish sufficient reason for rehearing, and the Commission should deny the Petition. If the Commission believes that it would be helpful to receive evidence concerning the Commission's jurisdiction over customer-owned farm-tap facilities with respect to pipeline safety, NorthWestern Energy would not object to a limited rehearing on this issue, but any such rehearing should be limited to relevant evidence concerning jurisdiction of pipeline safety.

The Commission should deny the petition for rehearing.

For the reasons stated in this answer, NNG has not established sufficient reason for a rehearing in this proceeding. The Commission should deny the Petition. The Petition is procedurally deficient because it seeks a rehearing (1) with respect to determinations that NNG is not challenging and has not identified as erroneous, contrary to the Commission's administrative rules, and (2) on an untimely basis with respect to a determination the

Commission made in 2011. NNG also has not established sufficient reason to rehear the pipeline-safety-jurisdiction question. The customer-owned farm-tap facilities do not meet the definitional requirements and are outside of the scope of the intended purpose of South Dakota's pipeline-safety compliance program. Evidence regarding safety risks is inapplicable to the question of jurisdiction.

Accordingly, NorthWestern Energy requests that the Commission deny the Petition. Finally, should the Commission conclude that a rehearing is warranted, NorthWestern Energy reserves its rights to participate fully in any rehearing.

Dated at Sioux Falls, South Dakota, March 9, 2017.

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