

**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 Response
in Support of
Staff's Motion for Judicial Notice**

NorthWestern Corporation d/b/a NorthWestern Energy (*NorthWestern Energy*) submits this response in support of the motion of Staff of the South Dakota Public Utilities Commission (the *Commission*) to take judicial notice of certain facts concerning five NorthWestern Energy customers that are not the subject of this proceeding. NorthWestern Energy respectfully requests the Commission grant the motion to clarify the record in this proceeding and take judicial notice of the differences between the circumstances of these five customers and the 197 farm tap end users that are the subject of this proceeding.

The five NorthWestern Energy customers are different than the 197 farm tap end users that are the subject of this proceeding.

There are numerous differences between the five NorthWestern Energy customers and the 197 farm tap end users that are the subject of this proceeding. NorthWestern Energy believes that it is important for the Commission to approve the motion and take judicial notice of facts regarding the five NorthWestern Energy customers to clear up the confusion that has been introduced to this proceeding. As explained below, the circumstances of these five customers are markedly different than the circumstances of the 197 farm tap end users, and a

clear and complete understanding of the different circumstances is necessary to contravene what has been a calculated strategy to create confusion and incite the public.

Staff's motion correctly summarizes the circumstances of the five customers. As described in the motion: (1) these five customers are not part of the group of 197 farm tap end users that are the subject of Staff's petition for a declaratory ruling; (2) NorthWestern Energy does not serve these five customers pursuant to a contract for service; (3) these five customers are charged a general service rate pursuant to NorthWestern Energy's tariff, on file with the Commission; (4) NorthWestern Energy owns, maintains, and operates the facilities serving these five customers; and (5) NorthWestern Energy served these five customers, pursuant to the provisions of NorthWestern Energy's tariff, prior to 2011.

To expand upon the facts set forth in Staff's motion, NorthWestern began serving the five customers at various times during the early 1990s. When that service began, NorthWestern Energy installed the distribution service lines that emanate from the farm tap and delivers gas to these five customers. After installation, NorthWestern Energy has continued to own, maintain and operate the distribution service lines for these five customers. Importantly, NorthWestern Energy maintains these lines in compliance with pipeline safety requirements. NorthWestern Energy also reads the meters with respect to each of the five customers on a monthly basis as part of NorthWestern Energy's standard monthly meter reading routes.

In addition, these five customers are part of NorthWestern Energy's approximately 46,000 natural gas tariff customers in South Dakota and have been charged NorthWestern Energy's general natural gas service rate since the date NorthWestern Energy installed the distribution service lines for these five customers. NorthWestern Energy does not serve the five customers because of a contractual obligation owed to those customers or to any other party.

Instead, these five customers are public utility customers of NorthWestern Energy. These five customers also have been subject to any subsequent rate increases the South Dakota Public Utilities Commission has granted to NorthWestern Energy.

The only similarity between these five customers and the group of 197 farm tap end users is that they all have access to the natural gas transmission line owned by Northern Natural Gas Company (NNG) via a farm tap. Otherwise, the differences between the five customers and the 197 farm tap end users are stark.

Unlike the five NorthWestern Energy customers, NorthWestern Energy was not involved with the 197 farm tap end users until June 1, 2011, the effective date of a partial assignment to NorthWestern Energy of certain obligations under an Agreement between NNG and Peoples Natural Gas Company, Division of UtiliCorp United Inc., dated April 1, 1987 (the *1987 Agreement*). The 197 farm tap end users are not a party to the 1987 agreement; Northern is the party to the 1987 agreement.

The stated purpose of the 1987 agreement is for a vendor to provide natural gas sales to the 197 farm tap end users *for and on behalf of NNG*. Thus, unlike the five NorthWestern Energy customers, NorthWestern Energy is providing service *for and on behalf of NNG* to the 197 farm tap end users under the 1987 Agreement, which states:

WHEREAS, Northern has requested Peoples to perform certain services *for Northern in connection with the natural gas sales to said existing and future customers*, and Peoples has agreed to provide the services *on behalf of Northern*.¹

Also in contrast to the five customers, NorthWestern Energy did not install and does not own any equipment, facilities or infrastructure associated with the 197 farm tap end users. As part of the 2011 assignment of certain of the contractual obligations under the 1987

¹ See 1987 Agreement, p. 1, included as Attachment “A” to the Initial Brief of Northern Natural Gas Company (emphasis added).

agreement, NorthWestern Energy did not acquire any of these assets, and NorthWestern Energy has not subsequently acquired any of these assets. Instead, in 2011, NorthWestern Energy was assigned the obligation to “perform certain services *for Northern*” under the 1987 agreement “in connection with natural gas sales” to the 197 farm tap end users.

Unlike the five NorthWestern Energy customers, the 197 farm tap end users are not charged NorthWestern’s general natural gas service rate and have not been subject to any general rate increases the South Dakota Public Utilities Commission has granted to NorthWestern after June 1, 2011. Instead, the 197 farm tap end users are charged a separate rate that was established by Minnesota Energy Resources Company at least as early as 1994.

The 197 farm tap end users have a right to gas and Northern has an obligation to furnish gas under the terms of the easements.

It is important to remember that the right of the 197 farm tap end users to receive natural gas arises under the terms of the easements those landowners granted to NNG in the 1950s. At the December 14, 2016, hearing in this proceeding, the Commission questioned NNG extensively about the following language of the easements:

(3) That grantee, upon written application by the grantor, will make, or cause to be made, a tap in any gas pipe line constructed by grantee upon the above described premises for the purpose of supplying gas to grantor ... and *gas to be taken under this provision shall be measured and furnished to the grantor at the rates and upon the terms as may be established by grantee, or by any vendee of grantee*, from time to time.²

The rights of the 197 farm tap end users to receive gas arises from the quoted easement language; they have the right to gas “furnished ... by grantee [NNG], or by any vendee of grantee

² See Easement included as Attachment “1” to the Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company (emphasis added).

[NNG].” The easement requires NNG to either furnish the gas or to find another party to furnish the gas.

At the hearing, when questioned by the Commission about this specific language of the easement and as reflected in the transcript of the hearing (quoted below), NNG agreed that it either had the obligation to furnish gas or it had the obligation to find another party to furnish the gas. NNG also stated that it had never furnished the gas and, under its current corporate structure as a transmission company, has chosen not to put itself in a position to furnish the gas. Nevertheless, NNG agreed that the easement obligates it to find another party to furnish the gas.

CHAIRMAN NELSON: So let me ask you, what do you think *[the above-quoted language of the easement]* means to the farmer that granted the easement?

MR. PORTER: *It means they're going to get gas. That's exactly right.*

That does not mean that Northern is selling the gas to them. And that's the distinction that I think is important. We have never sold the gas to the end user in the State of South Dakota.

CHAIRMAN NELSON: *Understand. But in this phrase, this phrase leaves open the possibility of that or that if Northern chooses not to, that you will have the responsibility of finding a vendee to do that.*

Is that accurate?

MR. PORTER: *I agree with that.*³

Consistent with NNG's statements at the hearing that it has the responsibility for finding a vendee, NNG's own division, Peoples Gas (*Peoples*), initially served as NNG's vendee for many years. NNG has repeatedly insisted that it has never furnished gas to the 197 farm tap end

³ See Transcript of Proceedings, December 14, 2016, pages 47-48.

users, arguing that Peoples, “a division of Northern (1952-1980)” furnished the gas and was “functionally separate and distinct” from the federally-regulated business of NNG.⁴ However, NNG’s carefully selected words hide a relation that is much less separate and distinct than NNG wants us to understand. A “division” is not a separate legal entity. While a division may have its own employees, operations, etc., it does not stand alone as a different corporate entity. For a considerable period of time relative to the easements (1952-1980), Peoples was merely a division of NNG, not a separate entity.⁵ As part of the same corporate entity as Peoples, can it be said that NNG has *never* furnished gas to the 197 farm tap end users in South Dakota?

Apparently, in 1985, NNG sold Peoples, and thereafter NNG entered into the 1987 Agreement to formalize the services Peoples provided as NNG’s vendee. Today, NorthWestern Energy currently is serving as NNG’s “vendee” in South Dakota under the 2011 assignment of certain obligations of the 1987 Agreement.

At the hearing, NNG agreed that NorthWestern Energy is its vendee under the easements:

CHAIRMAN NELSON: So is NorthWestern today your vendee?

MR. PORTER: We don't refer to them as a vendee in normal conversation, but under the language of this easement, I would say yes.⁶

The 1987 Agreement to perform certain services for and on behalf of NNG continues until “May 31, 2017 and from month to month thereafter” unless terminated “effective any time

⁴ See Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company (emphasis added) at page 7.

⁵ *Id.*

⁶ See Transcript of Proceedings, December 14, 2016, page 51.

after May 31, 2017 by providing six (6) months' prior written notice to Northern."⁷ On November 15, 2016, in accordance with terms of the 1987 Agreement, NorthWestern Energy delivered a termination notice to NNG, effective December 31, 2017. Thus, effective on the last day of 2017, NorthWestern Energy will cease being NNG's vendee, and the 1987 Agreement will expire.

However, NNG's obligations to furnish gas or arrange a vendee to furnish gas under the easements will remain in place. And, over the years, no agreement or transaction has impacted the language of the easements. When asked at the December 14, 2016, hearing in this proceeding whether the 197 farm tap end users were involved in the 1985 sale of Peoples and whether they "have a stake in ensuring their easement isn't altered in any significant way," NNG responded:

MR. PORTER: ***Easement holders would have, I believe, an interest if their easement was altered or amended, one. Two, I don't think they were.*** They were transferred from -- excuse me. They weren't even -- the easements weren't transferred.

The same entity that owned -- that had entered into the easements as we have discussed prior to 1985, ***the easements that were entered into by Northern Natural are held today by Northern Natural.***

What was transferred was the utility service that through historical practices had developed and Peoples Natural Gas had provided -- from the beginning had provided that utility service. Northern Natural never did. Peoples provided that service.

That was transferred. ***It does not impact a word of the easement. So I think the easement is unaffected.***⁸

⁷ See 1987 Agreement, Section 5, included as Attachment "A" to the Initial Brief of Northern Natural Gas Company.

⁸ See Transcript of Proceedings, December 14, 2016, page 125.

By NNG's own words, it is clear that the perpetual obligations in the easements remain preserved today as they existed when NNG made those promises in the 1950s.

In light of the differences regarding the five NorthWestern Energy customers and the 197 farm tap end users, taking judicial notice is appropriate.

With this full context of the five NorthWestern Energy customers and the 197 farm tap end users, the differences become clear. Regarding the five, NorthWestern Energy installed and continues to own, maintain, and operate these facilities. NorthWestern Energy's obligation to serve these five customers does not arise from a contractual obligation. On the other hand, with respect to the 197, NorthWestern Energy is party to a contract to provide services "for" and "on behalf of" NNG which expires at the end of 2017. The need to furnish gas to the 197 arises from the terms of the easements, which require NNG to either furnish the gas or provide a "vendee" to furnish the gas. NNG's promises in the easements remain unaltered and perpetual.

Accordingly, in light of the differences between the five NorthWestern Energy customers and the 197 farm tap end users summarized in the record and in this response, NorthWestern Energy requests that the Commission grant Staff's motion.

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

**NORTHWESTERN CORPORATION,
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