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	**)** **)** **)** **)** **)**	**Staff's Response to Northern Natural Gas Company's Motion** **NG16-014**

On December 23, 2016, Northern Natural Gas Company (Northern) filed a Motion to Reopen the Record, Take Judicial Notice and Correct the Record (Motion). On December 30, 2016, the Commission noticed the Motion for hearing. In its Motion, Northern makes three requests. First, Northern seeks to reopen the record in this docket. Second, Northern requests the Commission take judicial notice of the recorded transcript of the March 8, 2011, hearing in Docket NG11-001. Finally, Northern requests the Commission enter a finding in this docket that Northern does not have an obligation to provide service to farm tap customers after December 31, 2017, and that any contrary finding in Docket No. NG11-001 be vacated. Staff addresses each request separately.

1. **Reopen the Record**

Northern requests the Commission reopen the record in this proceeding. However, it is unclear exactly why Northern seeks to reopen the record and exactly what information they hope to add to the record. Northern simply states that by "reopening the record and reflecting the erroneous nature of the testimony from 2011 in this record, the Commission will have what it needs to correct any findings made on the misleading testimony and to ensure utility service to the farm tap customers." Northern at 5. As a preliminary matter, Staff objects to characterization of those statements as testimony. No witnesses were sworn in or subject to cross-examination in NG11-001.

In addition, ARSD 20:10:01:27.01 provides that if good cause is shown the Commission may order that the record be reopened *and* the matter be set for further hearing. The wording of the administrative rule dictates that if the Commission were to reopen the record, a hearing must be held. The proffered addition to the record is not simply admitted prima facie. Therefore, whatever specific evidence Northern seeks to add to the record would need to be subjected to the discovery and cross-examination process.

Northern alleges that the statements made in 2011, were made "without hesitation and without any inquiry." Northern at 4. There is no evidence in the record to indicate that there was or was not any inquiry by NorthWestern Corporation dba NorthWestern Energy (NorthWestern) or Staff prior to making those statements in 2011. At most, the statements were legal interpretations made by non-attorneys. There is no indication that the statements were made with any intent to mislead or misinform.

The request assumes the Commission incapable of differentiating between unsworn statements and legally binding testimony. It further assumes the Commission would otherwise be unable or unwilling to divorce itself from a prior decision. The Commission is well aware that past decisions do not establish binding precedent.

Based upon the record in this docket, it is abundantly clear that one or more of the parties disagree with the representations made in NG11-001. Nothing additional is to be gained by continuing to argue that point. Because the information was available at the time of the hearing on December 14, 2016, and was, in fact, discussed at that time[1], there is not good cause for reopening the record simply to cover ground that has already been covered.

[1] See Hearing transcript 16-17.

Northern states that the Commission would "have what it needs to correct any findings made on the misleading testimony." Northern at 5. It is unclear what findings Northern would have the Commission correct. If Northern seeks to make changes to the findings in the 2011 Order, the time to do so has long since lapsed. Any application for reconsideration of the Commission's order needed to be filed by a party to the docket within 30 days of the Commission decision or order. ARSD 20:10:01:30.01. Another point of concern is what effect any changes to the 2011 Order could have on the purchase of the Milbank Pipeline, which was the central issue in NG11-001. Rather than reopening this record simply to argue about what was said and why it was said six years ago, Staff would simply acknowledge that others in the past may have formed different opinions of Northern's obligation and the Commission is not bound to those previous opinions.

At this point, Staff objects to reopening the record. However, if a more clear explanation of what new information that has not already been addressed is provided, Staff reserves the right to change its position. If the only information that would be added to the record is that statements were made in NG11-001 and that Northern has a different opinion than did those making the statements, there is already ample information in the record to demonstrate that point. If the Commission does reopen the record, Staff would like the opportunity to cross-examine any person whose statements shall be entered into the record.

2. Judicial Notice

Staff does not dispute that on March 8, 2011, the Commission conducted a hearing in Docket No. NG11-001, and that the purpose of the hearing was to rule on NorthWestern's application for approval to purchase the Milbank Pipeline. SDCL 19-19-201 provides in relevant part that:

> The [Commission] may judicially notice a fact that is not subject to reasonable dispute because it [i]s generally known within the trial [Commission's] territorial jurisdiction; or [c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. … The [Commission] [m]ust take judicial notice if a party requests it and the [Commission] is supplied with the necessary information.

"Judicial notice is the taking cognizance by courts of those facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." *State ex rel. Kornmann v. Larson*, 81 SD 540, 138 N.W.2d 1 (S.D. 1965). "The [Commission] may generally take judicial notice of its own records and prior proceeding in the same case and may take judicial notice of original record in proceedings which are engrafted thereon or ancillary or supplementary thereto. " *State v. Cody*, 322 N.W.2d 11 (S.D. 1982). However, the [Commission] cannot, in one case take judicial notice of its records in another and different case. *Grace v. Ballou*, 4 S.D. 333, 56 N.W. 1075 (S.D. 1893). "Judgments and decrees are conclusive only as between parties and privies to the litigation." *Id*. (citing, Black, Judgm. § 534). The South Dakota Supreme Court has stated that judicially notice could not be taken of a court's own records in another case to which plaintiff was not a party. *Schreier v. Veglahn*, 56 S.D. 125, 227 N.W. 487 (S.D. 1907). The parties to Docket No. NG11-001 were NorthWestern and Staff. Northern was not a party to that docket. Montana-Dakota Utilities was not a party to that docket. More recently, in a 2017 decision, the Court reiterated that the adjudicative facts which may be judicially noticed are "the who, what, when, where, and why as between the parties. *Mendenhall v. Swanson*, 2017 S.D. 2, ¶9 (A court may not judicially notice a fact simply because it has been previously included in the findings of fact of a prior proceeding). Further, the 2011 proceeding is not the same case or supplementary to this docket. If NorthWestern were to be declared a public utility, and a docket was ultimately brought to determine if NorthWestern had already

been granted the right to discontinue service, NG11-001 would certainly be ancillary to that docket. As Staff continues to stress, ultimate discontinuance of service is not the issue in this docket. Therefore, it is not appropriate for the Commission to take judicial notice of the prior docket as an administrative record or file.

If the Commission were to take judicial notice of the transcript as Northern requests, the effect would be that all questions asked and statements made during the 2011 hearing would become part of the record in this docket as though the discussion took place in this docket. "Judicial notice is merely a substitute for the conventional method of taking evidence to establish facts." *Id.* (quoting *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 235 F.2d 303, 307 (7th Cir. 1956)). While the Commission can certainly acknowledge that the 2011 docket exists, the law does not permit the transcript to be entered into evidence in this proceeding.

While Staff is certainly willing to stipulate to the fact that NorthWestern purchased the Milbank Pipeline, that the purchase was approved by the Commission in NG11-001, and that NorthWestern acquired certain farm tap responsibilities through that purchase, Staff requests the Commission deny the motion for judicial notice.

3. Correction of Error

This request seems to be a restatement of Northern's first request. Moreover, it requests the Commission rule on the ultimate issue in this docket in much the same manner as if Northern had filed for summary judgment. Ruling on this issue would be redundant to the Commission's ultimate decision in the docket. If the Commission does not agree with the assertions in 2011 that the responsibility escheats to Northern after 2017, the Commission need only rule as such on the declaratory ruling. The existence of Docket No. NG11-001 does not preclude the

Commission from making a different determination at this time. Therefore, even if it were legally permissible, making changes or "corrections" to the past docket adds nothing to the declaratory ruling process.

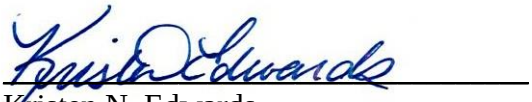
As previously stated, ARSD 20:10:01:30.01 allows for reconsideration only when the Commission or a party to the proceeding makes an application within thirty days of the order. Northern was not a party to NG11-001. Thirty days lapsed years ago. Therefore, no legal mechanism exists for the Commission to go back and make changes to the final Order in NG11-001.

Even if the Commission were to make changes, the findings Northern seeks to alter do not exist. The Commission never made a finding that Northern would bear any responsibility after 2017 for the 197 farm tap customers. Statements made by parties during a hearing but not enumerated in the Order do not constitute findings.

CONCLUSION

For the reasons stated above, Staff requests the Commission deny the Motion.

Dated this 9th day of January, 2017.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us