

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

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

(NG 16-014)

32CIV17-000071
32CIV17-000083

**NORTHERN NATURAL GAS
COMPANY’S OPENING BRIEF**

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to SDCL 1-26-30. Northern Natural Gas Company (“Northern”) appeals the Declaratory Ruling on Farm Taps, dated January 24, 2017 (“the Declaratory Ruling”) and the Order Denying Petition for Rehearing and Motion for Judicial Notice dated March 20, 2017 (“Rehearing Order”). Notice of entry of the Declaratory Ruling was served January 24, 2017. Northern timely sought rehearing of the Declaratory Ruling pursuant to ARSD 20:10:01:29 and 20:10:01:30.01 by filing a Petition for Rehearing February 17, 2017. The Public Utilities Commission for the State of South Dakota (“the PUC”) issued the Rehearing Order denying Northern’s petition for rehearing, and notice of entry of the Rehearing Order was served March 20, 2017. Northern filed and served the notice of appeal in this matter March 22, 2017. This appeal is timely under SDCL 1-26-31 because it was filed within thirty days of service of notice of entry of the Rehearing Order.¹

STATEMENT OF THE ISSUES

I. Whether the PUC Committed a Procedural Error When Issuing the Declaratory Ruling Without Entering Written Findings of Fact and Conclusions of Law?

The PUC issued the Declaratory Ruling without separately stated findings of fact and conclusions of law.

II. Whether the PUC Erred in Issuing the Declaratory Ruling without Admitting Any Evidence?

The PUC did not admit any evidence, and there is no record for this Court to review.

III. Whether the PUC Erred in Issuing the Declaratory Ruling Without Following the Procedures for a Contested Case Proceeding?

The PUC issued the Declaratory Ruling without following the procedures applicable to a contested case proceeding under South Dakota’s Administrative Procedures Act.

¹ Based upon stipulation of the parties, this appeal has been consolidated with the appeal filed by NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) in 32 Civ.17-83.

IV. Whether the PUC Erred in Denying Northern’s Request for Rehearing?

The PUC denied Northern’s request for rehearing in the Rehearing Order and failed to rectify the procedural defects in Docket NG 16-014.

STATEMENT OF THE CASE

This is an appeal of the Declaratory Ruling and Rehearing Order issued by the PUC. The Declaratory Ruling relates to a dispute involving approximately 200 farm taps in South Dakota. A farm tap is the natural gas facility through which a landowner is able to access natural gas transported by an interstate pipeline. The pipeline, in addition to other consideration, grants the right to a farm tap to a landowner (*i.e.*, farm tap customer) in exchange for allowing the pipeline to be placed on the landowner’s property.

A dispute has arisen regarding what obligation, if any, exists to provide natural gas utility service to South Dakota landowners with farm taps on Northern’s interstate gas pipeline after December 31, 2017. To try to address this issue, the Staff for the PUC (“Commission Staff”) filed a petition for declaratory ruling regarding farm taps (“Petition”) November 9, 2016. AR 11-13.² The Petition attached a memorandum describing the Commission Staff’s understanding of the “facts” related to the Petition. AR 14-19.

Northern, NorthWestern, and Montana-Dakota Utilities (“MDU”) intervened as parties. AR 47. Northern, NorthWestern, and Commission Staff submitted briefs with various attachments. AR 116-54, 155-79, 205-18, 219-34. The PUC then held “oral argument” on the Petition December 14, 2017. The PUC met January 17, 2017, to decide the matter. No discovery occurred before these hearings, and no evidence was received at the hearings. The entire record is based upon argument of counsel and submission of the briefs. After the January

² Citations to the Administrative Record from the PUC are cited “AR” with citation to the appropriate page reference.

17, 2017, meeting, the PUC issued the Declaratory Ruling dated January 24, 2017, ruling on the three questions posed in the Petition. AR 828-30. The Declaratory Ruling never articulates the PUC’s factual findings or rationale for its decision on the posed questions. *Id.*

After issuance of the Declaratory Ruling, Northern petitioned for rehearing because the Petition commenced a contested case, and due to the fact the PUC committed a plethora of procedural errors. AR 838-53. The PUC denied the rehearing March 20, 2017, without explanation. Northern appeals to this Court because the procedural mistakes made by the PUC require a rehearing of the entire docket.

STATEMENT OF FACTS³

Commission Staff faced a dispute affecting approximately 200 natural gas customers in South Dakota—will the landowners still receive natural gas service through their farm taps after December 31, 2017, and if yes, will it be Northern, NorthWestern, or some other company selling the gas and providing retail service to the landowners. Confronting this uncertainty, the Commission Staff commenced a declaratory action before the PUC in Docket NG 16-014 to address the dispute. Unfortunately, a multitude of procedural errors were made in the docket, which requires a remand for a proper evidentiary hearing and the entry of findings of fact and conclusions of law.

A. Background of Farm Taps

Northern is an interstate natural gas pipeline. Pursuant to the Natural Gas Act 15 U.S.C. § 717f *et seq.*, 48 U.S.C. 60101(a)(6) and 60104(c), Northern is subject to the exclusive

³ The recitation of facts in this brief is based upon statements and arguments of counsel and documents filed appended to briefs. Because the PUC did not hold a proper contested case, and because it did not admit any evidence into the administrative record, there is no evidentiary support for these contested “facts.” As noted below, this procedural deficiency provides one of the reasons for remand to the PUC to hold a proper hearing.

jurisdiction of the Federal Energy Regulatory Commission. Northern only transports gas, and it does not sell gas. It owns and operates an interstate natural gas pipeline that traverses South Dakota and other states. In South Dakota, the portion of Northern's interstate natural gas pipeline is located in Eastern South Dakota and contains approximately 200 farm taps.

Beginning in the 1950s, as part of acquiring some of its easements for installation of its interstate pipeline in South Dakota, Northern agreed to a provision in the easements that granted the landowner the right to "tap" into Northern's pipeline. If a tap was requested, Northern would construct the facilities necessary to operate the tap, measure usage, and reduce the pressure of the gas for the local utility to safely receive the gas. The local utility was responsible for purchasing the gas, arranging for the gas to be transported on Northern's pipeline, billing, and providing emergency call-out services. Gas is delivered to the utility and transferred to the landowner essentially at the farm tap, where the landowner/utility's facilities interconnect with Northern's facilities.

Specifically, the farm tap facilities start at the interstate transmission line, where there is a "tap" into the transmission line. Northern owns the transmission line and the tap. From the tap, the gas is transmitted through pipeline facilities and certain above ground facilities. The above ground facilities are depicted in the picture found at Appendix 18. Northern owns all of the equipment (valves, regulators, and meter) from the transmission line up to an above ground 3-way valve downstream of the meter. The landowner or the local utility own all of the facilities downstream, including the 3-way valve, odorant tank, and fuel line to the landowners' buildings where the gas is used, which may be a half mile or more from the above ground facilities.

Once a farm tap is constructed, two separate actions must take place for the farm tap customer to receive natural gas. First, the local gas utility must buy the gas and arrange for

transportation of the gas on the interstate pipeline. Second, the interstate pipeline must transport the gas from the designated point of receipt to the point of delivery. The point of delivery is the outlet of the 3-way valve where the utility receives the gas on behalf of the farm tap customer. Only the responsibility for the first action was at issue in the Declaratory Ruling. The second issue, transportation of natural gas in interstate commerce, was not at issue in the Declaratory Ruling. Northern stands ready and able to provide the interstate transportation service.

Although Northern granted the original easements permitting the farm taps, the obligation to sell natural gas at retail was specifically assumed by state-regulated utilities. Since 2011, NorthWestern has provided the retail gas services to the farm tap customers connected to Northern's interstate transmission line; however, NorthWestern intends to stop providing farm tap services December 31, 2017. NorthWestern's refusal to provide services after December 31, 2017, creates a void because Northern's status as a federally regulated natural gas pipeline prohibits it from bundling the sale of gas with its transportation services. Thus, it remains unsettled who, if anyone, will provide service after that date.⁴

B. Commission Staff's Petition for Declaratory Relief and the Procedural Posture of the PUC's Docket

The Commission Staff filed the Petition November 9, 2016. In the Petition, the Commission Staff asked for a declaratory ruling by the PUC on three questions:

- 1) Does the Commission have jurisdiction over any utility providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern Natural Gas Company (Northern)?
- 2) If so which entity, NorthWestern Corporation dba NorthWestern Energy (NorthWestern) or Northern, if either, is a public utility as defined by SDCL Chapter 49 with respect

⁴ During the 2017 Legislative Session, the South Dakota Legislature has adopted Senate Bill 104 which addresses, in part, the issue with landowners losing their farm tap services by expressly setting forth the landowners right of specific performance. Senate Bill 104 does not address, however, the issue of who must provide the farm tap services. A copy of Senate Bill 104 is attached to this appendix for the Court's ease of reference at Appendix 19 to 21.

to these farm tap customers? 3) Finally, are farm taps in whole or in part subject to state jurisdiction for the purpose of the pipeline pursuant to SDCL Chapter 49-34B?

AR 11-13. Along with the Petition, Commission Staff prepared a memorandum detailing its understanding of the “facts.” AR 14-19.⁵ Based upon the Petition, the PUC opened Docket NG 16-014.

Northern, NorthWestern, and MDU applied to intervene as parties. The PUC permitted Northern, NorthWestern, and MDU to intervene in an Order Granting Intervention dated November 23, 2016. AR 47.

The PUC entered an Order for and Notice of Hearing (“Notice of Hearing”) November 30, 2016. AR 64-65. In the Notice of Hearing, the PUC scheduled a hearing on the Petition for December 14, 2016. The Notice of Hearing stated: “[a]t the hearing, each party will be permitted to present oral argument.” AR 64. The Notice of Hearing then describes the issues at the hearing as the questions posed in the Petition. Finally, the Notice of Hearing advised the parties of their right to be represented by an attorney and appeal the decision:

All parties have the right to be present and to be represented by an attorney. These rights and other due process rights may be forfeited if not exercised at the hearing. After the hearing, the Commission will consider the matter. The Commission will then issue a declaratory ruling. As a result of this hearing, the Commission will make decisions on the issues set forth above. The Commission’s declaratory ruling may be appealed by parties to the Circuit Court and the Supreme Court as provided by law.

AR 65. The Notice of Hearing never advised the parties that the hearing was an adversarial proceeding as required by SDCL 1-26-17.

⁵ Many of the “facts” identified in the Staff Commission’s memorandum were disputed by the parties in briefing and argument to the PUC. AR 116-54, 159-79, 219-34, 839-851, 983-95, 1011-18, 1058-67.

After the Notice of Hearing, the parties filed briefs with the Commission. AR 116-54, 155-79, 205-18, 219-34. The parties attached various documents to these briefs. *Id.* Throughout their respective arguments on the Petition, the parties relied on the existence of various alleged “facts” supporting their legal arguments. Many of these alleged facts were disputed.

The PUC held a hearing December 14, 2017. Consistent with the Notice of Hearing, the PUC only held oral argument on that hearing. (*See generally* Hearing Transcript for December 14, 2017, Hearing (“12-14-16 HT”).) No documentary evidence was offered or admitted at the December 14, 2017, hearing. The PUC heard no testimony during the December 14, 2017, hearing. Instead, the attorneys representing all parties merely argued from the briefs and supporting attachments.

Following the December 14, 2016, hearing, Northern filed a Motion to Reopen the Record, Take Judicial Notice, and Correct the Record seeking to supplement the record with evidence from another PUC docket. AR 596-609. On December 30, 2016, the PUC issued an Order Setting Final Motion Hearing and Decision Date, which scheduled an additional hearing for January 17, 2017. AR 648. The PUC then held a meeting January 17, 2017. Once again, at the January 17, 2017, meeting, the PUC never heard any testimony or accepted any “evidence.” (*See generally* Hearing Transcript for January 17, 2017, Hearing (“1-17-17 HT”).) During the January 17, 2017, meeting, the PUC voted on each of the three questions posed in the Petition. The PUC also denied Northern’s motions to reopen record, for judicial notice, and to correct the record. AR 826-27.

On January 24, 2017, the PUC issued the Declaratory Ruling. In the Declaratory Ruling, the PUC indicates it reviewed “the filed documents, the transcript of the hearing, and the

arguments of the parties” AR 828. Based thereon, the PUC answered the questions posed in the Petition as follows:

ORDERED, that the Commission has jurisdiction over utilities providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern. It is further

ORDERED, that NorthWestern is a public utility as defined in SDCL 49 with respect to these farm tap customers. It is further

ORDERED, that farm taps in whole or in part are not subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B.

AR 829. In the notice of entry of the Declaratory Ruling, the PUC stated that “[p]ursuant to SDCL 1-26-32, this Declaratory Ruling will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.” AR 829. The Declaratory Ruling also advised the parties of their ability to seek rehearing or reconsideration.

Northern filed a petition February 17, 2017, seeking rehearing of the Declaratory Ruling. AR 838-53. Northern argued, among other things, that the Petition commenced a contested case, and that several procedural errors occurred in the docket. NorthWestern petitioned for reconsideration but opposed rehearing.

The PUC held a hearing on Northern’s petition for rehearing and on NorthWestern’s petition for reconsideration March 14, 2017. During the hearing, Commission Staff’s attorney admitted that the Petition resulted in a contested case proceeding. (Hearing Transcript for 3-14-17 Hearing (“3-14-17 HT”) at p.27). The PUC nevertheless denied Northern’s Petition for Rehearing. AR 1127-28. The PUC also denied NorthWestern’s petition for reconsideration. AR 1125-26. The PUC provided no explanation or analysis for their denial of both Northern and NorthWestern’s post-hearing motions. Northern now appeals to this Court because the

procedural errors affect the entire Docket NG 16-014 and require reversal of the Declaratory Ruling.

ARGUMENT

I. The Declaratory Ruling Must Be Reversed for Failure to Enter Findings of Fact and Conclusions of Law Which Prevent this Court from Conducting a Proper Appellate Review of the Declaratory Ruling.

The PUC issued the Declaratory Ruling pursuant to SDCL 1-26-16, ARSD 20:10:01:34 and 20:10:01:35. SDCL 1-26-30⁶ of the Administrative Procedures Act provides this Court jurisdiction to review the Declaratory Ruling. *See In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 SD 21, ¶ 13, 877 N.W.2d 340, 346. South Dakota's Administrative Procedures Act also defines the standard of review for this Court:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or

⁶ SDCL 1-26-30 states: "A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

SDCL 1-26-36. Agency factual findings are reviewed under the clearly erroneous standard while questions of law are reviewed *de novo*. *Sauder v. Parkview Care Center*, 2007 SD 103, ¶ 11, 740 N.W.2d 878, 882. Without findings of fact and conclusions of law, this Court cannot fulfill its statutory obligation to properly review the agency decision. *See Dep't of Public Safety v. Eastman*, 273 N.W.2d 159, 161 (S.D. 1978) (stating that a court cannot review an agency decision without findings of fact and conclusions of law).

Here, the PUC failed to enter any separately stated findings of fact and conclusions of law when adopting the Declaratory Ruling. In the Petition, Commission Staff posed three questions to the Commission. AR 11-13. In the Declaratory Ruling, the PUC answered each of these three questions as follows:

It is therefore

ORDERED, that the Commission has jurisdiction over utilities providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern. It is further

ORDERED, that NorthWestern is a public utility as defined in SDCL Chapter 49 with respect to these farm tap customers. It is further

ORDERED, that farm taps in whole or in part are not subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B.

AR 829. The Declaratory Ruling never explains **how** the PUC reached each of these conclusions. Nor does the Declaratory Ruling indicate what **“facts”** were determined to support

each of the conclusions, or how these “facts” support the PUC’s conclusions. Without this analysis, this Court has nothing to review.

Indeed, the PUC’s failure to prepare separately stated findings of fact and conclusions of law effectively denies the parties their statutory right to appeal Docket NG 16-014 pursuant to SDCL 1-26-30, *et seq.* The PUC states orally and in its orders that the parties to Docket NG16-014 have the right to appeal. Although they acknowledge the appeal right, the PUC eviscerates that right by making no findings of fact or conclusions of law. The Court cannot review what it does not have. *See Wiswell v. Wiswell*, 2010 SD 32, ¶ 6, 781 N.W.2d 479, 481 (stating that findings of fact and conclusions of law are necessary so the appellate court can review the decision). Effectively preventing a party from exercising a statutory right is an error of law.

The PUC’s answer to the third question illustrates the defective nature of the Declaratory Ruling.⁷ In answering the third question, the PUC held “that farm taps in whole or in part are not subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B.” AR 829. The only rationale for that conclusion is the statement in the Declaratory Ruling that “Northern is a federally regulated interstate pipeline and is not subject to state jurisdiction for the purpose of pipeline safety.” Although this is a correct statement regarding **Northern and its facilities**, it ignores that there are farm tap facilities downstream of Northern’s facilities, such as the fuel line and odorization equipment. Furthermore, the question posed in the Petition is not limited to Northern’s facilities but instead inquires whether the PUC has safety jurisdiction “in

⁷ The PUC’s failure to enter findings of fact and conclusions of law affect the entire Declaratory Ruling; not just the PUC’s answer to question three in the Declaratory Ruling. The PUC’s answer to question three simply illustrates the inherently factual analysis impacting the entire Declaratory Ruling.

whole *or in part*” over farm taps.⁸ AR 829. Thus, when ruling on the third question, the Declaratory Ruling concluded that there is no state pipeline safety jurisdiction over farm tap facilities downstream from Northern’s facilities. The Declaratory Ruling remains silent, however, regarding why the PUC (the State) lacks pipeline safety jurisdiction in whole or in part over those the intrastate facilities downstream from Northern’s facilities.

Logically, the PUC cannot reach its conclusion about downstream facilities without making factual determinations. The PUC has authority to regulate pipelines pursuant to SDCL Chapter 49-34B. SDCL 49-34B-4 states the PUC “may . . . establish safety standards for . . . gas pipeline facilities.” In turn, gas pipeline facilities are statutorily defined 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 within this state purchasing gas for its own consumption, and any equipment, facility, or building used in the transportation of gas or in the treatment of gas during the course of transportation.

SDCL 49-41B-1(5). Thus, in reaching its legal conclusion that it lacked safety jurisdiction over the downstream facilities, the PUC apparently concluded that the downstream facilities do not meet the statutory definition of a gas pipeline facility.⁹ The Declaratory Ruling never explains how the PUC reached that determination, or what facts support this conclusion. Why are the downstream facilities not considered an existing pipeline or pipeline facility transporting gas from Northern’s interstate transmission line to the direct sales customer (a/k/a the farm tap customer)? Why are the downstream facilities not considered equipment or facilities used in the transportation of gas? What does the PUC mean when it refers to the term “farm tap?” Without

⁸ In footnote 1 of its memorandum attached to the Petition, Commission Staff broadly defines “farm tap” as a “pipeline that branches from a transmission or gathering line to deliver gas to a farmer or other landowner.” AR 14.

⁹ Although no supporting evidence was admitted, the allegations by the Commission Staff in their memorandum attached to the Petition describe the real safety concerns associated with the farm tap facilities downstream from Northern’s facilities. AR 15-16.

findings of fact and conclusions of law, this Court cannot know how the PUC decided these questions. In turn, this Court cannot properly review the Declaratory Ruling, and remand must occur.

Similarly, the arguments asserted by NorthWestern in Docket NG 16-014 confirm the inherently factual nature of the PUC's declaratory ruling. In the Declaratory Ruling, the PUC ruled that "NorthWestern is a public utility as defined in SDCL Chapter 49 with respect to these farm tap customers." AR 829.

In its arguments regarding rehearing and reconsideration, NorthWestern argues that various "facts" establish it is **not** a utility regarding farm tap customers:

- Farm tap components are only owned by Northern or the farm tap customer. AR 1031-32.
- Farm tap customers own all facilities downstream from the farm-tap meter. AR 1032.
- Farm tap facilities are outside the scope of the *intended* purpose of South Dakota's pipeline safety inspection program. AR 1031.
- "Gathering," "transmission" and "distribution" are well known terms of art in the utility and energy industries. NorthWestern then implies these terms of art support their position that Customer-Owned Facilities¹⁰ are not involved in the transportation of gas. AR 1032.
- The movement of gas within a customer-owned farm tap facility does not involve a gathering line, a transmission line, or a distribution line. AR 1032-33.
- The right to receive farm tap service only arises pursuant to a private easement contract. AR 987.

By arguing these factual issues, NorthWestern's arguments confirm that the PUC must have found at least some facts when issuing the Declaratory Ruling. Without written findings of fact,

¹⁰ According to NorthWestern, "Customer-Owned Facilities" are all the facilities downstream from Northern's facilities.

however, this Court cannot properly review those decisions. As a result, the Declaratory Ruling should be reversed and remanded to the PUC.

II. In Issuing the Declaratory Ruling, the PUC Erred Because It Necessarily Found Facts Without Admitting Any Evidence to Support Those Factual Determinations.

As described above, the PUC must have made certain factual determinations when issuing the Declaratory Ruling. This Court cannot properly review those factual findings, however, because the PUC never admitted any evidence.

On appeal, this Court reviews the PUC's factual findings based upon the clearly erroneous standard. *Sauder*, at ¶ 11, 740 N.W.2d at 882. The clearly erroneous standard of review for agency factual findings inquires “whether there is substantial evidence” to support the findings. *Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (S.D. 1996). Without evidence to support its findings, an agency decision is arbitrary and capricious. *See In re Jarman*, 2015 SD 8, ¶ 19, 860 N.W.2d 1, 9 (“An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.”).

In this case, the PUC did not hold an evidentiary hearing, and as a result, it never ruled on or admitted any “evidence.” Instead, the respective parties all submitted briefs (including attachments), and the PUC held an oral argument on December 14, 2017. Indeed, the Notice of Hearing expressly states that the hearing held on December 14, 2017, will be an “oral argument.” AR 64. Arguments and briefs of counsel are not, however, considered “evidence.” *See In re Mehrer*, 252 N.W.2d 22, 23 (S.D. 1977) (reversing decision of Circuit Court revoking driver's license in civil proceeding because the only submissions to the Court were briefs and there was no testimony or evidence to support the decision); *cf. Ward v. Lange*, 1996 SD 113, ¶ 28, 553 N.W.2d 246, 253 (stating that an attorney cannot testify regarding a contested matter and

continue to represent that client in that matter). Thus, there is no “evidence” actually admitted into the administrative record. Without any admitted evidence, the factual findings cannot be supported by substantial evidence, and the Declaratory Ruling must be remanded.

III. Failure to Treat the Petition for Declaratory Ruling as a Contested Case Proceeding Created Several Reversible Procedural Errors.

The Petition filed by Commission Staff commenced a contested case proceeding. Under the Administrative Procedures Act, an action for a declaratory ruling is a contested case proceeding. Specifically, SDCL 1-26-1(2) defines a contested case:

"Contested case," a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in § 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents.

Notably, SDCL 1-26-1(2)'s broad definition of a contested case expressly excludes any “proceeding relating to rule making.” In turn, SDCL 1-26-1(8)(b) expressly states that a declaratory ruling is not a “rule” adopted through formal rule making process. By excluding “rule making” but not “declaratory relief” from the definition of contested case, SDCL 1-26-1(2) confirms that declaratory judgment proceedings, including this docket, are contested case proceedings.

Indeed, the language of the Declaratory Ruling itself confirms Docket NG 16-014 is a contested case proceeding. In the portion of the Declaratory Ruling providing notice of entry and advising the parties of their appeal rights, the PUC cites, among other things, SDCL 1-26-32 addressing the procedure for a stay of the Declaratory Ruling. AR 829. By its plain language, this statute only applies to stays pending appeals from contested case proceedings. *See* SDCL 1-26-32 (“Any agency decision in a contested case is effective ten days after the date of receipt or

failure to accept delivery of the decision by the parties. . . .”). *See also Dale v. Young*, 2015 SD 96, ¶ 6, 873 N.W.2d 72, 74 (stating that statutes are interpreted based upon their plain language).

Moreover, the Commission Staff’s counsel tellingly conceded that their Petition commenced a contested case. Specifically, when questioned by the Commission at the hearing on March 14, 2017, counsel for Commission Staff admitted this matter was a contested case. (3-14-17 HT at p.27). Commission Staff conceded it was a contested case because the Declaratory Ruling required the Commission to determine factual issues. (*Id.* at pp.27-28). Commission Staff was correct.

Despite the fact that this matter was a contested case, the PUC never treated the matter as a contested case. This procedural error affected the entire proceeding. Specifically, because the PUC failed to treat this matter as a contested case:

A. The PUC Issued Improper Notice for the Hearing on the Petition

The notice of hearing on the Petition must contain specific information because the Petition commenced a contested case. SDCL 1-26-17 addresses the contents for a notice of hearing in a contested case proceeding. Among other things, that statute requires the notice to include “[a] statement that the hearing is an adversary proceeding” SDCL 1-26-17(6). The Notice of Hearing in this case did not contain this disclosure, which in turn affected the entire docket because it was not treated like a contested case.

B. Parties were Deprived the Right to Discovery and to Present Evidence.

Second, as a contested case proceeding, the parties were entitled to discovery and to present evidence at the contested case hearing before the issuance of the Declaratory Ruling. The Legislature has adopted specific statutes authorizing discovery and controlling the admission of evidence in contested case proceedings. *See, e.g.*, SDCL 1-26-19; 1-26-19.1; 1-26-19.2.

Moreover, the PUC has adopted administrative rules permitting discovery and governing the admission of evidence. *See, e.g.,* ARSD 20:10:01:01.02; 20:10:01:22.06; 20:10:01:22.07. Administrative rules in South Dakota are “binding and have the force of law.” *Duffy v. Mortenson*, 497 N.W.2d 437, 439 (S.D. 1993).

In this case, none of the parties were advised they had the ability to engage in discovery. More importantly, the PUC did not advise the parties they could present evidence or testimony at the hearing. Instead, the Notice of Hearing informs the parties they will be allowed to present “oral argument” at the hearing. AR 64. Consistent with that notice, the PUC proceeded to hear oral argument only, without taking any testimony or evidence. (*See generally* 12-14-16 HT and 1-17-17 HT.)

Moreover, as noted above, the administrative record does not indicate what, if any, evidence was actually admitted in this proceeding. Without some indication of what “evidence” was actually admitted, there is no way to determine whether the PUC properly applied the rules of evidence applicable to contested case proceedings. *See* SDCL 1-26-19. Moreover, without a clear record of what “evidence” was actually admitted into the administrative record, this Court could not perform its appellate responsibilities to determine whether there is substantial evidence to support the PUC’s factual determinations made in the Declaratory Ruling. *See Abild* 547 N.W.2d at 558 (stating that clearly erroneous standard of review for agency factual findings inquires “whether there is substantial evidence” to support the findings).

C. The Declaratory Ruling Violates the Statutory Requirement that the PUC Issue Separately Stated Findings of Fact and Conclusions of Law.

When ruling on a contested case proceeding, the PUC is statutorily required to enter findings of fact and conclusions of law. Specifically, SDCL 1-26-25 requires a written decision including separately stated findings of fact and conclusions of law:

A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. It may affirm, modify, or nullify action previously taken or may direct the taking of new action within the scope of the notice of hearing. *It shall include findings of fact and conclusions of law, separately stated.* Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . .

SDCL 1-26-25 (emphasis added). Written findings of fact and conclusions of law are required so that a court can properly review a PUC decision on appeal. *See Eastman*, 273 N.W.2d at 161. In turn, when the PUC fails to enter findings of fact and conclusions of law, the circuit court on appeal must remand the matter to the PUC for entry of findings of fact and conclusions of law. *Id.*

Here, the PUC entered the Declaratory Ruling January 24, 2017. As described above, the Declaratory Ruling does not, however, contain the required separately stated findings of fact or conclusions of law. As a result, this Court should reverse and remand to the PUC. *See Eastman*, 273 N.W.2d at 161.

In short, the PUC engaged in a fundamental procedural mistake by failing to treat Docket NG 16-014 as a contested case proceeding. This error affected all the procedural aspects of the docket, including the notice, discovery, presentation of evidence, and written decision. Because the Declaratory Ruling is procedurally defective, this Court should reverse the Declaratory Ruling, and remand for a properly noticed and held contested case hearing on the Petition.

IV. The PUC Erred in Denying Rehearing, Which Provided It an Opportunity to Remedy the Procedural Defects

Northern identified the foregoing procedural errors to the PUC, both in writing and orally, and it sought rehearing of the Declaratory Ruling. The PUC denied the Petition. AR 1127-28. The Rehearing Order never explained why the procedural defects do not require rehearing. *Id.* The PUC abused its discretion in denying rehearing because the procedural

defects in Docket NG 16-014 were an error of law. *See Corcoran v. McCarthy*, 2010 SD 7, ¶ 13, 778 N.W.2d 141, 147 (stating that a mistake of law is an abuse of discretion). Unlike the PUC, this Court should remedy the procedural defects and remand for a properly held hearing. *See Sioux Falls Shopping News, Inc. v. Dep't of Revenue & Regulation*, 2008 SD 34, ¶ 6, 749 N.W.2d 522, 523 (stating that agency decisions on issues of law are fully reviewable on appeal).

CONCLUSION

Based on the foregoing, Northern requests that the Court reverse the Declaratory Ruling and remand for a proper contested case proceeding.

REQUEST FOR ORAL ARGUMENT

Northern respectfully requests oral argument, which has already been scheduled for September 18, 2017.

Dated this 2nd day of May, 2017.

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CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of the law firm of Boyce Law Firm, LLP, attorneys for Northern Natural Gas Company and that on the 2nd day of May, 2017 a

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