

**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

NG16-014

**NORTHERN NATURAL GAS
COMPANY'S ANSWER TO
NORTHWESTERN ENERGY'S
PETITION FOR RECONSIDERATION
OF DECLARATORY RULING**

The South Dakota Public Utilities Commission ("PUC") issued its Declaratory Ruling Regarding Farm Taps dated January 24, 2017 ("Declaratory Ruling"). NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") requests the PUC reconsider the Declaratory Ruling. Rather than addressing the procedural defects affecting the Declaratory Ruling, NorthWestern simply restates its previously asserted arguments and asks the PUC to change the Declaratory Ruling without holding a proper hearing. Although it also seeks reconsideration of the Declaratory Ruling, Northern Natural Gas Company ("Northern") objects to NorthWestern's request for reconsideration without a rehearing because NorthWestern's proposal perpetuates the procedural mistakes made in this docket. Separately, and in addition, NorthWestern's mere reargument of its losing legal positions does not warrant reconsideration.

I. NorthWestern's Petition for Reconsideration Highlights the Procedural Defects in the Existing Docket, and the PUC Should Not Grant Reconsideration without Addressing these Procedural Problems.

NorthWestern seeks reconsideration of two rulings in the Declaratory Ruling, namely: (1) that the PUC has jurisdiction over utilities providing natural gas to farm tap users; and (2) NorthWestern is a public utility with respect to these farm taps. (NorthWestern Energy's

Petition for Reconsideration of Declaratory Ruling (“NorthWestern’s Petition”) at p.1). NorthWestern argues that these rulings are erroneous because the alleged obligation to serve farm tap customers arises from various contractual relationships. (*Id.*). Based upon these contractual relationships, NorthWestern argues that the PUC erred in the Declaratory Ruling.

NorthWestern’s arguments for reconsideration confirm the inherently factual nature of the Declaratory Ruling. For instance, in arguing the PUC erred, NorthWestern relies on the following “facts” as if they have been established:

- All parties’ obligations regarding the farm taps are governed by private contractual relationships. (NorthWestern’s Petition at p.9)
- Farm tap end users entered into an easement contract with Northern. (NorthWestern’s Petition at p.1).
- The easement obligates Northern to provide farm tap service. (NorthWestern’s Petition at p.1).
- Northern entered into contracts in which various entities, including NorthWestern, agreed to provide farm tap services on behalf of Northern. (NorthWestern’s Petition at p.1).
- NorthWestern never held itself out to the public as provider of farm tap services. (NorthWestern’s Petition at p.1).
- NorthWestern is serving Northern, not the public, when NorthWestern provides farm tap services. (NorthWestern’s Petition at pp.6-7).
- NorthWestern may discriminate when providing farm tap services. (NorthWestern’s Petition at pp.7-8).

- NorthWestern does not own any of the farm tap facilities. (NorthWestern's Petition at p.12).
- NorthWestern does not have access to the farm tap landowner's property so NorthWestern could not shut off a valve stopping the delivery of gas. (NorthWestern's Petition at p.12). Although not directly argued, NorthWestern's insinuates it could not terminate farm tap service for non-payment for instance.¹

These "factual issues" illuminate the need for a proper, contested case hearing in which the PUC admits evidence and finds the relevant facts. Without a properly noticed hearing, there would be no "evidence" to support the PUC's findings on these factual issues, and the Declaratory Ruling would be reversed on appeal. *See Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (S.D. 1996) (under the clearly erroneous standard of review for agency factual findings the proper question is "whether there is substantial evidence" to support the findings).

Implicitly acknowledging that the PUC must receive evidence to support these "facts." NorthWestern repeatedly refers to the easement document and the 1987 Agreement. These documents have not, however, been properly admitted into evidence at a proper hearing. Moreover, there is no testimony admitted regarding whether these documents fully reflect the various parties' relationships.

NorthWestern's request that the PUC find facts without properly admitted evidence extends past the language of the easement and the 1987 Agreement. Instead, NorthWestern relies on statements made at oral argument to establish a "record:"

Numerous statements *on the record* by all of the parties to this docket establish that the right to farm tap services arises pursuant to a private easement contract

¹ On rehearing, it is expected that the evidence will show NorthWestern can and has accessed the three-way valve on farm taps, and, thus, it can terminate service for non-payment.

between landowner and Northern, and [NorthWestern] performs services on behalf of Northern pursuant to another private contract, the 1987 Agreement.

(NorthWestern's Petition at p.5).

As an initial matter, Northern disagrees that the 1987 Agreement alone defines NorthWestern's and its predecessors' obligations to provide farm tap services. NorthWestern's obligations may also be affected by, among other things, UtiliCorp Inc.'s purchase of Peoples Natural Gas Company on December 20, 1985 ("the 1985 Agreement"), which included the assumption of the obligation to serve the farm taps. (December 14, 2016, Hearing Transcript at pp.35-36, 38-39). Upon rehearing, Northern also expects that the evidence will show that NorthWestern has filed a tariff approved by the PUC governing NorthWestern's selling of gas and provision of specific services to farm tap customers. More fundamentally though, NorthWestern cannot rely on these disputed, oral statements as "evidence" to create a record supporting factual findings because attorneys of record cannot provide testimony in controverted matters. *See Andrushchenko v. Silchuk*, 2008 SD 8, ¶ 15, 744 N.W.2d 850, 856.

Ultimately, the PUC erred by issuing the Declaratory Ruling without holding a proper, contested case hearing. NorthWestern's reliance on "factual determinations" for its argument on rehearing illustrates why the PUC needs to hold a proper contested case proceeding, admit evidence, and issue proper findings of fact and conclusions of law.

II. NorthWestern's Reassertion of Its Losing Argument Does Not Establish a Grounds for Reconsideration Under the Applicable Regulations.

The grounds for reconsideration are articulated in ARSD 20:10:01:30.01, which states:

An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or

reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding.

Although NorthWestern cites ARSD 20:10:01:30.01, it never explains how its Petition for Reconsideration complies with the applicable rule. Instead, restating its previously stated legal arguments, NorthWestern merely states “there is sufficient reason to reconsider” the Declaratory Ruling. (NorthWestern’s Petition at p.3).

NorthWestern’s petition appears to argue the PUC erred in the Declaratory Ruling. Under ARSD 20:10:01:30.01, when reconsideration is based upon a claim of error, the petition for reconsideration “shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error.” Here, NorthWestern’s Petition cannot satisfy this requirement because the PUC never issued findings of fact or conclusions of law. Thus, there is no way to specify which findings of fact or conclusions of law are erroneous. Granting reconsideration based upon NorthWestern’s arguments without holding a proper, contested case hearing will compound the procedural errors already committed.

III. NorthWestern’s Request for Reconsideration Should be Denied Because the Anticipated Evidence at a Proper, Contested Case Hearing Will Show NorthWestern is a Public Utility in South Dakota Regarding the Farm Tap Services.

Substantively, NorthWestern argues that reconsideration should be granted because: (1) the PUC does not have jurisdiction for contractual matters; and (2) NorthWestern is not a public utility with respect to farm tap services. These are essentially the same legal arguments asserted by NorthWestern in its briefing filed with the PUC before the Declaratory Ruling. Rather than restating its legal arguments here, Northern refers the PUC to its responsive briefs that were filed before the Declaratory Ruling addressing these issues.

CONCLUSION

For the reasons stated above, the PUC should grant Northern's Petition for Rehearing and deny NorthWestern's Petition to the extent it seeks reconsideration without holding a contested case hearing.

Dated: March 9, 2017.

Two handwritten signatures in black ink are positioned above a horizontal line. The signature on the left is cursive and appears to be 'T. Welk'. The signature on the right is also cursive and appears to be 'J. Sutton'.

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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 9th day of March, 2017 a true and correct copy of Northern Natural Gas Company's Answer to NorthWestern Energy's Petition for Reconsideration of Declaratory Ruling and this Certificate of Service was served via email to the following addresses listed:

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