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** **Petition for Reconsideration of** **Declaratory Ruling**

NorthWestern Corporation d/b/a NorthWestern Energy (*NorthWestern Energy*) requests the South Dakota Public Utilities Commission (the *Commission*) to reconsider its declaratory rulings in this proceeding that ruled that (1) the Commission has jurisdiction over utilities providing natural gas to farm tap end users taking natural gas from the transmission line owned and operated by Northern Natural Gas Company (*Northern*), and (2) NorthWestern Energy is a public utility with respect to the farm tap services.

These two rulings are in error because the right to farm tap services arises pursuant to contract, not from any public utility obligations. The farm tap end users (or their preceding land owners) entered into an easement contract with Northern that obligates Northern to provide farm tap service. In turn, Northern has contracted with various parties over the years, including NorthWestern Energy beginning in 2011, to perform certain of the farm tap services for and on behalf of Northern. There is no public duty or obligation to provide farm tap services; the obligation is entirely contractual. NorthWestern Energy did not hold itself out to the public as a provider of farm tap services. In addition, the farm tap services are not available to the general public without discrimination. Instead, the farm tap services are available only to those landowners specified by Northern whose land is subject to a farm tap easement with Northern and who has a farm tap from Northern. The mere fact that NorthWestern Energy is a

public utility in this state with respect to other services does not change the private contract nature of the farm tap services. NorthWestern Energy is not a public utility with respect to the Northern farm tap services in question. Finally, as stated repeatedly in this proceeding by the Commission, Commission Staff and the parties, the Commission does not have jurisdiction over private contractual relationships.

Accordingly, NorthWestern Energy requests the Commission to reconsider its declaratory rulings in this proceeding and determine that (1) the Commission does not have jurisdiction over the farm tap services that arise pursuant to contract, and (2) NorthWestern Energy is not a public utility as defined by SDCL Chapter 49 with respect to the farm tap services.

Procedural Background

On November 14, 2016, Commission Staff filed a petition for declaratory ruling, which opened this docket (NG16-014). On November 21, 2016, NorthWestern Energy petitioned to intervene in this Docket, and on November 23, 2016, the Commission granted NorthWestern Energy's petition for intervention. Following a November 30, 2016, notice of hearing, the Commission held a hearing on Staff's petition on December 14, 2016, during which each party had the opportunity to provide oral argument regarding Staff's petition. Pursuant to a December 30, 2016, order, the Commission set January 17, 2017, as the date for a hearing on any final motions and a decision on Staff's petition. Following that January 17, 2017, hearing, the Commission issued its declaratory ruling (the *Declaratory Ruling*) on January 24, 2017.

Standard for Reconsideration

The Commission's administrative rules provide the standard for reconsideration that may be requested by any party to the proceeding. Pursuant to ARSD 20:10:01:29:

> A party to a proceeding before the commission may apply for a rehearing or reconsideration as to any matter determined by the commission and specified in the application for the rehearing or reconsideration. The commission may grant reconsideration or rehearing on its own motion or pursuant to a written petition if there appears to be sufficient reason for rehearing or reconsideration.

ARSD 20:10:01:30.01 sets forth the requirements of an application for reconsideration:

> 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.

NorthWestern Energy submits this petition for reconsideration pursuant to these two administrative rules and requests that the Commission reconsider its declaratory rulings that the Commission has jurisdiction over the farm tap services and that NorthWestern Energy is a public utility with respect to the farm tap services. For the reasons stated below, NorthWestern Energy submits there is sufficient reason to reconsider those declaratory rulings.

The Commission does not have jurisdiction over contractual matters.

Throughout this docket, the Commission and Commission Staff have indicated that the Commission does not have jurisdiction over contractual matters. No party to this proceeding has disagreed with that conclusion. At the December 14, 2016, oral argument in this

proceeding, the Commission examined the language of the easements and the 1987 Agreement.[1] The Commission understood that these documents are the contracts which give rise to the right to receive farm tap services. Yet, despite numerous statements on the record that the Commission does not have jurisdiction over contractual matters and nearly ten transcript pages to dissect the language of the easements,[2] the Declaratory Ruling asserted jurisdiction over these contractual rights, without any basis for such determination.[3]

South Dakota courts have not considered this issue, but other courts examining services that arise pursuant to a contract have concluded that such services are not subject to regulatory jurisdiction.

A Utah court examined this issue in *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970). Medic-Call, Inc. provided a beeper/paging service to approximately 100 licensed physicians who subscribed to the service. The Utah Public Service Commission (*UPSC*) sought to regulate the service as a telephone corporation. *Medic-Call, Inc.*, 24 Utah 2d at 274, 470 P.2d at 258-59. In concluding that the UPSC did not have jurisdiction over the paging service, the *Medic-Call* court stated,

> the state may not, by mere legislative fiat or edict, or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier …. *[W]here the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission*."

Medic-Call, Inc., 24 Utah 2d at 275-76, 470 P.2d at 259-60 (emphasis added).

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[1] *See* Agreement, dated April 1, 1987 (the *1987 Agreement*), between Northern and Peoples Natural Gas Company, included as Attachment "A" to the Initial Brief of Northern Natural Gas Company.
[2] *See* Transcript of Proceedings, December 14, 2016 (*Hearing Transcript*), pp. 44-53, which was included as Exhibit A to Northern's Petition for Rehearing.
[3] *See* Declaratory Ruling. See also, Transcript of Proceedings, January 17, 2017 (*Ruling Transcript*), pp. 8-10 (discussion lasting less than one and a half pages), which was included as Exhibit B to Northern's Petition for Rehearing.

The Iowa Supreme Court reached a similar conclusion in *City of Des Moines vs. City of West Des Moines*, 239 Iowa 1, 30 N.W. 2d 500 (1948). In that case, the court concluded that a private business contract between the two cities was not subject to legislative rate regulation. *Id.* at 9, 30 N.W.2d at 505. The two cities had entered into an agreement pursuant to which Des Moines would provide access to its sanitary sewer system to West Des Moines in perpetuity at an agreed upon rate based on the population of West Des Moines. In that case, Des Moines sought to invalidate that agreement as being void because it fixed rates for public utility services in perpetuity, contrary to state law.

The *City of Des Moines* court concluded that the private business contract did not involve public utility services. The city of Des Moines "owed no duty to" West Des Moines and "could have refused to render it any service." *City of Des Moines*, 239 Iowa at 9, 30 N.W.2d at 505. The *City of Des Moines* court concluded, "the agreement is a business contract, in no way subject to legislative rate regulation. In that respect it is private. Not public." *Id*.

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 between the landowner and Northern, and NorthWestern Energy performs services on behalf of Northern pursuant to another private contract, the 1987 Agreement. Consistent with the *Medi-Call* and *City of Des Moines* decisions, the Commission indicated several times in this proceeding that it believed, unfortunately, that the courts would have to resolve the farm tap issues, despite the Commission's desire to be able to resolve the issues without the need for the farm tap end users to spend their hard-earned money. Yet, the Declaratory Ruling concluded that the Commission had jurisdiction, without providing any basis for that conclusion.

There is no statutory obligation to provide farm tap services to an indefinite public. Farm tap services are available only to those landowners with a farm tap easement and a farm

tap. The right to farm tap services arises by contract, and despite the Commission's desire to preserve farm tap services, the Commission does not have jurisdiction to convert a private contract to a public utility matter. The Commission should reconsider the Declaratory Ruling and conclude that it does not have jurisdiction over farm tap services.

NorthWestern Energy is not a "public utility" with respect to the farm tap services.

In the Declaratory Ruling, the Commission ruled that NorthWestern Energy is a public utility as defined by SDCL Chapter 49 with respect to the farm tap services. The relevant section defines a public utility as, "any person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part, in this state." SDCL § 49-34A-1(12).

There is no question that NorthWestern Energy is a public utility in the State of South Dakota with respect to some 46,000 customers. However, the question in this docket is not whether NorthWestern Energy is a public utility. The question is whether NorthWestern Energy is a public utility ***with respect to the farm tap services***.

NorthWestern Energy is not a public utility with respect to the farm tap services because (1) by contract, NorthWestern Energy is serving Northern, *not the public* in whole or in part, (2) the farm tap end users are *not the public* in whole or in part, (3) service pursuant to a private contract is not public utility service, and (4) NorthWestern Energy does not own – and thus does not operate, maintain or control – any of the equipment or facilities used to deliver natural gas to the farm tap end users.

1. NorthWestern Energy is serving Northern, not the public.

The statutory definition of "public utility" requires "service to or for the public in whole or in part, in this state." SDCL § 49-34A-1(12). NorthWestern Energy is not serving any part of

the public pursuant to its private contractual relationship with Northern. NorthWestern Energy is serving Northern.

NorthWestern Energy has a contractual obligation to serve Northern. NorthWestern Energy's obligation arose in 2011 when NorthWestern Energy took a partial assignment of the 1987 Agreement. Pursuant to that partial assignment, NorthWestern Energy agreed

> to perform certain services ***for Northern*** in connection with the natural gas sales to said existing and future customers, and … to provide the services ***on behalf of Northern***.[4]

Prior to entering into that contractual relationship with Northern to "perform certain services for Northern," NorthWestern Energy did not hold itself out to the public as a provider of farm tap services. It is only due to the private contractual relationship between NorthWestern Energy and Northern that NorthWestern Energy began assisting Northern with respect to the services Northern is obligated to provide the farm tap end users. Accordingly, NorthWestern Energy is not a public utility within the meaning of the statute because NorthWestern Energy is providing service to Northern, not the public.

2. Farm tap service is not public utility service because the farm tap service provider may discriminate with respect to such service.

Even if the Commission were to conclude that NorthWestern Energy is serving the farm tap end users, and not simply Northern, such service is not public utility service within the meaning of the statute. The rights of farm tap end users arise from their private contractual arrangement (the easement) with Northern and not because NorthWestern Energy held itself out to the public as being willing to provide farm tap service to the public.

[4] *See* 1987 Agreement at p. 1 (emphasis added).

SDCL Chapter 49 does not explain what it means to serve the public, and South Dakota courts have not addressed the issue. However, authorities outside of South Dakota have examined what it means to provide public utility service.

The public utility analysis "is controlled by the facts of a particular case" and "depends upon whether the operation has been held out as a public service, upon whether the service is in fact of a public character and whether it may be demanded on a basis of equality and without discrimination by all members of the public or obtained by permission only." *Northern Natural Gas Co. v. Roth Packing Co.*, 323 F.2d 922, 928-29 (8th Cir. 1963) (quoting *Johnson City v. Milligan Utility District*, 276 S.W.2d 748, 753 (Tenn. App. 1954). Courts have looked to whether or not the service is held out "to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals." *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970).

The service provided to farm tap end users is highly discriminatory and is available only to particular individuals for consumption specified in the easement. Such service may be obtained only by owners of land subject to an easement granted to Northern. Even with such easement, such service may be obtained only by permission from Northern – Northern must provide the farm tap. There is no equality to the public regarding farm tap service. A land owner adjacent to a farm tap end user has no right to the farm tap service, unless that owner's land is subject to a farm tap easement. Farm tap service quite simply is not available to the entire public near Northern's transmission line like public utility service is in areas subject to a natural gas franchise. Farm tap service is available only to those particular land owners whose land is subject to a farm tap easement and who have been provided a farm tap by Northern to access natural gas.

Moreover, the provider of farm tap service may discriminate against anyone whose land is not subject to a farm tap easement or anyone who wants to consume gas for purposes beyond the purposes afforded by the easement. Accordingly, providing service to a farm tap end user cannot be deemed to be providing public utility service within the meaning of SDCL 49-34A-1(12), and NorthWestern Energy cannot be a public utility with respect to the farm tap customers.

3. Providing services pursuant to a private contract is not providing public utility services.

The farm tap end users have a right to service from Northern pursuant to a private contractual arrangement (an easement), and Northern has contracted with a third party to perform that service "for" and "on behalf of" Northern pursuant to another private contractual arrangement (the 1987 Agreement). Courts that have examined utility services provided pursuant to private contractual arrangements have concluded that such services are not public utility services.

A 1963 case involving Northern, which was appealed to the Eighth Circuit Court of Appeals, is instructive on this issue. *Northern Natural Gas Co. v. Roth Packing Co.*, 323 F.2d 922 (8th Cir. 1963). The *Northern Natural Gas* case examined the validity of an indemnity provision in a private contract between Northern and Roth Packing Company. The Nebraska trial court concluded that the indemnity provision was invalid as a matter of public policy because it related to the performance of a public duty; Northern was a natural gas public utility pursuant to a natural gas franchise for the nearby city of Glenwood.

The court in the *Northern Natural Gas* case overturned the trial court, stating, "While Northern served the city of Glenwood as a public utility, its public utility obligation did not exist with respect to Roth's plant beyond the city limits" because "Northern served the Roth plant

only by virtue of private contract." *Id.* at 928. The court continued, "a public utility can enter into [a] private contract in fields not covered by its utility obligations." In concluding that no public duty was involved with respect to the Roth plant, the *Northern Natural Gas* court stated, "The fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by it a public service." *Id.* at 929. Clearly, based on the results of the *Northern Natural Gas* case and the arguments Northern raised in that case, Northern understands that not every service performed by a public utility is a public utility service, especially when private contracts are involved like the farm tap easements.

The *Medic-Call* case from Utah also is instructive concerning the nature of private contracts. Only licensed physicians were able to subscribe to the Medic-Call, Inc. beeper/paging service; the service was not available to the general public. *Medic-Call, Inc.*, 24 Utah 2d at 274, 470 P.2d at 258-59. In concluding that the Utah Public Service Commission did not have jurisdiction over the paging service as a telephone corporation, the *Medic-Call* court stated, "the state may not, by mere legislative fiat or edict, or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier." *Medic-Call, Inc.*, 24 Utah 2d at 275-76, 470 P.2d at 259-60.

The Iowa Supreme Court reached a similar conclusion concerning sanitary sewer services provided pursuant to a private contract in *City of Des Moines vs. City of West Des Moines*, 239 Iowa 1, 30 N.W. 2d 500 (1948). The cities had entered into an agreement pursuant to which Des Moines would provide access to its sanitary sewer system to West Des Moines in perpetuity at an agreed upon rate based on the population of West Des Moines. In the *City of Des Moines* case, Des Moines sought to invalidate that agreement as being void because it fixed rates for public utility services in perpetuity, contrary to state law.

The *City of Des Moines* court concluded that the private business contract did not involve the provision of public utility services. The court stated that the disposal of sewage can be a public utility service, and that Des Moines provided public utility sewage disposal services to the citizens of Des Moines. However, the court indicated that a "public utility can practice no discrimination" concerning the users who must depend on it for service and to whom it must render service upon request. With respect to West Des Moines, the city of Des Moines "owed no duty to" West Des Moines and "could have refused to render it any service" *City of Des Moines*, 239 Iowa at 9, 30 N.W.2d at 505. Thus, the *City of Des Moines* court concluded, "the agreement is a business contract, in no way subject to legislative rate regulation. In that respect it is private. Not public." *Id*.

Each of these cases is directly applicable to the contractual relationships governing service to the farm tap end users. Like the *Northern Natural Gas* case, NorthWestern Energy is party to a private contract with Northern to perform services for and on behalf of Northern to the farm tap end users, whose rights to farm tap service arise only from a private contractual relationship (an easement). As *Northern Natural Gas* instructs, the fact that NorthWestern Energy is a public utility with respect to some services does not make it a public utility with respect to every service performed by it, and NorthWestern Energy may enter into private contract in an area not covered by its public utility franchises without rendering such private contract public utility services. The farm tap services are not public utility services.

Like the paging service in *Medi-Call*, which was available only to subscribers and not to the general public, farm tap services are not available to the general public, only to those landowners whose land is subject to a Northern farm tap easement and who have a Northern farm tap. When a service is available only pursuant to a private contract and not to the general public, that service is not subject to public regulation.

Finally, like the city of Des Moines owed no duty to the city of West Des Moines prior to entering into a contractual relationship, NorthWestern Energy did not owe any duty to the farm tap end users prior to 2011. NorthWestern Energy could have declined to perform services on behalf of Northern to the farm tap end users. Instead, NorthWestern Energy (in reliance on the Commission's order in Docket NG11-001) entered into a private business contract with Northern to provide farm tap services on behalf of Northern, but NorthWestern Energy had no duty to do so, absent that contractual relationship.

For these reasons, NorthWestern Energy is not a public utility with respect to the farm tap services because NorthWestern Energy is providing such services pursuant to a private business contract, and not to the public pursuant to any obligation or duty as a public utility.

4. NorthWestern Energy does not own any part of the farm tap facilities.

The record in this proceeding has established that NorthWestern Energy does not own any part of the farm tap facilities. Northern owns the farm tap facility from the transmission pipeline up to and through the farm tap meter outlet. The farm tap end user owns everything downstream from that point. NorthWestern Energy owns nothing.

A "public utility" is "any person operating, maintaining, or controlling in this state equipment or facilities" to provide gas service to the public. SDCL 49-34A-1(12). The Declaratory Ruling appears to be based upon the premise that NorthWestern Energy controls the farm tap facilities because it may shut off a valve owned by the farm tap end user in the event of non-payment. However, NorthWestern Energy does not own that valve, and the farm tap end user has the ultimate control over its property. There would be nothing NorthWestern Energy could do if the farm tap end user prevented access to its property. NorthWestern Energy has no control absent permission from the farm tap end user.

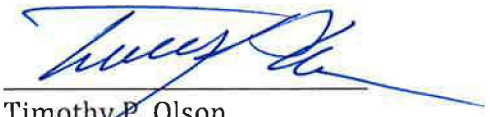
Thus, the limited control NorthWestern Energy is permitted pursuant to contract regarding farm tap facilities is quite different from the control NorthWestern Energy has over its owned public utility assets that serve its 46,000 public utility customers, and does not meet the statutory requirement.

CONCLUSION

Accordingly, NorthWestern Energy requests that the Commission reconsider its Declaratory Rulings and determine that the Commission does not have jurisdiction over farm tap services and that NorthWestern Energy is not a public utility with respect to farm tap services. Sufficient reason exists to reconsider the prior Declaratory Rulings because the right to farm tap services arises pursuant to private contractual relationships, not pursuant to any public duty or obligation.

Dated at Sioux Falls, South Dakota, February 23, 2017.

NORTHWESTERN CORPORATION,
d/b/a NORTHWESTERN ENERGY



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Certificate of Service

I certify that on February 23, 2017, a true and correct copy of *NorthWestern Energy's Petition for Reconsideration*, was served upon the service list on the following page.

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