

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

| | | |
|-------------------------------------|---|-------------------------|
| IN THE MATTER OF COMMISSION |) | INITIAL BRIEF OF |
| |) | NORTHERN NATURAL |
| |) | GAS COMPANY |
| STAFF’S PETITION FOR |) | |
| DECLARATORY RULING REGARDING |) | NG16-014 |
| FARM TAP CUSTOMERS |) | |
| |) | |
| |) | |
| |) | |

INITIAL BRIEF OF NORTHERN NATURAL GAS COMPANY

I. Introduction

Northern Natural Gas Company (“Northern”) is a “natural gas company” under the Natural Gas Act 15 USC § 717f *et seq* (1938). Northern is under the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”) and the Pipeline Hazardous Materials Safety Administration (“PHMSA”). Northern is not subject to the jurisdiction of the South Dakota Public Utility Commission (“SDPUC” or “Commission”) or any other state utility commission. The obligation to provide the retail gas utility service to farm tap customers, which is separate and distinct from Northern’s easement obligation to provide a delivery point (i.e., a “tap”), was definitively acquired by UtiliCorp United Inc. (“UtiliCorp”) when it purchased Peoples Natural Gas Company (“Peoples”) in 1985 from InterNorth Inc. (“InterNorth”). UtiliCorp expressly acquired all the rights, duties, liabilities and obligations associated with providing retail utility service to the farm tap customers along Northern’s pipeline system in South Dakota.

In this proceeding, the Commission’s effort, to determine if natural gas utility service should be continued to approximately 200 farm tap customers and if so, which utility should provide the service, should begin with UtiliCorp’s acquisition of Peoples. Once it is understood

and appreciated that the obligation to provide utility service to farm tap customers was expressly acquired by UtiliCorp in 1985, any allegation or inference that Northern has any such responsibility is easily dismissed. To the extent the Commission determines farm tap customers should continue to receive gas utility service, the 1985 acquisition means, as a matter of private agreement and statute (SDCL § 49-34A-2.1), the responsibility to provide the desired utility service is that of UtiliCorp (Peoples) or a successor to Peoples' South Dakota operations (e.g., Minnesota Energy Resources Corp. ("MERC") or NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern")).

In this brief, Northern will show the responsibility (i.e., "all duties, liabilities and obligation") to provide utility service to the farm taps was permanently transferred to NorthWestern's predecessors in 1985; explain that the 1987 Agreement, attached hereto as Attachment "A," between Northern and Peoples ("1987 Agreement") is irrelevant and reliance upon the 1987 Agreement is misplaced; and address the following three questions, specifically propounded by the SDPUC in its "Order and Notice of Hearing" in this docket November 30, 2016¹:

1. Does the Commission have jurisdiction over the utility providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern?
2. If so, which entity, North Western or Northern, if either, is a public utility as defined by SDCL Chapter 49 with respect to these farm tap customers?
3. Finally, are the farm taps in whole or in part subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?

¹ On November 9, 2016, staff of the SDPUC ("Staff") filed a "Petition for Declaratory Ruling" ("Petition"). Staff, as an attachment to the Petition, submitted a memorandum purporting to set forth the facts and circumstances giving rise to the Petition ("Staff Memorandum").

As demonstrated below, the SDPUC has jurisdiction over the gas utility service provided to South Dakota farm tap customers; NorthWestern, or one of its predecessors (i.e., MERC or Aquila, Inc.) is the relevant public utility as defined by SDCL § 49 with respect to the obligation to provide utility service to farm tap customers currently served by NorthWestern; the SDPUC has the authority, pursuant to SDCL § 49-34A, to order NorthWestern, as a public utility, to continue to serve the farm tap customers; Northern is not a public utility subject to the jurisdiction of the SDPUC; and Northern does not own, operate or maintain any natural gas facilities in the state of South Dakota subject to the pipeline safety jurisdiction of the Commission pursuant to SDCL § 49-34B.

II. Terminology

The Term “Farm Tap” has Different Meanings to Different People

As a preliminary matter, to understand the issues relevant to the Petition (and addressed herein), it is critical to understand clearly what is being referenced each time the term “farm tap” is used. The problem is “farm tap” is used as a generic term to refer to the natural gas service received by rural landowners that granted a pipeline easement to Northern in exchange for access to a tap in Northern’s interstate pipeline through which the natural gas utility service can be received. Alternatively, the term is used generically to refer to some or all of the pipeline facilities involved in the delivery of natural gas to the landowners, inclusive of interstate pipeline facilities, utility facilities and landowner facilities. Significant confusion occurs because the generic term “farm tap” is often used, without distinction. From an interstate pipeline perspective, a farm tap is the limited amount of equipment owned by the pipeline (see “Northern Facilities” below). Others colloquially use “farm tap” to generally refer to the utility service received by the easement grantor and both the Northern Facilities and the facilities downstream

of the Northern Facilities owned by the utility and/or the farm tap customer. Therefore, while considering the issues raised by the Petition, the following should be kept in mind relative to the term “farm tap” whether such term is used in reference to a particular facility, service or customer.

- **Northern Facilities** – Northern owns, operates and maintains the transmission pipeline, tap, riser, valves, meter, regulators and connections (“Northern Facilities”) to an aboveground 3-way valve downstream of the meter. Persons *other than Northern* own the 3-way valve, odorant tank and all facilities downstream. Attachment “B” is an illustration of the typical equipment at a farm tap setting, identifying the Northern Facilities.
- **Northern Service** – Northern transports natural gas pursuant to its FERC Gas Tariff nominated by a customer for receipt and delivery. Northern does not sell gas (except operational gas). Northern delivers gas only on Northern Facilities.
- **Northern’s Customer** – Northern’s customers are large industrial customers, or local distribution utilities and marketers that procure their own gas and are able to arrange for delivery of customer-procured gas to Northern transmission facilities and for receipt, after transmission, away from Northern Facilities.
- **Farm Tap Customer** – The farm tap customer is (i) an end user receiving gas utility service from NorthWestern that (ii) granted an easement to Northern in exchange for a right to tap the pipeline once constructed below grantor’s land.

III. Statement of the Case

Farm tap customers have been receiving natural gas utility service in South Dakota since the 1930s. Until NorthWestern declared it was discontinuing service to approximately 195 of its 200 farm tap customers, the obligation to provide utility service to the farm taps had never been seriously questioned. From the beginning, Northern has always provided the interstate pipeline service and the state regulated utility (i.e., Peoples or one of its successors or assignees) always provided the retail service. Now, despite being “wholly regulated by the SDPUC,” having a farm tap service in its tariff approved and overseen by the SDPUC, and being paid a regulated rate authorized by the SDPUC, NorthWestern wants to terminate service because of its asserted

safety and financial concerns. Staff Memorandum at 3-4. Instead of working through the economic issues with the SDPUC to reach an arrangement that makes sense for NorthWestern, the Commission *and* NorthWestern's farm tap customers, NorthWestern decides it is not worth it. NorthWestern asserts the 1987 Agreement, designed to document (for the first time) the long-followed separation of functions between distribution utility and interstate pipeline service, allows NorthWestern to abandon utility service regulated by the SDPUC. Although Northern believes it is in the public interest for the Commission to continue to ensure safe and reliable utility service to the farm taps, ultimately it is a matter for the SDPUC to decide. To continue utility service will require some tough decisions; however, continuation of utility service is well within the responsibility, jurisdiction and authority of the SDPUC. If the SDPUC concludes, as Staff intimates,² that the Commission already gave NorthWestern permission to discontinue service, for the reasons set forth herein, the SDPUC and NorthWestern ought to actively engage in a collaborative discussion to work out a reasonable plan that would fairly compensate NorthWestern and ensure farm tap customers continue to receive the gas utility service they desire. This is the only reasonable option that results in the utility service being provided by a proven and sophisticated public utility already subject to the Commission's jurisdiction.

History of Farm Tap Service in South Dakota

Prior to 1985 (and decades before the 1987 Agreement), on a continuous and uninterrupted basis, Peoples, as a public utility regulated by the SDPUC, provided farm tap service to approximately 200 farm tap customers receiving service off of Northern's interstate pipeline system in the state of South Dakota. Although the pipeline easement permitting the pipeline to be built across the landowners' property was granted to Northern, Peoples, as a separate affiliate of Northern, provided the natural gas utility service to the farm tap customers.

² Staff Memorandum at 4.

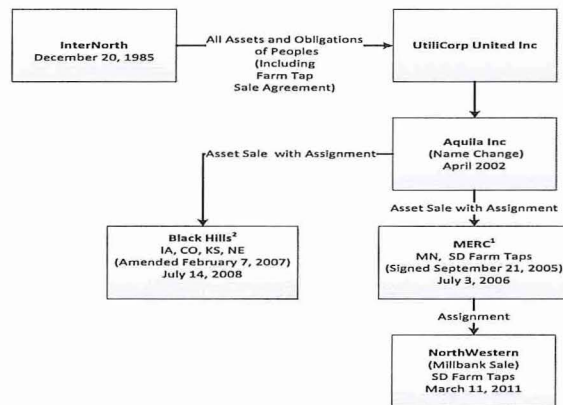
Organizationally, Peoples and Northern were different businesses, corporately structured so that the state-regulated utility business (Peoples) was conducted separate and distinct from the federally-regulated interstate business (Northern). Peoples was responsible for gas procurement, leak detection and repair, gas nominations, odorization, meter reading and billing. See Attachment “C” hereto, Affidavit of Keith L. Petersen.

In 1985, Northern’s owner, InterNorth, sold Peoples to UtiliCorp. UtiliCorp assumed all of the rights, duties and obligations related to the farm tap customers served by Peoples. Thereafter, as shown in Schematic Number 1, UtiliCorp changed its name to Aquila Inc. (“Aquila”) in 2002, and in 2006 Aquila sold the South Dakota utility operation to MERC.³ Finally in 2011, MERC assigned its obligation to serve the South Dakota farm tap customers to NorthWestern. The purchasers and assignees of UtiliCorp's gas utility business (not Northern) are responsible for providing the farm tap services expressly acquired by UtiliCorp in the 1985 acquisition.

Schematic Number 1 below illustrates the 1985 sale to UtiliCorp and the sequence of transactions involving farm taps occurring thereafter.

³ In the Matter of the Sale of Aquila, Inc.’s Minnesota Assets to Minnesota Energy Resources Corporation, Docket No. G-007, 011/M-05-1676, (Minn. P.U.C. June 1, 2006).

Schematic Number 1 Farm Tap Obligations



Footnotes:

1. WPS Resources Corp purchased Minnesota distribution assets and dropped into new subsidiary, Minnesota Energy Resources Corporation ("MERC")
2. Three way deal between Great Plains Energy, Black Hills and Aquila. Black Hills, Interallia, acquired assets of Aquila's gas utilities in CO, IA, NE and KS.

1985 Sale of All Farm Tap Service Obligations

In 1985, InterNorth sold all the assets of Peoples to UtiliCorp. Peoples assumed all of the rights, duties, liabilities and obligations in regard to farm taps along Northern's pipeline system. Specifically, the 1985 farm tap sale agreement expressly provided:

- (a) UtiliCorp shall be entitled to all the rights and shall assume all the duties, liabilities, and obligations of Peoples in regard to the farm taps served by Peoples existing as of Closing date along Northern's pipeline system;
- (b) With regard to installations, removal, maintenance, liability, odorization, meter reading, repair, service and leak calls, billing, and general operation and responsibility for the farm taps (i) which, prior to Closing were Northern's responsibility, shall be Northern's responsibility after Closing and (ii) which, prior to Closing were Peoples' responsibility, shall be UtiliCorp's responsibility after Closing;

The "agreement" dated December 20, 1985, by and between InterNorth and UtiliCorp ("Farm Tap Sale Agreement") is attached hereto as Attachment "D."

The state-regulated public utility service NorthWestern currently provides to the farm tap customers is the same service Peoples provided prior to (and after) UtiliCorp's 1985 acquisition.

See affidavit of Keith L. Petersen (Attachment "C"). The 1985 asset purchase agreement and the Farm Tap Sale Agreement legally transferred all of the assets and obligations of Peoples to UtiliCorp. As a result, it is clear and uncontroverted that InterNorth permanently transferred the responsibility and obligation to provide utility service to farm taps. Any claim to the contrary is without support.

The 1987 Agreement is a Red Herring

The 1987 Agreement should not be relevant to whether farm tap customers lose utility service. The 1987 Agreement between Northern and Peoples has taken on a life of its own. Apparently, the *legend* makes a better tool than *reality*. Northern has explained the 1987 Agreement, which was entered into *after* UtiliCorp's acquisition of Peoples, was merely to memorialize the well-settled practices regarding service to farm tap customers. Prior to the 1985 sale, Peoples and Northern were longtime affiliates. After the sale, the two companies thought it was appropriate to reduce to writing their long-accepted practices and respective obligations, clearly identifying the separate functions of distribution utility and interstate pipeline service.

NorthWestern argues (i) it only took a partial assignment of Peoples' obligation to serve; (ii) the obligation resulting from the partial assignment expires December 31, 2017; and (iii) upon expiration of the assignment its obligation reverts to Northern. Staff, in its memorandum, does not go so far. Staff only says NorthWestern can terminate the 1987 Agreement as of December 31, 2017. Staff Memorandum at 4. Neither NorthWestern nor Staff addresses the 1985 Farm Tap Sale Agreement. It is illusory to assert the obligation to provide utility service reverts to Northern without addressing the controlling effect of the transfer of rights and obligations resulting from the 1985 Farm Tap Sale Agreement. If termination of the 1987 Agreement results in obligations reverting to Northern, express terms of the InterNorth and UtiliCorp asset purchase

agreement, including the 1985 Farm Tap Sale Agreement, would be voided and nullified. NorthWestern and Staff have not, nor could they, present any evidence to support avoidance, in whole or in part, of the sale of Peoples to UtiliCorp. Such a position is wholly unfounded and legally untenable. It completely ignores the fact InterNorth contractually sold all duties and obligations to provide the farm tap customers utility service nearly two years before the 1987 Agreement was executed. The 1987 Agreement did not void the 1985 sale of Peoples and, consequently, it did not change the entity legally responsible for providing utility service to the farm tap customers. Peoples was responsible for service to farm tap customers prior to the 1987 Agreement (e.g., See Northern Natural Gas Company, 21 FPC 151 (1959)) and Peoples remained responsible after the 1987 Agreement was signed. To read the 1987 Agreement to mean the obligation to provide state-regulated utility service to farm tap customers reverts to Northern upon termination, imputes a meaning not legally tenable based on the transfer of assets and obligations.

In response to Northern saying that “the 1987 Agreement does not alter whose obligation it is to provide continuing public utility service to the farm tap [customers],” Staff reasonably asked, “Why [is] there a termination date in the 1987 Agreement if NorthWestern must continue to serve beyond the termination date?” The reason for the termination date was not to terminate the obligation Peoples had well before the 1987 Agreement to provide gas utility service; it was to put temporal parameters around Peoples’ reading of Northern’s meters (a convenience Peoples agreed to provide Northern) and to address, now that the parties were no longer affiliates, whether Peoples would be required to provide service to new right of way grantors who might request service. Ultimately, in paragraph 3 of the 1987 Agreement, Peoples agreed to serve new farm tap customers. Northern and Peoples were aware of the obligation being transferred (along

with Peoples) to UtiliCorp two years earlier. Northern and Peoples had no intention, let alone corporate or statutory authority, to affect Peoples' obligation to provide public utility service in Iowa, South Dakota, Minnesota, Nebraska, Michigan and Kansas.

In regard to Northwestern specifically, Northern does not have complete knowledge of the legal agreements between MERC and NorthWestern, so it is conceivable NorthWestern expressly limited the term for which it was taking on MERC's utility service obligation. However, even if NorthWestern only acquired from MERC a service obligation through December 31, 2017, this would only mean the service obligation is MERC's (or some other successor to Peoples' interests), not Northern's.⁴ Prior to and after the 1987 Agreement, Peoples provided public utility service in South Dakota pursuant to SDCL § 49-34A. Peoples acknowledged and agreed in the 1987 Agreement that it would continue to "provide public utility service ... presently served by Peoples." (1987 Agreement Paragraph 3 (emphasis added)). Peoples could not contractually agree to terminate public utility service. Such a provision would violate SDCL § 49-34A-2.1, which requires any utility desiring to terminate or discontinue utility service to first obtain the express approval of the SDPUC.

Staff considers in the Staff Memorandum that NorthWestern, as an assignee of the 1987 Agreement, is a "third-party contractor." Although Staff did not elaborate on its theory, if Staff is suggesting NorthWestern is a third-party contractor to Northern, such a view would directly conflict with the legal effect of UtiliCorp's 1985 Farm Tap Sale Agreement. Once the obligation to provide utility service was acquired by UtiliCorp, it is not possible for NorthWestern to be a third-party contractor *to Northern*.

⁴ Whatever was agreed among the respective parties in the asset sales and assignments subsequent to the 1985 Farm Tap Sales Agreement is irrelevant to Northern. This does not mean it is not important to identify which successor to Peoples has the obligation to serve the farm tap customers; rather, it simply means the obligation to serve is between Aquila, MERC and NorthWestern and does not involve Northern. The 1985 Farm Tap Sale Agreement unambiguously transferred the obligation to UtiliCorp.

Of course, whatever the legal relationship regarding service to the farm tap customers may be *between and among UtiliCorp's successors*, it does not involve Northern. The responsibility does not, and cannot, revert to Northern.

IV. Statement of Position

Northern is a federally regulated interstate pipeline. Northern has provided, and will continue to provide, interstate transmission service subject to the exclusive jurisdiction of the FERC. Since natural gas industry restructuring in the early 1990s, Northern has not sold gas as a merchant and has no plans to do so. Northern was required to separate gas transportation from any sales function.⁵ Extensive and costly measures were taken to buy out of gas purchase contracts and to exit the sales function.⁶ Consequently, Northern is not set up legally or administratively to sell gas. Northern is exclusively an interstate transmission company. To the extent natural gas is properly nominated and scheduled on Northern's system, Northern will receive and redeliver the gas to the delivery point on its pipeline. However, if gas is not properly nominated by NorthWestern (or some other utility⁷), there will be nothing for Northern to transport.

In summary, Northern's position relative to the matters raised by the SDPUC in its petition for declaratory ruling, including the Staff Memorandum attached thereto, is as follows:

- Northern is a "natural gas company" under the Natural Gas Act, 15 USC § 717f (1938). As such, it is under the exclusive jurisdiction of the FERC.
- Utility service downstream of Northern Facilities has never been provided by Northern. Northern does not sell gas (other than for purposes of operating its pipeline).

⁵ Order No. 636, *FERC Stats. & Regs., Regulations Pre-amble 1991-1996* ¶30, 939 at 30, 437 (1992).

⁶ The sales referenced here were subject to the jurisdiction of the FERC and governed by the terms and conditions of a sales tariff on file with the FERC. Northern did not make direct sales to farm tap customers in South Dakota.

⁷ See Staff Memorandum wherein, "Staff recommends service to the farm tap customers only continues if a utility owns and operates the service lines." Staff Memorandum at 6. Northern agrees, the only practical provider of utility service to farm tap customers is a natural gas utility.

- The SDPUC does not have the legal authority to compel Northern to sell natural gas or to become a public utility.
- InterNorth, Northern's parent, sold Peoples, including all South Dakota assets, to UtiliCorp in 1985. Subsequent to the sale, UtiliCorp and its successors possess the obligation to provide utility service to farm tap customers.
- Northern allowed rural landowners to tap into its pipeline in return for an easement allowing Northern to run the pipeline below their land. Northern's sole obligation is to allow and construct (at grantor's expense) the tap (i.e., Northern Facilities).⁸

V. Argument on Stated Questions

Question 1: Does the Commission have jurisdiction over the utility providing natural gas to farm tap customers taking natural gas from the transmission line owned and operated by Northern?

Yes, the Commission has jurisdiction over the utility providing natural gas to farm tap customers receiving natural gas from the interstate natural gas pipeline owned and operated by Northern. Today, this utility is NorthWestern. NorthWestern, like its predecessors MERC, Aquila and Peoples, is a gas utility subject to the SDPUC's exclusive jurisdiction pursuant to SDCL § 49-34A-1(12), which defines a public utility in pertinent part 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. ...

NorthWestern operates, maintains or controls equipment or facilities for the purpose of providing gas service to the public, in whole or in part, in the state of South Dakota. SDLC § 49-34A-4 unambiguously states the SDPUC *shall* regulate *every public utility*.

In addition to meeting the statutory definition, both the SDPUC and NorthWestern have consistently recognized NorthWestern as a gas utility that sells gas at retail and provides gas

⁸ Should any person, or party to this proceeding, claim Northern's obligation to easement grantors is something different than stated by Northern herein; the claim must be addressed before a court with competent jurisdiction and not reviewed or considered in this proceeding.

service through piped distribution. For example, in NorthWestern's application to the FERC to purchase the Milbank pipeline from Northern, NorthWestern represented, "NorthWestern's South Dakota gas operations are *wholly regulated* as a local distribution company by the South Dakota Public Utility Commission" (emphasis added). NorthWestern Corporation Application for a Blanket Certificate, Docket No. CP-11-76-000 (filed February 1, 2011).

Similarly, when NorthWestern filed with the SDPUC to obtain approval to assume the obligation to serve, *as a public utility*, the approximately 200 farm taps at issue in this proceeding, the SDPUC unanimously found it has jurisdiction over NorthWestern's application pursuant to SDCL § 49-34A, *et seq.*⁹

NorthWestern had Farm Tap Customers before the MERC Assignment

Not only has the SDPUC exercised jurisdiction over the utility service provided to the approximately 200 farm tap customers NorthWestern acquired from MERC, but it also regulates the service to farm tap customers that was being provided by NorthWestern well before it assumed MERC's obligations. Notwithstanding NorthWestern's claim that it can walk away from its obligation to serve the farm tap customers acquired from MERC on December 31, 2017, no one suggests NorthWestern can terminate all service to *all* farm taps. Even if NorthWestern discontinues service to the approximately 200 farm tap customers, it still must serve the other farm tap customers not acquired from MERC. The fact gas utilities are providing farm tap service subject to the SDPUC's jurisdiction and pursuant to tariff sheets approved by the SDPUC is not a new phenomenon. Gas utilities have been serving farm tap customers for decades. The only novel twist is one public utility, NorthWestern, is claiming its obligation to serve some, but not all, of its farm tap customers contractually expires on a date certain. Northern understands

⁹ *NorthWestern Corporation d/b/a NorthWestern Energy For Its Purchase of the Milbank Northern Natural Gas Pipeline* 2011 WL 11820331 (March 11, 2011, SDPUC).

the difficult position the SDPUC is in if NorthWestern walks away; however, being put in such a position does not diminish or change in any way the Commission's jurisdiction or its statutory obligation to ensure adequate, efficient and reasonable service pursuant to SDCL § 49-34A-2.

Question 2: If so, which entity, North Western or Northern, if either, is a public utility as defined by SDCL § 49-34A with respect to these farm tap customers?

Northern is not a "public utility" as defined by SDCL § 49-34A-1(12) with respect to the farm tap customers or, for that matter, any customer in the state of South Dakota. As stated above, Northern is a "natural gas company" as defined by the Natural Gas Act 15 USC § 717f (1938). Northern is under the exclusive jurisdiction of the FERC and, therefore, is not subject to the jurisdiction of the SDPUC.¹⁰

Moreover, the SDPUC previously found that Northern is not a public utility. In the Final Decision and Order approving NorthWestern's purchase of the Milbank pipeline from Northern, the SDPUC unambiguously found, "Northern Natural Gas is not a public utility as defined in SDCL § 49-34A-1(12)." *Infra*. For the SDPUC to find differently would be flawed and inconsistent with its own prior findings regarding applicability of South Dakota law.

For the reasons set forth above, NorthWestern is a public utility as defined by SDCL § 49-34A-1(12) with respect to the referenced farm tap customers and Northern is not.

A Public Utility Should Serve Farm Tap Customers

For the same safety and practical reasons cited by Staff (See Staff Memorandum at 2), Northern also submits it is imperative a public utility continue to provide the utility service. Specifically, Staff concluded:

Staff recommends service to the farm tap customers only continues
if a utility owns and operates the service lines following pipeline

¹⁰ In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), the United States Supreme Court made clear the Natural Gas Act confers upon FERC exclusive jurisdiction over the transportation of natural gas in interstate commerce.

safety inspections and replacements if necessary. The safety risk is too great to continue service to these customers in the current manner with customers owning and being responsible for maintaining the service lines.

Only a utility will be able to consistently provide the elements of utility service, such as leak detection and monitoring, procurement, billing, etc. in the manner required for safe and reliable service.¹¹ **Termination of NorthWestern's obligation under the partial assignment of the 1987 Agreement, does not change the facts that (i) the SDPUC has jurisdiction over utility service to farm taps, and (ii) NorthWestern is a public utility wholly regulated by the SDPUC pursuant to SDCL § 49-34A.** The SDPUC could order NorthWestern to provide the required gas utility service to the farm tap customers. The Commission has the authority, pursuant to SDCL § 49-34A and SDCL § 49-34B, to effectuate the procedures, requirements and policies to satisfy the farm tap customers' need for safe, reliable and adequate service.¹²

In 1995, the Minnesota Public Utility Commission ("MPUC") was faced with issues very similar to those currently before the SDPUC. Peoples, the public utility serving most of the Minnesota farm tap customers, made a filing with the MPUC to clarify its responsibilities for the repair and maintenance of customer-owned distribution lines running from Northern Facilities to the farm tap customers' property.

In the order approving safety and inspection procedures, the MPUC made short shrift of the possibility the public utility, Peoples, could legally discontinue service to farm tap customers.

In a dismissive manner, the MPUC summarily addressed the claim in a footnote, providing:

The Commission will not address the hypothetical question of whether Peoples could legally discontinue farm-tap service, since that appears unworkable from a practical standpoint. The

¹¹ Due to critical public safety issues involving gas delivery, Northern questions whether a non-utility could serve the farm tap customers under South Dakota law.

¹² See e.g., SDCL § 49-34A-2, SDCL § 49-34A-4, SDCL § 49-34A-6, SDCL § 49-34A-8 and SDCL § 49-34B-1 (*et seq.*).

easements given in return for farm-tap service are crucial to the operation of the interstate gas transmission system.

Re: Matters of Peoples Natural Gas Company, 1993 WL 732940 (Minn. P.U.C. 1993).

The Commission in the text of the order explained:

It is clear that there is cause for concern about the safety of some farm-tap lines. It is equally clear that Peoples must continue to provide service to farm-tap customers and that the service provided must be “safe, adequate, efficient, and reasonable.” Minn. Stat. § 216B.04 (1992). The Commission can enforce the Company’s obligation to provide safe service under Minn. Stat. § 216B.09 (1992), which authorizes the Commission to set standards or require practices for a utility to follow in delivering service.

The Commission finds that Peoples cannot provide reasonably safe service to farm-tap customers unless farm-tap lines are inspected periodically for leaks and corrosion. Peoples has the technical and organizational expertise to conduct these inspections. Rural landowners do not. ... The Commission concludes the most straightforward and efficient way to ensure periodic inspections is to require Peoples to perform them. The Commission will do so.

In summary, NorthWestern is a public utility and Northern is not. Northern (and Staff) submit that service to the farm tap customers could only be provided safely by a public utility. Pursuant to the statutory authority granted in SDCL § 49-34A, the SDPUC should require NorthWestern to provide service to the farm tap customers, notwithstanding NorthWestern’s stated intention to terminate utility service December 31, 2017.

Question 3: Finally, are the farm taps in whole or in part subject to state jurisdiction for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?

The Petition seeks a ruling from the SDPUC “whether the farm taps or any portion thereof are subject to the pipeline safety requirements of SDCL 49-34B.” For the reasons set forth below, the answer is clearly “no” with respect to the Northern Facilities.

Northern Facilities are not Subject to SDCL § 49-34B.

Northern endeavors to ensure the SDPUC understands what facilities at a farm tap setting are owned, operated and maintained by Northern as part of Northern's interstate natural gas transmission facilities and which facilities at the farm tap settings are owned, operated and maintained by persons other than Northern. As explained above, at a farm tap setting, Northern owns, operates and maintains only the Northern Facilities. The 3-way valve, odorant tank and all facilities downstream of the Northern Facilities are owned by persons other than Northern. Northern has no responsibility whatsoever for any facilities or equipment at a farm tap setting that are not part of the Northern Facilities.

The Commission is only authorized to promulgate safety regulations for *intrastate* natural gas pipeline facilities (See SDCL § 49-34B-4). The SDPUC has no safety jurisdiction over *interstate* natural gas pipeline facilities. *Interstate* natural gas pipeline facilities are subject to the exclusive safety jurisdiction of the Pipeline Hazardous Materials Safety Administration ("PHMSA") pursuant to the Pipeline Safety Act (49 U.S.C. § 60101, *et seq.*). Congress's intent to grant PHMSA exclusive jurisdiction over interstate natural gas pipeline facilities is explicit:

(c) Preemption.--A state authority that has submitted a current certificate under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation...."

49 U.S.C. § 60104(c) (emphasis added).

The Northern Facilities are interstate natural gas pipeline facilities. Under the Pipeline Safety Act, "interstate gas pipeline facility" means a gas pipeline facility (i) used to transport gas; and

(ii) subject to the jurisdiction of the [Federal Energy Regulatory] Commission under the Natural Gas Act. (49 U.S.C. § 60101(a)(6)). There can be no doubt the Northern Facilities are used to transport gas. With respect to the second prong, FERC has long recognized the Northern Facilities are used in the transportation of natural gas in interstate commerce, and thus are subject to their exclusive jurisdiction under the Natural Gas Act (See Northern Natural Gas Company, Docket No. CP99-75-000, 87 FERC ¶ 62,307 (June 17, 1999)). FERC has similarly recognized farm tap facilities are subject to their jurisdiction under the Natural Gas Act in other pipeline dockets (See Texas Gas Transmission Corporation, Docket No. CP78-300, 11 FERC ¶ 61,111 (May 2, 1980)). Many activities related to the Northern Facilities are conducted under Northern's blanket certificate authority granted in FERC Docket No. CP82-401.¹³ For documentation the Northern Facilities in South Dakota are FERC-jurisdictional, see Attachment "E," a copy of the cover page, index, page 46, and page 55 of Northern's Annual Report For Blanket Certificate Activities 2011, Docket No. CP12-251-000. In this filing with FERC, Northern reported its most recent activity in the state of South Dakota involving farm tap facilities, the abandonment of three of its South Dakota farm tap settings. This filing reported the abandonment of FERC-jurisdictional assets, i.e., the meter and regulator as well as the riser to the first below-grade valve on the riser (described on page 46 of 57) at three farm taps in South Dakota. The natural gas facilities downstream of the Northern Facilities are not reported in Northern's blanket certificate filing, because, as described herein above, the downstream facilities are not owned or operated by Northern, and are not facilities subject to FERC jurisdiction.

As demonstrated above, the Northern Facilities are subject to the exclusive safety jurisdiction of PHMSA. Northern does not own, operate or maintain any natural gas facilities in

¹³ Northern Natural Gas Company, 20 FERC ¶ 62,410 (1982).

the state of South Dakota subject to the jurisdiction of the SDPUC pursuant to SDCL § 49-34B-4. Moreover, the SDPUC is prohibited from exercising safety jurisdiction over the Northern Facilities by the express provisions of 49 U.S.C. § 60104(c). *Colorado Interstate Gas Company v. Wright*, 707 Supp.2d 1169 (D.Kan.2010).

VI. Conclusion

For the reasons set forth above, the Commission should conclude the responsibility (i.e., “all duties, liabilities and obligation”) to provide utility service to the approximately 200 farm tap customers was permanently transferred from Northern’s owner, InterNorth, to UtiliCorp in 1985; any reliance on the 1987 Agreement to support NorthWestern’s assertion that, upon termination, the obligation to provide utility service reverts to Northern is legally flawed and unsupportable. In regard to the specific questions raised by staff in its Petition, the SDPUC should find the SDPUC has jurisdiction over the gas utility service provided to farm tap customers in South Dakota; NorthWestern, or one of its predecessors (i.e., MERC or Aquila, Inc.), is the relevant public utility as defined by SDCL § 49-34A with respect to farm tap customers currently served by NorthWestern; Northern is not a public utility and is not subject to the jurisdiction of the SDPUC; and Northern does not own, operate or maintain any natural gas facilities in the state of South Dakota subject to the jurisdiction of the Commission pursuant to SDCL § 49-34B-4.

Respectfully submitted,

Northern Natural Gas Company

By:

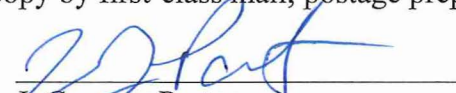


J. Gregory Porter
Vice President and General Counsel
Dari R. Dornan
Senior Attorney
1111 South 103rd Street
Omaha, NE 68124
(402) 398-7404
Counsel for Intervenor

Dated this 7th day of December, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of December 2016, a true and correct copy of the foregoing "Initial Brief of Northern Natural Gas," was served upon the service list of this Commission by electronic means, or by mailing a copy by first-class mail, postage prepaid.


J. Gregory Porter