

**Before the Public Utilities Commission  
of the State of South Dakota**

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**In the Matter of  
Commission Staff's Petition  
for Declaratory Ruling  
Regarding Farm Tap Customers**

**Docket No. NG16-014**  
**NorthWestern Energy's Reply to  
Staff's Response and Northern Natural  
Gas Company's Answer**

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NorthWestern Corporation d/b/a NorthWestern Energy replies to (1) Staff's Response to Motions for Rehearing and Reconsideration, and (2) Northern Natural Gas Company's Answer to NorthWestern Energy's Petition for Reconsideration of Declaratory Ruling (*Answer*). Staff has taken no position on NorthWestern Energy's petition, while Northern Natural Gas Company (*NNG*) continues to push for a rehearing of determinations it has not challenged. For the reasons provided below and in NorthWestern Energy's petition for reconsideration, NorthWestern Energy asks the Commission to grant reconsideration.

### **Reply to Staff's Response**

Although Staff "does not take a position" on whether the Commission should reconsider its ruling, Staff's response raises the issue of the Commission's jurisdiction over contractual matters. NorthWestern Energy agrees with Staff that the Commission has jurisdiction over limited contractual matters (such as the approval of contracts for deviation from established tariff rates). However, as Staff indicated, the Commission does not have plenary jurisdiction over all aspects of all contracts, like the easements. Nor does the Commission have jurisdiction over every contract NorthWestern Energy enters into simply because NorthWestern Energy is, with respect to a portion of its business, a public utility regulated by the Commission.

Staff's response also points out that the *Medi-Call* case (which NorthWestern cited in its petition) reached two determinations: (1) that the state cannot convert private contractual arrangements into public utility obligations; and (2) the service in question in *Medi-Call* was not a public utility service because it did not have the elements of the public utility.<sup>1</sup> Staff is correct that the *Medi-Call* court concluded that the paging service did not have the elements of a public utility. But Staff did not mention that the *Medi-Call* court reached that conclusion after examining a series of cases and other authorities holding that services are not public utility services if the general public does not have a legal right to use the services.<sup>2</sup>

The farm-tap services that NorthWestern Energy provides on behalf of NNG pursuant to a private contractual arrangement are not available to the general public. Such services are **only available** to a landowner who (a) owns property subject to an NNG farm-tap easement, **and** (b) has an NNG farm tap. Substantially all of the general public cannot meet these two requirements for farm-tap services. NorthWestern Energy is not providing public utility services with respect to these farm-tap customers associated with NNG.

The Commission should reconsider its determination that NorthWestern is a public utility with respect to the farm-tap customers that hold easements with NNG. NorthWestern Energy only serves those specific customers, on behalf of NNG, as a result of NNG's obligations to provide such services under the farm-tap easements. Absent a private contractual arrangement between NNG and NorthWestern Energy, NorthWestern Energy would have no obligation to serve as NNG's vendee under the easements.

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<sup>1</sup> *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970)

<sup>2</sup> *Id.* at 275-277, 470 P. 2d at 259-261.

## Reply to NNG's Answer

### ***1. NorthWestern Energy requested reconsideration, not a rehearing.***

NorthWestern Energy filed a petition requesting this Commission to reconsider its decision based on the legal arguments and authorities cited in the petition. The petition specifically identified the two Commission determinations that NorthWestern Energy found to be erroneous and the reason why those determinations were in error. NorthWestern Energy did not ask the Commission to rehear the issues and does not believe a rehearing is necessary for the Commission to reach the proper conclusion concerning these questions of a jurisdictional nature from Staff's petition for declaratory ruling.

NNG, on the other hand, has not challenged the two determinations that NorthWestern Energy has asked this Commission to reconsider. NNG has not specifically identified or even intimated that these two determinations are erroneous. Nevertheless, NNG would have this Commission and the parties engage in a lengthy and costly rehearing process, apparently, to have the Commission reach the same determination. It is time for NNG to take responsibility for the issues it created with its easements.

### ***2. NNG has argued that its own Petition for Rehearing should be denied.***

While arguing against NorthWestern Energy's petition for reconsideration, NNG has provided a basis for this Commission to deny NNG's petition for rehearing. In its answer, NNG argues that the Commission should deny NorthWestern Energy's petition because NorthWestern Energy cannot satisfy the requirements of the administrative rules. "[T]he 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."<sup>3</sup>

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<sup>3</sup> See Answer, p. 4.

Setting aside for the moment that NorthWestern Energy's petition identified the conclusions that were erroneous and why they were in error, *if NNG's argument is true* – that there is no way to specify and meet the requirements of the administrative rule – *then NNG's petition for rehearing must also be denied* on the same basis. NNG's argument is even more interesting because, although NNG has identified as erroneous the Commission's determination regarding pipeline-safety jurisdiction, NNG has not identified as erroneous the two other determinations made by the Commission.

**The Commission should grant NorthWestern Energy's petition for reconsideration.**

For the reasons stated in this reply and in NorthWestern Energy's Petition for Reconsideration, the Commission should 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 NNG, and (2) NorthWestern Energy is a public utility with respect to the farm-tap services. NorthWestern Energy's service to the farm-tap customers arises not from an obligation to serve the general public, but from an obligation to serve as NNG's vendee under the NNG farm-tap easements.

Dated at Sioux Falls, South Dakota, March 10, 2017.

**NORTHWESTERN CORPORATION,  
d/b/a NORTHWESTERN ENERGY**



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