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 Objection to Northern Natural Gas Company's Motion to Reopen the Record**

NorthWestern Corporation d/b/a NorthWestern Energy (*NorthWestern Energy*) objects to the motion of Northern Natural Gas Company (*NNG*) in which NNG requests the South Dakota Public Utilities Commission (the *Commission*) to reopen the record in this proceeding and, without further hearing, vacate prior Commission action and establish new findings inconsistent with the record and in violation of the due process rights of the parties in this proceeding. The Commission should deny the motion.

At the conclusion of oral arguments in this proceeding, the Commission considered the need for post-hearing briefs and concluded that it did not require additional information to reach a decision. Contrary to the Commission's conclusion and under the guise of a motion to reopen the record, NNG has filed a post-hearing brief nonetheless. In the "motion," NNG continues to ignore the language of the easements it received in the 1950s from landowners who permitted NNG to bury its transmission pipe line beneath their soil in exchange for NNG's perpetual promises to (1) provide a farm tap ***and*** (2) furnish gas to the farm tap customers either directly "by grantee, or by any vendee of grantee." Instead, NNG's motion is premised on the mistaken belief that its obligations under the easements were somehow transferred without the consent of the landowners under a 1985 agreement to which the landowners were not a party.

This objection will outline the various agreements that are applicable in this proceeding and explain that the record in this proceeding has established NNG's obligations to the landowners have not been transferred or otherwise altered. In addition, this objection will demonstrate that the Commission should deny NNG's motion because NNG has not established good cause to reopen the record in this proceeding. NNG elected not to participate in the 2011 proceeding, the testimony from the 2011 proceeding is not erroneous, and the information in this proceeding concerning the 1985 transaction is, at best, scant and incomplete. Moreover, the motion improperly requests entry of new findings, inconsistent with the record of this proceeding and without the further hearing required by the South Dakota Administrative Rules. For the reasons detailed below, NorthWestern Energy requests that the Commission deny NNG's motion to reopen the record.

Background Regarding Contractual Obligations

NNG's motion is replete with characterizations of "uncontroverted evidence" and allegations of "inaccurate information" being provided to the Commission. NorthWestern Energy disagrees with NNG's "uncontroverted" and "inaccurate" characterizations and would add that much of what NNG has offered the Commission is incomplete information, which creates confusion.

First, many issues in this proceeding are in controversy. The parties have different interpretations of the circumstances. Through briefing and oral arguments at the December 14, 2016, hearing in this proceeding, the parties also have provided a considerable amount of information for the Commission's consideration as it reaches its decision. Second, NorthWestern believes NNG has confused making statements in a brief with providing evidence to the Commission. During this proceeding, no witnesses have been sworn in and

provided testimony, while affording other parties the opportunity to cross-examine the witnesses, and no documents have been entered as exhibits.

The parties have made certain agreements part of the record of this proceeding, and those agreements provide a very important context for the Commission's decision on the motion to reopen the record, particularly in light of NNG's allegations regarding inaccurate information. The parties to this proceeding cannot forget that rights of the 197 farm tap end users that are the subject of this proceeding to receive natural gas and the obligations to furnish that gas arise from these agreements that have been made a part of the record.

The Easements. The first agreements, the easements granted to NNG by the 197 farm tap end users, originated in the 1950s and state:

> (3) That grantee [Northern Natural Gas Company], upon written application by the grantor, will make, or cause to be made, a tap in any gas pipe line constructed by grantee upon the above described premises for the purpose of supplying gas to grantor ... and *gas to be taken under this provision shall be* measured and *furnished* to the grantor at the rates and upon the terms as may be established ***by grantee, or by any vendee of grantee***, from time to time.[1]

The language within the four corners of the easement agreement is clear – (1) NNG, as the grantee, must provide access to its transmission line through a farm tap, and (2) NNG must furnish gas or make arrangements with another party, NNG's vendee, to furnish the gas.

The 1985 Agreement. NNG has made another agreement part of this record. This *two-page* agreement has been referred to in this proceeding as the 1985 Agreement.[2] NorthWestern Energy was not aware of the existence of the 1985 Agreement until approximately April of 2016, and apparently the 1985 Agreement is part of an alleged sale transaction, the

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[1] *See* Easement included as Attachment "1" to the Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company (emphasis added).
[2] *See* Agreement included as Attachment "D" to the Initial Brief of Northern Natural Gas Company.

documentation for which NNG has not included in this record, pursuant to which NNG's parent sold Peoples Natural Gas Company to UtiliCorp United Inc. in 1985.

NNG argues that the 1985 Agreement permanently transferred its second obligation under the easements (to furnish gas or make arrangements with another party to furnish gas). However, the language within the four corners of the 1985 Agreement is not consistent with NNG's argument and *none of the 197 farm tap end users agreed to the transfer of any obligations under the 1985 Agreement to another party.*

The 1985 Agreement states:

> (b) With regard to installation, 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 prior to Closing were Peoples' responsibility, shall be Utilicorp's responsibility after Closing;[3]

The 1985 Agreement does not mention the easements. The 1985 Agreement does not alter the language in the easements concerning NNG's obligation to furnish gas or make arrangements with another party to furnish gas to the easement holders.

Instead, the language within the four corners of the 1985 agreement actually confirms the continuance of the obligation from the easements by specifically stating in the 1985 agreement, with respect to the "general operation and responsibility for the farm taps," those obligations "which, prior to Closing were Northern's responsibility, shall be Northern's responsibility after Closing." NNG is the only entity that ever has been a party to the easements. The language of the easements obligates NNG to furnish gas or arrange for another party to furnish gas to the 197 farm tap end users. That obligation has been NNG's since the 1950s, and

[3] *See Id.* at page 1 (emphasis added).

by the 1985 agreement, all obligations of NNG's prior to closing of the 1985 sale, remain NNG's after the 1985 sale.

The 1987 Agreement and 2011 Partial Assignment. The final agreements to discuss that have been made a part of the record of this proceeding are the 1987 Agreement and the 2011 partial assignment of the 1987 Agreement to NorthWestern Energy. The 1987 agreement is a natural gas sales and services agreement between NNG and its vendee to provide natural gas sales and services to the 197 farm tap end users for and on behalf of NNG. In 2011, the South Dakota portion of certain of the services required by the 1987 Agreement were assigned to NorthWestern Energy.

Pursuant to that 2011 partial assignment, NorthWestern Energy began providing service, effective June 1, 2011,[4] ***for*** and ***on behalf of NNG*** to the 197 farm tap end users under the 1987 Agreement, which states:

> WHEREAS, Northern has requested Peoples to perform certain services ***for Northern in connection with the natural gas sales to said existing and future customers***, and Peoples has agreed to provide the services ***on behalf of Northern***.[5]

When you consider this language in the context of the language of the easements, the purpose of the 1987 Agreement is clear. NNG entered into the 1987 Agreement to make arrangements with another party to provide natural gas sales on behalf of NNG to the 197 farm tap end users, consistent with NNG's continuing obligations in the easements.

With this background understanding of the specific language within the four corners of the agreements that have been made part of the record in this proceeding, NNG's asserted

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[4] *See* Partial Assignment of agreement, second paragraph, included as Exhibit B to NorthWestern Energy's Brief in Response to Commission Staff's Petition for Declaratory Ruling.
[5] *See* 1987 Agreement, p. 1, included as Attachment "A" to the Initial Brief of Northern Natural Gas Company (emphasis added).

justification for the relief requested in its motion falls away. For the reasons summarized below, the Commission should deny NNG's motion.

NNG has not shown "good cause" to reopen the record.

Under the Commission's administrative rules, the Commission may reopen the record "for good cause shown by a party to the proceeding ...." ARSD 20:10:01:27.01. The motion fails to show good cause because:

(1) NNG elected not to participate in the 2011 proceeding;

(2) The testimony from the 2011 proceeding was not erroneous;

(3) Evidence in this proceeding concerning the 1985 transaction is, at best, scant and incomplete; and

(4) NorthWestern Energy is not a public utility with respect to the 197 farm tap end users.

1. NNG elected not to participate in the 2011 proceeding.

The Commission should not permit NNG to attempt to change the outcome of a proceeding in which NNG chose not to participate. Neglect does not establish good cause.

By its motion, NNG seeks to change the result (or the effect of the result) reached by the Commission in Docket NG11-001, the Milbank pipeline docket. In that docket, the Commission approved NorthWestern Energy's acquisition of the Milbank pipeline and service to NNG with respect to the 197 farm tap end users until December 31, 2017, pursuant to the partial assignment of the 1987 Agreement.

The Commission provided general notice of the Milbank pipeline docket filing and the February 4, 2011, intervention deadline in that docket to all interested individuals and entities pursuant to the Commission's "Weekly Filings" for the Period January 13, 2011, through

January 19, 2011.[6] That Weekly Filings notice identified the issues that the Commission would be considering as part of that docket, including specifically (a) the December 31, 2017, termination date of the services NorthWestern Energy would be providing to NNG pursuant to the partial assignment of the 1987 Agreement and (b) the adoption of the existing rates established by Minnesota Energy Resources Corporation (*MERC*) to provide such service. No parties intervened.[7]

NNG was the seller of the Milbank pipeline that was the subject of the Milbank pipeline docket. As part of that acquisition, NNG knew that NorthWestern Energy was required to and would be seeking regulatory approval of both the purchase of the Milbank pipeline and the partial assignment of the 1987 agreement. In addition, NNG has a regulatory group that likely is subscribed to the Commission's Weekly Filings notification.

At the December 14, 2016, hearing in this proceeding, the Commission asked NNG why it did not participate. NNG responded that it could have intervened but does not know why it did not intervene in that particular proceeding, adding that it very rarely intervenes in its customers' matters.[8] NNG cannot establish good cause to reopen the record in this proceeding because it neglected to participate in the Milbank pipeline docket. The Commission should deny the motion.

Moreover, the result of the Milbank pipeline docket is final, and the time for filing a petition for reconsideration of the March 11, 2011, order in that docket expired long ago.[9] The

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[6] The Weekly Filings notice is available at the Commissions website at http://puc.sd.gov/WeeklyFiling/2011/0113-0119.aspx.

[7] Final Decision and Order, dated March 11, 2011 (Docket NG11-001). Available at http://puc.sd.gov/commission/orders/naturalgas/2011/NG11-001fdo.pdf.

[8] *See* Transcript of Proceedings, December 14, 2016, pages 118-119.

[9] *See* SDCL § 49-1-19 (stating SDCL chapter 1-26 governs appeals from a Commission decision); SDCL § 1-26-31 (requiring notice of appeal to be filed within 30 days of a final decision); South Dakota Administrative Rule 20:10:01:30.01 (requiring application for rehearing or reconsideration to be filed within 30 days from the issuance of the Commission's order).

March 11, 2011, order approved the acquisition of the Milbank pipeline, approved the December 31, 2017, end date of the services NorthWestern Energy would be providing to NNG under the partial assignment of the 1987 Agreement, and approved the adoption of MERC's existing rates. In reliance on that order, effective June 1, 2011, as provided by the partial assignment of the 1987 Agreement, NorthWestern Energy began providing services for NNG under the 1987 Agreement. Any ruling by this Commission in support of NNG's motion to reopen the record and change the effect of the result in the Milbank pipeline docket or which otherwise alters, modifies or extends the rights and obligations under the 1987 Agreement may unconstitutionally impair NorthWestern's contract rights.[10]

2. The testimony from the 2011 proceeding was not erroneous.

NNG's motion to reopen the record is premised in part on a mistaken belief that testimony in the 2011 Milbank pipeline docket was erroneous, was contrary to the record in this proceeding and should be corrected. NorthWestern disagrees.

If we compare the statements from the 2011 Milbank pipeline docket with the language within the four corners of the agreements that are part of the record in this current proceeding, we find that the 2011 statements are remarkably consistent with the record in the current proceeding. Accordingly, good cause does not exist to reopen the record in this proceeding because the testimony from the 2011 proceeding was accurate and consistent with the record in this proceeding.

2011 Statements from Commission Staff. As quoted by NNG in its motion, Commission Staff stated in 2011 that the easements require NNG to provide service to the 197 farm tap end users and that NNG has contracted with four or five different parties over the

[10] *See* Article I, Section 10, U.S. Constitution.

years to provide that service. Specifically, Commission Staff (Mr. Dave Jacobsen) stated in 2011 that the underlying service responsibility:

> is within the easement between Northern Natural and those customers legally.... There has been about what 4 or 5 different companies that have contracted out to do the billing for these customers, similar to what Northern, NorthWestern is, is doing in this case.... ultimately Northern Natural Gas has that obligation through those easements to keep providing that service.[11]

Commission Staff also stated in 2011,

> to me looking at the old easements there is no expiration of that duty to keep providing gas service to these customers it's an evergreen provision.[12]

In summary, in 2011, Commission Staff stated that (a) the easements obligate NNG to provide services, (b) there is no expiration date of the obligations under the easements, and (c) over the years NNG has contracted with various parties to provide services on its behalf. These statements are entirely consistent with the record in the current proceeding as summarized below.

Record in the Current Proceeding. Consistent with the 2011 statements of Commission Staff, at the December 14, 2016, hearing, when questioned by the Commission about the language of the easements, NNG stated that it either had the obligation to furnish gas or it had the obligation to find another party to furnish the gas:

> CHAIRMAN NELSON: So let me ask you, what do you think *[the above-quoted language of the easement]* means to the farmer that granted the easement?
>
> ***MR. PORTER: It means they're going to get gas. That's exactly right.***

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[11] Northern Natural Gas Company's Motion to Reopen the Record, Take Judicial Notice and Correct the Record, at page 8 (transcribing the audio recording of the hearing for the Milbank pipeline docket).
[12] Audio recording of March 8, 2011 at approximately 43:15 into the recording. Available at http://puc.sd.gov/Dockets/NaturalGas/2011/ng11-001.aspx (last visited December 23, 2016).

That does not mean that Northern is selling the gas to them. And that's the distinction that I think is important. We have never sold the gas to the end user in the State of South Dakota.

CHAIRMAN NELSON: Understand. But in this phrase, this phrase leaves open the possibility of that or that if Northern chooses not to, that you will have the responsibility of finding a vendee to do that.

Is that accurate?

MR. PORTER: I agree with that.[13]

In addition, we know from the language of the 1987 Agreement (quoted earlier in this objection), that such agreement is a contract between NNG and its vendee to provide natural gas sales services "for" and "on behalf of" NNG to the 197 farm tap end users.

Apart from NNG's oral statements in this proceeding, the written language in the easements provide an obligation to furnish gas "by grantee, or a vendee of grantee." And, there is no expiration of the rights and obligations under the easements; the easements contain no limit on their duration so long as NNG's pipeline is in the ground.[14]

Consistent with the 2011 statements, we also know from the filings NNG has made in this proceeding that at least four parties identified by NNG –Peoples, Aquila, MERC, NorthWestern Energy – have served under the 1987 Agreement.[15] NNG acknowledged that NorthWestern Energy is currently its vendee under the easements:

CHAIRMAN NELSON: So is NorthWestern today your vendee?

MR. PORTER: We don't refer to them as a vendee in normal conversation, but under the language of this easement, I would say yes.[16]

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[13] *See* Transcript of Proceedings, December 14, 2016, pages 47-48.
[14] *See* Easement included as Attachment "1" to the Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company.
[15] *See, e.g.*, Motion for Leave to File Supplemental Brief and Supplemental Brief of Northern Natural Gas Company, at pages 6-7 (listing the various parties that have provided services under the 1987 Agreement).
[16] *See* Transcript of Proceedings, December 14, 2016, page 51.

NNG also acknowledged that Peoples was its vendee under the easements:

> CHAIRMAN NELSON: So my question is was Peoples your vendee per the language of the easement?
>
> MR. PORTER: Yes. Again, I've never thought of them, but under the language – the wording in the easement I would say that they're the vendee.[17]

Thus, the statements made by Commission Staff during the hearing for Milbank pipeline proceeding are supported by and consistent not only with the record in this proceeding, but also *with the record created by NNG's oral statements and written submissions in this proceeding.* The 2011 statements made by Commission Staff are accurate and consistent with the record established in this proceeding, and good cause does not exist to reopen the record in this proceeding.

The consistency of statements made in 2011 and the record in the current proceeding continues when we examine testimony from NorthWestern Energy in the 2011 Milbank pipeline proceeding against the record of this proceeding.

2011 Statements from NorthWestern Energy. In 2011, when the Commission asked NorthWestern Energy what would happen after December 31, 2017, NorthWestern Energy (Mr. Bleau LaFave) responded:

> Chairman, the current contract Northern Natural has for contract for those services with MERC and all the other people that take of those farm taps for them expires on that date. So, at that time Northern Natural would have to decide exactly how they would proceed with those customers at that time....
>
> Northern Natural has the responsibility [inaudible] and they have contracted those responsibilities out to various parties and that is the termination date of the existing contract so they between now and then they will have to decide how they will pursue that [inaudible].[18]

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[17] *See* Transcript of Proceedings, December 14, 2016, page 52.
[18] Northern Natural Gas Company's Motion to Reopen the Record, Take Judicial Notice and Correct the Record, at page 8 (transcribing the audio recording of the hearing for the Milbank pipeline docket).

In summary, similar to Commission Staff's statements in 2011, NorthWestern Energy accurately described in 2011 the obligations under the easements and the 1987 Agreement, indicating that (a) NNG contracted for services with various parties under the 1987 Agreement, (b) NNG's obligations under the easements continue without expiration, and (c) the 1987 Agreement expires in 2017. These statements are entirely consistent with the record in the current proceeding as summarized below.

Record in the Current Proceeding. The record created in this proceeding by NNG's oral statements and written submissions indicates that NNG has contracted with various parties to provide services under the 1987 Agreement and that the language of the easements does not contain any expiration date for the obligations set forth in the easements. The support for these conclusions based on the record of the current proceeding has been summarized with respect to the 2011 Commission Staff statements above and will not be repeated here.

Moreover, consistent with NorthWestern Energy's 2011 statements, the record in this proceeding has established the 2017 expiration of the 1987 Agreement. First, Section 5 of the 1987 Agreement provides, "Peoples may terminate this Agreement effective at any time after May 31, 2017 by providing six (6) months' prior written notice to Northern."[19] On November 15, 2016, NorthWestern Energy delivered written notice of termination, effective as of December 31, 2017, to NNG, and filed a copy of such notice on the docket in this proceeding.

Accordingly, good cause does not exist to reopen the record in this proceeding because statements made in the 2011 Milbank pipeline docket are accurate and consistent with the record established in this proceeding. The Commission should deny the motion.

[19] 1987 Agreement, Section 5, included as Attachment "A" to the Initial Brief of Northern Natural Gas Company.

3. *Evidence in this proceeding concerning the 1985 transaction is, at best, scant and incomplete.*

NNG's motion also is premised in part on allegations that the obligations in the easements to serve the 197 farm tap end users were somehow transferred as part of the 1985 sale of Peoples to UtiliCorp. However, there is no record of what precisely was transferred in that sale. NNG has not submitted any of the transaction documents, other than the two-page 1985 Agreement. None of the 197 farm tap end users were part of or otherwise consented to the 1985 sale. The language of the easements was not modified by the 1985 sale. There is no evidence in this proceeding as to what did or did not occur during the 1985 sale. Arguments in briefs do not constitute evidence.

To establish good cause to reopen the record in this proceeding, NNG's motion relies on the affidavit of Keith L. Petersen submitted by NNG as uncontroverted evidence of the effect of the 1985 Agreement. However, this "evidence" falls far short of being dispositive. Mr. Petersen did not testify at the December 14, 2016, hearing in this proceeding. Mr. Petersen didn't even attend the hearing. Without his attendance at the hearing, there was no opportunity to cross examine Mr. Petersen so that the Commission could assess the veracity of the witness.

In addition, Mr. Petersen's affidavit did not contain any specific information regarding what was transferred in the 1985 sale. As noted by the Commission, "His statements, obviously, were pretty vague .... They really weren't helpful in answering ... what did Peoples actually have to transfer?"[20] And, when the Commission asked if a document existed that listed what obligations Peoples purportedly transferred, NNG responded in a variety of ways that it could not produce such a listing.[21]

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[20] *See* Transcript of Proceedings, December 14, 2016, pages 53-54.

[21] *Id.* at 52-54 (responding to questions from the Commission, NNG stated, "I am not aware of a document as you described" and "I'm not aware of any document that lays out that a person for Peoples is going to do this and a person for Northern, the interstate transmission company's, going to do that" and "there is no

However, when we compare NNG's argument that the sale in 1985 transferred the obligation to serve with what actually is in the record in this proceeding, the argument in the motion fails.

The 1985 Agreement, summarized at the outset of this objection, was made a part of the record in this proceeding by NNG. The language within the four corners of the 1985 Agreement indicates that any obligations prior to closing that were NNG's will remain NNG's responsibility after closing. In other words, the 1985 Agreement does not alter the easements.

Indeed, NNG stated at the December 14, 2016, hearing that the 1985 Agreement did not alter the language of the easements. When asked whether the 197 farm tap end users were involved in the 1985 sale of Peoples and whether they "have a stake in ensuring their easement isn't altered in any significant way," NNG responded:

> MR. PORTER: ***Easement holders would have, I believe, an interest if their easement was altered or amended, one. Two, I don't think they were.*** They were transferred from -- excuse me. They weren't even – the easements weren't transferred.
>
> The same entity that owned -- that had entered into the easements as we have discussed prior to 1985, ***the easements that were entered into by Northern Natural are held today by Northern Natural.***
>
> What was transferred was the utility service that through historical practices had developed and Peoples Natural Gas had provided -- from the beginning had provided that utility service. Northern Natural never did. Peoples provided that service.
>
> That was transferred. ***It does not impact a word of the easement. So I think the easement is unaffected.***[22]

Thus, although we cannot tell from the record in this proceeding what was transferred in the 1985 sale, we can establish from the record in this proceeding, based on the oral and

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document that says Joe that works for Peoples or Mary that works for Northern is going – carries out these functions.")

[22] *Id.* at 125.

written statements of NNG, that the 1985 sale did not affect "a word of the easement." And the record in this proceeding regarding the language of the easements, and the Commission's understanding of the effect of the language of the easements, is very clear.

NorthWestern agrees with NNG that the language of the easements is "unaffected" and that the easements "are held today by Northern Natural." This means that the language agreed to in the easements in the 1950s remains in place today. The promises made in the 1950s remain today. And NNG's transmission line, remains in the ground today. The benefits and the burdens associated with the 1950s easement remain today.

Accordingly, good cause does not exist to reopen the record based on NNG's unsupported arguments concerning the effect of the 1985 sale. The Commission should deny the motion.

4. *NorthWestern Energy is not a public utility with respect to the 197 farm tap end users.*

NorthWestern Energy is not a public utility with respect to NNG's farm tap customers. NorthWestern Energy has been incorporated since 1923 and has provided public utility service in South Dakota long before the easements were granted to NNG. NNG's argument suggests NorthWestern Energy somehow had an obligation to serve the 197 farm tap end users simply because NorthWestern Energy is a public utility with respect to other customers in South Dakota. But the record is clear that this is not the case. The only obligation NorthWestern Energy has to serve is to serve NNG pursuant to a contractual obligation to NNG under the 1987 Agreement and the partial assignment of that agreement to NorthWestern Energy. NorthWestern Energy is party to an agreement with NNG to provide services "on behalf of" NNG.[23] On the other hand, NNG has a contractual obligation to NNG's farm tap customers

[23] *See* 1987 Agreement, included as Attachment "A" to the Initial Brief of Northern Natural Gas Company.

pursuant to the easements. These are not public utility customers. There is not a statutory duty for NorthWestern Energy to serve these customers.

NorthWestern Energy has been in a contractor role before. NorthWestern has provided contractual services to another party's customers in a number of instances, and in none of these instances has the Commission ever reached the conclusion that NorthWestern Energy is a public utility with respect to contractual services or because it at one time provided contractual services with respect to another party's customers. For example, this Commission is aware that NorthWestern Energy has provided contractual services to the cities of Humboldt, Crooks, and Garretson concerning the natural gas distributions systems owned, maintained and operated by those cities. NorthWestern was not the public utility concerning those cities' customers.

Eventually, the city of Humboldt believed it could provide those contractual services with its own personnel and decided to discontinue the contract with NorthWestern Energy. After the city of Humboldt began operating its own distribution system, it did not comply with pipeline safety requirements, and the Commission addressed those concerns in Docket PS15-001. NorthWestern Energy was not involved in that docket and was not a "public utility" with respect to the City of Humboldt's customers simply because at one point in time it provided contractual services concerning those customers.

The same reasoning applies with respect to the services NorthWestern Energy is providing to NNG under the 1987 Agreement. NorthWestern Energy is providing contractual services to NNG. The 1987 Agreement is part of this record. That agreement defines what NorthWestern Energy is obligated to do, not any statute.

Providing contractual services to another party, whether its NNG or the cities mentioned above, does not make NorthWestern Energy a public utility with respect to such

services. Accordingly, good cause does not exist to reopen the record in this proceeding, and the Commission should deny the motion.

If the Commission finds good cause to reopen the record, the matter must be set for further hearing.

In the motion, NNG requests the Commission to reopen the record of this proceeding and, *without further hearing*, enter a finding that is contrary to (a) the record in this proceeding, (b) the language of the 1987 agreement, and (c) the language of the 1950s easements. However, NNG's request is not permitted by the Commission's administrative rules.

The applicable administrative rule to reopen the record in this proceeding provides:

> **20:10:01:27.01. Reopening of the record.** Any time after any matter is taken under advisement and before a decision of the commission is entered, the commission may, on its own motion or for good cause shown by a party to the proceeding, order that the record be reopened ***and*** the matter set for further hearing.

ARSD 20:10:01:27.01 (emphasis added). The language of this administrative rule requires that the matter be set for further hearing if the record is reopened. This requirement for a further hearing preserves important due process rights that provide an opportunity for all interested parties to be heard before a final decision is reached.

In its motion, however, NNG has not requested further hearing in this matter. Instead, NNG asks the Commission to ignore vital due process rights and "take judicial notice of the Transcript [of the 2011 proceeding] *and to accept the discussion [in the motion] related to the Transcript.*"[24] In other words, NNG is asking the Commission to accept its *arguments* in its motion as *new evidence* in this proceeding without providing other parties an opportunity to refute NNG's allegations.

[24] NNG's Motion @ page 5 (emphasis added).

Such a request cannot be countenanced, particularly when, as summarized above, the motion is premised upon NNG's repeated allegations of "uncontroverted" evidence which is actually controverted by the record of this proceeding and the language within the four corners of documents that are part of this record.

The administrative rule does not permit the Commission, as requested by NNG, to simply accept the arguments NNG made in the motion as evidence without providing the other parties an opportunity to be heard in a further hearing on the matter. Thus, if the Commission concludes that good cause has been shown to reopen the record of this proceeding, the administrative rule requires further hearing.

As summarized above, the testimony from the 2011 proceeding is consistent with the record established in this proceeding, and NNG's so-called evidence has been challenged in numerous instances by the parties to this proceeding. There is no need to reopen the record in this proceeding to take notice of consistent testimony from 2011.

However, if the Commission determines to reopen the record, a further hearing may provide the parties an opportunity to attempt to reconcile some of the open questions that remain. For instance, what obligations, if any, were actually transferred when NNG sold Peoples in 1985? Did the 197 farm tap end users receive notice of the 1985 transaction? Did they consent to that transaction and the alleged transfer of the easement obligations to another party? If NNG did in fact sell its obligations under the easements in 1985, why did NNG later enter into the 1987 agreement (and confirm that agreement in 2011) to pay another party to perform natural gas sale services "for" NNG and "on its behalf?" Why was there a need for the 1987 agreement if the 1985 agreement transferred those obligations? Who drafted the 1987 Agreement? Why did the drafter of the 1987 Agreement include an expiration date?

These are some of the inquiries that may be helpful to better understand what actually occurred in 1985 if the Commission decides to reopen the record in this proceeding based on NNG's allegations concerning the 1985 transaction.

If the record is reopened, the parties also may wish to inquire further regarding NNG's insistence that, despite the language of the easements, NNG has no obligation, not even a moral obligation, to the 197 farm tap end users. For instance, if NNG has no moral obligation to easement holders in South Dakota, why is NNG assisting similarly situated farm tap easement holders in Iowa with respect to alternative services, such as propane or electricity? Why is NNG not providing any assistance to its South Dakota farm tap easement holders?

Regardless of the potential lines of inquiry, if the Commission decides to reopen the record in this proceeding, the proceeding must be set for further hearing pursuant to the administrative rules in order for any new information to be received into the record.

Finally, to the extent the motion is seeking to reopen and correct the record of the 2011 proceeding, the motion must be denied as being untimely because the Commission has already reached a decision in the 2011 proceeding. It is unclear to NorthWestern what relief, exactly, the motion is seeking, but the motion does request in several places that the Commission either "correct" or "vacate" the result of the 2011 proceeding. However, procedurally there is nothing in the administrative rules or the applicable statutes that allow the Commission to "vacate any prior finding" from the 2011 proceeding at this late date. Any such request is untimely by over five years.

The Commission should deny the motion to reopen the record.

For the reasons stated in this objection, NNG has not established good cause to reopen the record in this proceeding. The Commission should deny the motion. NNG chose not to participate in the 2011 Milbank pipeline docket, and neglect cannot be used to establish good cause to reopen the instant record. Moreover, the statements made in 2011 during the Milbank pipeline docket are consistent with the record established in the current proceeding by NNG's own oral statements and written submissions. As demonstrated in this objection, the 2011 statements were not erroneous; instead, those statements comport with the plain language contained within the four corners of the easements and other agreements that are part of the record of this proceeding.

Accordingly, NorthWestern Energy requests that the Commission deny the motion. Finally, should the Commission conclude that good cause does exist to reopen the record, the Adminstrative Rule to reopen the record requires the Commission to set this matter for further hearing. Contrary to the request in the motion, the Administrative rule does not permit new to be accepted into the without a further hearing.

Dated at Sioux Falls, South Dakota, January 9, 2017.

NORTHWESTERN CORPORATION,
d/b/a NORTHWESTERN ENERGY

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