

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

<b>IN THE MATTER OF COMMISSION</b>	)	
<b>STAFF’S PETITION FOR</b>	)	<b>Staff’s Reply Brief</b>
<b>DECLARATORY RULING REGARDING</b>	)	
<b>FARM TAP CUSTOMERS</b>	)	<b>NG16-014</b>
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On December 7, 2016, Northern Natural Gas (Northern) and NorthWestern Energy (NorthWestern) filed briefs detailing their positions. Through these briefs, Staff obtained more information and a better understanding of the background and roles that the two companies play with respect to the farm tap customers. Therefore, in some respects, Staff is now able to more clearly define its position.

**A. Does the South Dakota Public Utilities Commission (Commission) have jurisdiction over the utility providing natural gas to farm tap customers?**

As a preliminary matter, retail natural gas service provided by a public utility through a farm tap, like any other connection, is the type of service which falls within the jurisdiction of the Commission. Therefore, if the entity providing service is a public utility, that entity is subject to the Commission’s jurisdiction. For the purposes of this docket, the relevant jurisdiction is the Commission’s authority under SDCL 49-34A-2 to require a public utility to obtain Commission permission prior to discontinuing gas service. Thus, it is necessary to determine if there is a public utility and if that utility would be discontinuing service. Staff notes that neither Northern nor NorthWestern has made a formal request to the Commission to discontinue service, and Staff does not have the authority to do that in their place. However, as noted in Staff’ Memorandum to its Petition for Declaratory Ruling, Staff believes the Commission already gave permission to discontinue service through its order in Docket NG11-

001, which includes an expiration date of December 31, 2017, if it is determined permission to discontinue service is required.

A public utility is defined 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). We first explore whether NorthWestern meets that definition in the context relevant to this docket.

Northern states in its brief that the Commission has already found that NorthWestern is a public utility, quoting the Commission's order in Docket No. NG11-001. Northern at 13. The Commission's statement in that docket that NorthWestern is a public utility was with reference to the purchase of the Milbank pipeline. The Milbank pipeline and customers along that line are distinct from the 200 farm tap customers at issue in this docket. Staff agrees that, with respect to the Milbank pipeline customers, NorthWestern is a public utility and clearly falls under the jurisdiction of the Commission. However, the facts differ significantly between the customers on the Milbank pipeline and the farm tap customers NorthWestern serves pursuant to the Minnesota Energy Resources Corporation (MERC) contract expiring at the end of 2017. Most importantly, NorthWestern owns the Milbank pipeline and has exclusive control of the equipment or facilities used to provide gas service.

Exhibit A, attached to Northern's brief provides a description of the services NorthWestern provides to the farm tap customers along Northern's line. The responsibilities for which NorthWestern contracted originated from the 1987 contract and are markedly different from those responsibilities set forth in the 1985 contract. Most importantly, the 1985 contract had no end date, whereas the 1987 contract expires in 2017.

Under the 1985 contract, UtiliCorp purchased from Northern all assets of Peoples Natural Gas Company (Peoples) and expressly “assumed all of Peoples rights, duties, liabilities, and obligations in regard to farm taps...” This contract provided that Northern would retain all general operation and responsibility for farm taps which were Northern’s prior to the contract, and UtiliCorp would assume all general operation and responsibility for farm taps which were Peoples’ responsibility prior to the closing of the contract. Applying the terms of this contract to the definition of a public utility if this contract were in force today, UtiliCorp would be a public utility, as it clearly contracted to operate, maintain, or control equipment or facilities for the purpose of providing gas service.

The responsibilities for which NorthWestern and its predecessors contracted are distinct from the 1985 contract. Contrary to Northern’s assertion, NorthWestern and its predecessors date back to the 1987 contract, rather than the 1985 contract. It was the 1987 contract which was assigned. Nothing provided in the briefs submitted by Northern or NorthWestern shows that the 1985 contract was ever assigned, much less that it was ultimately assigned to NorthWestern.

The 1987 agreement was attached to Northern’s brief as Attachment A. At the time this contract was entered into, Peoples was no longer a subsidiary of Northern, but was owned by UtiliCorp. In the 1987 agreement, Peoples contracted to “[r]espond as a third party contractor to customers’ needs related to appliance purchase or service, fuel line or irrigation equipment.” And to perform other duties as described in Exhibit 1 to the contract. In the contract, Peoples expressly agreed to serve as a public utility. This agreement was to be effective until May 17, 2017. It is impossible to discern what the parties intended should happen following the termination date in 2017, but it is clear that both sides were aware that this was only a thirty-year agreement. There is nothing in the record to indicate that either party did anything to correct that

after the Federal Energy Regulatory Commission (FERC) passed FERC Order 636, prohibiting Northern from directly selling to end users. The 1987 agreement prohibited either party from assigning its responsibilities without the express written consent of the other party. Therefore, each time the agreement was assigned, the other party was fully aware of what responsibilities were being assigned and which were not.

The agreement signed by NorthWestern, Minnesota Energy Resources Corporation (MERC), and Northern references the 1987 agreement in the first paragraph. It is clear from the assignment that the agreement which NorthWestern contracted to inherit was the 1987 agreement. No reference to the 1985 agreement is made. By signing the partial assignment of agreement, NorthWestern agreed to “assume and perform all of the responsibilities of [MERC], under the [1987] Agreement with respect to customers located in the state of South Dakota; provided that [NorthWestern] shall not be assuming or responsible for any obligations set for in paragraph 2 of Exhibit 1 of the Agreement; provided, further, that [NorthWestern] shall not be assuming or responsible for the obligation to check delivery pressure as set forth in paragraph 3 of Exhibit 1 to the Agreement.”

Section 1 of the 1987 agreement states that “Peoples shall operate as a public utility and provide the services herein described and as are set forth on the attached Exhibit 1.” This language was not stricken when NorthWestern assumed the contract. However, merely stating that one will operate as a public utility does not make that company a public utility under the laws of the state of South Dakota. Section 9 of the agreement acknowledges that all rights and obligations are subject to all valid legislation, as well as all approved tariff provisions. It is the actions of NorthWestern that should determine whether it has acted as a public utility with

respect to the farm tap customers, as those actions determine compliance with applicable regulations.

One notable provision of the 1987 contract is section 11, which provides that the Peoples could close Northern's inlet valve for nonpayment of bills. This provision was not excluded from the assignment of the contract. The ability to close a valve, effectively shutting off gas service to a customer, demonstrates control over "facilities for the purpose of providing gas or electric service to or for the public in whole or in part" as provided by SDCL 49-34A-1(12). Staff has always understood that NorthWestern believed it was unable to shut the valve and discontinue service for nonpayment of bills. Noting that the contract says otherwise, Staff questions how NorthWestern came to that conclusion and looks forward to its explanation.

NorthWestern argues that the statute's requirement that the service be provided for the public in whole or in part precludes it from being a public utility, relying on decisions from other jurisdictions holding that the hallmark of *public* is the inability to refuse service. NWE at 7. NorthWestern quotes a Pennsylvania court holding which states "a public utility holds itself out to the public generally and may not refuse legitimate demand for service." *Pennsylvania v. Lafferty*, 233 A.2d 256, 260 (Penn. 1967). This Pennsylvania decision is consistent with the law in South Dakota. The requirement to serve all demands for service is less stringent for gas service than electric service, as gas companies in South Dakota do not maintain exclusive service territories and are not subject to the requirements of SDCL 49-34A-58. NorthWestern is able to refuse gas service upon the expiration of its contract. Therefore, NorthWestern is not a public utility beyond December 31, 2017, with respect to the farm tap customers.

Northern has control of facilities within this state, but clearly has the ability to refuse service. In fact, Northern is prohibited by FERC Order 636 from providing retail service to South Dakota customers. Thus, Northern is not a public utility.

**B. Which entity is a public utility with respect to the farm tap customers?**

For the reasons discussed above, Northern is not a public utility, and NorthWestern is a public utility only through 2017. It is unclear what entity, if any, is a public utility after 2017.

Staff is generally aware that a contract between Aquila<sup>1</sup> and MERC exists, but such agreement has not been filed in the docket. It could prove helpful in determining what entity is a public utility in this circumstance. As part of this transaction, the 1985 agreement was likely transferred from Aquila to MERC. Because Northern must agree to any assignment of the 1985 agreement, Northern is in the best position to answer this question.

**C. Does the Commission have jurisdiction over farm taps for the purpose of pipeline safety pursuant to SDCL Chapter 49-34B?**

Northern has not provided proof that it is under a blanket FERC certificate for the farm taps in South Dakota. It is necessary for Pipeline Safety Staff to have this certificate in order to determine whether Northern is under state jurisdiction for the purposes of pipeline safety inspections. Without this information, Staff is unable to conclusively determine where jurisdiction lies, but remains concerned that these farm taps are not being inspected. See Hillmer Affidavit attached hereto as Attachment 1.

**CONCLUSION**

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<sup>1</sup> UtiliCorp later changed its name to Aquila.

The Commission has jurisdiction over retail sales to an end user by a public utility under SDCL Chapter 49-34A. Northern is not a public utility. Any responsibility that Northern had as a public utility was transferred in the 1985 agreement. NorthWestern assumed the responsibility to be a public utility through 2017, by assuming the 1987 agreement. However, those obligations will end with the contract, and NorthWestern will no longer be a public utility for the farm tap customers. The ongoing responsibility to be a public utility was written into the 1985 agreement, which was not the agreement NorthWestern assumed. The current status of the 1985 agreement is unknown to Staff. The 1985 agreement likely transferred from Aquila to MERC. Because all transfers had to be agreed to in writing by Northern, Northern is in the best position to answer that question.

Staff does not have adequate information to conclusively answer the pipeline safety question at this time. However, if Northern can show that it is under a blanket FERC certificate with respect to farm taps in South Dakota, the Commission does not have jurisdiction pursuant to SDCL Chapter 49-34B.

Dated this 12th day of December, 2016.



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