STATE OF SOUTH DAKOTA) :SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL DISTRICT

In the Matter of Commission Staff's Petition for Declaratory Ruling Regarding Farm Tap Customers (NG 16-014)	32-CIV-17-71 32-CIV-17-83

NORTHWESTERN ENERGY'S REPLY BRIEF

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INTRODUCTION

In their reply briefs, both Northern and the PUC fail to address the issues central to the arguments raised by NorthWestern. Northern's argument that the PUC should have handled this matter as a contested case is a textbook example of waiver, and yet Northern, in its reply, chooses to talk about the PUC's silence on the issue *after* the hearing rather than the waiver itself. The PUC asks the Court to ignore substantive issues, and, instead, to adopt a circular, unworkable definition of "public" in SDCL § 49-34A-1. All of the arguments of Northern and the PUC, such as they are, should be rejected.

ARGUMENT

1. Northern sidesteps the subject of waiver and, instead, offers mostly strawman arguments against NorthWestern.

On the subject of waiver, Northern's reply brief offers little but strawman arguments—refuting arguments that NorthWestern never advanced. Northern does not dispute that it never asked the PUC to treat this matter as a contested case before the PUC issued its decision. Nor does Northern dispute that the first time it breathed a word of its (now-vociferous) position was *after* the PUC's final decision in Northern's petition for rehearing—a petition denied without comment by the PUC. Instead of grappling with those facts, instead of offering some explanation for failing to raise an objection earlier, Northern frames NorthWestern's argument as primarily raising a question of whether the PUC erred in not granting Northern's petition for rehearing. (Playing on a sentence in NorthWestern's brief, Northern says this Court should not

"affirm" the "implicit" finding of the PUC in denying rehearing.) That is the wrong question.

Logically, the first question for this Court is this: Did Northern—before the PUC issued its final decision—waive any right it might have had to seek a contested hearing? If the answer to that question is "yes" (and it is), then the next and final question regarding Northern's appeal is this: Did Northern, nonetheless, somehow preserve the issue for appeal by raising the issue for the first time—after the PUC issued its final decision—in a petition for rehearing? To that question, the answer is an unqualified "no."

a. Waiver is an equitable doctrine, and there is no compelling reason to consider this issue as anything but irretrievably waived.

NorthWestern explained in its opening brief how Northern had conspicuously limited the scope of its intervention in this matter to "providing comments and oral arguments, if appropriate" and how, before the PUC issued its decision, Northern never objected to the hearing as declaratory or affirmatively requested a contested-hearing case. *See* NorthWestern Brief at 14 (citing cases establishing waiver). Northern does not address these points or the supporting cases cited by NorthWestern in its brief. Nor does Northern have anything to say about the equities of this Court holding that Northern waived its right (expressly or impliedly) to object.

The so-called "raise-or-waive principle" cannot, as one court memorably said, simply "be dismissed as a pettifogging technicality or a trap for the indolent; the rule is founded upon important considerations of fairness, judicial economy, and practical

wisdom." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995). "This is as it should be: the rule fosters worthwhile systemic ends and courts will be the losers if they permit it to be too easily evaded." *Id.* The exceptions to this hard-and-fast rule should come sparingly, and none of the extraordinary circumstances in which courts excuse a waiver exist here.

Northern, for example, uses the term "due process" at a handful of points in its brief, but falls short of making a constitutional argument, and for good reason: there are no constitutional issues presented here. Northern was permitted to intervene, and chose to do so as a non-party and in a limited capacity. *See* AR 28. Northern was permitted to submit evidence and make written and oral arguments. The PUC did not limit Northern's ability to present further evidence, to conduct discovery, or to otherwise make its case in any way. The PUC provided due process, yet Northern now asks to start the process over again, all while failing to identify any specific substantive decisions with which it disagrees or any basis for allowing such drastic measures. As a matter of equity, these circumstances support waiver.

Northern's failure to offer additional evidence was tactical. It was deliberate. And this was understandable, given Northern's apparent attempt to avoid the PUC's jurisdiction. But the fact that Northern may have wanted to avoid submitting to the PUC's jurisdiction does not entitle it now to strategically re-litigate an entire proceeding. In fact, Northern's failure to raise an objection at any time during the process suggests that even Northern did not deem its own contested-case argument as persuasive. Northern apparently saw no need to request party status and it saw no need

to try to present additional testimony. Only after receiving the PUC's order did Northern suddenly determine that some grave procedural injustice had taken place.

NorthWestern, by contrast, is appealing because it disagrees with the PUC's specific legal conclusions. NorthWestern maintains the same position it did during the hearing process, and its appeal does not prejudice Northern or the PUC. On the other hand, Northern's appeal—which raises no substantive objection to the PUC's decision—constitutes special prejudice to the parties, given the unnecessary delay, the costs to all concerned, and the inequity of allowing Northern another bite at the apple.

Finally, with respect to the equities of dismissing Northern's appeal on waiver grounds, the Court should consider that the PUC made its ruling in complete conformity with the process outlined in its administrative rules. *See* ARSD 24:10:01:34-35. Those rules were promulgated under a statutory mandate. *See* SDCL § 1-26-15 ("Each agency *shall* provide by rule for the filing and *prompt disposition* of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency" (*emphasis added*)). Were the Court now to consider Northern's contested-case demand, it would undermine the longstanding procedures required by the legislative and judicial branches.

b. The South Dakota Supreme Court does not permit a party to raise an issue for the first time in post-trial briefing.

Though the South Dakota Supreme Court has not addressed waiver of a contested administrative hearing, it generally disfavors a dissatisfied litigant's request for a second trial when it made no timely objections. *See In re Adoption of Baade*, 462

N.W.2d 485, 488 (S.D. 1990) (*quoting In re A.I.*, 289 N.W.2d 247, 249 (S.D. 1980)) ("Generally, error must be brought to the attention of the trial court as soon as it is apparent and failure to object at a time when the court can take corrective action precludes appellate review"). In *Baade*, the natural father of an adopted child lodged his first objection to an expert report when he filed his objections to another party's proposed findings of fact and conclusions of law. *Id.* at 488. The South Dakota Supreme Court held that "[s]uch objection is too late to preserve the issue for appeal because the trial court could easily have corrected the alleged error by refusing admission." *Id.*

In South Dakota, even where one party alleges judicial error or impropriety, a post-trial objection is untimely. In *Gilkyson v. Wheelchair Express*, the defendant in a personal injury case moved for post-trial relief due to claims, identified only after trial, that the judge acted improperly in front of the jury. 1998 S.D. 45, ¶¶ 11-14, 579 N.W.2d 1, 4-5 (S.D. 1998). Citing *Baade*, the Supreme Court held that the defendant "did not preserve the record on this issue by stating a timely objection and therefore the issue has been waived." *Id.*

> The affidavits containing [defendant's] version of the objectionable facts were filed well after the completion of the trial, thus denying the plaintiff the chance to be timely heard on the matter. In addition, it denied the trial court the opportunity to consider an objection and take whatever measures it felt were necessary, if any, to correct the situation. After the verdict had been received and the jury discharged, any remedial action by the trial court short of ordering a new trial became an impossibility. There is no acceptable reason cited by [defendant] that it could not have timely made its objection on the record.

Id. at ¶ 14.

Other courts conducting appellate review have reached similar conclusions. The Eighth Circuit has stated the law plainly: "Raising an objection for the first time in a post-verdict motion for new trial is not sufficient to preserve it." *Csiszer v. Wren*, 614 F.3d 866, 871 (8th Cir. 2010). And the First Circuit, in *Harwood*, made the point even more emphatically: "This rule is deeply embedded in our jurisprudence, and we have invoked it with a near-religious fervor." *Nat'l Ass'n of Soc. Workers*, 69 F.3d at 627 (*internal citations omitted*).

Here, the same equities that drove the *Gilkyson* decision and that stand behind the holdings of other appellate courts apply. After expressly limiting its rights in its petition for intervention, Northern submitted evidence and legal arguments to the PUC without objection to the PUC's process. Only after the entire proceeding had run its course did Northern raise an objection to the manner in which the PUC conducted the proceedings (Northern has not raised any objection to the substantive decision the PUC rendered). But there were no improprieties in the process—and even if there were, this would be no grounds for allowing an untimely objection.

The PUC allowed Northern to submit evidence and arguments in support of its position. Had Northern properly requested a contested-case hearing or even attempted to present additional evidence, the PUC could have properly considered the request before completing a several-months-long declaratory-ruling process. Northern's objection would have been on the record and may have been properly before this Court. By the time Northern raised any objection to the amount of evidence the PUC received,

nothing short of ordering a new hearing process would have remedied any alleged error.

Even where the alleged error involves the fundamental nature of the proceedings, South Dakota courts are reluctant to reverse where a party's first objection is untimely. In *Sioux Valley Hosp. Ass'n v. S.D. State Bd. of Equalization*, a board argued for the first time on appeal that the trial court failed to hold the opposing party to its burden of proof. 513 N.W.2d 562, 564 (S.D. 1994). There was evidence to the contrary in the record, but the Supreme Court declined to address the issue, observing that "[a]s the party claiming error, [the] Board had the responsibility to insure that a record was made." *Id.* Here, Northern failed to make its record, and the law does not permit it to demand a new hearing after the fact.

2. The PUC's attempt to limit the issues on appeal to whether due process was provided is contradicted by South Dakota statute and the PUC itself.

The PUC begins its response to NorthWestern's argument by asking the Court to ignore the issues NorthWestern has raised on appeal and make no attempt to "understand[] the rationale for the declarations [the PUC] made" because the role of this Court is only to consider whether the PUC provided due process below. PUC Brief at 25. This argument—unsupported by any law—is contradicted by the PUC itself earlier in its brief, where the PUC argues that neither Northern nor NorthWestern has suffered any "actual injury" but, "as recent precedent has presented, the Court should review the declaratory ruling." *Id.* at 18. This argument is also contradicted by statute—namely, SDCL § 1-26-15—which the PUC also acknowledges elsewhere in its brief

("SDCL 1-26-15 provides that '[r]ulings disposing of petitions have the same status as agency decisions or orders in contested cases.'" PUC Brief at 18). In short, this Court is not limited to reviewing whether the PUC provided due process below.

3. The PUC misconstrues the definition of a "public utility."

The PUC correctly notes in its opening brief that "gas utility" and "public utility" have been defined by statute. PUC Brief at 26. But whether either of those definitions applies here turns on whether NorthWestern is providing "service to or for the public," as required by such definitions. *See* SDCL § 49-34A-1(9) and (12). The Legislature has created no applicable statutory definition for the term "public." The PUC also does not define "public" in its brief but seems to be asking the Court to conclude that the mere act of providing gas service to someone—anyone—in South Dakota makes a gas provider a "public" utility. The PUC's definition of the term "public" is so broad that it renders the term meaningless.

What actually defines a public utility—as NorthWestern explained in its opening brief—is the degree to which a provider holds a service out "to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals." *Medic-Call, Inc. v. Public Service Commission*, 470 P.2d 258 (Utah 1970). That understanding of "public" comports with the standard dictionary definition of the term: "1. Relating or belonging to an entire community, state, or nation . . . [or] 2. Open or available for all to use." *Black's Law Dictionary* 1422 (10th ed. 2014).

And with that plain and workable definition of "public" in mind, NorthWestern—with respect to farm-tap customers—is *not* a public utility within the meaning of SDCL § 49-34A-1(12). NorthWestern provides services pursuant to a contract between only NorthWestern and Northern. In turn, Northern has separate contractual obligations to a limited set of specifically defined consumers (farm tap easement holders), not to any member of the general public who signs up within a geographical area. These services are not open or available for all to use. Thus, the PUC had no jurisdiction over this private contractual matter and NorthWestern is not a "public utility" for the farm-tap easement holders.

CONCLUSION

For the reasons above and in NorthWestern's opening brief, the Court should: (1) deny Northern's request for relief and dismissing its appeal; (2) reverse the PUC's determination that it has jurisdiction over utilities providing natural gas to the Northern farm tap customers; and (3) reverse the PUC's determination that NorthWestern is a "public utility" as defined by SDCL Chapter 49 with respect to the farm-tap customers.

Respectfully submitted this 2nd day of August, 2017.

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