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April 17, 2017

-- VIA ELECTRONIC SERVICE --

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

Re: United Natural Gas, LLC Response to Comments
Docket Nos. G6960/M-16-214 and PL6580/M-16-1026

Dear Mr. Wolf:

Introduction

Please consider this United Natural Gas, LLC's ("UNG") response to the Comments of the Minnesota Department of Commerce, Division of Energy Resources ("Department"), Docket No. G6960/M-16-214, dated April 7, 2017 ("Comments"). These Comments were issued in relation to a request by UNG for exemption from regulation of the Minnesota Public Utilities Commission ("Commission") to provide incidental service to the public outside the borders of municipalities. UNG seeks to provide incidental service to the public along the natural gas lines that will be constructed for UNG to provide natural gas service to the Lower Sioux Indian Community, a federally recognized Indian tribe, in the State of Minnesota (the "Community"). UNG is not seeking to provide natural gas service to residents within the City of Morton, Minnesota. In the Comments, the Department claims that UNG has not provided sufficient information to support its request and recommended issuance of a request for comments. It is the position of UNG that the Commission only has jurisdiction to determine whether UNG may provide incidental service to the public along the route of the natural gas service lines to supply the Community. The Commission does not have jurisdiction to regulate UNG's provision of natural gas to the Community, as the Community is an Indian tribe that is not subject to State civil regulation. Therefore, Minnesota Laws concerning the regulation of public utilities do not apply to UNG's agreement to provide the Community with natural gas service. Consequently,

an exemption from the requirements of Minn. Stat. § 216B with respect to the provision of natural gas service to the Community is unnecessary. UNG respectfully requests that it not be prohibited from providing incidental service to the public along the route of UNG's natural gas distribution system to the Community; and, UNG understands that it will be subject to the same regulatory requirements for and treatment of those customers that it is subject to for the rest of its customers as an exempt small gas utility.

Background

UNG received an exemption from rate regulation from the Commission on May 24, 2016 pursuant to an Order filed in this docket. The exemption was granted because the Commission determined that UNG met the requirements of a small gas utility under the terms of Minn. Stat. §216B.16, subd. 12 for service provided within municipalities and for tangential incidental service. The exemption was granted for UNG's service to the municipalities of Courtland, Minnesota and Lafayette, Minnesota and the associated incidental service. UNG is not wholly exempt from regulation in that it is still required to meet certain statutory reporting requirements, primarily related to consumer protection issues, tariff updates, and notice of a significantly expanded customer base. The Commission also required that UNG submit a compliance filing within one year providing certain empirical information regarding its customers.

On February 7, 2017, UNG followed the path taken by other exempt small gas utilities and submitted an updated rate book reflecting changes to its service territory and its Rate Board. On April 7, 2017, the Department s filed Comments. In those Comments, the Department concluded that UNG "needs to show that the Commission can exempt service to the Tribe from Commission regulations, whether based on relevant Minnesota, Federal, or Tribal laws." The Department stated that UNG had not met its burden to provide sufficient information to support informed decisions about its planned extension of service to the Community, located in in Redwood County, approximately two miles south of the City of Morton.

The Community agreed to have natural gas service provided to it by UNG. The Community and UNG entered into a Minimum Use Agreement, dated January 11, 2017 ("Minimum Use Agreement") in which UNG agreed to provide and the Community agreed to accept natural gas services pursuant to the terms of the agreement. The Minimum Use Agreement provides that UNG shall provide natural gas service to several tribal buildings/enterprises including the Jackpot Junction Casino, government center, clinic, recreation center, and maintenance building located on the Community's tribal property. There are future plans for residential service to the Community. The Community formally approved the Minimum Use Agreement and the provision of natural gas service by UNG when The Community Council of the Lower Sioux Indian Reservation "(Community Council)" passed Resolution No. 17-08 on January 11, 2017

unanimously. The Community is governed by the Community Council. Const. of the Lower Sioux Indian Community in Minnesota, Art. IV, § 1. The Constitution of the Community grants the Community Council to “manage all economic affairs and enterprises of the Community” *Id.* at Art. V, §1(f). Recently, the Community Council has reaffirmed its intent to have UNG provide natural gas service to the Community in correspondence from the Community Council, dated March 24, 2017. See Correspondence from Brian Pendleton, Vice President of the Community Council, dated March 24, 2017. This correspondence may not have been previously provided to the Commission. In this correspondence, the Community Council details the benefits of UNG’s natural gas services will provide and respectfully requests approval of UNG’s petition. Among other things, the Community states that the provision of natural gas services by UNG will assist in providing economic diversification and help attract new businesses.

Analysis

UNG Followed Established Procedure When Expanding its Service Territory and Notifying the Commission of the Same

A filing constitutes a Miscellaneous Filing when it is a request or notice that does not require determination of the Company's general revenue requirements. Minn. R. 7829.0100, subp. 11 (2017). Miscellaneous filings include filings involving new service offerings; changes in a utility's rates, services, terms, or conditions of service; changes in a utility's corporate structure, assigned service area, or capital structure, when conducted separately from a general rate proceeding; filings made under the rules governing automatic adjustment of charges in chapter 7825; or any related matter. *Id.* The inclusion of a particular type of filing in the list of miscellaneous filings does not require a filing that would not otherwise be required or confer jurisdiction that would not otherwise be present. *Id.* Minn. R. 7829.1400, subp. 1, permits initial comments on miscellaneous filings to be made within 30 days of filing and reply comments 10 days thereafter.

Historically, when exempt small gas utilities expanded their service to new areas but remained under the statutory customer threshold level, those utilities filed supplemental information with the Commission that identified the areas being added to their service territory and an updated rate book. *See, e.g.,* In re the Petition of Community Co-ops of Lake Park for Exemption for Small Gas Utility Franchise, Docket No. G6956/M-15-856, supplemental filing 4/15/2016; In re the Petition of Dooley’s Natural Gas for Exemption for Small Gas Utility Franchise, Docket No. G6915/M-13-672, supplemental filings 6/24/2016 and 11/28/2016. Nothing further was required of the small gas utilities, and no further action was taken by the Department or the Commission.

UNG recognizes that its small utility exemption was predicated on the original municipalities that it proposed to serve, as those municipalities agreed to regulate UNG's natural gas rates and rights, thus serving the same essential and basic functions of the Commission. When UNG entered into an agreement with the Community to provide natural gas to the Community, UNG followed the same procedure established in prior small utility exemption dockets. It made a supplemental filing in its exemption docket that notified the Commission of the area being added to its service territory and it filed revisions to its rate book in accordance with its territory expansion. UNG did not receive any response, which was typical of the other small utility exemption dockets.

However, approximately 60 days after UNG submitted its miscellaneous filing, the Department filed Comments indicating that UNG had not provided a sufficient basis for what was deemed an effective request for approval of its expansion of service to the Community. The Department also suggested that the Commission issue a request for comments in this docket and in Docket No. PL6580/M-16-1026 (requesting approval of a transportation agreement between UNG and Greater Minnesota Transmission, LLC ("GMT")).

UNG understands that its planned expansion to serve the Community is unique in that the Community is not a municipality, which is typically the case with small utility exemption expansions.¹ Nonetheless, UNG respectfully submits that it is entitled to the same treatment given to other small gas utilities as their service territory expanded into areas that did not subject them to regulation. It is also entitled to rely on the timelines defined by the rules and regulations governing utility proceedings. In this case, UNG did exactly what was required by the rules for miscellaneous filings and used the same methods that other small gas utilities previously used. Yet, approximately two months after UNG submitted its filing, it has been asked to submit additional information and a request has been made to open the matter up for a public comment period. While UNG does not object to providing additional information, and does so herein, UNG respectfully maintains that it is neither appropriate nor fair and equal treatment to require additional approval in UNG's small utility exemption docket, thereby delaying its ability to deliver gas service to a federally recognized Indian tribe that is not subject to the Commission's jurisdiction.² Therefore, UNG requests that the Commission not request additional comments in

¹ . UNG notes that it appears that Dooley's Natural Gas, LLC may have expanded its service territory to areas that do not include municipalities based on its supplemental rate book filing; however, UNG has no direct knowledge of the timing or location of Dooley's expansions after its small gas utility exemption was obtained other than to the two municipalities specifically identified in supplemental filings in the docket.

² . UNG respectfully notes that the Department and Commission were made aware of the underlying plan for UNG to serve the Lower Sioux Indian Community in November, 2016 when GMT filed its Petition seeking approval of the related transportation agreement. While that transportation agreement is not contingent upon UNG seeking or receiving any approval to serve the Community, and the question of approval is not germane to the transportation agreement docket, that docket did effectively provide early notice of the plan to deliver natural gas to the Lower

this proceeding and that it allow UNG to move forward with expansion of its service territory as other small gas utilities have.

UNG's Provision of Natural Gas to The Lower Sioux Indian Community, a Federally Recognized Indian Tribe, Is Not Subject to Regulation by the Commission Because the Community Possesses Inherent Sovereign Immunity.

While the state has jurisdiction over some private civil litigation involving reservation Indians, the state does not have general civil regulatory authority over Indian tribes. *See, Bryan v. Itasca County*, 426 U.S. 373, 384 (1976). The United States Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987). This sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 U.S. at 207. The Minnesota Supreme Court has recognized this and held that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997), *citations omitted*. Tribal sovereignty is dependent on and subordinate to only the federal government, and not the state government, unless Congress expressly provided that state law may be applied to tribal matters. *See, Id.*

Generally, the State may not impose its own regulations on an Indian tribe if the tribe can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs. *See, Mille Lacs Band of Chippewa Indians v. State of Minn.*, 952 F. Supp. 1362, 1369 (D. Minn. 1997) (*considering state regulation of Indian usufructuary rights*). While no Minnesota courts have considered the specific issue of utilities regulation, the decision in *North Central Electric Cooperative, Inc. v. North Dakota Pub. Serv. Comm'n, et al*, 837 N.W.2d 138, 146 (N.D. 2013) is instructive, wherein the court held that a:

Tribe's decision authorizing Otter Tail to provide electric service to the tribal-owned facility on tribal trust land within the reservation represents the Tribe's control of its internal relations in the context of making its own laws and being ruled by those laws. The Tribe's regulatory decision to authorize Otter Tail to provide the electric service is tribal action within the context of its inherent tribal sovereignty We conclude the Commission correctly applied the law and decided it lacked authority to

Sioux Indian Community. Additionally, UNG's submission of its supplemental filing on February 7, 2017 provided ample opportunity for the question of service to the Lower Sioux Indian Community to be raised within a standard 30 day comment period. No questions were raised about the status of Lower Sioux Indian Community as it relates to receiving natural gas service until April 7, 2017, at which time it was raised in both dockets.

regulate the Tribe's decision authorizing Otter Tail to supply electric service to the tribal-owned facility on tribal trust land within the reservation.

In *North Central Electric Cooperative*, the issue of whether the North Dakota Public Service Commission had regulatory authority over Otter Tail Power Company, an organization that provided electric service to the Turtle Mountain Band of Chippewa Indians on tribal land, was addressed. Initially, the Public Service Commission determined that it lacked authority to regulate the tribe's discretion as to who was to provide electrical services to the tribe. The Public Service Commission's decision was appealed by a rival power company. Ultimately, the North Dakota Supreme Court affirmed the decision that the Public Service Commission did not have regulatory authority over the tribe's decision to authorize Otter Tail Power Company to provide electrical service. *Id.* at 146. The decision was based on the tribe's regulatory discretion with respect to electrical service is a power of the tribe's "inherent tribal sovereignty." *Id.*

The present situation is similar to the one addressed in *North Central Electric Cooperative*. In the instant case, the Community exercised its authority to enter an agreement with UNG for UNG to serve tribal enterprises on tribal lands and, in the future, to serve tribal residents who want natural gas service. Since the Community is not subject to State civil regulation, the Commission does not have jurisdiction over whether UNG can provide natural gas service to the Community or how the Community participates in regulating UNG. Therefore, UNG respectfully submits that it is not required to seek Commission approval of its plan to provide service to the Community or extension of its exemption as a small gas utility and that its submission of an updated rate book was not an implicit request for that approval, nor was it a request to expand the scope of UNG's small gas utility exemption. Rather, UNG's submission of its updated rate book reflecting the expanded area and the inclusion of the Community on its Rate Board was consistent with the established practice of other exempt small gas utilities to notify the Commission about miscellaneous changes to its service. Therefore, UNG maintains that no additional comment period is necessary since the Commission does not have jurisdiction to make a decision about that business relationship.

*UNG Should Be Permitted to Serve the Incidental Rural Customers
on its Route to Reach the Lower Sioux Indian Community*

As the Department discussed in its Comments, public policy supports the provision of affordable, reliable, safe natural gas service in Minnesota and expanding access to natural gas to unserved areas of the State. In this situation, UNG will be running a natural gas line across a rural area to reach the Community and, as such, it will pass some rural homes and farms that do not currently have access to natural gas. It is UNG's intent to serve those individuals so that they

can avail themselves of the benefits of natural gas, just as other small gas utilities have expanded their service into additional rural non-municipal areas. UNG requests that it not be prohibited from providing incidental service to the public along the route of UNG's natural gas distribution system to the Community; and, those customers will be treated in the same manner as UNG's other customers so they will receive the same benefits and protections.

UNG understands that, since those potential customers are not members of the Community and are not situated on tribal lands, service to them is subject to the Commission's jurisdiction; and, that since they do not lie within a self-regulating municipality, their service is subject to rate regulation by the Commission. However, it is appropriate to allow them to be served by UNG just as other incidental customers are served by UNG. Because UNG has not abandoned its one-rate system, customers in non-municipal and non-tribal areas will still be protected with regard to rates and rights because UNG's rates and rights are determined by its Rate Board. Additionally, as Department and Commission staff have noted in previous small gas utility exemption discussions, the incidental customers are not without recourse given their ability to seek relief from the Commission.

Since other exempt small gas utilities have expanded their service territory to include additional non-municipal customers who benefit from the same protections as other incidental customers, and since there is no other foreseeable means to extend natural gas to the rural customers along the UNG line to the Community, the Commission should not prohibit UNG from serving those customers. Nonetheless, in the event that the Commission determines that those rural customers should not receive natural gas service from the line running past them unless UNG becomes a fully regulated utility, UNG will respect that determination and will not serve the incidental customers on the line.

Conclusion

UNG followed the rules and practices established in other dockets that granted small gas utilities exemption from rate regulation. It should not be subject to disparate treatment from that historically given to similarly situation utilities. UNG's business relationship with the Community does not require the Commission's approval because the Community is not subject to State civil regulation and, therefore, the Commission is without jurisdiction to make a decision in that regard. UNG's service to the Community is not dependent on its ability to serve the incidental customers along the natural gas line going to the Community; but, UNG would like to serve those incidental customers so that they can benefit from the natural gas line running right past them. The incidental customers will be protected in the same sense that UNG's other incidental customers are protected.

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For all of the reasons stated herein and based upon the record as a whole, UNG respectfully requests that the Commission decline to open an additional comment period, determine that it does not have jurisdiction over UNG's service to the Community, and not prohibit UNG from serving the incidental customers along the line.

Sincerely,

SOBALVARRO & HAUPERT

/s/ Gregory J. Hauptert

GJH/lkp
Attachment