

Staff Briefing Papers

Meeting Date August 26, 2021 Agenda Item **3

Company Gorham’s Inc., Northwest Natural Gas, LLC, Northwest Natural Gas of Murray County, Inc., and Northwest Natural Gas of Cass County LLC (Northwest)

Docket No. **G-6278, G-6279, G-6280/CI-18-770**

In the Matter of an Inquiry into Exemptions for Small Gas Utility Franchises Under Minn. Stat. §216B.16, Subd. 12, for Gorham’s Inc., Northwest Natural Gas, LLC, Northwest Natural Gas of Murray County, Inc., and Northwest Natural Gas of Cass County

Issue Should the Commission reconsider its June 22, 2021 Order Accepting Filings and Establishing Additional Requirements?

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Relevant Documents

Date

PUC – Order Accepting Filing and Establishing Additional Requirements	June 22, 2021
Gorham’s Inc., Northwest National Gas LLC, and Northwest Natural Gas of Murray County LLC (Northwest) – Motion and Request for Reconsideration	July 12, 2021
Department of Commerce-DER – Response to Reconsideration Request	July 20, 2021

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

I. Statement of the Issue

Should the Commission reconsider its June 22, 2021 Order Accepting Filings and Establishing Additional Requirements?

II. Background

On March 14, 2019, the Commission issued its Order in Docket No. 18-465 initiating an investigation into the regulatory status of Gorham's, Inc., Northwest Natural Gas, LLC, and Northwest Natural Gas of Murray County, LLC ("Northwest" or "the Company"). A subsequent November 20, 2019 Order required filings from Northwest, after which the Company filed a compliance filing on November 18, 2020.

On May 31, 2019, the Department of Commerce – Division of Energy Resources ("Department") filed comments arguing that Northwest was in violation of Minnesota Statutes and recommended Northwest either file for a small gas utility exemption or initiate a general rate case proceeding. On June 28 and July 8, 2019, Northwest provided additional information in response to Department Information Requests ("IRs").

On October 2, 2020, the Department filed comments recommending the Commission treat Northwest as a single public utility ineligible for exemption from state rate regulation based on the fact that the statutory customer count threshold has been exceeded. On December 15, 2020, Northwest filed reply comments.

On March 11, 2021, the Department filed supplemental comments reiterating its prior recommendation but also offering an alternative proposal for collaborative regulation between the municipalities and the Commission. On April 2, 2021, Northwest filed reply comments.

On May 6, 2021, the Commission met to consider this docket. On June 22, 2021, the Commission issued its Order Accepting Filings and Establishing Additional Requirements¹ in this docket with the following Ordering Paragraphs:

1. The Commission accepts the February 18, 2020 filing of Gorham's, Inc., Northwest Natural Gas, LLC, and Northwest Natural Gas of Murray County, LLC, as in substantial compliance with the Commission's November 20, 2019 order in this docket, with the exception of filing tariff pages or rate sheets with the rights and responsibilities of the customer. Northwest shall file these tariff pages or rate sheets within 90 days.
2. The Commission finds that Gorham's, Inc., Northwest Natural Gas, LLC, and Northwest Natural Gas of Murray County, LLC are the same public utility for purposes of Minnesota Statutes chapter 216B, but that the evidence on the record at this time has not demonstrated that the utility has more than 5,000 customers.
3. The Commission finds that Northwest's service outside of all of the municipalities Northwest serves at this time is incidental, except for the service provided to the townships and unincorporated areas around Grand Rapids.

¹ Docket No. G-6278, G-6279, G-6280/CI-18-770 June 22, 2021 Order, pp. 13-14.

4. For each Northwest franchise agreement between a municipality and an entity that is not currently serving that municipality with natural gas service, the municipality shall execute a new franchise agreement with the entity serving the municipality, and Northwest shall file the franchise agreement with the Commission, within 90 days.
5. Northwest shall file a new request for a small gas utility exemption in a separate docket within 90 days, or by another date agreed upon with the Executive Secretary.
6. For each small gas utility exemption, Northwest shall file an annual uniform compliance filing per the Commission's November 9, 2018 Order Determining Compliance with Commission Orders and Establishing Filing Requirements.
7. The Commission requests that the Department of Commerce:
 - a. Verify that there are no significant customer complaints regarding Northwest's service quality, and if there are not,
 - b. Within 180 days, file a proposed alternative regulatory collaboration between the Commission, Grand Rapids, and the areas served around Grand Rapids.
8. Paul Bunyan Natural Gas, LLC, shall file its present and anticipated 2022 customer counts, a thorough description of its corporate and operational relationship to Northwest, and, if applicable, a small gas utility exemption request, within 90 days.
9. The Commission delegates to the Executive Secretary authority to vary all time periods and procedures related to this matter for the duration of this proceeding.
10. This order shall become effective immediately.

III. Northwest's Motion for Reconsideration

On July 12, 2021, Northwest filed a Motion for Reconsideration requesting the Commission allow rehearing and reconsideration of the June 22, 2021 Order. Northwest is limiting its reconsideration request to one aspect of the Commission's finding: "that the Northwest Utilities are the 'same public utility' for the purposes of Minn. Stat. §216B.16, Subd. 12."² In particular, Northwest requests the Commission to: "reconsider its determination that Gorham's Inc., an entity solely owned by Mr. Mike Gorham, should be treated as the 'same utility' as two LLC entities in which Mr. Gorham holds only a minority interest."³ Northwest says that the Commission has created a new measure to examine whether the Company is one public utility – that of minority owner influence, which goes beyond the Department's arguments and will result in unintended avoidable consequences. Northwest is requesting the opportunity to present oral argument.

Northwest believes the statement within the June 22 Commission Order that, "although the companies do not share identical ownership and governance, the overlap in this case is enough to raise questions about unified control or influence between the three companies under the totality of the circumstances"⁴ warrants reconsideration.

² 18-770 Northwest Motion for Reconsideration, July 12, 2021, p. 1.

³ 18-770 Northwest Motion for Reconsideration, July 12, 2021, p. 1.

⁴ 18-770 Northwest Motion for Reconsideration, July 12, 2021, p. 2.

Northwest points out that Gorham's Inc. is owned by one shareholder, Mr. Mike Gorham, who also has a minority ownership interest in Northwest Natural Gas and Northwest Natural Gas of Murray County. Those entities are overseen by their members, who are able to vote with their ownership shares. The Motion says that Mr. Gorham's minority ownership is not a significant enough overlap to establish unified control or influence, particularly when it comes to:

- 1) The Commission has directed Northwest to take steps to ensure the utilities operate independently (see Ordering Paragraphs 4 and 5);
- 2) The Companies have committed to taking those additional steps; and
- 3) The Companies have separate municipal regulators, customers, and operate in geographically separate areas.

In their comments, Northwest and the Department offered different legal viewpoints on whether Northwest could be considered a single utility. Northwest said that the Commission could follow the principle of "piercing the corporate veil," which observes the corporate form unless a corporation is insufficiently distinct from its owner and that the lack of distinction is an injustice. Northwest says that the Department's comments urged the Commission to consider whether the entities are alter egos of each other.

The Commission's June 22, 2021 Order found that neither parties' case law arguments address the question presented. Instead, Northwest says that the Commission created a new doctrine of "influence" in which a minority owner treats a corporation as their own property because of apparent acquiescence by the actual owners. Northwest says that "this new doctrine is unwieldy and likely to lead to unwanted results."⁵ Northwest argues against this doctrine of influence for the following reasons:

- 1) Northwest is aware of no cases where the doctrine is presented in the proceeding in which a minority shareholder is deemed the entity's owner or in which a minority shareholder is deemed the corporation's alter ego.
- 2) The doctrine is difficult to adjudicate. Northwest says since the Commission said that Mr. Gorham exerts influence beyond being a minority shareholder, participation by minority owners will lessen because of fear of greater regulation.
- 3) Northwest Natural Gas, LLC and Northwest Natural Gas of Murray County, LLC are now effectively bound by the actions of Gorham's Inc., even though Gorham's Inc. has no control over them, and vice-versa.

Northwest says that the Commission likely did not intend to cause these issues when it ordered that Northwest is "one utility." Therefore, the "one utility" confusion, plus the Commission's determination that the 5,000-customer cap is firm for a utility's eligibility for local rate regulation, is causing challenges for Northwest.

Since the May 6, 2021 agenda meeting, Northwest has decided to stop connecting new customers, because they are too close to the 5,000-customer threshold. Northwest made this decision out of fear customers would experience increased costs and municipalities would lose

⁵ 18-770 Northwest Motion for Reconsideration, July 12, 2021, p. 3.

out on regulation. Northwest says that they do not want this decision to be perceived as a threat or overreaction but want to better understand what the Commission's future decisions might mean for their current customers and communities before adding new customers at this time. They state that granting the reconsideration will alleviate the Company's fear and allow them to move forward with providing natural gas service to new customers in rural Minnesota.

IV. Department of Commerce Comments

The Department of Commerce recommends that the Commission deny Northwest's request for reconsideration. The Department argues that per the Commission's February 7, 2018 Order Denying Reconsideration in Docket No. E-015/M-16-564, "typically, the Commission only takes up petitions when they (1) raise new issues, (2) point to new and relevant evidence, (3) expose errors or ambiguities in the underlying order, or (4) otherwise persuade the Commission that it should rethink its decision."⁶ The Department says that Northwest's petition does not meet these standards.

The Department says that Northwest asks the Commission to reconsider the finding that Gorham's, Inc. in combination with Northwest Natural Gas and Northwest Natural Gas of Murray County are a single public utility. Northwest supports its request by arguing that the Commission created a new "influence doctrine," which the Department says mischaracterizes the Commission's Order and lacks record support.

The Department does not support Northwest's petition for the following reasons. First, the Commission considered extensive evidence and arguments by the parties. When Northwest said that the Order relies on a finding that Mr. Gorham exercises influence over Northwest Natural Gas and Northwest Natural Gas of Murray County, the Department says this does not reflect the Order's language, because "the Commission made the finding 'based on the evidence in the record, the arguments of the parties, and the persuasive effect of cases cited.'"⁷ Further, the Order summarizes the evidence in the record, including discrepancies between the independence of the entities and their actual operations. The Department says that Northwest misstates the record by saying that the Order relies on a finding that Mr. Gorham exercises influence. Further, the Department states that Northwest's "claim that a mere minority stake in another utility entity will preclude that entity from extending service to new customers" is undercut by the evidence in the record.⁸ Finally, an ownership interest was only one determination of many.

Second, the Department says that Northwest is wrong when it says that an influence doctrine would be difficult to adjudicate. Nothing in the June 22, 2021 Order creates a doctrine. The Department says that the reverse is true: that the Commission speaks through its Orders and that Orders are limited to the specifics of the proceeding. Orders rule on facts in the record of the proceeding, which ensures the integrity and rigor of the decision-making process and that

⁶ 18-770 Department Response to Reconsideration Request, July 20, 2021, p. 1.

⁷ 18-770 Department Response to Reconsideration Request, July 20, 2021, p. 2.

⁸ 18-770 Department Response to Reconsideration Request, July 20, 2021, p. 3.

the Commission exercises its quasi-judicial powers with restraint. Therefore, the Department says that the Northwest's concerns are baseless.

To conclude, the Department says that Northwest "has failed to raise new issues, point to new and relevant evidence, expose errors or ambiguities in the underlying order, or present evidence that otherwise warrants reconsideration."⁹ So, the Department recommends that the Commission deny Northwest's petition, but that Northwest's concerns can be addressed in the alternative regulatory collaboration process per Ordering Paragraph 7.

V. Staff Analysis

Northwest filed a motion for reconsideration of the Commission's decision following the Commission's June 22, 2021 Order. Northwest requests reconsideration of the finding in Ordering Paragraph 2:

The Commission finds that Gorham's, Inc., Northwest Natural Gas, LLC, and Northwest Natural Gas of Murray County, LLC, are the same public utility for purposes of Minnesota Statutes chapter 216B, but that the evidence on the record at this time has not demonstrated that the utility has more than 5,000 customers.¹⁰

Northwest argues that the Commission based this finding on the fact that Mr. Gorham is a minority owner of Northwest Natural Gas and Northwest Natural Gas of Murray County, in addition to being the sole owner of Gorham's Inc. Additionally, Northwest says that it is not taking on new customers at this time to avoid regulation until the implications of the Commission's decision are clear.

The Department argued that Northwest's petition should be denied. The Department says that the Commission's decision was based on extensive evidence and arguments from parties. Also, Northwest's argument that the Commission created an "influence doctrine" is incorrect.

To further clarify Northwest's business practices, the Commission's June 22 Order asked for filings and follow-up work. By September 20, 2021, the Company must file:

- 1) Tariff pages or rate sheets with the rights and responsibilities of the customer;
- 2) New franchise agreements with each entity serving the municipality;
- 3) New small gas utility exemptions for each entity;
- 4) Customer counts, description of relationship to Northwest, and if applicable, a small gas utility exemption request for Paul Bunyan Natural Gas.

By December 19, 2021, the Department of Commerce is asked to file a proposed alternative regulatory collaborative plan between the Commission, Grand Rapids, and the areas served around Grand Rapids. The collaborative plan will likely be decided upon in a workgroup setting.

⁹ 18-770 Department Response to Reconsideration Request, July 20, 2021, p. 3.

¹⁰ Docket No. G-6278, G-6279, G-6280/CI-18-770 June 22, 2021 Order, p. 13.

While the collaborative plan only covers incidental customers around Grand Rapids, it is an opportunity for all parties to work together to find an alternative regulatory framework.

Finally, by May 1, 2022, Northwest must file a uniform small gas utility compliance filing for each entity.

Therefore, although the Commission found that Northwest is a single public utility, it also found that Northwest has less than 5,000 customers. After the numerous filings and the regulatory collaborative plan from the Department are filed, the Commission may want to meet again to further examine and consider Northwest's regulatory status.

VI. Decision Options

1. Grant Northwest's petition for reconsideration. *[Northwest]*
2. Deny Northwest's petition for reconsideration. *[Department]*