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November 15, 2006

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Re: In the Matter of the Merger between NorthWestern Corporation and BBIL
Glacier Corp., a Subsidiary of Babcock & Brown Infrastructure Limited
Docket GE06-001

Enclosed each of you will find a copy of Staff's Brief on Jurisdiction in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,


Kara Van Bockern
Staff Attorney

Enc.

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

IN THE MATTER OF THE MERGER)	STAFF'S BRIEF ON
BETWEEN NORTHWESTERN)	JURISDICTION
CORPORATION AND BBIL GLACIER)	
CORP., A SUBSIDIARY OF)	GE06-001
BABCOCK & BROWN)	
INFRASTRUCTURE LIMITED)	

COMES NOW Commission Staff ("Staff"), by and through, Kara Van Bockern, Staff Attorney, and hereby responds to Northwestern Corporation ("NorthWestern"), and Babcock & Brown Infrastructure Limited's ("BBIL") (jointly referred to as "Petitioners") joint Petition for Declaratory Ruling and for Transaction Approval if Jurisdiction is Found (Petition). Petitioners argue that the South Dakota Public Utilities Commission ("Commission") lacks jurisdiction in this matter. As a result, the argument follows that the Commission lacks any authority over the proposed merger of Petitioners. Petitioners described the nature of their respective business and the history of the proposed merger in depth in their Petition. Staff will not, therefore repeat such information at this time. Rather, Staff will focus on the jurisdiction question alone.

SUMMARY OF ARGUMENT

Staff agrees with Petitioners that the analysis presented involves two parts. First, whether the Commission has jurisdiction over the parties to this action and second, only if it is determined that the Commission does have jurisdiction, whether it approves or disapproves of the proposed merger of Petitioners. Details of the proposed merger are relevant only in the event jurisdiction is found, as only then does the Commission have authority over the proposed merger. Staff does not believe the Commission has jurisdiction and, therefore, facts and arguments surrounding the actual approval or disapproval will not be presented in this brief.

I. Applicable Statutes

Two statutes appear to be relevant and possibly convey jurisdiction to the Commission. First SDCL 49-34A-35 prohibits a public utility from disposing of its property to another public utility without first being authorized by the Commission. Staff agrees with Petitioners' view that BBIL is not a "public utility" as defined by SDCL 49-34A-1(12). SDCL 49-34A-1(12) defines a public utility as "any person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service ...". BBIL does not currently operate or control any facility in this state. Consequently, Northwestern is not disposing property to a "public utility" and SDCL 49-34A-35 does not apply.

The second statute to possibly convey jurisdiction is SDCL 49-34A-38.1. This statute acts to override SDCL 49-34A-35 above and it applies when the utility being acquired receives "more than twenty-five percent of its gross revenue in this state." If the statute is applicable, it prohibits such a disposal without first securing authorization to do so from the Public Utilities Commission. The three questions below, as presented by Petitioners, naturally rise from SDCL 49-34A-38.1.

- 1) Does "gross revenue," as used in SDCL 49-34A-38.1, include regulated and non-regulated revenues?
- 2) If all revenue in this state, both regulated and non-regulated, is considered "gross revenue," then does all revenue generated outside the state but allocated to this state by accounting requirements also constitute "gross revenue" for purposes of the statute?
- 3) Does the Commission have jurisdiction and therefore authority to approve or disapprove the proposed merger?

As a final issue, Staff will discuss the revenue numbers as submitted by NorthWestern.

II. Definition of "Gross Revenue"

The determination of whether jurisdiction exists under SDCL 49-34A-38.1 obviously falls heavily upon the definition of "gross revenues." It is very seemingly a broad term that becomes more specific when read and understood within the context of Title 49 of the South Dakota Code, utility regulation. Standing alone, gross revenue obviously means all revenues from wherever generated. Such a reading would not, however, remain consistent with the interpretation of the term elsewhere in Title 49. Petitioners cite several cases, none of which were decided in South Dakota as this specific question has not yet been before the Commission or Courts. General statutory reading guidelines are of some help and require we read the term within the context of the Title.

The most logical first step to interpret the meaning of "gross revenue" is to compare it to the meaning of "gross receipts" drawn from SDCL 49-1A-3. SDCL 49-1A-3 gives the Commission the authority to collect a tax from each public utility, as defined in subdivision SDCL 49-34A-1(12), which is subject to rate regulation by the Commission. The Statute allows a tax on intrastate "gross receipts." For the calendar year ended December 31, 2005, Northwestern paid gross receipt tax to the Commission in total revenue of \$149,484,118. Historically, the tax has been collected on regulated gross receipts only. Non-regulated revenues have not been subject to the tax. To take a narrow reading of the term "gross receipts," for purposes of the gross receipts tax and to now arbitrarily expand the definition seems to stretch the Commission's jurisdictional arms beyond a consistent and historic interpretation of the term and our statutes.

Staff, therefore, argues the Commission should examine regulated revenue only to determine whether the twenty-five percent threshold is met in SDCL 49-34A-38.1. Through the process of data requests, NorthWestern provided Staff with various amounts to represent Northwestern revenues in and out of South Dakota, regulated and non-regulated revenues. If the Commission believes, as Staff does, that regulated

revenues only should be considered "gross revenue," and further, finds the amounts supplied by Northwestern to be credible, it will conclude that 14.72% and 14.82% of NorthWestern gross revenues for the years ended 12/31/05 and 6/30/06 respectively, come from South Dakota. See *NorthWestern Exhibits 1 and 2 attached to Applicant's Brief on Jurisdiction dated 9/14/06*. In the event, however, the Commission chooses to include South Dakota non-regulated revenue with regulated revenue when examining the twenty-five percent threshold, it will still find gross revenues fall below twenty-five percent. In that case, the Commission will find 20.84% and 19.78% of such revenue for the years ended 12/31/05 and 6/30/06 respectively, come from NorthWestern business in South Dakota. *Id.* Staff argues the statutory threshold, contained in the only statute available to give this Commission jurisdiction, is not met.

III. Revenue must be from South Dakota

When calculating the percentages cited above, specifically when including non-regulated services, NorthWestern used revenue generated from sales made within South Dakota only. NorthWestern did not use revenue received for the delivery of natural gas to customers outside South Dakota. Staff argues this method of Gross Revenue calculation is consistent with statutes and policy and agrees, therefore, with NorthWestern's rationale. The statute at issue, SDCL 49-34A-38.1, clearly requires two elements prior to granting jurisdiction to the Commission. The first requirement obviously being the twenty-five percent threshold already discussed and the second being such revenue must come from this state or, in other words, intrastate sales. Intrastate transactions denote those which occur entirely within the boundaries of one state. Transactions that begin in one state and terminate in another state can more properly be termed interstate. LCI International Telecommunications Corporation v. State Department of Commerce, 227 Mich.App. 196, 204, 574 N.W.2d 710, 713 (1998). The Commission is charged with intrastate regulation, and has no jurisdiction over the

utility business in other states. It is, therefore, not only consistent with common statutory reading and interpretation, but upholds the Commerce Clause to only consider such revenue created through intrastate sales. Sales to residents outside South Dakota, whether regulated or non-regulated should not be included in the gross revenue determination for jurisdictional purposes.

IV. The FERC basis revenue, Exhibit B

NorthWestern submitted the original "Exhibit B," a FERC basis revenue compilation based on a twelve month period ending December 31, 2005, attached to its initial filing. Exhibit B did not contain any information regarding the methodology behind the Exhibit and Staff, therefore, questioned the accuracy of the numbers submitted. Staff, consequently, submitted a data request to better understand and verify the accuracy of NorthWestern's revenue calculations. NorthWestern has stated that all revenues are subject to quarterly review procedures and annual audit procedures by independent auditors. The only question, yet unanswered by Staff is the appropriate selection of NorthWestern revenues to include when determining gross revenues. In other words, the exact twelve month sampling remains in question.

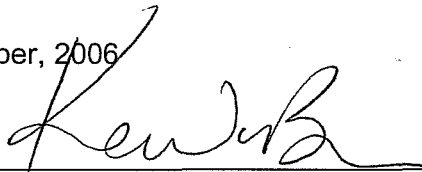
Staff requested and NorthWestern submitted an updated version of 'Exhibit B' for the twelve months ending June 30, 2006. Staff finds this twelve month sampling to be a reasonable time frame to inspect. The updated twelve month sample gives the Commission gross revenue percentages consistent with the proposed merger timeframe. Both the original and the modified Exhibit B are attached and depict that Northwestern's Gross Revenue from South Dakota falls below the twenty-five percent threshold required to convey jurisdiction.

CONCLUSION

The Commission does not have jurisdiction over the merger between NorthWestern Corporation and BBIL without necessary statutory authority. Two statutes

arguably apply to this proposed merger, yet fail to convey jurisdiction because necessary statutory elements simply are not met. The first, 49-34A-35, is immediately eliminated due to the nature of BBIL and the very definition of those entities affected by the statute. The second statute, 49-34A-38.1, conveys jurisdiction only if Northwestern receives more than twenty-five percent of its gross revenue from the State of South Dakota. After studying the revenue amounts submitted by NorthWestern, Staff does not believe the necessary gross revenue threshold has been met and as a consequence does not believe the Commission has jurisdiction over the proposed merger between the two above captioned companies.

Dated this 15th day of November, 2006



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CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Brief on Jurisdiction were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 15th day of November, 2006.

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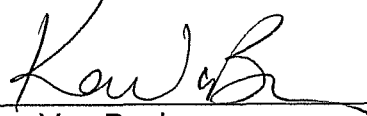
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Staff Attorney

NorthWestern Corporation
FERC basis revenue-South Dakota
Year ended December 31, 2005

South Dakota Electric	104,318,847
South Dakota Gas	55,290,157
Total SD regulated	<u>159,609,005</u>

Total NorthWestern FERC basis revenue 1,084,668,143

SD regulated revenue as percent of FERC basis revenue 14.72%

Revenues of non-regulated SD operations

NorthWestern Services Corporation	152,870,155
Nekota Resources, Inc.	1,200,537
Total	<u>154,070,692</u> See note below

Note-The revenues of these subsidiaries are not included in total FERC revenues, because FERC requires presentation of subsidiaries on the equity method of accounting.

	NPS Revenue
FERC IS	214,975,502
SEC IS	<u>214,975,502</u>

SD Electric	104,318,847
SD Gas	55,290,157
NE Gas	55,366,497
	<u>214,975,502</u>

Calculation 1

159,609,005	total SD regulated
154,070,692	all unregulated gas
313,679,697	total
<u>1,261,354,865.31</u>	<u>total co grossed up revenues</u>
<u>24.87%</u>	<u>%</u>

Calculation 2

159,609,005	total SD regulated
154,070,692	all unregulated gas
313,679,697	total
<u>1,243,473,483.43</u>	<u>total co grossed up revenues less adjustments</u>
<u>25.23%</u>	<u>%</u>

Calculation 3

159,609,005	total SD regulated
99,535,692	just SD unregulated (exclude Nebraska)
259,144,697	total
<u>1,243,473,483.43</u>	<u>total co grossed up revenues less adjustments</u>
<u>20.84%</u>	<u>%</u>

NorthWestern Corporation
FERC basis revenue-South Dakota
12 Months ended June 30, 2006

South Dakota Electric	107,490,002
South Dakota Gas	58,462,933
Total SD regulated	<u>165,952,936</u>

Total NorthWestern FERC basis revenue 1,119,486,662

SD regulated revenue as percent of FERC basis revenue 14.82%

Revenues of non-regulated SD operations

NorthWestern Services Corporation	121,744,955
Nekota Resources, Inc.	1,219,796
Total	<u>122,964,751</u> See note below

Note-The revenues of these subsidiaries are not included in total FERC revenues, because FERC requires presentation of subsidiaries on the equity method of accounting.

SD Electric	107,490,002
SD Gas	58,462,933
NE Gas	60,188,803
	<u>226,141,738</u>

Calculation 1	
165,952,936	total SD regulated
122,964,751	all unregulated gas
288,917,687	total
	total co grossed up
	revenues
<u>1,254,968,842.00</u>	
23.02%	

Calculation 2	
165,952,936	total SD regulated
122,964,751	all unregulated gas
288,917,687	total
	total co grossed up
	revenues less
	adjustments
<u>1,211,945,082.00</u>	
23.84%	

Calculation 3	
165,952,936	total SD regulated
73,795,676	just SD unregulated
239,748,612	(exclude Nebraska)
	total
	total co grossed up
	revenues less
	adjustments
<u>1,211,945,082.00</u>	
19.78%	