

Transcript of
Proceedings
Telephone
Conference

July 11, 2006

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE MERGER BETWEEN
NORTHWESTERN CORPORATION AND BBI GLACIER
CORP., A SUBSIDIARY OF BABCOCK & BROWN
INFRASTRUCTURE LIMITED

GE06-001

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Transcript of Proceedings
Telephone Conference
July 11, 2006

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COMMISSION STAFF

- Patricia Van Gerpen
- John Smith
- Sara Greff
- Tina Douglas

ORIGINAL

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1 TUESDAY, JULY 11, 2006

2 MR. SMITH: Good afternoon, everyone. We have just
3 left the endless meeting and hearing that we had this morning.
4 This is John Smith and I'm going to let everybody -- I'm really
5 tired, I'm going to go around the room and let everyone here in
6 the room introduce themselves. Then we will go to the phone
7 and see who's on the phone. You want to start with Mr. Gerdes.

8 MR. GERDES: Dave Gerdes, Pierre, South Dakota,
9 representing NorthWestern.

10 MS. GREFF: Sara Greff, South Dakota PUC, representing
11 staff.

12 MR. KOENECKE: Brett Koenecke, I'm a lawyer from
13 Pierre and I represent BBI in this matter.

14 MS. ROGERS: Darla Rogers, an attorney from Pierre, I
15 represent East River Electric and Basin Electric in this
16 matter.

17 MS. VAN GERPEN: Patty Van Gerpen representing staff.

18 MS. GREFF: We have Tina Douglas here from staff with
19 a calendar for scheduling, for dates and stuff like that.

20 MR. SMITH: And we do also have a court reporter,
21 Carla Bachand. She will be taking the transcript of the
22 conference. Let's go on to the phone, who do we have on the
23 phone at this point.

24 MR. TAYLOR: Bill Taylor representing --

25 MR. SMITH: Bill, you want to try again?

1 MR. TAYLOR: Bill Taylor, Woods Fuller, Sioux Falls,
2 representing South Dakota Power Company, Heartland Consumers
3 Power District.

4 MR. SMITH: Thank you.

5 MR. YAFFE: David Yaffe representing Missouri River
6 Energy Services.

7 MR. SMITH: Who just joined?

8 MS. SIMON: This is Mrg Simon with Missouri River
9 Energy Services.

10 MR. SMITH: Do we have everybody now?

11 MS. ZAKIR: Nadia Zakir from Van Ness Feldman
12 representing Missouri River.

13 MR. SMITH: Is that everyone? I haven't heard
14 anything, if we hear any beeps, I think that covers everybody
15 on the list here. This is my list. I think that's everybody.
16 Tom Knapp isn't on, but is he joining?

17 MR. GERDES: Tom is not joining. Tom had a tragedy
18 over the weekend, he lost his brother-in-law in a car accident,
19 so he's involved in family matters right now.

20 MR. SMITH: Okay. All right, Mr. Gerdes, NorthWestern
21 is actually who requested this scheduling conference, so do you
22 wish to begin and give us your thoughts on what you would like
23 to accomplish?

24 MR. GERDES: Well, this petition is somewhat unique,
25 it is unique in my recollection, in that if you look at our

1 petition, we at least think there are some questions as to
2 whether or not the commission has jurisdiction, and therefore,
3 after consulting with John Smith, we concluded that what we
4 would do would be to file a two-part petition, asking first for
5 the commission to determine jurisdiction and thereafter,
6 assuming that it finds jurisdiction, to approve the
7 transaction. Obviously if it doesn't find jurisdiction, that's
8 the end of it.

9 To those in the room, and I apologize to those that
10 are on the phone, to those in the room, I passed out something
11 I put together a long time ago, which is a proposed procedural
12 schedule, which may or may not work because we have to work
13 with the commission's schedule, and then also I just -- we
14 wanted to just see what we thought were the issues and so I did
15 an issues statement.

16 MR. SMITH: Can you hear Dave there, everybody?

17 MR. GERDES: I'll speak up, that's one thing I can do.
18 This is a small room. In case you missed it, I apologized to
19 those on the line. I prepared a proposed procedural schedule
20 and an issues statement, which I have passed out here. The way
21 things go around here, and John, you can correct me if I'm
22 wrong, is John typically does the procedural schedule and then
23 asks for help on identifying the issues, so I just put that on
24 paper and there's nothing cast in stone about it.

25 MR. SMITH: Let me ask something, Dave, quick like.

1 Is everybody else on the phone, are you in a place where you
2 could get a quick e-mail of this? We will scan it immediately
3 and send it to you right away.

4 MR. TAYLOR: This is Bill Taylor, I am not.

5 MR. YAFFE: David Yaffe is not either, though Nadia
6 is.

7 MR. SMITH: If anybody would like us to quickly scan
8 it and send it to you, I can do that.

9 MS. SIMON: I think that would be helpful.

10 MR. SMITH: Nadia, do you want it?

11 MS. ZAKIR: Yes, please.

12 MR. SMITH: I have got the e-mail addresses. I think
13 they are all listed on there, Nadia and Mrg. I guess the rest
14 of you we will just have to do it verbally the best we can.

15 MR. GERDES: Which is what we usually do. I just
16 happened to be organized this time.

17 MR. SMITH: Yeah, Bill, we usually just do this orally
18 anyway, but Bill, you were saying something.

19 MR. TAYLOR: Go ahead and e-mail it to me, I may be
20 able to pick it up here in a couple minutes.

21 MR. SMITH: It will be something to kind of work off.

22 MR. GERDES: That was my idea. It just gets us
23 started.

24 MR. SMITH: This morning, incidentally, I don't know
25 if any of you were listening to the meeting, but after a

1 vicious assault between -- by Dave Gerdes (laughter),
2 intervention was granted to all of your clients, so that part
3 is over with for now. I will tell you, Bill, the only one he
4 objected to was your client. You had a little help from your
5 friends, namely me.

6 MR. TAYLOR: Thanks.

7 MR. SMITH: Well, why don't we start, then. Dave, you
8 want to explain what you have done. I guess we can wait just a
9 second here.

10 MR. GERDES: Just as a preliminary matter, John and I
11 talked several times before this thing was filed because it's
12 pretty unique, and I think we agreed that the best way to do
13 this was to sort of have the two questions on a parallel track.
14 First the jurisdictional question and secondly the regulatory
15 question of approval of the transaction, and so what I have put
16 together here is with the idea -- I've got a briefing schedule
17 for the legal question and then I have a discovery deadline
18 that's out about two months, and the idea would be that
19 discovery would be ongoing at the same time we are writing
20 briefs, and then about the time right after the discovery
21 deadline, or excuse me, right before the discovery deadline, we
22 would do oral argument on the jurisdiction question.

23 That's I'm saying September 12th and then September
24 18th for the discovery deadline and so somewhere in there the
25 commission then would announce their decision on jurisdiction

1 and then prefiled testimony would be due October 10th on the
 2 theory that that would be almost a month that people could be
 3 looking at the discovery and working on their prefiled
 4 testimony, and then obviously depending on the way the
 5 commission chooses, we either go forward or not. That to me
 6 gets us on a parallel track and keeps us going.

7 MR. SMITH: I'm going to throw out one issue to start
 8 with and that is on the jurisdiction issue, and I haven't had a
 9 chance to peruse your issues here, Dave, but just in looking at
 10 it, thinking it over a little bit myself, and I'll just throw
 11 this out for the group. I mean, there may be an initial
 12 threshold question of law or two and depending on how the
 13 commission were to rule on those, it may be dispositive of this
 14 jurisdictional issue one way or another. At least some of the
 15 jurisdictional questions do involve questions of fact, and I
 16 guess one question I have at the outset, then, is is some
 17 initial discovery necessary in order to enable parties to
 18 effectively advocate their positions relative to the
 19 commission's authority to even hear this case?

20 I'll give you a couple of examples. First of all, if
 21 the commission holds that the existence of a proceeding at FERC
 22 with jurisdiction under Section 203 as amended, if the
 23 commission holds that that then precludes our hearing this case
 24 under most of the statutes that we have, I think what we are
 25 left with is one statute and that's 49-34A-38.1, and at that

1 point, because NorthWestern is not a South Dakota chartered
2 utility, we devolve down to the next level of inquiry and what
3 that is is whether or not NorthWestern receives 25 percent of
4 its gross revenues from South Dakota or in South Dakota. I
5 don't have my book open here to the section.

6 In this state, okay, so to me at least it looks as
7 though assuming that might be the path, since there is a
8 pending FERC proceeding and since it appears on its face at
9 least that there's very little doubt that this proceeding --
10 that this transaction does need FERC approval, that we are
11 probably operating on the basis of that 25 percent of gross
12 revenue threshold test. And so an initial -- there's an
13 initial legal question and that is, what revenues do we look
14 at? Do we look at all revenues or do we look only at regulated
15 revenues?

16 And then there's a second set of questions, if we
17 decide we look at all revenues, if we look only at unregulated
18 rev -- at regulated revenues, end of story, I can tell you
19 that. I don't care whether you look at the FERC filings or the
20 10K, they are so far under the 25 percent, it's over.

21 If we conclude that there is -- that we look at all
22 revenues, then we have to face the issue of what revenues are
23 in the state of South Dakota, and to me we get into some
24 significant issues of fact when we get there and so I guess my
25 question is, Dave, how that inquiry may jibe or mesh with your

1 discovery schedule that you have outlined and timetable for
2 decision.

3 MR. GERDES: That's a good point. I hadn't thought
4 about that and it -- I did attach our computations to the
5 petition, but that doesn't mean other parties wouldn't want to
6 question them, obviously. And that's a part I didn't think
7 about. So it may very well be that we would want to establish
8 an initial period whereby we discover just on that issue and
9 then write the briefs.

10 MR. SMITH: That's fairly --

11 MR. GERDES: That makes sense. We have got all the
12 information, it's all in the financials and that's easily --

13 MR. SMITH: The one breakdown that seemed a little
14 trickier is if we reach the point where we say all revenues are
15 included, to me the toughest issue then is defining which of
16 the unregulated revenues are includable as South Dakota
17 revenues.

18 MR. GERDES: Just for you people on the phone, there's
19 a rather large block of revenue that deals with unregulated
20 retail, or excuse me, wholesale sales of gas and they occur in
21 various physical locations, but for accounting purposes, the
22 accountants have allocated them to South Dakota. But if you
23 read the statute, the statute says gross revenue in this state,
24 and so then the question is, do you have to actually determine
25 where that gross revenue is generated, which would be in large

1 part in other states, mostly Montana, I believe.

2 MR. SMITH: Some of it -- actually, I think this
3 particular revenue, Dave, they have a separate category called
4 Montana unregulated, that's almost totally electric, and that's
5 sales off of Milltown Dam and the Colstrip plant that are sold
6 directly into the wholesale grid, into the grid at wholesale.
7 But mainly what we are talking about here are gas marketing
8 transactions from a division of NorthWestern called
9 NorthWestern Services that's located physically in Sioux Falls.
10 However -- mainly what they do is they sell directly off the
11 wholesale pipelines, the interstate pipeline system, and they
12 sell directly into large industrial users, and of those users,
13 they are almost exclusively ethanol plants. Many of those
14 ethanol plants are here in South Dakota and I think if we
15 decide unregulated revenues are covered, there's no question,
16 then, if we decide that, that a sale off Northern Border
17 Pipeline, say, just for example, to an ethanol plant all within
18 the state of South Dakota is unquestionably South Dakota
19 revenue, I think. I think it probably is.

20 But another situation, and there's a lot of revenue in
21 that pot, is from Nebraska gas sales, and those are sales where
22 the gas is taken off an interstate pipeline in the state of
23 Nebraska, they are not retail transactions, and they are
24 delivered to a large scale user in Nebraska and nothing other
25 than the actual brokering of the transaction occurs in South

1 Dakota. So I think that's an issue. There's a legal issue
2 there, and then secondly, there's a fact issue, is what are
3 these transactions and where are they located and how do they
4 happen?

5 MR. GERDES: Then that raises the question, does
6 anybody -- is anybody going to want to take a deposition or two
7 on that or are you going to be satisfied with the documents
8 that we produce? Right?

9 MR. SMITH: Any thoughts on the phone here? Darla,
10 you are sitting in here, too. Any thoughts off the top of your
11 head, Mr. Yaffe?

12 MR. YAFFE: No, we sent in our petition to intervene.
13 We were not going to participate on the question of
14 jurisdiction.

15 MR. SMITH: I'm sorry.

16 MR. GERDES: They are out of that question, everybody
17 else is in it.

18 MR. YAFFE: If I could follow up, and forgive me if
19 I'm a little behind the eight ball. In the order that was
20 approved today, was anything set for hearing?

21 MR. SMITH: No, that's what we are doing right now.
22 All that was done today is the interventions were granted.

23 MR. YAFFE: Okay, thanks.

24 MR. SMITH: Today what we'd like to do is try to map
25 out an entire schedule, ultimately resulting in a hearing on

1 the merits, even though -- depending on the jurisdiction, we
2 may not get that far.

3 MR. YAFFE: Right. Got it, thank you.

4 MR. SMITH: You guys, I gotta remind you to identify
5 yourselves so the reporter here knows who you are. Go ahead,
6 Bill.

7 MR. TAYLOR: I'm past the intervention threshold with
8 South Dakota Power Company --

9 MR. SMITH: Yes.

10 MR. TAYLOR: -- and with Heartland? It seems to me my
11 focus up to this point has been trying to get the petition done
12 and get lined up to intervene. I understand the basic
13 question. I haven't seen any of the supporting documentation,
14 I'm sure Dave can make that available, a lot of it is available
15 on the Web. I don't want to be obstructionistic, but I also
16 want to measure these questions that lead to the jurisdictional
17 decision for my client and I want to, if necessary, be in the
18 position to serve an interrogatory, to make a request for
19 discovery, request for production, relating to that issue. I'm
20 not sure that I can commence with the speedy timetable. I'll
21 certainly accommodate anything that I can.

22 MR. GERDES: Bill, our petition has got the basics in
23 it and that's on the Web site and has been there since June
24 7th.

25 MR. TAYLOR: Yeah, and I read it right after you filed

1 it, Dave. It does have the basics, but I would have to say
2 that it's pretty basic basics.

3 MR. SMITH: It's super basic. There's no supporting
4 anything in there on your numbers.

5 MR. GERDES: Sure, there is.

6 MR. SMITH: I didn't see it, Dave, I'm sorry.

7 MR. GERDES: It's the same sheet I gave you.

8 MR. SMITH: Where did those numbers come from?

9 MS. ROGERS: Darla Rogers, representing East River and
10 Basin Electric, and I am the same as Mr. Taylor, I'm not trying
11 to be an obstructionist. In response to your question, Dave,
12 whether interrogatories would be sufficient, ordinarily, that
13 might be the case, but I'm tending to think that if we are
14 given a large volume of detailed financial documents, sometimes
15 a short deposition with someone that can help walk us through
16 there might be helpful, and again I'm not trying to delay the
17 process, I'm just saying that rather than us trying to decipher
18 the documents that would be produced in interrogatories, very
19 limited deposition testimony might really be helpful and might
20 ultimately expedite the process.

21 MR. GERDES: Well, without talking to Tom Knapp and
22 the comptroller's office at NorthWestern, I can't be specific,
23 but conceptually, what you probably want is the basic
24 supporting documents like a week or ten days ahead of time and
25 then a deposition date and somebody from the comptroller's

1 office to explain them, correct?

2 MS. ROGERS: I guess that's what I was thinking.

3 MR. GERDES: We could do that, I think. I don't know
4 why not.

5 MR. SMITH: I don't know why not. You are parties
6 now, you have a right to discovery, so it's just down to trying
7 to be as a commodious as we can.

8 MR. TAYLOR: In the interest of economy, Darla and I
9 are -- our clients are essentially in the same position with
10 respect to the jurisdiction question. I'm sure that we can
11 work something out and take the resources and time and energy
12 and keep the thing moving, but I don't want to be -- I also
13 don't want to be saddled with an unreasonably rapid discovery
14 process. Unlike Dave, I have discovered over the years of my
15 practice contemplative thought is the only way I can figure
16 things out, I'm not a quick study. I would like to think about
17 some of this stuff that's generated. It's not like there's a
18 fire drill going on. There is approval proceedings in Montana,
19 there are approval proceedings in Nebraska. There is going to
20 be a lot of work going on all around the region, so, Dave, I
21 appreciate your magnanimous approach, but send me the papers
22 and then we will have a deposition a week later may not be
23 quite enough time for me to figure out what I'm going to ask
24 questions about.

25 MR. SMITH: And again, back to Bill, just on

1 jurisdiction, period, I'm not going on to the merits, which is
2 a whole other thing in terms of the transaction itself. But a
3 lot of the numbers in that exhibit that are attached, that is
4 attached, those are public documents. I was able to verify
5 those on EDGAR, on the SEC's EDGAR database, and also if you
6 look on the FERC Form 1 filing database, some of the other
7 numbers, those are actual right out of the public documents.

8 There are a couple of things that I just note and that
9 is when you start digging into the SEC numbers, when you look
10 at their segment analysis, the segment numbers do not end up
11 adding up to the actual totals in terms of total company
12 revenue, et cetera, and I had one of your -- one of
13 NorthWestern's people via Dave offered some level of
14 explanation. A few things like that where we could get some
15 explanation can go a long way toward having at least those
16 macro level numbers quickly make sense. And then we can focus
17 maybe more.

18 I think you guys then can get beyond that and you
19 don't need to figure out what the basic large scale segment
20 numbers are and have a bunch of wasted time and get to the
21 basics, which I think really gets down to this. It gets down
22 to what are South Dakota jurisdictional revenues in terms of --
23 regulated revenues by the PUC, and then what are the
24 unregulated revenues that may be for the whole company and
25 particularly those that might arguably be attributable to South

1 Dakota, and really I think that's where the focus is in terms
2 of this phase of things. You guys may think differently after
3 you have analyzed the issues, but that's what it looks like to
4 me.

5 MR. TAYLOR: Sounds pretty straightforward to me.
6 Bill Taylor speaking. It doesn't sound terribly difficult. I
7 don't have the level of exposure to NorthWestern's financials
8 that you do and so your confidence levels in how this is going
9 to go are much higher than mine, mine being determined by
10 ignorance, yours being determined by knowledge.

11 MR. SMITH: You're right, Bill, I have been looking at
12 this for a couple of months now. I don't have a huge -- in
13 terms of having burrowed into real super detail, other than we
14 get a quarterly report here from NorthWestern, it has numbers
15 in there. Those are all regulated numbers in terms of what we
16 see and those include regulated large scale transactions, too.
17 We are probably not as far ahead of you as you might think.
18 I'm thinking, too, though, Dave, a deposition on -- the other
19 element that may be relevant, you guys are lawyers and you can
20 try your own case, but is the way those transactions occur in
21 Sioux Falls. What happens there? What do you do there? What
22 is the nature of the consideration that flows into
23 NorthWestern's trough? Is it broker fees only or is it actual
24 revenues from the gas? What is that and how do those
25 transactions happen? And maybe that's irrelevant, but I would

1 think just thinking of tax cases and that, sometimes those kind
2 of things end up being what determines where the nexus of an
3 event is. Well, with that, shall we turn -- did you get your
4 document, Nadia, and everybody else that we sent it to?

5 MS. ZAKIR: I have not received anything yet. This is
6 Nadia.

7 MS. SIMON: This is Mrg, I did receive my e-mail of
8 the document.

9 MR. SMITH: You did?

10 MS. SIMON: Yes, I did.

11 MR. SMITH: Can you send it to Nadia?

12 MR. YAFFE: You may want to check the spam filter or
13 something.

14 MR. SMITH: We usually try -- if you want to set your
15 spam filters, I usually try to -- once we have a case filed, I
16 usually begin every communication with the docket number.

17 MS. SIMON: This is Mrg Simon and I see from the
18 e-mail it was sent to Nadia, but instead of using the letter N,
19 they used the letter M as in Mrg.

20 MR. SMITH: I'll go tell them that, just a second. Do
21 you want to just forward it to her, Mrg?

22 MS. SIMON: You bet. Let me know if you get it,
23 Nadia.

24 MR. GERDES: This deposition date doesn't depend on
25 the commissioners.

1 MR. SMITH: You can do anything you want on discovery.
2 If you want a date from us, that's fine. We normally don't get
3 involved in discovery unless you guys get bogged down and can't
4 get along.

5 MS. DOUGLAS: We could move that to the 26th, but the
6 meeting is in Sioux Falls, just so you know. But that 12th
7 commission meeting date is very, very tentative right now and
8 as of this point we are not having a commission meeting, but we
9 have just left it on the calendar. Because we have switched
10 access hearings going on at that time and we can't.

11 MS. ZAKIR: I just got the e-mail, thank you.

12 MR. SMITH: You can see on the front page the
13 schedule. Maybe we are not going to stay on that. I'll just
14 tell you I just made this statement, but it's usually true and
15 Dave knows this, in this case if we need to do a little
16 different let me know, but normally we pretty well butt out of
17 the discovery process. We get involved when there's a lack of
18 cooperation or objections that need to be overruled and usually
19 that happens on motions to compel. But normally we just allow
20 the parties to trudge along under the discovery rules and what
21 we do, despite what you will see in our rules, we pretty much
22 default over to the civil rules in terms of managing discovery.
23 I don't know, if you guys need expedited turn around on some of
24 this, Dave, maybe we ought to decide that.

25 MR. GERDES: Our goal is to get this thing fully

1 decided, both questions, by the end of the year.

2 MR. SMITH: I think that's doable.

3 MR. GERDES: That's what this shows. We can play with
4 the dates.

5 MS. ROGERS: If we get into some of these factual
6 questions on the jurisdictional issue, aren't we going to need
7 a little bit more time up front instead of just a straight
8 briefing schedule to do some discovery up there?

9 MR. GERDES: Yes. Except we would do the first brief
10 and we have got the documents. So it's not quite so bad. What
11 I'm thinking is maybe just move a couple of those back a week,
12 that might work.

13 MR. SMITH: Maybe instead of the very first event you
14 have got on here as NorthWestern/BBI brief, we can move that
15 back, but do you want to have one initial deadline for
16 submission of an interrogatory round or something related at
17 least to the jurisdiction issues that happens fairly quick?

18 MR. GERDES: We could do that.

19 MR. KOENECKE: I'm trying to think of a way to kick
20 this thing off in a more rapid fashion because what typically
21 happens -- this is Brett Koenecke speaking -- you will serve
22 interrogatories and you will get some answers, then you will
23 have to serve three or four more or maybe half a dozen because
24 you didn't quite ask it right the first time and I can see us
25 being lengthened here rather than shortened. I can't come up

1 with a way I guess in my mind to get this thing kicked off
2 by -- maybe we can just file some exhibits on our side, Dave,
3 to get some things started rather than to ask for. . .

4 MR. GERDES: Maybe what we ought to do is agree that
5 by a certain deadline we will produce a list of witnesses with
6 their qualifications, who would speak to two issues, and that
7 is the financial documents, and secondly, the manner of the gas
8 sales and provide documents relative to that and then give you
9 some time to pose questions and then set a deposition date.
10 Maybe that would work.

11 MR. TAYLOR: This is Bill Taylor. You are thinking of
12 doing like a Rule 26 proposal?

13 MR. GERDES: Kind of like that, yes.

14 MR. TAYLOR: Except on a couple limited questions. I
15 think that's a great idea.

16 MR. GERDES: That would get us going.

17 MR. SMITH: Dave, when do you want to do that by?

18 MR. GERDES: Obviously I haven't talked to Tom Knapp
19 about this.

20 MR. SMITH: What we will do is do a draft order and
21 I'll circulate it, but if we can get a ballpark, we can start
22 honing in on it.

23 MR. GERDES: I would think -- this is the 11th, I
24 would think we ought to be able to produce something by the end
25 of the following week, by the 21st.

1 MR. SMITH: That's pretty fast. It's up to you if you
2 think you can.

3 MR. GERDES: Yeah.

4 MR. SMITH: By July 21?

5 MR. GERDES: Yep.

6 MR. SMITH: That will include financial statements and
7 other financial documentation supporting the numbers you have
8 in your exhibit, right?

9 MR. GERDES: Yep.

10 MR. SMITH: And generally supporting any claimed
11 NorthWestern -- any claim of jurisdictional separation by
12 NorthWestern involving nonregulated revenues. Is that a fair
13 way to put it?

14 MR. GERDES: Yeah. And we will also tender witnesses
15 on those subjects.

16 MR. TAYLOR: Are you going to name them -- Bill Taylor
17 speaking -- are you going to name them and what their
18 qualifications are and a summary of what they have got to say?

19 MR. GERDES: Something to that effect, yeah. That's
20 what I thought.

21 MR. TAYLOR: Great.

22 MR. GERDES: Sort of like I'm answering one of your
23 frivolous interrogatories.

24 MR. TAYLOR: All of mine are frivolous, that's why I
25 have to send them over and over.

1 MR. SMITH: Okay, just a minute, I'm just writing here
2 so I remember what to put. Okay, I think I got that down. So
3 you will provide financial info supporting the exhibit to the
4 petition and also supporting any jurisdictional separation of
5 revenues that may be relevant to the South Dakota determination
6 and a list of witnesses who can testify regarding, one,
7 financials, and two, nature and mechanics of gas marketing
8 transactions.

9 MR. GERDES: Yes.

10 MR. SMITH: I suppose we could throw in any other
11 nonjurisdictional, but I don't think there are any
12 nonjurisdictional electric tractions, unless you guys want to
13 go to the way farthest out thing of saying that Montana
14 Electric transactions are somehow relevant to this proceeding
15 in South Dakota.

16 MR. GERDES: I would have to ask, I don't know.

17 MR. SMITH: In the 10K, those transactions are
18 actually denominated Montana unregulated revenues. And they
19 are revenues of wholesale power on the western grid off of
20 Colstrip and off of Milltown.

21 MR. GERDES: That's electric revenue.

22 MR. SMITH: Electric revenues. Now, that's the first
23 event, huh? Then after that do you guys want to set a target
24 date for depositions or do you want to do that on your own?

25 MR. TAYLOR: Bill Taylor speaking. Why don't we just

1 tentatively agree that after we get that production, Darla and
2 I will get together and try and sort out what we think needs to
3 be done, talk to Dave about it and see if we can arrive at a
4 mutually acceptable approach and time line, and as far as
5 Dave's client, maybe our discussions need to be culminated
6 within two weeks after Dave's production. That gives us some
7 days to look at his material and try and decide what it all
8 means and for Darla and I to talk about where we want to go
9 from there.

10 MS. ROGERS: We need to make sure that staff is
11 included in this process.

12 MR. TAYLOR: Of course. I didn't mean to slight you.

13 MS. GREFF: This is Sara Greff from staff. We may
14 have questions and/or interrogatories that we want to be served
15 as well.

16 MS. ROGERS: If we do depositions, I'm assuming you
17 want to be involved.

18 MS. GREFF: We want to be involved.

19 MR. GERDES: I would just like to have a deadline so
20 that we are not waiting --

21 MS. ROGERS: I think so, too.

22 MR. GERDES: That we have to have the deposition --
23 that we have to have the deposition occur by, completed.

24 MR. SMITH: East River, and I'm just calling your
25 client Heartland, Bill, even though I know you got two of them,

1 and you guys -- Basin and Heartland will have -- that you will
2 have conducted your depositions by when?

3 MR. TAYLOR: I would say -- Bill Taylor speaking --
4 give us a couple of weeks to examine the material, in that
5 couple of weeks time, Darla and I and Sara can coordinate, see
6 if we have -- if we find common ground and common interests.
7 How far along are we, then? A couple weeks, that puts us the
8 middle of August, earlier than that, end of the first week of
9 August.

10 MR. SMITH: I think you would be about --

11 MS. GREFF: How about we make 8-21 the intervenor,
12 staff on jurisdiction the date for depositions to be done.

13 MR. SMITH: 8-21?

14 MR. TAYLOR: Depositions completed by the 21st?

15 MS. GREFF: Correct.

16 MR. TAYLOR: I hate to be a complainer, but that might
17 be a little -- my one and only child is reporting to his
18 country's active service on August 14th and I promised him that
19 I would spend ten days or so with him before he left, so the
20 early part of August is going to be family time for me. I'll
21 do the best I can.

22 MR. GERDES: We will have that deadline as 8-21.

23 MR. TAYLOR: Yeah, with the understanding that that
24 deadline may have to be moved back. If we get a pile of stuff
25 from you and I try and sort it out and my kid calls me up and

1 says, we are going to the lake because I'm leaving for the Army
2 in two weeks, I'm going to the lake, I'm not going to worry
3 about your deposition.

4 MR. GERDES: Get one of your other lawyers to work on
5 it, that's what people always tell me.

6 MR. TAYLOR: Yeah, me, too, a lot. I will attempt to
7 do that of course.

8 MR. SMITH: Again right now, guys, again it's sort
9 of -- maybe it's flying in the face of what you said at the
10 very outset, Dave, but I am assuming that the track we are on
11 now is we are strictly limiting this to the jurisdictional
12 issues.

13 MR. GERDES: Right.

14 MR. SMITH: Hopefully this stuff, I'm hoping this will
15 be relatively straightforward and not too terribly complicated,
16 Bill, and I don't think it is.

17 MR. TAYLOR: I hope not.

18 MR. SMITH: I don't think so. I don't think you will
19 have any trouble with it at all. Let's look at that, then, we
20 are looking at 8-21 for the date by which to have the
21 jurisdictional depositions completed. You want to stress, too,
22 of course that means we gotta have cooperation on both ends,
23 you know, Dave, your people have to make themselves available
24 and one crappy thing is in the summer people are on vacation
25 and things just don't work out. This is a target date and I

1 expect everybody to work in good faith toward that.

2 MR. KOENECKE: They will probably be in Sioux Falls.

3 MR. GERDES: I would guess.

4 MR. KOENECKE: That makes it easier for Mr. Taylor.

5 MR. GERDES: Then we start with when do we start our
6 brief, right? Now we go back to that, which would be I suppose
7 we would want a couple weeks from that date. A lot of it we
8 can have done.

9 MR. KOENECKE: I would say if it's done at the end of
10 the next week.

11 MR. SMITH: The 28th?

12 MR. KOENECKE: If it would be due on the 1st of
13 September, that's a Friday. You don't like having things due
14 on Fridays always.

15 MR. SMITH: You can do it on Thursday, then.

16 MR. KOENECKE: I don't see why we couldn't have ours
17 well down the road.

18 MR. GERDES: We can be working on that, so 9-1 would
19 be when our brief would be due. Then intervenors, I think when
20 I set this up I put three weeks between them.

21 MR. SMITH: I really think these issues -- I don't
22 know, maybe -- but I would think the overall jurisdictional,
23 the legal bases for this could be being researched right now.
24 Bill, that is an appropriate thing for a junior lawyer to be
25 looking at, right, the legal research?

1 MR. TAYLOR: I was always going to talk to them about
2 it. I have a difficult time persuading them of that.

3 MR. GERDES: Tell them to do it.

4 MR. KOENECKE: That's what Dave does.

5 MR. GERDES: Then they talk back.

6 MR. SMITH: I was kidding you, but I do think that
7 some of the fleshing out, while we are doing this, just to know
8 what questions are relevant, you are going to have to do some
9 looking at what you believe the legal parameters are here.

10 MS. GREFF: 9-22.

11 MR. GERDES: 9-22.

12 MR. SMITH: 9-22 for intervenors and staff.

13 MR. GERDES: I'll have to get mine done a day early,
14 I'm going to the Corvette Rally in the Black Hills.

15 MR. SMITH: 9-22 is going to be intervenors and staff.

16 MS. GREFF: Can you guys turn yours around by the
17 29th, your reply?

18 MR. GERDES: Why don't you give us until the following
19 Monday just in case.

20 MS. ROGERS: To do what?

21 MR. GERDES: Do our reply.

22 MR. SMITH: What's the date?

23 MR. GERDES: 10-2.

24 MR. SMITH: We have got a meeting when?

25 MS. DOUGLAS: There's a meeting in Rapid on October

1 19th, which is a Thursday, and then there's a --

2 MR. SMITH: Is that the first one in October?

3 MS. DOUGLAS: Then the next one is October 31st in
4 Pierre.

5 MR. GERDES: Let's do the oral argument, what is it?

6 MS. DOUGLAS: October 19th, but that's in Rapid City,
7 Dave.

8 MR. GERDES: That's fine.

9 MS. GREFF: We can do it on the phone.

10 MR. GERDES: We can do it on the phone or we can
11 travel. I prefer to be there just so I can see --

12 MS. DOUGLAS: That's why I wanted you to know it was
13 in Rapid.

14 MR. GERDES: -- so I can see the faces the general
15 counsel is making at me.

16 MR. SMITH: 9-22, now, there's nothing after that,
17 huh, between then and the 19th, that's it?

18 MR. GERDES: 10-2, our reply brief is due 10-2.

19 MR. SMITH: That's why it has to be that late, okay.
20 So then on the 19th the commission will hear your argument on
21 the jurisdictional issue, okay. Now, I'm assuming while that's
22 going on, and they may or may not decide it right then and
23 there, they might and they might not. Okay, what's the other
24 piece of this, then? Shall we turn back to the -- and you
25 guys, I'm assuming now that other discovery, is other discovery

1 going to be going on during this?

2 MR. GERDES: I would think so. I contemplate that we
3 would be doing discovery on the regulatory part of it as well,
4 the approval part, just paper discovery. So then I would have
5 an overall discovery deadline for all discovery somewhere in
6 there, because then we have got to start doing our direct
7 testimony or prefiled testimony.

8 MR. SMITH: Are we going to operate under the normal
9 30-day discovery turnaround regime?

10 MR. GERDES: I think we can if we start now.

11 MR. TAYLOR: Let me weigh in. I know it sounds like I
12 don't want to do anything, but I'm not interested in pursuing
13 discovery on the main question until I know there's going to be
14 a main question.

15 MR. GERDES: Bill, our view of it is that this is
16 something that has to be decided as soon as possible. I'm not
17 talking about being unreasonable here, but we are talking about
18 a two-month period where somebody could be thinking about
19 written discovery on the overall issue as well.

20 MS. ROGERS: What about the other parties, were they
21 going to weigh in on the other?

22 MR. GERDES: Missouri River would be.

23 MS. ROGERS: Missouri River.

24 MR. SMITH: And also -- yeah, Missouri River, Missouri
25 River, you are going to be involved in the substance of the

1 case, right?

2 MS. SIMON: Correct.

3 MR. YAFFE: Right.

4 MR. GERDES: You can be doing your discovery and
5 everybody else can, too, on the ultimate question.

6 MR. KOENECKE: Staff will have the lion's share of
7 discovery on the ultimate question. I would think there would
8 be a lot of direction given by that.

9 MR. SMITH: When are they going to start on that?
10 Have they already started?

11 MS. GREFF: Tomorrow. I don't know.

12 MR. SMITH: Who is the boss around here?

13 MR. TAYLOR: Let's talk about this a minute. Just a
14 second before we jump to a conclusion. Bill Taylor speaking.
15 NorthWestern chose the forum and chose the path. NorthWestern
16 chose the idea they wanted a contested jurisdiction to the
17 board. Let's decide the jurisdiction. When the jurisdiction
18 issue is decided, then let's decide the question. Really,
19 Dave, if you guys want to push forward on the ultimate
20 question, give up on the jurisdiction issue and we will push
21 forward on the ultimate question. I don't think it's
22 particularly fair to expect intervenors, some of whom are not
23 very well-financed, to have to debate the question of
24 jurisdiction and then if there's a finding that there is no
25 jurisdiction, which your client wants in the first place, to

1 have spent a good deal of time and energy and money on
2 discovery for a question that will never be decided. It may be
3 easy for NorthWestern to afford that, but it's not easy for
4 everybody else to afford that.

5 MR. GERDES: All I know is, Bill, I have been
6 practicing in front of the PUC for 15 years or more and it's
7 not unusual to do that in this venue. It may be in Minnehaha
8 County Circuit Court they don't, but this is something that we
9 do. We work quickly.

10 MR. TAYLOR: Dave, you have been around a little
11 longer than I have, but not much, and I am familiar with what
12 goes on in the world also and it's not unusual to expect for an
13 applicant to contest jurisdiction, but then to want to discover
14 and work towards trial of the main question at the same time,
15 that's highly unusual.

16 MR. GERDES: I'll let the PUC people talk about it. I
17 said what I was going to say.

18 MR. SMITH: I see some level of both sides. Is there
19 kind of a middle ground where at some point on down the line,
20 Bill, we could at least begin with, if nothing else, with the
21 main interrogatory type stuff? Just because when we have
22 30-day turnarounds, you get two or three rounds and we are way
23 down the road.

24 MR. GERDES: You are done working after September
25 22nd, you file your brief and then we don't argue until October

1 19th. You can certainly be thinking about some discovery that
2 you would file if the case goes forward in that month.

3 MR. SMITH: In the interim, staff may have -- a lot of
4 staff discovery hopefully will have been done.

5 MS. GREFF: I was going to say why doesn't staff start
6 all this by getting some interrogatories or data requests out
7 there. We typically normally only serve them on the party that
8 we are requesting information from, but we can serve it on all
9 parties and we can -- the party can serve their answers on
10 everybody and to at least get that ball rolling that way.

11 MR. GERDES: Yes.

12 MR. SMITH: Does that sound okay, Bill?

13 MR. TAYLOR: That's perfectly fine with me, just so
14 there's no artificial deadlines imposed on me or Darla or on
15 Missouri River.

16 MS. ROGERS: Maybe we should --

17 MS. SIMON: This is Mrg Simon, on behalf of Missouri
18 River, I'd like to just make sure that everyone keeps in mind
19 that not everybody is arguing on the jurisdictional issue and
20 since Missouri River is only interested in the merits, it does
21 get a little bit different for us in terms of why should we go
22 through all the discovery process while we are waiting to find
23 out if there's jurisdiction, and if ultimately it's determined
24 that there isn't jurisdiction, then we have just wasted all of
25 that effort. It just seems counter to the way judicial

1 proceedings are typically handled and in my experience in the
2 states in which we operate, usually in regulatory proceedings,
3 most of our states handle it that way, too. So obviously we
4 will stand by whatever the decision is, but I don't think it's
5 simply a matter of NorthWestern is in a hurry so we ought to
6 get this done. I think we need to make sure that if that's our
7 decision, we have got a better reason than that.

8 MR. SMITH: What was your thought on staff's
9 suggestion that they will forge ahead and sort of lead the
10 charge on discovery on the substance of the matter?

11 MS. SIMON: I certainly think that that's their
12 prerogative and I think that's probably prudent for staff
13 because they are in a much different position than we are as an
14 intervenor. But as an intervenor, I think in only going to the
15 merits of the issue, I think to require us to proceed with
16 discovery when we may find out two months down the road that
17 there's less of a case, I think that's counterproductive.

18 MR. SMITH: Let me ask you, in your view, is this time
19 frame we have set for determination of the jurisdictional issue
20 reasonable, Dave? Is that reasonable or in your view is that
21 too long?

22 MR. GERDES: No, I think it's reasonable. We are just
23 trying to be reasonable about this. I don't see anything wrong
24 at all with the intervenors and staff starting to think
25 about -- starting to think about discovery after they have

1 written their brief on jurisdiction because they are basically
2 done with that. They can certainly be thinking about it.
3 That's not an unreasonable request I don't think.

4 MS. ROGERS: Is there any way to cut down on the time
5 frame between when your reply brief is filed and oral argument?
6 Could we do an ad hoc or something? Because that's --

7 MR. SMITH: I don't know, Tina, what have you got down
8 there? A lot of it might depend on switched access.

9 MS. DOUGLAS: We have a hearing, then we have another
10 hearing.

11 MR. SMITH: What do we have?

12 MS. DOUGLAS: We have Alltell arbitrations that next
13 week.

14 MR. SMITH: We don't have those any more, they went
15 away.

16 MS. DOUGLAS: They went away today?

17 MR. SMITH: Let's schedule something right in there.

18 MS. GREFF: That's the 18th through the 21st of
19 September.

20 MR. GERDES: It's gotta be after October 2nd.

21 MS. DOUGLAS: We have a hearing on the 11th.

22 MS. GREFF: How about the 10th?

23 MR. KOENECKE: Can't. Deep in the Canadian bush.

24 (Discussion held off the record.)

25 MR. GERDES: The reason I want to get this thing done,

1 because once we get into the legislative session, the lid goes
2 on everything and nothing gets done.

3 MS. GREFF: You are looking at a changing commission
4 next year, too.

5 MR. GERDES: We have got to get it done by the middle
6 of January, I believe, or maybe the third week in January.

7 MS. DOUGLAS: But like she said, remember there will
8 be a different commissioner here starting and sworn in on
9 January 5th. So that's going to make a difference, he's going
10 to have to come up to speed if he wants to vote on it at all.
11 Just so you know.

12 MR. SMITH: Dave has set as his tentative hearing date
13 December 14th, some days, the 12th through the 14th or is
14 that --

15 MR. GERDES: Two days starting on the 14th, so it
16 would be the 14th and 15th for the hearing on the merits.

17 MS. DOUGLAS: PUC forum is on December 14th and 15th
18 in Sioux Falls. We have a commission meeting on the 19th,
19 though.

20 MR. SMITH: Of December?

21 MS. ROGERS: What about the 19th and 20th?

22 MS. DOUGLAS: We could go the afternoon of the 19th.

23 MS. ROGERS: All day the 20th of December.

24 MR. GERDES: Sure, 19th and 20th of December.

25 MS. DOUGLAS: The afternoon of the 19th because the

1 commission meeting would be in the morning.

2 MR. GERDES: For the hearing you mean?

3 MR. SMITH: Have you guys been able to hear that?

4 MR. TAYLOR: Not really.

5 MR. GERDES: December 19th and 20th for the hearing on
6 the merits. Then we will work between those dates.

7 MS. GREFF: I'm sorry, but two months to get
8 testimony, rebuttal and surrebuttal and discovery done?

9 MR. SMITH: Do you think this case merits prefiled?
10 Do you need it?

11 MR. GERDES: Maybe not.

12 MR. SMITH: You want to just put on your case and do
13 it on the record?

14 MR. GERDES: That would be a little more discovery.
15 We could do it that way rather than doing prefiled testimony.

16 MR. KOENECKE: You can really compress your schedule.

17 MR. GERDES: That's true.

18 MR. SMITH: If you want to. I don't know if the
19 complexity is here to warrant that, but it's up to you guys.

20 MR. KOENECKE: I've been thinking the same thing, this
21 isn't that complicated.

22 MR. SMITH: No, it's not a rate case or a -- it's not
23 a switched access type of thing.

24 MR. GERDES: We have got the October 19th oral
25 argument on the jurisdiction thing and so then the idea would

1 be that we would do our own discovery on the merits once the
2 commission announces its decision between sometime after
3 October 19th, presumably within a week when the commission
4 decides it, and the December 19th and 20th. And you might want
5 to have a prehearing, we probably would want a prehearing
6 conference if we are going to do our own discovery so we get
7 everything on track.

8 MR. KOENECKE: Do you think two days is enough?

9 MR. GERDES: For the hearing? I think so.

10 MR. YAFFE: It would strike me as -- this is David
11 Yaffe -- to do something like that. The question we have in
12 our minds is to what extent -- we have asked for a condition to
13 be put on the approval, if any. You may have a hearing on the
14 issue of whether the transaction should be approved and that's
15 one thing. There's a question in our mind that needs to be
16 sorted out at some point, at what point do the request of
17 conditions have to be the subject of hearings as opposed to
18 briefing to the commission.

19 MR. GERDES: That's one of the issues that would be
20 decided, obviously discovered.

21 MR. SMITH: Yeah, I think that would be part of the
22 hearing, David.

23 MR. YAFFE: Okay, all right.

24 MR. SMITH: Any factual issues related to conditions
25 ought to be dealt with at that time. I wonder, you have got

1 your condition, and we have heard -- you know, that's at least
2 an issue I think the commissioners already understand, because
3 that's within what we deal with on a regular basis. So I don't
4 know how terribly much -- how much time you will have to spend
5 on proving that. It's probably going to get down more to a
6 commission --

7 MR. YAFFE: It's more of a policy issue.

8 MR. SMITH: I think it probably will and what the
9 commissioners believe their authority is in a case like this.

10 MR. YAFFE: Yes.

11 MS. GREFF: In reality there's only time for two
12 rounds of discovery and those are going to have to be
13 expedited.

14 MS. ROGERS: We are not going to have 30 days.

15 MS. GREFF: You go 9/20 to 10/20, 10/20 to 11/20, 9/20
16 to 10/20 and 10/20 to 11/20, that's about it.

17 MR. SMITH: Do you guys want to switch, then, to like,
18 say, a 20-day turnaround on discovery?

19 MR. GERDES: Yeah. Yeah, we have to.

20 MR. SMITH: We are talking following October 19th,
21 right?

22 MR. TAYLOR: Let me ask a question so I have got my
23 calendar straight. You said October 9th --

24 MR. SMITH: 19th.

25 MR. TAYLOR: -- for the Rapid City meeting?

1 MR. SMITH: Yeah. Now, did you hear the part, you
2 guys, about switching to 20-day discovery response turnarounds?

3 MR. YAFFE: Yeah.

4 MR. SMITH: Is that a problem for anybody? I'm
5 assuming there will be extremely little discovery going back
6 your way, maybe I'm wrong on that. I don't know, what do you
7 think, Brett?

8 MR. KOENECKE: I don't think -- I can't envision any.
9 I can't say nothing will come up, but I'm having a tough time.

10 MR. GERDES: There will be a couple things. Why do
11 you want the condition would be one, and of course they have
12 said that in their pleadings, so it probably needs to be
13 fleshed out a little bit, but we know basically what it is.
14 No, there's not going to be much, but there will be some.

15 MS. GREFF: Can we keep the December 11th prehearing
16 conference date?

17 MR. GERDES: That would be great, yeah, if that works
18 out in your schedule.

19 MS. GREFF: It does in the commissioners' calendar it
20 looks like.

21 MR. KOENECKE: Would they be part of that?

22 MR. SMITH: No, they are usually not part of that. If
23 there's motions, yeah, we could schedule them on there, but the
24 other thing is the prehearing conference we usually just
25 schedule the date so we have a date to talk over how things are

1 going to go and whether there are any last problems or
2 whatever, but normally if you guys have a discovery problem or
3 something pops up, you just need to do it by motion and we
4 don't cover those things here. I'm trying to think if there's
5 anything else if we are not going to do -- you guys might want
6 to give some thought to prefiled, but if we don't do prefiled,
7 then we have much less paperwork.

8 MS. ROGERS: I would like to at least talk to my
9 clients about that to see if they have any huge heartburn about
10 that.

11 MS. DOUGLAS: The commissioners have to approve those
12 hearing dates, that's not -- I can say yes right now, but I
13 have to get permission from them first.

14 MR. SMITH: They do, and I recognize that. What I'm
15 going to do is do up a draft order and I will circulate it to
16 you all via e-mail and then it will probably be at least Monday
17 before I'll be able to get it out because I've got the SDREA
18 thing tomorrow and the Big Stone, so it will be a little while,
19 a few days.

20 MS. GREFF: This is Sara from staff again. Do we want
21 to put a drop dead discovery date?

22 MR. GERDES: We should probably.

23 MS. GREFF: Put discovery to be concluded by?

24 MR. GERDES: How about the date of the prehearing
25 conference?

1 MR. KOENECKE: Sure.

2 MR. SMITH: Does anybody have anything else? All
3 right. Thanks, everybody, and we'll be in touch.

4 (Whereupon, the proceedings were concluded at 3:05
5 p.m.)

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STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 14th day of July 2006.

Carla A. Bachand

Carla A. Bachand, RMR, CRR
Freelance Court Reporter
Notary Public, State of South Dakota
Residing in Pierre, South Dakota.

My commission expires: June 10, 2012.