

Transcript of
Proceedings

Motion for
Intervention

July 11, 2006

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THE PUBLIC UTILITIES COMMISSION JUL 17 2006

OF THE STATE OF SOUTH DAKOTA SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF THE MERGER BETWEEN
NORTHWESTERN CORPORATION AND BBI GLACIER
CORP., A SUBSIDIARY OF BABCOCK & BROWN GE06-001
INFRASTRUCTURE LIMITED

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Transcript of Proceedings
Motion for Intervention
July 11, 2006

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BEFORE THE PUC COMMISSION

Chairman Robert Sahr
Vice-Chair Dusty Johnson

COMMISSION STAFF

John Smith
Sara Greff

ORIGINAL

APPEARANCES

DAVID A. GERDES,
MAY, ADAM, GERDES & THOMPSON, Attorneys at Law,
503 South Pierre St., Pierre, South Dakota 57501,
appearing on behalf of NorthWestern Corporation;

Reported by Carla A. Bachand, RMR, CRR

1 TUESDAY, JULY 11, 2006

2 CHAIRMAN SAHR: Next item is under gas and electric,
3 number one is GE06-001, in the matter of the merger between
4 NorthWestern Corporation and BBI Glacier Corporation, a
5 subsidiary of Babcock & Brown Infrastructure Limited, and the
6 question today is shall the commission grant intervention to
7 Missouri River Energy Services, Heartland Consumers Power
8 District, South Dakota Power Company, East River Electric, and
9 Basin Electric? And we do have a court reporter here that's
10 covering this proceeding, so please, everyone, speak clearly
11 and especially those of you on the phone line, please make sure
12 you state your name and speak in a manner that she can easily
13 take down your comments. With that, does staff have a
14 recommendation how to proceed?

15 MS. GREFF: I guess, Commissioner Sahr, this is Sara
16 Greff for staff, we would ask if any of the parties have any
17 comments first before proceeding.

18 CHAIRMAN SAHR: Thank you. I guess we will first hear
19 from the intervenors. Any additional comments or do your
20 pleadings pretty much stand for themselves?

21 UNIDENTIFIED SPEAKER: Missouri River Energy Services,
22 we stand on our pleadings.

23 CHAIRMAN SAHR: With that, NorthWestern, do you have
24 any comments? Mr. Gerdes, good morning.

25 MR. GERDES: Good morning, Mr. Chairman, members of

1 the commission. My name is Dave Gerdes. I'm a lawyer in
2 Pierre and I appear for NorthWestern Corporation in this
3 proceeding. Just a brief word of explanation on this docket.
4 It's a little bit unusual and this is the first time the
5 commission has seen the docket. Early in the game when we
6 found out about the merger, I consulted at some length with
7 general counsel Smith as to how best to present the legal
8 questions that we saw to the commission.

9 The jurisdictional statutes of the commission are
10 unclear as to whether or not it has jurisdiction to approve or
11 not this transaction, and the way I read the statutes anyway,
12 and I think we agreed that there was at least a question as to
13 whether there was that jurisdiction. There is one section that
14 says that if a federal agency has jurisdiction, then this
15 commission doesn't. Well, of course FERC has jurisdiction or
16 we think it does anyway. So that the commission would have the
17 opportunity to thoroughly ventilate the jurisdictional
18 question, we decided the best way to proceed was to first ask
19 for a declaratory ruling under the declaratory ruling statute
20 in the Administrative Procedures Act, which this commission has
21 used and done many times before, to have the commission
22 determine whether it thinks it as jurisdiction, and thereafter
23 if the commission has jurisdiction, to present the merits of
24 the transaction to the commission and that's the way the
25 petition was structured and filed.

1 So with that, I'll state that NorthWestern has no
2 objection to the intervention petitions of Missouri River
3 Energy Services, Heartland Consumers District, East River
4 Electric or Basin Electric. We do object to the intervention
5 of South Dakota Power Company, and the objection is based upon
6 the commission's rules. The commission's rules talk about
7 the -- this would be ARSD 20:10:01:15.05 talks about the
8 granting of the intervention petition and it says that a
9 petition to intervene shall be granted by the commission if the
10 petitioner shows, one, that the petitioner is specifically
11 deemed by statute to be interested in the matter involved.
12 That's not present here.

13 Number two, that the petitioner is specifically
14 declared by statute to be an interested party to the
15 proceeding. That's not present here. Or three, that by the
16 outcome of the proceeding, the petitioner will be bound and
17 affected, either favorably or adversely, with respect to an
18 interest peculiar to the petitioner as distinguished from an
19 interest common to the public or the taxpayers in general. We
20 would submit that is not present here either.

21 From its petition, South Dakota Power Company tells us
22 that they are, for lack of a better term, a rejected suitor in
23 terms of the purchase of NorthWestern, but beyond that they
24 have no contractual interest with NorthWestern, they have no
25 business interests that's affected by NorthWestern. Each of

1 the other petitions specifically showed transmission concerns
2 and things such as that. The interest of South Dakota Power
3 Company is simply the same as any other consumer of power in
4 the state and we would submit that that petition should be
5 denied.

6 CHAIRMAN SAHR: Thank you. Staff, do you have a
7 position on the question before the commission today?

8 MS. GREFF: Thank you, Chairman Sahr. This is Sara
9 Greff of staff again. We do not have any objection to the
10 interventions of the parties. We do support Mr. Gerdes's
11 position that South Dakota Power Company does not have an
12 interest in this docket and may not be proper for intervention,
13 but as a whole we have no objection to them coming on board.

14 CHAIRMAN SAHR: Thank you. Any questions from
15 commissioners? I do, Mr. Gerdes, if you would come back up
16 here. I don't know if you are privy to this or not, but my
17 recollection was that NorthWestern had stated publicly that
18 they were going to come before this commission, the Montana
19 commissions, and I believe, but I'm not certain about Nebraska
20 commissions for approval.

21 MR. GERDES: I've seen some press on that and of
22 course that's what this petition is designed to do, to
23 determine whether or not the commission has the approval
24 authority and if it does, then to submit to the commission's
25 jurisdiction. Mr. Chairman, I don't think any client of mine

1 should submit to a regulatory body that has no jurisdiction to
2 pass on. This is for everybody's -- in everybody's best
3 interest, in my opinion, to have this question decided, whether
4 or not this commission has jurisdiction. As a lawyer, I
5 believe that there's a very real legal question as to whether
6 it does, because of the way the statutes are written. Now,
7 certainly we can go out and change the statutes and perhaps the
8 statutes should be changed for the next case, but right now
9 there's a question, a serious question in my mind as to whether
10 the current statutes provide jurisdiction to the commission and
11 so we need to have that decided, I think.

12 CHAIRMAN SAHR: So the answer to my question is you
13 don't know whether your client had said it was intending to
14 come before the commission?

15 MR. GERDES: No, I seem to recall that, yes. There
16 was something in the press to that effect.

17 CHAIRMAN SAHR: And I believe something was told to
18 the commission to that effect as well, but I do not believe you
19 were present at that meeting.

20 MR. GERDES: I don't recall being present at a
21 meeting.

22 CHAIRMAN SAHR: Thank you. Do you have the
23 administrative rules before you?

24 MR. GERDES: Not all of them, no.

25 CHAIRMAN SAHR: I'm sorry, I should ask. Do you have

1 the one that you quoted?

2 MR. GERDES: Yes, I do. I read from it.

3 CHAIRMAN SAHR: Could you read the three criteria
4 again, please?

5 MR. GERDES: Specifically deemed by statute to be
6 interested in the matter involved, specifically declared by
7 statute to be an interested party to the proceeding, or that by
8 the outcome of the proceeding, the petitioner will be bound and
9 affected, either favorably or adversely, with respect to an
10 interest peculiar to the petitioner as distinguished from an
11 interest common to the public or to the taxpayers in general.

12 CHAIRMAN SAHR: I don't have any other questions.

13 VICE-CHAIR JOHNSON: I have a question for Ms. Greff.
14 Ms. Greff, is it staff's legal opinion that South Dakota Power
15 Company would not be affected by an interest distinguishable
16 from that of a general taxpayer?

17 MS. GREFF: Yes, the arguments outlined by Mr. Gerdes
18 that they are not truly an affected interested party as
19 outlined in our statutes, we would agree with those comments.
20 However, as far as staff is concerned, they have no issues with
21 them being involved in this docket.

22 VICE-CHAIR JOHNSON: Question for either Mr. Gerdes or
23 Ms. Greff. Perhaps you can walk through your legal rationale
24 again of why South Dakota Power Company wouldn't have an
25 interest in this that is distinguishable from that of a general

1 taxpayer.

2 MR. GERDES: Because, Commissioner Johnson, if you
3 read their petition to intervene, they basically say that we
4 tried to buy them and we couldn't and we know a lot about them,
5 so we want to be at the table, and that's it. Now, if you look
6 at the intervention petitions of the other petitioners, they
7 specifically talk about interest as it may relate to business
8 relationships that they have with NorthWestern, which are
9 different than a relationship of the public in general, and I
10 would submit that the rules of this commission say that you
11 just can't be Joe Doe walking in off the street.

12 Now, there is another rule that you have that says
13 people can come in and comment and that's where the public
14 comes in, but it doesn't make them parties to the proceeding,
15 and there is a distinction. Here we believe that they should
16 not be parties to the proceeding because their interest is no
17 different than anybody else out there on the street. They can
18 come in and comment, there's no doubt about that, and that is
19 provided in your rules. But they can't be parties. That's our
20 position.

21 VICE-CHAIR JOHNSON: Thank you.

22 MR. GERDES: Maybe I'll just stay here since I've come
23 back twice now.

24 MR. SMITH: One of the assertions of interest is that
25 this organization is composed of, although it's a nonprofit

1 corporation, it's effectively a corporate surrogate, if you
2 will, for a group of municipalities, all of whom are in fact
3 served by NorthWestern and whose citizens will in fact, are in
4 fact every day affected by the health and well-being of
5 NorthWestern. Do you want to comment on that? Because that
6 would seem to at least meet our relatively minimal thresholds,
7 threshold and interest that is different from Joe Blow out in
8 Rapid City, for example.

9 MR. GERDES: But it's no different than Joe Blow in
10 Huron or Joe Blow in Yankton or someplace like that. It's my
11 view of it that they are not a trade association, that they are
12 not authorized by their citizens. I don't think any of the
13 citizens of any of those cities have said you go intervene in
14 this docket. And I don't think they are authorized to -- they
15 don't have a business interest, they don't have a legitimate
16 interest as an advocacy body. They were formed for the sole
17 purpose, and they say so in their petition, for the sole
18 purpose of purchasing NorthWestern and that didn't go through,
19 for whatever reason, and so I don't draw -- I don't draw a
20 distinction in favor of intervention from those facts, Mr.
21 Smith.

22 MR. SMITH: And what about the -- in their petition,
23 they state that, I think we all know it because we have read
24 about it for months in the paper, of this organization,
25 nonprofit corporation as a suitor for NorthWestern, as a group

1 of municipalities affected that organized themselves into a
2 corporation for the purpose of acquiring those assets, doesn't
3 that fact alone actually create a sufficient interest in the
4 outcome of this case?

5 MR. GERDES: I don't believe so. Merely because I am
6 the resident of a municipality, that doesn't mean the
7 municipality speaks for me unless I ask them to speak for me.

8 MR. SMITH: I mean this corporate entity. They were
9 in fact a suitor for these assets.

10 MR. GERDES: They were in fact a suitor, but they were
11 a rejected suitor. I have no obligation to sell my business to
12 you if I don't want to. The same thing with NorthWestern,
13 NorthWestern has no obligation to sell themselves to anybody
14 else. Now, they do have an obligation, NorthWestern has an
15 obligation to its stockholders to be good stewards of the
16 assets of the company, but as far as my obligation to sell to
17 you, I have no obligation to sell to you. So that right is
18 extinguished, and that's not covered in this rule, a rejected
19 suitor, I don't believe. That's my view of it.

20 MR. SMITH: Okay, thank you.

21 VICE-CHAIR JOHNSON: Question for Mr. Smith. It seems
22 as though in the past we have liberally interpreted our rules
23 to allow for appropriate and reasonable input from those that
24 could potentially be affected. How do you view the rules, our
25 past standard operating procedure and the application by South

1 Dakota Power Company to request intervention?

2 MR. SMITH: Well, again, we are fairly liberal in our
3 rules, in our interpretation of the intervention rule. An
4 example of that I think is the frequent permission of SDTA, for
5 example, to intervene on behalf of -- which has a lot to do
6 with this electric case.

7 CHAIRMAN SAHR: Are they intervening, too?

8 MR. SMITH: I'm sure they will before all this is
9 over.

10 MR. GERDES: But Mr. Smith, SDTA is specifically
11 mentioned in our rules and there is authority for association
12 tariffs.

13 MR. SMITH: And they do have a somewhat different
14 standing.

15 MR. GERDES: They have standing.

16 MR. SMITH: But if one wants to view this particular
17 entity in that light as at least having some quasi
18 representative capacity for the publics of those communities,
19 those particular public entities did elect to form this unit,
20 it's official -- its elected officials from these communities
21 make up this organization. The communities are in fact
22 affected and I might argue when the public tender rules of the
23 SEC and so on, I'm not so sure that the organization itself
24 doesn't at least have an interest sufficient to allow them
25 intervention in whether or not this transaction is approved,

1 because if it's not approved, they are still alive and they
2 have a potential financial interest in that, in that outcome.
3 I don't know.

4 CHAIRMAN SAHR: I think -- I mean, I will put my cards
5 on the table. I think they clearly have an interest. I think
6 they meet the administrative rules. I think I disagree with
7 Mr. Gerdes saying that there has not been any sort of public
8 action or public vote. Each of these members voted to form
9 this organization, they voted to proceed, and I think clearly
10 the public has spoken in each of these communities saying they
11 want to evaluate this, they want to look at this. I think
12 their input would be very, very valuable.

13 I think they have certainly raised some very strong
14 factual issues that if Mr. Gerdes wants to come back and do a
15 motion to dismiss later, that's his prerogative, but I think
16 they have raised some evidentiary issues that I'm not
17 comfortable certainly just saying you are not in, because I
18 think they have raised some issues beyond just being a suitor,
19 which I think may be enough in and of itself, but they also
20 receive electricity and have some concerns that I think go well
21 beyond just anything this minimal and I think they are a
22 valuable part of the process.

23 I hope this process can continue in the state of South
24 Dakota and I think historically we have precedent where we
25 weren't involved in some of the decisions with NorthWestern and

1 whether or not we would be in a different world today if the
2 state had had a more active review process in the nineties, I
3 don't know, but I think the state role is important and we need
4 to also look at the interests of our citizens, our cities, our
5 organizations, and I think clearly the South Dakota Power
6 Company has a stake in this. I think they have an interest and
7 I really don't see any harm in having them on the docket and I
8 think it brings hopefully a lot more to the table and different
9 perspective, and we are here to be an open tribunal and to get
10 the public input, so I look forward to having them in the
11 docket.

12 VICE-CHAIR JOHNSON: I think that was well said,
13 Chairman Sahr. It didn't sound quite close enough to a motion
14 for me to second it, but if you want to offer something up.

15 CHAIRMAN SAHR: I move the commission grant
16 intervention to Missouri River Energy Services, Heartland
17 Consumers Power District, South Dakota Power Company, East
18 River Electric, and Basin Electric.

19 VICE-CHAIR JOHNSON: Second.

20 (Whereupon, the proceedings were concluded at 11:10
21 a.m.)

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C E R T I F I C A T E

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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.