

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

GE06-001

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

Transcript of Proceedings
December 12, 2006

BEFORE THE PUC COMMISSION

Chairman Dusty Johnson
Vice-Chair Gary Hanson
Commissioner Steve Kolbeck

COMMISSION STAFF

Rolayne Ailts Wiest
Kara Van Bockern

APPEARANCES

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503 South Pierre St., Pierre, South Dakota 57501,
appearing on behalf of NorthWestern Corporation;

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appearing on behalf of South Dakota Power Company
and Heartland Consumers Power District.

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RITER, ROGERS, WATTIER & BROWN, Attorneys at Law,
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appearing on behalf of East River Electric and
Basin Electric;

Reported by Carla A. Bachand, RMR, CRR

ORIGINAL

1 TUESDAY, DECEMBER 12, 2006

2 CHAIRMAN JOHNSON: The next item on the agenda for gas
3 and electric, number one is GE06-001. That's in the matter of
4 the merger between NorthWestern Corporation and BBI Glacier
5 Corporation, a subsidiary of Babcock & Brown Infrastructure
6 Limited. The question is today shall the commission rule on
7 NorthWestern and BBIL's petition for declaratory ruling? I
8 believe we are taking oral arguments today. Briefs have been
9 filed. Mr. Gerdes is at the microphone. Please proceed, Mr.
10 Gerdes.

11 MR. GERDES: Mr. Chairman, members of the commission,
12 my name is Dave Gerdes. I'm a lawyer from Pierre. I represent
13 NorthWestern Corporation in this matter and Brett Koenecke of
14 our firm represents Babcock & Brown Infrastructure Limited,
15 which I will refer to as BBI, in this matter.

16 In June the parties filed a joint petition for
17 declaratory ruling and the petition was twofold. First we
18 asked for a declaratory ruling, and then secondly, if
19 jurisdiction was found, that the commission approve the
20 transaction. The commission has before it a transaction
21 whereby there will be a merger between a subsidiary of BBI and
22 NorthWestern, thus making NorthWestern a wholly owned
23 subsidiary of the BBI companies.

24 The petition deals with first of all a request for a
25 declaratory ruling under the commission's rules. I would like

1 to just mention the fact that we have mentioned before in other
2 proceedings involving this docket, there has been some
3 undercurrent and some writing in the press out there that
4 somehow NorthWestern and BBI are trying to duck something by
5 filing this petition for declaratory ruling. And I just need
6 to say that that's not the case at all. The transaction is
7 above board. It's a good transaction. It works financially.
8 It's good for both companies and it's also good for the
9 customers of NorthWestern.

10 The transaction so far has been approved in Nebraska
11 and by the Federal Energy Regulatory Commission, and so the
12 reason that the -- the question before you today is the
13 question of whether or not the commission has jurisdiction is
14 simply this. There is a substantial legal question as to
15 whether or not, under the current statute that govern matters
16 such as this and the commission, whether or not those statutes
17 give this commission jurisdiction over the transaction, and for
18 that reason, we have filed the petition, have pursued discovery
19 involving both commission staff and some of the parties and are
20 now before the commission with a record to ask the commission
21 to rule on the question of jurisdiction.

22 I should mention that I have with me both Tom Knapp,
23 who is general counsel of NorthWestern, and Michael Ryan, who
24 comes to us all the way from Australia, who is general counsel
25 for the BBIL companies. And if necessary, I can rely on their

1 expertise as well.

2 Finally, I will mention that the parties have filed a
3 stipulation with the commission establishing the hearing record
4 for this matter, which consists of the depositions that have
5 been taken, the deposition exhibits, and the settlement
6 agreement between this commission and FERC settling the
7 commission filing with FERC. The reason for the inclusion of
8 the latter item in the record is simply to support the
9 contention that we make in our filings that there is in fact
10 FERC jurisdiction over this transaction, which is of course an
11 element of the statute.

12 As I have mentioned, there's a two-level analysis.
13 The first question and the one that we have to get past before
14 the commission can consider whether or not it will approve this
15 transaction is in fact whether or not the commission has
16 jurisdiction. There is essentially or there are essentially
17 two statutes that on their face perhaps would give the
18 commission jurisdiction over this matter. And it's our
19 position that neither statute do in fact, because of the facts,
20 give the commission jurisdiction.

21 As mentioned in our brief, the first is 49-34A-35.
22 However, that statute does not give the commission jurisdiction
23 because 49-34A-38 says that if there is federal jurisdiction
24 over the transaction, then 49-34A-35 does not apply. And of
25 course as the settlement agreement will show and as the record

1 will show, this matter has been subject to FERC jurisdiction
2 and for that reason, 49-34A-35 does not apply because 49-34A-38
3 says that if there is federal jurisdiction, 35 does not apply.

4 The second statute comes a little closer, but again we
5 believe that it does not provide jurisdiction as well, and that
6 is 49-34A-38.1, which gives the commission jurisdiction to
7 approve the transaction if NorthWestern receives more than 25
8 percent of its gross revenue in this state. The question then
9 is, and unfortunately, the legislature wasn't thinking ahead to
10 this particular transaction when had they wrote the statute and
11 so there are questions that are presented such as what gross
12 revenue are we talking about. Are we talking about gross
13 regulated revenue or are we talking about all revenues of the
14 company?

15 We have posited in our brief, and commission staff has
16 agreed with us, that because of the context of the legislation,
17 the legislature meant gross regulated revenue in the state.
18 Well, why is that? Well, first, it has to mean gross regulated
19 revenue because when the statute was passed in 1975, and as the
20 commission knows, before 1975, there was no regulation of
21 investor-owned utilities other than that which occurred in the
22 cities. And it was in 1975 that the various segments of the
23 utility industry came to the legislature and asked to be
24 regulated to quell the battles that were occurring among the
25 three segments, being the investor-owned utilities, the

1 municipal utilities, and the REAs.

2 And at that time investor-owned utilities did not as a
3 matter of practice have unregulated revenue, so in context, the
4 person writing the statute was writing the statute for the
5 industry as they thought the industry existed at that time, and
6 we submit that that means gross regulated revenue because
7 that's what they were dealing with.

8 Secondly, at the same time as the companies were
9 regulated, a gross receipts tax was also established to fund a
10 portion of the regulation of the company. That gross receipts
11 tax has been interpreted by this commission since the first day
12 it was in place to apply only to gross regulated revenue. The
13 tax is not paid on unregulated revenues, never has been. So
14 the commission over the years, by its own practice, has defined
15 gross revenue, and that term is used in the gross receipts tax
16 revenue as well, has defined gross revenue as gross regulated
17 revenue.

18 So for those reasons, it is our belief that, and we
19 have cited a textbook full of cases in our brief and I won't go
20 through all the cases, but we have cited case specific
21 authority which says that you have to deal with the context of
22 the statute when you are interpreting a statute, and the
23 context of this statute relates to the fact that we are dealing
24 with gross regulated revenue, not all revenue.

25 And as the commission is painfully aware I'm sure

1 because we have talked about this before, if you utilize gross
2 regulated revenue, you come up with a percentage of 14.72
3 percent is received in South Dakota, based upon year end 2005
4 figures. Now, the commission staff also asked for a more
5 recent set of figures that ended June 31st, 2006. If you use
6 the more recent 12-month figures, you get 14.82 percent, I
7 believe. But in any event, far within the 25 percent.

8 So our first point is simply that this is what the
9 statute meant and that unfortunately, the commission, if it
10 really wants jurisdiction, unfortunately, we submit that it
11 does not grant jurisdiction to the South Dakota Public
12 Utilities Commission.

13 Now, it has been contended by other parties to this
14 proceeding that, no, we should include all revenues. If you
15 refine the evidence down, basically the other revenues that
16 would be relevant to this proceeding would be Nebraska and
17 South Dakota unregulated gas sales. We have, as we say in our
18 brief, we have provided those figures for the parties and for
19 commission staff, and unregulated gas sales, if you include
20 only South Dakota unregulated revenues, still do not get you
21 past the 25 percent figure. The percentages are in the close
22 to 20 percent category.

23 So it's only, and this is of course the point that
24 Heartland makes in their brief, it's only if you include the
25 Nebraska unregulated sales in the gross revenue figure that you

1 even approach 25 percent. And then only if you use the year
2 end 2005 figures do you get over 25 percent. We went through a
3 lot of depositions and a lot of exchange of information and as
4 Heartland counsel says in his brief, we can use NorthWestern's
5 figures. They are not disputing the figures and the figures
6 say that if you use Nebraska figures, you end up with slightly
7 more than 25 percent using year end 2005 figures, and if you
8 use the more recent figures, which show the trend toward what
9 NorthWestern's situation actually is, you get a figure less
10 than 25 percent. And as we have said in our briefs,
11 NorthWestern is in the process of getting out of the
12 unregulated gas sales, so that figure will even recede further
13 as time passes.

14 So why is it that we should include Nebraska sales,
15 Nebraska unregulated sales? Well, it is argued that we should
16 include those because that's the way NorthWestern treated them.
17 I would submit that that is a specious argument because there
18 is nothing magic about the way NorthWestern treated them other
19 than the fact that it's the same accounting system NorthWestern
20 has used since the beginning of time. But the facts and the
21 legal precedent that we have cited in our brief will show you
22 that the gas was delivered in Nebraska and that the test that
23 the courts use is where was the gas delivered, not where was
24 the revenue received.

25 And even to suggest that somehow the revenue was

1 received in South Dakota doesn't show you that there should be
2 jurisdiction in South Dakota, because the sales occurred in
3 Nebraska. That's where the sales occurred. I made the point
4 in my reply brief, if we are going to use that standard, why
5 are we not talking about the Montana revenues? Because
6 eventually the Montana revenues get into the bottom line of
7 NorthWestern as well. It simply isn't a fact.

8 We filed with our petition -- excuse me, with the
9 first data request response a copy of the contract that governs
10 the Nebraska unregulated sales and the contract establishes the
11 point of sale as being in I believe it's three specific places
12 in Nebraska. So there's no reason that the Nebraska sales
13 should be considered as part of the gross revenues of
14 NorthWestern, quote, received in South Dakota, because if you
15 read the statute, it says, any public utility organized under
16 the laws of any other state. That's NorthWestern because they
17 are organized under the laws of Delaware. Receiving more than
18 25 percent of its gross revenue in this state, the revenue must
19 be received in this state, and as we have mentioned in our
20 briefs, really we believe the context of the statute talks
21 about receipt of revenues from operations in this state. If
22 you put the words "from operations" in the statute, you can
23 clearly see the intent of the statute.

24 Mr. Taylor is an inventive, smart lawyer and he's
25 going to say, well, but you are adding words to the statute

1 that the legislature never used. That's right, we are adding
2 words to the statute that the legislature didn't use and we are
3 doing that because that helps us understand what the author of
4 the legislation was attempting to do. And as the authorities
5 that we have quoted in our brief say, you are entitled to take
6 the context of the statute into place, that you have to give
7 the statute the meaning that makes the most sense, and as was
8 stated in the Moore vs. Michelin case, I cite that case because
9 it's a case that I lost in the South Dakota Supreme Court, so
10 we always tend to remember those things that way.

11 The South Dakota Supreme Court has said, each statute
12 must be construed according to its manifest intent as derived
13 from the statute as a whole as well as other enactments related
14 to the same subject. Words used by the legislature are
15 presumed to convey their ordinary popular meaning. In other
16 words, we have to find out what the manifest intent of this
17 legislation was, and we submit that the manifest intent of this
18 legislation was to define a situation where it was the gross
19 revenues in this state that are relevant to the evaluation of
20 jurisdiction under the statute that I just got done talking
21 about.

22 So Mr. Chairman, members of the commission, I'll leave
23 you with this thought, and this comes from our reply brief.
24 Why would the legislature want to limit the jurisdiction of
25 this commission to the company's in-state revenue? And the

1 answer we believe is simple. That's because the South Dakota
2 commission has no more business regulating the business aspects
3 of a Nebraska utility than Nebraska has in regulating a South
4 Dakota utility. In other words, the regulation should apply to
5 those revenues that are received in the state that the
6 particular commission has jurisdiction over.

7 So for those reasons, Mr. Chairman, members of the
8 commission, we submit that for all the reasons that we have
9 stated in our briefs, and we of course welcome the analysis of
10 commission staff as well, we believe that the commission should
11 find that there is no jurisdiction and that an order should be
12 issued accordingly in response to the petition for declaratory
13 ruling. I'd be happy to answer any questions or if you would
14 like to save them until the end, we can do that, too.

15 CHAIRMAN JOHNSON: Thanks, Mr. Gerdes. As long as
16 it's acceptable to my colleagues, I would think for efficiency
17 sake, we would hold questions for everyone until the end.

18 MR. GERDES: That's fine.

19 CHAIRMAN JOHNSON: At this time presumably we will
20 hear from the intervenors. Good morning, Mr. Taylor.

21 MR. TAYLOR: Good morning. Commissioners, staff,
22 thank you for letting me come this morning. My name is William
23 Taylor, I'm a lawyer with Woods and Fuller in Sioux Falls and I
24 represent Heartland Consumers Power District and the South
25 Dakota Power Company in these matters.

1 Before I tell you who my clients are, I want to make
2 one point that I want you to keep in mind as we talk about this
3 nice academic discussion today. We are not interested in what
4 the 1975 legislature was thinking about. The statute that's at
5 issue, 49-34A-38.1, was enacted in 1987, 12, 14 years after the
6 initial regulation of investor-owned utilities.

7 Now let me tell you about who we are. Heartland
8 Consumers Power District is a consumers power district
9 organized under the laws of South Dakota, headquartered in
10 Madison, that represents 23 cities in South Dakota, provides
11 them with their power. It also provides power to the
12 University of South Dakota, Brookings, and the state
13 institutions at Plankinton and has a cooperative arrangement
14 with one co-op in South Dakota. Heartland Consumers Power
15 District is also a part owner of the integrated transmission
16 system with WAPA and Basin Electric that has seven, 8,000 miles
17 of transmission lines in several states.

18 South Dakota Power Company is a put together entity.
19 South Dakota Power Company is a nonprofit corporation that
20 represents 23 cities served by NorthWestern Corporation in
21 South Dakota. Its board of directors is populated by
22 representatives of the city, representatives of Heartland,
23 representatives of MREA, Missouri River Energy Services, and
24 others. Its stated purpose is to keep its eye on NorthWestern.

25 Now we need to talk just a minute about who

1 NorthWestern is. NorthWestern is a public corporation,
2 formerly known as NorthWestern Public Services, incorporated in
3 1923, headquartered in Huron, South Dakota for many years and
4 now headquartered in Sioux Falls. According to its Web site,
5 and according to my 93-year-old mother, who knows about these
6 things, NorthWestern Corporation was formed as a consequence of
7 the bankruptcy of a man who owned a number of utility
8 investments across the United States in the early twenties.

9 The corporation was formed as a Delaware corporation.
10 Everybody knows that formation of corporations in Delaware is a
11 popular thing in the United States and has been for a long time
12 because of the corporate governance rules in Delaware. So for
13 purposes of discussing this controversy today, NorthWestern
14 Corporation is incorporated in Delaware and it is a foreign
15 corporation in that sense. The only foreign aspect of
16 NorthWestern Corporation is the fact that its corporate charter
17 says incorporated in Delaware. Every other aspect of
18 NorthWestern is South Dakota.

19 NorthWestern Corporation is a monopoly, like all
20 regulated public utilities. It has, by genesis of having
21 surrendered its financial and rate making behavior to the
22 supervision of this commission, the uncontested right to
23 provide essential utility services, electricity and gas, to a
24 territory, South Dakota territory, composed of communities in
25 South Dakota. You know, in 1923 the services it provided were

1 not as essential as they are in 2006. Today the provision of
2 electricity at fair, reasonable, and economically acceptable
3 rates and the provision of natural gas in the state of South
4 Dakota is an absolute necessity.

5 None of us have wood stoves in our houses any more.
6 All of us have computers and electric lights. We rely, without
7 fail and without exception, on the product that NorthWestern
8 provides as a monopoly. And we rely on you, the Public
9 Utilities Commission, under the mandate handed you by the
10 legislature of the state of South Dakota, to protect against
11 avaricious behavior within the scope of that monopoly.

12 I want to tell you who NorthWestern is and I want to
13 tell you who NorthWestern isn't. NorthWestern is not the
14 company that our parents knew as NorthWestern Public Service.
15 NorthWestern moved from Huron to Sioux Falls, I don't remember
16 exactly when, sometime in the nineties. I can see their
17 offices from the window in my office. NorthWestern expanded
18 out of its traditional business sort of in conjunction with the
19 move to Sioux Falls. From 1923 until sometime in the middle
20 nineties, NorthWestern was a staid, conservative utility
21 company that operated out of Huron, sold gas and electricity
22 in South Dakota and in Nebraska.

23 Its Nebraska business operations have been a part of
24 the company since it was organized in 1923. It may have been a
25 remnant when NorthWestern acquired -- when NorthWestern was

1 incorporated, but it's a remnant business that's been
2 maintained for, what's that, 80 years, in NorthWestern
3 Corporation. The services that they provide in Nebraska is
4 they provide regulated natural gas to three, actually three and
5 three quarters communities in Nebraska, and they sell
6 unregulated natural gas. By unregulated I mean natural gas to
7 customers who are not ultimate end user consumers, who are
8 subject to the regulation of the Nebraska Public Utilities
9 Commission.

10 So that business has been intact all these years and
11 NorthWestern has reported for accounting purposes the income,
12 the revenue, if you will, generated by that service in South
13 Dakota electricity and gas in Nebraska since 1923, and during
14 the period of time that they have been under close supervision
15 by this Public Utilities Commission, up until very recently
16 they reported their revenue, including the Nebraska revenue,
17 and the South Dakota revenue.

18 Now, in the middle nineties NorthWestern Corporation
19 launched on a business adventure well beyond the scope of their
20 history and tradition, led by Merle Lewis, who was a year
21 behind me in law school. NorthWestern ventured off into
22 telecommunications, propane, HVAC, and a host of other
23 businesses, grew like crazy, were reported in the Sioux Falls
24 Argus Leader as a Fortune 500 company, one of two in South
25 Dakota, the other being IBP, and then they went bankrupt,

1 because their business adventures in the late nineties and into
2 2001 and 2002 proved to not be such a good idea. Their
3 business adventures in the HVAC, telecommunications, and other
4 worlds brought down the company. The company that my parents
5 were invested in, the company that many, many, many South
6 Dakotans were invested in failed as a result of that and filed
7 for bankruptcy.

8 I told you I'd tell you who NorthWestern is and who it
9 isn't. It isn't the company that our parents invested in.
10 What it is now is this. In November of 2004 NorthWestern
11 Corporation emerged from bankruptcy. They filed a
12 reorganization plan. Incidentally, the bankruptcy was not
13 filed in South Dakota, the heart of their business, the
14 bankruptcy was filed in Delaware. When they emerged from
15 bankruptcy under their new plan of reorganization, NorthWestern
16 cancelled all of its common stock. That is the common stock
17 that was owned by South Dakotans, they cancelled it and they
18 issued all new common stock and the all new common stock was
19 issued to those persons who were the creditors of NorthWestern
20 Corporation, those persons who held NorthWestern's debt.

21 Now, theoretically, those debtors could be somebody in
22 Huron who had sold some product to NorthWestern or somebody in
23 Sioux Falls to whom they owed rent, but that isn't how it
24 turned out. In the bankruptcy world, there are a group of
25 speculators who are sometimes unflatteringly referred to as

1 vulcher capitalists who buy the debt of bankrupt corporations
2 for pennies, dimes on the dollar, speculating that there will
3 be a reorganization and that when the reorganization is
4 completed, they will be able to convert the debt that they buy
5 for a percentage of its face value into stock in the company
6 which will trade for a considerable multiple.

7 That's precisely what happened here. The principal
8 shareholder of NorthWestern Corporation is a hedge fund called
9 Harbert, I think it changed its name sometime in the last year
10 or so, I can't remember what it's currently called, owns well
11 into the twenties, 20 percent range of NorthWestern
12 Corporation. Nobody knows what it paid for its debt, the debt
13 that it acquired, because that's confidential information on
14 the part of Harbert. We can speculate maybe they paid a dime
15 on the dollar, maybe they paid a third on the dollar, but what
16 we do know is that in 2004 when NorthWestern emerged from
17 bankruptcy, Harbert was issued shares of stock in NorthWestern
18 that had a face trading value of twenty some dollars. And each
19 one of those shares, their investment may have been 10 percent,
20 15 percent of that \$25 face value, and we also know that by
21 this merger and acquisition, those shareholders will receive
22 something like 37 and a half dollars for each one of those
23 shares.

24 So it's no wonder that the current shareholders of
25 NorthWestern Corporation are interested in seeing this

1 transaction pass as low below the radar as humanly possible.
2 Now, there's nothing wrong with that. This is a capitalist
3 country and a capitalist society and speculating in the debt of
4 a bankrupt company and making a profit from that speculation is
5 perfectly legal and perfectly appropriate and I'm sure every
6 one of us in this room wishes we were smart enough and good
7 enough gamblers to make that bet and win the way this will come
8 out.

9 But it is significant because this company is no
10 longer our parents' company. If this merger is approved, it
11 will be owned by an Australian company that is investing in the
12 infrastructure of public utilities through and across the
13 United States. Nothing wrong with that either, but it
14 certainly isn't our parents' company any longer.

15 Now, there's one other aspect of the history of
16 NorthWestern that's important. In 2002 NorthWestern purchased
17 the bones of Montana Power Company. Montana Power Company was
18 a regulated public utility, vertically integrated public
19 utility just like NorthWestern Corporation in Montana, where it
20 had been for 100 years. Montana Power Company was disassembled
21 in the late nineties by a man who thought he was a business
22 genius and could better put to work the assets of Montana Power
23 Company in the telecommunications industry than in its
24 traditional markets. First he sold all the generating assets
25 in Montana, so the vertically integrated utility is no longer

1 vertically integrated. Then he invested in the telecom
2 business and then the company went broke.

3 NorthWestern Corporation came into Montana and bought
4 what was left of Montana Power Company, which consisted of
5 transmission and distribution of electricity and gas and a list
6 of customers and some -- a partial interest in a coal-fired
7 plant and a couple other odds and ends, a Super Fund site at
8 the Milltown Dam that was a former power generator. They
9 bought it subject to very stringent restrictions imposed by the
10 Montana PSC, what they call a ring fencing arrangement in
11 Montana, meaning that I guess it's a cowboy term, ring fencing,
12 that the bones of the Montana Power Company are caught within
13 this ring fence and closely watched and closely monitored and
14 closely regulated by the Montana PSC.

15 In fact the petition that's before you to approve this
16 merger is before the Montana PSC. My clients are a party to
17 that petition, to that process. The discovery so far stacked
18 on end is about four feet high. I finally took it out of my
19 office and moved it into the library. The hearing on the
20 merger is scheduled for sometime in March. The Montana
21 newspapers are full of the controversy. That of course is
22 opposed to discovery so far in this case, which consists of a
23 handful of pages and three depositions.

24 Now, what happened to NorthWestern Power Company is
25 that this always conservative utility that had been in the same

1 business for 70 plus years took a foray into an unregulated
2 business, lost advanced amounts of money, half a billion
3 dollars of equity, owned in large measure by South Dakotans,
4 and the company failed and all of the South Dakotans lost their
5 investment.

6 When it emerged from bankruptcy, there was a new board
7 of directors. Except for Mike Hanson, the CEO, there are no
8 South Dakotans on their board of directors. It cancelled all
9 its stock. It issued new stock to its creditors, who now own
10 the company, although it is publicly traded now so there may
11 have been some of the creditors who have sold some of their
12 stock to others. It ditched all the businesses that brought it
13 down and it kept its core South Dakota business intact,
14 fortunately for us, and running exactly the same as it always
15 ran.

16 The company has gas distribution, electric
17 distribution, gas transmission, electric transmission, it owns
18 interests in several generating stations, and it sells gas,
19 regulated and unregulated, in Nebraska, just like it did from
20 1923 to the present date. It also now owns that ring fenced
21 arrangement in Montana. If it didn't own the ring fenced
22 arrangement in Montana, NorthWestern Corporation, for all
23 practical purposes, would be back to its conservative, staid
24 old South Dakota public utility.

25 So NorthWestern Corporation, because it's a regulated

1 public utility and because it's a monopoly, has to come to this
2 commission to ask permission to sell itself. By the way, it's
3 of no small interest to discuss what happens when it sells
4 itself? It's all public record, you know, the Securities and
5 Exchange Commission regulates and requires transparent public
6 reporting of the economic situation of this company. Every
7 year it must file what's called a 10K.

8 I have last year's 10K with me, if you want to see it,
9 it's about an inch and some thick and it contains a
10 comprehensive statement of what the company did in the
11 preceding year, business wise, reports on their economics,
12 reports on their business plan, reports on their litigation,
13 tells who the members of the board of directors are, who the
14 key employees are, tells you who owns what stock in what, it
15 tells you what stock plans there are for the employees and the
16 directors, and the plain facts are that in addition to the
17 hedge funds who are investors in this company, on the sale,
18 because of plans adopted by the board of directors, the
19 officers and the directors of the company will also profit
20 handsomely from the sale.

21 But you know, that's the American way. Officers and
22 directors of public companies are allowed to have stock grants
23 and stock options and under the law of Delaware, there are
24 instances when a company sells that those stock grants and
25 stock options become vested and the officers and directors can

1 sell the stock and make a profit. We read about that in the
2 Wall Street Journal almost every day.

3 So when this company is sold, there is considerable
4 motivation by both management and the directors and the
5 acquirers and the vulcher capitalist hedge funds that own the
6 majority of the stock or at least a substantial portion of the
7 stock in the company for this merger to be approved.

8 Now, Mr. Gerdes started out by saying that there had
9 been some inferences that something was wrong. Well, there's
10 nothing wrong if you follow the law, and the law of South
11 Dakota says there are certain things that have to happen before
12 a regulated public utility can sell itself. And one of the
13 things that the law of South Dakota says, SDCL 49-34A-38.1, the
14 1987 statute that Mr. Gerdes is talking about, is that if the
15 public utility receives more than 25 percent of its gross
16 revenue in this state, it can't merge or sell itself without
17 the permission of the Public Utilities Commission. That's a
18 jurisdictional statute.

19 There are key words in that statute. The key words
20 are "receiving," and I'd like you to take note of the fact that
21 the statutory language is "receiving." If you read the briefs
22 that NorthWestern has submitted, they never use that word, they
23 talk about -- I wrote them down so I wouldn't forget -- they
24 talk about earned, they talk about accounted for, they talk
25 about generated, they talk about received -- I'm sorry, they

1 talk about derived, but they never talk about received. The
2 statute says received, it says 25 percent, it says gross
3 revenue, and it says in this state.

4 When we started out looking at NorthWestern's
5 petition, we couldn't figure it out. The numbers that
6 NorthWestern offered up were essentially indecipherable, and
7 there is an explanation for that. There are two kinds of --
8 actually three kinds of accounting. There are Generally
9 Accepted Accounting Principles, GAAP, which ordinary people try
10 and live with in ordinary businesses. Woods and Fuller, our
11 law firm uses GAAP accounting. There is SEC accounting,
12 Securities and Exchange Commission accounting, separate set of
13 rules similar to GAAP, separate set of rules. Then there's
14 FERC accounting, Federal Energy Regulatory Commission
15 accounting. FERC and SEC accounting arrive at the same end,
16 but they get there by different ways. And it principally
17 involves timing issues, how intercompany transactions are
18 managed. My undergraduate degree was in English, I never
19 thought that I would have to understand all this, but
20 unfortunately, I've had to.

21 So in the initial numbers posed by NorthWestern, they
22 attempted to relate SEC accounting to FERC accounting and tried
23 to, in a distant way, relate that to GAAP accounting, which
24 made this all kind of difficult to grasp in the beginning. We
25 once joked that Mr. Kliever, their -- I have forgotten what he

1 is, their CFO, their chief financial officer or controller,
2 that's right, didn't speak the same language that the rest of
3 us spoke, that he spoke accounting, which somehow seemed
4 different. But after a couple of depositions, we got it sorted
5 out and figured out what he was talking about.

6 The essence of it is this, the regulated revenue issue
7 is nothing more than a red herring. You can read that statute
8 until you go blind, 38.1, and the word "regulated" is not
9 contained in it. It says receiving more than 25 percent of its
10 gross revenue. NorthWestern would like you to insert the word
11 "regulated" ahead of revenue. Well, he argues that the tax
12 statute that the legislature enacted has been interpreted by
13 this commission to be limited to regulated revenue. Read the
14 tax statute. The tax statute is written in a context entirely
15 different than this 1987 statute. The tax statute talks about
16 intrastate and it talks about regulated -- it talks about
17 public utilities and it talks about from its customers.
18 There's no comparable.

19 The whole regulated issue is a red herring, it's not
20 in the statute. There's no discussion of "regulated" in the
21 1987 statute. It says gross revenue. We have a case --
22 everybody wants to cite their cases, the ones they lost and the
23 ones they won. Well, Dave remembers his case, I remember mine,
24 mine is In Re Famous Brands when the Department of Revenue was
25 instructed by the South Dakota Supreme Court that statutes are

1 written by the legislature and are presumed to mean what they
2 say and to say what they mean, and it is equally a presumption
3 that the legislature knew what it was doing when it enacted the
4 statute and absent a statute being unclear on its face, no one
5 except the legislature has the legal authority to insert words
6 into the statute. The plain facts are that the Public
7 Utilities Commission is not the legislature and does not have
8 the authority to engraft the concept of regulated revenue onto
9 this statute. It just simply doesn't exist.

10 There aren't very many cases that say that and there's
11 a reason why there aren't very many cases that say that,
12 because the principal of law is that you can't put words in a
13 statute to make them say what you want them to say. So you
14 aren't going to find a case anyplace that says, oh, 38.1
15 doesn't include the word "regulated" because it doesn't include
16 the word "regulated." You know, ultimately the outcome of this
17 case might be that the Supreme Court would say "regulated"
18 doesn't belong in that statute.

19 So the regulated revenue issue is a red herring and
20 Mr. Gerdes, who I've known for many years, was very
21 complimentary of me, he also is a capable and able, smart
22 lawyer, assisted by able and capable, smart lawyers. And what
23 better way is there to help the commission arrive at a
24 favorable decision but to suggest a route for them to split the
25 baby. And the easy way for the commission to split the baby,

1 which is human nature, is to offer a red herring, regulated
2 revenue, have you say, oh, no, it doesn't mean regulated
3 revenue and think you have done me a terrific favor and move on
4 to find for him on some other point. So regulated revenue is a
5 red herring.

6 Now, the second issue we have to talk about is what
7 revenue, and that has two parts. One is what revenue time
8 specific and the other is geographic. Well, time specific is
9 an interesting question, and this ties back to the history of
10 NorthWestern Corporation. We can't go before 2005 because they
11 emerged from bankruptcy in 2004 and as you will see in their
12 10K, wiped their slate clean, if you will.

13 There's two kinds of accounting that they use and they
14 talk about it in their 2005 annual report. There is
15 preemergence and post emergence accounting, and the two are
16 apples and onions, the onions being the bankruptcy era
17 accounting and the apples hopefully being the future.

18 So we have November and December of 2004 to look at.
19 I can't remember, I think they emerged on November 4th, 2004,
20 maybe the 6th. So we have a month and a half or so then to
21 look at. Then we have 2005, 12 consecutive months, and at the
22 end of 2005 they submitted their 10K and their 10K contains the
23 financial information that's relevant to this, certified by
24 their officers as true and accurate and certified by their
25 independent auditors as true and accurate. And then we have

1 2006, when we started this case, six months of uncertified,
2 unaudited numbers. And now we are in December and we now have
3 11 months of uncertified, unaudited numbers.

4 Logic says the only basis on which we can evaluate
5 this company is on the certified numbers reported to the
6 government of the United States, reported to this agency,
7 certified by the officers of the company and affirmed by their
8 independent auditors. There are a hundred ways we could do
9 this. We could do a 12-month rolling average back to 1923. We
10 could do an average average, just a simple arithmetic average,
11 pick a year, '97, 2001, pick a year. The statute doesn't say,
12 it gives us no guidance, zero. We could do a rolling average
13 for any year that you wanted. We could do a rolling average
14 for six months. We could look at the month of November. We
15 could look at the month of June, the month in which the
16 petition was filed. But that lacks logic and lacks sense.

17 Businesses in this country run on annualized outcomes,
18 for tax purposes, for accounting purposes, for reporting to its
19 shareholders, and for reporting to the regulatory agencies that
20 govern it. And the numbers that are used for reporting to a
21 regulatory agency that govern a business are numbers that are
22 by statute required to be certified by the officers and
23 directors of the company and audited by independent auditors to
24 assure their accuracy. So it only makes sense, and with all
25 due respect to Ms. Van Bockern and your staff, it only makes

1 sense to use the 2005 revenue.

2 All right, so now we get to the guts of the case. The
3 2005 revenue contains a couple of components. Now, remember we
4 are going to look at revenue received, we are not looking at
5 earned, accounted for, generated or derived, we are looking at
6 revenue received by a company whose headquarters, and I'm
7 showing my age, is what is in the telephone company in Sioux
8 Falls, the telephone company building, I think it's call the
9 Qwest building now, its headquarters is there. Mike Hanson's
10 office is there, I can see his office from mine. Mr. Bird, its
11 CFO, lives in Sioux Falls and his office is there. Mr.
12 Kliewer, next door neighbor to one of my partners, Chris Lent,
13 who by the way is an SEC lawyer, lives in Sioux Falls and his
14 office is there.

15 The management decisions are made there. The nerve
16 center of the company is there. The history of the company is
17 South Dakota. The history of the company isn't Delaware or
18 Maryland or Nebraska or Montana. The history of the company is
19 South Dakota. From 1923 until this moment, NorthWestern
20 Corporation, nay NorthWestern Public Service, has received the
21 income from its traditional operations in Sioux Falls, South
22 Dakota. There wasn't any Internet in 1987 when this statute
23 was enacted and electronic banking was only barely beginning.
24 And electronic accounting, the interstate transmission of
25 electronic data for accounting purposes, was only beginning.

1 What did the legislature intend in 1987? It's
2 obvious. The legislature intended that South Dakota companies,
3 who only by fiat of incorporation exist in Delaware, that South
4 Dakota companies who want to sell more than 10 percent of their
5 stock will be regulated by this commission, and to do so so
6 that some small company that has an interstate border crossover
7 wouldn't fall under your radar, they said 25 percent of the
8 revenue.

9 You know, Mr. Gerdes said maybe Montana should be
10 scooped into this and the word "received" should include
11 Montana. We considered that. We considered that outcome.
12 Should the Montana operations be included in calculating
13 whether or not this is a South Dakota company? There is a darn
14 good argument for the fact that it should be because the nerve
15 center, the decision making occurs in Sioux Falls, South
16 Dakota. The difference between Montana's operations and the
17 South Dakota operations is this.

18 NorthWestern acquired the Montana business as a
19 package. In Butte there's a big building that is now
20 NorthWestern's building, it used to be Montana Power Company,
21 where they send out their bills, and actually they send out the
22 bills to South Dakota utility customers from that building in
23 Butte. But the entirety of the Montana operation is carefully
24 regulated by the Montana PSC inside of this ring fence and it's
25 like an independent division of the company, with the exception

1 of the fact that senior management is the same, unlike the
2 South Dakota/Nebraska operations.

3 The unregulated gas sales in Nebraska, ironically and
4 interestingly, are managed by a subsidiary of NorthWestern.
5 You remember NorthWestern is incorporated in Delaware. The
6 subsidiary, NSC, NorthWestern Services Corporation, is a South
7 Dakota corporation incorporated in the state of South Dakota.
8 Their own accounting system, as you will see from the CFO's
9 testimony and Mr. Kliever's testimony, brings the money from
10 the Nebraska unregulated gas sales into NSC through a couple of
11 other subsidiaries. The contract that Mr. Gerdes referred to
12 for management of the Nebraska sales is a contract with itself.
13 NorthWestern Corporation contracted with one of its
14 subsidiaries to manage all that, contracted it with itself.
15 And the corporation that brings that revenue to the table is a
16 South Dakota corporation.

17 So here is the picture that emerges. We have a
18 business incorporated in Delaware in 1923 that always did
19 business in South Dakota and had had some incidental sales in
20 Nebraska. From 1923 to the present date, those Nebraska sales
21 were accounted for as part of its South Dakota revenue. From
22 sometime in the nineties when this subsidiary was formed, NSC,
23 those revenues were accounted for through that subsidiary,
24 which is a South Dakota corporation.

25 Now, some of the lines got blurred in the course of

1 bankruptcy and there's a corporate organizational chart that
2 you will see as an exhibit to the depositions, but one line
3 that didn't get blurred is that the Nebraska revenue follows
4 its way through the South Dakota incorporated subsidiary into
5 NorthWestern's books.

6 Now, we didn't argue with NorthWestern's calculations,
7 and you know the reason we didn't argue with NorthWestern's
8 calculations is because there wasn't any reason to argue with
9 their calculations. They offered up, it's an exhibit to their
10 brief, I can't remember if it was an exhibit to their initial
11 petition or not, but it was offered up in the discovery, they
12 offered up three computations. Sometimes they are, A, B and C,
13 sometimes they are one, two and three.

14 The first computation is an effort to merge SEC and
15 FERC accounting and figure out what the South Dakota revenue
16 represented as a percentage. By the time we got done with
17 discovery, both Bird and Kliwer had agreed we essentially
18 should ignore that first calculation because it really wasn't
19 an apples and apples calculation. So then there's only two to
20 look at, B and C or two and three, depending on which exhibit.

21 Number two is a calculation of the gross revenue of
22 the company and a calculation of the gross South Dakota
23 revenue, one divided by the other, to result in a percentage,
24 and that percentage is in excess of 25 percent. That revenue
25 includes the Nebraska revenue brought to the table through the

1 South Dakota wholly owned subsidiary corporation. The second
2 calculation excludes that revenue and it's less than 25
3 percent. So when the day is over and after my long, windy
4 speech is concluded, it comes down to a very simple question.
5 Do you accept calculation B or C?

6 If you accept B, you have jurisdiction over the
7 question of whether or not these companies should be allowed to
8 merge. And calculation B includes revenue, unregulated,
9 captured from sales of natural gas that was delivered in
10 Nebraska, but the business decision was made in Sioux Falls,
11 South Dakota, the deals were made, the company that made them
12 is a South Dakota corporation and the dollars were received in
13 South Dakota. Or you can say because the gas was delivered
14 someplace other than South Dakota, it's not revenue that you
15 should consider.

16 Commissioners, I submit to you that if this is a close
17 question, all ties should be in favor of the base runner and
18 the public is the base runner. This corporation is barely two
19 years out of bankruptcy. As impolite and perhaps as
20 politically incorrect it is to say it, it was grossly
21 mismanaged and resulted in going into bankruptcy. The business
22 that this corporation, the business that this corporation is in
23 is critical. It is essential to the well-being and the welfare
24 of the citizens of the state of South Dakota who receive gas
25 and electric services from NorthWestern Corporation. You must,

1 you must superintend that business as the statutes mandate and
2 you must not allow the transfer of this business without your
3 watchful eye and watchful thumb.

4 Now, I'll grant you, you did a good job with your FERC
5 piece, but your FERC settlement was negotiated among the
6 lawyers and approved and considered by the commission. You
7 haven't heard from the public. If you find no jurisdiction in
8 this case, you will never hear from the public. If you find
9 jurisdiction, as you should, avoiding and ignoring the hyper
10 technical argument advanced by NorthWestern Corporation, if you
11 find jurisdiction, you will then hear from the public, and you
12 know what, when the day is over, you might say, our FERC
13 settlement is adequate to protect the interests of the public
14 in South Dakota, or you might say there were some people who
15 came to this podium for a public hearing who had some pretty
16 good ideas on how this, how the FERC settlement could be
17 enhanced or the conditions of the FERC settlement could be
18 enhanced or how this corporation could be watched in the
19 future, all within the scope of your power and jurisdiction.
20 And that's what this is really all about.

21 The word "public," the word "public" plays a role,
22 plays a part of the title of your elected office, public
23 utility commissioner, and it's part of the title of the
24 business this company is in, public utility, also refers to my
25 clients, South Dakota Power Company, an affiliation of 20 plus

1 cities that receive public utility services from this company,
2 and Heartland Consumers Power District, another 20 cities.
3 They probably got something to say that's worth listening to.

4 And for that reason, I would respectfully urge that
5 you acknowledge the plain language of the statute, you
6 acknowledge that 25 percent, greater than 25 percent of the
7 revenue of this company, the last certified, audited, confirmed
8 revenue of this company was earned and received, and to use
9 their words, allocated to South Dakota. And this Public
10 Utilities Commission should have jurisdiction. Thank you very
11 much.

12 CHAIRMAN JOHNSON: Thanks, Mr. Taylor. There are
13 other intervenors in the case. I don't know -- I don't think
14 other briefs were filed, but certainly if any of the other
15 intervenors have any comments, we would take them at this time.
16 If memory serves, I think Basin Electric, East River were
17 intervenors.

18 MS. ROGERS: Thank you, Commissioner Johnson. My name
19 is Darla Pollman Rogers and I represent intervenors East River
20 and Basin Electric. We did not file a brief on the
21 jurisdictional matter. We did participate in some of the
22 discovery that took place. We will not be presenting comments
23 or argument at this time and then depending on the outcome of
24 the commission, we will determine our future involvement.
25 Thank you.

1 CHAIRMAN JOHNSON: Thanks very much, Ms. Rogers.
2 Appreciate it. At this time I think it's appropriate to hear
3 from staff. Ms. Van Bockern filed the brief. Go ahead, Ms.
4 Van Bockern.

5 MS. VAN BOCKERN: Thank you, chairman and
6 commissioners. This is Kara Van Bockern speaking today on
7 behalf of staff. As staff did write in its brief, staff does
8 not believe this commission has jurisdiction. Despite all of
9 the history and emotion wrapped up in NorthWestern Company as a
10 whole, we do not believe that the only statute available
11 conveys authority to this commission.

12 Two statutes do arguably apply jurisdiction. None of
13 the parties did argue that 49-34A-35 applies. Therefore, we
14 are simply left with 49-34A-38.1 as the jurisdictional question
15 and the only statute staff argues that will convey
16 jurisdiction, possibly arguably convey jurisdiction in this
17 case. As we have heard and read from the other parties and all
18 the briefs, that statute, 38.1, could possibly convey
19 jurisdiction to this commission if the utility company at issue
20 and the circumstances all involved in this case, if 25 percent
21 of that gross revenue comes from this state.

22 And staff does agree with petitioners that the more
23 specific question is what is gross revenue. Does that include
24 regulated and unregulated revenue? Does that include South
25 Dakota and out-of-state revenue? And we could even add in a

1 third question, as intervenors argued, that there's a time
2 specific gross revenue question in there as well. That third
3 question, however, that time specific question, doesn't affect
4 staff's argument, and our assertion that jurisdiction doesn't
5 exist remains, regardless of what time set of information is
6 used.

7 As staff did brief, staff believes that gross revenue
8 for purposes of this statute should only be that revenue from
9 regulated utility activity. Although admittedly the statutory
10 language is slightly different, staff did look at 49-1A-3,
11 which is the gross receipts tax statute, when analyzing the
12 statute at issue. 49-1A-3 does not specify regulated gross
13 receipts shall be taxed, yet this commission has historically
14 and continues to only consider those receipts from regulated
15 activity when calculating the tax.

16 So it only makes sense, in staff's opinion and staff's
17 argument, that this commission look at regulated activity now.
18 This commission has authority over regulated and regulation
19 power over regulated activity and why now would the commission
20 want to extend its jurisdictional arm and include all of that
21 unregulated revenue as well?

22 The second question is that South Dakota revenue
23 versus out-of-state revenue. Intervenors did argue to include
24 Nebraska revenue due to the ways in which NorthWestern does
25 deal with and account for the revenue it generates throughout

1 South Dakota and Nebraska. Staff argues that such facts are
2 not relevant in this specific procedure. Corporate structure,
3 accounting practice, where the money is physically received,
4 what office building it is sent to, loss of investment, the
5 history, all of that, although makes for a colorful history of
6 NorthWestern's past, I don't believe it's relevant to the
7 arguments in what revenue to include in this analysis.

8 Rather, staff would urge the commission to look to the
9 statute to determine what revenue should be included. The
10 statute does say 25 percent received in this state. Gas sold
11 in Nebraska is not South Dakota revenue and staff argues should
12 not be included.

13 So in conclusion, staff argues that only the regulated
14 revenue should be included in the calculation and it argues
15 only South Dakota revenue should be included in the
16 calculation. The 25 percent threshold is not met, regardless
17 of the time frame, the number time frame you look at, in the
18 information as submitted by NorthWestern, and therefore, the
19 commission does not have jurisdiction. Thank you.

20 CHAIRMAN JOHNSON: Thank you, Ms. Van Bockern. At
21 this time I think it would be appropriate to see if there are
22 any commissioner or advisor questions. Oh, sure, Mr. Gerdes,
23 if you would like some opportunity for rebuttal, we would allow
24 you that. Thanks, Ms. Wiest. There is much to rebut I'm sure.

25 MR. GERDES: Mr. Chairman, members of the commission,

1 I will try to keep this short. Mr. Taylor gave me a lot of
2 fodder to think about, but I would submit that most of what he
3 was talking about would best be served for a legislative speech
4 or some other kind of pep talk than it would be to talk about a
5 legal analysis that relates to the question before the
6 commission.

7 The first thing I'd like to talk about is the 1987
8 statute. It is true that the statute that we have been talking
9 about, 38.1, was adopted in 1987, but if you will look at it,
10 it specifically relates to a series of four statutes that were
11 adopted in 1975 and so it was adopted with a 1975 context, thus
12 my comments. Yes, it was added to the statute in 1987, but it
13 was added to deal with statutes adopted in 1975 and that was
14 the reason for my comment. I stand by what I said and that is
15 that the entire chapter, 49-34A, was adopted in a context of
16 regulated atmosphere, and therefore, that would be the reason
17 for saying that we are dealing with regulated revenues. We
18 have talked about the fact that also the gross receipts tax
19 deals with regulated revenues.

20 We should also keep in mind that there's another
21 reason that we should be dealing with regulated revenues here
22 and that is that the commission's own statutes deal with
23 unregulated revenues. And as a matter of fact, the chapter, as
24 we mentioned in one of our briefs, specifically requires the
25 commission asks utilities to account separately for their

1 unregulated income, and so for those reasons, by distinguishing
2 and segregating out unregulated income in that fashion, we are
3 left again with the situation in the context we are talking
4 about here, regulated revenues is what the statute applies to.

5 You know, I think I need to respond a little bit on
6 behalf of BBI as to the comments about some Australian company
7 coming in here and taking over NorthWestern and that this
8 somehow is bad. As the materials that have been filed with the
9 commission, including our petition, will reflect, BBIL has a
10 significant business presence in the United States. It is true
11 that BBI does not have business interests in this region that
12 would affect the merger or any of the markets that NorthWestern
13 Corporation does business in, but nonetheless, BBI is certainly
14 no stranger to the United States and to suggest that somehow
15 BBI is a suspect entity in this whole thing I would submit is
16 without basis in fact and without basis in the record.

17 Mr. Taylor talks about ring fencing. I would remind
18 the commission, and I'm sure the commission knows this, that
19 one of the fundamental bases for the commission's settlement
20 agreement in the FERC proceeding was the fact that NorthWestern
21 agreed to and will agree to a ring fencing arrangement as it
22 relates to the South Dakota business, the South Dakota company.
23 So for that reason, to say somehow that the commission should
24 find that there is not regulation so that it can, it can take
25 up the question of ring fencing, is a red herring, if I can

1 borrow Mr. Taylor's phrase. The red herring is that this
2 commission should somehow seek to find jurisdiction so that it
3 can accomplish ring fencing and all these other things that
4 have already been accomplished. So that I would submit is a
5 red herring argument.

6 It's a popular argument to say that we need to hear
7 from the public here. Quite frankly, I would submit that the
8 public has spoken. There has been much in the press and there
9 has been much in the press of this state concerning this
10 matter. And to be truthful, the question before the commission
11 here is simply whether or not it has jurisdiction and the
12 jurisdictional issue has to be dealt with based upon the facts
13 before the commission and the issues related to jurisdiction
14 without regard to whether or not anyone should be heard from,
15 whether the public or South Dakota Power Company or anybody
16 else at all.

17 The fact remains that the question of jurisdiction is
18 always first in any adjudicative proceeding, whether it be with
19 the PUC, a court or some other administrative body. If you
20 don't have jurisdiction, you simply do not have the ability to
21 act and that is the common denominator that has to be addressed
22 by this commission first.

23 Mr. Taylor indicated that his clients are part of the
24 Montana proceeding and of course if they have complaints about
25 the Montana situation, they certainly are able to present their

1 arguments to the Montana commission.

2 Finally, I would submit that the question of whether
3 or not we are talking about regulated revenue or something more
4 than regulated revenue certainly is not a red herring in this
5 matter. It is an effort to get to what the legislature had in
6 mind when it was writing the statute, and I think we have
7 flogged that issue to death. I think the commission
8 understands what we are talking about, but if we are not
9 talking about gross regulated revenues, then what we are
10 talking about, and Mr. Taylor has identified the issue, and
11 that is the difference between the revenues, unregulated
12 revenues connected in Nebraska and whether or not they are
13 includable as gross revenues within the meaning of the statute.

14 I would submit that with all of Mr. Taylor's rhetoric,
15 he didn't talk about one case. He didn't talk about, for
16 instance, the Arkansas Power case, which is the only case that
17 we found in some rather significant legal research into the
18 subject, that talks about what you do when you are dealing with
19 the question of gross income, in their case. Our statute says
20 gross revenue, I'd say they are close enough. And in that
21 case, they concluded that that utility's unregulated ice
22 business was not part of the gross income of the company, and
23 that's without a statute. So that speaks more strongly than
24 anything else that says that unregulated income is not part of
25 a regulated utility's gross income. Unregulated income is not

1 an integral part of the gross income or the gross revenue of a
2 regulated utility.

3 If you go on, in our initial brief we have cited case
4 after case where courts have determined that it is the context
5 that counts and where the context indicates otherwise, gross
6 revenue does not include unregulated revenue. So I would
7 submit I was interested in listening to Mr. Taylor's debating
8 style, but he didn't talk about a case, and the cases support
9 our position. And we would submit that for those reasons, the
10 commission should and has really no other choice but to
11 determine that it has no jurisdiction in this matter.

12 CHAIRMAN JOHNSON: Thanks, Mr. Gerdes. We will start
13 with questions. If there are any commissioner or advisor
14 questions for any of the parties, we would take those at this
15 time. Ms. Wiest.

16 MS. WIEST: I would just ask Mr. Gerdes, do you
17 consider the entirety of the NorthWestern Corporation to be a
18 public utility?

19 MR. GERDES: Do I consider the entirety of the
20 NorthWestern Corporation to be a public utility?

21 MS. WIEST: Yes.

22 MR. GERDES: To the extent that it's in the public
23 utility business. There is a nonutility part of it that would
24 not be regulated as a utility. I don't know if I answered your
25 question.

1 MS. WIEST: I guess that's what I'm getting at. If
2 the statute speaks to a public utility, what part of
3 NorthWestern Corporation is a public utility?

4 MR. GERDES: That part that is in the business of
5 delivering regulated services.

6 MS. WIEST: In any state?

7 MR. GERDES: Yes. I know MDU, I know other utilities
8 that have nonutility business, and simply because a regulated
9 utility owns and operates an unregulated business doesn't make
10 that revenue that's generated in the nonutility business
11 regulated revenue.

12 MS. WIEST: Then why would you take the total capital
13 stock of the entirety of NorthWestern?

14 MR. GERDES: Why would I take the -- I don't
15 understand your question.

16 MS. WIEST: Well, when you are talking about the total
17 capital stock, are you looking at the entirety of NorthWestern
18 Corporation?

19 MR. GERDES: Where do I take the total capital stock?
20 I'm not with your context.

21 MS. WIEST: When you are comparing the 25 percent to
22 the total capital stock, what are you looking at with your
23 total capital stock?

24 MR. GERDES: Twenty-five percent relates to revenues.

25 MS. WIEST: I'm sorry, total revenue.

1 MR. GERDES: That 25 percent relates to revenues, not
2 capital stock. The statute relates to revenues, it has nothing
3 to do with capital stock.

4 CHAIRMAN JOHNSON: There are two numbers, one is 10
5 percent of total capital stock, which is half of the first
6 trigger, then the 25 percent, yes, Mr. Gerdes, is revenues,
7 gross revenue.

8 MR. GERDES: Correct. I have a copy of the statute if
9 I can find it here. The capital stock just talks about you may
10 control either directly or indirectly more than 10 percent of
11 the total capital stock of any public utility. That has
12 nothing to do with the question here and that is whether or not
13 there is jurisdiction as it relates to 25 percent of the gross
14 revenue. Revenue isn't capital stock. Revenue is income.

15 CHAIRMAN JOHNSON: We will give Ms. Wiest just a
16 moment to confer with Mr. Rislov.

17 MS. WIEST: Go ahead with any other questions.

18 CHAIRMAN JOHNSON: I have comments but no questions,
19 so if you have questions, go ahead.

20 COMMISSIONER KOLBECK: I have a question for Ms. Van
21 Bockern. When you say that being regulated, do you feel -- I
22 know Mr. Taylor's argument was that "regulated" is actually
23 being input into the legislation. Could you give me your
24 opinion on that?

25 MS. VAN BOCKERN: I don't believe it is. I think when

1 you read the statute in context of the entire title of our
2 codified law that applies and with the Public Utilities
3 Commission's purpose as a whole, we have, the commission has
4 authority and regulation power over those regulated portions of
5 utility business only, and so therefore, I don't think it's --
6 although technically I suppose you could say it's inserting a
7 specific word, but it's not inserting an idea by any means,
8 because that's what we do, the Public Utilities Commission
9 regulates only those portions of a utility business they have
10 authority to do so.

11 COMMISSIONER KOLBECK: Mr. Taylor, do any of your
12 clients have a problem or had they requested more from the FERC
13 settlement? Any questions or concerns over the FERC
14 settlement?

15 MR. TAYLOR: Do we have questions or concerns with it?
16 We would love to see it expanded, the scope of the issues.
17 Like I said, I think the commission did a good job with the
18 FERC settlement, it's a sound starting point. I can't tell you
19 today that my clients will come to this commission and say, we
20 reject and want you to reject the BBI NorthWestern merger.
21 What I can tell you is that my clients will come to you and
22 say, you started pretty well with the FERC settlement, we have
23 issues that we think you need to hear about that could well
24 be -- what are the right words -- we could build on the FERC
25 settlement with these issues. And I'd love to present those

1 issues, love to make that case.

2 Dave is right, this is a jurisdiction question today,
3 so the future outcome is for another day. I want to respond to
4 your question to Ms. Van Bockern. First I have to tell you
5 it's very disconcerting for me because I figured out this
6 morning that Ms. Van Bockern graduated from high school the
7 same year as my youngest son and to have your opponent be the
8 age of your youngest child makes you feel pretty old.
9 Especially after I listened to her argument. I think she might
10 be smarter than I am.

11 The word "regulated" isn't in 38.1, isn't in 38.1.
12 And you can do all you want with concepts, what is the concept?
13 But if you limit your review to regulated revenue, you have
14 amended that statute to include regulated revenue. The key to
15 our code is this. There's nothing in our law that prohibits a
16 corporation that's in the regulated utility business from going
17 into other businesses. They can do anything they want.
18 There's no prohibition against that.

19 And it is those other businesses that have so
20 graphically proven in 2002 that can cause the failure, the
21 collapse, the bankruptcy of a public utility, which puts the
22 public interest at great risk. South Dakota Power Company was
23 formed with the idea of buying the South Dakota public utility
24 business of NorthWestern Corporation and having it held as a
25 nonprofit corporation, in a nonprofit corporation owned by

1 municipalities so that this would never happen again, so that
2 the risk would be eliminated.

3 You as a regulator must have some anchor, some rope to
4 grab onto with respect to the management of these companies,
5 the business decisions that they make that threaten the
6 fundamental monopolistic public utility business, and the
7 anchor you have is they can't sell it without your permission.

8 You know, the next -- what if NorthWestern was sitting
9 here today and said, well, here is what we have decided to do,
10 we are going to break it up into pieces like Montana Power
11 Company did in 1999, we are going to sell the generation off,
12 we are going to sell this off and sell that off. There's no
13 difference, this Public Utilities Commission has the legal
14 authority and the obligation to consider the impact of this on
15 the people of South Dakota.

16 Your FERC piece is a good step, solid step, but there
17 are other issues to be considered, and that's all that needs to
18 be done here. It's not a red herring to say that the public
19 should have a voice in a regulated monopoly that provides
20 public services and is regulated by a public commission of
21 elected officials.

22 CHAIRMAN JOHNSON: Thanks, Mr. Taylor. Other
23 questions, Ms. Wiest?

24 MS. WIEST: Yes, Mr. Gerdes. I think I have my
25 question figured out now. If you could go to Exhibit 1

1 attached to your initial brief. None of this is confidential;
2 is that correct, Mr. Gerdes?

3 MR. GERDES: No.

4 MS. WIEST: It would be the first page of Exhibit 1.

5 MR. GERDES: All right.

6 MS. WIEST: Four lines down we have total NorthWestern
7 FERC basis revenue; is that correct?

8 MR. GERDES: That's correct.

9 MS. WIEST: Is that the revenue for the entirety of
10 the NorthWestern Corporation?

11 MR. GERDES: I believe it is, yes.

12 MS. WIEST: So I guess --

13 MR. GERDES: As reported on a FERC basis.

14 MS. WIEST: Right, and the statute speaks to a public
15 utility, but I believe you told me earlier that it was your
16 position that the entirety of NorthWestern Corporation would
17 not be considered a public utility; is that correct?

18 MR. GERDES: I believe, in my experience, that
19 nonutility business is not treated as a regulated entity, so
20 what I'm saying is NorthWestern Corporation is a public
21 utility, a regulated utility, but it is entitled to have, and
22 I'm familiar with many regulated utilities that have nonutility
23 businesses that they own, and so to the extent that there is a
24 nonutility component to the company, I'd say that part of it is
25 not a regulated utility.

1 MS. WIEST: It's still a public utility? I'm just
2 trying to figure out the definitions. I'm not trying to be
3 tricky or anything. I'm trying to figure out the definitions
4 because we defined it in the definitions section of 49-34A.

5 MR. GERDES: A public utility is a regulated entity
6 under Chapter 49-34A by definition, I agree, and that was one
7 of the points I was going to raise in response to Mr. Taylor
8 saying that regulation is not in 38.1. Well, regulation
9 certainly is in the -- regulation certainly is in 38.1 because
10 38.1 talks about public utilities and public utilities are
11 regulated entities.

12 CHAIRMAN JOHNSON: I think sort of the key point of
13 the matter is if the commission is to read "regulated" into
14 38.1, then shouldn't the numerator we are looking at, the total
15 revenue that we are trying to find out what 25 percent of would
16 be, wouldn't that be total regulated revenue? If we are going
17 to read "regulated" in advance of gross revenue.

18 MR. GERDES: I understand what you are saying. Yes,
19 and I think you could.

20 CHAIRMAN JOHNSON: So then if the commission is to
21 read "regulated" into that, that section, do we know what total
22 NorthWestern regulated revenue would be?

23 MR. GERDES: I don't know that question right off the
24 top of my head, Commissioner, but I'm sure it could be
25 determined from the materials that are in the discovery. The

1 FERC basis revenue is regulated revenue I'm told.

2 CHAIRMAN JOHNSON: So only regulated revenue is in
3 that number?

4 MR. GERDES: Right.

5 CHAIRMAN JOHNSON: Of the Nebraska unregulated natural
6 gas revenue we have been discussing, none of those dollars are
7 included in that FERC basis revenue number?

8 MR. GERDES: That's correct, none of the unregulated
9 Nebraska revenues would be in the FERC number.

10 CHAIRMAN JOHNSON: I interrupted your line of
11 questioning, Ms. Wiest. My apologies.

12 COMMISSIONER KOLBECK: I guess my question, Mr.
13 Gerdes, while they are conferring there, then South Dakota
14 regulated revenue, total NorthWestern FERC basis revenue,
15 that -- I want to be clear on this -- that represents your
16 public utility revenue, correct?

17 MR. GERDES: Right. Regulated revenue.

18 CHAIRMAN JOHNSON: Any other commissioner or advisor
19 questions?

20 MR. TAYLOR: I have a comment.

21 CHAIRMAN JOHNSON: Sure, come forward, Mr. Taylor.

22 MR. TAYLOR: The FERC number represents regulated
23 revenue if you count the way FERC requires that you count.
24 Here is an example of how FERC requires you to account as
25 opposed to how the SEC requires you to account. Under FERC

1 accounting, let's assume that NorthWestern Corporation bought
2 \$100 worth of electrical energy to be delivered at a given date
3 from a generator and they only used \$99 worth of the
4 electricity and sold \$1 back to the generator or didn't take
5 it. FERC requires you to account for that as a \$99 event. In
6 the SEC accounting world and in the GAAP accounting world, you
7 treat the \$100 as an expense and you treat the \$1 as revenue.
8 So when you look at FERC basis revenue, the number will be
9 lower than if you look at SEC or GAAP basis revenue, because
10 under the SEC, you treat it as a \$99 expense item and a \$1
11 revenue item, under GAAP you treat it as a \$99 expense item and
12 a \$1 revenue item.

13 So hence the early problems in this whole case and
14 that is the apples to apples to apples comparison. If you want
15 to do a FERC-based analysis, it's simple. You take that one
16 billion 84 million dollars that's shown on that fourth line
17 that you talked about, then you go over to the second piece,
18 then you have to make the decision whether regulated or
19 unregulated sales should be included anyplace, and here is the
20 question you have to decide then.

21 NorthWestern Corporation owns a pipeline in South
22 Dakota, a gas pipeline, and it collects fees for the capacity
23 that that pipeline offers. Now, that's not regulated by the
24 PUC, but it certainly is ancillary to the utility business.
25 The utility business is based on the sale of gas and

1 electricity. This is the transportation of gas. NorthWestern
2 Corporation also sells a huge volume of natural gas in South
3 Dakota to I think 10, a substantial number of the 11 operating
4 ethanol plants in South Dakota. Now, that's unregulated, but
5 it's certainly related to the regulated business.

6 So getting apples to apples to apples across the board
7 is tough duty. Part of it is because you have three forms of
8 accounting. Part of it is because you have businesses that are
9 not clearly outside of the scope of what you should be paying
10 attention to. I mean, if they owned a casino in Deadwood,
11 that's pretty clearly -- that's regulated by the Gaming
12 Commission as opposed -- that's a bad example. If they owned a
13 shoe store in Sioux Falls, a Red Shoe in Sioux Falls, that's
14 clearly not a regulated business.

15 So what it comes down to is find "regulated" in the
16 statute, which you can't, and then if you decide "regulated" is
17 in the statute, which it isn't, which of these businesses that
18 are closely akin and physically inseparable from the regulated
19 business aren't you going to think about. It takes you all the
20 way back around to the conclusion that we arrived at the very
21 first day, and that's that you can't define the difference
22 between "regulated" and "unregulated" and it makes perfect
23 political and economic sense to not try and define that
24 difference because the business isn't going to rise or fall or
25 fail on regulated activity. The business is going to fail on

1 unregulated utility and it is the business that you are
2 supposed to look at because of the scheme of the way our
3 statutes are written.

4 CHAIRMAN JOHNSON: Thanks, Mr. Taylor.

5 MR. GERDES: May I have some rebuttal?

6 CHAIRMAN JOHNSON: Go ahead, Mr. Gerdes.

7 MR. GERDES: Very briefly, Mr. Chairman, members of
8 the commission. If you want to get into the numbers, look at
9 Kendall Kliever's two depositions. They are in the record,
10 please read them. Mr. Kliever goes through chapter and versus
11 as to what is includable and what is not and what the basis is
12 for the revenue in these exhibits. Neither Mr. Taylor nor I
13 are qualified as accountants to talk about these revenues and I
14 would submit if you have a substantial question about that, I
15 would refer you to those depositions. What I will tell you is
16 that the only purpose for the 14 percent calculation that was
17 on the face of Exhibit 1 was to come -- to make a decision
18 based upon regulated revenue because that's one of the issues
19 we talk about as to what the percentage is.

20 Now, if you want to start talking about unregulated
21 revenue, the only calculations that mean anything are the ones
22 on the second page, calculation one, two and three, and Mr.
23 Kliever talks in detail about those calculations as well in his
24 deposition, if you want to see what an expert says about these
25 items. But my point is that Mr. Kliever admits calculation one

1 doesn't apply, calculations two and three depend on whether or
2 not you want to count the Nebraska unregulated revenues or not.
3 That's the whole bottom line.

4 CHAIRMAN JOHNSON: We are not prone to much in the way
5 of speeches here at the commission and so I'll keep it brief,
6 but I do want to mention a couple of things before we get to
7 commission action. I understood what Mr. Taylor meant when he
8 said there hadn't been any opportunity for public input. I
9 would just note that the good thing about having an elected
10 commission is that you constantly receive citizen input, and
11 it's not just Commissioner Kolbeck, who ran this last time, or
12 Gary Hanson when he ran, but I live in Mitchell and that's a
13 NorthWestern community and almost everybody I see when I go to
14 the grocery store is a NorthWestern customer. And in the two
15 years I've been on the commission, I don't think I have
16 received questions on any subject from consumers and ratepayers
17 more than I have received questions on NorthWestern, and
18 certainly they are not just questions, they are often opinions
19 and sometimes given at great volume toward me as to what people
20 think about NorthWestern.

21 But to me, I think it is important to note that this
22 is not -- the question -- the vote that we may take today is
23 not whether or not I like NorthWestern, and the question before
24 us is not whether or not I think BBI should be allowed to buy
25 NorthWestern, and the question isn't whether or not I think

1 NorthWestern has been grossly mismanaged, as was characterized.
2 It may have been. The question isn't really whether or not I
3 think NorthWestern shareholders should get rich on a sale. The
4 question isn't whether or not I think there have been enough
5 inches of paper filed in this docket yet. The question really
6 is whether or not the legislature has given us the authority to
7 approve this merger.

8 And I don't know what we will decide, but to put it
9 very bluntly, this commission doesn't get -- I don't get to do
10 what I want to do. I get to do what we have been given the
11 authority to do. If there are any other commissioner comments
12 or questions prior to us taking action, maybe action isn't
13 appropriate today, I don't know, but certainly if other
14 commissioners have comments, they can make them. Otherwise I
15 have maybe a proposed motion. I don't know that I would make
16 it, maybe I would propose it and get people's take on it prior
17 to us voting on it.

18 VICE-CHAIR HANSON: This is Gary Hanson. I very much
19 appreciate your comments that you just made. I think they are
20 extremely appropriate. There was considerable amount of
21 fodder, as we are fond of using that term, that was available I
22 guess for all six sides of this issue. And rather than
23 attempting in any way to go through all of those at this time,
24 I would just say that I agree with the comments that you made
25 pertaining to our accessibility to the public and such and I

1 fully understand and appreciate Mr. Taylor's point of view that
2 there would be additional information that we would certainly
3 receive if this would continue.

4 I will give somewhat of possibly my -- I don't know
5 all the remarks I am going to make at this juncture. I will
6 give some hint as to where I am sitting. The issue on ring
7 fencing, I feel compelled to say something about that simply
8 because there is ring fencing and then there is ring fencing.
9 We hear of companies saying that there is going to be ring
10 fencing. The former CEO of NorthWestern, Gary -- I forget his
11 last name -- Drung, he stated that they were going to do some
12 ring fencing and when I quizzed him on that, it was obviously
13 not true ring fencing. So when we hear of those issues, I
14 would really like to hear people use ring fencing in its proper
15 term and if it's going to be a true ring fencing, then to state
16 that. If it's going to be something other than that, then
17 state that.

18 I'm conflicted here because I find it just absolutely
19 incongruous that a company with headquarters in South Dakota
20 and a company with millions of dollars in revenues that are
21 generated and received in South Dakota would not, under our
22 statutes, need to receive approval of a sale from the South
23 Dakota PUC, and yet it's incredibly inconsistent that a company
24 with headquarters in another state and a company with much
25 smaller revenues in South Dakota would in fact need to receive

1 sale approval from the South Dakota PUC, just based upon that
2 25 percent qualification.

3 And my confliction is that the jurisdictional
4 question -- and this statute plainly needs to be changed as
5 soon as possible to allow the South Dakota Public Utilities
6 Commission to have jurisdiction over this type of case
7 situation, especially with the history of the former
8 NorthWestern Corporation, and I don't mean to cast dispersion,
9 aspersions on the present board of directors or management.
10 Certainly we are fortunate that there has been a significant
11 turnaround in the NorthWestern Corporation, with the tremendous
12 misfortune for all of those innocent people that have been
13 harmed as a result of their, I'll be kind and simply say of
14 their former board of directors and the former administration
15 of the incredible poor management. That's as kind as I can be.

16 But we are in fact fortunate that a company with a
17 very good track record and excellent potential for wind
18 renewables has taken that over, and there was some comment by a
19 previous -- forgive me for digressing on issues we don't need
20 to talk about here, but there was some previous statements
21 casting aspersions from -- that came somewhat from -- well, it
22 came from the commission, from one commission member in regards
23 to an out of state or out of country ownership, and I believe
24 presently in fact there's a major stockholder offshore company
25 in the Bahamas.

1 So I'll try not to digress any more, Mr. Chairman. I
2 will simply say that we absolutely -- and I know that we are in
3 fact as a commission working on legislation to change this. We
4 also need to examine other statutes that may have similar
5 challenges and make sure that we don't run into this situation
6 again, and with that, I have obviously tipped my hand as to
7 what my position is, what I would support in the line of a
8 motion. I find this entire situation to be very troubling,
9 that we as a commission have no jurisdiction in a situation of
10 this nature. Thank you, Mr. Chairman.

11 CHAIRMAN JOHNSON: You bet, Commissioner. I'll sort
12 of explain where I'm coming from. This is a tough issue so I
13 actually appreciate the opportunity to hear what Commissioner
14 Hanson is thinking and get a feel for how we work through this
15 issue prior to having a firm motion ahead of us. Here is where
16 I'm coming from.

17 I open up Title 49, 49, Chapter 34A and I look through
18 here and it's got all kinds of words in here and if you look in
19 six, subsection six, it talks about the commission's power to
20 set reasonable rates and that's always been the commission's
21 power to set rates in regulated activities. We don't set rates
22 for furnace repair or for that shoe store in Sioux Falls that
23 somebody talked about. If you look in Section 8, it talks
24 about the commission's authority to provide incentives to
25 encourage improved performance. Again, that's always been on

1 the regulated side of the ledger. If you look in Subsection
2 12, it talks about customers. Again, it's been very clear
3 throughout, for decades that's meant regulated customers. If
4 you look at 13, they talk about changes to rates. Again we are
5 talking about the rates of a public utility, a regulated
6 activity.

7 As we talk about the difficulty of reading "regulated"
8 into this chapter, it seems no me that there may be more
9 complications by reading the word "unregulated" or "regulated"
10 into this chapter. If we read "unregulated," if we presume
11 that no adjective means all revenues and rates and customers
12 and functions apply, then wouldn't that give the Public
13 Utilities Commission tremendous authority and control over the
14 unregulated operations of companies in South Dakota?

15 I don't think -- it's very clear to me at least that
16 that's not the manifest intent of the legislature, that the
17 legislature wanted us to regulate public utility functions and
18 not furnace repair and not aggregate sales. So to me context
19 is important and it's very clear throughout Chapter 34A that
20 when we are talking about rates or customers or incentives, we
21 are talking about regulated.

22 I wonder, I'd look to Greg Rislov or Rolayne Wiest.
23 We are trying to compare -- if the commission were to read
24 "regulated revenue," view gross revenues as only regulated
25 revenues, do we think that the depositions have provided us the

1 factual record to say that 14.7 percent is the right number or
2 have there been issues raised about FERC basis that would lead
3 us to believe that 14 percent might get to 25 percent?

4 MR. RISLOV: As you can probably tell, judging by some
5 of the questions that came before, we were concerned not just
6 about the numerator but about the denominator as well, which it
7 appears for the most part people -- not that it wasn't
8 addressed, but it certainly wasn't addressed at length the way
9 the numerator was in this difficult equation.

10 But as Mr. Taylor has suggested, I believe, and Mr.
11 Gerdes, they said go to the depositions, and our big concern
12 was the denominator and the revenue that was shown there. But
13 clearly on page 55 of the September 27th, which I believe it
14 would be the first deposition of Kliever, is the statement that
15 FERC revenue does not include the unregulated revenues, and
16 that was our primary concern or at least my primary concern. I
17 cannot speak for Rolayne on this issue. I will admit that if
18 we were involved in a case in a normal way, there would be
19 perhaps not four feet of paper, but maybe a few more inches
20 than what already appeared.

21 So from my point of view, this is what I have to go on
22 and I don't know where it was challenged, if it was challenged,
23 so I'll take that statement from this deposition, which both
24 have recommended, and at this point I have to believe that
25 statement is a true recognition of what we or at least what I

1 thought should be in the denominator of that equation.

2 CHAIRMAN JOHNSON: I want the commission to have
3 jurisdiction over this sale and I wish the legislation was more
4 clear that we did. But I think a common sense reading of the
5 chapter that dictates this matter leads me to believe that the
6 25 percent threshold has not been met, so I would move that the
7 commission find that threshold has not been met and that,
8 therefore, I would further move the commission does not have
9 jurisdiction to approve or disapprove the merger between
10 NorthWestern Corporation and Babcock & Brown Infrastructure
11 Limited.

12 COMMISSIONER KOLBECK: I will second the motion, but I
13 would like to --

14 (Lost phone connection with Vice-Chair Hanson.)

15 CHAIRMAN JOHNSON: Apparently it's good you were
16 appointed early, Mr. Kolbeck. We will pause for just a moment
17 while we see if we can get Commissioner Hanson back on the
18 line.

19 For those listening on the Internet, if it's not
20 clear, we are pausing for just a moment while we can reconnect
21 Commissioner Hanson with this conference call.

22 (Brief pause.)

23 CHAIRMAN JOHNSON: Commissioner?

24 VICE-CHAIR HANSON: I reached for the mute and I hit
25 the other button.

1 CHAIRMAN JOHNSON: I believe that's defined as user
2 error, but welcome back. I believe Commissioner Kolbeck had
3 the floor. Please proceed.

4 COMMISSIONER KOLBECK: I just wanted to say that I
5 will second the motion, but I'd like to echo the other
6 commissioners' comments. I feel that we are doing what is
7 given to us by the legislature. We are doing what is in our
8 realm and we are doing what we are authorized to do and nothing
9 more. I would like to echo, though, that I think it is
10 something that we need to fix. I think there is a problem with
11 the legislation, but something that we cannot fix right now.
12 So I will second the motion.

13 VICE-CHAIR HANSON: This is Gary Hanson. I concur.

14 CHAIRMAN JOHNSON: The motion, having been made,
15 seconded and voted on, passes. You know, I would note, because
16 I have heard a lot of misconceptions out there, that somehow
17 the finding, that if this commission were to find it did not
18 have jurisdiction over this sale, that somehow NorthWestern
19 would not be regulated in the same way on a go forward basis,
20 and I would just want to make it very clear, crystal clear, it
21 doesn't matter whether people from New York or Huron or
22 Delaware or Australia or Mars own NorthWestern, as long as it
23 does business in South Dakota as a public utility, it will
24 continue to be regulated by the South Dakota Public Utilities
25 Commission.

1 And the vigilance and the review and the regulation
2 that I think Mr. Taylor did speak very eloquently about will
3 continue to be exercised by this commission. And because of
4 the concessions that were secured during the FERC proceeding,
5 this is going to continue to be a company that is locally
6 managed and has local control and that will have ring fencing
7 provisions set up that are currently in place legally to insure
8 that whatever happened in the past with NorthWestern is not
9 going to happen again. The laws of the state don't
10 discriminate, if you are doing business as a public utility in
11 South Dakota, you are going to be regulated by this commission.
12 Is there any other business to come before this body? If not,
13 we will stand adjourned.

14 (Whereupon, the proceedings were concluded at 11:50
15 p.m.)

C E R T I F I C A T E

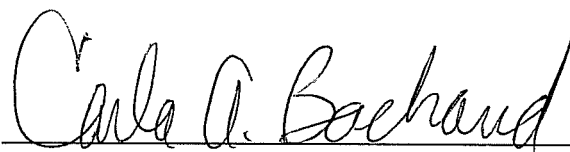
STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

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 15th day of December 2006.



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.