

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

<b>IN THE MATTER OF THE MERGER BETWEEN )</b>	<b>DECLARATORY RULING</b>
<b>NORTHWESTERN CORPORATION AND BBI )</b>	<b>REGARDING JURISDICTION</b>
<b>GLACIER CORP., A SUBSIDIARY OF )</b>	
<b>BABCOCK &amp; BROWN INFRASTRUCTURE )</b>	<b>GE06-001</b>
<b>LIMITED )</b>	

On June 7, 2006, Northwestern Corporation (NorthWestern) and Babcock & Brown Infrastructure Limited (BBI) filed a Petition for Declaratory Ruling and for Transaction Approval if Jurisdiction Found. On June 19, 2006, NorthWestern and BBI (collectively referred to as Applicants) filed an amendment to Petition for Declaratory Ruling and for Transaction Approval if Jurisdiction Found. NorthWestern and BBI have entered into an agreement and plan of merger, dated as of April 25, 2006. In connection with this transaction the Applicants stated that a question has arisen as to whether the South Dakota Public Utilities Commission (Commission) has jurisdiction to approve the transaction. NorthWestern and BBI filed the Petition for a Declaratory Ruling pursuant to SDCL § 1-26-15 and ARSD 20:10:01:34. If the Commission concludes that it does in fact have jurisdiction, a second question is presented, namely, whether the Commission will approve the transaction.

On June 8, 2006, the Commission electronically transmitted notice of the filing and the intervention deadline of June 21, 2006, to interested individuals and entities. On June 21, 2006, the Commission received a Petition for Leave to Intervene and Provisional Request for Conditions to Approval of Merger from Missouri River Energy Services (MRES) and Petitions to Intervene from South Dakota Power Company (SD Power) and Heartland Consumers Power District (Heartland). On June 22, 2006, the Commission received a Joint Petition to Intervene from East River Electric Cooperative, Inc. (East River) and Basin Electric Power Cooperative, Inc. (Basin). At its July 11, 2006, meeting, the Commission granted intervention to MRES, SD Power, Heartland, East River and Basin. On July 11, 2006, a pre-hearing scheduling conference was held among counsel for the parties, and on July 20, 2006, the Commission issued a Scheduling Order. On September 26, 2006, the Commission issued a Second Scheduling Order.

On October 10, 2006, the Commission received a Motion for Continuance of the procedural schedule from Heartland and SD Power. On October 13, 2006, the Commission received an Opposition to the Motion for Continuance of Heartland and SD Power from NorthWestern. On October 17, 2006, the Commission received a Reply to NorthWestern's Response to Motion for Continuance and Notice of Hearing from Heartland and SD Power. At its October 19, 2006, meeting, the Commission considered the motion. The Commission voted to grant the motion. Following the meeting, the parties discussed setting a new procedural schedule. Northwestern, Heartland, and SD Power agreed to a new schedule. None of the other parties objected to the new schedule. On October 31, 2006, the Commission issued an Order Granting Motion for Continuance and Third Scheduling Order.

On November 15, 2006, the Commission received the Brief of Intervener Heartland Consumers Power District and South Dakota Power Company on Jurisdiction and Staff's Brief on Jurisdiction. On November 29, 2006, the Commission received Applicants' Reply Brief on Jurisdiction.

At its December 12, 2006, meeting, the Commission considered this matter. The Commission was presented with a Stipulation for Hearing Record entered into by Northwestern, Heartland, SD Power, East River, Basin, and Commission Staff. The Stipulation provided that

depositions and a copy of the Settlement Agreement entered into by Northwestern, BBI, and the Commission regarding FERC Docket No. EC06-127-000 may be considered by the Commission as the hearing record in support of the position taken by the parties in their briefs on the issue regarding jurisdiction. The Commission then heard oral argument from the Applicants, Commission Staff, and Intervenors Heartland and SD Power. Heartland and SD Power argued that the Commission had jurisdiction to approve or deny the merger. The Applicants and Commission Staff argued that the Commission lacked the jurisdiction. After listening to the oral arguments, the Commission unanimously voted to find that the Commission did not have the statutory jurisdiction to approve or deny the merger.

Based on the hearing of record, the Commission enters the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. On June 7, 2006, Northwestern and BBI filed a Petition for Declaratory Ruling and for Transaction Approval if Jurisdiction Found. On June 19, 2006, NorthWestern and BBI filed an amendment to the Petition. NorthWestern and BBI entered into an agreement and plan of merger, dated as of April 25, 2006.

2. The Applicants requested a declaratory ruling on the following issues:

a. As used in SDCL 49-34A-38.1 does the term "gross revenue in this state" include regulated gross revenue or all revenue, both regulated and nonregulated, wherever incurred?

b. If the term includes all revenue in this state, both regulated and nonregulated, wherever incurred, does revenue actually generated outside the state of South Dakota but allocated to this state by accounting requirements constitute "gross revenue in this state" for the purpose of the statute?

c. Does the Commission have jurisdiction over the proposed merger?

3. Intervention was granted to MRES, SD Power, Heartland, East River, and Basin.

4. The statute at issue is SDCL 49-34A-38.1. This statute provides:

Notwithstanding the provisions of §§ 49-34A- 35 to 49-34A-38, inclusive, no person may acquire or control either directly or indirectly more than ten percent of the total capital stock of any public utility organized and doing business in this state or of any public utility organized under the laws of any other state receiving more than twenty-five percent of its gross revenue in this state without first securing authorization to do so from the Public Utilities Commission. Any such acquisition or control without the commission's prior authorization is void.

5. NorthWestern is organized under the laws of the state of Delaware. The question then becomes whether NorthWestern, as a public utility organized under the laws of another state, receives "more than twenty-five percent of its gross revenue in this state." The dispute among the parties centered on how the 25% of gross revenues is calculated.

6. The evidence showed that using NorthWestern's electric and gas revenue that is regulated by the Commission, the South Dakota regulated revenue, as a percent of FERC basis revenue, is

14.72% for the year ending December 31, 2005. Kliewer Deposition dated September 27, 2006, Exhibit 1. The percentage is 14.82% for the 12 months ending June 30, 2006.

7. The evidence showed that for South Dakota regulated and unregulated revenue, excluding revenue derived from operations in South Dakota but ended outside the state, the percentage is 20.84% for the year ending December 31, 2005. *Id.* The percentage is 19.78% for the 12 months ending June 30, 2006.

8. The evidence showed that for South Dakota regulated and unregulated revenue, including revenue received from the sale of unregulated gas in Nebraska, the percentage is 25.23% for the year ending December 31, 2005. *Id.* This percentage is based on total company grossed up revenues less adjustments. *Id.* The percentage is 23.84% for the 12 months ending June 30, 2006.

9. The Commission first finds that the appropriate time period to consider is for the year ending December 31, 2005. Although using the 12 months ending June 30, 2006, is a more recent time period, the numbers for that time period are not audited numbers. Therefore, the Commission finds that consideration of the numbers derived during the year ending December 31, 2005, results in the use of more reliable numbers.

10. The Commission finds that the term "gross revenues" is limited to South Dakota regulated revenue. This finding is based on the Commission's statutory limitations on its regulatory authority. Although a utility company may provide unregulated services, the Commission may only regulate those services which are authorized to be regulated by statute. *See generally* SDCL chapter 49-34A. Statutory references to the terms "rates" and "services" are not preceded by the term "regulated," yet there is no question that the Commission's jurisdiction is limited to regulating only those rates and services that meet the definition of a gas or electric service. Thus, a public utility's "gross revenue in this state" is similarly limited to those revenues that are regulated by the Commission.

11. This interpretation is consistent with the Commission's interpretation of its gross receipts tax. Pursuant to SDCL 49-1A-3, the Commission is authorized to assess "annual intrastate gross receipts derived by the public utility or telecommunications company from its customers within the State of South Dakota during the preceding calendar year." Although the statute does not refer to "regulated" gross receipts, the Commission has always interpreted that statute to only allow the assessment on a public utility's regulated gross receipts, even though the utility may receive gross revenues from its South Dakota customers from unregulated services.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this Petition for Declaratory Ruling pursuant to SDCL chapter 49-34A and SDCL 1-26-15.

2. SDCL 49-34A-38.1 provides as follows:

Notwithstanding the provisions of §§ 49-34A- 35 to 49-34A-38, inclusive, no person may acquire or control either directly or indirectly more than ten percent of the total capital stock of any public utility organized and doing business in this state or of any public utility organized under the laws of any other state receiving more than twenty-five percent of its gross revenue in this state without first securing authorization to do so from the Public Utilities Commission. Any such acquisition or control without the commission's prior authorization is void.

3. The Applicants' first issue raised in its request for a declaratory ruling was whether the term "gross revenue in this state," as used in SDCL 49-34A-38.1, includes regulated gross revenue or all revenue, both regulated and nonregulated, wherever incurred. For the reasons stated in findings of fact 10 and 11, the Commission concludes that the term "gross revenue in this state" is limited to regulated gross revenue.

4. The Applicant's second issue was whether, if the term includes all revenue in this state, both regulated and nonregulated, wherever incurred, does revenue actually generated outside the state of South Dakota but allocated to this state by accounting requirements constitute "gross revenue in this state" for the purpose of the statute. The Commission concludes that this issue is rendered moot based on the Commission's finding on the first issue.

5. The third issue raised by the Applicants is whether the Commission has jurisdiction over the proposed merger between NorthWestern and BBI. Based on its finding that the term "gross revenue in this state" is limited to regulated gross revenue, the Commission finds that it does not have jurisdiction to approve or deny the proposed merger. The Commission finds that using NorthWestern's electric and gas revenue that is regulated by the Commission, the South Dakota regulated revenue, as a percent of FERC basis revenue, is 14.72% for the year ending December 31, 2005. Pursuant to SDCL 49-34A-38.1, in order for the Commission to have jurisdiction over the merger, NorthWestern would have to be receiving more than 25% of its gross revenue in this state. NorthWestern is not receiving more than 25% of its gross revenue in this state, and therefore, the Commission lacks the statutory authority to approve or deny the proposed merger.

It is therefore

ORDERED, that the Commission does not have jurisdiction to approve or deny the proposed merger between NorthWestern and BBI.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 9<sup>th</sup> day of January, 2007. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 9<sup>th</sup> day of January, 2007.

<b>CERTIFICATE OF SERVICE</b>	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Aeldine Kolbe</u>
Date:	<u>1/12/07</u>
(OFFICIAL SEAL.)	

BY ORDER OF THE COMMISSION:

Dustin M. Johnson  
DUSTIN M. JOHNSON, Chairman

Gary Hanson  
GARY HANSON, Commissioner

Steve Kolbeck  
STEVE KOLBECK, Commissioner