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125 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

In re NorthWestern Corporation and NorthWestern Services, LLC — Docket No. IN09-4-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued November 26, 2008)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and NorthWestern Corporation (NorthWestern) and NorthWestern Services, LLC (NWS). This Order is in the public interest because it resolves the investigation into self-reported violations by NWS of the Commission's capacity release policies, specifically violations of the shipper-must-have-title (SMHT) requirement. It also resolves an alleged violation of section 7(c) of the Natural Gas Act (NGA) by Nekota Resources, Inc. (Nekota), formerly a wholly-owned subsidiary of NWS, which were identified by Enforcement staff. NorthWestern and NWS have agreed to pay a civil penalty of $450,000. In addition, NorthWestern and NWS have agreed to compliance monitoring reporting.

Background

2. NorthWestern engages in the generation, transmission, and distribution of electricity, as well as the purchase, transportation, distribution and storage of natural gas for residential, commercial, and industrial clients in South Dakota and other states. NWS, which provides natural gas supply and management services to customers in eastern South Dakota, is a wholly-owned subsidiary of NorthWestern. Until February 2007, Nekota was a wholly-owned subsidiary of NWS that owned and operated 88 miles of gas pipeline in South Dakota used by NWS to deliver gas to its industrial customers. In February 2007, Nekota was merged into NorthWestern's South Dakota local distribution system.

3. NWS discovered two series of SMHT violations in November 2006. In March 2007, representatives of NWS met with Enforcement staff to self-report these violations.

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During the ensuing investigation, Enforcement staff determined that Nekota had not obtained a certificate of public convenience and necessity for its pipeline operations in South Dakota.

Violations

4. Enforcement opened an investigation into the reported violations pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008). Enforcement confirmed the SMHT violations, which occurred on two interstate pipelines, and involved the transportation of approximately 39.4 Bcf of natural gas between October 1998 and April 2007.

5. A central requirement of the Commission's capacity release program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of each interstate pipeline's tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline. *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998).

6. NorthWestern violated the SMHT requirement during the period October 1998 through October 2005 by improperly transporting approximately 28.7 Bcf of gas owned by NWS on capacity held by NorthWestern. To comply with the SMHT requirement when transporting NWS-owned gas, NorthWestern should have released this capacity to NWS using the pipeline's capacity release mechanism. SMHT violations also occurred during the period November 2005 to April 2007 when NWS shipped a total of 10.7 Bcf of customer-owned gas on capacity rights owned by NWS. To correct these violations, NWS resumed its prior role as gas supplier for most of the customers served via NWS-owned capacity rights; for its remaining customer, NWS released the pipeline capacity to the customer through the pipeline's capacity release mechanism. Violations of the SMHT requirement interfere with the Commission's oversight of natural gas markets and interfere with the Commission's goal of market transparency.

7. The Commission regulates the transportation of natural gas in interstate commerce pursuant to its authority under the NGA, 15 U.S.C. § 717 et seq. (2006). Section 7 of the NGA authorizes the Commission to issue certificates of public convenience and necessity for the construction and operation of pipelines and to regulate the transportation of natural gas subject to Commission jurisdiction. 15 U.S.C. § 717f (2006). Nekota's facilities, which were located entirely within the state of South Dakota, consisted of four pipeline segments serving retail customers of NWS from two interstate pipelines, Northern Natural and Northern Border. These Nekota facilities were not owned by the

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owners of the plants they served and were not regulated by the South Dakota Public Utilities Commission (South Dakota PUC). Staff concluded that Nekota failed to obtain a certificate of public convenience and necessity under the NGA. Effective February 23, 2007, Nekota was merged into NorthWestern's local distribution system, and is now regulated by the South Dakota PUC. NorthWestern and NWS neither admit nor deny that Nekota's failure to obtain a certificate of public convenience and necessity from the Commission constitutes a violation of the NGA.

8. The primary cause of the violations was lack of adequate knowledge of the Commission's legal and regulatory requirements by company personnel.

Stipulation and Consent Agreement

9. Enforcement and NorthWestern and NWS resolved Enforcement's investigation of NorthWestern and NWS's violations by means of the attached Agreement. The Agreement requires NorthWestern and NWS to pay a $450,000 civil penalty to the United States Treasury within ten days of this Order accepting and approving the Agreement.

10. NorthWestern and NWS have also agreed to compliance monitoring reports, and will submit semi-annual reports to Enforcement staff for one year. With respect to all of NorthWestern's and NWS's wholesale natural gas business, each compliance report shall describe any new and existing compliance program measures including training, and alert staff to any additional violations of the capacity release requirements that may occur. Enforcement may extend the compliance monitoring for one additional year at its sole discretion.

Determination of the Appropriate Civil Penalty

11. Pursuant to section 22(a) of the Natural Gas Act (NGA), the Commission may assess a civil penalty up to $1 million per day per violation for as long as the violation continues.[1] In arriving at the appropriate civil penalty amount, staff considered the factors set forth in section 22(c) of the NGA, 15 U.S.C. § 717t-1(c), and the Commission's Revised Policy Statement on Enforcement.[2] For the reasons noted below, we conclude that the penalty determination in the instant matter is a fair and equitable

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[1] 15 U.S.C. § 717t-1(a) (*added by* the Energy Policy Act of 2005, Pub. L. No. 109-58, § 314 (b)(1)(B), 119 Stat. 594, 691 (2005) (authorizing the Commission to impose civil penalties "of not more than $1,000,000 per day per violation for as long as the violation continues").

[2] *Enforcement of Statutes, Regulations, and Orders*, 123 FERC ¶ 61,156, at P 54-71 (2008).

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resolution of this matter and is in the public interest, as it reflects the seriousness and scope of NorthWestern's and NWS's violations while recognizing that the companies took the initiative both to report and to remedy the SMHT violations. Although NorthWestern and NWS neither admit nor deny Nekota's NGA violation merger of Nekota's facilities into NorthWestern's local distribution system in 2007 means that a certificate of public convenience and necessity is no longer needed.

12. In determining the civil penalty we took into account that NWS discovered the SMHT violations through an internal investigation and investigated, reported, and corrected the SMHT violations it found. Further, there were no unjust profits to disgorge. Finally, NorthWestern's and NWS's cooperation throughout the investigation was exemplary.

13. NorthWestern's and NWS's SMHT violations involved 39.4 Bcf of gas over a period of approximately eight-and-a-half years. Compared with prior settlements in cases involving SMHT violations, the civil penalty amount appropriately addresses the extent of the violations and NorthWestern's and NWS's efforts to report and remedy the violations.

14. We conclude that the civil penalty and the compliance monitoring plan specified in the Agreement are fair and equitable, and in the public interest.

The Commission orders:

15. The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In re NorthWestern Corporation and NorthWestern Services, LLC	))	Docket No. IN09-4-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and NorthWestern Corporation (NorthWestern) and NorthWestern Services, LLC (NWS) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2008), into self-reported violations of the Commission's natural gas transportation program and violations with respect to the operation of certain natural gas pipeline facilities in South Dakota.

II. STIPULATED FACTS

Enforcement, NorthWestern, and NWS hereby stipulate and agree to the following:

A. Background

16. NorthWestern engages in the generation, transmission, and distribution of electricity, as well as the purchase, transportation, distribution and storage of natural gas for residential, commercial, and industrial clients in South Dakota and other states. NorthWestern is based in Sioux Falls, South Dakota.

17. NWS is a wholly-owned subsidiary of NorthWestern. NWS provided natural gas supply and management services to customers in eastern South Dakota. Nekota Resources, Inc. (Nekota) was a wholly-owned subsidiary of NWS until February 2007. Nekota owned and operated 88 miles of natural gas pipeline used to deliver gas owned by NWS to industrial customers of NWS. The entire pipeline system was located in South Dakota. Nekota was merged into NorthWestern's South Dakota local distribution system as of February 23, 2007.

18. Staff initiated this investigation following a March 2007 meeting with NorthWestern and NWS, at which they self-reported violations of the Commission's shipper-must-have-title (SMHT) requirement with respect to two series of transactions on

Northern Border Pipeline Company (Northern Border) and Northern Natural Gas Company (Northern Natural). NorthWestern and NWS discovered the violations in November 2006 and subsequently restructured the transactions in order to bring them into compliance. Their self-report included a summary of the identified transactions, as well as an explanation of how management discovered and remedied the violations, and information on employee training undertaken by NWS.

B. Summary of Violations

19. Staff's investigation confirmed the self-reported violations of the SMHT requirement. Staff's investigation also revealed a separate violation of the Natural Gas Act (NGA) resulting from Nekota's failure to obtain a certificate of public convenience and necessity under section 7(c) of the NGA for the construction and operation of a natural gas pipeline transporting natural gas in interstate commerce. Staff did not find any unjust profits that resulted from these violations.

1. SMHT Violations

20. A central requirement of the Commission's capacity release program is that all shippers must have title to the gas at the time the gas is tendered to the pipeline or storage transporter and while it is being transported or held in storage by the transporter. Interstate pipeline tariffs include provisions requiring shippers to warrant good title to the gas tendered for transportation on the pipeline. Although the specific language of each interstate pipeline's tariffs varies, the Commission has made clear that the shipper of record and the owner of the gas must be one and the same throughout the course of the transportation or the duration of storage on any pipeline. [3]

21. The primary reason the SMHT violations occurred at NorthWestern and NWS is because of inadequate knowledge of the Commission's requirements by company personnel. The self-reported SMHT violations occurred with respect to the following two series of transactions.

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[3] *See Enron Energy Services, Inc.*, 85 FERC ¶ 61,221, at 61,906 (1998). This requirement is reflected in Northern Natural's FERC Gas Tariff, Fifth Revised Vol. No. 1, Substitute Second Revised Sheet No. 284, *superseding* First Revised Sheet No. 284, and Northern Border's FERC Gas Tariff, First Revised Volume No. 1, First Revised Sheet No. 264, *superseding* Original Sheet No. 264.

a. NorthWestern's Failure To Hold Title to Gas Shipped on Its Capacity

22. From October 1998 through October 2005, SMHT violations resulted when NWS used NorthWestern's rights on Northern Natural to deliver NWS-owned gas to NWS customers served off Northern Natural, including five ethanol facilities. NorthWestern did not release this capacity to NWS using the pipeline's capacity release mechanism. The resulting mismatch between gas ownership and capacity rights constituted a violation of the SMHT requirements. During this seven year period, NorthWestern shipped a total of 28.7 Bcf of NWS-owned gas on capacity rights held by NorthWestern.

b. Customers' Use of NWS's Pipeline Capacity

23. Prior to July 2005, NWS provided a bundled gas supply and transportation service to six ethanol producers, the five served through Northern Natural and one served through Northern Border. In July 2005, NWS decided that it no longer wished to continue the gas supply component of this service and, instead, proposed an alternative arrangement whereby NWS would provide transportation capacity for gas acquired by the industrials directly from gas marketers.

24. NWS transferred its supply agreements with the six ethanol producers to third party marketers. However, SMHT violations resulted from November 2005 to April 2007 when NWS allowed these customers to ship their gas on the pipeline capacity still held by NWS. The resulting mismatch between gas ownership and capacity rights constituted a violation of the SMHT requirements. During this period, NWS shipped a total of 10.7 Bcf of customer-owned gas on capacity rights held by NWS.

25. To correct the violations, NWS re-assumed the supplier role for the five customers served through Northern Natural effective March and April 2007. As such, NWS assumed its former role of providing a bundled gas supply and transportation service to these customers. For the single customer served using Northern Border, NWS released the Northern Border capacity to the customer through the pipeline's release mechanism, effective March 2007. Currently NWS has only one active contract and that will expire in 2013.

2. Nekota Section 7(c) Violation

26. The Commission regulates the transportation of natural gas in interstate commerce pursuant to its authority under the NGA, 15 U.S.C. § 717 *et seq*. (2006). Section 7 of the NGA, 15 U.S.C. § 717f (2006), authorizes the Commission to issue certificates of public convenience and necessity for the construction and operation of pipelines and to regulate the transportation of natural gas subject to Commission jurisdiction, including the abandonment of certificated service. Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c,

717d (2006), require the Commission to regulate the price and other terms of natural gas transportation jurisdictional to the Commission, in order to ensure that the rates and charges for such service, as well as all rules, regulations, practices, and contracts affecting those rates and charges, are just and reasonable and not unduly discriminatory or preferential.

27. Nekota was formed in 1996 as a wholly-owned, direct subsidiary of NWS to build and operate facilities to deliver natural gas owned by NWS to NWS industrial customers. Located entirely within the state of South Dakota, Nekota's facilities consisted of four separate pipeline segments connecting the interstate pipeline systems of Northern Border and Northern Natural to retail customers of NWS. Combined, these four segments total approximately 88 miles of pipeline. Nekota did not apply to the Commission for a certificate of public convenience and necessity, or file a tariff with the Commission for service on the Nekota facilities. In 2001 NWS sought and obtained a declaration from the South Dakota Public Utilities Commission (South Dakota PUC) that certain Nekota facilities were not subject to regulation by the South Dakota PUC.

28. During its operation, Nekota had only one customer: its parent, NWS. NWS, in turn, relied on Nekota to transport gas received within South Dakota from the Northern Natural and Northern Border interstate pipelines to NWS's retail customers. The gas was consumed within the state of South Dakota. Staff determined that because the Nekota facilities were not owned by the owners of the plants they served, and because Nekota was not regulated by the state of South Dakota, Nekota was required to obtain a certificate of public convenience and necessity under the NGA. 15 U.S.C. § 717f (2006). Effective February 23, 2007, however, Nekota was merged into the local distribution system of NorthWestern. Accordingly, the facilities are now subject to the jurisdiction of the South Dakota PUC.

29. NorthWestern and NWS did not self-report the transportation by Nekota as a violation, but they cooperated fully with staff's investigation of Nekota.

C. Self-Corrective Action

30. The self-reported SMHT violations were discovered by the current NorthWestern management team, which undertook a voluntary internal review. The review ultimately led to the submission of the March 2007 self-report to Enforcement staff. NorthWestern and NWS took prompt self-corrective action to restructure the gas supply arrangements to bring them into compliance with the Commission's capacity release regulations and requirements. NorthWestern and NWS have since instituted extensive employee training in compliance with Commission requirements.

III. REMEDIES AND SANCTIONS

31. With respect to the self-reported SMHT violations, NorthWestern and NWS both agree with the facts as stipulated and admit that these acts constituted violations of the SMHT requirement. With respect to the Nekota section 7(c) violations, NorthWestern and NWS agree with the facts as stipulated, but neither admit nor deny Enforcement staff's determination that Nekota's failure to obtain a certificate of public convenience and necessity constitutes a violation of section 7(c) of the NGA. Nonetheless, in view of the costs and risks of litigation, and in the interest of resolving the dispute between Enforcement and NorthWestern and NWS without further proceedings, NorthWestern and NWS agree to undertake the obligations set forth in this Agreement.

32. As to the NGA section 7(c) violation only, NorthWestern and NWS consent to the use of Enforcement staff's conclusions set forth in this Agreement for the purpose of assessing the factors, including the factor of determining the company's history of violations, that are set forth in the *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008), or that may be set forth in any successor policy statement or order. Such use may be in any other proceeding before the Commission or to which the Commission is a party; provided, however, that NorthWestern and NWS do not consent to the use of specific acts set forth in this Agreement as the sole basis for any other proceeding brought by the Commission, nor do NorthWestern or NWS consent to the use of this Agreement by any other party in any other proceeding.

A. Civil Penalty

33. NorthWestern shall pay a civil penalty of $450,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below.

B. Compliance Monitoring

34. NorthWestern and NWS shall make semi-annual reports to Enforcement staff for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than ten days after the end of the second calendar quarter following the quarter in which the Effective Date of this Agreement falls. The second report shall be submitted six months thereafter. With respect to all of NorthWestern's and NWS's wholesale natural gas business, each compliance report shall (1) advise staff whether additional violations of the capacity release requirements have occurred; (2) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period, including a description of the training provided to all relevant personnel concerning the Commission's capacity release policies, and a statement of the personnel that they have received such training and when the training took place; and (3) include an affidavit executed by an officer of NorthWestern

and NWS that the compliance reports are true and accurate. Upon request by staff, NorthWestern and NWS shall provide to staff all backup documentation supporting its reports. After the receipt of the second semi-annual report, Enforcement staff may, at its sole discretion, require NorthWestern and NWS to submit semi-annual reports for one additional year.

IV. TERMS

35. The "Effective Date" of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein as to NorthWestern, NWS, and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest to NorthWestern, NWS, and Nekota. Upon the Effective Date of this Agreement, Enforcement's investigation of NorthWestern, NWS, and Nekota shall terminate in Docket No. IN09-4-000, except with respect to semi-annual compliance reports and other obligations as set forth in this Agreement.

36. Commission approval of this Agreement without material modification shall release NorthWestern, NWS, and Nekota and forever bar the Commission from holding NorthWestern, NWS, Nekota, and any affiliated entity, its agents, officers, directors and employees, both past and present, and any successor in interest liable for any and all administrative or civil claims arising out of, related to, or connected with the capacity release violations addressed in this Agreement.

37. Failure to make a timely civil penalty payment or to comply with the compliance monitoring agreed to herein, or any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the NGA, and may subject NorthWestern to additional action under the enforcement and penalty provisions of the NGA.

38. If NorthWestern does not make the civil penalty payment above at the time agreed to by the parties, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 154.501(d)(2008) from the date that payment is due, in addition to the penalty specified above.

39. The Agreement binds NorthWestern and NWS and their agents, successors, and assigns. The Agreement does not create any additional or independent obligations on NorthWestern, NWS, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in Section III of this Agreement.

40. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise

of any kind by any member, employee, officer, director, agent, or representative of Enforcement or NorthWestern or NWS has been made to induce the signatories or any other party to enter into the Agreement.

41. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor NorthWestern nor NWS shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and NorthWestern and NWS.

42. In connection with the payment of the civil penalty provided for herein, NorthWestern and NWS agree that the Commission's order approving the Agreement without material modification shall be a final and non-appealable order assessing a civil penalty under section 22(a) of the NGA, 15 U.S.C. § 717t-1(a). NorthWestern and NWS waive findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

43. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity and accepts the Agreement on the entity's behalf.

44. The undersigned representatives of NorthWestern and NWS affirm that they have read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of their knowledge, information, and belief, and that they understand that the Agreement is entered into by Enforcement in express reliance on those representations.

45. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original. The Agreement may be signed in counterparts.

Agreed to and accepted:

Susan T. Court
Director
Office of Enforcement
Federal Energy Regulatory Commission

Date

Maggie F. Crimbly
Vice President, General Counsel and
Corporate Secretary
NorthWestern Corporation

Date

Curtis T. Pohl
President
NorthWestern Services, LLC

Date

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