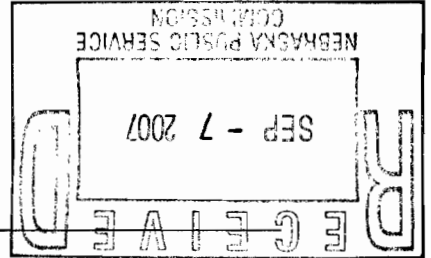


BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)
motion, to investigate jurisdictional issues)
pertaining to construction and operation of a)
natural gas pipeline within the state of)
Nebraska by Nebraska Resources Company,)
LLC, or any other entity.)

Application No. NG-0051



**COMMENTS OF NORTHWESTERN CORPORATION
D/B/A NORTHWESTERN ENERGY**

I. INTRODUCTION

NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) respectfully submits these comments in connection with the Nebraska Public Service Commission’s (the “Commission”) July 24, 2007, Order Opening Investigation and Notice of Hearing (the “Order”) in the above-captioned proceeding.

In its Order, the Commission sought comments from interested parties regarding four specific issues related to the construction and operation of a natural gas pipeline within the state of Nebraska by Nebraska Resources Company LLC (“NRC”). The Commission also found that the scope of its investigation should not be restricted solely to the project proposed by NRC. Accordingly, NorthWestern respectfully submits the following comments to Commission Issues Nos. 1-4 along with additional sub-issues for Commission consideration:

Commission Issue No. 1: Does the definition of “high-volume ratepayer” in NEB.REV.STAT. § 66-1802(7) include LDCs with volumetric demand in excess of 500 therms per day?

No. The term “high-volume ratepayers” should not include local distribution companies (“LDCs”) because (1) the statutory definition does not refer to LDCs, and (2) any inference to an LDC would conflict with other sections of the State Natural Gas Regulation Act § 66-1801, et seq. (“SNGRA”).

Pursuant to NEB.REV.STAT. § 66-1802(7), a “[h]igh-volume ratepayer means a ratepayer whose natural gas requirements equal or exceed five hundred therms per day as determined by average daily consumption.” From the plain language of its statutory definition, a high-volume ratepayer is a ratepayer having a natural gas requirement or demand that is determined by average daily consumption. A plain reading of the statutory definition does not necessarily eliminate a LDC as a high-volume ratepayer because a LDC may be reasonably considered a

ratepayer having a natural gas requirement or demand that is determined by average daily consumption, albeit, consumption by its end-user customers.

However, although a plain reading of the language of the statutory definition of “high-volume ratepayer” does not explicitly exclude a LDC, a reasonable reading of such language in the context of the entire SNGRA, seems to at least exclude jurisdictional utilities¹ from being considered high-volume ratepayers. This is particularly true in light of the irreconcilable conflict that would result in the application of both § 66-1810(1), which limits Commission jurisdiction over high-volume ratepayers, and § 66-1802(10), which provides the Commission with expansive jurisdiction over jurisdictional utilities. Thus, it was clearly not the intention of the Legislature that a jurisdictional utility would qualify as a high-volume ratepayer under the SNGRA.

Commission Issue No. 2: Does Nebraska’s double-piping prohibition under NEB.REV.STAT. § 66-1852 apply to a pipeline providing a new interconnection to an LDC?

No. Based upon a plain reading of NEB.REV.STAT. § 66-1852, the double-piping prohibition does not prohibit an intrastate or interstate high-pressure pipeline from establishing a new interconnection to a LDC.

Section 66-1852 prohibits the extension of duplicative or redundant pipelines or services into an area which has existing natural gas utility infrastructure, unless the circumstances involve gas mains or service into an area in which two or more jurisdictional utilities share authority to provide service within the same territory under franchises issued by the same city. More specifically, § 66-1852 provides as follows:

(1) Except as otherwise expressly authorized in the State Natural Gas Regulation Act, no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has existing natural gas utility infrastructure or where a contract has been entered into for the placement of natural gas utility infrastructure.

(2) The prohibition in subsection (1) of this section shall not apply in any area in which two or more jurisdictional utilities share authority to provide natural gas within the same territory under franchises issued by the same city.

Based upon a plain reading of § 66-1852(1) and particularly the language, “extend . . . into,” the double-piping prohibition does not apply to an intrastate or interstate high-pressure pipeline that provides a new interconnection to a LDC² that does not extend

¹ A jurisdictional utility under the SNGRA is defined in NEB.REV.STAT. § 66-1802(10).

² For purposes of this analysis and the inapplicability of § 66-1852(1) to a pipeline providing a new interconnection to a LDC, jurisdictional utilities and city-owned utilities should be treated as LDCs. *See e.g., In re Application of Peoples Natural Gas*, 2004 WL 726828, page 1 (Neb.App. April 6, 2004) (Not Designated for Permanent Publication) (“MUD and Aquila are both natural gas local distribution companies . . . that deliver natural gas from interstate natural gas pipelines to individual end users.”); *see*

into³ the area that is within or a part of the LDC's local distribution network of infrastructure. Thus, although an intrastate or interstate high-pressure pipeline may establish a new interconnection at a physical location that is not part of LDC's local distribution network of infrastructure, such entity cannot construct new pipelines or provide service at a location inside or within the existing natural gas utility infrastructure unless franchises have been issued in such area to multiple jurisdictional utilities. The legislative history of § 66-1852 lends support that the statute was intended to prohibit double piping "where two natural gas companies have pipes running right down the street vis-à-vis each other," rather than an intrastate or interstate high-pressure pipeline establishing a new interconnection to a LDC.⁴ In fact, the exception in § 66-1852(2) was created solely for the fact that this very circumstances already existed in Kearney at the time of enactment.⁵

This reading of § 66-1852(1) is consistent with the Commission's concern for public safety because it contemplates only a single physical interconnection with a local distribution network, and thus the risk of increased emergencies or gas leaks is minimized.⁶ The aforementioned interpretation of § 66-1852 is also consistent with a policy of protecting ratepayers from the spreading of costs over a smaller customer base that could result if duplicative or redundant facilities were not prohibited *within* a local distribution area. In fact, under the aforementioned interpretation, customers stand to benefit from the facilitation of a competitive environment of the delivery of natural gas to LDCs.

Furthermore, as referenced in NRC's July 16, 2007, letter to the Commission which resulted in the opening of this investigation, if the Commission interprets § 66-1852 to prohibit an entity from constructing a pipeline to provide a new interconnection to a LDC, then such entity need only apply for a certificate of public convenience from FERC, and then § 66-1852 may arguably be preempted by federal law. This would lead to an unfair result for pipelines that are subject to the Commission's jurisdiction because the prohibition would apply to state regulated pipelines providing new interconnections to LDCs but not to federally regulated pipelines providing new interconnections to LDCs. Under this unfavorable reading of § 66-1852, a federally regulated entity could provide a new interconnection to a LDC, but a Nebraska regulated entity could not. This was certainly not the result that the Nebraska Legislature had in mind when it enacted § 66-1852, and it would be bad public policy to impose regulation in a manner that clearly provides a competitive advantage to one particular group of entities over another in the same industry. Moreover, even if § 66-1852 is not preempted by federal law, a prohibition against the provision of a new interconnection to a LDC results in the

also, 15 U.S.C. § 3301(17) (defining local distribution companies under the Federal Natural Gas Policy Act).

³ Webster's II New College Dictionary (2001) defines "into" as "1. To the inside or interior of. . . 5. To a point within the limits of a . . . extent of space."

⁴ Floor Debate for 2003 Leg. Sess. 7602-03.

⁵ See *id.*

⁶ See *In the Matter of Peoples Natural Gas of Omaha, Nebraska, Seeking Resolution of a Dispute Under Nebraska Revised Section 57-1306*, Order, Application No. P-0003, page 9 (May 1, 2001).

potential for the LDC to be held hostage by the sole existing interstate pipeline regarding pricing structure and other terms of service.

For all of the foregoing reasons, the Commission should find that pursuant to § 66-1852, the double-piping prohibition does not prevent an intrastate or interstate high-pressure pipeline from establishing a new interconnection to a LDC.

Finally, even in the event that the Commission finds that § 66-1852 applies to a pipeline providing a new interconnection to a LDC, there are multiple circumstances under which such pipeline or services to a LDC is not “redundant” or “duplicative.” On several occasions the Commission has interpreted the meaning of “redundant” and “duplicative” in the context of the former § 57-1305 (now 66-1862) regarding metropolitan utilities districts.⁷ In those proceedings, the Commission consistently defined “redundant” to mean “exceeding what is necessary or normal: superfluous,” and “duplicative” to mean “done over or again often needlessly.” Thus, an intrastate or interstate high-pressure pipeline that provides a new interconnection to a LDC is not needless or exceeding what is necessary if it provides an additional source of supply, improves reliability, establishes operational benefits, and creates a financial benefit for the LDC and its customers that results from competitively priced gas from more than one source. Additional factors that should be considered in determining redundancy or duplication include the existence of a pipeline that no longer desires to provide service to a LDC, the amount or level of redundancy or duplication that would result, public interest, the interest of the LDC, and other competitive considerations.

Commission Issue No. 3: Does the Commission have jurisdiction over an Application under NEB.REV.STAT. § 66-1853(1) for a Certificate of Public Convenience to operate a “jurisdictional utility” a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

Although the Commission has jurisdiction to rule on an Application under NEB.REV.STAT. § 66-1853(1), the instant investigation may not be the appropriate procedural vehicle in which to make a preliminary ruling on NRC’s future application under § 66-1853(1).

Commission Issue No. 4: What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?

As a general rule, section 1(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717(b), applies, and hence Federal Energy Regulatory Commission (“FERC”) jurisdiction extends, to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and to the natural gas companies engaged in such transportation or resale. Since the pipeline proposed by NRC would transport

⁷ See Application Nos. P-003, P-006, and P-007.

natural gas that has moved in interstate commerce,⁸ FERC's NGA jurisdiction would apply.⁹

However, NGA section 1(c), often called the "Hinshaw Amendment" was enacted to avoid duplicative regulation by FERC of intrastate lines already subject to state regulation. The Hinshaw Amendment exempts from NGA regulation natural gas that is received "within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission."¹⁰ The FERC has explained that a pipeline must satisfy two tests in order to be eligible for a Hinshaw exemption under Section 1(c): "First, all of the gas received by the pipeline within or at the boundary of a state must be consumed within the state. Second, the pipeline's rates, services and facilities must be subject to regulation by a state commission."¹¹ Accordingly, since it would transport natural gas that has moved in interstate commerce, the NRC's proposed pipeline would be subject to FERC's NGA jurisdiction unless NRC satisfies both prongs of the the Hinshaw exemption.

In accordance with Commission's finding that the scope of its investigation in this docket should not be restricted solely to the project proposed by NRC, NorthWestern submits subissues No. 4(a) and No. 4(b) for Commission consideration.

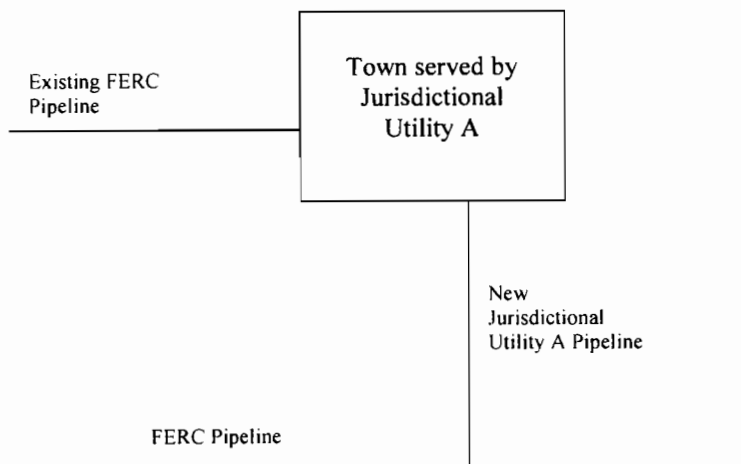
⁸ NRC admits that its pipeline would transport natural gas that has moved in interstate commerce. *See* NRC's July 16, 2007, letter to the Commission, page 2.

⁹ Similarly, NRC's proposed pipeline would also qualify as an interstate pipeline under SNGRA § 66-1802(8), which provides: "Interstate pipeline means any corporation, company, individual, or association of persons or their trustees, lessees, or receivers engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the federal Natural Gas Act, 15 U.S.C. 717 et seq., as such act existed on January 1, 2003."

¹⁰ 15 U.S.C. § 717(c).

¹¹ *Natural Gas Pipeline Company of America, et al.*, Docket No. CP80-520-000, *et al.*, 18 FERC ¶ 61,235, p. 61,472 (1982).

Issue No. 4(a): If a jurisdictional utility, as defined under the SNGRA, constructs a pipeline that extends from an interconnection with an existing interstate natural gas pipeline within the State of Nebraska to a Nebraska municipality that is currently being served by the same jurisdictional utility, is such pipeline and the service and rates associated therewith subject to the jurisdiction of the Nebraska Public Service Commission?



Yes, the pipeline, its services, and rates would all be subject to the jurisdiction of the Nebraska Public Service Commission. As described above, pursuant to NGA section 1(b),¹² FERC jurisdiction generally extends to the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and to the natural gas companies engaged in such transportation or resale.¹³ However, the Hinshaw Amendment, which was enacted to avoid duplicative regulation by FERC of intrastate lines already subject to state regulation,¹⁴ exempts from NGA jurisdiction pipelines that satisfy two tests: “First, all of the gas received by the pipeline within or at the boundary of a state must be consumed within the state. Second, the pipeline’s rates, services and facilities must be subject to regulation by a state commission.”¹⁵

The natural gas in the circumstances described in NorthWestern Issue No. 1 above would be physically capable of flowing in only one direction – away from the higher-pressure interstate natural gas pipeline interconnection. Once delivered, all the gas would be consumed by customers located in the municipality. Neither the end-user

¹² NGA § 1(b), 15 U.S.C. § 717(b).

¹³ *See id.*

¹⁴ NGA § 1(c), 15 U.S.C. § 717(c) (exempting from NGA regulation natural gas received “within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.”).

¹⁵ *Natural Gas Pipeline Company of America, et al.*, Docket No. CP80-520-000, *et al.*, 18 FERC ¶ 61,235, p. 61,472 (1982).

customer nor the municipality has any capability to transport the gas outside the state of Nebraska. Therefore, once the natural gas leaves the interstate line and enters the above-described pipeline, it would remain in the state of Nebraska until it was ultimately consumed. Thus, the first prong of the two-part Hinshaw test would be satisfied. Accordingly, the pipeline would not be subject to NGA jurisdiction if the pipeline's rates, services and facilities are subject to regulation by the Commission.

With regard to the second prong of the two-part Hinshaw test, a jurisdictional utility under the SNGRA is already subject to the jurisdiction of the Commission.¹⁶ Furthermore, the jurisdictional utility's pipeline that extends to the municipality it already serves, along with the rates and services to such municipality would also be subject to the jurisdiction of the Commission.¹⁷ Accordingly, under the above-described circumstances, NorthWestern concludes that the Hinshaw exemption would apply, and thus the pipeline would be subject to the Commission's jurisdiction. NorthWestern further notes that assuming the jurisdictional utility is not presently regulated under the NGA, the exemption would be self-implementing, that is, no application to the FERC would be required.¹⁸

¹⁶ NEB.REV.STAT. § 66-1802(10).

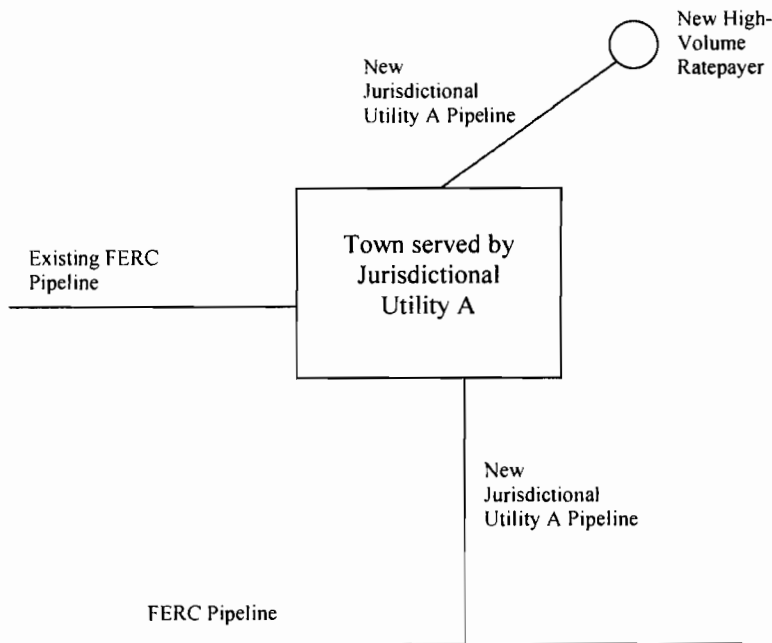
¹⁷ See NEB.REV.STAT. §§ 66-1806, 66-1808, 66-1825, 66-1838, 66-1853(3), 66-1854..

¹⁸ *Natural Gas Pipeline Company of America*, 18 FERC at p. 61,473; see 18 C.F.R. § 152.1(a) (application for exemption under NGA § 1(c)). The FERC has clarified that the Hinshaw exemption is self-implementing:

In our view our declaration of exemption should only be required when the Commission is currently exercising natural gas jurisdiction over a company. Once the Commission commences the exercising of jurisdiction, it will presume to retain jurisdiction until the company receives a declaration of exemption. On the other hand, a declaration of exemption will not be required from a company which is not presently regulated by the Commission and satisfies the two-fold test of section 1(c).

Id.

Issue No. 4(b): If a jurisdictional utility, as defined under the SNGRA, constructs a pipeline extending from an interconnection with an interstate natural gas pipeline within the State of Nebraska to a municipality in Nebraska already served by the same jurisdictional utility and also extends such pipeline beyond the municipality to serve a high-volume ratepayer, is such pipeline and the service and rates associated therewith subject to the jurisdiction of the Nebraska Public Service Commission?



Yes, the pipeline, its services, and rates would be subject to the jurisdiction of the Nebraska Public Service Commission because the both prongs of the Hinshaw test are satisfied. Similar to the analysis in NorthWestern Issue No. 1, the natural gas in the above-described circumstances would be physically capable of flowing in only one direction – away from the higher-pressure interstate natural gas pipeline interconnection. Once delivered all the gas would be consumed by the high-volume ratepayer or customers located in the municipality. Neither the high-volume ratepayer nor the municipality (or its end users) would have any capability to transport the gas outside the state of Nebraska. Therefore, the first prong of the Hinshaw test is satisfied because once the natural gas leaves the interstate line and enters the above-described pipeline, it would remain in the state of Nebraska until it was ultimately consumed. Accordingly, the pipeline would not be subject to NGA jurisdiction, if the pipeline’s rates, services and facilities are subject to regulation by the Commission.

Again, with regard to the second prong of the two-part Hinshaw test, a jurisdictional utility under the SNGRA is already subject to the jurisdiction of the Commission.¹⁹ Furthermore, the jurisdictional utility’s pipeline that extends to the

¹⁹ NEB.REV.STAT. § 66-1802(10).

municipality it already serves, along with the rates and services to such municipality would also be subject to the jurisdiction of the Commission.²⁰

The possible additional service to the high-volume ratepayer does not change the result. Admittedly, the SNGRA imposes a slightly different regulatory scheme for a jurisdictional utility's service to "high-volume ratepayers."²¹ Specifically, Section 66-1810(1) of the Nebraska Revised Statutes, in pertinent part, provides:

A jurisdictional utility may provide service at negotiated rates, contracts, and terms and conditions of service under contract to high-volume ratepayers. Service under the contracts shall be provided on such terms and conditions and for such rates or charges as the jurisdictional utility and the high-volume ratepayer agree, without regard to any rates, tolls, tariffs, or charges the jurisdictional utility may have filed with the commission. Upon the request of the commission, the jurisdictional utility shall file such contracts with the commission. The contracts . . . may be used by the commission in any investigation or proceeding. Except as provided in this subsection, high-volume ratepayers shall not be subject to the jurisdiction of the commission.

Thus, once again the applicability of the Hinshaw exemption hinges on the extent to which, under § 66-1810(1), a jurisdictional utility's "rates, services, and facilities" provided to a high-volume ratepayer are subject to regulation by the Commission. For the following several reasons, it appears that the Commission does have jurisdiction, and, the Hinshaw exemption applies.

To begin, the only jurisdictional limitation provided in § 66-1810(1) relates to a high-volume ratepayer itself and *not* a jurisdictional utility or the rates, services, and facilities provided by a jurisdictional utility. Nowhere in § 66-1810(1) did the Legislature remove or even limit the Commission's jurisdiction over a jurisdictional utility or the rates, services, and facilities of a jurisdictional utility. Furthermore, the statutory language -- "[e]xcept as provided in this subsection, high-volume ratepayers shall not be subject to the jurisdiction of the commission" -- indicates that the rest of subsection (1) was in fact intended by the Legislature to provide some level of jurisdiction over the high-volume ratepayer.

Furthermore, although § 66-1810(1) provides that a jurisdictional utility *may* provide service to a high-volume ratepayer at negotiated rates, contracts, and terms and conditions of service, this statutory *option* does not dismiss or remove the Commission's jurisdiction over such negotiated rates, contracts and terms and conditions of service. To the contrary, the option to negotiate the rate and service terms was intended to be a light-handed exercise of jurisdiction by the Commission under circumstances in which two entities with seemingly equal bargaining power could reach an agreement on terms.

²⁰ See footnote 17.

²¹ See NEB.REV.STAT. § 1802(7) (defining high-volume ratepayer).

Thus, the rates, facilities, and service are still subject to the Commission's jurisdiction, even though the parties have an option to negotiate. Furthermore, if there is a dispute between the parties regarding service, rates, terms and conditions, or facilities, the Commission would be the appropriate decision-maker for resolving such dispute. In fact, § 66-1810(1) supports this conclusion by explicitly providing the Commission with authority and jurisdiction to obtain copies of the contract in the context of an investigation.²² Thus, although the Commission's jurisdiction over a high-volume ratepayer may be limited, the rates, facilities, and services provided by a jurisdictional utility to a high-volume ratepayer are very much subject to the Commission's jurisdiction.

Moreover, the primary reason for construction of the above-described facilities is to provide another source of supply for the jurisdictional utility's current customers in the municipality. Though providing increased throughput, the service to the high-volume ratepayer would be a secondary motivation for constructing the facilities, and there is little doubt that the Commission has jurisdiction to regulate the core purpose for which the facilities would be constructed.

Furthermore, if the Commission does not declare that these rates, facilities, and services are subject to its jurisdiction, such rates, facilities, and services will fall into a regulatory gap which will be filled by FERC jurisdiction. This result would not be in the best interests of the Commission or state-regulated entities desiring to serve an increasing number of high-volume ratepayers in Nebraska.

Based on all of foregoing reasons, the above-described facilities, including those provided to a high-volume ratepayer, would be subject to the Commission's jurisdiction. As a result, the Hinshaw test would be satisfied, and the FERC's NGA jurisdiction would not attach. Finally, assuming that the jurisdictional utility is not presently regulated under the NGA, the exemption would be self-implementing, that is, no application to the FERC would be required.²³

IV. CONCLUSION

NorthWestern respectfully submits these comments for Commission consideration and requests that the Commission give careful attention to the issues presented herein. Northwestern appreciates this opportunity to participate in this docket and looks forward to working with the Commission as it pursues these issues further.

²² In addition, the light-handed regulatory scheme involving transportation service to the high-volume ratepayers is not a "regulatory gap." Section 66-1810(1) provides that the Commission can require the utility to file and investigate the contract with the high-volume ratepayer. As such, no valid regulatory purpose would be served by the FERC's exercising jurisdiction over all or part of the above-described facilities. See, e.g., *Commonwealth Gas Pipeline Corp. et al.*, Docket No. G-2500-000, 28 FERC ¶ 61,223, p. 61,416 (1984). The FERC in *Commonwealth Gas* explained that "the legislative history is clear that Congress intended that the Hinshaw exemption not create a gap in regulation as to either transportation or rates. Facilities in states which did not assert the requisite regulatory authority would not be exempt from Federal regulation." *Id.*

²³ 18 FERC ¶ 61,235, p. 61,473; see 18 C.F.R. § 152.1(a) (application for exemption under NGA § 1(c)). The FERC has clarified that the Hinshaw exemption is self-implementing:

Dated: September 7, 2007.

**NORTHWESTERN CORPORATION
d/b/a NORTHWESTERN ENERGY,**

By: 

Mark A. Fahleson (#19807)
Troy S. Kirk (#22589)
REMBOLT LUDTKE LLP
1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
(402) 475-5100 (telephone)
(402) 475-5087 (facsimile)
mfahleson@remboltludtke.com
tkirk@remboltludtke.com

Counsel for NorthWestern Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Comments of NorthWestern Corporation was sent on this 7th day of September, 2007, via hand-delivery or U.S. mail, postage prepaid, to the following:

Angela Melton
Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln, NE 68508

Laura Demman
Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln, NE 68508

Loel P. Brooks
Brooks Pansing Brooks PC LLO
1248 O Street, Suite 984
Lincoln, NE 68508

William F. Demarest Jr.
Blackwell Sanders LLP
750 17th Street NW, Suite 1000
Washington, DC 20006

Douglas Law
Blackwell Sanders LLP
750 17th Street NW, Suite 1000
Washington, DC 20006

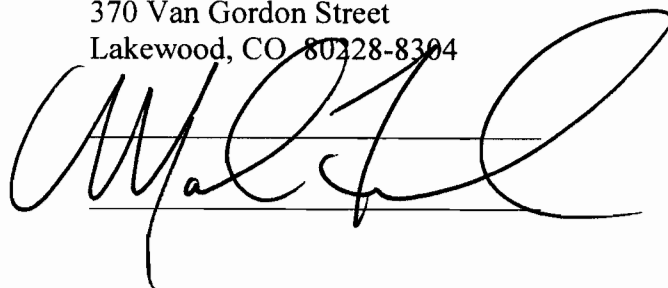
Penny Tvrdik
Northern Natural Gas Company
1111 South 103rd Street
Omaha, NE 68124

Heather S. Voegel
Koley Jessen PC LLO
1125 South 103rd Street, Suite 800
Omaha, NE 68124

Stephen M. Bruckner
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102

Roger P. Cox
Harding & Shultz PC LLO
P.O. Box 82028
Lincoln, NE 68501-2028

T.J. Carroll
Kinder Morgan Interstate Gas Tran
370 Van Gordon Street
Lakewood, CO 80228-8304

A large, stylized handwritten signature in black ink, appearing to read 'T.J. Carroll', is written over a horizontal line. The signature is fluid and cursive.