

161 FERC ¶ 61,253
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

NorthWestern Corporation

Docket No. ER18-73-000

ORDER DISMISSING FILING

(Issued December 12, 2017)

1. On October 13, 2017, NorthWestern Corporation (NorthWestern) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ and Part 35 of the Commission's regulations,² an agreement between NorthWestern and Vista, LLC (Vista) to relocate electric transmission facilities to accommodate a road improvement project (Agreement).³ For the reasons discussed below, we dismiss the filing.

I. Background

2. NorthWestern states that, from time to time, it is asked to relocate or modify certain of its transmission facilities to enable other entities to complete projects adjacent to those facilities, such as road construction projects by the Montana Department of Transportation. NorthWestern states that, while it does not believe that these agreements are subject to the Commission's jurisdiction, it has typically filed these agreements with the Commission under section 205 of the FPA out of an abundance of caution and the Commission has consistently accepted them.⁴

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. pt. 35 (2017).

³ The Agreement is designated as Service Agreement No. 828 under NorthWestern's Montana Open Access Transmission Tariff (Montana OATT).

⁴ Transmittal at 3.

3. NorthWestern states that, under the Agreement with Vista, entered into on September 27, 2017, it will relocate certain Commission-jurisdictional transmission facilities in Livingston, Montana (Livingston), to accommodate a road improvement and widening project. NorthWestern states that the Agreement describes the construction and engineering activities that NorthWestern expects to provide. NorthWestern states that it has agreed to perform these activities at cost, and Vista has agreed to reimburse NorthWestern for its actual costs.⁵

II. Request for Jurisdictional Determination

4. NorthWestern requests that the Commission disclaim jurisdiction over the Agreement with Vista, or hold that the Agreement does not need to be filed under the Commission's "rule of reason," and dismiss or reject this filing. NorthWestern states that, in *Prior Notice*,⁶ the Commission provided significant guidance regarding when agreements entered into by public utilities must be filed with the Commission. According to NorthWestern, the Commission further stated that, if a utility is uncertain regarding whether an agreement is subject to Commission jurisdiction, it should seek a ruling from the Commission, and that the easiest and most efficient way to do so is to file the agreement and ask the Commission to disclaim jurisdiction.⁷

5. NorthWestern contends that the Commission has considerable flexibility in determining when rates, charges, classifications, and practices "affect," "pertain to," or are "in connection with" a jurisdictional service such that they must be filed with the Commission. NorthWestern states that in making this determination, the Commission applies a "rule of reason" and requires utilities to file rates and charges only if they significantly affect rates and services.⁸ NorthWestern further notes that, in *Prior Notice*, the Commission explained that, "[i]n general, the question of our jurisdiction over a particular contract depends on whether the contract contains a rate or charge for or in

⁵ *Id.* at 1-3.

⁶ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (*Prior Notice*), clarified, 65 FERC ¶ 61,081 (1993).

⁷ Transmittal at 3-4 (citing *Prior Notice*, 64 FERC ¶ 61,139 at 61,977-61,978).

⁸ *Id.* at 4 (citing *City of Cleveland v. FERC*, 773 F.2d 1368 (D.C. Cir. 1985); *PacifiCorp*, 127 FERC ¶ 61,144, at P 11 (2009); *Pub. Serv. Co. of Colo.*, 67 FERC ¶ 61,371, at 62,267 (1994) (*Pub. Serv. Co. of Colo.*)).

connection with the transmission or sale of electric energy in interstate commerce, or whether the contract affects or relates to such rates or service.”⁹

6. NorthWestern argues that, under these standards, the Commission does not have jurisdiction over the Agreement because the Agreement does not involve rates or charges for or in connection with transmission service.

7. NorthWestern acknowledges that its activities under the Agreement relate to the siting and relocating of transmission facilities, but contends that it is well-settled that the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects.¹⁰ In addition, NorthWestern states that Vista is not a NorthWestern transmission customer and that NorthWestern is not providing transmission or interconnection service to Vista. NorthWestern states that the Agreement is not intended to facilitate or improve transmission service to Vista, Livingston, or any other transmission customer. Rather, NorthWestern submits that the purpose of the Agreement is to relocate a transmission pole to accommodate widening of a road—a project that NorthWestern contends falls entirely outside of the Commission’s jurisdiction.¹¹

8. NorthWestern contends that the fact that Commission-jurisdictional facilities are being relocated under the Agreement does not make the Agreement subject to the Commission’s jurisdiction. NorthWestern submits that the Commission ruled that “pole attachment agreements” – agreements in which a public utility leases space on its Commission-jurisdictional transmission poles to allow third parties to attach wires – are not subject to the Commission’s jurisdiction. NorthWestern observes that the Commission stated that, “if the pole attachment or charges involve any other matter over which this Commission has no jurisdiction (for example, telephone or retail electric service), public utilities need not file the agreements for Commission review.”¹² Therefore, NorthWestern argues that the Commission should have no jurisdiction over

⁹ *Id.* at 3 (citing *Prior Notice*, 64 FERC ¶ 61,139 at 61,990).

¹⁰ *Id.* at 5 (citing *PacifiCorp*, 72 FERC ¶ 61,087, at 61,488 (1995); *PSI Energy, Inc.*, 55 FERC ¶ 61,254, at 61,811, *reh’g denied*, 56 FERC ¶ 61,237, at 61,911 (1991)).

¹¹ *Id.*

¹² *Id.* at 6 (citing *Prior Notice*, 64 FERC ¶ 61,139 at 61,993).

the Agreement even though it involves Commission-jurisdictional transmission facilities that are being relocated to facilitate a road improvement project.¹³

9. NorthWestern states that transmission rates and charges paid by transmission customers under NorthWestern's Montana OATT will not be affected by the Agreement because Vista will reimburse NorthWestern for the actual costs of relocating the transmission lines. NorthWestern further contends that the activities it performs under the Agreement will not alter the NorthWestern transmission system in any material respect and will not impact in any material respect transmission service provided to any customers under the Montana OATT.¹⁴

10. NorthWestern states that providing a jurisdictional disclaimer will spare NorthWestern the burden of filing similar non-jurisdictional agreements in the future and also spare the Commission from future burdens of processing and adjudicating agreements that do not significantly affect or relate to rates, charges or services within the Commission's jurisdiction. NorthWestern states that it has filed, and the Commission has accepted, 31 similar filings since 2013, including 12 filings in 2016 alone. NorthWestern contends that it would have to make a comparable number of filings in the future if the Commission does not provide the requested jurisdictional disclaimer.¹⁵

11. In the alternative, if the Commission does not disclaim jurisdiction over the Agreement, NorthWestern requests that the Commission accept the Agreement for filing, with an effective date of October 14, 2017.¹⁶

III. Notice of Filing

12. Notice of the filing was published in the *Federal Register*, 82 Fed. Reg. 48,717 (2017), with interventions and protests due on or before November 3, 2017. None was filed.

IV. Discussion

13. Section 205(c) of the FPA requires public utilities to file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7.

Commission, and the classifications, practices, and regulations affecting such rates and charges, *together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*¹⁷ As the Commission has stated on several occasions, “the determination of what agreements ‘affect or relate to’ electric service . . . must be judged by the rule of reason.”¹⁸ As the United States Court of Appeals for the District of Columbia Circuit has noted, the rule of reason allows the Commission to exercise its discretion to allow utilities to forego filing particular contracts that deal only with matters of “practical insignificance.”¹⁹ In *PacifiCorp*, the Commission further elaborated on the rationale underlying the rule of reason:

Under the rule of reason, the Commission does not require . . . contracts to be filed unless they significantly affect rates and services. In deciding what must be filed, the Commission balances the need for full disclosure of pertinent contracts, which provide real benefits to existing and potential customers, against the burden that would be imposed by requiring public utilities to file contracts that do not significantly affect rates and services. The Commission does not believe it is appropriate to deprive utilities of the flexibility to manage their operations by introducing delay and layered decision-making as would arise from filing obligations for agreements that would have an insignificant impact on rates, where such filing and posting would serve no practical purpose.[²⁰]

¹⁷ 16 U.S.C. § 824d(c) (2012) (emphasis added); *see also Pub. Serv. Co. of Colo.*, 67 FERC ¶ 61,371 at 62,267.

¹⁸ *See, e.g., PacifiCorp*, 127 FERC ¶ 61,144, at P 11 (2009); *Town of Easton, Maryland v. Delmarva Power & Light Co.*, 24 FERC ¶ 61,251, at 61,531 (1983) (*Town of Easton*) (quoting *Pacific Gas and Elec. Co.*, 7 FERC ¶ 61,267, at 61,565 (1979), *aff'd sub nom. Pacific Gas and Elec. Co. v. FERC*, 679 F.2d 262 (D.C. Cir. 1982)).

¹⁹ *Pub. Serv. Comm'n of New York v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

²⁰ *PacifiCorp*, 127 FERC ¶ 61,144, at P 11 (2009) (citing *Town of Easton*, 24 FERC ¶ 61,251 at 61,531).

14. Based on NorthWestern's filing and representations, we find that, under the rule of reason, NorthWestern does not need to file the Agreement with the Commission. Under the Agreement, NorthWestern agrees to relocate an existing transmission pole to allow for road widening in an area that Vista is developing, and Vista agrees to reimburse NorthWestern for its actual costs.²¹ Vista is not a NorthWestern transmission customer, NorthWestern is not providing transmission or interconnection service to Vista, and NorthWestern does not seek to recover the costs it incurs pursuant to the Agreement in transmission rates.²² Pursuant to our discretion under the rule of reason, we find that the activities set forth in the Agreement do not significantly affect rates and services, and therefore the Agreement does not need to be filed with the Commission.²³ Because NorthWestern does not need to file the Agreement, we will dismiss the filing.

The Commission orders:

NorthWestern's request to dismiss the filing is hereby granted, as discussed in the body of this order.

By the Commission. Chairman McIntyre is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹ Transmittal at 3.

²² *Id.* at 5-6.

²³ The application of the rule of reason by the Commission does not make an agreement non-jurisdictional; it merely means that the Commission has decided that it does not need a public utility to file the agreement. *LG&E Energy Marketing, Inc.*, 123 FERC ¶ 61,147, at P 12 n.20 (2008). *Cf. Pub. Serv. Co. of Colo.*, 67 FERC ¶ 61,371 at 62,267.