

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UI 490

In the Matter of

NORTHWEST NATURAL GAS
COMPANY, dba NW NATURAL,Request for Approval of Affiliated
Interest Agreement with Dakota City
Renewables, LLC.

ORDER

DISPOSITION: STAFF'S RECOMMENDATION ADOPTED

This order memorializes our decision, made and effective at our August 22, 2023 Regular Public Meeting, to adopt Staff's recommendation in this matter. We waive the requirements of OAR 860-027-0048(4)(e) for good cause. Good cause exists because our determination that the lower of cost or market standard is met in this docket depends upon our forthcoming decision whether to adopt the all-party stipulation filed and pending before us in docket UG 462. By waiving the rule here, we intend to reinforce its importance while allowing for procedural flexibility where parties have addressed the substantive issue in another docket.

The Staff Report with the recommendation is attached as Appendix A.

Made, entered, and effective Aug 23 2023.



Megan W. Decker
Chair



Letha Tawney
Commissioner

COMMISSIONER THOMPSON WAS

UNAVAILABLE FOR SIGNATURE

Mark R. Thompson
Commissioner



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

ITEM NO. RA1

**PUBLIC UTILITY COMMISSION OF OREGON
REDACTED STAFF REPORT
PUBLIC MEETING DATE: August 22, 2023**

REGULAR X **CONSENT** **EFFECTIVE DATE** **N/A**

DATE: August 15, 2023

TO: Public Utility Commission

FROM: Rawleigh White

THROUGH: Bryan Conway, Caroline Moore, Scott Gibbens, and Marc Hellman **SIGNED**

SUBJECT: NORTHWEST NATURAL:
(Docket No. UI 490)
Requests Affiliated Interest with Dakota City Renewable Energy, LLC.

STAFF RECOMMENDATION:

Staff recommends the Commission approve Northwest Natural Gas Company's (NW Natural, NWN, or Company) affiliated interest application between NW Natural and Dakota City Renewable Energy, LLC, (Dakota City) subject to the conditions set forth in Attachment 1.

DISCUSSION:

Issue

Whether the Public Utility Commission of Oregon (OPUC or Commission) should approve NW Natural's affiliated interest application between NWN and Dakota City Renewable Energy, LLC.

Applicable Law

ORS 757.495(1) requires a public utility to seek approval of contracts with affiliated interests within 90 days of execution of the contract. The process for submitting a contract with an affiliated interest for review is found in OAR 860-027-0040.

An "affiliated interest" exists between a public utility and "every corporation five percent or more of whose voting securities are owned by any corporation or person owning at least five percent of the voting securities of a public utility or by any person or

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corporation in any chain of successive ownership of at least five percent of voting securities of the utility." See ORS 757.015(3). However, an "affiliated interest" also exists between "every corporation and person, five percent or more of which is directly or indirectly owned by a public utility." ORS 757.015(6).

The Commission reviews affiliated interest transactions and may approve the contract if it is "fair and reasonable and not contrary to the public interest." ORS 757.495(3).

When a transaction is entered into between affiliates in which services or supplies are sold to an energy utility by an affiliate, such transactions must be recorded at the lower of the affiliate's cost or the market rate. OAR 860-027-0048(4)(e). Similarly, an asset transfer from an affiliate to an energy utility is to be recorded at the lower of net book value or fair market value. OAR 860-027-0048(4)(a). An asset transfer from an energy utility to an affiliate are to be recorded in the utility's accounts at the approved rate, if one is on file, or recorded at the higher of net book value or fair market value. OAR 860-027-0048(4)(b).

The Commission may waive any Chapter 860, Division 27 rules for good cause shown, upon request or on its own motion. OAR 860-027-0000(2).

The Commission need not determine the reasonableness of all financial aspects of an affiliated interest contract for ratemaking purposes, as the Commission reserves that issue for a subsequent proceeding.¹

Analysis

Background

On June 5, 2023, NW Natural filed its request for approval of an affiliated interest agreement with Dakota City. NW Natural RNG Holding Company owns all Class A membership interests in Dakota City. An entity referred to in the application as BioCross LLC owns all Class B membership interests. NW Natural RNG Holding Company is a NW Natural subsidiary. BioCross LLC is an entity created by two other project developers, BioCarbN and Cross River Infrastructure Partners LLC.²

Under the affiliated interest agreement, NW Natural will purchase renewable thermal certificates (RTCs) and the associated renewable natural gas (RNG) from Dakota City. The RTCs are created at a production facility adjacent to a Tyson's Fresh Meats, Inc.

¹ *In the Matter of Avista Corporation Application to Enter multi-Tenant Lease Agreement*, Docket No. UI 306, Order No. 11-071 at 2 (March 2, 2011).

² NW Natural's Application for Approval of Dakota City Affiliated Interest Transaction, Docket No. UI 490 at pages 5-7.

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plant in Dakota City, Nebraska (Dakota City project). The project has been in operation since April 2023. This is one component of the overall project structure. NW Natural also contributes capital for the project through NW Natural RNG Holding Company, which invests those funds in Dakota City. BioCross LLC does not contribute capital, rather providing “significant ‘sweat equity’ to the project by performing diligence, forming a relationship with Tyson, and pursuing the initial development of the project prior to NW Natural’s involvement.”³

Under the affiliated interest transaction, NW Natural pays a set price per dekatherm to Dakota City for the RNG, which Dakota City will use to pay for operations and maintenance, property taxes, a royalty to Tyson, a management fee, and a distribution to BioCross LLC. Any cash in excess of these payments is distributed to NW Natural RNG Holding Company and BioCross LLC. NW Natural sells the physical gas acquired from Dakota City to a local gas marketer.⁴

NW Natural explains that the RTCs are to be acquired to meet a voluntary target for RNG set under Senate Bill (SB) 98.⁵ The Company further states that after it made the decision to invest in the Dakota City project, the Oregon Department of Environmental Quality adopted the Climate Protection Program (CPP) administrative rules. The RNG acquired with the Dakota City project will help NW Natural meet the greenhouse gas emission reductions required under the CPP rules.

NW Natural filed a separate application docketed as UG 462, seeking to recover costs associated with the Dakota City project in Schedule 198, the Company’s RNG automatic adjustment clause. Parties in that docket have executed an all-party, all issue stipulation that is pending before the Commission, which addresses project costs, including a proposed cost-sharing mechanism, and a number of additional terms.

Review

Staff investigated the following issues:

1. Terms and Conditions of the Agreement;
2. Transfer Pricing;
3. Public Interest Compliance; and
4. Records Availability, Audit Provisions, and Reporting Requirements.

After Staff’s review of these issues, and in light of the issues addressed in Docket No. UG 462, Staff supports approval of the affiliated interest agreement with the

³ Ibid at page 9.

⁴ Ibid. at pages 9-10.

⁵ ORS 757.396(1).

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conditions in Attachment 1 to ensure that the affiliated interest agreement is not contrary to the public interest.

Terms and Conditions

As noted in Staff's initial comments, Staff does not have concerns with the legal structure underlying this affiliated interest agreement. The project structure provides protections for the utility, and therefore customers, against creditors, being designed to limit operational recourse to the affiliate.

As also noted in initial comments, Staff was concerned with the financial capital structure of Dakota City. With NW Natural contributing 100 percent of the financial capital structure, BioCross was not required to contribute monetary capital, placing risk of operational and catastrophic failure on NW Natural. Staff understands that NW Natural's capital structure will apply to its contribution, and that the Commission approved the affiliated interest for a similar NW Natural project with a similar financial capital structure at Lexington in Docket No. UI 451. While Staff recommends approval of this AI contract, Staff recommends that the Company address this issue of appropriate capitalization in future filings for RNG projects with an affiliate structure.

Transfer Pricing

NW Natural will obtain the RTCs and associated RNG from the Dakota City project at a fixed price of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per dekatherm over a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] year term with an automatic adjustment clause to recover the actual all in costs per RTC under Schedule 198.⁶ NW Natural forecasted the average cost of RTC over a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] year term of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per RTC.⁷ The parties in Docket No. UG 462 have reached an agreement on terms of cost recovery for Dakota City. This agreement includes a cost cap above which costs will be shared. The cost cap is in the UG 462 stipulation as a confidential number.

Staff considered whether the RTC price represents the lower of cost or market. In its application, NW Natural states, "there is no liquid market for RNG, but the Company evaluated both RNG acquisitions from third parties, as well as other potential investment opportunities in determining to pursue the affiliated interest transaction."⁸ The Company represents that this project is the "lowest cost ready-to-develop RNG

⁶ Ibid. at page 15

⁷ NW Natural Response to UI 490 OPUC DR 4.

⁸ Ibid. at page 16-17.

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project.”⁹ In its 2022 IRP, the Company described the RNG market as nascent and dynamic.¹⁰

Staff agrees that to the extent the available reference points, including NW Natural’s 2021 RFP for RNG, represent a nascent RNG market, the fixed price is consistent with that current market. However, given the limited information available concerning the RNG market, and the overall risk that the overall project cost will fluctuate, discussed further below in the Public Interest section, the Commission may wish to waive the requirements of OAR 860-027-0048(4) and allow NW Natural to record the costs incurred pursuant to the AI agreement at the contracted fixed price.

Public Interest Compliance

This affiliated interest agreement allows NW Natural to purchase RTCs, which will be available to meet the voluntary targets under SB 98, and the Company will use the RTCs to meet its CPP compliance obligation. To mitigate customers’ risk of harm from the affiliated interest agreement, Staff proposes a number of conditions for approval addressing environmental risk, regulatory controls, tax conditions, and other issues in Attachment 1.

Staff’s initial comments recognized that the structure of NW Natural’s investment in the Dakota City project renders the overall project cost dependent on actual RNG production. NW Natural’s per-unit cost of RTCs will increase if fewer RTCs are produced. A similar concern was raised in the Company’s Lexington AI docket and was addressed in a stipulation adopted by the Commission establishing a cost-sharing mechanism to address this production risk.¹¹ For the Dakota City project, cost recovery and the associated production risk are issues currently being litigated in Docket No. UG 462. The Commission has previously recognized that the reasonableness of some financial aspects of an affiliated interest contract for ratemaking purposes may be reserved for other proceedings.¹² With the understanding that customer protections related to project cost recovery is an issue that will be addressed in Docket No. UG 462, Staff finds the affiliated interest contract is just, reasonable, and not contrary to the public interest, subject to the conditions in Attachment 1.

Records Availability, Audit Provisions, and Reporting Requirements

Northwest Natural’s affiliated interest contract with Dakota City presents certain unique risks related to accountability because the project is out of state and managed by a third

⁹ Ibid. at page 13.

¹⁰ NW Natural 2022 Integrated Resource Plan, Docket No. LC 79, IRP at 48.

¹¹ *In the Matter of Northwest Natural Gas Company’s Request for Approval of an Affiliated Interest Agreement with Lexington Renewables, LLC*, Docket No. UI 451, Order No. 22-211 (June 7, 2022).

¹² Docket No. UI 306, Order No. 11-071.

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party. As a condition of approval, Staff further recommends that Dakota City be subject to the same information sharing requirements as Northwest Natural.

Conclusion

Staff has discussed resolution of this docket with the Company, and with parties to Docket No. UG 462: Alliance of Western Energy Consumers (AWEC), and the Oregon Citizens' Utility Board (CUB). In light of those parties' stipulated terms pending resolution by the Commission in UG 462, Staff, NW Natural, AWEC and CUB support approval of the Dakota City affiliated interest agreement, subject to the conditions outlined in Attachment 1. Staff believes the Commission can approve this affiliated interest agreement prior to the Commission determination in UG 462 given the wording herein.

NW Natural, AWEC, and CUB have had the opportunity to review this memo and have no objections.

PROPOSED COMMISSION MOTION:

Approve NW Natural's affiliated interest application between NW Natural and Dakota City Renewable Energy, LLC, subject to the conditions set forth in Attachment 1 to this memo.

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Attachment 1

Staff's conditions of approval

1. Environmental Risks including contamination to the site.

- a. NW Natural shall report any environmental liability or cleanup obligation by Dakota City Renewable Energy, LLC exceeding \$100,000, to be reported to the Commission within ten days of the time it becomes aware of such an issue.
- b. NW Natural shall establish and maintain safety standards and policies for Dakota City Renewable Energy, LLC, substantially comparable to or better than NW Natural's current standards and policies.
- c. NW Natural shall provide Staff, by the rate effective date, with a summary demonstrating in-force liability insurance coverage(s) were in place prior to the facility's commercial operation date for each of NW Natural, NW Natural RNG Holding Company, LLC, and Dakota City Renewable Energy, LLC.
- d. NW Natural shall observe and respect corporate formalities between NW Natural RNG Holding Company, LLC and Dakota City Renewable Energy, LLC. These include but are not limited to prohibiting commingling of assets, maintaining separate books and records, and maintaining sufficient capitalization.

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2. Other Risks.

- a. NW Natural shall report to the Commission any event that materially impacts the operations and cost structure of the project within 10 days of becoming aware of such an event.
- b. Commission approval of the transaction extends only to the base term of the agreement filed in this docket, and NW Natural will obtain Commission approval before agreeing to any extension.
- c. All costs attributable to Dakota City Renewable Energy, LLC will be auditable by Staff and the origin of such costs among the companies must be demonstrable, so as to be specifically identified, tracked for the Commission.
- d. NW Natural shall account for personnel time for the Dakota City Renewable Energy, LLC project following the same policies and practices of NW Natural's accounting for capital projects.

3. Regulatory Controls.

- a. NW Natural shall ensure Dakota City Renewable Energy, LLC will not, without the approval of the Commission:
 - i. Make loans or transfer funds (a) to another member or the manager, or (b) other than dividends and payments pursuant to the operating agreement or project contracts;

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- ii. Assume any obligation or liability as guarantor, endorser, surety, or otherwise (a) for another member or the manager, or (b) other than a reasonable obligation or liability pursuant to project contracts;
 - iii. Transfer any of its project assets or property (a) to another member or the manager, or (b) other than (1) sales of products generated by the project or (2) assets or property that is worn out, obsolete, no longer necessary or useful for the operation of the project, or in the reasonable judgment of NW Natural should be disposed of or replaced;
 - iv. Pledge or seek to pledge project assets or securities backing for any hedging, indebtedness, or securities (a) to another member or the manager, or (b) other than as reasonably undertaken pursuant to project contracts;
 - v. Enter into cross-default provisions with NW Natural or its subsidiaries (other than NW Natural RNG Holding Company, LLC); and
 - vi. Participate in a money pool (unless with NW Natural or its subsidiaries).
- b. NW Natural shall report to the Commission, within 10 days of the time it becomes aware of such an issue, any debt obligation or liability as

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guarantor, endorser, surety, or otherwise undertaken by BioCross LLC related to the project.

- c. Headquarters for Northwest Natural RNG Holding Company, LLC will remain in the state of Oregon.
- d. The venue for all disputes related to the endeavors of NW Natural RNG Holding Company, LLC will be Oregon. For Dakota City Renewable Energy, LLC, NW Natural RNG Holding Company, LLC will, as reasonably practicable, cause venue for all dispute provisions set forth in project contracts to be Oregon. Where the existing operating agreement requires settlement by arbitration, NW Natural will provide parties access to all submissions and the final order in the arbitration, subject in all respects to confidentiality or similar rules that are not reasonably within the control of NW Natural.

4. Access to Information.

- a. NW Natural will have the ability to access all records and information related to the construction and operation of the Dakota City biogas facility in the possession of NW Natural RNG Holding Company, LLC and Dakota City Renewable Energy, LLC and respond to Commission request at any time for such records and information. In response to a discovery request that is made in accordance with Commission rules, NW Natural will provide the parties with information relevant to the

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regulatory review of the project. NW Natural, in supporting this condition, does not waive any of its rights under applicable law or regulations to prevent or limit disclosure of certain information due to confidentiality, privilege, or any other basis established in law or Commission rules. Upon request from parties during a regulatory review, NW Natural will also undertake reasonable efforts to obtain relevant information related to the construction and operation of the Dakota City biogas facility that is in the possession of entities that are not affiliated with NW Natural. NW Natural shall ensure that Dakota City Renewable Energy, LLC is subject to the same information sharing as NW Natural, including but not limited to access to books and records and meeting minutes.

- b. NW Natural shall make NWN Natural RNG Holding Company, LLC managing board members available to appear before the Commission.

5. Tax Conditions.

- a. If partnership allocations of income tax losses from Dakota City Renewable Energy, LLC to NW Natural RNG Holding Company LLC are limited/reduced on an annual basis compared to traditional utility ownership, NW Natural will notify interested parties in the annual affiliated interest report in Docket No. RG 8 and present a plan to address the matter. In future ratemaking proceedings, parties will be free to propose adjustments holding ratepayers harmless as if the assets

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were under traditional utility ownership.

- b. NW Natural will hold ratepayers harmless if any ITCs are allocated, directly or indirectly, to BiocarbN or Cross River Infrastructure Partners LLC working together as BioCross LLC so that rate payers receive the full benefit of the ITCs.