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Attorneys for Oak Tree Energy, LLC

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

**IN THE MATTER OF The Complaint By
Oak Tree Energy LLC Against
NorthWestern Energy For Refusing To
Enter Into A Purchase Power Agreement**

DOCKET NO. EL11-006

**OAK TREE ENERGY, LLC'S
MOTION TO EXCLUDE TESTIMONY**

**OAK TREE ENERGY, LLC'S
MOTION TO EXCLUDE TESTIMONY OF STEVEN E. LEWIS IN FULL
AND BLEAU LaFAVE IN PART
AND BRIEF IN SUPPORT**

I. INTRODUCTION

On January 13, 2012, NorthWestern Energy (NWE) filed *Prefiled Direct and Rebuttal Testimony of Steven E. Lewis on Behalf of Northwestern Energy* with the South Dakota Public Utilities Commission (PUC). This testimony was prepared to present NWE's position in Docket No. EL11-006 and to rebut Oak Tree Energy, LLC's (Oak Tree) testimony in the same docket. Also on January 13, 2012, NWE filed *Prefiled Direct and Rebuttal Testimony of Bleau LaFave on Behalf of NorthWestern Energy* with the PUC. In addition, NWE filed

Responsive Testimony of Bleau LaFave on Behalf of NorthWestern Energy with the PUC on February 24, 2012. Mr. LaFave's testimony seeks to, in part, provide information as to state and federal regulatory requirements and to rebut Oak Tree's testimony.

Oak Tree now files this motion to exclude Mr. Lewis's testimony as he is not a qualified expert on electric price forecasting and his methodology is unreliable. Therefore, his testimony is not relevant to this proceeding. Furthermore, Oak Tree files this motion to exclude, in part, the testimony of Mr. Bleau LaFave as he is not a qualified legal expert with respect to a portion of his testimony, making that part of his testimony irrelevant as well.

II. BACKGROUND

On April 27, 2011 Oak Tree filed a complaint with the PUC to resolve a dispute between Oak Tree and NWE regarding a Purchase Power Agreement. NWE responded to the complaint and at the initial scheduling conference it was determined that there were two issues that needed to be resolved. First, whether NWE has legally enforceable obligation to purchase power from Oak Tree; and, second, the avoided cost at which NWE must purchase power from Oak Tree. Throughout the discovery process, the issues have been further articulated and appear in the *Order For And Notice Of Hearing* filed on February 28, 2012 as:

1. Whether, and in what amounts, NWE should be required, pursuant to 16 U.S.C. §824a-3 and 18 C.F.R. §§ 292.303 and 292.304, to pay Oak Tree over the life of the Project for electricity made available to NWE from the project? The determination of this issue will require consideration of the avoided cost issues presented by 18 C.F.R. § 292.304, including, but not limited to, both avoided energy costs and avoided capacity costs.
2. Whether Oak Tree is currently bound by a legally enforceable obligation, and if so, when that legally enforceable obligation commenced and what impact that has on the avoided cost calculation.
3. Whether addition relief should be granted to Oak Tree as necessary for Oak Tree to obtain a power purchase agreement with NWE for electricity produced from the Project on terms that are consistent with the requirements of PURPA and the SDPUC PURPA Order and are as consistent as possible with the respective positions of the parties and with the interest of NWE's rate payers and the public interest.

From the first round of discovery forward, Oak Tree has requested information from NWE as to how it would calculate a 20-year avoided cost. On September 7, 2011, Oak Tree filed *Oak Tree Energy LLC's Motion to Compel*. As a response to the motion, NWE stated

that a 20-year avoided cost analysis did not exist and, therefore, could not be produced. This matter was addressed at the November 8, 2011 regular meeting of the PUC. NWE maintained throughout the discovery process, as well as during the hearing with the PUC on November 8, that the information necessary to develop NWE's 20-year avoided cost would be unreliable and that it did not exist. Therefore, NWE argued it could not produce the requested data. Ultimately, the Commission granted Oak Tree's motion, in part, by requiring NWE to produce avoided cost energy data for a five and avoided cost capacity data for a ten-year period.

On January 13, 2012, NWE filed *Prefiled Direct and Rebuttal Testimony of Steven E. Lewis on behalf of NorthWestern Energy*. In this testimony, Mr. Lewis presents information in an effort to rebut the testimony of Oak Tree expert Richard Lauckhart's 20-year avoided cost forecast. Since information regarding the calculation of a 20-year avoided cost had not been previously provided by NWE to Oak Tree, Oak Tree contacted NWE to arrange the deposition of Mr. Lewis. The parties failed to agree as to the deposition details and, ultimately, agreed to additional discovery limited to the information presented in the prefiled testimony. Oak Tree served its limited discovery requests on January 30, 2012. Unfortunately, on February 8, 2012 Oak Tree was forced to file *Oak Tree Energy, LLC's Second Motion to Compel Discovery* in order to receive information from NWE. On February 16, 2012 the PUC issued its *Order Granting In Part Second Motion to Compel and Protective Order*, which required NWE to produce information in its possession that was responsive to Oak Tree's discovery request to produce reports of Mr. Lewis's prior price forecasting. NWE produced additional information on February 22, 2012.

III. MOTION TO EXCLUDE LEWIS TESTIMONY

SDCL § 19-5-2 states:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data,
- (2) The testimony is the product of reliable principles and methods,
and
- (3) The witness has applied the principles and methods reliably to

the facts of the case.

Therefore, in order for expert testimony to be accepted the PUC must determine that it is 1) relevant, 2) by a qualified expert, 3) based upon sufficient data, 4) the product of reliable principles or methods, and 5) applied reliably to the facts of the case. Furthermore, the burden of proving that the testimony meets these requirements lies on the party who is offering the witness and his testimony. See *State v. Lemler*, 2009 SD 86, 774 N.W.2d 272; *Tosh v. Schwab*, 2007 SD 132, 737 N.W.2d 422; *Burley v. Kyttec Innovative Sports Equipment Inc.*, 2007 SD 82, 737 N.W.2d 397. In this case, NWE has not met this burden as it applies to Mr. Steven E. Lewis.

A. Qualification As An Expert

A witness must be qualified as an expert prior to testifying as expert. *Burley*, 2007 SD 82, ¶ 13, 737 N.W.2d at 402-403. Determination of whether a witness can be qualified as expert is dependent on the witness's level of knowledge or experience in relation to the issue about which he intends to testify. *Lemler*, 2009 SD 86, ¶18, 747 N.W.2d at 278. In other words, the witness must not only have a higher level of knowledge or experience in the generalized area, but he must have a specialized knowledge as to the specific issue to which he is testifying. In this case, Mr. Lewis does not.

There is no question that Mr. Lewis has experience in the field of electricity. A review of Mr. Lewis's Curriculum Vitae shows years of work experience in the field; however, it appears that the bulk of Mr. Lewis's experience lies in the area of electricity trading – not forecasting. It is not enough that Mr. Lewis is familiar with the industry; Mr. Lewis must be knowledgeable in the field of cost forecasting to testify as to the avoided cost issue in this matter.

NWE has not met its burden in showing that Mr. Lewis qualifies as an expert. Again, the burden of proof regarding an expert witness lies with the party offering the witness. NWE offers Mr. Lewis's testimony as it relates to the issue of avoided cost analysis. However, NWE has not provided sufficient proof that Mr. Lewis's expertise lies in this area; therefore, Mr. Lewis cannot be considered an expert in this area.

B. Testimony Based On Reliable Principles Or Methods

Testimony that is admitted must be based on a relevant and reliable foundation. *Tosh*,

2007 SD 132, ¶ 18, 737 N.W.2d at 428. The expert testimony must be based on a theory that is grounded in some type of scientific, technical, or specialized knowledge. *State v. Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d 401, 415-416. While there is no hard and fast rule to determining whether a particular theory or method is adequately based, the Court, or in this case the PUC, must find sufficient proof as to the validity of the theory or methodology used by the witness. *Id.*

Sufficient information has not been provided to show the relevance or reliability of Mr. Lewis's methodology. Once it was determined that Mr. Lewis was going to offer testimony as an expert with regard to the issue of an electric price forecast as it relates to the avoided cost, Oak Tree made several attempts to obtain information as to the basis to Mr. Lewis's testimony. NWE was less than willing to provide any such information; simply stating that Mr. Lewis's Curriculum Vitae speaks for itself. NWE did provide, after an Order from the PUC, some historical information developed by Mr. Lewis. This information, however, is not sufficient to conclude that Mr. Lewis's testimony is based on a reliable foundation.

NWE has not provided any empirical evidence that Mr. Lewis's method is valid. Oak Tree requested information regarding any other instances when Mr. Lewis's forecasts may have been used to calculate avoided cost, however, to date, none has been provided. While it is not necessary that the method be the "preferred" method within the industry, there must be evidence that it has been subject to some kind of peer review. *Lemler*, 2009 SD 86, ¶¶ 24-26, 774 N.W.2d at 280-281. NWE has not provided any instances where Mr. Lewis's method has been utilized within the industry or analyzed by any peer group. In fact, in one instance, Mr. Lewis's method has been specifically rejected by the Montana Public Service Commission . Montana PSC, Final Order 7108e, Docket D2010.7.77, ¶ 64, at p. 22 (October 19, 2011); see also *Oak Tree Energy LLC's Rebuttal Testimony of J. Richard Lauckhart*, filed in this Docket on February 24, 2012.

Furthermore, NWE did not rely on Mr. Lewis's forecast when proposing its own wind project in Montana (.e.g., Spion Kop, Montana PSC Docket D2011.5.41, yet would like the PUC to accept Mr. Lewis's forecast for Oak Tree's wind project. As set forth in Mr. Lauckhart's prefiled rebuttal testimony, this is undoubtedly because the method utilized by NWE for Spion Kop produce a higher result in Montana, and Mr. Lewis' forecast would not have served NWE's purposes in that proceeding. During the proceedings before the Montana

PSC, NWE did not present any of Mr. Lewis's forecast information. MPSC Docket 2010.7.77. Furthermore, had Mr. Lewis's methodology been used during the Montana proceeding, NWE's own wind project would have received a rate too low to support financing. See *Oak Tree Energy LLC's Rebuttal Testimony of J. Richard Lauckhart*, at p.7. In essence, NWE does not "buy in" to Mr. Lewis's expertise when promoting its own wind project when it needs a return on its investment. Consequently, NWE cannot be permitted to introduce such wildly inconsistent electric price forecasting information in two similar proceedings. Obviously, Mr. Lewis' testimony does not utilize a method that NWE finds supportable uniformly in all jurisdictions.

C. Burden Of Proof

"The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence." *Burley*, 2007 SD 82, ¶ 13, 737 N.W.2d at 403. Simply supplying an "expert" does not meet the standard required for admission of expert testimony. A party offering a witness as an expert must provide evidence that the witness qualifies as an expert. In this matter, NWE has not shown, by a preponderance of the evidence, that Mr. Lewis qualifies as an expert or that the testimony provided by Mr. Lewis is "competent, relevant, and reliable."

IV. IN THE ALTERNATIVE, MOTION TO STRIKE AVOIDED COST TESTIMONY

In the alternative, Oak Tree asks that any testimony provided by Mr. Lewis as it relates to the issue determining avoided cost be excluded. Regardless of the determination that the PUC makes in relation to Mr. Lewis's electric price forecasting ability, NWE has not offered an avoided cost calculation in this proceeding. Consequently, any testimony that Mr. Lewis would give that related to a formulation of a 20-year avoided cost analysis should be excluded from this proceeding.

Allowing Mr. Lewis to offer testimony on a 20-year avoided cost calculation without providing a methodology to how it was created is highly prejudicial to Oak Tree. Oak Tree has made repeated attempts to obtain NWE avoided cost, however, NWE has repeatedly stated that it is unable to provide such an analysis as it is unreliable. Therefore, allowing Mr. Lewis to rebut Oak Tree's expert testimony as it relates to avoided cost would put Oak Tree in

the position of attempting to compare apples to oranges. Thus, any testimony that Mr. Lewis has provided regarding the 20-year avoided cost should be excluded and Oak Tree avoided cost should be used.

V. MOTION TO EXCLUDE LaFAVE TESTIMONY IN PART

As stated in the previous section, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise ...” A significant issue in this proceeding is the Public Utility Regulatory Policies Act of 1978 (PURPA) and how it applies in this matter. Mr. LaFave’s testimony includes his legal opinion as to the requirements of PURPA; however, Mr. LaFave is not qualified to provide such an opinion.

Mr. LaFave’s testimony purports to provide an overview of PURPA; however, Mr. LaFave has not shown that he holds any specialized knowledge or experience in this area. The testimony in this matter as it relates to the requirements of PURPA is to assist the PUC in making its ultimate determination; therefore, it would be considered expert testimony. A witness must be qualified as an expert in the area about which he will provide testimony for the testimony to be accepted as relevant. *Lemler*, 2009 SD 86, ¶18, 747 N.W.2d at 278. Mr. LaFave’s education and employment history does not provide any indication that he has any experience in PURPA requirements. *Filed Direct And Rebuttal Testimony of Bleau LaFave*, at p. 1.

Oak Tree moves to exclude that portion of the Mr. LaFave’s prefilled direct and rebuttal testimony on page 17, line 27, that states, “PURPA requires five years of avoided costs.” Mr. LaFave repeats this legal error on page 2, line 24, through page 3, line 1, of his responsive testimony, “The uncertainty of these future forecasts is the basis for the requirement that PURPA only requires a 5-year avoided cost.” As covered more thoroughly in Oak Tree’s ___brief___, filed simultaneously with this motion and brief, numerous court decisions as well as the plain language of the Federal Energy Regulatory Commission’s (FERC) regulations implementing PURPA, 18 C.F.R. § 292.302(b), are directly contrary to Mr. LaFave’s statement. See *New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.*, 117 F.Supp.2d 211, 221 (N.D.N.Y., 2000); *Phoenix Power Partners, L.P. v. Colorado Public Utilities Com’n*, 959 P.2d 359 (1998); *American Paper Inst. v. American Elec. Power*,

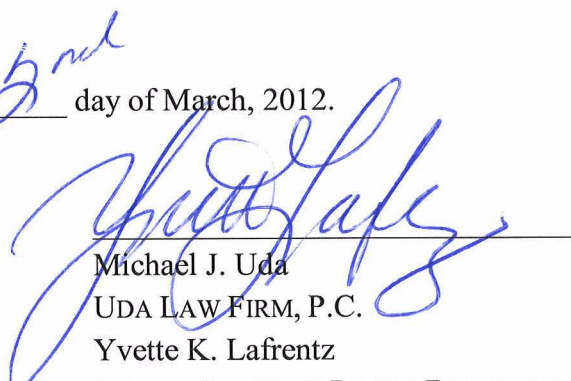
461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983). In other words, Mr. LaFave is offering an incorrect conclusion of law.

Oak Tree also seeks to exclude all portions of Mr. LaFave's testimony as a legal expert on PURPA as Mr. LaFave is not a lawyer, and there is no evidence in this proceeding or anywhere else that Mr. LaFave has any experience with PURPA or that he is qualified to testify about PURPA's requirements. The testimony in Mr. LaFave's Direct and Prefiled Rebuttal Testimony from page 5, line 20, to page 6, line 8, should be excluded. Also, Mr. LaFave's Responsive Testimony from page 2, line 24, through page 3, line 1, should also be excluded. In short, Mr. LaFave is not a legal expert and there is nothing in his testimony that indicates any legal experience or PURPA experience. Those portions of Mr. LaFave's testimony should be excluded from the hearing as Mr. LaFave is plainly unqualified to offer those opinions.

VI. CONCLUSION

For the reasons set forth above, Oak Tree requests that the testimony of Mr. Steven E. Lewis be excluded from this proceeding in its entirety. Furthermore, Oak Tree respectfully requests that Mr. LaFave's Prefiled Direct and Rebuttal Testimony from page 5, line 20, to page 6, line 8, and page 17, line 27, along with Mr. LaFave's Responsive Testimony from page 2, line 24, to page 3, line 1, be excluded.

Respectfully submitted this 5th day of March, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Exclude* was served electronically on this 2nd day of March, 2012, upon the following:

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