

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	EL 11-006 Brief in Opposition to Oak Tree Energy, LLC's Motion to Compel
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Introduction

Oak Tree Energy, LLC's motion to compel sets forth two issues:

- 1) Interrogatory No. 10 & Request for Production No. 22, which requests NorthWestern Energy's avoided cost for its South Dakota utility for a five-year period, a 10-year period, and a 20-year period; and
- 2) Request for Production Nos. 23 and 24, which request contracts with wind generators, specifically the Titan I Wind Project Power Purchase Agreement.

Argument

1) *Avoided Cost*

NorthWestern is compiling its five-year avoided cost and agrees to produce this information at least 15 days prior to Oak Tree's deadline for filing of testimony.

NorthWestern maintains its objection to producing 10-year and 20-year avoided costs. The Federal Energy Regulatory Commission administrative rule that addresses estimated avoided costs specifically requires a utility to make available costs for the current and subsequent five years.¹

2) *Titan I Wind Project Power Purchase Agreement*

Oak Tree has moved to compel production of the Titan I Wind Project Power Purchase Agreement between NorthWestern Corporation and Rolling Thunder I Power Partners, LLC

¹ "The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years." 18 C.F.R. § 292.302(b)(1).

(“Titan Wind PPA”). However, NorthWestern is bound by the confidentiality provisions of the Titan Wind PPA and therefore must resist production of this agreement.

Oak Tree’s arguments in favor of production of the Titan Wind PPA can be summarized with four words: stale, retaliatory, relevant, and necessary. NorthWestern will address each of the arguments, and NorthWestern submits that its objection to production of the Titan Wind PPA should be upheld.

The terms and conditions of the Titan Wind PPA are included in the agreement’s definition of “Confidential Information.”² The provisions of the agreement require NorthWestern to treat “such Confidential Information as confidential and use reasonable care not to divulge such Confidential Information to any third party”³ This obligation remains in effect for three years after termination of the agreement.⁴ Oak Tree’s argument that the Titan Wind PPA is “stale”⁵ does not trump the fact that NorthWestern must adhere to the confidentiality provisions in the agreement. In fact, Oak Tree admits that pricing information would be available through revenue requirements filings with the Commission⁶; therefore, Oak Tree does not need the Titan Wind PPA to obtain this information. Furthermore, the price paid by NorthWestern for past purchases pursuant to the Titan Wind PPA is available on the Federal Energy Regulatory Commission’s Web site under “Electric Quarterly Reports.”

Oak Tree compares this situation, which it ultimately characterizes as retaliatory, to NorthWestern’s request for information considered proprietary to Black & Veatch⁷ – information

² Titan Wind PPA § 8.1(a).

³ Titan Wind PPA § 8.1(b)(i).

⁴ Titan Wind PPA § 8.1(f).

⁵ Oak Tree’s Supp. Br. to Mot. to Compel at 4.

⁶ Oak Tree’s Mot. to Compel at 6; Oak Tree’s Supp. Br. to Mot. to Compel at 4.

⁷ Oak Tree’s Supp. Br. to Mot. to Compel at 3-4.

which Oak Tree's expert relied upon in forming his opinions. There are two important distinctions that nullify Oak Tree's argument. First, Richard Lauckhart, Oak Tree's expert, is a managing director in Black & Veatch's Enterprise Management Solutions Division.⁸ Thus, Black & Veatch is not an unaffiliated third party as intimated by Oak Tree. Second, Oak Tree must, upon request, provide the grounds for its expert's opinion.⁹ Effective cross-examination of an expert witness requires advance preparation.

Before an attorney can even hope to deal on cross-examination with unfavorable expert opinion he must have some idea of the basis of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.¹⁰

NorthWestern's request for information regarding the foundation for Mr. Lauckhart's opinions and Oak Tree's request for the Titan Wind PPA simply are not analogous.

Oak Tree's arguments as to the relevancy of the Titan Wind PPA are without merit. South Dakota law defines relevant evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹¹

The issues at stake in the present action are:

- 1) Does NorthWestern need additional energy produced by Oak Tree?
- 2) What is NorthWestern's avoided cost?

⁸ Oak Tree's Response to Data Request 1-16a; *Richard Lauckhart Joins Black & Veatch's Management Consulting Division in its Expanding Market Analysis Practice*, Black & Veatch News Release (Nov. 13, 2008), available at http://www.bv.com/wcm/press_release/11132008_4661.aspx.

⁹ SDCL § 15-6-26(b)(4)(A)(i).

¹⁰ *Kaiser v. University Physicians Clinic*, 2006 SD 95, ¶ 38, 724 N.W.2d 186, 196 (citations omitted).

¹¹ SDCL § 19-21-1.

The Titan Wind project is not a qualified facility from which NorthWestern was forced to buy power at an avoided cost. The project is a business partnership that allows NorthWestern to buy renewable energy in an effort to advance South Dakota's Renewable, Recycled and Conserved Energy Objective. The existence of the agreement and the business relationship has no relevance on the issues at stake here. Oak Tree is looking to draw an improper inference between the Titan Wind project and Oak Tree's proposed project in an effort to drive up NorthWestern's avoided cost rate. Avoided costs are "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."¹² The cost of electricity purchased pursuant to the Titan Wind PPA is not an incremental cost. NorthWestern is obligated to purchase the output of the Titan Wind project. The amount of energy that NorthWestern will purchase from the Titan Wind project will not be affected in any way if NorthWestern purchases energy from Oak Tree.

Oak Tree argues seeing the Titan Wind PPA can give them a look as to what terms and conditions they could be potentially offered by NorthWestern. Oak Tree is also looking for a free handout. Numerous hours of negotiation between attorneys, subject matter experts, and consultants went into the final Titan Wind PPA; giving Oak Tree a free look at that contract would allow them to unfairly benefit from that process. Oak Tree should not be given the Titan Wind PPA to use as a blueprint for future dealings with NorthWestern or others.

When bringing a motion to compel the moving party must "include a certification that the movant in good faith conferred or attempted to confer with the person or party failing to make the

¹² 18 C.F.R. § 292.101(b)(6).

discovery in an effort to secure the information or material without court action.”¹³ Oak Tree’s motion and supplemental brief fail to address the basis for NorthWestern’s objection to producing the Titan Wind PPA – i.e., that the agreement contains a confidentiality provision that imposes a duty on NorthWestern to protect the terms and conditions of the agreement. Oak Tree should be heartened that NorthWestern takes such provisions seriously. NorthWestern requests that the Commission deny Oak Tree’s motion to compel production of the Titan Wind PPA.

In Camera Review

NorthWestern would submit that an alternative for the Commission to consider prior to deciding Oak Tree’s motion to compel is to conduct an in camera review of the Titan Wind PPA. The Commission could at its discretion review the contents of the Titan Wind PPA and effectively decide whether it is relevant to the issues of the Oak Tree proceeding.

Request for Confidential Treatment

Finally, if the Commission orders NorthWestern to produce the Titan Wind PPA, NorthWestern respectfully requests confidential treatment of this agreement pursuant to ARSD 20:10:01:41. NorthWestern further requests that the Titan Wind PPA be treated as “Designated Material” under the Confidentiality Agreement previously signed in this docket.

Conclusion

For the reasons set forth above, NorthWestern requests that the Commission deny Oak Tree’s motion to compel. Alternatively, NorthWestern requests that the Commission conduct an in camera review of the Titan Wind PPA prior to determination of producing the document.

¹³ SDCL § 15-6-37(a)(2).

Ultimately, if the Commission grants Oak Tree's motion, NorthWestern requests confidential treatment of the Titan Wind PPA.

Dated at Sioux Falls, South Dakota, this 26th day of October, 2011.

**NorthWestern Corporation d/b/a
NorthWestern Energy**

/s/ Sara Greff Dannen

Sara Greff Dannen
3010 West 69th Street
Sioux Falls, SD 57108
(605) 978-2942
Sara.Dannen@northwestern.com

and

Al Brogan (admitted *pro hac vice*)
208 N. Montana Avenue, Suite 205
Helena, MT 59601
(406) 443-8903
Al.Brogan@northwestern.com

Attorneys for NorthWestern Energy

Certificate of Service

The undersigned hereby certifies that on this 26th day of October, 2011, a true and correct copy of the foregoing Brief in Opposition to Oak Tree Energy, LLC's Motion to Compel was served upon the following by electronic mail:

Yvette Lafrentz
Attorney for Oak Tree Energy, LLC
ylafrentz@doneylaw.com

Michael J. Uda
Attorney for Oak Tree Energy, LLC
muda@mthelena.com

Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
patty.vangerpen@state.sd.us

Kara Semmler, Staff Attorney
South Dakota Public Utilities Commission
kara.semmler@state.sd.us

Ryan Soye, Staff Attorney
South Dakota Public Utilities Commission
ryan.soye@state.sd.us

Chris Daugaard, Staff Analyst
South Dakota Public Utilities Commission
chris.daugaard@state.sd.us

Brian Rounds, Staff Analyst
South Dakota Public Utilities Commission
brian.rounds@state.sd.us

with copies provided to:

Jeffrey Decker, Regulatory Specialist
NorthWestern Energy
Jeffrey.Decker@northwestern.com

Pamela Bonrud, Director – SD/NE Government and Regulatory Affairs
NorthWestern Energy
Pam.Bonrud@northwestern.com

Bleau LaFave, Director – SD/NE Planning & Development
NorthWestern Energy
Bleau.LaFave@northwestern.com

Sara Greff Dannen, Corporate Counsel
NorthWestern Energy
Sara.Dannen@northwestern.com

Al Brogan, Corporate Counsel
NorthWestern Energy
Al.Brogan@northwestern.com

/s/ Dori L. Quam