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 **NorthWestern Energy's Brief in Opposition to Oak Tree Energy, LLC's Motion to Allow Electronic Testimony**

Introduction

Oak Tree Energy, LLC's motion to allow electronic testimony sets forth one issue, and that is a request to allow Mr. Thomas K. Anson to testify electronically.[1] NorthWestern Energy submits this brief in opposition to Oak Tree's request.

Argument

The rules of civil procedure in South Dakota do not address the use of telephonic testimony at trial. More specifically, the rules of civil procedure in South Dakota do not address the use of telephonic expert testimony at trial. The rules do contemplate the use of telephonic depositions, but are silent as to the use of electronic testimony at trial.[2]

The trial court—in this instance, the Commission—has broad authority to determine the manner in which a witness testifies.[3] The South Dakota Supreme Court in *People ex rel. O.S.* ruled that the trial court did not abuse its discretion in excluding telephonic testimony of an expert.[4] The Supreme Court affirmed the trial court's consideration of timeliness and ability to judge the witness's credibility in deciding not to allow telephonic testimony.

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[1] NorthWestern filed a motion to strike the Rebuttal Testimony of Thomas K. Anson in its entirety. This motion will be heard on March 13.
[2] SDCL § 15-6-30(b)(7).
[3] *People ex rel. O.S.*, 2005 S.D. 86, ¶ 17, 701 N.W.2d 421, 427 (*quoting State v. Alidani*, 2000 S.D. 52, ¶ 17, 609 N.W.2d 152, 157).
[4] *Id.*

In *Murphy v. Tivoli Enterprises*[5], the U.S. Court of Appeals for the Eighth Circuit also discusses the use of telephonic testimony.

> Because no federal appellate court has ruled on this question, we will closely examine the law in this area. Our starting place is Rule 43(a) which states, "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."
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> One federal rule decision addresses whether Rule 43(a) permits telephone testimony. The court in *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F. Supp. 1303 (D. Or. 1990), approved, over a party's objection, the use of telephone testimony under Rule 43(a), stating that the telephone testimony was "made in open court under oath." The court noted that it "had a greater opportunity to evaluate the testimony of the witnesses through the telephone testimony than through depositions offered by both parties." *Id.* at 1398 n.2.
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> We disagree with the *Official Airline Guides* court's reasoning that telephone testimony qualifies as testimony taken in "open court." We believe that Rule 43(a) presupposes that a witness will be physically present in the courtroom to give testimony orally. The Advisory Committee drafted Rule 43(a) to combat the practice in equity of presenting juries with edited depositions of witnesses' testimony. *See* 9 Charles A. Wright & Aurthur R. Miller, *Federal Practice and Procedure* § 2408, at 331 (1991). The federal rules strongly favor the testimony of live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity. *See* 5 *Moore's Federal Practice* ¶ 43.03 (1990). For testimony to presented "orally in open court," the witness must be present in the courtroom. *See In re Gust*, 345 N.W.2d 42, 44 (N.D. 1984) (interpreting North Dakota's version of Rule 43(a) as requiring presence of witness for testimony). We know of no exception in either acts of Congress, the Rules of Civil Procedure or the Rules of Evidence which permits telephone testimony.[6]

[5] 953 F.2d 354 (8th Cir. 1992).
[6] *Id.* at 358–59 (footnote omitted).

In *Byrd v. Nix*[7], the Supreme Court of Mississippi held that the admissibility of telephonic testimony is within the sound discretion of the trial judge. The court recognized that Mississippi did not have a specific law or rule allowing a witness to testify by telephone and held that the admissibility of testimony by telephone is within the discretion of the trial judge. The court noted that Mississippi's rules of civil procedure stated that, unless otherwise provided, testimony shall be taken orally in open court, and the rules of evidence provide that the court shall exercise reasonable control over the mode and order of interrogating witnesses in presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth. South Dakota's rules are similar to Mississippi's.[8] Therefore, the Commission can use the reasoning used by the Misssissippi court in finding the trial court did not abuse its discretion when it did not allow plaintiffs' expert, who suffered from a severe heart condition and was prohibited from traveling, to testifying at by telephone:

> In rejecting the patient's argument that the word "mode" may mean by telephone or other method, the court said that the comment apparently accompanying the rule states that the subsection is designed to give the judge discretion to determine whether presentation of the evidence must be in narrative or question-and-answer form. The court observed that, generally, special circumstances such as exigency, consent, and knowledge of the witness' identity and credentials, have dictated the admissibility of telephonic testimony, in the absence of which such testimony generally has not been allowed.[9]

Other factors the Commission could consider include:

> (1) whether any undue surprise or prejudice would result; (2) whether the proponent has been unable, after due diligence, to procure the physical presence of the witness; (3) the convenience of

[7] 548 So. 2d 1317, 1319 (Miss. 1989).
[8] SDCL § 15-6-43(a); SDCL § 19-14-18(1) (Rule 611(a)).
[9] Michael J. Weber, Annotation, *Permissibility of testimony by telephone in state trial*, 85 A.L.R.4th 476 (Originally published in 1991).

> the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony; (4) whether the procedure would allow full, effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination; (5) the importance of presenting testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings would impress upon the witness the duty to testify truthfully; (6) whether the quality of communication is sufficient to understand the offered testimony; (7) whether a physical liberty interest is at stake in the proceedings; and (8) such other factors as the court may, in each individual case, determine to be relevant.[10]

The Commission should not pay any deference to the cases cited by Oak Tree. The cases cited on page 2 of Oak Tree's motion offer no discussion as to the ultimate issue regarding the permissive use of electronic testimony.[11] Rather, these cases seem to be mere examples where electronic testimony was used. The record is void in those matters as to whether or not the parties agreed to the use of electronic testimony. It was rather a mere statement by the reviewer of facts regarding the mode of testimony used by the witness.

NorthWestern—and ultimately the Commission—would be at a severe disadvantage if Mr. Anson is allowed to testify electronically.

NorthWestern does not believe that Oak Tree has established a bona fide reason to have Mr. Anson testify electronically. One reason offered by Oak Tree is the "just, speedy and inexpensive determination of every action."[12] Cost should not be a factor considered in the Commission's decision. Generally, the cost to be in the forum that the complainant has chosen

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[10] *Id.*

[11] Oak Tree cites *Rathke v. Astrue*, CIV. 08-5084, 2010 WL 1258100 (D.S.D. Jan. 27, 2010), report and recommendation adopted in part, rejected in part, CIV. 08-5084-JLV, 2010 WL 1258097 (D.S.D. Mar. 26, 2010), and *Cody v. Hillard*, 2000 WL 287520 (D.S.D. 2000), 88 F. Supp. 2d 1049.

[12] Motion at 2.

without a showing of hardship is not a legitimate reason. Cost of attendance by an expert witness whose testimony is not required should not be a factor.

Speed should not be a factor considered in the Commission's decision. The time pressure in this instance is a result of Oak Tree's own doing. Oak Tree chose to file Mr. Anson's opinions late. Oak Tree has known from the inception of this matter that whether an legally enforceable obligation (LEO) was created was an issue in this case. Oak Tree could have submitted Mr. Anson's pre-filed testimony as direct testimony rather than rebuttal testimony, which would have allowed NorthWestern the time to either depose Mr. Anson or ask additional discovery of Mr. Anson. Rather, Oak Tree waited until the eleventh hour to file Mr. Anson's testimony as rebuttal testimony, effectively cutting off NorthWetsern's opportunity to present expert testimony to rebut Mr. Anson's testimony.

It will not be just to allow Mr. Anson to testify electronically. This case is a case of first impression for this Commission. NorthWetsern will be prejudiced if Mr. Anson is allowed to testify electronically. Whether or not an LEO was created is a crucial issue in this case. It is unfair to simply allow Oak Tree to submit improper rebuttal testimony of a new expert at the last minute and then also allow that new expert to testify electronically. The rules of evidence state that "[t]he court shall exerciser easonable control over the mode and order of interrogating witnesses and presenting evidence so as to [m]ake the interrogation and presentation effective for the ascertainment of the truth."[13] Electronic testimony will not be helpful in ascertaining the truth. Rather, if Mr. Anson is allowed to testify electronically, the Commision's opportunity to credibly evaluate Mr. Anson as a witness and NorthWestern's opportunity to effectively cross-examine the witness would be completely destroyed.

[13] SDCL § 19-14-18(1) (Rule 611(a)).

Conclusion

For the reasons set forth above, NorthWestern requests that the Commission deny Oak Tree's motion to allow Mr. Anson to testify electronically. In the alternative, if after testifying electronically Mr. Anson's testimony is found to be unreliable, NorthWestern asks that the Commission strike his electronic testimony from the record.

Dated at Sioux Falls, South Dakota, this 7th day of March, 2012.

Respectfully submitted,

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