

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 Exclude Testimony
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NorthWestern Energy submits this brief in opposition to Oak Tree's motion to exclude testimony of Steven E. Lewis in full and Bleau LaFave in part.

Steven Lewis

Oak Tree asserts that NorthWestern Energy has offered testimony of Mr. Steven Lewis for the purposes of its avoided cost analysis and that NorthWestern has not provided sufficient proof that Mr. Lewis is an expert in this area. Oak Tree is purporting that this Commission not allow NorthWestern to introduce Mr. Lewis's testimony or, in the alternative, strike Mr. Lewis's entire testimony because he is not an expert in avoided costs. Oak Tree's assertions are misplaced.

The admission of expert testimony is governed by SDCL § 19-15-2.¹ In order to qualify as an expert, the trier of fact must look to "area[s] in which the witness has superior knowledge, skill, experience, or education with the subject matter."² The Commission has the authority to determine whether a witness qualifies as an expert.³

Similar to the analysis that the South Dakota Supreme Court recently conducted in *State v. Fisher*, this Commission must look to Mr. Lewis's education and experience in determining that Mr. Lewis is qualified to be an expert. Mr. Lewis has a Bachelor of Science in physics with a

¹ *State v. Fisher*, 2011 S.D. 74, ¶ 39, 895 N.W.2d 571, 580.

² *Id.* (quoting *Maroney v. Aman*, 1997 S.D. 73, ¶ 39, 565 N.W.2d 70, 79).

³ *Id.* (citations omitted).

mathematics minor from Gonzaga University.⁴ Mr. Lewis has 19 years in the energy industry.⁵ He has expertise in all areas of power management and utility operations. His experience includes, but is not limited to, energy trading, risk management, power resource planning and acquisition, power plant development and acquisitions, transmission contracting, hydro operations, control area operations, and state and federal electricity rates and regulation.⁶ Mr. Lewis has been an independent consultant since 2001 for Lands Energy Consulting. His previous work experience includes Seattle City Light, Puget Sound Energy, and Bonneville Power Administration.⁷ He has experience in negotiating power purchase agreements and has advised a variety of clients on activities in the energy markets⁸, which inherently includes analysis of price forecasting. Mr. Lewis's list of accomplishments is long and distinguished and supports Mr. Lewis being qualified as an expert witness.

Oak Tree's arguments in its motion are fraught with inaccuracies, the most blatant of which is their assertion that Mr. Lewis is an expert testifying as to NorthWestern's avoided cost. Mr. Lewis's testimony is not being offered for the purpose of analyzing NorthWestern's avoided cost. The purpose of Mr. Lewis's testimony is "[t]o provide information related to the price forecast for wholesale electricity in South Dakota, to rebut certain parts of the testimony of J. Richard Lauckhart, and to provide information regarding NorthWestern Energy's recent solicitations for renewable energy."⁹ Mr. Lewis is not testifying as to NorthWestern's avoided cost.

⁴ Ex. SEL-01.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Lewis Direct Test. 1:21-23.

Oak Tree has tried to confuse the purpose of Mr. Lewis's testimony in its motion. They have made blanket assertions as to the reliability of Mr. Lewis's methods. Oak Tree may take issue with Mr. Lewis's methodology, but that should have no affect on whether or not Mr. Lewis is qualified as an expert to provide market forecasting for NorthWestern. As the South Dakota Supreme Court again noted in *Fisher*, in regards to expert medical testimony,

The fact that Dr. Free is not a pathologist and has not performed an autopsy or signed a death certificate may bear on the weight of her testimony, but it does not render her testimony inadmissible.¹⁰

The Commission should allow the expert testimony of Mr. Lewis and give it due regard during the hearing.

Bleau LaFave

Oak Tree is also seeking to exclude relevant portions of Mr. Bleau LaFave's testimony. Specifically, Oak Tree is asking the Commission to exclude portions of Mr. LaFave's prefiled direct testimony regarding PURPA. Oak Tree claims that Mr. LaFave is not an expert and is therefore not obliged to give his legal opinion as to requirements of PURPA. Again, Oak Tree's assumptions are misplaced.

SDCL § 19-15-1 (Rule 701) states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- (c) Not based on scientific, technical or other specialized knowledge within the scope of SDCL § 19-15-2.

¹⁰ *Fisher*, 2011 S.D. 74, ¶ 44, 805 N.W.2d at 580.

Under this statute, the focus should remain on the perception of the witness and not necessarily have ties to the witness's education or experience.¹¹ When it comes to the opinions of lay witnesses, the rules of civil procedure are fairly relaxed and liberally interpreted.¹² If a lay witness has subject matter knowledge of a matter, he may give his opinion on that issue.¹³ "Lay testimony requires no foundation."¹⁴

NorthWestern has never asserted that Mr. LaFave is an expert as to PURPA. The purpose of Mr. LaFave's testimony is as follows:

- Describe the framework for the federal and state regulatory requirements for qualifying facilities;
- Discuss the circumstances of where we are in the process and rebut testimony provided by Mr. Lauckhart concerning adequate negotiation with Oak Tree and [] the possible creation of a legally enforceable obligation;
- Introduce NorthWestern's witnesses
- Describe the process for choosing an appropriate method for calculating the incremental and avoided costs;
- Provide an estimate of avoided capacity costs
- Discuss the customer impact of the differences between NorthWestern's actual avoided costs and Oak Tree's demand; and
- Discuss the terms that should be included in an agreement with a qualifying facility that were never addressed in Oak Tree's demand.¹⁵

Mr. LaFave's testimony as to PURPA is an not an expert opinion; rather, it is his lay person's opinion based on his experience working at NorthWestern Energy. Furthermore, Mr. LaFave's

¹¹ *State v. Condon*, 2007 S.D. 124, ¶ 29, 742 N.W.2d 861, 870.

¹² *Id.*, 2007 S.D. 124, ¶ 30, 742 N.W.2d at 870 (citing *State v. Guthrie*, 2001 S.D. 61, ¶ 36, 627 N.W.2d 401, 416).

¹³ *Id.* (citing *State v. Andrews*, 2001 S.D. 31, ¶ 17, 623 N.W.2d 78, 83).

¹⁴ *Id.*

¹⁵ LaFave Direct Test. 1:28-2:11.

opinions are no different from Mr. Lauckhart's comparison of the Renewable Portfolio Objective in South Dakota versus the Renewable Portfolio Standard in Montana.

Conclusion

For the reasons set forth above, NorthWestern requests that the Commission deny Oak Tree's motion to exclude or, in the alternative, strike Mr. Lewis' testimony. NorthWestern also requests that the Commission deny Oak Tree's request to exclude and or strike Mr. LaFave's testimony regarding his opinions related to PURPA.

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Respectfully submitted,

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