

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

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IN THE MATTER OF THE COMPLAINT OF :
CONSOLIDATED EDISON DEVELOPMENT, :
INC., AGAINST NORTHWESTERN :
CORPORATION d/b/a NORTHWESTERN :
ENERGY REGARDING AVOIDED COST :
AND FOR THE BRULE COUNTY, WIND, :
LLC, AURORA COUNTY WIND, LLC, AND :
DAVISON COUNTY WIND, LLC PROJECTS :

Docket No.-El-16-021

**BRIEF IN SUPPORT OF MOTION
FOR ENTRY OF ORDER
CONCLUDING CASE**

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On August 15, 2017, the Commission directed NorthWestern to recalculate the levelized avoided cost applicable to the Brule, Aurora, and Davison projects, using the format NorthWestern presented in the April hearing on the merits in this matter, but employing June 23, 2016, as the date of the legally enforceable obligation. On August 23, NorthWestern published the recalculated levelized avoided cost rate as \$26.91 per megawatt hour. The rate included payment for capacity, NorthWestern’s recapture of interconnection upgrade costs, and regulation expense, but did not include renewable energy credits, which would remain with Consolidated Edison Development.

By letter dated October 27, 2017 (copy attached), Consolidated Edison Development advised commission counsel De Hueck that as a matter of business exigency, it would accept the avoided cost rate published on August 23, provided the charges for regulation were removed from the calculation. NorthWestern responded, declining to remove regulation cost from the calculation. On November 8, 2017, again by letter to commission counsel De Hueck (copy attached) Consolidated Edison Development advised the parties that it would accept the avoided

cost rate of \$26.91 as a matter of business exigency, provided the case be economically concluded with a simple order.

On November 21, 2017, counsel for NorthWestern advised commission executive director Van Gerpen that NorthWestern did not agree with Consolidated Edison Development's proposed resolution. NorthWestern insists on further proceedings, including development of findings of fact and conclusions of law.

Consolidated Edison Development believes that the methodology and inputs NorthWestern used to calculate its August 23, 2017, avoided cost rate are inappropriate, discriminatory, and inconsistent with PURPA and FERC directives. Nonetheless, Consolidated Edison Development will accept the rate and proceed with the construction of the projects, provided that the matter is concluded with a simple order noting acceptance of the rate and that no further proceedings are required.

1. Consolidated Edison Development's proposal is consistent with PURPA.

PURPA requires that qualified facilities and host utilities negotiate in good faith toward an avoided cost rate. In the event the QF and the utility cannot arrive at an agreement, PURPA directs the state regulatory commission, in this case the Public Utilities Commission, to hear the issues and if necessary determine an appropriate avoided cost rate. In this case, Consolidated Edison Development (then Juhl Energy) filed a petition, hearings were held, and the Commission ultimately directed NorthWestern to calculate an avoided cost based on a legally enforceable obligation date of June 23, 2016. Consolidated Edison Development is now willing, albeit reluctantly, to accept the resulting avoided cost calculation of \$26.91 per megawatt hour, provided no further proceedings or expense be incurred in this proceeding.

The Commission has done exactly what PURPA requires, namely develop an avoided cost rate acceptable to the parties. 18 C.F.R. § 292.301(b) states that nothing in PURPA

... limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart ...

Here, there is no difference of opinion on the rate. None the less NorthWestern is insisting on consuming yet more of Consolidated Edison's and the Commission's resources in pursuit of a final order that is not needed since the parties now apparently agree on the avoided cost rate.

The Commission has fulfilled its role, no further proceedings are required, and the Commission should so rule.

2. Judicial economy requires the matter be concluded with a simple order.

South Dakota law favors judicial economy. *State v. Berget*, 2014 SD 61, 853 N.W.2d 45; *In re S.M.N.*, 2010 SD 31, 781 N.W.2d 213. Judicial economy is defined as

[e]fficiency in the operation of the courts and the judicial system; especially the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." *Black's Law Dictionary* (10th ed. 2014).

The doctrine of judicial economy requires that a court and litigants only expend the time, energy or resources necessary to expeditiously reach basic resolution of matters in issue. 18 C.F.R. § 292.301(b), cited above, is consistent with the principles of judicial economy. Once agreement has been reached on avoided cost, as is exactly the case here, no further proceedings need take place.

Consolidated Edison Development is willing to accept NorthWestern's August 23, 2017, avoided cost rate of \$26.91, provided that Consolidated Edison Development is not required to make any further investment in the case, even though it believes the methodology and approach

to calculating the avoided cost employed by NorthWestern is incorrect, discriminatory, and inconsistent with PURPA and FERC directives. Ending the case at this juncture without further proceedings, employing a simple order, is consistent with PURPA and the doctrine of judicial economy.

3. Reservation of rights.

Because Consolidated Edison Development believes the methodology employed in developing the avoided cost rate is flawed, if the Commission directs that the case proceed and findings of fact and conclusions of law are to be entered, Consolidated Edison Development reserves the right to make a motion to reopen the proceedings and make a record, including offering additional evidence, with respect to those matters it believes contribute to the flawed nature of the August 23 avoided cost calculation. The matters, enumerated in Consolidated Edison Development's motion that this brief supports, include

- (a) The means and methods of determining payments for capacity and the calculation thereof, and
- (b) The appropriateness of including regulation cost, and
- (c) The calculation of charges for interconnection costs, and
- (d) The discount rate used by NorthWestern in levelizing the avoided cost rate, and
- (e) The issues relating to the so-called long 2 and long 3 circumstances.

4. Conclusion.

Consistent with PURPA, the Commission held hearings and took evidence that led to NorthWestern's development of an avoided cost rate that Consolidated Edison Development

found acceptable, albeit reluctantly. PURPA and the principles of judicial economy dictate that the Commission grant Consolidated Edison Development's motion and enter a simple order ending the case, substantially in the form attached thereto.

Consolidated Edison Development prays this matter be given hearing and it be granted the relief requested in its motion of even date herewith.

Dated this 30th day of November 2017.

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Attorneys for Consolidated Edison Development,
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Certificate of Service

I hereby certify that on the 30th day of November, 2017, I served via email a true and correct copy of Brief in Support of Motion for Entry of Order Concluding Case on the following:

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Consolidated Edison Development's Brief

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By Wm Taylor
One of the Attorneys for Consolidated Edison
Development, Inc.



TAYLOR LAW FIRM, LLC

ATTORNEYS AT LAW

Via Email
October 27, 2017

Adam de Hueck, esq.
Counsel
South Dakota Public Utilities Commission
500 E. Capital Ave.
Pierre, SD 57501

Re: ConEdison Development v NorthWestern
EL 16-021

Dear Mr. de Hueck

Thank you for your patience in waiting for ConEdison Development to respond to NorthWestern's recalculation of its avoided cost rate for the Brule County, Aurora County and Davison County Wind Energy Projects.

After considerable study and internal analysis, ConEdison Development has made the business decision to accept NorthWestern's proposed avoided cost rate provided one small adjustment is made. NorthWestern included a deduction for "regulation" in its most recent avoided cost rate calculation. ConEd Development believes there is no economic, legal or regulatory basis for including a charge for regulation in this avoided cost calculation.

Unless NorthWestern is able to provide a reference as to how this deduction was calculated and why it's applicable to the facilities ConEd Development proposes to build, this deduction should be removed from the avoided cost rate.¹ Assuming the Commission agrees that a charge for regulation is inappropriate, ConEd Development will accept NorthWestern's avoided cost rate once the regulation deduction is removed from the August 2017 calculation.

Please understand that ConEd Development's decision to accept the avoided cost rate is a matter of business exigency and is not an admission or concession that NorthWestern's approach to and methodology for calculating avoided cost is correct. ConEd Development continues to believe that the methodology and inputs NorthWestern used to calculate their avoided cost rate are inappropriate, discriminatory and inconsistent with PURPA and FERC's directives. Accordingly, ConEd Development's acceptance of the adjusted rate should not be considered an admission that the Commission's preliminary finding regarding NorthWestern's inputs, means

¹ Recalculating the final avoided cost rate without the regulation charge is a simple mathematical exercise and does not require any additional forecasting. NorthWestern should be able to easily and quickly re-calculate the final leveled avoided cost rate for these projects.

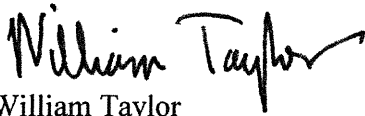
Adam deHueck
October 25, 2017

and methods is precedential. ConEd Development's proposed acceptance of the adjusted avoided cost rate is simply a matter of business convenience.

Perhaps the easiest way to bring this case to conclusion is for NorthWestern to concede the regulation charge, recalculate levelized avoided cost rate without it and publish the outcome. The parties could then conclude the finalization of the power purchase agreement, get on with their business and the case could be dismissed without further Commission involvement.

Please advise how the Commission would like to proceed from this point.

Yours sincerely,

A handwritten signature in black ink that reads "William Taylor". The signature is written in a cursive style with a long, sweeping tail on the "r".

William Taylor
One of the attorneys for
ConEdison Development

Copied via email: Al Brogan, Kristen Edwards, Amanda Reiss, Michael Uda



TAYLOR LAW FIRM, LLC

ATTORNEYS AT LAW

Via Email
November 8, 2017

Adam de Hueck, esq.
Counsel to the Commission
South Dakota Public Utilities Commission
500 E. Capital Ave.
Pierre, SD 57501

Re: ConEdison Development v NorthWestern
EL 16-021

Dear Mr. de Hueck:

Thank you for your patience in waiting for ConEdison Development's final decision with respect to NorthWestern's recalculation of its avoided cost rate for the Brule County, Aurora County and Davison County Wind Energy Projects.

Following Mr. Brogan's comments regarding my letter of October 27, ConEdison Development has made the business decision to accept NorthWestern's August 23, 2016 avoided cost rate of \$26.91 per megawatt hour based on a legally enforceable obligation date of June 23, 2016, provided that the case can be economically concluded with a simple order.¹

Following is the text of a proposed order that would conclude the case:

On August 23, 2017 NorthWestern Corporation calculated its levelized avoided cost rate (including payment for capacity, recapture of interconnection upgrade costs, regulation expense but not including renewable energy credits) for the Brule County, Aurora County and Davison County Wind Energy Projects as \$26.91 per megawatt hour employing a June 23, 2016 legally enforceable obligation date. Consolidated Edison Development, Inc. has advised the Commission that it accepts NorthWestern's avoided cost rate of \$26.91 based on a legally enforceable obligation date of June 23, 2016.

¹ ConEd Development's decision to accept the avoided cost rate is a matter of business exigency and is not an admission that NorthWestern's approach to and methodology for calculating avoided cost is correct. ConEd Development continues to believe that the methodology and inputs NorthWestern used to calculate its avoided cost rate are inappropriate, discriminatory and inconsistent with PURPA and FERC's directives. ConEd Development's acceptance of the adjusted avoided cost rate is simply a matter of business convenience and not an admission the avoided cost rate is correct.

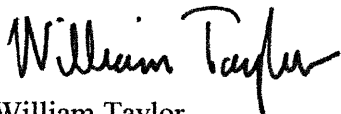
Adam deHueck
November 8, 2017

It is therefore ordered, adjudged and decreed as follows:

1. The levelized avoided cost rate for the Brule County, Aurora County and Davison County Wind Energy Projects shall be \$26.91.
2. The legally enforceable obligation date shall be June 23, 2016.
3. The avoided cost rate includes payment for capacity, NorthWestern's recapture of interconnection upgrade costs, and regulation expense but does not include renewable energy credits, which will remain with Consolidated Edison Development, Inc.
4. Further findings of fact and conclusions of law are unnecessary given the acceptance of the rate by Consolidated Edison Development, Inc.

If there is no objection from NorthWestern or the Commission Staff to the text of the order set out above, I'll prepare an order with the proper caption for the Commission's signature and send it to you for signing.

Yours sincerely,



William Taylor
One of the attorneys for
ConEdison Development

Copied via email: Al Brogan, Kristen Edwards, Amanda Reiss, Michael Uda