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 **CONSOLIDATED EDISON DEVELOPMENT'S MOTIONS IN LIMINE**

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Complainant Consolidated Edison Development, by and through its counsel of record, makes the following motions in limine with respect to the proposed testimony of the South Dakota Public Utilities Commission Staff witnesses Maini and Thurber and Respondent Northwestern Energy witness LaFave:

1. To prohibit the PUC Staff from offering portions of the pre-filed testimony of Ms. Maini and Mr. Thurber; and
2. To prohibit Northwestern Corporation from offering portions of the pre-filed testimony of Mr. LaFave

all for the reasons and on the grounds hereinafter stated.

BACKGROUND AND AUTHORITY

Background and procedural history.

Consolidated Edison Development proposes the development of three wind energy projects in Buffalo, Aurora and Davison counties. The projects are Qualified Facilities in the

sense of the Public Utilities Regulatory Policies Act of 1978 (PURPA) and the Federal Energy Regulatory Commission's (FERC) Order 69, the order that implemented PURPA federal regulations. The projects are located in Northwestern Corporation's service territory. ConEd's predecessor in interest, Juhl Energy, Inc., unsuccessfully attempted to negotiate a levelized avoided cost rate with Northwestern that would apply to the energy produced by the projects in the twenty years following their entry into commercial service. After the collapse of discussions, Juhl petitioned the Commission to set the avoided cost rate.

The Commission entered a procedural order August 19, 2016. Pursuant to the order, all parties prepared and submitted so-called "pre-filed" witness testimony, which presumably they will offer at the hearing scheduled for April 11. ConEd believes that much of the proposed Staff and portions of the proposed Northwestern testimony is inadmissible. For those reasons, it makes these motions in limine.

Motions in limine.

In limine is derived from the Latin phrase meaning "in the beginning" or "on the threshold". Motions in limine are heard in advance of trial. They seek a court order requiring parties, attorneys, and witnesses to limit their testimony. A motion in limine is defined as "[A] motion, heard in advance of [trial], which asks the court to instruct the [party], its counsel and witnesses not to mention certain facts unless and until permission of the court is first obtained". *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 426 (SD 1994), *First Premier Bank v. Kolcraft*, 2004 SD 92, 686 N.W.2d 430; *St. John v Peterson,* 2013 S.D. 67, 837 N.W.2d 67.

Application of the rules of evidence.

Adjudicatory hearings conducted by the Public Utilities Commission are contested case hearings per the South Dakota Administrative Procedures Act, SDCL 1-26 *et seq.* SDCL 1-26-1(1), *B.K ex rel Kroupa v. 4H,* 877 F. Supp.2d 804 (2012). When conducting a contested case hearing, the Commission acts in a quasi-judicial role. It is the "trier of fact" in the sense that it must decide competing questions of fact presented in the course of the hearing, in this case, the appropriate method for determining avoided cost.

The subject hearing is clearly an adjudicatory hearing. SDCL 1-26-19 (1) provides that in adjudicatory contested case hearings "The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state. . .shall be followed". Evidence rule 104[1], provides "The court must decide any preliminary question about whether a witness is qualified. . . or evidence is admissible." Thus, the Commission is required to hear and rule on *limine* motions in advance of the contested case hearing.

Expert testimony.

All fact testimony must be based on personal knowledge. Rule 602. Lay witnesses may not express opinions except in those situations where they have personal knowledge and the opinion is not based on scientific, technical or specialized knowledge. Rule 701; *State v Bittner,* 359 N.W.2d 121 (S.D. 1984).

Rule 702 addresses expert testimony. The statute allows a witness ". . .who is qualified as an expert by knowledge, skill, experience, training, or education. . ." to give an opinion, but

[1] The South Dakota rules of evidence are codified in SDCL Chapter 19-19. Properly cited as "SDCL 19-19-XXX", in this brief the citation is shortened to "Rule XXX", the rule number being the section number from the Chapter 19-19.

only if "the testimony is the product of reliable principles and methods" and the expert has "reliably applied the principles and methods to the facts of the case."

The United States Supreme Court requires that an expert be qualified and the expert's testimony relevant, meaning that the evidence has a ". . .tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The evidence must " assist [the trier of fact]". *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597, 113 S. Ct. 2786, 2799, 125 L.Ed.2d 469 (1993). The burden is on the proponent of the testimony to show that the proffered testimony meets *Daubert* standards. *Burley v Kytec Sports Equip.,* 2007 SD 82, 737 N.W.2d 397.

It is the function of the trier of fact to resolve evidentiary conflicts. *State v. Packed*, 2007 S.D. 75, 736 N.W.2d 851 (quoting *State v. Svihl*, 490 N.W.2d 269, 274 (S.D. 1992). Trial courts must be careful to distinguish between expert opinion that helps the trier of fact and expert opinion that merely endorses a witness's testimony. An expert's role is not to tell the trier of fact what to decide. *State v Bucholz*, 2013 S.D. 96, 841 N.W. 2d 449.

Application.

The teaching lesson from the statutes and the Supreme Court opinions can be refined as:

1. The Commission sits as the trier-of-fact in this case. It is the Commission's responsibility to resolve evidentiary conflicts and decide the case.
2. A witness who claims to be an expert on a given subject must be qualified through knowledge, skill, experience, training or education with respect to that subject. The party

who offers the purported expert testimony has the burden of showing the expert is properly qualified.

3. Once qualified, the expert can give an opinion based on the facts, but cannot give an opinion that merely endorses the testimony of another witness or tells the trier of fact what to do.

ARGUMENT AND AUTHORITIES

1. Staff Witness Maini does not qualify as an avoided cost expert.

Ms. Maini's pre-filed testimony commences with a recitation of her qualifications. While she has long experience in the financial side of the electrical industry, she says nothing about experience in avoided cost calculations. Nor does she claim any experience with, much less any expertise in, the Ventyx Promod IV or the Ascend Analytics PowerSimm simulations used by the parties.

As the Commission knows from its now nearly four year old Rules Docket RM 13-002, avoided cost calculation is a highly technical subject, not closely defined by the Federal Energy Regulatory Commission. Methods of calculation are subject to considerable debate among utilities and QFs. By FERC regulatory design, calculation is largely left to state regulatory agencies for determination. As demonstrated by the pre-filed testimony in this case, avoided cost calculation is largely a product of sophisticated computer simulation and highly technical analysis.

Rule 702, supported by *Daubert, supra.* and its South Dakota progeny, sets a high bar for technical experts. Rule 702 allows a witness who is qualified as an expert on a given subject "..

.by knowledge, skill, experience, training, or education. ." to give an opinion, but only if "the testimony is the product of reliable principles and methods" and the expert has "reliably applied the principles and methods to the facts of the case."

Ms. Maini is, by her resume and reputation, an expert in electric rate calculation, an experienced witness, and a congenial person. All that said, she is not, by her own admission, an expert ". . . by knowledge, skill, experience, training, or education. . ." in avoided cost calculation. In fact, with all due respect to her skills, she makes no representation that she has *any* experience with avoided cost calculation. Maini pre-filed testimony, pages 1&2.

A substantial body of law has developed about expert witness qualifications since *Daubert* was decided in 1993. In South Dakota, before a witness can give opinion testimony, it must be shown that she is in fact an expert *on the subject matter on which she will opine*....in this case the calculation of avoided cost under PURPA, FERC and SD PUC rules. As noted in *Burley v Kytec Sports Equip., supra.,* the burden is on the proponent of the testimony to show that the proffered testimony meets *Daubert* standards. Ms. Maini, by her own admission, is not an expert in avoided cost. The Commission Staff has not met its burden to demonstrate her qualifications. Accordingly, Ms. Maini should not be permitted to testify with respect to avoided cost matters, because her qualifications do not meet the threshold of Rule 702 or *Daubert.* Complainant respectfully requests the Commission so rule.

2. <u>Ms. Maini's summary of the litigant's views on avoided cost is not admissible.</u>

In section III of her proposed testimony, Ms. Maini summarizes the testimony of Messrs. Schiffman and LaFave with respect to how each calculated avoided cost. To be admissible,

testimony must be relevant. Rule 401 defines "relevant". Testimony is relevant if "it has any tendency to make a fact more or less probable than it would be without. . ." the testimony.

One of the questions posed characterizes the nature of her statements perfectly...."Please explain Mr. Schiffman's second area of disagreement...". Ms. Maini's "explanation" of Messrs. Schiffman or LaFaves testimony is simply irrelevant and immaterial to any fact in issue. Her explanation does not tend, in any fashion, to make either Messrs. Schiffman or LaFave's avoided cost testimony, as Rule 401 requires, "more or less probable." Rule 402 provides "Evidence which is not relevant is not admissible". Ms. Maini's summary of other witnesses testimony is argument, more properly made by counsel for the proponent of the evidence, and not admissible as evidence. Complainant respectfully requests the Commission so rule.

3. Ms. Maini's "recommendations" on elements of avoided cost are advisory and invade the province of the Commission.

Early in her proposed testimony Ms. Maini says she is not going to calculate avoided costs (p.4, lines 8-14). Rather, she says her ". . .recommendations are focused on the methodology that should be used to calculate avoided costs." (p. 4, lines 10-11.) Ms. Maini goes on to summarize the testimony of Messrs. Schiffman and LaFave, the parties avoided costs experts, describe where they disagree, and then to express her own views on what aspects of each witnesses testimony seems appropriate to the Commission's decision. While interesting from the academic perspective, her proposed testimony is not testimony at all, it is an argument, a commentary on the testimony of other witnesses, in support of her personal sophisticated but non-expert views.

An expert's role is not to tell the trier of fact what to decide. *Bucholz, supra.* Ms. Maini's proposed testimony is perfectly characterized by this question, posed to her on page 26, lines 12-13.

> "In summary, what are your conclusions and recommendations regarding methodology for avoided energy costs?"

The ultimate question in this case is the correct methodology for calculating avoided energy costs, a decision the Commission must make. Ms. Maini's views on that subject, with all due respect, quite simply are an attempt to tell the Commission, the trier of fact, what to decide. She presumes to offer her judgment, not even cast as an opinion, as to who is right and who is wrong as between Messrs. Schiffman and LaFave. That is the ultimate question in this case, the sole and exclusive province of the Commission to decide. Accordingly Ms. Maini's testimony is inadmissible and the Commission should so rule.

4. Mr. Thurber is not qualified and his testimony is largely argument.

Staff witness Jon Thurber, like Ms. Maini, makes no claim to avoided cost expertise in his resume. Although experienced in the electric industry through his employment history, he apparently has never performed an avoided cost analysis, nor does he profess to know anything about the modeling systems employed by the parties. For the reasons stated above, he simply is not qualified to render opinions on either side's avoided cost calculations.

Section IV and parts of Section V of Mr. Thurber's pre-filed testimony is a summary of the Public Utilities Regulatory Policies Act of 1978 (PURPA) and FERC Order 69, the order that implemented PURPA federal regulations, and a history of past PUC involvement with avoided

cost. While well written and a concise summary of elements of the body of PURPA law and regulation, it is legal argument that should be advanced by Staff in briefing and is irrelevant and incompetent as testimony.

Section V of Mr. Thurber's proposed testimony, similar to Ms. Maini's proposed testimony, summarizes Northwestern and Juhl (now Consolidated Edison Development) testimony. His summary is irrelevant and is immaterial *as evidence,* for all the reasons Ms. Maini's summaries are inadmissable. It may be appropriate as argument, but is nothing more than his view of evidence that may or may not be proposed by the parties.

Going a step further than Ms. Maini, Mr. Thurber professes to summarize evidence presented in EL 11-006, the Oak Tree case. Mr. Thurber then attempts to compare the parties' avoided cost methodology in this case to the Oak Tree methodology. His views of the evidence presented and outcome of the Oak Tree case are incompetent at many levels....first, the fifteen page 2013 Oak Tree findings of fact, conclusions of law and order speaks for themselves and are the official, binding explanation of the outcome of the case. What Mr. Thurber thinks they mean is irrelevant. If the findings and conclusions have precedential value in this case, that is for the Commission to decide, not for Mr. Thurber to opine upon. His views of what the Oak Tree case means and its application to this case are simply irrelevant.

Rule 401 defines relevant evidence. Testimony is relevant if "it has any tendency to make a fact more or less probable than it would be without. . ." the testimony. The facts presented by ConEd and Northwestern relevant to proper calculation of avoided costs in this case have nothing to do with Mr. Thurber's proposed testimony on the history of PURPA, the body

of regulatory law that has grown up around it, and prior Commission decisions. At best his dissertation is argument, and in any case it is irrelevant as evidence.

The final question in Section V of Mr. Thurber's presentation asks "Which of the parties avoided cost methodology is consistent with FERC and Commission policy?" That is the ultimate question before the Commission, and with all due respect to Mr. Thurber, his view is not testimony, it is argument. His response is nothing more than an effort to tell the Commission how to decide the case and as such entirely invades the province and duty of the Commission. Accordingly that portion of Mr. Thurber's testimony is inadmissible and the Commission should so rule.

5. Mr. Thurber's application of "proposed rules" to the outcome of this case is impermissible.

Section VI of Mr. Thurber's presentation attempts to engraft the proposed rule on legally enforceable obligations from Docket RM13-002, the avoided cost rules docket, into the outcome of this case. Any effort to engraft the proposed rule, or any comments made by anyone in the course of discussion of the rule as evidence in this case is inappropriate for the simple reason that the proposed rule is only proposed, it isn't a rule and has no effect on this case, precedential or otherwise.

The sections 1-13 of the South Dakota Administrative Procedures Act, SDCL 1-26, the law of South Dakota for more than a half century, carefully define the process under which administrative rules must be adopted. The proposed rule has not been adopted and has no role in this case.

Mr. Thurber acknowledges the rule is only proposed, not adopted. Whether or not Complainant comports to the draft rule, favors or disfavors the draft rule, or whether the draft rule is a good or bad idea simply is inappropriate to *even consider* in the adjudication of this case because *it is not a rule and does not have the force of law*. To allow Mr. Thurber to testify that the proposed rule is reasonable and should govern the outcome of this case makes a mockery of the Administrative Procedures Act and the notice and comment rule making process it requires. Accordingly all references to the proposed rule and comments made for or against the rule are inadmissible and the Commission should so rule.

6. Mr. Thurber's dialogue on carbon costs is legal argument, not testimony.

In Section VII, Mr. Thurber again summarizes the parties' positions on carbon costs, and then opines whether carbon costs should be included in avoided cost. For all the reasons stated above in objection to Ms. Maini and Mr. Thurber's bent to summarize the testimony of others, his efforts to summarize here should be excluded as evidence.

Finally, Mr. Thurber's opinion on whether carbon costs should be included in avoided cost, elicited on page 20, lines 12-16 of his proposed testimony, is beyond the scope of his expertise and is nothing more than an effort to tell the Commission what to decide. Accordingly Mr. Thurber's discussion of carbon costs is inadmissible and the Commission should so rule.

7. Mr. LaFave's discourse on PURPA background is inadmissible.

Like Mr. Thurber, Mr. LaFave expounds on his views of what he calls "the framework for the federal and state regulatory requirements for qualifying facilities." On page 8, lines 12-19 of his testimony he explains the 1982 Commission Order F-3365. On page 9, lines 7-

15 he explains the LEO concept and how it fits into FERC regulations. Mr. LaFave's proposed testimony is nothing more than his explanation his understanding of the law and regulations governing LEOs and avoided cost. Mr. LaFave's explanations of the law are argument and not relevant evidence, for all of the reasons explained above. Accordingly, they should not be admitted as evidence.

Conclusion

For the reasons and on the grounds expressed herein, Complainant Consolidated Edison Development respectfully requests the Commission enter its order granting the foregoing motions in limine, restricting the Commission Staff from offering the noted pre-filed testimony of Ms. Maini and Mr. Thurber, and Northwestern Corporation from offering the noted portions of the pre-filed testimony of Mr. LaFave.

Dated this 27th day of February, 2017.

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