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

IN THE MATTER OF THE)	
COMPLAINT BY CONSOLIDATED)	
EDISON DEVELOPMENT, INC.)	NORTHWESTERN ENERGY'S
AGAINST NORTHWESTERN)	RESPONSE TO CONSOLIDATED
CORPORATION d/b/a)	EDISON DEVELOPMENT, INC.'S
NORTHWESTERN ENERGY FOR)	MOTION FOR ENTRY OF ORDER
ESTABLISHING A PURCHASE)	CONCLUDING CASE
POWER AGREEMENT)	
)	EL16-021

NorthWestern Energy (“NorthWestern”) objects to Consolidated Edison Development, Inc.’s (“ConEd”) Motion for Entry of Order Concluding Case (“Motion”) and respectfully requests that the Public Utilities Commission (“Commission”) deny the Motion.

Background

During its August 15, 2017 meeting, the Commission considered and decided all contested issues in this docket and directed NorthWestern to rerun its model using inputs from June 23, 2016. On August 24, 2017, NorthWestern filed avoided cost calculations in compliance with the Commission’s direction. On both October 27, 2017 and November 8, 2017, ConEd

Attorney William Taylor sent correspondence to Commission Attorney Mr. de Hueck.

NorthWestern submitted a response on October 31, 2017, by email and then again by a filing in the docket on November 21, 2017. On November 30, 2017, ConEd filed its Motion for Entry of Order Concluding Case.

Argument

1. The Commission must make appropriate findings of fact and conclusions of law.

ConEd requests that the Commission issue an order devoid of findings of fact and conclusions of law. Such an order would violate statute. Statute requires, “A final decision or order adverse to a party in a contested case shall be in writing or stated in the record...It shall include findings of fact and conclusions of law separately stated.” SDCL 1-26-25.

A contested case is “a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” SDCL 1-26-1(2). ConEd initiated this matter as a contested case by filing a complaint against NorthWestern. Although ConEd now states that it “is willing to accept NorthWestern’s August 23, 2017 avoided cost rate,” it contests:

- (a) The means and methods of determining payments for capacity and the calculation thereof, and
- (b) The appropriateness of including regulation costs, 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.

Brief in Support of Motion for Entry of Order Concluding Case, pp. 3-4. ConEd cannot make this an uncontested matter by agreeing to accept the outcome of the Commission’s decision.

This remains a contested case; therefore, it is proper for the Commission to issue an order with findings of fact and conclusion of law.

An agency's order without finding of fact and conclusions of law violates the law. *State Dept. of Public Safety v. Eastman*, 273 N.W.2d 159, 161 (1978). *See also, Moulton v. State*, 412 N.W.2d 487, 494 (1987) (Absent findings of fact and conclusion of law, a formal decision never existed.). The findings of fact must be based solely on the evidence and matters officially noticed. SDCL 1-26-23.

The parties have developed an evidentiary record ample for the Commission to issue an order. The record includes:

- ConEd's Complaint with exhibits,
- the Prefiled Direct Testimonies of Roger Schiffman and Corey Juhl,
- NorthWestern's Answer to the Complaint,
- the Prefiled Response Testimonies of Luke Hansen, Bleau LaFave, and Autumn Mueller, with attached exhibits,
- the Testimonies of Jon Thurber and Kavita Maini, with exhibits,
- ConEd's Amended Complaint,
- the Rebuttal Testimonies of Autumn Mueller and Luke Hansen,
- the Rebuttal Testimony of Roger Schiffman,
- the written transcript of the Hearing held on April 11-12, 2017,
- the parties' post-hearing briefs, and
- NorthWestern's Supplemental Evidence submitted on August 24, 2017.

During the August 15, 2017 Commission meeting, the Commission considered and adopted seven motions. Those motions included:

- (1) Finding that a legally enforceable obligation was established on June 23, 2016 for all three projects;

- (2) Supporting the avoided cost model offered by NorthWestern using inputs from June 23, 2016;
- (3) Approving NorthWestern's position on situations 1, 2, and 3;
- (4) Requiring that there be no adjustment for renewable energy credits;
- (5) Adopting NorthWestern's method for handling interconnection costs;
- (6) Setting the capacity value at \$1.38/MWh beginning in 2019 and continuing through the remainder of the contract; and
- (7) Requiring that the model be rerun with the same methodologies that NorthWestern used in its original model.

Minutes of the Commission Meeting, August 15, 2017. Any Commission order resolving this matter must recognize and memorialize the facts and law on which the Commission based its adopted motions. Contrary to ConEd's assertion, the Commission will not fulfill its role until it issues an order as required by statute.

2. Administrative efficiency supports a fulsome order with developed findings of fact and conclusions of law.

Courts and administrative agencies should promote judicial and administrative efficiency. Doing so will conserve scarce resources, prevent multiple litigation of settled matters, and reduce regulatory litigation burdens. This case is the second major avoided cost docket to be decided by the Commission in the past four years.¹ In this matter, the Commission decided many issues that it did not decide in the previous docket. If the Commission issues an order with findings of fact and conclusions of law, utilities and QF developers will be able to follow the Commission's guidance and avoid re-litigation of the decided matters. Hopefully, NorthWestern and potential QFs will be able to use the guidance in the Commission's order to negotiate and agree on many

¹ Docket No. EL11-006 was closed on September 13, 2013.
NWE Response to ConEd Motion for Entry of Order Concluding Case
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issues that were litigated in this docket. However, an order without findings of fact and conclusions of law will not provide the needed guidance. The Commission will be required to decide the same matters repeatedly. Neither the Commission, nor the parties, will be well served by such a circumstance.

The cases cited by ConEd in support of its suggestion that “judicial economy requires the matter to be concluded with a simple order” are not applicable. In the first case, the convicted defendant appealed a circuit court’s amended judgment sentencing him to death. *State v. Berget*, 2014 SD 61, ¶ 1, 853 N.W.2d 45, 48. In referencing “judicial efficiency,” the Court stated that the Constitution requires circuit courts to give deference to the Supreme Court’s remand instructions and quoted, “If the circuit court’s original jurisdiction could spontaneously resurrect on remittal, the defined roles of our tiered judicial system . . . and the judicial certainty and efficiency they foster would be nullified.” *Berget* at ¶ 18, p. 52. The case did not suggest that circuit courts should not make necessary findings of fact and conclusion of law, even on remand.

In the second case, a child’s mother appealed a circuit court’s granting of permanent guardianship to the child’s grandmother. *In re Guardianship of S.M.N.*, 2010 S.D. 31, ¶ 1, 781 N.W.2d 213, 216. In discussing a circuit court’s options, the Court stated:

If, while a guardianship petition pursuant to this chapter seeking custody by a person other than the parent is pending, an action is commenced pursuant to 25-4, 25-5, 25-5A, 25-6, or 25-8, the court may, in its discretion, dismiss the guardianship proceeding and defer the child custody matter to the other proceeding or considering the stage of the proceedings, judicial economy, and best interests of the child, retain jurisdiction and establish the guardianship, or enter an appropriate protection order pending resolution of the pending proceedings.

Id. at ¶ 15, 219-220. Nothing in the decision suggests that the circuit court should not make complete findings of fact and conclusions of law.

Conclusion

NorthWestern reiterates its response of November 21, respectfully requesting the Commission issue an order consistent with the motions that it adopted on August 15, 2017. NorthWestern's August 24 filing showed avoided cost for ConEd's projects is \$26.91/MWh, including \$1.38/MWh for capacity. NorthWestern calculated this value as directed by the Commission per the August 15, 2017 meeting. NorthWestern requests that the Commission issue a final order with findings of fact and conclusions of law underpinning the decision that it made on August 15, 2017.

Dated this 12th day of December, 2017.

**NORTHWESTERN CORPORATION,
d/b/a NORTHWESTERN ENERGY**



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 12th day of December 2017, true and correct copies of the foregoing, NORTHWESTERN ENERGY'S RESPONSE TO CONSOLIDATED EDISON DEVELOPMENT, INC.'S MOTION FOR ENTRY OF ORDER CONCLUDING CASE in Docket No. EL16-021, were served on the following via electronic mail:

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