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**CONSOLIDATED EDISON  
DEVELOPMENT'S  
REPLY TO THE STAFF AND  
NORTHWESTERN'S BRIEFS**

After more than a year of futile discussions with NorthWestern Energy in an effort to obtain a nondiscriminatory avoided cost rate for three proposed wind projects in eastern South Dakota, Juhl Energy, Inc., filed a complaint with the South Dakota Public Utilities Commission requesting the Commission “ . . . determine an appropriate avoided cost for the Juhl projects . . . consistent with PURPA, FERC’s implementing regulations, and the Commission’s [1980] PURPA order.” Juhl Energy, Inc., was later acquired by Consolidated Edison Development, Inc., ConEd Development was named as the complainant, and the complaint amended accordingly. Hearing on the complaint was conducted in April of 2017. In August of 2017, the Commission directed NorthWestern to recalculate avoided cost using the date of the complaint as the date of the legally enforceable obligation. NorthWestern recalculated avoided cost at \$26.91 and published the recalculation on August 24, 2017.

On November 8, 2017, ConEd Development, by letter to commission counsel deHueck, advised the parties 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 to ConEd Development's proposed resolution, rather, insisting on further proceedings, including development of findings of fact and conclusions of law.

On November 30, 2017, ConEd Development made a motion requesting the Commission enter a simple order acknowledging acceptance of the avoided cost rate and the case be concluded accordingly. The motion is set for hearing on December 19, 2017. Both NorthWestern and the Commission's staff submitted briefs in response to the motion.

**1. Principles of offer and acceptance do not apply.**

Staff argues that principles of offer and acceptance, fundamentals of contract law, should govern the outcome of this motion. Staff contends that the \$26.91 rate "is not an offer." The Staff's argument is flawed. Offer and acceptance in the sense of contract law have no application to this situation.

The Public Utility Regulatory Policy Act of 1978, 16 U.S.C.A. 824a-3 ("PURPA") and FERC regulations that implement PURPA, in particular 18 C.F.R. § 292.303(a) *require* NorthWestern to purchase "any energy and capacity which is made available from a qualifying facility." NorthWestern, whether it likes it or not, has no choice. PURPA and its regulations are mandatory. If ConEd Development wants to sell energy to NorthWestern, NorthWestern must buy it, at NorthWestern's full avoided cost. 18 C.F.R. § 292.304(b)(2). There is no offer, only acceptance, which is about as far from traditional notions of negotiated contracts as you can get.

Unlike traditional notions of contract law, ConEd Development's decision to accept a proposed avoided cost rate is unilateral. Once the rate is established and it is acceptable to

ConEd Development, NorthWestern has no choice but to accept the energy and capacity and pay the rate.

Congress enacted PURPA to encourage development of alternative means of energy generation. PURPA is the law of the nation. PURPA was expressly re-authorized and reaffirmed in the Energy Policy Act of 2005. Until Congress says otherwise, Northwestern *must* buy the energy and capacity generated by the ConEd Development projects. At the Commission's direction, NorthWestern published an avoided cost rate of \$26.91/MWh. Although reluctantly, ConEd Development says it accepts the rate. That ends the discussion.

The Staff's argument that principles of offer and acceptance should apply in this circumstance is simply wrong.

**2. NorthWestern has published what it believes to be the avoided cost rate.**

In its cover letter of August 24, 2017, NorthWestern advised the Commission "enclosed for filing is NorthWestern Energy's Avoided Cost Calculations . . ." In an October 31, 2017, letter to Mr. deHueck, NorthWestern said "NorthWestern calculated this value exactly as directed by the Commission." In a November 21, 2017, letter, NorthWestern said "NorthWestern's position remains the same as stated in our October 31 correspondence." In its December 12, 2017, brief, on page 6, NorthWestern said "NorthWestern's August 24th filing showed avoided cost for ConEd's projects is \$26.91/MWh . . ."

It is clear from the filings and correspondence that NorthWestern believes \$26.91 is an appropriate avoided cost. In its briefing responsive to this motion, NorthWestern does not assert that the Commission was incorrect in its determination of the means and method of calculating

avoided cost, that the LEO date chosen by the Commission was incorrect, or that the avoided cost of \$26.91 is flawed or incorrect.

Five weeks ago, on November 8, 2017, ConEd Development said, in a letter to Commission counsel deHueck, "Con Edison 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." The avoided cost rate having been determined and ConEd Development having said it accepts it, nothing remains to be done except conclude discussions on the power purchase agreement and get on with the construction of the projects. ConEd Development would like to expedite that process.

If, as NorthWestern contends, findings of fact and conclusions of law are required to "avoid re-litigation of the decided matters," NorthWestern's argument is misplaced. Without findings and conclusions, no appeal of this docket will stand, so the Commission order is, for all practical purposes, final. There will be no "re-litigation of decided matters" because there can be no appeal and accordingly no remand or retrial.

NorthWestern argues that findings and conclusions are an expression of the Commission's views on how avoided cost should be calculated. Contested case hearings are for the presentation of evidence, not to make broad policy decisions. The proper place for the Commission to explain how it believes avoided cost should be calculated is a rule making docket. RM13-002 - In the Matter of the Consideration of Standards to Govern Avoided Cost Determinations, has been open for almost four years. If the Commission wishes to make a policy determination on how to calculate avoided cost, that docket is the place to do it. Notice and

comment rule making allows all affected parties, not just ConEd Development and NorthWestern, to express their views.

3. **An adversely affected party may waive findings and conclusions.**

The Staff and NorthWestern's citation to SDCL § 1-26-25 is inapposite. SDCL § 1-26-25 requires only that findings and conclusions be entered in "a final decision or order *adverse to a party* . . ." In this case, the outcome isn't adverse to NorthWestern or the Staff, rather, \$26.91/MWh is NorthWestern's number and substantially less than ConEd Development sought to prove in its case. On the face of it, the decision is *adverse* to ConEd Development, not NorthWestern. The rules of civil procedure allow the waiver of findings and conclusions. SDCL § 15-6-52(b) provides "findings of fact and conclusions of law are waived . . . by oral consent in open court . . ." ConEd Development is clearly willing to waive findings and conclusions in the interests of getting on with the project and judicial efficiency.

**Conclusion**

ConEd Development has every legal right under PURPA and FERC regulations to say that it accepts the proposed avoided cost that NorthWestern has proposed. Under the circumstances, further proceedings in this case are pointless, and would serve only to cost more money and delay construction of the project.

ConEd Development prays the Commission rule accordingly and grants its motion and enter an order substantially in the form proposed with the motion.

Dated this 15th day of December 2017.

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### **Certificate of Service**

I hereby certify that on the 15<sup>th</sup> day of December 2017, I served via email a true and correct copy of the Reply Brief on the following:

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