BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT BY CONSOLIDATED EDISON DEVELOPMENT, INC. AGAINST NORTHWESTERN CORPORATION DBA NORTHWESTERN ENERGY FOR ESTABLISHING A PURCHASE POWER AGREEMENT	)))))))	**STAFF'S RESPONSE IN OPPOSITION TO CONSOLIDATED EDISON DEVELOPMENT'S MOTIONS IN LIMINE** **EL16-021**

Staff submits this brief in opposition to Consolidated Edison Development, Inc's (Consolidated Edison Development or CED), motion to prohibit Staff from offering portions of the pre-filed testimony of Ms. Kavita Maini and Mr. Jon Thurber.

Staff does not contest CED's claims that this adjudicatory proceeding before the Public Utilities Commission (Commission) is a contested case, that the Administrative Procedures Act applies, that the Commission acts in a quasi-judicial role, or that the Commission serves as the "trier of fact" in this case. Staff does disagree with Consolidated Edison Development's application of snippets of the law in order to exclude the relevant testimony of Staff's expert witnesses. Staff contends that when the applicable laws, coupled with relevant case law, are applied as a whole, CED's argument to exclude the expert testimony of Mr. Thurber and Ms. Maini is lacking.

<u>Authority</u>

CED argues to exclude Staff witness testimony on various grounds including that the witnesses are not qualified as experts and that the witness's offered testimony is inadmissible for various reasons.

Under SDCL 19-19-702 (Rule 702), whether a witness is qualified as an expert can only be determined by comparing the areas in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony. *State v. Kvasnicka* adopts an application of this rule that the "court has broad discretion concerning the qualification of experts and the admissibility of expert testimony." *Kvasnicka, 2013 S.D. 25, ¶18, 829 N.W.2d 123, 128. Burley v. Kytec Innovative Sports Equipment Inc.* instructs that in regards to expert testimony, the "rules of evidence are interpreted

liberally" by "relaxing the traditional barriers to 'opinion' testimony." *Burley*, 2007 S.D. 82, ¶24, 737 N.W.2d 397, 405.

Once the court determines that a witness is qualified, the court must determine the admissibility of the expert's testimony. Rule 702 governs the admission of expert testimony and the trier of fact has broad discretion in ruling on the admissibility of expert opinions. *Daubert* interpreted this rule and established the *Daubert* test, which instructs that expert testimony which "rests on reliable foundation and is relevant to the task at hand" is admissible. SDCL 19-19-401 (Rule 401) defines relevance as "evidence having any 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." *State v. Lemler* provides that "pertinent evidence based on scientifically valid principles will satisfy the reliability demands of the *Daubert* test. *Lemler*, 2009 S.D. 86, ¶23, 774 N.W.2d 272, 280. The *Lemler court* goes on to clarify that a party who offers expert testimony is not required to prove to a judge in a *Daubert* hearing that the expert's opinion is correct: all that must be shown is that the expert's testimony rests upon good grounds, based on what is known, and any other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial. *Id.* at ¶34.

In administrative proceedings, SDCL 1-26-19 provides the trier of fact with additional discretion in making determinations as to the admissibility of evidence and provides "when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." In *Daily v. City of Sioux Falls*, the South Dakota Supreme Court relied on federal court decisions and recognized that the rules of evidence in administrative proceedings are not given the same weight as in traditional judicial proceedings. *Daily,* 802 N.W. 2d 905.

When these authorities are applied in this case, it is clear that the pre-filed testimony of Ms. Maini and Mr. Thurber meets the established standards and is admissible in its entirety in this proceeding.

1) <u>Ms. Maini is qualified as an avoided cost expert.</u>

CED is incorrect in its assertion that Ms. Maini does not qualify as an avoided cost expert witness in this proceeding.

Ms. Maini holds Master's Degrees in both Business and Applied Economics from Marquette University and has over 25 years of experience in the energy industry. Over the course of her more than twenty-five years working in the energy industry, Ms. Maini has directly worked and provided professional consultation in a wide variety of industry specific subjects including: process and impact evaluations for demand side management programs, forward price curve analysis, asset valuation analysis, Demand Side Management (DSM) evaluations and neural network forecasting, electric and natural gas procurement, contract negotiations, rate design, on-site generation feasibility analysis, class cost of service studies, resource planning, revenue requirement related issues, Midcontinent Independent System Operator (MISO) related matters, and various energy policy matters. Additionally, Ms. Maini has served as an End Use Sector representative at the Advisory Committee and Planning Advisory Committee, which provides policy guidance to MISO relating transmission planning, including a comprehensive vetting related to MISO's use of futures scenarios and input assumptions in its screening and hourly production cost models.

CED's assertion that the subject area of avoided cost is so specialized that Ms. Maini's advanced degrees in business and applied economics, coupled with her twenty-five years of industry specific experience utilizing and screening various cost models does not qualify her to provide expert testimony on any avoided cost issue is without merit. Utilities commonly use avoided cost principles and calculations in numerous aspects of industry business practices, including integrated resource planning and rate design. CED expressly admits that "Ms. Maini is, by her resume… an expert in electric rate calculation." To then claim that this expertise does not extend into the area of avoided costs is unreasonable.

Ms. Maini's experience is extensive and robust, giving her a unique set of qualifications to provide testimony that will assist the Commission in deciding the issues in this proceeding. The claim that Ms. Maini's experience does not make her qualified to offer testimony in any issue of this case related to avoided cost is not consistent with the applicable standards. Staff has presented ample evidence that

Ms. Maini qualifies as an expert witness to provide expert testimony in this case and her testimony should be admitted in this case.

2) Ms. Maini's summary of the litigant's views on avoided cost is admissible.

CED contends that Ms. Maini's summary of the litigant's views on avoided cost is not admissible because it is irrelevant and immaterial to any fact in issue. CED bases its argument on a fragment of the text of Rule 402, provides that "evidence which is not relevant is not admissible." However, in its argument CED fails to mention that Rule 402 also specifically provides that "all relevant evidence is admissible." CED also fails to mention that in applying these rules, the Court has ruled that the "law favors admitting relevant evidence no matter how slight its probative value." *State v. Bunger*, 2001 S.D. 116, ¶11, 633 N.W.2d 606,609. The Court has determined that "the standard of logical relevance is lenient and permits evidence to be admitted even if it only slightly affects the trier's assessment of the probability of the matter to be proved" and that "if when considered collectively with other evidence it tends to establish a consequential fact, such evidence is relevant." *Supreme Pork, Inc. v. Master Blaster*, 2009 S.D. 20, ¶46, 764 N.W.2d 474, 488.

Contrary to the assertions of CED, Ms. Maini's testimony, when considered as a whole and collectively with the other evidence presented, is extremely relevant and material to the issues in this case. Ms. Maini's testimony provides a third party analysis of the modeling and methodologies used by NorthWestern and CED in calculating avoided costs which is inherently relevant and material to this case. Additionally, Ms. Maini's inclusion of the litigant's summaries provides transparency and a foundation for Ms. Maini's analysis and expert opinion. This foundation gives the trier of fact additional information to consider when determining the issues in this case and in determining how to value Ms. Maini's testimony. Prohibiting an expert witness from providing evidence regarding the foundations of her testimony is counterintuitive. As such, Staff contends that Ms. Maini's inclusion of the litigant's summaries in her testimony is relevant and should be admitted as evidence.

3) Ms. Maini's "recommendations" on elements of avoided cost do not invade the province of the Commission and are admissible.

CED argues that Ms. Maini's "recommendations" on elements of avoided costs are inadmissible because, based on *State v. Buchholtz*, the "recommendations" are advisory and invade the province of the Commission. *Buchholtz*, 841 N.W. 2d 449, 2013 S.D. 96. Staff disagrees with this argument. SDCL 19-19-704 (Rule 704) specifically provides that an expert's opinion is not objectionable just because it embraces an ultimate issue."

Ms. Maini's testimony is her expert opinion based on her review of the information at hand and is based on her relevant education and experience. Ms. Maini's "recommendations" in her testimony are not unlike the recommendations provided in the pre-filed testimony of CED's witness Mr. Schiffman. Staff contends that these "recommendations" should not be excluded because they are relevant to the case and provide additional information that will assist the Commission in making its final decision.

Additionally, the Commission has historically accepted "recommendations" in expert testimony and Staff is confident that the Commission has ample experience considering conflicting opinions and recommendations offered by expert witnesses. The Commission is free to value or disregard Ms. Maini's testimony as the Commission sees fit. To the extent that the Commission or a party disagrees with a witness's testimony or "recommendations," there is ample opportunity to question the witness before the Commission makes a determination.

4) Mr. Thurber is qualified and his testimony is admissible.

CED incorrectly alleges that Mr. Thurber does not qualify as an expert witness in this proceeding. In reality, Mr. Thurber's ample experience in both the private and regulatory sectors, coupled with his educational background, make him more than qualified to testify as an expert in this proceeding.

Mr. Thurber graduated summa cum laude with Bachelors of Science Degree in Managerial Accounting, Computer Information Systems, Business Administration, and Mathematics. Mr. Thurber has eight years of experience working directly with utility rate proceedings, including three years as the Manager of Regulatory with Black Hills Corporation and five years with the Public Utilities Commission. Throughout Mr. Thurber's professional experience, he has provided testimony regarding the appropriate test year, rate base, revenues, expenses, taxes, cost allocation, rate design, power cost adjustments,

capital investment trackers, and PURPA standards. Mr. Thurber's industry experience gives him a unique knowledge and expertise that will assist the Commission in deciding this docket.

CED claims that Mr. Thurber's lack of stated experience in modeling avoided costs through computer simulations disqualifies him as an expert in this case. CED fails to understand that avoided cost is a financial concept, not simply a computer simulation. Avoided costs are defined by the Federal Energy Regulatory Commission as the incremental cost of energy, capacity, or both, but for the purchase from the qualified facility, such utility would generate itself or purchase from another source. When PURPA was passed in 1978, avoided costs were calculated with pencil and paper because computers did not exist. As so amply proven by CED's witness Mr. Roger Schiffman, the ability to run a computer model with nonsensical inputs does not translate into the proper calculation of an avoided cost.

Mr. Thurber's financial and cost of service expertise is unique to other expert witnesses in this docket and allows him to offer the Commission relevant and reliable testimony in this case. Avoided cost calculations and methodologies are utilized in a multitude of utility filings before the Commission each year including small power production rates, power cost adjustments, and general rate cases, all areas in which Mr. Thurber boasts significant experience. If CED has concerns that Mr. Thurber's testimony in a specific area is questionable, CED will have ample opportunity to question him regarding his testimony and experience at the hearing and the Commission can then determine how to value Mr. Thurber's testimony. However, to assert that Mr. Thurber's experience is insufficient to qualify him as an expert in this case is outrageous.

4) Consolidated Edison Development asserts that Mr. Thurber's application of "proposed rules" to the outcome of this case is impermissible.

CED claims that Mr. Thurber's testimony regarding the application of "proposed rules" from RM13-002 to the outcome of this case is impermissible. CED's only argument to this claim is that the rules are merely proposed and have not been adopted, no other legal argument is offered. Staff contends that Mr. Thurber's offered testimony is not completely dependent on the rulemaking docket, as CED suggests.

Additionally, Staff contends that Mr. Thurber's testimony on the matter is relevant to issues in this case and should be not be excluded.

Mr. Thurber's testimony includes the proposed rules because the rules establish requirements that are necessary for a qualifying facility to guarantee delivery, and provide sufficient commitment from a qualifying facility to obligate itself to sell electricity to the utility. Mr. Thurber's testimony discusses the thorough and comprehensive work conducted by Staff and various stakeholders, to define the requirements of a legally enforceable obligation. That work should not be dismissed out of hand, but instead be offered as potential guidance to the Commission. CED is not prohibited to propose alternative requirements to establish a legally enforceable obligation, but to this date, CED has failed to do so. To dismiss Mr. Thurber's analysis of requirements needed to establish a legally enforceable obligation because of unsupported and wrong legal conclusions by CED is utter nonsense.

5) Consolidated Edison Development asserts that Mr. Thurber's dialogue on carbon costs is legal argument, not testimony.

CED argues, in the second paragraph of section 6 in CED's brief, that carbon costs are beyond the scope of Mr. Thurber's expertise. However, CED makes no effort to defend or explain its contention that Mr. Thurber is not qualified to provide testimony on carbon costs. CED merely states that it is beyond his area of expertise. The issue of whether to include carbon costs in the avoided cost calculation is clearly an issue before the Commission. At this point, there are no established laws at the state or federal level on carbon costs which makes this a policy type issue the Commission will consider in this case.

Mr. Thurber's resume shows extensive experience in reviewing electric generation resources through integrated resource plans and rate cases, areas in which questions of carbon costs are regularly considered. The issue of carbon costs is an area for common knowledge for someone in his position and with his background. As an expert, Mr. Thurber has not only a right but an obligation to explain upon what he based his conclusions.

CED also argues that Mr. Thurber's testimony on carbon costs is legal argument. Yet, CED offers no support for that beyond the statement in the header. The ambiguity of CED's argument denies Staff the

opportunity to properly defend against this claim. Despite the ambiguity, Staff respectfully disagrees with CED's assessment of Mr. Thurber's testimony as legal argument. Mr. Thurber's testimony provides his opinion that the carbon costs are speculative based on his knowledge of carbon costs. Mr. Thurber's testimony includes information to show his foundation for his opinion and he makes no legal statement or conclusions in his testimony. To the extent that Mr. Thurber included any past or pending case in his testimony, it was used as a basis for his opinion on the matter, and not as a legal argument.

Conclusions

Staff has provided ample evidence that Staff's witnesses qualify as expert witnesses to provide testimony in this case. Additionally, Staff has shown that the testimony offered by Ms. Maini and Mr. Thurber is relevant to the case, is reliable, and should be admitted as evidence. If indeed Consolidated Edison Development feels it has a strong argument that Mr. Thurber is not qualified to testify on carbon costs or that Ms. Maini is not qualified to testify on avoided cost calculations, the appropriate procedure would be to request to voir dire the witness at the time of the hearing, rather than make a blanket and unsupported assertion that the witnesses are not qualified.

Dated this 7th day of March, 2017.

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