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	))))))	**EL16-021** **STAFF'S RESPONSE TO CONSOLIDATED EDISON DEVELOPMENT'S MOTION FOR ENTRY OF ORDER CONCLUDING CASE**

COMES NOW, Commission Staff and files this Response to Consolidated Edison Development's Motion for Entry of Order Concluding Case.

Background

On June 23, 2016, Juhl Energy, Inc. (CED) filed a Complaint seeking resolution of a dispute with NorthWestern Corporation dba NorthWestern Energy (NWE) regarding the proper avoided cost for a long-term electric power purchase agreement. On February 15, 2017, the Commission issued an order granting Juhl's request to amend the application based on Consolidated Edison Development, Inc's (CED) acquisition of Juhl. NWE, CED, and Staff engaged in numerous rounds of discovery and on March 31, 2017 each party filed a prehearing memorandum with the Commission. The parties all participated in an evidentiary hearing before the Commission beginning April 11, 2017. On May 17, 2017, following the evidentiary hearing, CED submitted an Opening Post-Hearing Brief. NWE and Staff each submitted a Post-Hearing response brief on June 7, 2017, with CED filing a Post-Hearing Response Brief and Request for Oral Argument on June 26, 2017. Additional oral arguments were held at the Commission's August 1, 2017 Commission meeting with the parties filing a Stipulation Allowing Supplemental Evidence on August 10, 2017. At its August 15, 2017 Commission meeting, the Commission considered the matter and made numerous oral motions.

On August 24, 2017, NWE filed with the Avoided Cost Calculations along with a letter indicating the filing was a compliance filing requested from the Commission's work session. On November 21, 2017, following correspondence between the parties and Commission Counsel de Hueck, indicating that NWE does not agree with CED's proposed resolution of the matter. On November 30, 2017, CED filed a Motion for Entry of Order Concluding Case with a Brief in Support of the Motion.

Argument

1) CED cannot simply agree to the recently filed avoided cost calculation of $26.91.

CED argues that CED may unilaterally accept the $26.91 rate that was submitted by NWE in response to instructions by the Commission and the Commission should issue a simple order noting acceptance of the rate and that no further proceedings are necessary. CED claims this proposal is consistent with PURPA as 18 C.F.R. § 292.301(b) states nothing in PURPA limits a utility or QF from agreeing to a rate or term or condition which would otherwise be required by PURPA. Although this provision does not prohibit such an agreement, Staff does not agree that this provision provides any support to CED's argument that CED is able to simply accept the recently filed rate.

18 C.F.R. § 292.301(b) does give flexibility to utilities and QF's to come to an agreement that may differ from the utility's actual avoided cost. This flexibility is important as it allows a QF and a utility to negotiate the terms of a PPA, especially when the utility and the QF may not agree that a purchase price is actually the utility's avoided cost. However, this provision in no

way authorizes a QF to unilaterally agree to a purchase price if the QF does not otherwise have that ability.

Contract law does provide that upon receiving an offer from an offeror, an offeree may choose to accept the offer and create a contract, unless it is first withdrawn by the offeror or rejected by the offeree. Black's Law Dictionary defines *offer* as "[t]he act or an instance of presenting something for acceptance; specif., a statement that one is willing to do something for another person or to give that person something." In this case, the $26.91 rate filed with the Commission is not an offer. NWE filed a new rate calculation to comply with the Commission's official actions made at the August 15, 2017 Commission meeting. On August 24, 2017, NWE filed an avoided cost calculation as a "compliance filing requested from the Commission's work session." NWE made no indication that this calculation was NWE's actual avoided cost, nor that NWE agreed with the calculations. As such, the filing of this rate cannot be construed as an offer by NWE and CED does not have the ability to unilaterally accept this as the rate.

Even if NWE did agree with this rate, the proper procedure would be for CED and NWE to file a settlement agreement and bring the proposed agreement before the Commission for approval. Alternatively, if an agreement were reached between the parties, CED and NWE could enter into an agreement and CED could request to withdraw the complaint filed against NWE. Again, such a request would need to be filed with the Commission for approval.

2) Judicial Efficiency does not require the Commission to conclude the matter with a simple order, as proposed by CED.

CED asserts that the concept of judicial efficiency requires the Commission conclude this contested case with a simple order stating CED accepts a PPA price of $26.91. CED relies on

State v. Berget, 2014 SD 61, 853 N.W.2d 45 and *In re S.M.N.*, 2010 SD 31, 781, N.W.2d 213, indicating these cases show the courts favor judicial economy. Staff agrees the courts do favor judicial efficiency when appropriate, but Staff wholly disagrees with CED's assertion that judicial efficiency *requires* the Commission to issue an order containing no findings of fact or conclusions of law, merely because at this juncture CED chooses to accept the $26.91 PPA price filed by NWE at the instruction of the Commission.

The authorities cited do not advocate that a case must be disposed of in the simplest manner, but encourage a reviewing court to promote efficiency by utilizing a limited remand. *State v. Piper*, 2014 S.D. 2, ¶ 9, 842 N.W.2d 338 also addressed this concept and explained that a reviewing court should avoid general remands and should only remand specific issues back to the lower court. The Court noted that a general remand effectively vacates the initial order and causes the lower court to readdress every issue, causing inefficiencies in the judicial process. Staff is unaware of any legal concept, law, rule, or court decision that actually requires the Commission to issue a simple order as requested by CED.

In fact, SDCL 1-26-25 actually requires that an order in a contested case shall include findings of fact and conclusions of law if the final decision is adverse to a party. In the *Matter of SDDS, Inc.,* 472 N.W. 2d 502, the Court indicated "the intent of SDCL 1-26-25 is to require adequate findings to aid in meaningful judicial review." Without adequate findings of fact included in an order, a reviewing court must first remand a case back for appropriate findings in accordance with the decision before a review can occur. *Id* at 513. This causes unnecessary delay and does not promote judicial efficiency.

There is one exception to this statute that would allow a simple order. SDCL 1-26-20 does permit informal disposition of a contested case “by stipulation, agreed settlement, consent order, or default. Save for a default order, each of these alternative resolutions require agreement by the parties. In this case, neither NWE nor Staff has indicated agreement with CED’s proposed resolution of this contested case. If the Commission issued such the type of order requested by CED, NWE would have no ability to appeal the Commission’s decision. As such, state law requires the Commission’s order for this contested case include findings of fact and conclusions of law.

3) **Staff does, and will resist any motion by CED to reopen the record to present additional evidence as reserved by CED’s Motion.**

Staff notes that CED specifically reserves the right to make a motion to reopen the proceedings and make a record by offering additional evidence on matters CED alleges contributed to the flawed nature of the August 23, 2017 avoided cost calculation. CED then lists five specific matters to address. Staff will resist such a motion as CED has had every opportunity to address these matters since filing the initial complaint and issues have been fully litigated. Additionally, the Commission has issued oral decisions on these matters.

On June 23, 2016 CED filed a complaint requesting the Commission resolve the dispute between CED and NWE related to the avoided cost calculation. Since then, CED has had every opportunity to present evidence as well as legal authority and argument on these matters. CED’s failure to present evidence and authority available at the time should not be used as sufficient reason for the Commission to reopen the record.

Conclusion

The Commission is free to issue an order with the findings of facts and conclusions of law the Commission determines appropriate in this contested case, but to issue an order consisting only of CED's request is contrary to state law. Based on this, Staff respectfully requests that the Commission deny CED's Motion and issue an order in this docket which includes findings of fact and conclusions of law.

Respectfully submitted this 12th day of December, 2017.

Amanda M. Reiss

Amanda M. Reiss
Kristen Edwards
Staff Attorneys
South Dakota Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501