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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT  
BY OAK TREE ENERGY, LLC, AGAINST  
NORTHWESTERN ENERGY FOR REFUSING  
TO ENTER INTO A PURCHASE POWER  
AGREEMENT

ES11-006

=====

Transcript of Proceedings  
February 14, 2012

**ORIGINAL**

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
CHRIS NELSON, CHAIRMAN  
KRISTIE FIEGEN, COMMISSIONER  
GARY HANSON, COMMISSIONER

COMMISSION STAFF  
John Smith  
Rolayne Ailts Wiest  
Karen Cremer  
Kara Semmler  
Ryan Soye  
Greg Rislov  
Ross Pedersen  
Brittany Mehlhaff  
Matthew Tysdal  
Chris Daugaard  
Brian Rounds  
Demaris Axthelm  
Joy Irving

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**MAR 07 2012**

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Reported By Cheri McComsey Wittler, RPR, CRR

1 APPEARANCES BY TELEPHONE

2 Mike Uda, Oak Tree  
3 Yvette LaFrentz, Oak Tree  
4 Al Brogan, NorthWestern  
5 Tim Olson, NorthWestern

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7 TRANSCRIPT OF PROCEEDINGS, held in the  
8 above-entitled matter, at the South Dakota State  
9 Capitol Building, 500 East Capitol Avenue, Pierre,  
10 South Dakota, on the 14th day of February, 2012,  
11 commencing at 2:30 p.m.  
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1           CHAIRMAN NELSON:  EL11-006, In the matter of the  
2  complaint by Oak Tree Energy, LLC against NorthWestern  
3  Energy for refusing to enter into a purchase power  
4  agreement.  And the issue today is Oak Tree's Second  
5  Motion to Compel.

6           And with that, Mr. Uda or Ms. LaFrentz, would  
7  you like to proceed?

8           MR. UDA:  This is Mike Uda.  I'll be doing the  
9  oral argument today.  I'm grateful for my colleague's  
10 taking the laboring ore yesterday morning at 8 a.m.  
11 Mountain Time.  So I acknowledge her assistance yesterday  
12 and am grateful for it.

13           At the outset, I think it's important to  
14 remember the scope of discovery under South Dakota Law.  
15 And without belaboring the point, the scope of discovery  
16 is intentionally broad.  (Inaudible) projection, if --  
17 the information sought will be admissible at trial if the  
18 information sought appears reasonably calculated --  
19 (Inaudible).

20   (Discussion off the record)

21           MR. UDA:  Okay.  Fair enough.  And I hope to  
22 make things as easy as possible on her.

23           At any rate, the point that I was making is that  
24 under South Dakota Law, the general rule is that  
25 information can be discoverable as long as it is

1 reasonably calculated to lead to the discovery of  
2 admissible evidence. South Dakota Law also permits under  
3 15-6-26B, SDCL, the fact discovery of experts for  
4 discovery facts noted and opinions held by experts  
5 through Interrogatories, which was the device that we  
6 chose to use in this instance.

7 Now going to the substance of the dispute with  
8 those background sort of rules in mind, we're in a  
9 situation here where on November 7 -- or, excuse me,  
10 November 8 of 2011 we filed our first Motion to Compel.

11 And as the Commission may recall, the substance  
12 of that Motion was two things. One was a request that  
13 NorthWestern produce the information required by  
14 18 CFR 292.302 with respect to five years of avoided cost  
15 energy data and 10-year avoided cost capacity data --  
16 capacity requisitions by the utility.

17 And then the second part of that Motion was we  
18 required a Motion to require NorthWestern to produce a  
19 20-year avoided cost forecast. And we did that because  
20 we were hoping to have essentially a full and fair and  
21 open debate about what NorthWestern's South Dakota  
22 utility long-term avoided cost was. Information up to  
23 that point we did not have.

24 The Commission granted our Motion in part and  
25 denied it in part. The part they granted was with

1 respect to the information that the federal rules already  
2 required NorthWestern to produce at least once every two  
3 years and denied the part with respect to the 20-year  
4 forecast. However, in doing that they did tell  
5 NorthWestern and reminded it of its discovery obligation  
6 to supplement in the event that that information became  
7 available.

8 Now as far as the facts go, what happened was is  
9 we had a discovery -- late filed discovery request on  
10 November 15, 2011 from Mr. Lewis. And that natural gas  
11 price forecast was disclosed to us after the close of  
12 discovery and after essentially what was the initial  
13 deadline in the initial scheduling order for scheduling  
14 depositions.

15 And because of that, we looked at the natural  
16 gas price forecast, and because it's simply an element of  
17 an avoided cost, you know, we didn't think anything of it  
18 and didn't make an issue out of it. It was not until we  
19 sought NorthWestern's rebuttal and direct prefiled  
20 testimony from Mr. Lewis on January 13, 2012 that we  
21 realized he was planning to testify as an expert and was  
22 attempting to use an electric price forecast to rebut the  
23 avoided cost forecast that was prepared by Oak Tree's  
24 expert, Mr. Lockhart.

25 Now this is important because what we are in the

1 situation then is that having the discovery deadline  
2 passed and the deposition deadline and the initial  
3 schedule said that depositions would be scheduled prior  
4 to the submittal of testimony, if possible, it was not  
5 possible at that point to schedule depositions. So we  
6 immediately contacted NorthWestern and attempted to  
7 schedule the deposition.

8           Ultimately, there was an informal prehearing  
9 conference with Mr. Smith. We agreed that we would  
10 submit limited discovery to NorthWestern instead of doing  
11 a deposition. And this goes back to those answers to our  
12 discovery.

13           And essentially this is a fairly simple motion  
14 despite all of the background. And I apologize if it's  
15 complicated and I'm complicating it more than I need to,  
16 but it's important to remember that what happens here is  
17 we requested avoided cost information for 20 years.  
18 NorthWestern said it's unreliable; you can't have it.

19           When we looked at Mr. Lewis's testimony it  
20 appeared to me that they were using it as a substitute  
21 for an avoided cost forecast. To our mind that should  
22 have been something that was supplemented in discovery  
23 and provided to us.

24           And then when we read Mr. Lewis's testimony he  
25 then holds himself out as an electric price forecasting

1 expert. In fact, on page 4, lines 6 through 8 of his  
2 testimony, he says, "Lands Energy has used this method of  
3 price forecasting to advise numerous clients in the  
4 wholesale energy markets and specifically to support  
5 resource management decisions. This method provides a  
6 sound basis for making resource planning decisions."

7 So we submitted this limited discovery, as I  
8 mentioned, last week, and we got Mr. Lewis's answers last  
9 week. And essentially what Mr. Lewis said in response --  
10 and what -- our questions were really very simple. We  
11 asked for the names of the clients in Interrogatory  
12 No. 12A, and Northwestern's response was that the  
13 question called for the disclosure of the identity of a  
14 nontestifying consulting expert. And then Mr. Lewis  
15 further stated he could not disclose the identity of  
16 these clients due to confidentiality reasons.

17 Our response is, first, Mr. Lewis is a  
18 testifying expert, and we're trying to determine the  
19 basis for his forecast. If some other person prepared  
20 this and the other forecast, then Mr. Lewis may not have  
21 the expertise to provide testimony in this proceeding.  
22 We don't know if this is true, but this is what we're  
23 trying to determine.

24 If, in fact, Mr. Lewis has never prepared a  
25 forecast at all, he is simply offering an unsupported

1 assertion and cannot offer expert opinion on this subject  
2 matter.

3 Furthermore, the case cited by NorthWestern,  
4 Papke v. Harbert, 738 N.W.2d 510 (2007) does not support  
5 NorthWestern's argument that information may not be  
6 disclosed because it comes from a nontestifying expert.  
7 Paragraphs 82 and 83 of that decision make it clear that  
8 if a testifying expert relies on the nontestifying  
9 expert's report or information in forming an opinion,  
10 that information can be disclosed.

11 What this all comes down to is NorthWestern does  
12 not want to disclose the basis for Lewis's opinions until  
13 he is cross-examined at hearing. Since we specifically  
14 requested in discovery pursuant to our Motion to Compel  
15 all of NorthWestern's avoided cost information which  
16 would necessarily include but not be limited to an  
17 electric price forecast and the PUC specifically reminded  
18 NorthWestern of its continuing obligation to produce it,  
19 it is hardly surprising we are here again requesting this  
20 information.

21 Secondly, Oak Tree asks in Request For  
22 Production No. 30 for the reports prepared by Mr. Lewis  
23 for other clients so as to better understand Mr. Lewis's  
24 methodology and the basis for his opinion. Again,  
25 NorthWestern responded that this calls for a disclosure



1 of a nontestifying consulting expert. If Mr. Lewis did  
2 not prepare these reports himself, it calls into question  
3 whether he qualifies to offer an opinion at all in the  
4 proceeding.

5 NorthWestern also repeated its concerns about  
6 confidentiality. However, with respect to the  
7 confidentiality objection, NorthWestern can't have it  
8 both ways. Confidentiality cannot be used as both a  
9 sword and a shield.

10 And Schutterle v. Schutterle, 260 N.W.2d 341,  
11 353 (S.D. 1977), overruled on other grounds, In  
12 discussing a claim of confidentiality in an antenuptial  
13 marriage agreement, the Court stated the owner of the  
14 privilege of preventing disclosure of confidential  
15 communications cannot, after testifying to or about them  
16 or to about any substantial part of them, without  
17 claiming his privilege, invoke that privilege to prevent  
18 other parties to the communications from testifying to  
19 them. He cannot by his silence lay down the shield of  
20 his privilege and assail another with the sword of his  
21 testimony to the privileged communications, and when his  
22 adversary essays to defend himself or by the testimony of  
23 other parties or witnesses to such communications, again  
24 seek the shield of its privilege and shut out all  
25 testimony as to the confidential communications but his

1 own, he has waived this privilege and such waiver is in  
2 no sense in contrary to public policy. Indeed, it is in  
3 the interest of truth and justice. And this is a quote  
4 from Stein v. First National Bank, Eighth Circuit Court  
5 of Appeals 298 F. 336 page 41.

6 In short, NorthWestern cannot claim that  
7 Mr. Lewis's vast expertise in electric price forecasting  
8 and that a number of utilities have relied on these  
9 forecasts and resource planning and then simultaneously  
10 refused to tell Oak Tree who these energies are in  
11 disclosed reports Mr. Lewis prepared. If the concern is  
12 one of confidentiality, we would obviously sign a  
13 confidential agreement. And if, as may be the case,  
14 Mr. Lewis did not prepare these forecasts himself, it is  
15 probable that Mr. Lewis does not possess the requisite  
16 expertise to testify about them.

17 Now NorthWestern makes much of the fact that  
18 discovery was closed and that NorthWestern permitted  
19 Oak Tree this additional discovery. As I stated  
20 previously, Oak Tree wanted depositions and the original  
21 scheduling order in this case permitted depositions  
22 following the close of discovery possible, a word that  
23 NorthWestern repeatedly neglected to include in its  
24 papers.

25 Since the schedule was amended and NorthWestern

1 was required to produce the requested information  
2 pursuant to Oak Tree's Original Motion to Compel on  
3 November 8, 2011, additional discovery was no longer  
4 possible from the time that Mr. Lewis first belatedly  
5 introduced his price forecast.

6 This was not a lack of diligence on Oak Tree's  
7 part, but we view it as contempt by NorthWestern to  
8 shield from discovery the basis for NorthWestern's case.

9 Now with respect to Mr. Wagner, Mr. Wagner  
10 introduced the issue of the Aberdeen plant in his  
11 prefiled direct and rebuttal testimony. Mr. Wagner's  
12 testimony repeatedly discusses the Aberdeen plant and the  
13 need for it in order to meet NorthWestern's resource and  
14 capacity needs as well as the timing of the decision by  
15 NorthWestern Energy to build that facility.

16 In order to better understand the timing and the  
17 basis for NorthWestern's decision, Oak Tree asks two  
18 simple questions in Request For Production No. 40: All  
19 copies of studies and reports that Northwest Energy has  
20 prepared that support the decision and any analysis and  
21 study that looked at alternatives to the Aberdeen plant.

22 NorthWestern's response was that it objected as  
23 irrelevant because this information is neither reasonably  
24 tailored to matters at issue in this proceeding nor  
25 reasonably calculated to lead to admissible evidence.

1 NorthWestern's decision to construct the Aberdeen plant  
2 is not an issue in this Docket which is addressed solely  
3 to the price that NorthWestern was paying Oak Tree for  
4 energy and capacity for a proposed wind generation  
5 facility located approximately 90 miles from Aberdeen.

6 Our response to this is, first, the information  
7 sought is highly relevant since NorthWestern decided to  
8 construct the Aberdeen plant instead of purchasing output  
9 from Oak Tree. Northwest Energy claims in part it does  
10 not need additional capacity because of the Aberdeen  
11 plant. Indeed, Oak Tree believes a small portion of the  
12 capacity from the Aberdeen plant could have been  
13 displaced as of February 25, 2011 or earlier had  
14 NorthWestern engaged in good-faith negotiations with Oak  
15 Tree.

16 Second, the utility resource planning decisions  
17 typically include a consideration of options. All  
18 options including existing power purchase agreements and  
19 the like. There is no basis for this relevance  
20 objection. NorthWestern appears not to want to provide  
21 the documents because they will undermine Northwestern's  
22 argument at hearing.

23 The third reason this information is relevant is  
24 because NorthWestern has raised the issue of legally  
25 enforceable obligations. And this has to do with time of

1 Northwestern's resource decisions. In order to  
2 understand the basis for Northwestern's decision and the  
3 timing of those decisions, we need the information that  
4 we've requested. We think that -- we think that this  
5 information is directly relevant to the issue of the  
6 calculation of avoided costs in this case regardless of  
7 where the plant is located.

8 Now today we've received Northwestern's argument  
9 that producing these documents would be burdensome. We  
10 believe that these documents exist. They should not be  
11 hard to locate or produce. We don't think the claim of  
12 burdensomeness is very credible. We're not asking  
13 Northwestern to create any document. Just asking them to  
14 locate documents which already exist.

15 And, finally, we would say that Northwestern has  
16 an alternative. If it does not want to cooperate with  
17 discovery of Mr. Lewis and Mr. Wagner, it can simply  
18 withdraw the testimony and keep Mr. Lewis -- the identity  
19 of Mr. Lewis's clients and the reports secret and not  
20 discuss further the decision for the Aberdeen plant but  
21 we think this would undermine Northwestern's case.

22 But we think that in this instance we think that  
23 the information is directly relevant to making our case,  
24 and we don't see any real basis for their objection.

25 CHAIRMAN NELSON: Thank you. Does that conclude

1 your --

2 MR. UDA: I am finished for the time being.  
3 Although I would like to reserve an opportunity for  
4 rebuttal.

5 CHAIRMAN NELSON: Certainly. Certainly.  
6 Mr. Brogan.

7 MR. BROGAN: Thank you, Mr. Chairman. Before I  
8 get going too much, I would ask you if the court reporter  
9 can hear me okay.

10 CHAIRMAN NELSON: There's a little bit of  
11 background noise.

12 MR. BROGAN: That's probably my nervousness and  
13 my heavy breathing.

14 CHAIRMAN NELSON: Okay. I tell you what. We'll  
15 go ahead and let you get started and I'll just kind of  
16 watch for a sign from the court reporter if it's not  
17 working and we'll try something different.

18 Go ahead.

19 MR. BROGAN: This hearing, as we well know, is  
20 on Oak Tree's Motion to Compel requesting that the  
21 Commission order NorthWestern to provide information and  
22 documents that NorthWestern objects to providing.

23 NorthWestern filed its Brief opposing Oak Tree's  
24 Motion to Compel at approximately 12:06 today Central  
25 Time. And I realize that the Commissioners may not have

1 had an opportunity to carefully review that Brief. I  
2 will try to avoid duplication, and I apologize in advance  
3 for any duplication that does occur.

4 Not surprisingly, perhaps, Oak Tree and  
5 NorthWestern have vastly differing views of the  
6 circumstances that have led to the parties being before  
7 the Commission today. Mr. Uda has provided Oak Tree's  
8 view. I would like to provide NorthWestern's view.

9 The Commission issued a scheduling order that  
10 provided for two rounds of discovery by the parties and  
11 one round of discovery by Commission Staff followed then  
12 by sequential testimony from Oak Tree, NorthWestern,  
13 Staff, and then Oak Tree on rebuttal.

14 The Commission issued an Amended Scheduling  
15 Order that extended the deadlines for Staff discovery and  
16 for testimony. Oak Tree had until December 16 to file  
17 testimony. NorthWestern had until January 13. Staff  
18 until January 27. In comparison to that schedule, all of  
19 NorthWestern's responses to Oak Tree's discovery at issue  
20 today including supplemental responses and Mr. Lewis's  
21 market price forecast were provided to Oak Tree by  
22 November 15.

23 Contrary to what might have been said earlier,  
24 Oak Tree did have an ample opportunity to seek additional  
25 discovery both after NWE's initial response to Oak Tree's

1 second round of discovery on September 23 or after  
2 NorthWestern's Third Supplemental Response on November  
3 15. It did not do so.

4 After NorthWestern filed testimony in January  
5 Oak Tree asserted that it wanted to depose Steve Lewis  
6 and Dennis Wagner. After negotiations Oak Tree agreed to  
7 forego deposing Dennis Wagner but still wanted to depose  
8 Steve Lewis. NorthWestern offered to make Mr. Lewis  
9 available for a deposition in Sioux Falls on February 2  
10 or 3. Oak Tree rejected those dates because Mr. Uda was  
11 scheduled to attend a CLE. Subsequently, NorthWestern  
12 agreed to make Mr. Lewis available in Sioux Falls on  
13 January 30.

14 Initially Oak Tree agreed but later wanted to  
15 hold the deposition by telephone. NorthWestern resisted  
16 such an arrangement. Through the good efforts of  
17 Mr. Smith, the parties agreed to allow Oak Tree to submit  
18 limited written discovery in lieu of deposing Mr. Lewis.  
19 On January 30 Oak Tree submitted four Interrogatories,  
20 two Requests For Admission, and 27 Requests For  
21 Production, if we count the subparts.

22 NorthWestern responded to all of them, including  
23 objecting to providing the identities of Mr. Lewis's  
24 other clients and to providing copies of reports that  
25 Mr. Lewis provided to other clients and then also to



1 providing analyses, studies, and reports that supported  
2 NorthWestern's decision to build the Aberdeen peaker  
3 plant or to compare the Aberdeen plant to other  
4 alternatives. Oak Tree filed its Motion to Compel last  
5 Wednesday, and we are here today.

6 At the outset I would say that the Rules of  
7 Civil Procedure are what apply. The Commission has  
8 adopted the Rules of Civil Procedure to apply in matters  
9 before it. That includes the appropriate discovery rules  
10 and the legal standards established under those rules. I  
11 don't think any of us disagree there.

12 I think it would be best to address two  
13 things -- or to address the two individuals, Mr. Lewis  
14 and Mr. Wagner, separately.

15 Mr. Uda discussed the scope of discovery. But  
16 he did not discuss the specific scope of discovery  
17 related to expert witnesses. South Dakota Law, and  
18 specifically SDCL 15-6-26D-4A(i) provides that a parties  
19 in time to discover the identity of experts, the subject  
20 matter on which a expert will testify, the substance of  
21 the facts and opinions to which the expert will testify,  
22 and a summary of the grounds for each opinion.

23 To the extent that Oak Tree has asked for this  
24 information, NorthWestern has provided it. However,  
25 neither the identities of other clients or reports

1 provided to other clients are within the scope of  
2 discovery.

3 I would like to respond to certain statements  
4 made in Oak Tree's Motion to Compel. Oak Tree states  
5 "Oak Tree is entitled to know the bases for Mr. Lewis's  
6 opinions in this proceeding and to test his testimony for  
7 credibility and accuracy." That's in their Motion at  
8 page 3. And generally NorthWestern agrees with this  
9 statement.

10 However, the Interrogatory and Request For  
11 Production at issue do not address either the bases of  
12 Mr. Lewis's opinions or his credibility and accuracy.  
13 They're asking for something totally separate. They're  
14 asking for identities of other people that he's provided  
15 information to, and they're asking for his stock and  
16 trade, the reports he's provided to them.

17 This statement that they're entitled to know the  
18 bases for Mr. Lewis's opinions does not support granting  
19 their Motion to Compel.

20 Secondly, Oak Tree states "Oak Tree also could  
21 not have requested additional discovery at the time that  
22 Mr. Lewis's natural gas price forecast itself was first  
23 disclosed on November 15, 2011 as no further  
24 opportunities for discovery were provided in the  
25 schedule." That also is in the Motion at 3.

1           That is totally inconsistent with Oak Tree's  
2 later assertion that it's entitled to discovery at this  
3 time. Furthermore, Oak Tree has not been bashful in this  
4 Docket about seeking discovery, whether or not it was  
5 provided for in the schedule. Certainly, if Oak Tree was  
6 concerned about Mr. Lewis's price forecast when it saw it  
7 November 15, any time between then and fighting its  
8 testimony in December, mid-December, December 16, it  
9 could have asked to depose Mr. Lewis. It did not do so.

10           Oak Tree also states with respect to Mr. Lewis  
11 "Oak Tree is seeking information regarding the use of  
12 Mr. Lewis's methodology by other utilities." And,  
13 further, "If Mr. Lewis's methodology was not used at all  
14 by these utilities, then it is simply irrelevant to this  
15 proceeding." That's in their Motion at 6.

16           And, quite frankly, I'm flabbergasted by those  
17 statements. How other utilities use Mr. Lewis's  
18 methodology is not relevant to whether this Commission  
19 would decide what weight to give it. It just -- it's  
20 beyond the pail that anybody would argue that this is  
21 relevant. It has nothing to do with this proceeding.

22           Furthermore, this is information that is not  
23 within NorthWestern's possession, custody, or control.  
24 NorthWestern doesn't have any right to ask one of its  
25 experts to provide documents that it provided to other

1 clients. We also don't have any right to ask it -- ask  
2 an expert to tell us who else he's worked for. That's  
3 his business, not ours.

4 With respect to Mr. Lewis's qualifications as an  
5 expert, that's not the subject of this Motion to Compel.  
6 But I would point out that Mr. Lewis's curriculum vitae  
7 was attached to his testimony, and it provides ample  
8 evidence of the experience and training and education  
9 that Mr. Lewis has. Some of these questions may go to  
10 the weight of Mr. Lewis's testimony, but they certainly  
11 don't go to the admissibility of it.

12 With respect to Mr. Wagner, our sole issue has  
13 to do with all of the documents about the Aberdeen plant.  
14 The costs associated with the Aberdeen plant are not  
15 costs that NorthWestern can avoid by purchasing energy  
16 and capacity from Oak Tree. Mr. Uda says that  
17 NorthWestern states that because of Aberdeen it doesn't  
18 need capacity. That is only true for the period from  
19 2013 to 2016. NorthWestern has certainly admitted that  
20 it needs capacity even after Aberdeen is built.

21 Secondly, the Aberdeen plant has been identified  
22 since at least NorthWestern's 2008 ten-year plan filed  
23 with the Commission on June 25, 2008. There is  
24 absolutely no reasonable excuse for Oak Tree to have not  
25 sought discovery with respect to it during the initial

1 discovery period. As set forth in NorthWestern's Brief,  
2 Oak Tree was well-aware of NorthWestern's plans to build  
3 Aberdeen prior to filing its Complaint.

4 Whether or not Mr. Uda believes there's any  
5 significant burden in providing this information is not  
6 at issue. We have the Affidavit of Sally Neill who is  
7 NorthWestern's Director of Records Management System and  
8 experienced in responding to discovery requests such as  
9 the one that Mr. Uda has propounded.

10 She testifies that it will take 45 to 60 days to  
11 search e-mail, capture the records, and review the  
12 results for relevant and privileged contact. We also  
13 believe this -- search all other storage locations,  
14 including network drives, hard drives, and physical  
15 warehouses to find every possible answer to Mr. Uda's  
16 request. This burden is substantial, and it's far in  
17 excess of any benefit that will be provided relative to  
18 the Aberdeen plant.

19 Finally, I would like to again speak to a couple  
20 of specific statements made in Oak Tree's Motion to  
21 Compel. Oak Tree states "Request For Production No. 40  
22 was posed by Oak Tree to determine the underlying basis  
23 for the opinions offered in prefiled testimony by NWE  
24 witness Mr. Wagner."

25 That might be an appropriate date -- appropriate

1 Request For Production if Mr. Wagner had offered  
2 opinions. Mr. Wagner is a fact witness. He did not  
3 offer opinions. He described exactly what NorthWestern  
4 had done, when, and why.

5 At another place Oak Tree states "Second, a  
6 significant portion of Mr. Green's testimony falls under  
7 the heading Aberdeen Generating Station No. 2. In his  
8 testimony Mr. Green discusses the decision to build this  
9 plant."

10 I'd point out this discovery is addressed to  
11 Mr. Wagner. Now these may be mere typographical errors  
12 referring to Mr. Green rather than Mr. Wagner, but  
13 NorthWestern cannot be certain that that's the case.

14 We appreciate the burden that this is placing on  
15 the Commission, and we apologize for it. We have tried  
16 to give Oak Tree everything that it needed. Certainly  
17 the Rules of Civil Procedure provide for broad discovery,  
18 but it's not unlimited. It is still limited to matters  
19 that is relevant, and with respect to experts it's even  
20 further limited.

21 NorthWestern requests that the Commission deny  
22 Oak Tree's Motion to Compel. And I am available to  
23 answer any questions if any of the Commissioners have  
24 any.

25 CHAIRMAN NELSON: Very good. Thank you,

1 Mr. Brogan.

2 With that, we will go to Staff.

3 MS. SEMMLER: Thank you, Mr. Chairman. This is  
4 Kara Semmler speaking on behalf of Staff today.

5 I'm going to start with just a real simple  
6 opinion regarding specifically and only the requests that  
7 were made by Oak Tree, and then I'd like to follow up  
8 with a brief reaction to some of the extra arguments that  
9 have been made.

10 So we're dealing with Interrogatory 12 and  
11 Request For Production 30 and names of clients, copies of  
12 reports. We see this as Oak Tree's attempt to understand  
13 whether or not the NorthWestern expert qualifies as an  
14 expert. We agree with NorthWestern this is not the time  
15 to challenge expert standing. But now is the time to  
16 obtain the materials necessary to do so at hearing should  
17 Oak Tree find it appropriate to do so.

18 This is a common request that we often see in  
19 discovery, and Staff believes Oak Tree is entitled to  
20 understand whether or not the expert -- or the witness  
21 has standing as an expert.

22 We do, however, understand NorthWestern Energy's  
23 argument that those documents are not in its possession,  
24 custody, or control as 15-6-34 requires. And although  
25 Oak Tree we think is entitled to the information, it may

1 need to seek it through other means. This may not be the  
2 appropriate venue -- discovery may not be the appropriate  
3 venue to do so.

4 Number two, Request For Production 40. This  
5 objection was based on relevancy. And Staff disagrees  
6 with the objection. We believe the request is relevant.  
7 Capacity need and the timing of the need is very real and  
8 relevant to an avoided cost analysis. Staff recommends  
9 the Commission grant this Motion as it relates to Request  
10 For Production 40.

11 NorthWestern Energy depicts the situation where  
12 this production could take 45 to 60 days. And it appears  
13 from the reply that it's been taken a bit to the extreme.  
14 The Request specifically asks for studies and reports,  
15 not every single piece of correspondence and every single  
16 e-mail that exists. If there are no studies and reports,  
17 well, then that's the answer. We can't force the  
18 production of something that doesn't exist. We don't see  
19 the request as asking, however, for every single piece of  
20 correspondence regarding the Aberdeen plant.

21 The issue before you today is a Motion to  
22 Compel. And as one would expect, in advocacy we've heard  
23 arguments for that Motion. We've heard arguments against  
24 it. We're also seeing, Staff believes, some arguments  
25 and positions that are outside the scope of the subject



1 matter before you today.

2 As a Staff we usually try to stay on point and  
3 ignore the sidebar arguments. With that said, I'm  
4 feeling compelled to mention our thoughts on a few of the  
5 arguments that have been made.

6 First, Oak Tree and NorthWestern clearly are  
7 employing different methods to determine avoided costs.  
8 And they're using different data and different numbers to  
9 do so. We will hear all of that in March at the hearing.

10 Today, Commissioners, you're not being asked to  
11 come to any conclusion regarding those arguments, and we  
12 don't believe it's appropriate for you to do so. Those  
13 arguments are not pertinent to the discovery dispute  
14 before you today.

15 Two, as a compromise and resolution to a  
16 procedural dispute regarding depositions, of which you  
17 heard some significant background on today, the parties  
18 agreed to additional discovery. And it is clear that  
19 NorthWestern Energy seems disgusted with the requests  
20 that were made, and they probably had something different  
21 in mind. When they got those questions from Oak Tree  
22 they weren't expecting -- they weren't expecting that --  
23 those particular questions. They weren't expecting the  
24 extent of those questions.

25 Nonetheless, we don't see anything about Oak

1 Tree's questions that are outside the scope of that  
2 compromise made.

3 And we are here for any questions of Staff,  
4 should you have them.

5 CHAIRMAN NELSON: Thank you. Mr. Uda, would you  
6 like a brief rebuttal?

7 MR. UDA: Yeah. I don't think I need to say a  
8 whole lot more. But I do want to point out, unless I've  
9 got the wrong statute, and I'm sure my South Dakota  
10 counsel will correct me if I do, but I believe under  
11 15-6-26B with respect to the scope of discovery, Sub 4  
12 says "Trial preparation: Experts, discovery facts known  
13 and opinions held by experts otherwise discoverable under  
14 the provisions of Subdivision 1," which is just the  
15 general relevance. So that's what we're really  
16 attempting to discover here.

17 Now the position that at this point Mr. Lewis  
18 has put us in -- and I'm not entirely sure what  
19 Ms. Semmler has in mind with respect to a compromised  
20 position, but the position Mr. Lewis has put us in is  
21 he's testifying as an expert. I believe Mr. Brogan made  
22 that clear. He's testifying about his expertise doing  
23 electric price forecasts.

24 We're trying to figure out, well, has he ever  
25 done this before? Is he qualified to testify as an

1 expert? We're trying basically to prepare for hearing.  
2 Now the objection I'm hearing from NorthWestern is, well,  
3 we don't have this information in our custody or control.  
4 And I haven't researched that issue directly, but my  
5 recollection is that if a party is testifying on behalf  
6 of a entity, that that entity can request that  
7 information and it's not outside of their control because  
8 this person is under contract to them to provide  
9 testimony.

10 They didn't have to introduce Mr. Lewis's  
11 testimony. That was a decision they made. And what  
12 we're being left with is something of a black box as far  
13 as Mr. Lewis's testimony. We're left with, okay, I'm an  
14 expert but you can't ask what I've done before or where  
15 I've done it. And I don't think that's entirely fair to  
16 Oak Tree.

17 I think the second point is that this  
18 information is directly relevant to creating a record  
19 with respect to in Mr. Lewis's expertise. You know, it's  
20 my expert's belief that Mr. Lewis is not an electric  
21 price forecast expert and he just wants to understand  
22 what he's done. As I said, we'd be willing to enter into  
23 any confidentiality agreement we have to in order to get  
24 the information so we can prepare our case for trial.

25 I think the other point with respect to

1 Mr. Lewis is is that again, as I pointed out earlier,  
2 Mr. Lewis is testifying about his expertise and holding  
3 himself out as an expert, but when we start asking about  
4 the basis for that opinion he's saying you can't discover  
5 this because it's all confidential.

6 This goes to the cite that I offered earlier  
7 from South Dakota with respect to using confidentiality  
8 as both a sword and a shield.

9 Now I don't understand entirely Mr. Brogan's  
10 statement with respect to Mr. Wagner because on page 4 of  
11 Mr. Wagner's testimony starting at line 27 it says "How  
12 does the addition of generating stations built by  
13 NorthWestern in NorthWestern's service territory factor  
14 into Northwestern's obligation to meet capacity?"

15 And it discusses at some length following that  
16 the addition of Northwestern's Aberdeen plant, the  
17 advantage to customers, the type of different generations  
18 that Northwestern could consider to meet capacity. It  
19 continues to talk about how long the generation station  
20 has been planned, all the rest of this information.

21 And all we're asking for is what analysis  
22 essentially did Northwestern perform to demonstrate that  
23 this was the best alternative and the timing and  
24 placement of this directly affects both the avoided cost  
25 calculation because it will determine when the legally

1 enforceable obligation under PURPA happens.

2 But also, more generally, if you read through  
3 that testimony, whether Northwestern is saying he's  
4 offering an expert opinion or whether he's offering a lay  
5 opinion is really irrelevant. He's offering an opinion,  
6 and we need to understand the bases of those opinions.

7 And that's all I have. I'm available for  
8 questions if there are any.

9 CHAIRMAN NELSON: Thank you.

10 Mr. Brogan, any brief comments?

11 MR. BROGAN: Mr. Chairman, I'll pass.

12 CHAIRMAN NELSON: Thank you.

13 Questions from Commissioners?

14 Commissioner Fiegen.

15 COMMISSIONER FIEGEN: For NorthWestern. On  
16 possession, custody, and control of the requested  
17 documentation, you would have control of some of your own  
18 reports from Mr. Lewis; correct?

19 MR. UDA: Commissioner Fiegen, yes, that is  
20 correct.

21 COMMISSIONER FIEGEN: So we could ask for that  
22 discovery? According to how I see it.

23 MR. UDA: Commissioner Fiegen, without  
24 committing whether or not we have any, because I'm not  
25 familiar with everything that Mr. Lewis has ever provided

1 to NorthWestern Energy, as an aside I would say I've only  
2 been with the company less than 10 months. But if we  
3 have anything, yes, that would be in our possession and  
4 control, and we could provide it.

5 COMMISSIONER FIEGEN: Okay. And then for Oak  
6 Tree, a question on personally I do believe that the  
7 peaking station is relevant. But you're asking for study  
8 and reports, which are relatively pretty formal reports  
9 and studies; correct?

10 MR. UDA: Yeah. I mean, we're asking did you  
11 guys do like some kind of resource analysis and just, you  
12 know, whatever form that analysis exists.

13 COMMISSIONER FIEGEN: Thank you. Thank you,  
14 Mr. Chairman.

15 CHAIRMAN NELSON: Other questions?

16 This is Commissioner Nelson. I've got just a  
17 couple. Starting with Mr. Brogan.

18 In the documents you filed today you talked  
19 about Mr. Lewis, and you described him as a nontestifying  
20 expert witness because he did not testify for any of  
21 these other clients that we're talking about today; is  
22 that correct?

23 MR. BROGAN: Mr. Nelson -- or Commissioner  
24 Nelson, excuse me, I think there's some confusion here.

25 CHAIRMAN NELSON: That's why I'm asking the

1 question. I am confused.

2 MR. BROGAN: We agree that Mr. Lewis is a  
3 testifying expert for NorthWestern in this Docket. What  
4 we were stating is that in these other dockets and for  
5 other clients he was a nontestifying expert. And I think  
6 that's clear from our answer where when we specifically  
7 stated that Mr. Lewis had not testified for those -- for  
8 other clients. Had he testified, we would have provided  
9 the docket. We would have provided either a link to or a  
10 copy of his testimony.

11 CHAIRMAN NELSON: Okay. Let me follow up. And  
12 I'm looking at our statute, 15-6-26B Sub 4D. "A party  
13 may discover facts known or opinions held by an expert."  
14 Mr. Lewis is your expert.

15 Certainly these reports -- and let me just ask,  
16 I mean, did Mr. Lewis prepare these reports that are at  
17 issue here?

18 MR. BROGAN: Commissioner Nelson, I can't say.  
19 I don't know. I don't work for those other people. I  
20 don't work for his other clients. I don't know exactly  
21 what was done or who did it.

22 I agree that D provides a party may discover the  
23 facts known or the opinions held by the expert, but I  
24 don't see where D says anything about the facts that --  
25 and reports that an expert provided to somebody who's not

1 a party to the docket.

2 CHAIRMAN NELSON: But those are still facts  
3 known and opinions held, if in fact Mr. Lewis did the  
4 work on them. And I understand your point about you  
5 don't know that.

6 MR. BROGAN: I am not certain that I would  
7 characterize reports provided to other people as facts  
8 known or opinions held.

9 CHAIRMAN NELSON: Okay. Fair enough.

10 Let me -- a question for Staff. On this issue  
11 of NorthWestern not having the information on hand,  
12 perhaps. And you indicated that perhaps it should have  
13 been sought through some other means.

14 Can you expound on that?

15 MS. SEMMLER: Yes. This is Kara Semmler. I  
16 believe Oak Tree could subpoena the information directly  
17 from Lands Energy, and that maybe is -- I didn't take  
18 this particular Rule of Civil Procedure -- it wasn't part  
19 of my argument until we received the filing just this  
20 afternoon. And as I looked into it, it does seem to have  
21 some merit. Again, I still believe it could be obtained,  
22 just maybe not through this particular means of  
23 discovery.

24 CHAIRMAN NELSON: Can you maybe comment on  
25 Mr. Uda's contention that because NorthWestern has



1 Mr. Lewis under contract that, therefore, they do have  
2 access to it?

3 MS. SEMMLER: And when I read it honestly that  
4 was the first thought I had too. That now he's been  
5 employed, so to speak, so that extends to NorthWestern  
6 that -- nonetheless, Lands Energy isn't a party, and this  
7 statute does specifically say a party may serve the  
8 request upon another party. And the party to the  
9 proceeding is NorthWestern.

10 CHAIRMAN NELSON: Mr. Brogan, would you like to  
11 comment on that particular question?

12 MR. BROGAN: Commissioner Hanson?

13 CHAIRMAN NELSON: Nelson.

14 MR. BROGAN: Excuse me. Commissioner Nelson. I  
15 apologize. I'm not as good with sounds as I should be.

16 What this strikes me as -- if I could -- I mean,  
17 analogies are tricky, and probably I shouldn't go into  
18 that. But it's like this: If there was a CPA talk --  
19 providing testimony and we were suddenly trying to ask  
20 who else have you prepared income taxes for and please  
21 provide a copy of their income tax returns or if we had a  
22 doctor testifying and we asked that doctor who else have  
23 you treated and what have you done for them, neither one  
24 of those are within the proper scope of discovery. They  
25 don't make anything -- any fact that's at issue more

1 likely or less likely.

2 And then, finally, if by being employed by a  
3 single entity that would open up a company's files with  
4 respect to all of its other entities, they'd never be  
5 employed by that company, and it would force people  
6 like -- or entities like NorthWestern to have nothing but  
7 in-house Staff.

8 That's not really efficient. It's not something  
9 that I think that the rate payers would want to pay for.  
10 But it seems to be where we're -- if we're going to treat  
11 outside experts the same as we would employees with  
12 respect to materials that they have, we've gone a long  
13 way past existing case law and I think a long ways past  
14 where the rules intended us to go for discovery.

15 CHAIRMAN NELSON: Thank you. The last question  
16 I've got is for Mr. Uda in dealing with the NorthWestern  
17 peaker plant. NorthWestern has filed an Affidavit  
18 talking about the voluminous search that would need to be  
19 done to find all the different items that might relate to  
20 that.

21 But my understanding was is that your request  
22 was fairly narrow and fairly tailored to simply get at  
23 reports; is that correct?

24 MR. UDA: That's correct, Commissioner Nelson.

25 CHAIRMAN NELSON: Thank you. I don't have any

1 further questions.

2 Commissioner Hanson?

3 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
4 I think that Staff did a real good job of summarizing the  
5 challenge that we have in front of us. There's a number  
6 of sort of loose ends and curiosities that I have if I  
7 could explore them just a little bit.

8 An Affidavit was filed just today I believe it  
9 was from Mr. Lewis that might answer a couple of the  
10 questions that we've been wondering about. On page 1 he  
11 states on item number 6 that I have not provided copies  
12 of the reports I've prepared for other clients to  
13 NorthWestern Energy. So he's intimating in item number 6  
14 that he did prepare reports.

15 He's also stating that I have not provided  
16 testimony in any other forum regarding this price  
17 forecast methodology. And that brings me to a curiosity  
18 to ask NorthWestern, knowing that ultimately there's  
19 going to be a question as to whether or not Mr. Lewis is  
20 qualified as an expert to testify before us, how do you  
21 plan to cement that relationship and qualify him as an  
22 expert if, in fact, you don't present this information  
23 showing his experience and his capabilities and knowing  
24 that you have to provide that information?

25 Is it not incumbent upon you to present that to

1 Oak Tree prior to the hearing?

2 MR. BROGAN: Commissioner, this is Mr. Brogan.  
3 And I assume that question was directed to me.

4 COMMISSIONER HANSON: That's correct.

5 MR. BROGAN: And I would go back to the  
6 SDCL 19-15-2, which indicates that a witness qualified as  
7 an expert by knowledge, skill, experience, training, or  
8 education may testify thereto in the form of opinion or  
9 otherwise, that that's taking a very limited part of that  
10 statute.

11 When NorthWestern provided Mr. Lewis's testimony  
12 it did provide a copy of his curriculum vitae which shows  
13 his training, education, and experience. Mr. Lewis has  
14 testified at least a few times -- I was tempted to say  
15 several -- on behalf of NorthWestern and before the  
16 Montana Public Service Commission. His qualifications of  
17 an expert there have never been questioned. Mr. Uda has  
18 cross-examined him in some of those cases. I was  
19 surprised that this issue would come up.

20 However, I think that given the broad experience  
21 that is reflected in Mr. Lewis's curriculum vitae that  
22 NorthWestern has already met its burden to show that he  
23 is qualified as an expert.

24 Now as Staff said, Oak Tree and NorthWestern are  
25 employing different methodologies and different numbers.

1 It will be up to the Commission to weigh those  
2 methodologies and numbers, but that isn't the purpose of  
3 this dispute today.

4 COMMISSIONER HANSON: However, I do agree with  
5 Staff on the foundation that they laid that it's  
6 important information in order to -- it's a Catch-22  
7 challenge that I put before you earlier.

8 On another subject, you had stated in your brief  
9 to us today that -- and this is one of the items that we  
10 take into consideration when we are making a  
11 determination on whether or not information must be  
12 compelled.

13 You state on page 6 that not only is the request  
14 for records untimely and irrelevant, you state that it  
15 would place a huge burden on NorthWestern. Not  
16 withstanding the information that you do not have, that  
17 you cannot produce, how can it be a huge burden to  
18 produce that information, which I would assume the board  
19 of directors and number of administrative people reviewed  
20 in making their decisions.

21 MR. BROGAN: Commissioner, I believe that that  
22 statement on page 6 was referring specifically to the  
23 Request For Production with respect to the Aberdeen  
24 plant, not with respect to --

25 COMMISSIONER HANSON: That's correct.

1           MR. BROGAN: And Mr. Uda's -- or excuse me.  
2 Oak Tree's Request For Production specifically asks for a  
3 copy of all studies and reports that supported the  
4 decision for Aberdeen and also a copy of any analysis or  
5 study and associated report performed by NorthWestern  
6 that looked at alternatives to the Aberdeen plant.

7           To look at every -- to find every possible  
8 analyses, every possible study, every possible report is  
9 going to require that we look at basically lots of  
10 e-mails and lots of physical documents to find out -- to  
11 discover whether they're relevant, whether they answer  
12 this, and we ask our director of records management to  
13 take a quick look. And I'm relying on what she has told  
14 us.

15           COMMISSIONER HANSON: Well, sir, a copy of an  
16 analysis or a study is not the same as requesting all of  
17 the e-mails that -- in order to gather that information.

18           A question -- thank you, Mr. Brogan.

19           A question for Mr. Uda. I'm curious, the  
20 timeliness that I mentioned just a moment ago that was on  
21 page 6, and Mr. Brogan mentions it a number of times --  
22 I'm just curious why did Oak Tree not inquire about  
23 expert witnesses?

24           MR. UDA: Commissioner Hanson, I think the  
25 answer to that question is we were under the impression

1 following our first Motion to Compel -- and I can't  
2 recall if it was you or Commissioner Nelson that asked  
3 the question, but you posed the question at the last  
4 hearing on our Motion to Compel how is NorthWestern going  
5 to rebut Oak Tree's 20-year forecast if it's not going to  
6 produce one itself.

7           And NorthWestern has reiterated repeatedly that  
8 it's not producing an avoided cost forecast and instead  
9 is introducing something else. When we first saw  
10 Mr. Lewis's natural gas price forecast we assumed it was  
11 just an element of our prior discovery. We had no idea  
12 that NorthWestern was going to introduce it in this  
13 matter. And the purpose to which testimony is put  
14 matters a great deal because it changes the calculation.

15           Part of this is due to sort of the -- I'm not  
16 trying to be pejorative, but sort of the unusual nature  
17 of this case where discovery came first after the  
18 testimony, that's not been my experience, but, you know,  
19 that's how things were done here.

20           But ultimately the answer to the question about  
21 timeliness was even if we had on November -- I think it  
22 was the 15th was a Friday. Even if we had on November 18  
23 followed up with additional discovery requests according  
24 to the schedule that existed at that time, there was no  
25 further opportunity for discovery.

1           We requested depositions because the schedule,  
2 the original schedule, said that we could schedule  
3 depositions at the end of discovery, if possible. But  
4 until we saw the testimony, we really didn't know what  
5 the bases for Mr. Lewis's opinion was or the bases for  
6 the opinions that were going to be offered in this  
7 proceeding by Mr. Wagner. So that's generally why we  
8 waited.

9           COMMISSIONER HANSON: All right. Thank you.  
10 That was Commissioner Nelson that asked that question. I  
11 am not that great a soothsayer, a visionary, as he.

12           Thank you, Mr. Chair.

13           CHAIRMAN NELSON: Any other questions from the  
14 Commission?

15           Seeing none, are there any motions dealing with  
16 this request?

17           COMMISSIONER FIEGEN: I'm going to ask General  
18 Counsel to help me a little bit. But what I can see that  
19 we can do today is, first of all, ask NorthWestern to  
20 give the reports that they have been given from  
21 Mr. Lewis, especially to the Montana PUC I believe used  
22 it before. So those reports that they have in hand, they  
23 should give those over in discovery.

24           And the other item is for the reports and  
25 analysis. And those are formal reports and analysis is



1 my understanding they're asking for, and that was  
2 confirmed by Oak Tree, that they give over those for  
3 discovery. So however that Motion would be, General  
4 Counsel.

5 COMMISSIONER HANSON: Excuse me, Mr. Chair.  
6 Should that be subject to a protective order at all?

7 MR. SMITH: I guess I don't know what you --

8 MS. SEMMLER: I think the parties might already  
9 have a confidentiality agreement.

10 COMMISSIONER HANSON: Okay.

11 CHAIRMAN NELSON: Okay. Mr. Smith.

12 MR. SMITH: Thank you. I guess I don't know. I  
13 would assume those documents maybe that were part of  
14 those Montana dockets, are those public documents,  
15 Mr. Brogan?

16 MR. BROGAN: Mr. Smith, I believe some of those  
17 are public documents and would not be appropriately -- I  
18 guess I'm somewhat confused because I'm not sure -- we  
19 suddenly went from documents or reports basically in hand  
20 for Mr. Lewis that were used in various things including  
21 the Montana dockets, and then we started talking about  
22 formal reports and analyses, which I thought meant  
23 reports related to Aberdeen, which wouldn't have had  
24 anything to do with, you know, Montana and which I do  
25 think would probably be subject to a protective order.

1           Many of those are -- some are public. They were  
2 provided to the Commission probably and -- with the 2009  
3 IRP data. But I think some were private and went to the  
4 company's board.

5           MR. SMITH: That's a good point. As I  
6 understood Commissioner Fiegen's Motion, the first thing  
7 was getting to the issue of just any of Mr. Lewis's work  
8 that's in your possession.

9           Is that correct, Commissioner Fiegen?

10          COMMISSIONER FIEGEN: Yes.

11          MR. SMITH: That you actually have those done  
12 for you or that you have in your possession. So it meets  
13 the standard of 34A, Rule 34A.

14          MR. BROGAN: Yes.

15          MR. SMITH: I believe that was the point of it.  
16 And, you know, because it -- and I think part of this  
17 comes from the answer to his Interrogatory 12 and the  
18 answer, you know, with respect to documents having  
19 been -- that NorthWestern had used this method in its  
20 procurement plans filed with Montana. And so at least  
21 something would appear to have at some point been in the  
22 possession of NorthWestern.

23          MR. BROGAN: Mr. Smith, with respect to the  
24 first thing that Mr. Fiegen mentioned, that's how I  
25 understand it also.

1           MR. SMITH: Is that correct, Commissioner  
2 Fiegen? Or any other documents that you have, reports  
3 related to this particular methodology or the underlying  
4 basis for it that NorthWestern would have in its  
5 possession.

6           And I think to the extent -- do you want to add  
7 protective order, Commissioner Fiegen? To the extent any  
8 document is currently in a confidential state that it be  
9 subject to a protective order?

10          COMMISSIONER FIEGEN: Yes. That would be --

11          MR. SMITH: Or an acceptable NDA to the parties.

12          COMMISSIONER FIEGEN: Good suggestion of  
13 Commissioner Hanson.

14          MR. SMITH: Okay. Thanks.

15          CHAIRMAN NELSON: Okay. I want to just  
16 reiterate this from my understanding. So the motion  
17 would be to grant Interrogatory No. 12 and Request For  
18 Production No. 30 but only to the extent that that  
19 information is possessed by NorthWestern and to grant  
20 Requests For Production No. 40 in its entirety.

21           Is that correct?

22          MR. SMITH: As I understand it, with the  
23 understanding that there's no -- that this is not -- does  
24 not cover matters such as correspondence, communications  
25 of all types. But we're only talking here about things

1 that have reached the level of an actual report, study,  
2 you know, something that anybody's going to know -- I  
3 mean, you're going to know about that. There's no way in  
4 heck that company people don't know about those kinds of  
5 things.

6 CHAIRMAN NELSON: Very good. So we have a  
7 motion. Is there discussion?

8 Seeing none, all those in favor vote aye.  
9 Commissioner Hanson.

10 COMMISSIONER HANSON: Aye.

11 CHAIRMAN NELSON: Commissioner Fiegen.

12 COMMISSIONER FIEGEN: Fiegen votes aye.

13 CHAIRMAN NELSON: Commissioner Nelson votes  
14 aye. Motion carries. We are concluded on that docket  
15 for the moment.

16 MR. BROGAN: Mr. Chairman, this is Mr. Brogan.  
17 May I ask one question with respect to the action you  
18 just took?

19 CHAIRMAN NELSON: Certainly.

20 MR. BROGAN: Am I correct in interpreting the  
21 action as basically excluding any requirement to search  
22 e-mails for the formal reports and analyses?

23 CHAIRMAN NELSON: That is our understanding, but  
24 let me just ask Mr. Uda. Do you have any objection to  
25 our understanding of this?

1 MR. UDA: No. I mean, really we're interested  
2 in -- really we're more interested in final reports than  
3 we are anything else.

4 CHAIRMAN NELSON: Yep. That would be my  
5 understanding. I think we're all on the same page, which  
6 is a good thing here.

7 MR. BROGAN: Thank you, Mr. Chairman.

8 CHAIRMAN NELSON: You are welcome. Thank you.

9 COMMISSIONER FIEGEN: Mr. Chairman, if I can  
10 thank the parties for coming to us quickly because I know  
11 that was a quick turnaround, and we certainly appreciate  
12 that. Thank you.

13 MR. SMITH: May I butt in here, Mr. Chairman.

14 CHAIRMAN NELSON: Certainly.

15 MR. SMITH: Maybe the parties and myself could  
16 do this by via prehearing conference. We had a second  
17 question. And that is -- because now we're up against  
18 the wall.

19 The prehearing deadline is on the 17th. I just  
20 don't think it's a physical possibility to achieve that.

21 CHAIRMAN NELSON: Well, do we need formal  
22 Commission action on that?

23 MR. SMITH: Well, let me ask the parties. Are  
24 you still on, Al, or are you off now?

25 MR. BROGAN: I'm still on.

1           MR. SMITH: Would you rather just handle this  
2 via informal prehearing conference here whenever you can  
3 get the time following your hearing, Al?

4           MR. BROGAN: I'm certainly willing to do that.

5           MR. SMITH: Mr. Uda.

6           MR. UDA: Yeah. I don't see any problem with  
7 that.

8           MR. SMITH: Why don't we try do it that way so  
9 we can move along here, rather than have a lengthy  
10 discussion about schedule today right now.

11           All right. Thanks, everyone.

12           MR. UDA: Thank you.

13           MR. BROGAN: Thank you and good-bye.

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 14th day of  
11 February, 2012, and that the attached is a true and  
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 6th day of  
14 March, 2012.

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Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter

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