

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Complaint by
Oak Tree Energy LLC against NorthWestern
Energy for refusing to enter into a Purchase
Power Agreement

EL 11-006
**Brief in Support of NorthWestern Energy's
Pre-Hearing Motions**

Introduction

There are three issues to be decided at hearing in this matter:

- 1) Whether, and in what amounts, NWE should be required, pursuant to 16 U.S.C. § 824a-3 and 18 C.F.R. §§ 292.303 and 292.304, to pay Oak Tree over the life of the Project for electricity made available to NWE from the project[.] The determination of this issue will require consideration of the avoided cost issues presented by 18 C.F.R. § 292.304, including, but not limited to, both avoided energy costs and avoided capacity costs.
- 2) Whether Oak Tree is currently bound by a legally enforceable obligation, and if so, when that legally enforceable obligation commenced and what impact that has on the avoided cost calculation.
- 3) Whether additional relief should be granted to Oak Tree as necessary for Oak Tree to obtain a power purchase agreement with NWE for electricity produced from the Project on terms that are consistent with the requirements of PURPA and the SDPUC PURPA Order and are as consistent as possible with the respective positions of the parties and with the interests of NWE's rate payers and the public interest.¹

The hearing is governed by the South Dakota Administrative Procedures Act² and the Commission's General Rules of Practice³. In addition, the rules of evidence used in civil cases must be followed.⁴ SDCL § 1-26-19 mandates that "[i]rrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded." Testimony and evidence that does not help the

¹ Order for & Notice of Hr'g.

² SDCL ch. 1-26.

³ ARSD ch. 20:10:01.

⁴ SDCL § 1-26-19(1).

Commission determine the answers to the three issues listed above should be excluded from the hearing.⁵ Therefore, NorthWestern Energy moves to strike portions of the Rebuttal Testimonies of J. Richard Lauckhart, Michael Makens, and Thomas K. Anson as described below.

Testimony of J. Richard Lauckhart

J. Richard Lauckhart's rebuttal testimony related to cases before the Montana Public Service Commission (PSC) is inadmissible because it is irrelevant.

Oak Tree persists in suggesting that NorthWestern's South Dakota customers should pay for the policy mistakes made in Montana. NorthWestern's Montana and South Dakota systems are separate. One is in the Western Interconnect; the other is in the Eastern Interconnect. One has no access to an organized market; the other is near to the Midwest Independent System Operator market. In one, there is no defined capacity market; in the other, NorthWestern purchases capacity separate from energy. One is a balancing authority; the other is within the balancing authority area of the Western Area Power Administration. In one, NorthWestern generates a small portion of its necessary electric load and purchases the rest; in the other, NorthWestern operates baseload generators to produce the majority of the electricity needed to serve load and only purchases a small portion of the time. In Montana, NorthWestern is moving from being a utility with no generation to being a vertically integrated utility. In South Dakota, NorthWestern is a vertically integrated utility. Finally, in Montana, NorthWestern faces significant monetary penalties if it does not meet mandatory renewable portfolio standards; in South Dakota, NorthWestern aspires to satisfy a voluntary renewable resource objective but does not face any penalty for

⁵ SDCL § 19-12-1 (Rule 401) ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); SDCL § 19-12-2 (Rule 402) ("Evidence which is not relevant is not admissible.").

noncompliance. All of these differences indicate that cases before the Montana PSC have no bearing on issues in this docket.

Mr. Lauckhart spends five and one-half pages comparing this docket to two cases before the Montana PSC. None of the statements in those pages, even if accurate, are helpful to this Commission in deciding the issues before it. NorthWestern's avoided cost in Montana is totally different from NorthWestern's avoided cost in South Dakota. The testimony of a witness in a Montana PSC case is not relevant in any way when that witness is not testifying before this Commission. Furthermore, Montana law regarding the establishment of a legally enforceable obligation is not applicable to South Dakota.

For these reasons, NorthWestern Energy respectfully requests that the following passages be stricken from the Rebuttal Testimony of J. Richard Lauckhart:

Page:Line Reference (unredacted version)	Testimony
2:13-3:6	Further, I have observed that when NorthWestern wants . . . which have fallen in the past year.
6:4-11:14	Comparing NorthWestern Wind Testimony in Montana with its Testimony in South Dakota (entire section)
14:8-17	The Montana Commission found it unreasonable . . . forecasting natural gas prices.
25:25-28	The Montana PSC conducted several hearings . . . a fair outcome in this case.
27:14-18	However, as NorthWestern has pointed out in its testimony in Montana in the Spion Kop proceeding . . . chose not to do so here.
Exhibit 1	Final Order, Montana PSC Docket No. D2010.7.77, Order No. 7108e
Exhibit 2	Prefiled Direct Testimony of Todd A. Guldseth, Montana PSC Docket No. D2011.5.41
Exhibit 3	Final Order, Montana PSC Docket No. D2011.5.41, Order No. 71591

NorthWestern further requests that the Commission preclude similar testimony or evidence at hearing of this matter.

Testimony of Michael Makens

Portions of the Rebuttal Testimony of Michael Makens related to the expense of litigation, litigation as a “last resort,” and good-faith or bad-faith negotiations are inadmissible because they are irrelevant, not based on personal knowledge, or more prejudicial than probative.

A. *Comments regarding litigation costs and litigation as a “last resort” are inadmissible.*

Mr. Makens’s testimony includes comments about the expense of litigation, NorthWestern not having to bear its own legal expenses, and Oak Tree bringing its complaint as a last resort.⁶ These comments should be excluded.

First, these comments are irrelevant, as they do not help the Commission decide any of the three issues before it. In addition, Mr. Makens does not have personal knowledge of the expenses incurred by NorthWestern Energy in defending this complaint docket as required by SDCL § 19-14-2 (Rule 602). Mr. Makens implies that NorthWestern Energy has no costs (which is simply not true) or that NorthWestern Energy can more easily afford its costs. Neither the wealth of Oak Tree nor of NorthWestern Energy is admissible in this matter; therefore, such comments should not be allowed.⁷

Remarks about legal expenses combined with the comments about litigation “as a last resort” which are sprinkled throughout Mr. Makens testimony create the illusion of a David-versus-

⁶ E.g., Makens Rebuttal Test. 2:24–25, 2:27–28.

⁷ See *Smith v. Weber*, 70 S.D. 232, 239, 16 N.W.2d 537, 540 (1944).

Goliath proceeding. Thus, even if the comments were relevant, they should be excluded because they are more prejudicial than probative.⁸

For these reasons, NorthWestern Energy respectfully requests that the following passages be stricken from the Rebuttal Testimony of Michael Makens:

Page:Line Reference	Testimony
2: 24-25	Litigation is expensive, and NorthWestern does not have to bear its own legal expenses.
2:27-28	We only brought this complaint as a last resort. It was not anything we wanted to do.
5:24	Litigation was always viewed as a last resort.
7:14	We have no interest in litigation with NorthWestern.
7:30	. . . and had no intent to commence any litigation.
8:23-24	The last thing we wanted was to litigate against Northwestern,
12:21-22	As I have said, we had no interest in having to litigate these issues with NorthWestern.
15:3-4	Although we were hoping to avoid litigation, we felt we had no choice.
16:29-31	We have incurred considerable expense in hiring counsel and retaining experts in litigation this matter.

B. Allegations of bad-faith negotiations are not relevant.

It is clear from the record that Oak Tree and NorthWestern Energy have differing views of the negotiations that led up to the filing of the complaint in this docket. While some of the details surrounding the negotiations may be relevant to determine if a legally enforceable obligation has been established, accusations that NorthWestern Energy refused to negotiate or negotiated in bad

⁸ SDCL § 19-12-3 (Rule 403) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . .”).

faith are not relevant and should be excluded. Therefore, NorthWestern Energy respectfully requests that the following passages be stricken from the Rebuttal Testimony of Michael Makens:

Page:Line Reference	Testimony
2:10-13	In summary, I believe Mr. LaFave is attempting to conceal . . . refused to negotiate.
5:22-25	If NorthWestern had asked, . . . all it had to do was ask.
7:8	That's not a negotiation[;] that's a proclamation.
10:39-11:5	More importantly, we would have taken it as a sign . . . NorthWestern had no interest in good faith discussions regarding the Oak Tree project.
11:10-11	In point of fact, we felt that NorthWestern was telling us to go away.
13:28-35	NorthWestern was telling us nothing other than "go away" . . . cost rate provided by NorthWestern.
14:2	"In a last gasp effort to prod NorthWestern into negotiations,"
14:37-15:1	As a response that said, in essence: . . . go to the South Dakota PUC.
15:15-34	NorthWestern is simply shifting the blame . . . That is simply wrong and makes no sense whatever.
16:22-34	Are you concerned . . . derail QF projects in this manner.

Testimony of Thomas K. Anson

On February 24, Oak Tree submitted testimony of a new expert witness, Thomas Anson, to rebut the testimony of Bleau LaFave, one of NorthWestern Energy's fact witnesses. Mr. Anson's opinions are untimely and fail to meet the requirements for admission of expert testimony. Mr. Anson's testimony consists of legal conclusions that are properly part of legal argument in briefs or other pleadings. Oak Tree is attempting to lend credibility to its legal arguments under the guise of expert opinion. Therefore, the Commission should grant the motion to strike the Rebuttal Testimony of Thomas K. Anson.

A. *Anson's testimony is an untimely expert opinion offered under the guise of rebuttal testimony.*

Mr. Anson describes the purpose of his testimony as follows:

I have been asked by Oak Tree Energy, LLC (Oak Tree) to address the federal framework regarding how a Qualifying Facility (QF) may create a Legally Enforceable Obligation (LEO) as set forth in 18 C.F.R. § 292.304(d). I am testifying as a rebuttal expert in response to NorthWestern Energy (NorthWestern) witness Bleau LaFave . . .⁹

NorthWestern Energy admits that Mr. LaFave briefly discusses a legally enforceable obligation (LEO) in his Prefiled Direct & Rebuttal Testimony.¹⁰ However, this is not a new issue. Rather, Mr. LaFave offers his brief comments in response to assertions in the direct testimony of J. Richard Lauckhart, as well as allegations pleaded by Oak Tree in its complaint.¹¹ Thus, Mr. Anson's opinions are not proper rebuttal testimony but rather expert testimony that should have been disclosed in Oak Tree's direct testimony.

There is no reason for the lateness of Mr. Anson's opinions. It is no surprise to Oak Tree that whether an LEO was created is an issue in this case. Allowing Oak Tree to introduce a new expert witness at this stage of the proceeding would prejudice NorthWestern Energy, as there is no longer an opportunity for NorthWestern Energy to present expert testimony to rebut Mr. Anson.

One of the factors identified by the South Dakota Supreme Court in considering whether to allow late-disclosed expert opinions is whether the expert testimony concerns a crucial issue in the case.¹² Whether an LEO was created is a crucial in this case—in fact, it is one of the three issues identified in the Commission's Order for and Notice of Hearing. It is simply unfair to allow Oak

⁹ Anson Test. 2:2–5.

¹⁰ LaFave Test. 5:20–6:8.

¹¹ LaFave Test. 5:30–31; Lauckhart Direct Test. 2–3; Compl. 4–5 & Ex. 10.

¹² *Papke v. Habert*, 2007 S.D. 87, ¶ 56, 738 N.W.2d 510, 539; *Kaiser v. University Physicians Clinic*, 2006 S.D. 95, ¶ 35, 724 N.W.2d 186, 195. (The other two areas of concern relate to disclosures pursuant to Rule 26. *Id.* Neither party provided Rule 26 disclosure in this docket, so those areas of concern are moot.)

Tree to submit the opinions of a new expert in response to comments by a lay witness—comments which were made in rebuttal to Oak Tree’s direct testimony—at this stage of the proceedings.

B. Anson opinions are improper.

SDCL § 19-15-2 sets forth the general requirements for admission of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, . . .¹³

In this case, an expert witness is not necessary to assist the Commission on this issue. First, as mentioned in Mr. LaFave’s testimony, “NorthWestern will provide legal arguments regarding the requirements for an LEO in its post-hearing brief.”¹⁴ Oak Tree’s counsel will have the same opportunity to present its legal arguments regarding the requirements for an LEO in its post-hearing brief, and that is the proper place for such legal arguments. Experts are not allowed to testify as to legal conclusions.¹⁵ Additionally, the Commission has legal counsel to answer its questions on this issue.

In addition, the Commission’s decision regarding if and when an LEO may have been created has consequences that reach far beyond this docket. As Staff witness Brian Rounds stated in his testimony,

. . . Staff would prefer the Commission not make a ruling regarding the existence of an LEO. Staff believes it is more appropriate, if necessary, to engage in a rule making proceeding at which time the

¹³ SDCL § 19-15-2 (Rule 702).

¹⁴ LaFave Test. 5:28–29.

¹⁵ See, e.g., *State v. Guthrie*, 2001 S.D. 61, ¶ 88, 627 N.W.2d 401, 431 (“We have also held that an expert cannot testify as to legal conclusions.” Gilbertson concurring in part and concurring in result).

Commission could receive comment and encourage participation from all stakeholders.¹⁶

NorthWestern Energy agrees. This is not the proper time or place for Mr. Anson's expert opinions.

Conclusion

Mr. Lauckhart's testimony is replete with irrelevant comments regarding dockets before the Montana PSC. The references Mr. Lauckhart makes to the Montana dockets are of no value to this Commission and have no bearing on the ultimate issues in this matter. Therefore, those portions of Mr. Lauckhart's testimony should be stricken and the corresponding exhibits excluded. In addition, Oak Tree's witnesses and counsel should be instructed not to introduce similar testimony or evidence at hearing of this matter.

Mr. Makens's testimony includes tangential comments about the expense of litigation, claims that Oak Tree filed this complaint as a last resort, and allegations of bad-faith negotiations against NorthWestern. None of these comments will assist the Commission in deciding the three issues before it. Therefore, those portions of Mr. Makens's testimony should be stricken. In addition, Oak Tree's witnesses and counsel should be instructed not to introduce similar testimony or evidence at hearing of this matter.

Oak Tree could have presented Mr. Anson's legal opinions regarding creation of an LEO during their case in chief, as this has been an issue from the beginning of this docket. They did not. To allow Mr. Anson's testimony now, when NorthWestern Energy cannot identify a new expert to rebut the opinions, would prejudice NorthWestern Energy. Mr. Anson's testimony fails to meet the general requirements of SDCL § 19-15-2; it is improper legal argument presented as

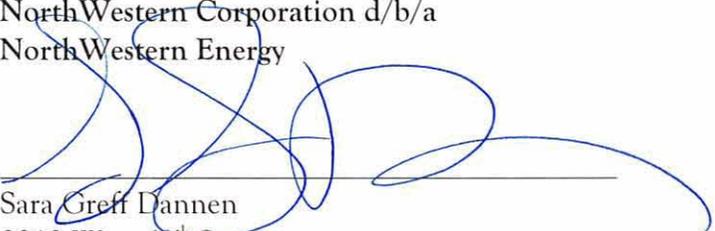
¹⁶ Rounds Test. 4:27-30.

testimony. For these reasons and for the reasons discussed above, NorthWestern Energy respectfully requests that the Commission strike the Rebuttal Testimony of Thomas K. Anson.

Dated at Sioux Falls, South Dakota, this 2nd day of March, 2012.

Respectfully submitted,

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