

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 NorthWestern Energy's Resistance to Oak Tree Energy, LLC's Second Motion to Compel
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NorthWestern Energy submits this response in resistance to Oak Tree Energy, LLC's Second Motion to Compel Discovery.

Response to Oak Tree's Background

Oak Tree's brief is peppered with allusions to its own cooperativeness while coloring NorthWestern in a palette of stubborn, unreasonable refusal to cooperate. However, Oak Tree "doth protest too much, methinks." In reality, Oak Tree has been going through the motions of attempting to informally resolve our discovery disputes while creating more and more tangential issues to muddy the waters. Oak Tree's only attempt at resolution was essentially to state, "We disagree, give us what we want, or we will file a motion to compel."

Oak Tree has sought information regarding NorthWestern's 20-year avoided costs. NorthWestern has been consistent in its response, and its position has been clear: NorthWestern has not calculated its 20-year avoided costs, and any such calculation would be unreliable at best. Oak Tree can continue to ask the question in as many ways as it desires, and our answer will remain the same. While NorthWestern has submitted testimony to rebut Oak Tree's avoided cost projections, this is not the same as having made our own 20-year avoided cost calculations. In fact, NorthWestern's testimony is consistent with the position it has taken throughout this discovery process—i.e., that long-term estimates of electricity costs are inherently unreliable.

Oak Tree now protests that it was blindsided by Steve Lewis's direct testimony rebutting Richard Lauckhart's 20-year avoided cost forecast. These protests are poppycock. Oak Tree could not reasonably believe that NorthWestern would not offer any expert opinions to rebut Mr. Lauckhart's opinions. If NorthWestern accepted Mr. Lauckhart's calculations, this docket would not exist. The primary issue for the Commission to determine in this docket is the price that NorthWestern must pay Oak Tree under PURPA for electricity generated from the project based on NorthWestern's avoided costs over the 20-year life of the project.¹ Oak Tree cannot be surprised that NorthWestern offered expert testimony to rebut its expert's avoided cost forecast.

NorthWestern supplemented its response to Oak Tree's first combined discovery requests on November 15, 2011, producing the following documents:

- ◆ NorthWestern Energy Informational Compliance Filing with the South Dakota Public Utilities Commission as required by 18 C.F.R. § 292.302 dated November 15, 2011;
- ◆ Avoided Cost Summary with 2012 - 2016 estimates; and
- ◆ Lands Energy Consulting price forecast.

Oak Tree admits that it received Mr. Lewis's forecast on November 15, yet it now complains that NorthWestern did not describe how it intended to use Mr. Lewis's forecast. Oak Tree fails to mention that nowhere in its discovery requests did it inquire about expert witnesses.

NorthWestern cannot "conceal" answers to a question that it was not asked.

In a motion to compel that is replete with misrepresented facts and irrelevant obfuscation, Oak Tree asks this Commission to order production of information to which Oak Tree is not entitled. As discussed in Oak Tree's motion, on January 27 the parties agreed to limited discovery directed to Mr. Lewis and Dennis Wagner in lieu of depositions. This limited discovery was a cheaper alternative to an "extravagant" live deposition of Mr. Lewis, a deposition Mr. Uda

¹ See Scheduling Order.

declared should be “very short.”² NorthWestern anticipated receiving written questions directed to Mr. Lewis and Mr. Wagner as allowed by SDCL 15-6-31(a). Instead, NorthWestern received eight requests for production, three interrogatories, and two requests for admission³ directed to Mr. Lewis, and seven requests for production directed to Mr. Wagner.⁴ Had the parties proceeded with live depositions, the witnesses would not have had any of the documents responsive to these new document requests available, yet Oak Tree now cries foul when its attempt to circumvent the proper discovery process was not successful. Oak Tree failed to craft written questions to Mr. Lewis and Mr. Wagner that would elicit the information Oak Tree seeks. Oak Tree is now creating smoke and mirrors with their motion to compel in the hope of compensating for this error.

Resistance to Motion to Compel

Interrogatory No. 12 & Request for Production No. 30

Oak Tree erroneously believes it is entitled to information as it relates to confidential, proprietary information of NorthWestern’s expert witness, Steve Lewis. Oak Tree believes it is entitled to:

- (1) names of Mr. Lewis’s clients for whom he has used the same price forecasting methodology;
- (2) copies of reports Mr. Lewis has provided to clients in which he has used the same price forecasting methodology;
- (3) a copy of any testimony Mr. Lewis provided about his price forecast methodology; and
- (4) forums in which Mr. Lewis has testified regarding this price forecasting methodology.⁵

² Jan. 26, 2012, email from Mike Uda to Yvette Lafrentz, Sara Dannen, Al Brogan, Ryan Soye, and Kara Semmler with copy to John Smith.

³ It is arguable whether requests for admission to Mr. Lewis were appropriate, as he is not a party. See SDCL 15-6-36(a).

⁴ The deposition was tentatively scheduled for Monday, January 30. As of Friday, January 27, Oak Tree had neither requested that documents be provided nor served a *subpoena duces tecum* pursuant to SDCL 15-6-30(b)(5).

⁵ Oak Tree’s Limited Discovery Req. to Mr. Lewis and Mr. Wagner, Interrog. No. 12 & Req. for Produc. No. 30.

NorthWestern has definitely answered Oak Tree's requests and, to the extent it can, has provided appropriate responses and objections to Oak Tree's questions.

Oak Tree is not entitled to any more in response to this interrogatory and request for production for at least three reasons. First, the scope of discovery related to experts expected to testify is governed by SDCL 15-6-26(b)(4)(A)(i). "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to the the expert is expect to testify and a summary of the grounds for each opinion."⁶ Oak Tree's Interrogatory No. 12 and Request for Production No. 30 go far beyond the information that is permitted by the statute.

Second, non-testifying experts' reports are generally not discoverable.⁷ Oak Tree's Interrogatory No. 12 and Request for Production 30 request information regarding a non-testifying expert's methodology, and that is clearly not discoverable under the South Dakota rules of civil procedure. In its answers to Oak Tree's Interrogatory No. 12 and Request for Production No. 30 and in the Affidavit of Steven E. Lewis⁸, NorthWestern explained that Mr. Lewis's relationships with his other clients has been in a non-testifying capacity. Mr. Lewis has not testified in any proceeding regarding his price forecasting methodology used in this matter. As far as giving Oak Tree information as to Mr. Lewis's clients, neither NorthWestern nor Mr. Lewis is in a position to waive Mr. Lewis's other clients' rights to protection of having hired Mr. Lewis as a non-testifying expert witness.

⁶ SDCL 15-6-26(b)(4)(A)(i).

⁷ *Papke v. Harbert*, 2007 S.D. 87, ¶ 82, 738 N.W.2d 510, 536; SDCL 15-6-26(b).

⁸ The Affidavit of Steven E. Lewis is being filed with this response.

Third, the scope of a request for production is limited by SDCL 5-6-34(a). The breadth of a proper request for production is limited to documents and tangible things “which are in the possession, custody, or control of the party upon whom the request is served.” The party served, NorthWestern, does not have possession, custody, or control of documents produced by its expert and his firm for other entities. NorthWestern cannot legitimately demand that Steven Lewis or Lands Energy provide documents that it has been paid to produce for others and that are governed by independent confidentiality arrangements.

Oak Tree is trying to confuse the Commission in its motion to compel by challenging Mr. Lewis’s qualifications as an expert. Quite frankly, Mr. Lewis’s qualifications as an expert have no bearing on a motion to compel; rather, this is an issue for the trier of fact to ultimately decide. As the South Dakota Supreme Court has stated, “Expert testimony admissibility is governed by SDCL 19-15-2 (Rule 702). It is well settled that the trial court has broad discretion in regard to the admission of expert testimony.”⁹ Ultimately, the issue as to whether Mr. Lewis is qualified as an expert is up to the Commission to decide at the hearing. A motion to compel is not the proper vehicle for determining the admissibility of an expert’s opinion. Oak Tree will have ample opportunity to cross-examine Mr. Lewis at hearing on his expert qualifications.

Request for Production No. 40

Oak Tree also erroneously believes it is entitled to information as it relates to non-relevant information about NorthWestern’s decision to build a peaking facility. Specifically, Oak Tree has requested:

- (1) copy of all studies/reports that NorthWestern has prepared in support of its decision to build a peaking facility; and

⁹ *State v. Edelman*, 1999 S.D. 52, ¶ 4, 593 N.W.2d 419, 421 (citations omitted).

- (2) a copy of any analysis/study (associated report if available) performed by NorthWestern that looked at alternatives to the Aberdeen plant.¹⁰

Oak Tree mischaracterizes this request as a need “to determine the underlying basis for the opinions offered in prefiled testimony by NWE witness Mr. Wagner.”¹¹ The building of the Aberdeen peaking facility is not a new issue; Oak Tree’s request is untimely. It has had time since the beginning of the discovery process to request written documentation regarding the decision to build the peaking facility. Not only is this request for records untimely, but it is quite frankly not relevant, and at this stage in the proceeding it would place a huge burden on NorthWestern.

Oak Tree has had knowledge that NorthWestern was going to build the Aberdeen peaking facility as early as July 2010. In a letter from NorthWestern to Mr. Uda on July 6, 2010, NorthWestern sited a link to its 10-year supply plan on file with the Commission.¹² NorthWestern’s 10- year supply plan on file with the Commission on July 6, 2010, referenced NorthWestern’s intent to build the Aberdeen peaking facility. More specifically, in follow-up correspondence to Oak Tree Energy on July 30, 2010, NorthWestern specifically mentioned that it was “currently under development of a natural gas peaking facility located near Aberdeen, South Dakota.”¹³ Oak Tree knew of NorthWestern’s intention to build the Aberdeen peaking facility well in advance of the filing of Mr. Wagner’s pre-filed testimony—in fact, well in advance of Oak Tree’s filing its Complaint in this docket. To claim otherwise is completely disingenuous.

Oak Tree’s pre-Complaint knowledge of NorthWestern’s intention to build a peaking facility is relevant to the arguments in this motion to compel. The procedural schedule in this

¹⁰ Oak Tree’s Limited Discovery Req. to Mr. Lewis and Mr. Wagner, Req. for Produc. No. 40.

¹¹ Oak Tree Mot. to Compel at 7.

¹² Compl. Ex. 3.

¹³ Compl. Ex. 7.

matter contemplated that all written discovery would be complete by November 28, 2011. Oak Tree's supplemental requests for production a month before the hearing date should not be NorthWestern's burden to bear. Oak Tree properly made capacity credits an issue when it pleaded those facts in its Complaint.¹⁴ NorthWestern has properly sought information, data requests, and discovery as to the issue of capacity.¹⁵ Oak Tree also sought discovery on capacity issues, specifically, in Request for Admission No. 2 Oak Tree asked:

Please admit that NorthWestern has a need for capacity and energy to serve its South Dakota load over the next 20 years.

Answer: . . . NorthWestern admits that it has a need for firm capacity and firm energy to serve its South Dakota load over the next 20 years.¹⁶

Oak Tree in its infinite wisdom never chose to ask for additional information when it should have regarding NorthWestern's plans for additional capacity.

Oak Tree had the knowledge of the proposed Aberdeen peaking facility prior to the Complaint being filed. Oak Tree made capacity an issue when it pleaded capacity in its Complaint. Oak Tree knew NorthWestern would be addressing capacity issues based on its discovery requests and pleadings to this point. NorthWestern properly followed procedure in this matter and filed all its data requests and pre-filed testimony in accordance with the procedural schedule agreed upon by all parties to this matter. Oak Tree's inadvertence to pay attention to the details and process in this matter should not hinder NorthWestern at this late date in the proceeding.

The information Oak Tree requests regarding the studies and reports on the Aberdeen peaking facility is not relevant to the ultimate issue of avoided costs in this proceeding and would be a burden for NorthWestern to produce this late in the proceeding. The incremental avoided

¹⁴ See Compl. ¶ 10.

¹⁵ See NWE 1st Data Req. to Oak Tree Nos. 1-6, 1-11, 1-18, 1-20, 1-21, 1-26, & 1-27.

¹⁶ NWE's Answers & Resp. to Oak Tree's 1st Combined Discovery Req., Req. for Adm. No. 2.

capacity costs that NorthWestern would potentially have to incur by buying capacity from the Oak Tree project has no relevant tie to NorthWestern's decision to build the Aberdeen peaking facility. Put another way, NorthWestern would not lower the expected capacity output of the Aberdeen peaking facility to account for OakTree's potential capacity credits.

While pre-hearing discovery in South Dakota may have broad constructions, it is not without limits. "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders, quash subpoenas, and grant terms when appropriate."¹⁷ South Dakota's discovery rules are clear: discovery "shall be limited," especially when the discovery sought is "unduly burdensome or expensive."¹⁸

Complying with Oak Tree's last-minute requests regarding reports, studies, and analyses done by NorthWestern with respect to the building of the Aberdeen peaking facility would require extensive work and time. It would require NorthWestern to do a records search of all potentially related documents. These searches are performed by NorthWestern's records management department. Once the email and storage locations are searched and the records are captured, it takes additional time to review all the search results, flag the relevant information, review the results for privileged communications, and produce it. Overall, the process could take 45 to 60 days.¹⁹

Oak Tree has also made much ado about taking the depositions of Mr. Wagner and Mr. Lewis in this matter. The request for the depositions was untimely. Oak Tree was clearly trying to circumvent the procedural schedule in this matter. The Scheduling Order clearly contemplated

¹⁷ *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 20, 658 N.W.2d 64, 72.

¹⁸ SDCL 15-6-26(b)(1)(A)(iii).

¹⁹ See Affidavit of Sally Neal.

that depositions would take place before pre-filed testimony was filed. No deposition notices or subpoenas were ever issued. All parties agreed that supplemental written discovery would take place. NorthWestern agreed to expedite answers in a short timeframe in order to accommodate Oak Tree. In NorthWestern's mind, the supplemental discovery it anticipated responding to from Oak Tree—discovery that was meant to take the place of depositions—would have been in the form of written interrogatories, not another full-blown data request. To assert that Oak Tree would have the documents they are now requesting after taking the telephonic depositions of Mr. Lewis and Mr. Wagner seems absurd.

Conclusion

For the reasons set forth above, NorthWestern respectfully requests that the Commission deny Oak Tree's second motion to compel discovery.

Dated at Sioux Falls, South Dakota, this 14th day of February, 2012.

Respectfully submitted,

**NorthWestern Corporation d/b/a
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