BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT BY CONSOLIDATED EDISON DEVELOPMENT, INC. AGAINST NWE CORPORATION DBA NWE ENERGY FOR ESTABLISHING A PURCHASE POWER AGREEMENT	DOCKET NO. EL16-021

CONSOLIDATED EDISON DEVELOPMENT, INC.'S MOTION TO EXCLUDE NORTHWESTERN'S MAY 3 RESPONSE TO COMMISSIONER NELSON

In the April hearing, Commissioner Nelson and NorthWestern witness Hansen had the following exchange (transcript pp. 247-248):

COMMISSIONER NELSON: Thank you. Page 13 of your testimony. Through your modeling you've arrived at a levelized energy rate for a contract term of 2018 through 2037 of $29.63 per megawatt hour. Yesterday as Mr. LaFave was being questioned there was some talk about during the Condition 3, the Min Gen hours, that zero dollars were credited for the Con Ed energy during those hours and that those zero hours are incorporated into the 29.63 average. Is that correct?

THE WITNESS: That is correct.

COMMISSIONER NELSON: *If those zero hours or those zero values were removed and this average were recalculated, what would it be?*

THE WITNESS: It would be slightly higher. As opposed to a –

COMMISSIONER NELSON: Well, I understand that. I'm looking for a number.

THE WITNESS: I can't give you that number off the -- I haven't calculated that number, but it's close. It would be maybe a dollar, dollar and a half difference. Certainly that calculation could be performed and provided to the Commission.

COMMISSIONER NELSON: *And I guess if I could just make a request, I would like to have that calculation run and provided as part of the record in this proceeding.*

As noted in the italicized portion of the quote from the transcript, Commissioner Nelson asked to have the dollar outcome of the Min-Gen condition recalculated without including so-called "zero hours".

On May 3 Northwestern sent a procedurally peculiar response to the question, characterized "NorthWestern's Response to Commissioner Chris Nelson," over the signature of its lawyer Jon Oostra. NorthWestern hasn't made a formal offer of the Response or any of its content, but presumably intends the Response be included in the record in some fashion. Consolidated Edison Development objects to inclusion of the Response in record or to its proffer as evidence to be considered in the hearing, and respectfully moves the Commission to exclude the Response from consideration in this proceeding.

The question posed by Commissioner Nelson was answered in the second sentence of the Response:

> "The avoided cost for energy increases from $29.63/MWh to $30.87/MWh for a total increase of $1.24/MWh for energy that is delivered when NorthWestern is not at Min-gen."

The Response then offers a two and one-third page mix of argument, opinions (presumably Mr. Oostra's), comments on other evidence presented in the proceeding, NorthWestern's "concerns" and a few facts, none of which answers Commissioner Nelson's question.

None of the Response, and in particular the two and one third page commentary, is admissible in evidence, for a host of reasons, and should not be included in the hearing record. First, the Response is unsworn. SDCL 19-19-603 requires that before testifying, a witness must give an oath to testify truthfully. Accordingly the Response is inadmissible, as all testimony in a contested case hearing must be presented under oath, per the rules of evidence.

Second, even if the Response was sworn, it doesn't identify who made the calculation contained in the second sentence or the spreadsheet that was attached, so the answer to the question lacks foundation. SDCL 19-19-602 provides that a witness may testify to a matter only if evidence is introduced demonstrating that the witness has personal knowledge of the subject on which he proposes to testify, so-called "foundation testimony." No such foundation testimony is offered in the Response. Although proffered by Mr. Oostra, there is no statement demonstrating who did the calculation, so the basic personal knowledge foundation required by Rule 602 is absent. For that reason alone, the calculation and spreadsheet cannot be admitted into evidence.

Third, presuming someone other than Jon Oostra did the calculation, lawyer Oostra's recitation of the outcome is hearsay, an unsworn out of court statement offered for the truth of the proposition asserted. Hearsay is inadmissible in administrative proceedings. *Dubray v SD Dept. of Soc. Services,* 2004 S.D.30, 690 N.W.2d 657, SDCL 19-19-802.

Fourth, only the second sentence, quoted above, is responsive to the question posed by Commissioner Nelson. Commissioner Nelson asked that the outcome of the adjusted Min-Gen hours be calculated, which is answered in the second sentence of the Response. He didn't ask for an argument on the plusses and minuses of the process, an explanation of market settlement procedures, or NorthWestern's perceptions of the complexities or fairness of application of the calculation to avoided cost. Accordingly, all of the Response save the second sentence is non-responsive to the question and inadmissible.

Fifth, the Response is signed by lawyer Jon Oostra, who appeared on behalf of NorthWestern in the case. Lawyer Oostra is not a competent witness. Lawyers are not competent to testify as fact witnesses if they have appeared representing a litigant, absent a

showing that the lawyer could not have reasonably anticipated the need to testify, which, does not exist in this situation. SDCL 19-1-3, Code of Professional Responsibility, Canon 5, SDCL 16-18 Appendix, *Ward v Lange*, 1996 S.D.113, 553 N.W.2d 246; *Matter of Evans Estate*, 238 N.W.2d 677 (1976).

Finally and terminally fatal to introduction of the Response into evidence, none of the Response, including the answer to the question, is subject to cross-examination. SDCL 1-26-19 (2), addressing administrative contested case hearings, provides "A party may conduct cross-examinations required for a full and true disclosure of the facts." Cross-examination is fundamental to due process, the truth seeking mechanism that is guaranteed by our statutes. Absent a meaningful opportunity for Consolidated Edison Development to cross-examine the proponent of the information in the Response, Consolidated Edison Development is deprived of a fundamental right assured every litigant in a contested case hearing.

Simply stated, none of NorthWestern's Response is admissible in the submitted form and the Commission should so rule. Consolidated Edison Development prays the Commission enter an order to that end.

Respectfully submitted this 17th day of May, 2017.

By William Taylor

William Taylor
John E. Taylor
Taylor Law Firm
4820 E. 57th Street
Sioux Falls, SD 57108
Email: bill.taylor@taylorlawsd.com
Telephone (605) 782-5304

Michael J. Uda
Uda Law Firm, PC
7 West Sixth Avenue
Power Block West, Suite 4H
Helena, MT 59601
Telephone: (406) 431-6775
Email: michaeluda@udalaw.com

Attorneys for Consolidated Edison Development, Inc.

Certificate of Service

I hereby certify that on the 17th day of May, 2017, I served via email a true and correct copy of Consolidated Edison Development's Motion to Exclude on the following:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us
(605) 773-3201 - voice

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us
(605) 773-3201 - voice

Ms. Amanda Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
(605) 773-3201 - voice
amanda.reiss@state.sd.us

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us
(605) 773-3201 - voice

Mr. Joseph Rezac
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
joseph.rezac@state.sd.us
(605) 773-3201 - voice

Mr. Corey Juhl
Director-Project Development
ConEdison Development, Inc.
1502 17th St. SE
Pipestone, MN 56164
cjuhl@juhlenergy.com

Ms. Pamela Bonrud
NorthWestern Energy
3010 West 69th St.
Sioux Falls, SD 57108
Pam.Bonrud@northwestern.com
(605) 978-2990 - voice
(605) 978-2910 - fax

Mr. Al Brogan
Corporate Counsel
NorthWestern Corporation dba NorthWestern Energy
Ste. 205
208 N. Montana Ave.
Helena, MT 59601
Al.Brogan@northwestern.com
(406) 443-8903 - voice

Mr. Jonathan M. Oostra
Corporate Counsel
NorthWestern Energy
3010 West 69th St.
Sioux Falls, SD 57108
jon.oostra@northwestern.com

Mr. Bleau LaFave
Director Long Term Resources
NorthWestern Energy
3010 West 69th St.
Sioux Falls, SD 57108
bleau.lafave@northwestern.com
(605) 978-2897 - voice

By William Taylor

William Taylor, one of the Attorneys for
Consolidated Edison Development, Inc.