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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE COMPLAINT BY
CONSOLIDATED EDISON DEVELOPMENT,
INC. AGAINST NORTHWESTERN
CORPORATION DBA NORTHWESTERN
ENERGY FOR ESTABLISHING A PURCHASE
POWER AGREEMENT**

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**CONSOLIDATED EDISON
DEVELOPMENT, INC.'S MOTION *IN
LIMINE* TO EXCLUDE REBUTTAL
TESTIMONY OF AUTUMN MUELLER
AND LUKE P. HANSEN AND BRIEF IN
SUPPORT**

EL16-021

Introduction

Applicant, Consolidated Edison Development, Inc. ("ConEd"), respectfully moves *in limine* the Public Utilities Commission of the State of South Dakota ("Commission") to enter an order to exclude from the record the Rebuttal Testimony of Autumn Mueller and the Rebuttal Testimony of Luke P. Hansen, filed in this docket on February 10, 2017 by NorthWestern Energy ("NWE") on the basis that NWE's testimony and exhibits are improper pursuant to the

Commission's Scheduling Order and basic concepts of procedural fairness and fundamental precepts of due process.

Argument

Applicant specifically objects to the inclusion of the Rebuttal Testimony of Autumn Mueller and the Rebuttal Testimony of Luke Hansen. Both instances of Rebuttal Testimony are improper because they exceed the scope of testimony to which NWE is entitled. The Procedural Scheduling Order issued by the Commission in Docket EL16-021 on August 19, 2016 provides for ConEd Testimony on July 29, 2016, NWE Response Testimony October 17, 2016, Staff Testimony on January 10, 2017, and Rebuttal Testimony to be filed February 10, 2017. NWE seems to have made the mistake of assuming that "Rebuttal Testimony" was open to all parties – it is not.

ConEd Energy is the Applicant in this proceeding. Pursuant to South Dakota Rule of Administrative Procedure 20:10:01:15.01, the Applicant "has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The [Applicant] has the burden of proof as to factual allegations which form the basis of the [application]." South Dakota Rule of Administrative Procedure 20:10:01:01.02 provides that "Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply." The model of procedure followed by circuit courts in South Dakota is the familiar model – the party that bears the burden of proof is entitled to the first and last word on the matter. Indeed, NWE has insisted on this very format in recent proceedings before the Montana Public Utilities Commission in Docket D2016.5.39. Both the Rebuttal Testimony of Autumn Mueller and the Rebuttal Testimony of Luke Hansen filed by

NWE in EL16-021 are improper in this regard. NWE is not entitled to file rebuttal testimony, or more accurately, supplementary testimony outside the bounds of the testimony it was entitled to by the Commission's Procedural Scheduling Order.

The Rebuttal Testimony of Autumn Mueller is additionally improper because it does not seek to rebut any testimony but instead to rebut ConEd Energy's responses to Staff Data Requests. Not only is Rebuttal Testimony offered to the Applicant as the party bearing the burden of proof in order to rebut the Response Testimony to which NWE was entitled, Rebuttal Testimony is intended to rebut *testimony*, not to rebut responses to Data Requests. Thus, not only is NWE not entitled to file the Rebuttal Testimony of Autumn Mueller it is attempting to introduce into the record, it would not be entitled to rebut the responses it purports to rebut even if it *were* entitled to Rebuttal Testimony. The Rebuttal Testimony of Autumn Mueller is improper and ConEd Energy therefore requests that the Commission exclude such testimony from the record.

Furthermore, the improper Rebuttal Testimony of Luke Hansen is made more improper by the introduction of new issues in evidence. NWE's Rebuttal Testimony of Luke Hansen does not refute or contradict any evidence presented by Ms. Maini – rather, it improperly seeks to bolster Ms. Maini's testimony by proffering extensive, non-contradictory testimony concerning issues that were not raised in the testimony NWE purports to rebut. Specifically, Mr. Hansen offers data through testimony that seeks to demonstrate a calibration and benchmarking system NWE uses to verify its PowerSimm modeling, but Ms. Maini never testified that NWE does not verify its modeling – she only testified that “NorthWestern's approach relies, in large part, on historical relationships to predict future conditions.” Maini page 15. These statements are not contradictory. NWE is merely attempting to bolster the staff's witness.

Worse, NWE is attempting to bolster the staff's witness with irrelevant data. The data relied upon in Mr. Hansen's testimony focuses on NWE's Montana power system and power prices at the Mid-C trading hub. This data is irrelevant to Mr. Hansen's estimate of avoided cost for the ConEd Projects located in South Dakota. Mr. Hansen's failure to include data from the South Dakota system or provide analysis based on the data in this proceeding makes already-improper testimony fundamentally incredible. This incredibility is exacerbated by the fact that on Page LPH-2, Lines 17-18, Mr. Hansen identifies that the description and process discussed in his testimony was prepared not by himself, but by Ascend Analytics, for NWE's 2013 Montana Resource Plan. No witness from Ascend Analytics has testified in this proceeding, and Mr. Hansen cannot be allowed to testify about highly detailed work he was not personally involved in.

Even more improper is the fact that new issues introduced in the Rebuttal Testimony of Luke Hansen reflect working papers requested, but not received, in the discovery process in this docket. In ConEd Data Requests ConEd-001 through ConEd-007, ConEd requested all workpapers, spreadsheets, input data and parameters, and output data related to NWE's South Dakota avoided cost estimate and related PowerSimm Modeling. NWE provided ConEd with no data concerning benchmarking, calibration, stochastic modeling parameters, or descriptions of stochastic modeling algorithms, all of which it is currently seeking to introduce into its improper "Rebuttal Testimony" at the eleventh hour, when it well knows that ConEd has no further scheduled opportunity to respond. For NWE to attempt to introduce new testimony -- and Ms. Mueller's Proposed Rebuttal Testimony and Mr. Hanson's Proposed Rebuttal Testimony are unquestionably new -- would violate ConEd's rights to due process. ConEd therefore requests

that the Commission exclude the Rebuttal Testimony of both Autumn Mueller and Luke Hansen from the record.

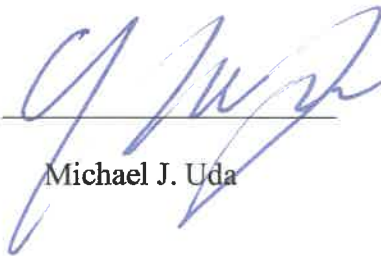
Conclusion

For the foregoing reasons, Applicant ConEd respectfully requests that the Commission enter an order excluding the highly improper Rebuttal Testimony of Autumn Mueller and the Rebuttal Testimony of Luke Hansen on behalf of NWE from the record. This is a clear abuse of the Commission's Procedural Scheduling Order in a bald attempt to gain an unfair advantage in litigation, and the Commission should not accept what would be a violation of ConEd's right to due process.

RESPECTFULLY SUBMITTED THIS 21st DAY OF FEBRUARY, 2017

Uda Law Firm, P.C.

By: _____



Michael J. Uda