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

<b>IN THE MATTER OF THE</b>	)	<b>NORTHWESTERN ENERGY'S</b>
<b>COMPLAINT BY CONSOLIDATED</b>	)	<b>RESPONSE TO CONSOLIDATED</b>
<b>EDISON DEVELOPMENT, INC.</b>	)	<b>EDISON DEVELOPMENT, INC.'S</b>
<b>AGAINST NORTHWESTERN</b>	)	<b>MOTION IN LIMINE TO EXCLUDE</b>
<b>CORPORATION d/b/a</b>	)	<b>REBUTTAL TESTIMONY</b>
<b>NORTHWESTERN ENERGY FOR</b>	)	
<b>ESTABLISHIN A PURCHASE</b>	)	<b>EL16-021</b>
<b>POWER AGREEMENT</b>	)	

NorthWestern Energy (“NorthWestern”) objects to Consolidated Edison Development, Inc.’s (“ConEd”) Motion in Limine to exclude the rebuttal testimony of Autumn Mueller and Luke P. Hansen (“Motion”) and respectfully requests the Public Utilities Commission (“Commission”) deny the Motion. NorthWestern’s submission of rebuttal testimony is consistent with the Commission’s Scheduling Order and prior Commission practice. In addition, NorthWestern’s submission of rebuttal testimony does not violate procedural fairness of fundamental precepts of due process. NorthWestern did not intend to and did not gain an unfair advantage in the litigation in this docket.

## **Background**

On June 23, 2016, ConEd's predecessor, Juhl Energy, Inc., filed the Complaint in this docket. On August 19, 2016, the Commission issued a Procedural Scheduling Order ("Scheduling Order"), which established the following deadlines:

July 29, 2016	Juhl Testimony
October 17, 2016	NorthWestern Response Testimony
January 10, 2017	Staff Testimony
February 10, 2017	Rebuttal Testimony
March 10, 2017	Final Discovery to all parties
April 7, 2017	File Witness and Exhibit Lists
April 11 – 14, 2017	Evidentiary Hearing

ConEd<sup>1</sup> had attached the testimony of Roger Schiffman to its complaint. On July 29, 2016, ConEd filed the testimony of Corey Juhl. On October 17, 2016, NorthWestern filed the testimonies of Luke P. Hansen, Bleau J. LaFave, and Autumn M. Mueller. On November 2, Commission Staff ("Staff") submitted its third set of data requests to ConEd in which it referenced Autumn Mueller's testimony and asked ConEd about site control. ConEd answered the data requests and disputed Ms. Mueller's testimony on November 15, 2016. On January 10, 2017, Staff filed the testimony of Kavita Maini and Jon Thurber. On February 10, 2017, NorthWestern filed the rebuttal testimony of Luke P. Hansen and Autumn Mueller. On February 21, 2017, ConEd filed its Motion to exclude NorthWestern's rebuttal testimony.

## **Argument**

ConEd asserts that NorthWestern does not have the right to file rebuttal testimony addressing Staff's testimony or disputing representations ConEd made in discovery responses that were provided after NorthWestern's filed its response testimony. Citing to procedure

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<sup>1</sup> On February 15, 2017, the Commission granted ConEd's Motion to Amend Complaint based on ConEd's acquisition of Juhl's interest in the Project. Throughout the pleading NorthWestern refers to the Complainant as ConEd.

followed by circuit courts, ConEd asserts that as the party bearing the burden of proof it is entitled to the first and the last word on every matter. While this assertion is true, it does not lead to the conclusion that NorthWestern's rebuttal testimony is improper. NorthWestern properly responded to Staff's testimony and to ConEd's disputation of Autumn Mueller's testimony regarding site control. If NorthWestern cannot respond to Staff's testimony or to ConEd's assertions, the Commission will lack the full record that it needs to decide the issues in this docket.

The Commission does not follow the court model in all matters. For example, court model limits the time and scope of discovery, does not include prefiled testimony, and does not provide any opportunity for one party to ask another about a third party's testimony, all of which are normal in regulatory dockets of this nature. In many dockets, intervenors and respondents are allowed to file rebuttal testimony. *See In re NorthWestern Energy*, EL14-106, Scheduling Order (June 26, 2015) (establishing a deadline for "all parties' rebuttal testimony"). *See also, In re Sprint*, TC06-175 (Petitioner Sprint and Respondent Interstate Telecommunications Cooperative both filed rebuttal testimony.) ConEd apparently ignores both the Commission's standard practice and the fact that it will have an opportunity at hearing to summarize and amplify its testimony, which will provide it the "last word." *See, e.g. Oak Tree Energy, LLC v. NorthWestern Energy*, Docket No. EL11-006, Transcript (witnesses allowed to summarize and explain testimony.)

Kavita Maini, in her testimony, opined, "In rebuttal testimony, NorthWestern should explain (a) how it currently handles facility specific upgrades for a customer that are later used by others, and (b) also provide justification for the specific capacity and related configurations of the three substations to address [ConEd's] interconnection requests for the three QF projects. I

will be submitting additional discovery requests and I will update my position based on the responses at the Hearing.” This testimony show two things. First, Staff anticipated that NorthWestern would file rebuttal testimony. Second, the Commission allows and witnesses expect to update their testimony and positions during the live hearing. These both undercut ConEd’s arguments about fairness, due process, and normal procedure.

Largely, the disputes in this docket center on the validity of competing models of weather, load, generation, and prices. While Ms. Maini testified that she preferred NorthWestern’s model, she also testified about weaknesses in the model saying, “Second, I tend to agree with Mr. Schiffman that the analysis can be enhanced by using the hourly prices to calculate the avoided costs instead of externally calculating the costs using monthly prices. Since the initial analysis uses hourly pricing data to ascertain the net purchase of sale position, it could be augmented by using the hourly pricing to calculate the costs.” Luke Hansen’s rebuttal testimony addressed these concerns, and concerns shown by the tenor of data requests, by providing a description of the steps undertaken to validate the PowerSimm model. This testimony is both relevant and proper.

The fundamental task in this docket is to balance the interests of a QF developer and NorthWestern’s customers. The information in NorthWestern’s rebuttal testimony will assist the Commission. The Commission is able to consider the weight to give the testimony. ConEd has the opportunity to challenge the testimony at hearing through cross-examination and live testimony.

### **Conclusion**

The Scheduling Order did not limit rebuttal testimony solely to ConEd. NorthWestern’s rebuttal testimony responded to concerns raised by Staff’s testimony and through data requests.

NorthWestern should be allowed to address those concerns. ConEd will have the opportunity to challenge NorthWestern's rebuttal testimony at the hearing. For these reasons, NorthWestern request that the Commission deny ConEd's Motion.

Dated this 7<sup>th</sup> day of March, 2017.

**NORTHWESTERN CORPORATION,  
d/b/a NORTHWESTERN ENERGY**



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 7<sup>th</sup> day of March 2017, true and correct copies of the foregoing, NORTHWESTERN ENERGY'S RESPONSE TO CONSOLIDATED EDISON DEVELOPMENT, INC.'S MOTION *IN LIMINE* TO EXCLUDE REBUTTAL TESTIMONY in Docket No. EL16-021, were served on the following via electronic mail:

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