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

IN THE MATTER OF THE)	NORTHWESTERN ENERGY'S
COMPLAINT BY CONSOLIDATED)	RESPONSE TO CONSOLIDATED
EDISON DEVELOPMENT, INC.)	EDISON DEVELOPMENT, INC.'S
AGAINST NORTHWESTERN)	MOTIONS IN LIMINE TO EXCLUDE
CORPORATION d/b/a)	TESTIMONY OF BLEAU LAFAVE,
NORTHWESTERN ENERGY FOR)	KAVITA MAINI, AND JON
ESTABLISHIN A PURCHASE)	THURBER
POWER AGREEMENT)	
)	EL16-021

NorthWestern Energy (“NorthWestern”) objects to Consolidated Edison Development, Inc.’s (“ConEd”) Motions in Limine to exclude portions of the testimony of Bleau J. LaFave and all of the testimony of Kavita Maini and Jon Thurber (“Motions”) and respectfully requests the Public Utilities Commission (“Commission”) deny the Motions.

Background

On October 17, 2016, NorthWestern filed the testimonies of Luke P. Hansen, Bleau J. LaFave, and Autumn M. Mueller. 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 27, 2017, ConEd filed its Motions to exclude portions of Bleau J. LaFave's testimony, and all of Staff's witnesses testimony.

Argument

ConEd bases its Motions on the proposition that the rules of evidence strictly apply to contested cases before the Commission. SDCL 1-26-19(1), which ConEd quoted in part, provides:

Irrelevant, incompetent, immaterial, or unduly repetition evidence shall be excluded. The rules of evidence as applied under statutory provision and in the trial of civil cases in the circuit courts of this states, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary matters may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

Notwithstanding this statutory language, the South Dakota Supreme Court has ruled that "Application of the technical rules of evidence is not constitutionally required. Numerous courts have recognized that this is especially true in administrative proceedings. Yet it cannot be doubted that the applicable rules of evidence must be applied in a fair and even-handed manner." *Daily v. City of Sioux Falls*, 802 N.W.2d 905, 910 (2011).

Calculation of avoided cost involves projections about the future. While these projections are facts, they are not reasonably susceptible of proof under the rules of evidence. The testimony offered by Bleau J. LaFave, Kavita Maini, and Jon Thurber is the type of information relied on by reasonably prudent utilities in planning for and meeting their obligations to provide service. As described below, the testimony should be admitted so the Commission has a full and robust record before it to decide the matters in this docket.

Bleau J. LaFave

ConEd seeks to strike the following portions of Bleau J. LaFave's testimony as "argument and not relevant evidence" (Motions, p. 12):

Q. Has the South Dakota Public Utilities Commission ("SDPUC") adopted any rules or orders concerning requirements for QFs?

A. Yes, Order F3365.

Q. What are the requirements for a utility concerning a qualifying facility requesting to provide energy and capacity under 1982 South Dakota Public Utilities Commission Order F-3365?

A. Under Order F-3365, the SDPUC found that rates for purchases from QFs with a design capacity of more than 100 kW should be set by contract negotiations between the QF and the electric utility. The SDPUC would act as a dispute arbitrator between the parties in accordance with this rule and PURPA requirements if agreement between the parties cannot be reached.

("LaFave Page 8").

Q. What is an LEO, and where does that fit into the FERC regulations?

A. As described in the FERC rules that I cited earlier, FERC created the concept of an LEO to protect QFs from a utility's refusal to sign a contract. By taking certain actions, a QF can unconditionally obligate itself to deliver electric energy and capacity over a set period. When a QF incurs an LEO, the utility has the ability to enforce the delivery obligation against the QF. When or how an LEO is established varies from state to state. The SDPUC has not determined what is necessary to establish an LEO in South Dakota. However, the touchstone of an LEO is the QF's unconditional commitment to sell energy and capacity to a utility.

("LaFave Page 9").

Mr. LaFave is NorthWestern's Director of Long-Term Resources. In that role, he evaluates every electric resource that NorthWestern considers acquiring and negotiates power purchase agreements with QFs. The first Q&A on LaFave Page 8, is merely a statement of fact. There are no grounds for excluding this statement. The second Q&A explains his understanding of what NorthWestern is required to do to comply with PURPA in South Dakota. Mr. LaFave is

merely putting a context around NorthWestern's efforts to negotiate an agreement with ConEd and the Commission's role in this docket. This is appropriate evidence.

The Commission has found that a QF established an LEO, in part, because NorthWestern failed to negotiate in good faith. *Oak Tree Energy, LLC v. NorthWestern*, Docket No. E111-006, Interim Order (May 15, 2012). A QF is entitled to rates based on information known at the time an LEO is created. *Id.* Mr. LaFave supervises, directly or indirectly, NorthWestern's employees who calculate its avoided costs. As such, he must be aware of LEO requirements to determine the proper data for NorthWestern to use. The LaFave Page 9 testimony demonstrates his understanding of PURPA and how he supervises NorthWestern's implantation of PURPA. The testimony is a factual, not legal argument. Mr. LaFave's testimony includes his opinions that are rationally based on his perception, are helpful to determining a fact in issue, and is not based on scientific or technical knowledge. *See* SDCL 19-19-701. This is appropriate evidence.

Kavita Maini

ConEd asserts that Kavita Maini does not qualify as an avoided cost expert. ConEd asserts that only someone who is an expert in avoided cost is qualified to offer testimony in this docket. ConEd's definition is too narrow. PURPA requires a utility to pay a QF "the incremental cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). Any person who is knowledgeable about electric utility procurement, electricity pricing, and alternative electricity resources is qualified to offer opinions about how the incremental cost should be calculated. Ms. Maini's testimony demonstrates that she is knowledgeable about utility resource planning, electricity procurement, and electricity markets. Ms. Maini is qualified to offer the opinions in her testimony. She also summarizes testimony of ConEd's and

NorthWestern's witnesses to explain the basis of her opinions. Her testimony is based on specialized knowledge, is appropriate, and will help the Commission make a decision in this docket.

Jon Thurber

ConEd asserts that Jon Thurber does not qualify as an avoided cost expert. Mr. Thurber has spent the last nine years working as a utility analyst for the Commission or as the Manager of Rates for a utility. He has previously testified about PURPA standards. He is qualified to offer to the Commission the descriptions and opinions in his testimony.

Conclusion

For the reasons stated above, NorthWestern requests that the Commission deny ConEd's Motions.

Dated this 7th day of March, 2017.

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



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