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**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**

**DOCKET NO. EL11-006
OAK TREE ENERGY, LLC'S
MOTION TO COMPEL**

**OAK TREE ENERGY, LLC'S
SECOND MOTION TO COMPEL DISCOVERY**

I. INTRODUCTION

Pursuant to Section 20:10:01:22.01 of the South Dakota Public Utilities Commission (PUC) Administrative Rules, Oak Tree Energy, LLC (Oak Tree) moves for an order to compel NorthWestern Energy (NWE) to respond to Interrogatory No. 12 and Request for Production No. 30 and Request for Production No. 40.

At the outset, Oak Tree wishes to emphasize that it has attempted informally to resolve this discovery dispute with NWE to no avail. Several e-mail communications, phone calls between counsel and a teleconference moderated by Mr. John Smith, PUC counsel, have been

attempted to come to a resolution. Furthermore, after the January 27, 2012 teleconference, Oak Tree agreed to utilize additional written discovery so this matter could continue forward without delay. However, Oak Tree feels that this motion has become necessary.

II. BACKGROUND

Before discussing in detail the instant motion to compel, Oak Tree wishes to recap what has transpired in discovery in this proceeding. Throughout the course of this proceeding, Oak Tree has requested that NWE produce information as to how it would calculate a 20-year avoided cost. On September 7, 2011, Oak Tree filed *Oak Tree Energy LLC's Motion to Compel*. As a response to the motion, NWE stated that a 20-year avoided cost analysis does not exist and, therefore, could not be produced. This matter was addressed at the November 8, 2011 regular meeting of the PUC. NWE maintained throughout the discovery process, as well as during the hearing with the PUC on November 8, that the information necessary to develop NWE's 20-year avoided cost would be unreliable and that it did not exist. Therefore, NWE argued it could not produce the requested data. Ultimately, the Commission granted Oak Tree's motion, in part, by requiring NWE to produce avoided cost data for a five and ten-year period. The Commission also stated that the denial of Oak Tree's motion with respect to the 20-year data does not relieve NWE of the responsibility to provide the information should it become available. Only after Oak Tree had the opportunity to review NWE's Prefiled Direct and Rebuttal testimony on January 13, 2012 did it become apparent that NWE was attempting to introduce testimony to rebut Oak Tree expert Richard Lauckhart's 20-year avoided cost forecast.

In other words, NWE is attempting to have it both ways: (1) thwarting Oak Tree in its effort to make its case for a 20-year avoided cost forecast by depriving Oak Tree of any understanding of NWE's position on its avoided costs; and (2) prejudicing Oak Tree's ability to prepare for hearing by failing to disclose at any point prior to January 13, 2012 that Mr. Lewis would be offering his testimony to rebut Mr. Lauckhart on avoided costs. NWE should not be permitted to use the Commission's discovery process to conceal essential facts and prejudice another party in this fashion. Although NWE has denied that Mr. Lewis is offering his 20-year natural gas price forecast as an avoided cost forecast, it cannot deny that it is attempting to use Mr. Lewis's testimony and forecast as the basis to rebut Mr. Lauckhart's 20-year avoided cost forecast. Regardless of what NWE chooses to call Mr.

Lewis's forecast, if NWE knew that it would use Mr. Lewis's testimony in this fashion, NWE should have disclosed that fact at some point either before or during the PUC's hearing on November 8, 2011 regarding Oak Tree's first motion to compel. No such words were uttered by NWE or its counsel during that hearing.

NWE has claimed that a "forecast" is different than an avoided cost calculation. This statement is undeniably true. However, it is also true that the reason Oak Tree wished to obtain a 20-year price forecast from NWE during the discovery period and that Oak Tree filed its motion to compel was so that a fair and honest debate could take place over methodologies, and both Oak Tree and NWE would have an opportunity to contrast and compare methodologies as part of making their respective cases. Oak Tree had a right to this information if it existed, and NWE undoubtedly knew it would prejudice Oak Tree by introducing Mr. Lewis's testimony as rebuttal to Mr. Lauckhart well after the close of discovery. It is also unquestionably true that without Mr. Lewis's testimony, NWE will have little or no ability to rebut Mr. Lauckhart's avoided cost calculations at the hearing, as it would have no testimony on that subject matter. NWE's actions in this proceeding have deprived Oak Tree of a meaningful opportunity to obtain needed information necessary to its case during discovery and to prepare its case.

Although NWE is correct that Oak Tree received Mr. Lewis's forecast on November 15, 2011, it is also true that NWE in no way disclosed to the parties or to the PUC that it intended to use Mr. Lewis's forecast in the manner disclosed only as of the filing of Mr. Lewis's testimony on January 15, 2012. Oak Tree also could not have requested additional discovery at the time that Mr. Lewis's natural gas price forecast itself was first disclosed on November 15, 2011, as no further opportunities for discovery were provided in the schedule. Furthermore, Oak Tree had no indication at any point up until January 13, 2012 that NWE would attempt to use Mr. Lewis's forecast to rebut Oak Tree's case or that NWE had concealed this fact from Oak Tree for approximately two months.

Oak Tree is entitled to know the bases for Mr. Lewis's opinions in this proceeding and to test his testimony for credibility and accuracy. Yet, as discussed further below, NWE continues to withhold relevant information regarding Mr. Lewis's calculations and how they relate to a proper calculation of NWE's avoided costs over a 20-year period.

A separate, but related, issue arose for Oak Tree upon the receipt of the prefiled testimony of NWE witness Mr. Dennis Wagner on January 13, 2012. For the first time in this proceeding, NWE disclosed, through Mr. Wagner's testimony, that NWE disagrees with Mr. Lauckhart's calculations regarding the need for additional capacity due to the existence of the Aberdeen gas plant. NWE's decision to construct the Aberdeen facility was part of a resource planning analysis that led to the decision by NWE that the Aberdeen facility was a necessary capacity addition for NWE's South Dakota utility. A necessary part of that resource planning process was the natural gas price forecast that would have been used to prepare the analysis that cost-justified the Aberdeen facility. Oak Tree believes this natural gas price forecast is necessarily relevant in this proceeding and may be dispositive on the issue of natural gas pricing.

As mentioned previously, the parties attempted to resolve their differences informally in the January 27, 2012 teleconference, whereby NWE and Oak Tree agreed to a period of limited discovery to allow Oak Tree to request information regarding the prefiled testimony of NWE witnesses Mr. Lewis and Mr. Wagner. Thereafter, Oak Tree submitted limited discovery on these witnesses with the understanding that Oak Tree might file a motion to compel if NWE continued to resist the bases for its witnesses' testimony. On January 30, 2012, Oak Tree submitted its limited requests regarding NWE witnesses Mr. Lewis and Mr. Wagner. Instead of answering the questions, NWE continued its pattern of refusing to fully cooperate in ordinary discovery, thus necessitating this Second Motion to Compel.

III. MOTION TO COMPEL

The PUC made it clear in its November 8, 2011 order that NWE had an obligation to produce any avoided cost information in its possession. Despite this clear directive, NWE has refused to cooperate in discovery regarding the underlying bases and justification for its witnesses' testimony on avoided costs. Interrogatory No. 12 and Request for Production No. 30 requested that Mr. Lewis identify how his natural gas forecast has been used by his clients. This is not a small matter: if Mr. Lewis's methodology has not been used by any utility for long-term forecasting of any sort, and is only short-run internal guidance, it is not at all relevant to this proceeding, nor can it be used to rebut Mr. Lauckhart's very thorough avoided cost forecast specifically prepared for NWE's South Dakota utility. Oak Tree's requests and NWE's responses are as follows:

INTERROGATORY NO. 12 AND REQUEST FOR PRODUCTION NO. 30:

On page 4, lines 6-8 of your testimony, you indicate that Lands Energy has used the method of price forecasting you advocate in this proceeding to advise numerous clients on the wholesale energy markets and specifically to support resource management decisions. Please provide:

(a) The names of the clients for which you have used this method;

Answer: NorthWestern Energy objects to Interrogatory No. 12 on the grounds that it calls for the effective disclosure of the identity of a non-testifying, consulting expert without any showing of exceptional circumstances. Without waiving said objection, Mr. Lewis responds as follows:

Lands Energy has provided a forecast using the methodology for forecasting South Dakota prices to a number of clients other than NorthWestern Energy over the years. Based on a review of its records, Lands Energy has supported 7 different utilities or utility organizations, 1 Native American tribe, 2 industrial end users, 2 resource developers, and 2 consulting firms with forecast electricity prices using this process. Due to confidentiality obligations to those clients, Lands Energy is unable to identify these clients.

(b) A copy of the report or documentation (including any existing in electronic format) you provided to the client identifying the method and results of this wholesale electricity price forecast;

Answer: NorthWestern Energy objects to Interrogatory No. 12 on the grounds that it calls for the effective disclosure of the identity of a non-testifying, consulting expert without any showing of exceptional circumstances. Without waiving said objection, Mr. Lewis responds as follows:

Again, due to confidentiality obligations to its other clients and the fact that the information is proprietary to Lands Energy, Lands Energy is not able to provide the forecasts it delivered to other clients here.

- (c) A copy of any testimony you provided in any forum where you testified about the methodology. Also provide the forum and docket number associated with that testimony;

Answer: Lands Energy has not provided testimony in any forum regarding this price forecast methodology.

- (d) Identify any forum wherein a regulatory authority such as a state public service commission with rate setting authority approved the methodology you have identified in your testimony, and the final order in that proceeding.

Answer: Beginning in 2007, NorthWestern Energy has used this method in its electricity supply resource procurement plans filed with the Montana Public Service Commission. These are dockets that do not result in final orders.

Oak Tree believes there are two significant problems with NWE's responses. First, and most important, Oak Tree is seeking information regarding the use of Mr. Lewis's methodology by other utilities. If these entities simply use Mr. Lewis's forecast to calculate short-run natural gas hedging strategies, Mr. Lewis's calculation is not relevant to avoided cost. If Mr. Lewis's methodology was not used at all by these utilities, then it is simply irrelevant to this proceeding. If Mr. Lewis's methodology has never been used in any fashion to prepare a fundamentals-based forecast, which is the industry standard, it is far too unreliable for any real planning purpose, much less as a basis to calculate avoided cost. Oak Tree is absolutely entitled to know the answers to these questions prior to the hearing of this matter.

Second, NWE is plainly intending to offer Mr. Lewis as an expert qualified to rebut Oak Tree's method of calculating avoided cost, but NWE is unwilling or unable to prove to Oak Tree and this Commission that Mr. Lewis is indeed an expert in this field. This is contrary to the rules of evidence used in South Dakota.

SDCL 19-15-2 states, in pertinent part,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

may testify thereto in the form of an opinion or otherwise, if: ... (2) The testimony is the product of reliable principles and methods, ...

However, based on the responses given by NWE, Oak Tree is unable to determine: (1) whether Mr. Lewis is an expert; and (2) whether his testimony is the product of reliable principles and methods.

NWE's objections that the request "calls for the effective disclosure of the identity of a non-testify consulting expert" and "calls for the effective disclosure of the facts known and opinions held by a non-testifying, consulting expert" are indicative of NWE's failure to engage in the discovery process in good faith. Based on NWE's responses, Oak Tree is unsure whether Mr. Lewis is an expert or is merely relaying information developed by a "non-testifying, consulting expert." If the latter is the case, Oak Tree would suggest that Mr. Lewis's testimony is irrelevant and should be disregarded in its entirety.

If Mr. Lewis is indeed being held out as an expert in this field, Oak Tree is entitled to ascertain his level of expertise. NWE's failure to provide *any* of Lands Energy's prior clients or reports leaves Oak Tree, and the Commission, in the position of relying solely on NWE's certification of their own expert. While NWE may consider Mr. Lewis an expert, the Commission, as the trier of fact, must ultimately determine whether Mr. Lewis's "knowledge, skill, experience, training, or education" qualify him as an expert. Without providing any information relating to the prior use of Mr. Lewis's method of price forecasting, Oak Tree is unable to ascertain his level of expertise and the Commission cannot reasonably rely on his testimony.

Thus, without knowing the use to which Mr. Lewis's forecast has been employed, and by whom, and whether Mr. Lewis is actually an expert or is simply relaying the expert opinions of others (whom have not been disclosed), Oak Tree is prejudiced. The PUC should require NWE to answer fully and fairly, without equivocation, Oak Tree Interrogatory No. 12 and Request for Production No. 30.

Request for Production No. 40 was posed by Oak Tree to determine the underlying basis for the opinions offered in prefiled testimony by NWE witness Mr. Wagner. The request and responses are as follows:

REQUEST FOR PRODUCTION NO. 40: On page 5, lines 15-17 of your testimony, you discuss NorthWestern's decision to build the Aberdeen plant. Please provide:

- (a) A copy of all studies/reports that NorthWestern has prepared that support this decision;

Response: NorthWestern objects to Request for Production No. 40(a) as irrelevant in that it is neither reasonably tailored to matters at issue in this proceeding nor reasonably calculated to lead to admissible evidence.

NorthWestern's decision to construct the Aberdeen plant is not an issue in this docket, which is addressed solely to the price that NorthWestern must pay Oak Tree for energy and capacity from a proposed wind generation facility located approximately 90 miles from Aberdeen.

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

Response: NorthWestern objects to Request for Production No. 40(b) as irrelevant in that it is neither reasonably tailored to matters at issue in this proceeding nor reasonably calculated to lead to admissible evidence.

NorthWestern's decision to construct the Aberdeen plant is not an issue in this docket, which is addressed solely to the price that NorthWestern must pay Oak Tree for energy and capacity from a proposed wind generation facility located approximately 90 miles from Aberdeen.

NWE's response to Request for Production No. 40 is difficult to take seriously. First, information about the decision to construct the Aberdeen plant is highly relevant in this proceeding; indeed, it could be pivotal to a determination of NWE's actual avoided cost. Second, a significant portion of Mr. Green's testimony falls under the heading "Aberdeen Generating Station #2." In his testimony, Mr. Green discusses the decision to build this plant. Consequently, any analysis, study, or report utilized for this decision is relevant and should be provided to Oak Tree.

Generally, any new resource decisions include a full resource planning activity – meaning it is very likely that NWE engaged in a process that looked into all its needs from all technologies, including wind, prior to its decision to build the Aberdeen plant. It is also likely

that such a process involved an analysis which could be used to determine NWE's avoided cost. Finally, as stated previously, any resource planning process would typically include a fundamentals based natural gas price forecast, a methodology which greatly differs from that used by NWE witness Mr. Lewis in his non-fundamentals based forecast. Any such information is not only relevant, but critical, to the determination of the avoided costs NWE must pay Oak Tree for electricity generated as a result of Oak Tree's project.

The decision to build the Aberdeen plant was based on a capacity issue – another relevant issue in this case. NWE has stated it is not in need of the additional capacity that could be generated by the Oak Tree project. Mr. Green's testimony states that the decision to build the Aberdeen plant was in response to future capacity needs. Thus, any analysis, study, or report utilized in the decision will likely have capacity information and be highly relevant to this matter, and should be provided without further delay. The PUC should order NWE to fully respond to Oak Tree Request for Production No. 40 immediately.

As stated previously, Oak Tree attempted to resolve this issue informally by contacting NWE to set up the depositions of Mr. Lewis and Mr. Green. While NWE did agree to the deposition of Mr. Lewis, their insistence that the deposition take place in-person at their offices in Sioux Falls, SD, rather than telephonically, was expensive, unnecessary, and, in Oak Tree's opinion, unreasonable. To continue to work toward a resolution in this matter, Oak Tree agreed to additional discovery, but NWE's refusal to adequately respond to the requests has made this motion necessary.

The PUC will recall that Mr. Lauckhart's testimony was due February 9, 2012, and in light of this dispute, Oak Tree has asked that this deadline be extended to February 17, 2012. NWE has agreed to this extension, provided it also receives a similar extension to respond to testimony by PUC Staff. Regardless, Oak Tree believes it has a right to the information so that Mr. Lauckhart may incorporate it into his prefiled rebuttal testimony. Thus, time is of the essence.

IV. CONCLUSION

For the reasons set forth above, Oak Tree respectfully requests the PUC grant Oak Tree's Motion to Compel by ordering NWE to respond to Interrogatory No. 12 and Request for Production No. 30 and Request for Production No. 40 immediately or, in the alternative,

order any relief the PUC deems appropriate. Oak Tree regrets that it has been unable to resolve this dispute informally and only brings this motion to compel as a last resort.

Respectfully submitted this 8th day of February, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Compel* was served electronically on this 8th day of February, 2012, upon the following:

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