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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 PREHEARING MOTIONS REGARDING RIGHT TO FULL AVOIDED COST AND CREATION OF LEGALLY ENFORCEABLE OBLIGATION**

OAK TREE ENERGY, LLC'S OMNIBUS PREHEARING MOTIONS

I. INTRODUCTION

Oak Tree Energy, LLC (Oak Tree), acting by and through counsel, and pursuant to the South Dakota Public Utility Commission's (PUC) second amended scheduling order, hereby submits its Prehearing motions and memoranda in support regarding Oak Tree's right to a full avoided cost over a 20-year term based on the avoided cost forecast prepared by Oak Tree Expert Richard Lauckhart in his Direct Prefiled Testimony in this proceeding. Oak Tree also

requests that, based on recent decisions by the Federal Energy Regulatory Commission FERC) the PUC declare that Oak Tree has incurred a legally enforceable obligation or "LEO" as established by FERC's rules and decisions regarding that issue.

Oak Tree's request specifically is that the PUC rule the rate for Oak Tree's 19.5 Megawatt ("MW") wind project be based on the 20-year avoided cost forecast prepared and submitted by Oak Tree expert witness Lauckhart since NorthWestern Energy (NWE) has consistently claimed it cannot produce a 20-year avoided cost forecast in this proceeding. As set forth herein, Oak Tree has a right under PURPA to a full avoided cost rate over a specified term. Oak Tree has specified a 20-year term whereby it has committed to sell its output to NWE, and NWE has steadfastly refused to cooperate and prepare its own 20-year avoided cost forecast (although it undoubtedly knows how to do so, based on the Prefiled and Direct Testimony of NWE witness Bleau Lafave, pp. 9-10). Thus, Oak Tree is left shooting at a moving target, created by NWE's intransigence. More importantly, NWE cannot carry its burden of production to rebut Mr. Lauckhart's forecast since it refuses to produce a 20-year avoided cost forecast of its own. Oak Tree has a right to have the rates for its wind project based on NWE's *full* avoided costs and since NWE refuses to produce a 20-year avoided cost forecast, Oak Tree should have its rates based on Mr. Lauckhart's avoided cost forecast for NWE over a 20-year term because it is the only one in existence in this proceeding.[1]

Second, Oak Tree moves for an order as a matter of law that Oak Tree properly created an LEO as of February 25, 2011. Under the direction provided by FERC in recent decisions regarding the creation of an LEO, Oak Tree has done everything it was required to do under the Public Utility Regulatory Policies Act of 1978 (PURPA) to create an LEO to sell its output over a 20-year term to NWE. Oak Tree bound itself to sell its output to NWE over a 20-year term on February 25, 2011. Oak Tree need not, under PURPA, do anything more. Oak Tree should not be required to litigate its entitlement to an LEO when NWE has no legal or factual basis for questioning the existence of an LEO for Oak Tree.

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[1] Oak Tree has also filed separate motions seeking to exclude the expert testimony of NWE witness Steven Lewis on the grounds he is unqualified to offer the opinions he seeks to offer in this proceeding, and that his methods are unreliable. Oak Tree further seeks to strike certain portions of the testimony of NWE witness Bleau LaFave for offering legal opinions which he is unqualified to offer, and some of which are directly contrary to established law.

II. ARGUMENT

A. Oak Tree is Entitled to a 20-Year Rate Based on an Avoided Cost Forecast; NWE Admits it has No 20-Year Avoided Cost Forecast, Therefore The Rate Must Be Based on Oak Tree's 20-Year Avoided Cost Forecast

Oak Tree has consistently argued that it needs a 20-year avoided cost in order to construct and operate its 19.5 MW wind project. Federal and state courts have long held that PURPA gives QFs the right to determine the length of the "specified term" over which they will sell power to utilities. 18 C.F.R. § 292.304(d) "Federal regulations provide that QFs are permitted to enter into long-term PPAs in which the purchase rate is based on utilities' avoided costs calculated—at the QF's option—either at the time the contract is executed or at the time the energy is delivered." *New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.,* 117 F.Supp.2d 211, 221 n. 15 (N.D.N.Y., 2000). "In order to facilitate financing of QF projects, the avoided cost rate calculated at the inception of the contract can be fixed or 'locked in' for the full term of the contract." *Phoenix Power Partners, L.P. v. Colorado Public Utilities Com'n, 959 P.2d 359, 362 (1998) (citing to 18 C.F.R. § 292.304(d)* (2)). Thus, it is Oak Tree's <u>right</u> to determine the length of its specified commitment to sell output to NWE and NWE has no right to decide on a different term.

It is well settled that Oak Tree has a right to a rate no less than NWE's "full" avoided cost over the length of this 20-year term. *American Paper Inst. v. American Elec. Power,* 461 U.S. 402, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983). "QFs are entitled to receive the *full* avoided cost rates provided in the QF's standard offer contract, 18 C.F.R. § 292.304, and not a rate that is 80% (or less than 80%) of the full avoided cost rate." *Independent Energy Producers Ass'n, Inc. v. California Public Utilities Com'n,* 36 F.3d 848, 854-55 (1994); *Armco Advanced Materials Corp.v. Penn. Public Utility Com'n,* 135 Pa.Cmwlth 15, 37, 579 A.2nd 1337, 1349 (1990)("The PUC must order a rate for such a purchase equivalent to the full avoided costs, 18 C.F.R. § 292.304(b)(2), and the PUC may not order terms or conditions for the purchase in any way contrary to the FERC regulations, or contrary to the goals of PURPA."); *GPU Indus. Intervenors v. Penn. Public Utility Com'n,* 156 Pa.Cmwlth. 626, 629, 628 A.2d 1187, 1188 (1993)("The PURPA requires utilities to purchase needed energy and capacity offered by QFs at full avoided cost, subject, however, to the right of the parties to negotiate a price of their own choosing. In other words, if a utility and a QF fail to reach agreement on a contract

price, *the QF may nevertheless insist that the utility purchase needed energy and capacity at full avoided cost*." (emphasis added)).

In *Kansas City Power & Light Co. v. Kansas Corp. Com'n*, 676 P.2d 764 (Kansas, 1984), the Kansas Supreme Court considered a situation where the state regulatory authority decided it did not have good enough information to set a rate based on Kansas City Power & Light's ("KCPL") avoided costs. The Court noted that the Kansas Corporation Commission ("KCC") had ruled "that it was impossible to determine a rate based upon avoided cost and refused to do so. It then proceeded to exercise its power under state law and determined rates on a different basis than avoided cost." *Id.* at 767. KCPL appealed and the Court noted that the Supreme Court in the *API* case had proscribed a state regulatory authority from setting rates for QFs at *anything other than avoided cost*:

> Simply stated, the United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA and the federal regulations, *must* apply the avoided-cost rule in the absence of a waiver granted by FERC or a specific contractual agreement setting a price that is lower than the avoided-cost rate.

Id.

Simply put, PURPA mandates that a QF has the right to specify the length of its commitment to sell power and a right to no less than full avoided cost. Federal and State courts have unanimously upheld the avoided cost rule, and the fact that it is difficult or "unreliable" (as NWE has put it), to perform an avoided cost forecast over a 20-year period does not strip Oak Tree of its right to an avoided cost rate over a 20-year term.

There are only three places whereby a prospective QF can obtain avoided cost information over the specified term of its proposed contract to sell its generation to a utility. The QF can get it from the utility voluntarily, the state regulatory authority can require a utility to produce it, or the QF can generate the avoided cost forecast over the specified term itself. NWE has consistently taken the position that it will not and cannot produce an avoided

cost forecast.[2] The PUC has not required NWE to produce it, leaving some doubt as to how NWE will carry its burden to demonstrate that Oak Tree expert Lauckhart's 20-year avoided cost forecast is incorrect. Oak Tree, not obtaining the information voluntarily from NWE, and unable to obtain it through PUC order, generated a very detailed avoided cost forecast using an established avoided cost forecast methodology, using detailed data from national expert Black & Veatch.

After discovery closed in this proceeding, NWE produced a 20-year electric price forecast by NWE witness Mr. Steven Lewis. As NWE witness Mr. LaFave has pointed out, there are five ways in which state regulatory commissions have calculated avoided costs. Prefiled Direct and Rebuttal Testimony of Bleu LaFave (January 13, 2012), p. 9. Mr. LaFave then describes in some detail the calculations for the following five methods: (1) Proxy Unit or Surrogate Avoided Cost; (2) Component/Peaker method; (3) Differential Revenue requirement method; (4) Market estimates; and (5) Bidding Approach. *Id.*

Mr. LaFave then describes the Market Estimates method as follows: "The Market Estimates method calculates avoided cost by estimating future market prices that the utility would pay for energy and capacity and capacity equal to the QF's estimated production. Underlying this method is an assumption that the utility will purchase electric energy in the market and that electric energy is a homogenous commodity." *Id.* at p. 10, lines 15-18. [3]

In other words, a simple energy price forecast for a region such as that prepared by Mr. Lewis for NWE is not an avoided cost forecast. Oak Tree agrees that NWE has not

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[2] "NorthWestern has been consistent in its response, and its position has been clear: NorthWestern has not calculated its 20-year avoided costs, and any such calculation would be unreliable at best." NWE Resistance Br. at 1 in response to Oak Tree Second Motion to Compel.

[3] The Market Estimate method Mr. LaFave describes needs to reflect, among other things, the QF's estimated production and its capacity value in order for it to be a valid avoided cost forecast.

produced an avoided cost forecast in this proceeding. Mr. Lewis's price forecast does not comport with any of the five models identified by Bleau LaFave, and therefore does not, even according to Mr. LaFave, constitute a long-term avoided cost forecast such as that prepared by Mr. Lauckhart in this proceeding.

Thus, NWE has admitted that it has no such avoided cost forecast over a 20-year term and that one cannot be produced because it is too unreliable. Regardless of whether it is difficult to perform such a calculation (and, again, based on Mr. LaFave's testimony, NWE clearly knows how to prepare an avoided cost forecast), the fact remains that Oak Tree has a right to be paid full avoided cost over a 20-year term. Since NWE claims it cannot produce such an avoided cost forecast, and since Oak Tree is entitled to just such a 20-year forecast, Oak Tree is entitled to the rate set forth in Mr. Lauckhart's testimony.

Under PURPA, NWE had an obligation to negotiate in good faith with Oak Tree. *See Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC 61,282 (2004). NWE failed in this obligation by refusing to produce any avoided cost data and by failing to produce voluntarily its own 20-year forecast so that Oak Tree could make an informed decision about whether to proceed to execute an agreement with NWE. Instead, Oak Tree was required to file a complaint and to later file a motion to compel to obtain avoided cost data that NWE was already required to produce at least once every two years by 18 C.F.R. § 292.302. The PUC also did not order NWE to produce a 20-year avoided cost forecast. So the only evidence in this record regarding a 20-year avoided cost forecast is that contained in Mr. Lauckhart's testimony. This must, as a logical and evidentiary matter, therefore, be the basis for Oak Tree's contract rate in this Docket.

NWE's failure to produce an avoided cost forecast over the 20-year term specified by Oak Tree is fatal to NWE's attempt to carry its evidentiary burden on a 20-year avoided cost forecast at hearing. Although the plaintiff in a civil proceeding bears the burden of proof and in making its *prima facia* case, *see Farmers' State Bank of Turton v. Van Houten*, 52 S.D. 528, 532, 219 N.W. 206, 207 (1928) (citing *Scott Co. v. Scheidt*, 35 N.D. 433, 160 N.W. 502 (1916)); *Peters v. Lohr*, 24 S.D. 605, 610, 124 N.W. 853, 855 (1910) (citation omitted), the burden of production thereafter shifts to the defendant to come up with sufficient proof that there is a contested issue of fact. *Peck v. Peck*, 51 S.D. 157, 164, 212 N.W. 872, 875 (1927).

There is no contested issue here because only Oak Tree has produced a 20-year avoided cost forecast in this proceeding. Despite every opportunity to do so, NWE has refused to provide such an avoided cost forecast. Just as the KCC could not base its rate for KCPL on something other than avoided cost because it was difficult to do so, NWE cannot claim an avoided cost forecast is too unreliable and refuse to prepare one when requested by a QF. Just as KCPL was entitled to pay no more than avoided cost to its QFs, Oak Tree is entitled to no less than NWE's full avoided cost.

NWE cannot carry its burden of proof on this pivotal issue, and therefore the PUC should decide this issue in favor of Oak Tree based on NWE's unwillingness to meet its obligation to produce a full 20-year avoided cost forecast. NWE will undoubtedly claim that its electric price forecast is somehow more reliable and should be used to rebut Oak Tree, but the fact remains that an electric price forecast is missing many of the key elements of an avoided cost forecast (as even Mr. LaFave admits), and there is no basis for thinking that future projections of electric prices are any more or less reliable than an avoided cost forecast. In addition, there is every reason to believe Mr. Lewis' electric price forecast is substantially

defective as it incorporates a gas price forecast methodology that was recently rejected by the Montana Public Service Commission in Docket D2010.7.77, Order 7108e, at ¶¶ 58-64, pp. 19-22 (attached hereto as "Exhibit 1").

NWE should not be permitted by the PUC to capitalize on its own refusal to bargain with Oak Tree in good faith, or to refuse to produce the data upon which a 20-year avoided cost forecast must be based. For the PUC to permit this would be to permit NWE to evade its PURPA obligations in violation of federal law and would constitute a failure to implement PURPA in South Dakota. The PUC should grant Oak Tree's motion that the avoided cost forecast in this proceeding is to be based on Mr. Lauckhart's forecast, and not on something other than an avoided cost forecast, which would violate PURPA.

B. Oak Tree Incurred a Legally Enforceable Obligation By Committing itself to sell to NWE

The existence and timing of the creation of an LEO is an issue of first impression before the PUC. Fortunately, PURPA's regulations and recent FERC decisions provide the PUC with substantial guidance on the meaning of that term and what a QF must do to create an LEO. PURPA's regulations, adopted by FERC, provide QFs with certain rights under PURPA as set forth in 18 C.F.R. § 292.304(d):

> (d) *Purchases ''as available'' or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a *legally enforceable obligation for the delivery of energy or capacity over a specified term,* in which case the rates for such purchases shall, *at the option of the qualifying exercised prior to the beginning of the specified term,* be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) *The avoided costs calculated at the time the obligation is incurred.*

(emphasis added).

Thus, a QF has the right to sell its output to a utility pursuant to an LEO, has the right to determine the length of its commitment to sell its output to the utility, and the right to determine whether to base the LEO avoided cost calculation on the date the LEO was incurred or based on avoided costs as estimated at the time of the delivery. The individual states, under PURPA, have been left to grapple with the question of when and whether an LEO was incurred.

FERC's recent decisions in *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (Oct. 4, 2011) and *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (Nov. 19, 2009), have clarified FERC's view of how a QF under PURPA may establish an LEO. In both cases, although FERC declined enforcement action, it found that the Idaho and Texas commissions had overreached in making decisions on the LEO issue without comporting with FERC's PURPA regulations. In order to provide a brief but detailed background, it is important to note for the PUC's benefit what PURPA requires with respect to the formation of an LEO:

> Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to *prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs*. The Commission explained:
>
>> Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. *Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.*
>
> Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. *While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.* Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from

> the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.

Cedar Creek Wind, 137 FERC ¶ 61,006 at ¶ 32, pp. 13-14 (emphasis added, citations omitted).

In *Cedar Creek Wind, LLC*, FERC found that the Idaho PUC erred in deciding that the QF in that case had not created an LEO because no contract had been consummated between the QF and the utility:

> We disagree with Idaho PUC and find our discussion of PURPA in *JD Wind 1* particularly applicable, that the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and *that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract*, or as here, from delaying the signing of a contract, so that a later and lower avoided cost is applicable.

Id. at ¶ 36, p. 14 (emphasis Added).

In other words, what a utility may *not* do under PURPA is simply refuse to negotiate with a QF, as happened here. Although NWE has submitted Prefiled Direct and Rebuttal Testimony by NWE witness LaFave attempting to blame Oak Tree for NWE's stonewalling Oak Tree in negotiations, the facts as set forth in proposed Prefiled Rebuttal Testimony by Oak Tree witness Michael Makens completely refutes this claim:

- NWE never tendered a proposed contract to Oak Tree (as Oak Tree did), never made an actual proposal to buy output from Oak Tree, never asked any questions regarding the Oak Tree project, responded to Oak Tree's correspondence with boilerplate language which changed very little during a period of approximately nine months without substantial deviation, affirmatively misrepresented its actual avoided costs to Oak Tree, ignored the QF's right to a long-term avoided cost rate and offered only short-term avoided cost rates that were not based on FERC-required energy and capacity cost data as set forth in 18 C.F.R. § 292.302(b), and forced Oak Tree to file a complaint with the PUC.
- Even after this proceeding was commenced, NWE continued to stonewall inquiries into its actual long-term avoided costs, thus, requiring Oak Tree to go to the PUC with a motion to compel on November 8, 2011, almost four months after Oak Tree submitted its initial discovery requests.

- Based on Mr. Maken's Rebuttal Testimony as well as the correspondence which is attached to that testimony, NWE cannot credibly claim it ever attempted to negotiate. Oak Tree attempted in every way possible to engage in negotiations, but NWE refused. NWE simply repeated the incredible claim it had no need for capacity and that Oak Tree's proposal for a PPA was higher than NWE's short-run avoided costs.
- Oak Tree had every reason to negotiate and no reason to litigate this action. NWE does not bear its own legal costs the way that Oak Tree does. Oak Tree tried over and over again to get a response from NWE, to no avail.

Federal law requires good faith negotiation by a utility at all times. *See Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC 61,282 (2004). In the *Central Iowa* decision, FERC had the following to say about a utility's good faith obligations under PURPA:

> The mandate of section 210 of PURPA is to encourage cogeneration and small power production. The Commission attempted to implement that mandate by prescribing rules with the specific purpose of avoiding situations *where QFs are required to go through complex procedures simply to sell electricity to an interconnected utility. We found that when individuals such as Mr. Swecker are forced to endure years of litigation before being permitted to sell their QF output, we are unable to make the requisite finding, i.e., that our regulations governing arrangements between QFs and electric utilities are not necessary to encourage cogeneration and small power production in Petitioner's service area. 10. The November 19 Waiver Order noted that we were particularly concerned with the strategy of CIPCO, as demonstrated by its member Midland, to fight vigorously a QF's right to sell rather than negotiate with the QF in good faith.*

Id. at p. 4, ¶ 10 (emphasis added).

In 1982, the PUC adopted Order F-3365[4] in which it stated:

> The Commission finds that rates for purchases from (sic) QF's with a design capacity of more than 100 KW should be set by contract negotiated between the QF and the electric utility. The Commission agrees with the recommendations of all parties that the Commission should play a minimal role in the negotiation of such contracts, a role limited to resolving any

[4] *In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Production, Decision and Order F-3365 (December 14, 1982)*

> contract disputes which arise between the parties. The Commission finds such a limited role to be consistent with the provision of 18 C.F.R. Section 292.403(a) that an acceptable method of implementation of FERC's rules by a state regulatory authority is "an undertaking to resolve disputes between qualifying facilities and electric utilities ..."

Id. at 9.

If a utility is allowed to thwart its PURPA obligations simply by refusing to negotiate in good faith with a proposed QF (which has no incentive not to negotiate in good faith as it is needs a market for its power and utilities are monopolies that wish to build generation for which they can obtain rate base recovery), then a state which requires negotiation as the sole mechanism by which a QF greater than 100 KW can obtain a contract is failing to implement PURPA. As stated previously, under PURPA, the *sine qua non* of the LEO issue is whether the QF obligated itself to sell its output to a utility. *See Cedar Creek Wind*, 137 FERC ¶ 61,006 at ¶ 32, pp. 13-14.

Here, Oak Tree has no other market for its electricity and therefore sent a signed contract obligating itself to sell its entire output to NWE. This was all Oak Tree was required to do under PURPA. NWE witness LaFave claims that many terms in the proposed contract tendered by Oak Tree to NWE failed to include key terms. However, the proposed agreement does not have to be executable by NWE (nor can NWE credibly claim it would have voluntarily executed the contract under any conditions) in order for an LEO to be created. The key under PURPA to creating an LEO is the commitment to sell; not the terms of the commitment. The terms can be worked out later between the parties or pursuant to PUC order. Given that NWE never offered a contract of any sort to Oak Tree, refused to negotiate, ignored Oak Tree's requests for data that 18 C.F.R. § 292.302(b) required NWE to publish, and that NWE never responded to Oak Tree's communications with anything other than

boilerplate letters, no negotiation regarding contract terms by Oak Tree was ever possible due to NWE's intransigence.

Consistent with FERC's *Central Iowa Power Cooperative* decision, NWE's pattern of conduct in this case raises grave concerns. Including the aforementioned questionable negotiating (stalling) tactics, NWE's refusal to cooperate in any meaningful way in this process has now placed Oak Tree's ability to obtain production tax credits (PTCs) in jeopardy. NWE has refused to cooperate in discovery, requiring Oak Tree to file two separate motions to compel, one of which was necessary to obtain information that NWE was already required to produce pursuant to 18 C.F.R. § 292.302. NWE also resisted a deposition of Mr. Lewis because it insisted that Oak Tree's counsel fly to Sioux Falls, South Dakota, for what would have been a brief deposition rather than agree to permit Oak Tree's counsel to appear telephonically. Then, after an informal prehearing conference, NWE agreed to permit Oak Tree "limited" discovery, much of which NWE did not answer and which prompted Oak Tree to file a second motion to compel. These tactics have caused Oak Tree to incur considerable costs, all of which serve as a disincentive to any other QF that attempts to sell output to NWE.

The PUC has limited discretion to determine the LEO issue. In *Cedar Creek Wind,* FERC took issue with the notion that states have broad discretion in determining the LEO issue:

> Idaho PUC and other protesters interpret *West Penn's* discussion to give broad discretion to the states as to what constitutes a legally enforceable obligation and when such obligation is incurred. We disagree. While *West Penn* stands for the notion that the Commission gives deference to the states to determine the date on which a legally enforceable obligation is incurred, such deference is subject to the terms of the Commission's regulations. *West Penn* does not, as Idaho PUC argues, give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred.

*Id.*at ¶ 35, pp. 14-15 (emphasis added).

Specifically, FERC found that the state commissions may not impose additional requirements beyond those set forth in FERC's regulations implementing PURPA:

> Like the Public Utility Commission of Texas (Texas PUC) in *JD Wind 1, the Idaho PUC has imposed requirements on QFs seeking to enter into agreements to sell electricity that are in addition to those contained in the Commission's regulations.* In *JD Wind 1*, the Texas PUC refused to find that a legally enforceable obligation existed because, in its view, the QF was unable to provide "firm" power. The Commission disagreed with the Texas PUC and explained that the Commission's PURPA regulations do not contain any reference to "firm" power, and that Texas PUC's reliance on certain language in the regulatory text was incorrect. Similarly, Idaho PUC requires that a legally enforceable obligation can result from only a fully-executed contract. *Like the requirement that a QF must provide "firm" power, the requirement of a fully-executed contract is absent from the Commission's regulations.*

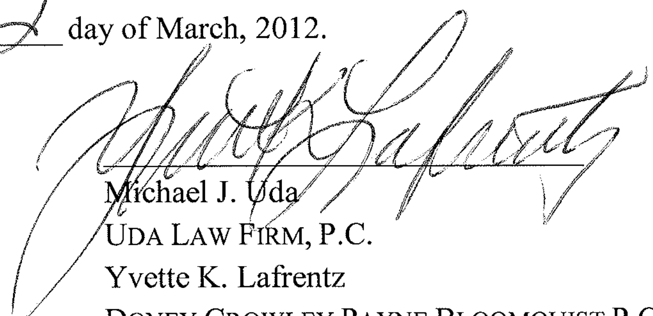
Id. at ¶ 37, p. 16.

Thus, what individual states may not do, according to FERC, is impose additional requirements to those in the federal regulations. An LEO, as stated previously, is created by the QF committing to sell its output to a utility. Oak Tree did so on February 25, 2011 and the PUC should declare that this commitment, which was Oak Tree's right pursuant to 18 C.F.R. § 292.304(d), created an LEO as of that date.

III. CONCLUSION

For the reasons set forth herein, Oak Tree respectfully requests an order finding that Oak Tree's long-term (20 year) avoided cost forecast is the basis for rates for the Oak Tree wind project, and that Oak Tree has incurred an LEO. These issues do not need further evidentiary exploration at the hearing of this matter.

Respectfully submitted this 2nd day of March, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Prehearing Motions* was served electronically on this 2nd day of March, 2012, upon the following:

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