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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 REPLY IN SUPPORT OF ITS MOTION TO COMPEL**

INTRODUCTION

On September 7, 2011, Oak Tree Energy, LLC ("Oak Tree") filed *Oak Tree Energy, LLC's Motion to Compel* (Motion) with the South Dakota Public Utilities Commission ("PUC"). Subsequently, on October 12, 2011, Oak Tree filed a supplemental brief to its Motion to Compel. On October 26, 2011, NorthWestern Energy ("NWE") filed a *Brief in Opposition to Oak Tree Energy LLC's Motion to Compel* ("NWE Brief"). Oak Tree replies as follows:

1. Interrogatory No. 10 and Request for Production No. 22.

Oak Tree urges the PUC to direct NWE to provide all of the information requested. Oak

Tree appreciates the effort on the part of NWE to provide Oak Tree with a portion of the requested information; however, NWE's objection to producing the 10-year and 20-year avoided costs is not compelling. First, NWE misstates the rule: 18 C.F.R. § 292.302(b) states:

> (b) General rule. To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:
>
> (1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;
>
> (2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and
>
> (3) *The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt-hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.*

(Emphasis added.)

Thus, contrary to NWE's assertion, it is required by 18 C.F.R. § 292.302(b) to publish its avoided cost information at least every two years. The avoided cost information to be provided by NWE is to include avoided cost calculations for energy purchases, starting with the calculations for the current calendar year and for each of the next five years. In addition, NWE is required at least every two years to submit a plan for the addition of capacity by amount and type for the purchases of firm energy and capacity, as well as its proposed capacity retirements during the succeeding 10 years. Finally, NWE is required at least every two years to estimate its capacity avoided costs at the time of completion of the planned units,

as well as the avoided costs related to planned capacity purchases during the 10-year period specified in 18 C.F.R. § 292.302(b). Thus, NWE's claim that it is only required to produce energy-avoided cost information for a five-year period is incorrect.

NWE is required by federal law to produce the requested information at least every two years. The fact that NWE has not done so is evident from its objection to this request. That NWE would resist producing information that it is required to produce (i.e., energy avoided costs over a five-year period and its avoided capacity costs over a 10-year period) is surprising. However, NWE has no basis for resisting production of this information over a five-year period for energy and a 10-year period for capacity, since NWE is already required by federal law to produce this information.

Even if the federal regulations do not require NWE to produce this information over a 10-year period for energy and a 20-year period for capacity, it does not make this information less relevant to a project that is attempting to determine NWE's avoided costs over a 20-year period. One of the primary objectives in this matter is to determine NWE's avoided costs over the 20-year life of the project. Therefore, Oak Tree asks that the PUC compel NWE to produce all of the requested information no less than 15 days prior to Oak Tree's deadline for filing testimony.

2. Requests for Production No. 23 and 24.

NWE continues to maintain that the terms of the Titan Wind PPA prevent disclosure of this agreement. However, at this point, Oak Tree, and the PUC for that matter, must rely on NWE's characterization of the terms, since no other party has firsthand knowledge of the agreement. The agreement, sections of which were referenced in NWE's Brief, may also contain terms under which NWE is allowed to produce the document, such as an order by the PUC. Without production of the agreement, or at the very least an in camera inspection, Oak Tree and the PUC cannot be certain of the absolute prohibition on release of the Titan Wind PPA that NWE claims the Titan Wind PPA contains.

Oak Tree is not insensitive to the issue of confidentiality. While NWE portrays Oak Tree's comparison of the proprietary information of Black & Veatch Company to the Titan

Wind PPA as "retaliatory,"[1] Oak Tree's intention was to show respect for the confidential nature of the information we are all utilizing. When Oak Tree was asked through discovery by NWE to release confidential information in the possession of Black and Veatch Company that Oak Tree had no right to disclose, Oak Tree sought a way to adhere to the terms of the confidentiality agreement and comply with discovery. Oak Tree initiated the process of procuring a confidentiality agreement between Black & Veatch Company and NWE. This agreement was ultimately executed and the information has been provided to NWE – a process that Oak Tree would be more than willing to reciprocate with NWE and Rolling Thunder I Power Partners, LLC.

NWE inaccurately states that Oak Tree has failed to address the confidentiality issue prior to seeking its motion to compel. *NWE Brief*, p. 5. Oak Tree has offered – both verbally and in its original Motion – to enter into a confidentiality agreement directly with Rolling Thunder I Power Partners, LLC so that any confidential information would be protected and NWE would not be in a position to violate any contractual terms. To date, NWE has not even acknowledged this as a potential resolution.

Additionally, NWE has in the past been required to produce power purchase agreements and actual proposed bids from third parties in its Montana proceedings subject to the confidentiality rules of the Montana Public Service Commission. *See e.g.,* Docket D2010.7.77 at http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2010-7-77_7108b.pdf. Why NWE would resist a similar procedure with the PUC is puzzling and difficult to discern.

In addition to confidentiality concerns, NWE claims that Oak Tree's request is not relevant or necessary. Since "necessity" is not a standard for whether information is discoverable, one must turn to the standard of "relevance" for discovery under South Dakota law. In discovery, the South Dakota Rules of Civil Procedure state at SDCL 15-6-26(b):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought

[1] There is simply no evidence this is the case. Oak Tree has attempted to work out its entire discovery issues with NWE informally, and NWE can point to no indicia of "retaliation."

will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The information in the Titan Wind PPA is clearly relevant to the resolution of this dispute. First, the Titan Wind PPA contains terms and conditions that will or may affect a calculation of avoided cost, such as curtailment provisions, scheduled and unscheduled maintenance requirements, and force majeure provisions. NWE is prohibited by the Public Utility Regulatory Policies Act of 1978 ("PURPA")[2] to engage in discrimination against Qualifying Facilities ("QFs") such as Oak Tree's by adopting contractual provisions that result in differential treatment by NWE of Oak Tree as compared to Titan Wind. Since the PUC is, among other things, being asked to set contract terms and conditions for Oak Tree's QF, an examination of the terms and conditions in the Titan Wind PPA is absolutely critical to prevent the very sort of discrimination prohibited by PURPA.

Additionally, the Titan Wind PPA is likely to contain information highly relevant to the determination of the manner in which NWE calculated its avoided cost over the life of the Titan Wind project. Furthermore, since NWE continues to maintain that it does not need additional energy or capacity, information contained in the Titan Wind PPA is likely to provide insight into whether or not NWE needs additional energy or capacity over the life of the proposed project.

The Titan Wind PPA is also relevant to establishing whether NWE will continue to have an obligation to purchase output from Titan Wind under certain contractual conditions, thus perhaps affecting the calculation of avoided costs as NWE's need for energy and capacity may vary over time. Such information would also affect the calculation of NWE's avoided capacity and energy costs.

Finally, the implication that Oak Tree's request for production of the Titan Wind PPA, or any other contract with a wind generator and NWE, is an attempt at a "free handout" is without merit. Oak Tree has spent more than a year and a half and considerable amount of time and money attempting to negotiate with NWE, but was forced to institute expensive litigation due to NWE's unwillingness to negotiate in good faith.

In conclusion, there is simply no basis for NWE's objection. Oak Tree has always

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[2] See e.g., *New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.* 117 F.Supp.2d 211 (N.D.N.Y., 2000)(specifying rates cannot discriminate against QFs, citing 16 U.S.C. § 824a-3(b)).

been willing to take whatever steps to ensure the confidentiality of the Titan Wind PPA. The information is unquestionably relevant as it may affect the calculation of avoided energy and capacity costs and will ensure that NWE is not attempting to discriminate against Oak Tree in violation of federal law. Oak Tree is not attempting to "retaliate" or to obtain a "free handout" or whatever other pejorative characterizations NWE alleges without a shred of evidence in support. Oak Tree needs the information to make its case, and NWE has no basis for refusing to comply.

CONCLUSION

For the reasons set forth above, Oak Tree respectfully requests the PUC grant Oak Tree's Motion to Compel by ordering NWE respond to the above requests, which have not yet received responses, by providing the documentation requested no later than 15 days prior to Oak Tree's deadline for filing testimony and order such further relief the PUC may deem appropriate.

Respectfully submitted this 1ST day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically on this 17 day of November, 2011, upon the following:

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