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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT BY CONSOLIDATED EDISON DEVELOPMENT, INC. AGAINST NWE CORPORATION DBA NWE ENERGY FOR ESTABLISHING A PURCHASE POWER AGREEMENT	UTILITY DIVISION DOCKET NO. EL16-021

CONSOLIDATED EDISON DEVELOPMENT, INC.'S OPENING POST-HEARING BRIEF

I. INTRODUCTION

Petitioner Consolidated Edison Development, Inc. ("ConEdison Development"), acting by and through undersigned counsel, respectfully submits its opening post-hearing brief

to the South Dakota Public Utilities Commission ("Commission"). ConEdison Development filed its complaint on June 23, 2016, requesting the Commission establish avoided cost rates for three ConEdison Development wind projects[1], each with an installed capacity of 20 megawatts or less ("MW") pursuant to the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"). Each of the three ConEdison Development wind projects are "qualifying facilities" or "QFs" as that term is defined in PURPA. Under the Federal Energy Regulatory Commission's (hereinafter "FERC") regulations implementing PURPA, NorthWestern Energy ("NWE") is obliged to purchase "any energy and capacity which is made available from a qualifying facility." 18 C.F.R. § 292.303(a). Such purchases, per FERC's regulations, must be at the utility's full avoided cost. 18 CFR § 292.304(b)(2).[2] The utility's full avoided cost is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." PURPA § 210(d), 16 U. S. C. § 824a-3(d)). *See* 18 CFR § 292.101(b)(6) (1982) (the term full "avoided costs" used in the regulations is the equivalent of the term "incremental cost of alternative electric energy" used in § 210(d) of PURPA). On April 4, 2016, ConEdison Development[3] and NWE failed to reach agreement on an avoided cost for the projects, necessitating Commission resolution of this dispute.

II. ARGUMENT

1 The three projects are: (1) Brule County Wind, LLC, which is located in Brule County near Kimball, South Dakota; (2) Aurora County Wind, LLC, which is located in Aurora County near White Lake, South Dakota; and (3) Davison County Wind, LLC, which is located in Davison County near Mitchell, South Dakota.

2 FERC's regulation requiring that utilities pay QFs full avoided cost was upheld by the United States Supreme Court in *Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 406 (U.S. 1983)

3 At that time, ConEdison Development's predecessor in interest, Juhl Energy.

A. ConEdison Development's Projects Are Entitled to a Legally Enforceable Obligation Under Existing South Dakota Precedent and Federal Law.

1) NWE's Position Concerning the Establishment of a LEO is Unlawful; ConEd Development Met All Requirements for Establishment of a LEO by April 4, 2016.

It remains at issue in this matter whether and when ConEdison Development established a Legally Enforceable Obligation ("LEO"). A LEO, as explained by FERC, is incurred when "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF." 137 FERC ¶ 61,006, at P 32 (2011). A LEO is a creation of PURPA as implemented by the FERC at 18 C.F.R 292.304. FERC has found that "[i]t is up to the states, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law." *Metropolitan Edison Co.*, 72 FERC ¶ 61,015, ¶ 61,050 (1995) (quoting *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995)). The states have developed a variety of different tests to determine whether and when a LEO has been incurred, and each state's test is valid so long as it does not conflict with the requirements and purposes of PURPA or FERC's implementing regulations.

The most relevant and controlling decision from the Commission on the matter of LEO establishment remains the test used in Commission in Docket EL11-006 - In the Matter of the Complaint by Oak Tree Energy LLC against NorthWestern Energy for refusing to enter into a Purchase Power Agreement ("Oak Tree"). In that case, the Commission ultimately determined that Oak Tree Energy had indeed incurred a LEO because Oak Tree Energy had done everything it reasonably could in order to come to a negotiated agreement with NWE, including participating in extensive negotiations and, ultimately, being forced to send NWE a letter detailing Oak Tree Energy's willingness to sell its generation to NWE with the intent to establish

a LEO. AMENDED FINAL DECISION AND ORDER; EL11-006, Conclusion of Law, p. 13, ¶ 4.

Here, ConEdison Development has done everything reasonably within its power to demonstrate its intent, capability, and willingness to sell its energy and capacity to NWE in order to establish a LEO pursuant to the applicable test. Specifically, ConEdison Development has done everything within its power to obtain a negotiated agreement with NWE. Based on the Commission's decision in Oak Tree, ConEdison Development established a LEO with NWE on April 4, 2016.

a. *ConEdison Development has made every reasonable attempt to negotiate with NWE on a PPA amendable to both parties.*

The parties began negotiations in October 2015. Complaint, ¶ 15. Negotiations proved unproductive, due to a series of avoided cost proposals from NWE that fluctuated greatly, but never approached ConEdison Development's calculation of NWE's avoided cost. *Id.*; *Id*, at Exhibits 1-10. On April 5, 2016, parties agreed that their respective avoided cost estimates were too far apart. *Id.*, ¶ 15.

These facts are sufficient to establish a LEO pursuant to the Commission's own test as well as PURPA. As discussed above, the Commission found a LEO existed in Oak Tree where the QF had exhausted all attempts at negotiation. All attempts at negotiation were exhausted in this matter on April 4, 2016. NWE's position, contrasted with ConEdison Development's opinion about the legality of NWE's position, meant that parties were simply too far apart to resolve the avoided cost issue through negotiation. Furthermore, FERC has stated concerning the setting of avoided costs "[w]hile 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." *Virginia Electric Power Co.,* 151 FERC ¶ 61,038, at P. 25 (2016) ("*VEPCO*"). Furthermore, in *Nebraska Public Power District*, 156 FERC ¶ 61,043 at P. 19 (2016)("*NPPD*"), FERC stated: "PURPA and the Commission's regulations provide that a QF that has initiated a proceeding before the appropriate state regulatory authority or non-regulated electric utility that may result in a legally enforceable contract or obligation prior to an electric utility filing its petition for relief pursuant to section 292.310 of the Commission regulations will be entitled to have any contract or obligation that may be established by state law grandfathered."

In the *NPPD* case, FERC determined that a LEO existed where a QF had merely sent a letter requesting a PPA from NPPD. *NPPD,* at ¶ 20. In *VEPCO*, FERC found a LEO existed on the basis that the QF had obtained a certificate of public convenience and necessity ("CPCN"), and sent a letter to VEPCO, similar to what the QF had done in *NPPD*. *VEPCO*, at ¶ 26. In the present case, ConEdison Development has far exceeded these standards. While no CPCN is required by South Dakota, the parties negotiated for approximately 6 months as stated above. These negotiations, coupled with the multitude of actions ConEdison Development has taken toward developing its projects, are sufficient to establish the existence of a LEO. In *Cedar Creek Wind*, FERC stated "we noted that these extensive negotiations between the parties are persuasive and point to the reasonable conclusion that Cedar Creek did commit itself to sell electricity to Rocky Mountain Power. Such commitment to sell to an electric utility, the FERC has found, 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." 137 FERC ¶

61,006, at P. 39 (2011). This finding clearly indicates that extensive negotiations between parties are both persuasive and a reasonable indication that a LEO has been established. ConEd Development has negotiated extensively with NWE, a fact NWE admits. *Cross Examination of Bleau LaFave*, South Dakota Public Utility Commission Docket EL16-021, Hearing Transcript (April, 11 2017) 149:1-12.

b. NWE's Unlawful Position

During the course of this proceeding, NWE has asserted that in order to establish a LEO, a QF (here, ConEdison Development) must commit to sell power to NWE at NWE's avoided cost.4 *LaFave Response Testimony*, p.9:18-22. This could mean one of two things, both of which are unlawful. First, it is possible that NWE means that ConEdison Development must agree during negotiation to NWE's avoided cost as calculated by NWE. This position plainly obviates the utility of negotiations if, as has occurred here, a QF has doubts or disagreements with the utility about avoided cost calculation. Under NWE's approach, the QF is faced with the choice of either accepting an unlawful rate offer or dealing with the utility's inevitable argument that the QF did not establish a LEO. This commits the error addressed by FERC in *Grouse Creek* of "creat[ing] practical disincentives to amicable contract formation." *Grouse Creek Wind Park*, 142 FERC ¶ 61,187, at P. 40 (2013). It would be possible under this regime for a utility to, for example, low-ball a QF with a series of rates artificially lowered through the inclusion of a number of discriminatory deductions, then claim the QF had not established a LEO because the QF failed to accept an economically infeasible and legally discriminatory rate. This is clearly contrary to the purposes of PURPA and the reasons for FERC's LEO regulations. Second, NWE

4 NWE has also argued that deliverability is a prerequisite for the creation of a LEO, an unlawful position addressed in A(2), below.

could mean instead that the QF must accept the avoided cost rate as established by the Commission at the end of a contested case proceeding. This interpretation is found at Tr. at 156:5-9, where Mr. LaFave, in response to the question "if the Commission sets an avoided cost, at that point ConEd Development has an LEO?" testified "Well, yeah. Well, I don't know if it has an LEO, but it has a rate for its PPA. I don't know if that qualifies as an LEO." This interpretation is also completely at odds with the entire purpose of FERC's LEO regulation, which exists to prevent a utility from avoiding or lessening its obligations to purchase from a QF pursuant to PURPA. If a LEO is established at the end of a contested case, the LEO would not have prevented the delay of PURPA requirement referred to in *Cedar Creek.* Additionally, NWE's test would make the requirement to negotiate pointless and even disincentivize negotiation since a LEO could not be incurred until the end of a contested case; negotiation would simply be a waste of time. Furthermore, under FERC regulation 18 C.F.R. 292.304(d)(2)(ii), avoided cost is calculated from the time the LEO is incurred. If the LEO were incurred at the end of a contested case and the Commission set the avoided cost, PURPA would become circular and meaningless. The clear purpose of the LEO is to provide a moment in time *prior* to the Commission determination of avoided cost, for which moment in time the Commission is meant to determine the utility's avoided cost. Thus, NWE's position that to establish a LEO, ConEdison Development must agree to NWE's avoided cost or to the Commission's administratively determined avoided cost is clearly unlawful and untenable.

Furthermore, it is unclear whether NWE's negotiations were anything more than an attempt at the sort of delay that the LEO is designed to restrict. ConEdison Development, in order to better verify NWE's avoided cost, hired Mr. Schiffman, who provided an analysis of NWE's avoided cost using a publicly available model and data set, which NWE admitted was a

reasonable step to take. Tr. at 164:13-18. Mr. Schiffman calculated an avoided cost that was substantially higher than any of the six avoided cost estimates offered by NWE. A variety of reasons for the cost disparity exist, many of which have been discussed in this proceeding, and all of which are either plainly unlawful or could have been resolved through the negotiation process.

In *Cedar Creek Wind*, 137 FERC ¶ 61,006 at P 32, FERC found that "the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or, as here, by delaying the signing of a contract so that a later and lower avoided cost is applicable." NWE has admitted that its initial avoided cost offer to ConEdison Development on November 24 was $31.02 per megawatt-hour. Tr. at 152:15-19. NWE has admitted that its sixth and final avoided cost offer to ConEdison Development on April 5, 2016 had dropped to $24.35 per megawatt-hour, with lower offers and erroneous estimates occurring between the two. Tr. at 154:6-9. NWE has admitted knowledge that natural gas prices and electricity forecast prices have, in general, decreased since the fall of 2015 when negotiations with ConEdison Development began. Tr. at 161:8-12. NWE has even admitted awareness that delaying the date of establishment of a LEO during a period of declining electricity price forecasts may result in a lower avoided cost forecast. Tr. at 162:1-2. These admissions, when coupled with NWE's stated position concerning the standard for establishment of a LEO, namely, that the QF must simply agree to the utility's calculation of its own avoided cost, plainly demonstrate that negotiations concerning avoided cost were a futile exercise from the start.

For that reason, NWE's position regarding avoided cost is clearly at cross-purposes with FERC's findings in *Cedar Creek Wind*, which determined that not only does the LEO exist in

part to prevent utilities from delaying entering into contracts as a means to a lower avoided cost, but also that a LEO was established through the completion of extensive negotiations. NWE should not be able to with its right hand extend negotiations and delay contract formation through inconsistent and often incoherent avoided cost estimates, and at the same time with its left hand argue that ConEdison Development has not met the standard for establishing a LEO because it did not simply accept NWE's unlawfully discriminatory avoided cost offers under an improper legal standard.

The parties have negotiated extensively. As discussed above, a LEO is appropriately created at the point that ConEdison Development had committed to sell its electricity to NWE. Under FERC precedent, that point occurs when parties have negotiated extensively and been unable to come to agreement. It could also come at the point that ConEdison Development sought Commission assistance in resolving the impasse, under *VEPCO*. NWE has admitted awareness that a QF that files a complaint with a state regulatory commission such as this Commission is serious about its commitment to sell to the utility. Tr. at 161:3-7. This Commission should find that these negotiations, coupled with the totality of everything else that ConEdison Development has undertaken with regard to project development and the pursuit of its legal rights under PURPA, clearly indicates that a LEO had been established on April 4, 2016. In the alternative, this Commission should find that the date of filing of the complaint in this matter, June 23, 2016, sufficiently indicated to NWE, as admitted in the testimony of Mr. LaFave, that ConEdison Development was committed to selling its power to NWE and determine that a LEO was created on that date. Tr. at 161:3-7.

c. ***Staff's Application of Proposed LEO Rules is Legally Improper***

Their continuing draft status notwithstanding, in the present docket Commission Staff recommends applying the draft rules proposed in RM13-002 to ConEdison Development in order to determine whether and when a LEO was incurred. *Thurber Direct Testimony*, p.18:1-14. Staff provides an analysis of the proposed rules' five requirements and argues that, based on the application of these five requirements, ConEdison Development had not incurred a LEO by April 4, 2016. *Id.*, p.15:1-3.[5]

Staff's argument is flawed on two primary counts. First, Staff's suggestion that the Commission apply the LEO rules proposed in 20:10:40:03 is legally impermissible. Second, the proposed rules themselves are out of step with recent FERC rulings and contain several requirements that place them into conflict with PURPA.

2. Staff's Application Of Proposed LEO Rules Is Legally Improper

As discussed above, the proposed rules Staff advocates applying have never been adopted by the Commission. They remain proposed. To apply them to ConEdison Development in this matter would therefore be legally improper for two reasons. First, because unadopted rules are unenforceable under South Dakota law. Second, because retroactive application of rules in this matter would violate state law and ConEdison Development's right to due process.

a. Application of Draft Rules Improper Because Draft Rules Unenforceable Under SD Law

5 It is here important to note that during the Commission Hearing of April 12, 2017, the Commission sustained ConEdison Development's motion to exclude the Thurber Testimony as it pertained to the applicability of the draft rules. *See Direct Examination by Ms. Edwards*, South Dakota Public Utility Commission Docket EL16-021, Hearing Transcript (April, 11 2017) 293:16 – 305:18. The Commission's bases for sustaining this objection is murky, but appears to have been that Mr. Thurber testified as to legal matters beyond his purview as an expert witness. ConEdison Development agrees with the Commission's determination on that objection, but asserts the position that not only did Mr. Thurber's testimony exceed his role, but that what his testimony suggests is legally impermissible no matter who might suggest it.

SDCL 1-26-6.8 reads "Rules unenforceable until properly adopted. No agency rule may be enforced by the courts of this state until it has been adopted in conformance with the procedures set forth in this chapter." Furthermore, SDCL 1-26-6(6) provides ". . . Notwithstanding § 15-6-6(a), all other rules are provisionally effective on the twentieth day after being filed, not counting the day of filing. In either case a later effective date may be specified as part of the rules being filed." SDCL1-26-8, states the same "Each rule is effective twenty days after filing with the secretary of state".

In the present matter, the Commission may not apply proposed rules to ConEdison Development in determining whether or when ConEdison Development incurred a LEO, because a rule is not effective until twenty days after it has been filed with the secretary of state pursuant to proper procedure. That procedure has not been followed with regard to the rules proposed in RM13-002, which Staff argues should be applied to the present matter. Such application would be improper pursuant to the statutes cited above. The Commission should therefore decline to apply the draft rules to the present case to determine whether and when ConEdison Development established a LEO.

b. Application of Draft Rules Improper Because Retroactive Application of Rules Violative of State Law and Due Process

To complicate matters further, Staff's suggestion, through the testimony of John Thurber at p.18:1-14, that the draft rules be applied to ConEdison Development in this matter amounts to a not only an application of draft rules, but a *retroactive* application of the draft rules. This creates a second level of impropriety of application. SDCL 2-14-21 reads "Code not retroactive. No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears." A review of the draft rules presented in RM13-002 will reveal plainly

that no such express intention of retroactive application is present. The draft rules, then, may not be retroactively applied to ConEdison Development.

Furthermore, even if the draft rules *were* to have included language expressing an intent for retroactive application, the Commission would still be under a statutory burden to explain how such a violation of ConEdison Development's due process right is authorized by law, which it has not done. SDCL1-26-8.3 reads "Retroactive effect of rule--Burden of proving authority or necessity. If any rule is proposed to have retroactive effect, the burden is on the agency to show that the retroactivity is authorized by law or is necessary to implement new provisions of law." So, in order to apply these rules to ConEdison Development, the Commission would not only need to adopt them for them to become effective, but also amend them to express the Commission's desire for them to apply retroactively, then explain why it has gone to such great lengths to apply these standards to ConEdison Development, whose Complaint was made under the Oak Tree LEO regime. Until that time, to apply the draft rules to ConEdison Development would be legally improper, no matter what the content of ConEdison Development's Juhl Energy's comments in RM13-002.

c. *The Proposed LEO Rules Conflict With PURPA*

Even if the Commission were to ignore the legal impropriety of applying proposed rules to ConEdison Development, several provisions of the proposed rules are in direct conflict with FERC's rulings concerning the creation of LEOs under PURPA. Specifically, requirements (2), (3), (4), and (5) are all out of date and run afoul of recent FERC determinations.

***(1) Requirement (2) is Legally Improper Pursuant to FERC's Decision in the* FLS ENERGY, INC., case.**

Requirement (2) looks to whether "the qualifying facility has entered into an interconnection agreement or the interconnection process is delayed as a result of a dispute that has been filed with the proper jurisdiction." This element of the proposed rules LEO test is legally improper. In *FLS Energy, Inc.,* 157 FERC ¶ 61,211, FERC considered the question of whether a state commission may require as part of a LEO test that a QF tender an executed interconnection agreement and found that such a requirement is a violation of PURPA. 157 FERC ¶ 61,211, at P. 23. FERC determined that such a requirement "allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement." *Id.*

In the present case, Staff is advocating the application of a test that includes the exact same improper requirement rejected by FERC in *FLS* and predicating its determination that ConEdison Development did not establish a LEO on April 4, 2016 in part on this legally improper requirement. The Commission may not require a QF to have tendered a signed interconnection agreement with the purchasing utility in order to find that the QF has established a LEO. The Commission should therefore not find that ConEdison Development has not established a LEO on this improper basis.

(2) *Requirement (3) is Legally Improper Pursuant to FERC's Decision in the* Grouse Creek Wind Park, LLC case.

Similar in legal impropriety is Requirement (3), which looks to whether "[t]he public utility has failed to provide the avoided cost information required by 18 7 C.F.R. 292.302 or the qualifying facility has filed a dispute of the public utility's avoided cost information with the Commission." Staff notes that ConEdison Development fulfilled this requirement by filing its

Complaint against NWE in this matter on June 23, 2016. This requirement, like Requirement (2), has been addressed by FERC. In *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, FERC found that a complaint to a state commission may not be used as a requirement for the establishment of a LEO, stating that:

> [T]he tool of 'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation. The Idaho Commission's requirement that a QF formally complain 'meritorious[ly]' to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. Such obstacles to QFs are at odds with the Commission's regulations implementing PURPA. They are not reasonable conditions for a state PURPA process.

Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, p.17, ¶ 40.

In the present case, Staff is advocating the application of a test that includes exactly this improper requirement and predicating its argument that ConEdison Development did not establish a LEO on April 4, 2016 in part on this legally improper requirement. The Commission may not require a QF to have filed a complaint with the Commission in order to establish a LEO. The Commission should therefore not find that ConEdison Development has not established a LEO on this improper basis.

B. ConEdison Development's Avoided Cost Approach is Calculated Using a Differential Revenue Requirement Analysis Created with a Well-Respected Program that Utilizes a Fundamentals-Based Forecast.

In this proceeding, ConEdison Development has presented a comprehensive, fundamentals-based and detailed forecast of full avoided cost for NWE Energy. ConEdison Development's estimated avoided cost is $47.29/MWh for energy, and $1.79/MWh for capacity, for a total avoided cost of $49.07/MWh (Exhibit 2, Page 34). ConEdison Development's estimate is the only unbiased, independent estimate of avoided cost in the

record, the only estimate derived using industry standard and FERC-recognized methodology, and the only estimate that reflects NWE's full avoided cost.

ConEdison Development's avoided cost approach utilized the Ventyx/ABB Reference Case forecast, and included development of a differential revenue requirement analysis of avoided costs for NWE, with and without the ConEdison Development projects (Consolidated Edison Exhibit 2, Page 21-23). The approach follows industry standards for developing avoided cost, and ConEdison Development believes it is the most accurate approach used in the industry (Tr. at 123:1 - 124:18). ConEdison Development's avoided cost estimate is also independent, relying upon the Ventyx/ABB Reference Case forecast (Tr. at 123:6 - 124:4). That forecast has more than 100 subscription-based clients, is detailed and well-researched, and is routinely used throughout the industry in planning cases, and in supporting financing and the purchase and sale of power plants (Tr. at 115:2 - 116:22, Tr. 340:17 - 343:10). Energy suppliers, consumers and investment banks all routinely rely upon the Ventyx/ABB Reference Case forecast. The avoided cost estimate developed by ConEdison Development used the most recently available Ventyx/ABB Reference Case data, at the time it was prepared (Tr. at 343:17-25), and at the time when ConEdison Development established a Legally Enforceable Obligation (Tr. at 126:13 - 129:4).

C. NWE'S Avoided Cost Approach is Flawed, Pays QFs less than Full Avoided Costs, and Discriminates Against QFs.

In contrast to the ConEdison Development approach, NWE developed avoided cost estimates using a methodology that is flawed, that is not commonly used in the industry, that rests on a foundation that does not reflect underlying supply and demand fundamentals in the

energy markets, that includes a series of "adjustments" to avoided cost that are discriminatory against QF resources, and which are designed to disadvantage QF resources (Consolidated Edison Exhibit 3, page 2). For example, NWE's avoided cost approach is incapable of measuring structural changes occurring in the industry due to retiring coal generation, a shift to natural gas generation, and substantial development of renewable energy. NWE's approach is thus incapable of measuring how those structural changes will result in changing market heat rates and marginal resources in the SPP market, in altered energy and transmission flows across the Midwest, and in substantially higher natural gas demand than has occurred historically. Consolidated Edison Exhibit 3, pages 2-3. NWE's proposed approach takes near-term forward prices for natural gas and electricity, and escalates those price strips using the annual escalation rate for Henry Hub natural gas prices, as published in the 2016 EIA Annual Energy Outlook. Consolidated Edison Exhibit 3, page 2, Exhibit NWE 3, pages LPH-13 – LPH-14.

The expected electricity price under NWE's approach is wholly dependent upon the credibility and validity of the ICE futures prices in both the short-term and the long-term, because prices from those futures contracts are used initially, and are then subsequently carried forward through the end of the study period after incorporating EIA projected escalation of Henry Hub natural gas prices. However, ConEdison Development's analysis showed there is no credibility and reliability to ICE futures prices upon which NWE bases its avoided cost. As pointed out by ConEdison Development, there is zero reported trading volume for the underlying futures contracts that NWE uses as the foundation of its electricity price estimates. Consolidated Edison Exhibit 3, pages 3-4. With zero trading volume, the posted prices are not

valid representations of future prices and are speculative and unreliable estimates and must be discounted by the Commission. The approach used by NWE is not commonly used in the industry for forecasting prices, and is not a good representation of the current market because there is no trading volume. Tr. at 107:20 - 109:6.[6] Because the approach does not reflect changing conditions in the electricity markets, it also understates NWE's full avoided cost.

D. NWE'S Situation 2 and Situation 3 Adjustments Would Result in Paying ConEdison Development less than Full Avoided Cost and Discriminates Against QFs.

1. Legal Standards For Determining NWE's Proposed Deductions From Avoided Cost.

Under FERC's regulations, a QF is entitled to a utility's full avoided costs. See *American Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 406 (1983). Consequently, any rate that is set at less than the utility's full avoided cost is in violation of FERC's regulations implementing PURPA. *See Allco Renewable Energy, Ltd. V. Mass Elec. Co.*, 2016 U.S. Dist. LEXIS 130617, * 2, 208 F. Supp. 3rd 390 (D. Mass. 2016) (In accordance with PURPA, FERC promulgated rules requiring electric utilities to purchase energy from QFs at a rate equal to the utility's full avoided cost."). Moreover, a utility is not allowed to impose "light loading curtailments" under 18 C.F.R. § 292.304(f). *See Pioneer Wind Park I*, 145 F.E.R.C. ¶ 61,215, at P. 36 (2013); *Idaho Wind Partners 1*, LLC, 140 F.E.R.C. ¶ 61,219, at P. 40 (2012). 62022, 2012 FERC LEXIS 1670, *27-30 (F.E.R.C. 2012) ("In sum, therefore, a

6 At hearing, NWE witness Mr. Hansen initially testified that the forward prices are "regulated by CFTC and Dodd-Frank and that he has seen bilateral transactions priced based on the published forward prices (Tr. 246-247). However, Mr. Hansen later corrected his testimony, and stated that his experience was with natural gas products, not electricity (Tr.262-263). The futures market for natural gas is much more liquid than for electricity. NWE provided no actual evidence showing trading volumes underlying its forward price strips.

utility may not curtail unilaterally where the QF electric energy is purchased, as here, pursuant to a long-term obligation.").

It is notable that in the *Pioneer Wind Park I* case, NWE intervened before FERC to make the very same arguments it has raised in this proceeding:

> In its comments, NorthWestern complains that Pioneer Wind is asking the Commission to impose cost responsibility for transmission system upgrades necessary for firm transmission service on PacifiCorp and, ultimately, PacifiCorp's retail customers. Northwestern states that Pioneer Wind can point to no case supporting the proposition that Pioneer Wind does not need transmission service and that it should remain free of incremental transmission costs that the Pioneer Wind project would impose on PacifiCorp's system. *NorthWestern asserts that, when conducting a resource planning analysis, one of its key considerations in the overall valuation of the QF project is the location of a QF project and the impact of the QF project on potential transmission costs. NorthWestern argues that if the Commission grants the Petition, NorthWestern and other similarly situated utilities would be barred from considering these transmission costs when determining the customer impacts of QF projects, which is inconsistent with prudent resource planning and cost-causation principles.*

Pioneer Wind Park I, 145 F.E.R.C. P 61,215, 62165, at P. 23 (emphasis added).

FERC ruled regarding these issues in *Pioneer Wind Park I* as follows:

> The Commission has specifically held that: (1) *the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility*; (2) the QF is not required to obtain transmission service, either for itself or on behalf of the purchasing utility, in order to deliver its energy from the point of interconnection with the purchasing utility to the purchasing utility's load; and (3) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.

Id. at P. 38 (emphasis added).

With respect to situation 2, NWE has argued that it should be allowed to replace the full avoided cost owed to the ConEdison Development projects with the highest variable cost of

units in its resource stack, presumably on the theory that ConEdison Development's projects are displacing the variable cost of NWE's resources. Apparently, NWE's contention is based on the notion that it has resources dedicated to serving customers which cannot be fully displaced by QF purchases. With respect to situation 3, NWE argues that it should be able to apply a value of "zero" instead of market to ConEdison Development's energy production. NWE has argued that this latter adjustment is based on the dictates of FERC Order 69. In *Tri-State Generation and Transmission Association, Inc.,* 155 FERC ¶ 61,269, at PP. 20-21 (2016), FERC addressed this argument with respect to the cost recovery arguments of Tri-State, a generation and transmission cooperative, with regard to contracts that required member cooperatives to purchase 95 percent of their generation from Tri-State. FERC was not persuaded that a cooperative purchasing generation from Tri-State should be allowed to charge the purchasing cooperative for investment made on its behalf, stating:

> *Furthermore, we are not persuaded by Tri-State's reliance on Order No. 69. Order No. 69 – adopting the Commission's QF regulations – was issued in 1980 in the wake of the enactment of PURPA, and its discussion of this issue was in the context of pre-existing (i.e., pre-PURPA) all requirements contracts between supplying-utilities and their customer-utilities; those contracts could not have anticipated what Congress or the Commission would do.* Here, in contrast, the Tri-State/Delta-Montrose contract at issue post-dates PURPA (and post-dates *PSNH*, as well), and that contract expressly provides for QF purchases by Delta-Montrose. Order No. 69's discussion of who should bear the impact of the loss in revenues to the supplying-utility is thus of no relevance in this case.
>
> Finally, other than general assertions, Tri-State has not demonstrated that, in fact, it will not recover its fixed costs if Delta-Montrose exceeds the contract's 5 percent limitation on QF purchases. *Unlike in 1989, Tri-State has easier access to energy markets where it can, and currently is, selling its excess power.* Additionally, Tri-State has admitted that the Commission's ruling in *Delta-Montrose* would not have a material adverse effect on Tri-State's finances.

(Emphasis added).

With the foregoing legal framework in mind, we turn to the specific factual record in this case and its bearing on the Commission's determination of avoided cost.

2. NWE's Situation 2 and 3 Adjustments to Avoided Cost Are Unlawful and Discriminatory.

The record contains substantial discussion of NWE's proposed Situation 2 and Situation 3 adjustments to avoided cost. As briefly discussed above, under Situation 2 conditions, NWE's approach assigns the variable costs of the dispatchable resource with the highest variable costs to energy production from the ConEdison Development projects, and under Situation 3 conditions, the approach assigns a value of zero. NWE Exhibit 3, page LPH-12. These adjustments proposed by NWE are discriminatory and in violation of PURPA because they are explicitly punitive toward QF resources, and treat QF resources differently than the treatment of NWE-owned supply resources (Consolidated Edison Exhibit 3, pages 7-10). Apart from this, FERC's decision in *Tri-State* explicitly rejected the justification for the situation 2 and situation 3 adjustments. FERC decided that Order 69 was adopted prior to years of decisions made by Congress and the Commission which altered the PURPA technical and legal landscape. 155 FERC ¶ 61,269, at P. 20. FERC further stated that Tri-State could recover its costs of its investment in generation and transmission by selling its excess generation into the market. *Id.* at P. 21. As NWE admitted at hearing, in its actual operations NWE will sell excess energy into the SPP wholesale market, anytime it has excess generation available. ConEd Development, Exhibit 3, pages 9-10, Tr. 166.

Furthermore, NWE's proposed adjustments are inaccurate in calculating avoided cost, because they do not reflect how NWE actually operates its system, and violate economic

dispatch principles (Consolidated Edison Exhibit 3, pages 9-10). Under NWE's avoided cost methodology, it effectively collects sales revenue based on market price, but will pay the QF projects either zero, or the variable cost of the marginal resource. The methodology violates PURPA, because it subsidizes NWE and its ratepayers, at the expense of the QF project and thus discriminates against the QF project. "Section 292.304, in turn, requires that the rates for such purchases shall: (1) be just and reasonable to the electric consumer of the electric utility and in the public interest; and (2) *not discriminate against qualifying cogeneration and small power production facilities*." *Cal. PUC*, 134 F.E.R.C. ¶ 61,044, 61161 (2011) (emphasis added).

In addition, as testified by Mr. LaFave, NWE recovers fixed operating and investment costs for its own generation resources under all periods, including Condition 1, Condition 2 and Condition 3. Tr. at 168-169. If NWE builds and owns a new generation resource, it will similarly collect its full investment cost for that resource under Condition 1, Condition 2 and Condition 3 circumstances. *Cross Examination of Bleau LaFave*, South Dakota Public Utility Commission Docket EL16-021, Hearing Transcripts (April, 11 2017) 168:2 - 169:19. Unless NWE foregoes rate recovery for its owned resource under Condition 2 and Condition 3 circumstances, then it is treating its own resources more favorably than QF resources, which discriminates against QFs, again in violation of PURPA. The Commission should not accept NWE's Condition 2 and Condition 3 adjustments because they are unjust, unreasonable, and discriminatory and thus violate PURPA.

NWE witness Hanson, and Staff Witness Maini both testified that they view PowerSimm to be a preferable tool to use in estimating avoided cost, due to its stochastic modeling capability. NWE Exhibit 3, page LPH 4-5, Staff Exhibit 2, pages 13-15. However, as explained by ConEdison Development, while the risk analysis features of PowerSimm may

present some advantages in resource planning, the model is not a price forecasting tool, and the way in which NWE has used it in this proceeding, its stochastic features have been used only to estimate the Situation 1, 2 and 3 conditions. ConEdison Development Exhibit 3, pages 7-10. There is no stochastic treatment of price, or cross-correlation with fuel price volatility in NWE's actual avoided cost estimate. *Id.*

Instead, NWE applies a simplistically derived, deterministic estimate of monthly electricity prices as the avoided cost value in Situation 1 conditions, and then applies a deterministically derived estimate of the operating cost of the marginal resources, or zero, as an avoided cost value under Situation 2 and Situation 3 conditions. *Id.* NWE does not use the production costs from its PowerSimm modeling, so the claimed benefits of stochastic modeling are not even applied to the avoided cost determination. As such, the application of stochastic modeling techniques in NWE's dispatch analysis adds no substantive value to its analytic approach. Consolidated Edison Exhibit 3, pages 10-12. In fact, because electricity and natural gas prices have asymmetric probability distributions, had NWE actually applied stochastic techniques to its estimated electricity prices in the avoided cost determination, it would increase the avoided cost. Consolidated Edison Exhibit 3, page 11.

While not binding on the Commission, ConEdison Development notes that the Montana Public Service Commission ("MPSC") has expressly rejected the application of the Long-2 adjustment directly:

> 73. NorthWestern and MCC are incorrect. Their arguments variously ignore PURPA's legal requirement not to discriminate, overlook the salient facts at hand, and fail to answer the concerns the Commission has elaborated in its prior orders. *NorthWestern ignores the fact that the revenues from the sale of excess energy*

from a QF will also be credited to customers. The Commission notes that the revenue-crediting feature of the hydroelectric facilities acquisition does not eliminate customers' exposure to risk because if actual market prices fall below projections, as they indeed have, actual revenue credits fail to contribute the projected offset to fixed costs, exposing customers to higher net costs. NorthWestern's resources are thus contributing to the very risk that they purportedly seek to offset here. *In re NorthWestern Energy's Acquisition of Hydroelectric Generating Facilities*, Docket D2013.12.85, Interim Order 7323l, ¶ 3 (Jan. 20, 2016) (increasing rates more than $41 million to "account for lower forecasted sales volumes and market prices resulting in lower revenue credits").

74. MCC's and NorthWestern's arguments that the portfolio was typically short before the hydroelectric facilities acquisition are misguided, because pricing under an Order 69 paradigm would have taken this automatically into account, by assigning the increment of generation from the assets that caused NorthWestern to be long a price designed to mitigate the impact of actual prices falling below their forecast values. *The Long-2 adjustment, which is grounded solely in NorthWestern's legal interpretation of Order 69, is thus clearly discriminatory, which PURPA forbids.* 18 C.F.R. §292.304(a)(1)(ii). Otherwise, NorthWestern and MCC have provided no persuasive evidence to demonstrate that the market forecast risk of a long-term QF PPA differs significantly from the market forecast risk of a company-acquired generating resource. Indeed, the hydroelectric assets thus far may be more risky than a QF because consumers are exposed to risk associated with underproduction (or overproduction) and not just to market-price forecasts. Order 7323l ¶ 3. As in *Greycliff*, the Commission finds that a long-term fixed-price QF power purchase agreement is a fixed-price hedge similar to utility acquisition of a generating resource. Order 7436d ¶ 38.

75. Additionally, as the Commission has already articulated, Order 69 does not appear to stand for the legal proposition that NorthWestern supposes it does. Order 7436e ¶¶ 12– 16. NorthWestern does not convincingly engage the reasons the Commission previously elaborated in its latest Order. The Commission again rejects NorthWestern's reading of FERC Order 69, and counsels that there are two things which would lead the Commission to change its mind. First, NorthWestern could begin modeling the resources it owns or proposes to own or otherwise control in this manner. Alternatively, NorthWestern should file a petition for declaratory order at FERC if it wants a definitive clarification FERC's order, instead of raising the argument again before this Commission.

In the Matter of Crazy Mountain Wind, Docket D2016.7.56, Order No. 7505b, at pp. 22-24 (January 5, 2017).

FERC's admonitions regarding light loading curtailments here are also a serious consideration. As noted above, FERC has made it clear that light loading curtailments could not be applied to QFs seeking forecast avoided cost rates:

> We find that the proposed section 4.4(b) curtailment provision violates PURPA and the Commission's PURPA regulations. The Commission's PURPA regulations permit a purchasing utility to curtail a QF's output in two circumstances: (1) in system emergencies, pursuant to section 292.307(b) of the Commission's regulations; or (2) in light load periods, pursuant to section 292.304(f) of the Commission's regulations, but only if the QF is selling its output on an "as available" basis. It is undisputed here that Pioneer Wind and PacifiCorp intend to enter into a long-term, fixed rate PPA based on avoided costs calculated at the time the obligation is incurred; Pioneer Wind's sale here is not intended to be on an "as available basis." Under these circumstances, the Commission's PURPA regulations only permit PacifiCorp to curtail Pioneer Wind's QF output during system emergencies, pursuant to section 292.307(b) of the Commission's regulations

Pioneer Wind Park I, LLC, 145 F.E.R.C. ¶ 61,215, at P. 36 (F.E.R.C. 2013)

Here, what NWE is attempting to do with its Situation 2 and Situation 3 adjustment is essentially implement a light loading curtailment without: (1) any evidence that would satisfy the circumstances specified by FERC regulation 18 C.F.R. § 292.304(f); (2) any evidence that it cannot simply resell whatever excess energy it may have into the market as FERC noted in *Tri-State*. Here, rather than attempt to claim a right to light loading curtailment of ConEdison Development's generation, NWE is attempting to impose a defacto curtailment whereby it proposes to pay less than full avoided cost in those periods where its loads are less than the available generation. If NWE is prohibited from implementing light loading curtailments for QFs seeking to sell power at a long-term avoided cost rate (and it is), then NWE is similarly prohibited from paying QFs less than avoided cost under Situation 2 or nothing under Situation 3. The effect is the same a s a light loading curtailment, and if NWE cannot implement light

loading curtailments with respect to QFs proposing to sell at a long-term avoided cost forecast rate, then NWE cannot implement essentially the same approach by paying less or paying zero to a QF for generation where NWE's generation exceeds load. Whether in Situation 2 or Situation 3, the power sold into market has value. That value will be collected by NWE, and in the absence of the value of those sales being credited to QFs, the money will go to offset NWE's revenue requirement and ultimately go to NWE's ratepayers or shareholders. In that regard, it is simply a wealth transfer from the QF to NWE's shareholders and its ratepayers. This is plainly unlawful. The money belongs to the QFs.

E. NWE'S Estimate of Avoided Capacity Costs Proposes to Pay ConEdison Development Less than Full Avoided Capacity Costs and Discriminates Against QFs in Favor of NWE's own generation.

NWE witness LaFave testified that the avoided capacity cost for the ConEdison Development projects should be based on current market capacity costs of $3.50/kW/Month, with a 2 percent annual escalation, and that the capacity credit for the projects should begin at 5%, and then be based on measured capacity contribution after the first three years. NWE Exhibit 1, pages BJL-15 to BJL-17, and BJL-23. ConEdison Development disagrees with this estimate, because NWE in its long-term resource plan indicates it will build or procure new thermal capacity, most likely a peaking resource beginning in 2019 (Consolidated Edison Exhibit 3, pages 6-7) and a new resource will have substantially higher cost than the $3.50/kW/month value used by NWE. ConEdison Development estimated that avoided capacity cost should be $1.78/MWh, which is based on the levelized investment cost of a LMS-100 peaking resource, equivalent to $10.45/kW/Month. Consolidated Edison Exhibit 2, page 34. That value is lower than Mr. LaFave's estimate of the levelized investment cost of a

new peaking resource, ranging from $14 to $20 per kW/Month. *Cross Examination of Bleau LaFave*, South Dakota Public Utility Commission Docket EL16-021, Hearing Transcripts (April, 11 2017) 169:8-9. As such, the Commission should adopt ConEdison Development's estimate of avoided capacity cost, which is a conservative estimate of the long-term capacity cost for NWE, but is more realistic than Mr. LaFave's proposal to continue to procure capacity on a short-term basis for the next 25 years.

F. NWE'S Proposal to Reduce Avoided Cost by $2.84/MWH For Transmission Upgrade Costs is Discriminatory and Violates PURPA and FERC Policy.

NWE also proposed that avoided cost be reduced by $2.84/MWh, due to its estimate of transmission network upgrade costs. NWE Exhibit 1, pages BJL-17 to BJL-18. This proposed deduction to avoided cost is inappropriate, and violates both PURPA (because it is discriminatory), and FERC transmission policy. Consolidated Edison Exhibit 2, page 11; Consolidated Edison Exhibit 3, page 14. Under FERC transmission interconnection policy, transmission network upgrade costs are funded by the project developer, but are then refunded when the project(s) achieve commercial operation. FERC Order 2003. RM02-1-000, 104 FERC ¶ 61,103, at P. 676, p. 127 (2003). ("The Interconnection Customer would then be entitled to a cash equivalent refund (i.e., credit) equal to the total amount paid for the Network Upgrades, including any tax gross-up or other tax-related payments. The refund would be paid to the Interconnection Customer on a dollar-for-dollar basis, as credits against the interconnection customer's payments for transmission 4 services.") NWE witness Mueller agreed that NWE's "but for" approach proposed in this proceeding was inconsistent with FERC Order 2003. Tr. at 276:1 - 277:8. Ms. Mueller's explanation for the differential treatment was that since QFs do not pay for transmission charges, there is no way to refund the money back to QFs. However, Ms.

Mueller's (and by extension, NWE's) reasoning makes little sense. If FERC's policy is to reimburse customers for network upgrades because the interconnecting customer should not ultimately be charged by the utility for those upgrades, then the cost of these transmission network upgrades should still be, unsurprisingly, a net zero cost to the interconnecting QF generator. If it is a net zero cost to the interconnecting non-QF generator (and it is), the only possible rationale for deducting those costs from ConEdison Development as a QF is that NWE is attempting to artificially reduce avoided cost to less than full avoided cost in violation of PURPA. If NWE could not impose such costs on a non-QF generator, it should not be able to impose those costs on a QF. To do otherwise would be discriminatory.

FERC had very specific reasons why it did not permit interconnecting utilities to charge "but for" for network upgrade costs as proposed by NWE in this proceeding. In FERC Order 2003,7 FERC stated:

> 694. The Commission recognizes that its policy of requiring refunds to be paid to an Interconnection Customer for the cost of Network Upgrades constructed on its behalf is a controversial one. However, the Commission instituted this policy to achieve a number of important goals. First, consistent with the Commission's long-held policy of prohibiting "and" pricing for transmission service, the crediting policy ensures that the Interconnection Customer will not be charged twice for the use of the Transmission System. The Commission determined that it is appropriate for the Interconnection Customer to pay initially the full cost of Interconnection Facilities and Network Upgrades that would not be needed but for the interconnection, but once the Generating Facility commences operation and delivery service begins, it must receive transmission service credits for the cost of the Network Upgrades. *This ensures that the Interconnection Customer will not ultimately have to pay both incremental costs and an average embedded cost rate for the use of the Transmission System.* Second, the Commission's crediting policy helps to ensure that the

7 The Commission took notice of FERC Order 2003 and 2006 at the hearing on April 12, 2017 hearing.

> Interconnection Customer's interconnection is treated comparably to the interconnections that a non-independent Transmission Provider completes for its own Generating Facilities. *The Transmission Provider has traditionally rolled into its transmission rates the cost of Network Upgrades required for its own interconnections, and the Commission's crediting policy ensures that Network Upgrades constructed for others are treated the same way.* Finally, the policy is intended to enhance competition in bulk power markets by promoting the construction of new generation, particularly in areas where entry barriers due to unduly discriminatory transmission practices may still be significant. The policy is therefore consistent with the Commission's long-held view that competitive wholesale markets provide the best means by which to meet its statutory responsibility to assure adequate and reliable supplies of electric energy at just and reasonable prices.
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> *************************
>
> 696. However, the Commission remains concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the *"but for" pricing approach, creates opportunities for undue discrimination. As the Commission stated in the NOPR, a number of aspects of the "but for" approach are subjective, and a Transmission Provider that is not an independent entity has the ability and the incentive to exploit this subjectivity to its own advantage.* For example, such a Transmission Provider has an incentive to find that a disproportionate share of the costs of expansions needed to serve its own power customers is attributable to competing Interconnection Customers. The *Commission would find any policy that creates opportunities for such discriminatory behavior to be unacceptable. Furthermore, none of the commenters in this proceeding has convinced the Commission that, in the absence of independence, it is possible to implement a "but for" pricing approach that avoids this inherent subjectivity.*

FERC Order 2003. RM02-1-000, 104 FERC ¶ 61,103, at P.694 and P. 696.

FERC thus noted that permitting utilities to charge non-QF interconnecting generators on a "but for" basis would: (1) be charging these customers twice for access to the utilities' transmission systems; (2) treat non-utility interconnecting generators the same as utility interconnecting generators; (3) reduce the risk of a utility imposing "but for" costs on

competitors in a way so as to favor its own generation. The policy risks, particularly the discrimination risk, are equally if not more so applicable with regarding to sales by ConEdison Development to NWE. To the extent a utility must buy generation from a qualifying facility, that qualifying facility will either displace utility generation or planned utility generation. As a result, the utility may not be able to earn a return on its own investments that it would in the absence of QF purchases. The discrimination incentive that motivated FERC's policy in Order 2003 thus applies with at least as much force to QFs as it does with respect to FERC's interconnection policies for wholesale generators.

There is simply no justification here for treating QFs differently than other wholesale generators other than NWE's desire to artificially reduce the proposed avoided cost to be paid to ConEdison Development. It is also worth noting that the Montana Public Service Commission has not permitted NWE to reduce avoided cost by network upgrades in two prior dockets, *Greycliff Wind Prime, LLC*, Docket No. D2015.8.64, and in *Crazy Mountain Wind, LLC*, Docket No. D2016.7.56. Finally, it is clear from FERC's *Pioneer Wind Park I* decision that "the QF's obligation to the purchasing utility is limited to delivering energy to the point of the interconnection by the QF with that purchasing utility."

NWE has urged this Commission to ignore FERC policy and precedent in this proceeding. ConEdison Development believes NWE's argument is a distraction and an invitation to error that this Commission should decline. FERC's policies are clear, have a decided rationale, and have sound policy justifications. The only real rationale offered by NWE for deducting interconnection costs from avoided cost is because QFs are not FERC jurisdictional with respect to interconnection costs. This is an argument no one disputes, but it

is not a justification for treating QFs differently than non-QFs. The real justification is discrimination, and adopting NWE's approach would mean the Commission would be adopting a discriminatory rationale that violates PURPA and FERC policy.

G. The Commission Should Adopt ConEdison Development's Avoided Cost of $49.07/MWH Without Including Avoided Carbon Costs But Should Take Carbon Costs into Consideration in the Rate.

In ConEdison Development's Direct Testimony, the avoided energy cost estimate did not include a component for pricing potential CO_2 or Greenhouse Gas regulation. However, based on regulatory filings made by NWE in its resource planning activities, ConEdison Development did estimate an upward adjustment to avoided cost, due to CO_2 regulation, amounting to $11.63/MWh. Consolidated Edison Exhibit 2, Page 34. In NWE's analysis, it did not reflect any carbon cost in its avoided cost projection. However, in its 2016 South Dakota Electricity Supply Resource Plan, NWE stated "[d]espite the Supreme Court's decision to stay the CPP, there remains significant risk regarding the uncertainty of the ultimate disposition of carbon emissions reductions in the states where NorthWestern's jointly owned affected power plants are located." NWE Exhibit 7, page 7-3. In addition, in developing its 2016 Resource Plan, NWE used EIA electricity prices and growth projections that include carbon regulation. NWE Exhibit 7, page 7-3, 7-4.

Even with the election of President Trump, and recent changes at the U.S. EPA, over the next 25 years there remains a strong likelihood that some form of CO_2 regulation will be enacted, or that state policies will have the same effect and include carbon regulation in pricing. *Cross Examination of Bleau LaFave*, South Dakota Public Utility Commission Docket EL16-021, Hearing Transcript (April, 11 2017) 113:16-114:12. This remains a real risk for

NWE, and highlights an advantage of the zero carbon-emitting ConEdison Development projects. The ConEdison Development projects will provide benefits to NWE in complying with likely future carbon regulation (Consolidated Edison Exhibit 2, Page 33), and NWE's actual energy and avoided cost through time is likely to include a carbon pricing component. This pricing component should be included as recognition of NWE's full avoided cost. At minimum, the risk of potential CO_2 pricing should be accounted for in the Commission's overall avoided cost decision, including recognition that pricing energy from the ConEdison Development projects without CO^2 pricing, hedges NWE against that risk over the long-term, and provides likely upside profit potential for the market energy sales that have been so widely discussed in this proceeding.

H. Staff's Testimony Largely Supports NWE's Discriminatory and Unlawful Approach and its Own Proposals Violate PURPA.

Commission Staff witnesses Thurber and Maini mostly support NWE's flawed approach to avoided cost, which has been critiqued extensively above. Ms. Maini also offers several proposals as alternatives to an administratively determined avoided cost as requested by ConEdison Development here, including basing avoided cost on competitive solicitations, current pricing of large wind farm power purchase agreements, and current LMP prices. Each of these proposals violates PURPA. Some states have utilized competitive solicitations to establish avoided costs, but these competitive solicitations have been approved by FERC and contain specific guidelines for implementation. See e.g., *Southern California Edison Co.,* 70 FERC ¶ 61,215, 61,677 (1995) ("Congress in this language did not in any way limit the sources to be considered. The consequence is that regardless of whether the State regulatory authority determines avoided cost administratively, through competitive solicitation (bidding), or some

combination thereof, it must in its process reflect prices available from all sources able to sell to the utility whose avoided cost is being determined. If the state is determining avoided cost by relying on a combination of benchmark and bidding procedures, as here, this means that the bidding cannot be limited to certain sellers (QFs); rather, it must be all-source bidding."). None of FERC's guidelines or protections for a competitive solicitation process are presently in place in South Dakota, and Staff's proposal would deprive ConEdison Development of its rights to due process by requiring it to retroactively apply to a process that does not exist.

Furthermore, FERC ruled in *Hydrodynamics*, et al, 146 F.E.R.C. 61,193 (2014), that the "Montana Rule," which required a QF larger than the standard offer threshold (then 10 MWs in Montana) to win a competitive solicitation in order to obtain a long-term forecast avoided cost rate and a contract to sell its power, was inconsistent with PURPA and FERC's regulations implementing PURPA. FERC held the Montana Rule's requirement that a QF win a competitive solicitation was inconsistent with its regulations because state commissions were required by 18 C.F.R. 292.304(d) to provide an opportunity for QFs to create a legally enforceable obligation or "LEO" outside of the competitive solicitation process. Obviously, what the Staff suggests here, namely that a QF participate in a competitive solicitation process that does not yet exist, would also run afoul of FERC's decision in *Hydrodynamics*.

In addition, basing avoided cost on a specific resource such as sole-source wind solicitation would similarly violate PURPA and ConEdison Development's due process rights, as PURPA requires that the utility include "all sources" not just wind resources in such a competitive bidding process. Finally, ConEdison Development believes basing avoided cost on short-term locational marginal pricing also violates the requirement that avoided costs be estimated over a specified term (i.e., forecast rates over the length of the contract). *See* 18

C.F.R. § 292.304(d)(2)(ii). Without including long-term estimates of local marginal pricing, short-term locational marginal pricing is not an estimate but simply a requirement that a utility accept an "as available" rate as set forth in 18 C.F.R. § 292.304(d)(2)(i). This approach is also contrary to PURPA, as FERC's implementing regulations makes clear that it is a QF's right to sell its energy and capacity on an "as available basis" or pursuant to a long-term forecast rate pursuant to a LEO. *Hydrodynamics*, 146 FERC ¶ 61, 193, at P. 31 ("Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or at a forecasted avoided cost rate pursuant to a legally enforceable obligation."). Staff's current LMP proposal would thus violate PURPA as it deprives QFs of a valuable right to determine how to sell its power.

For the foregoing reasons, the Commission should reject Staff's alternatives to the present proceeding and resist the call to adopt a new procedure and apply it retroactively to ConEdison Development.

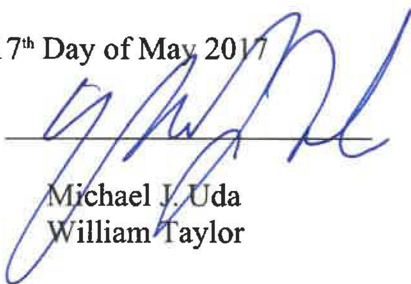
III. CONCLUSION

ConEdison Development met the requirements of the *Oak Tree* test no later than April 4, 2016. ConEdison Development did all that it could do to negotiate an agreement with NWE, but it cannot make NWE be more reasonable than it is inclined to be. It became apparent by April 4, 2016, that NWE was not going to move off the inappropriate and unlawful adjustments it made to avoided cost, and therefore continuing negotiations with NWE were fruitless. As required by FERC, ConEdison Development committed itself to selling its energy and capacity to NWE on a long-term basis, and negotiated for months to achieve this goal. Although NWE did not refuse to

discuss avoided cost at all, NWE knew that its position on these issues would require ConEdison Development to file a complaint before the Commission, and its actions led directly to the filing of the instant complaint. Therefore, consistent FERC's tests for creation of a LEO, ConEdison Development did all it could reasonably due to reach agreement before filing its complaint.

With respect to avoided costs, the Commission should adopt ConEdison Development witness Schiffman's approach to avoided cost analysis. Mr. Schiffman used a well-respected and commonly accepted approach to calculating avoided cost (i.e., the differential revenue requirement approach) which studied the production cost modeling, system inputs, transmission constraints, must run obligations, and all other factors on NWE's system, both with and without the ConEdison Development projects, and used the resulting difference in costs as the basis for ConEdison Development's proposed forecast of avoided cost. The $49.07/MWH avoided energy and capacity payment including integration costs, represents the full avoided cost for the ConEdison Development projects. NWE's adjustments to avoided cost, including the Situation 2 and Situation 3 deductions, are unlawful, discriminatory and violate PURPA. The adjustment for interconnection costs is also unlawful and discriminatory. The basis for the market price forecast prepared by NWE as an input to PowerSimm is based on forward prices at ICE with zero transactions, and therefore has very little credibility. For these reasons, ConEdison Development urges the Commission to adopt its forecast avoided cost estimate in this proceeding.

RESPECTFULLY SUBMITTED THIS 17th Day of May 2017



By: ______________________

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