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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 POST-HEARING REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

I. INTRODUCTION

Complainant Consolidated Edison Development, Inc. ("ConEdison Development"), acting by and through undersigned counsel, respectfully submits this post-hearing reply brief to the South Dakota Public Utilities e Commission ("Commission"). Initially, ConEdison Development

notes that many of the arguments raised by NorthWestern Energy ("NWE") and by Commission Staff ("Staff") are in conflict with the Public Utilities Regulatory and Policy Act ("PURPA") and well established Federal Energy Regulatory Commission ("FERC") precedent interpreting its own regulations implementing PURPA. Contrary to arguments raised in the response briefs, FERC's pronouncements regarding its PURPA implementation and attendant regulations are not meaningless and should not ignored. Under well-established authority, the federal courts are required to grant "substantial deference" to FERC's interpretation of its own regulations "unless its interpretation is plainly erroneous or inconsistent with the regulation." *Bluestone Energy Design, Inc. v. FERC,* 74 F.3d 1288, 1292 (D.C. Cir. 1996) (internal quotations omitted). Although NWE and Staff appear to urge the Commission to ignore FERC's positions on issues regarding PURPA implementation and LEO formation, this is an invitation to error that the Commission should decline.

It should be further noted that where NWE and Staff do not address certain arguments raised by ConEdison Development, those omissions will be noted where appropriate below. In summation, ConEdison Development's proposal is that the Commission should set an avoided cost for the three ConEdison Development projects at approximately $49/MWH, without an adjustment for carbon, without the Long-1 and Long-2 adjustments, without an adjustment for interconnection costs and with an appropriate adjustment for capacity contribution and a small deduction for integration costs.

Congress's directive when PURPA was adopted was that utility commissions must "encourage" QF generation. 16 U.S.C. § 824a-3(a) (2012); *see also Windham Solar, LLC,* FERC ¶ 61,134 at P 8 (2016). If the Commission departs from this principle of "encouraging"

QF generation by adopting the multiple discriminatory adjustments argued for by both NWE and Staff, the Commission will be departing from the primary purpose of this Congressional directive.

Finally, ConEdison Development formally requests oral argument before the Commission on these matters.

II. ARGUMENT

A. ConEdison Development Established a LEO for All Three Projects by April 4, 2016.

1. NWE Appears to Argue That ConEdison Development's Avoided Cost Cannot Be Calculated from the Date of ConEdison Development's LEO.

NWE makes two primary arguments concerning the establishment of a LEO in its Response Brief. First, NWE appears to argue that the avoided cost cannot be calculated from the date of Consolidated Edison Development's LEO. Second, NWE argues that FERC's rulings on LEO matters have no authority. The Commission should not credit either argument.

NWE states that "[t]he import of if and when [ConEdison Development] had incurred an LEO is relevant only to the time at which [NWE's] avoided cost should be calculated. If [ConEdison Development] incurred a LEO, then [NWE] should calculate its avoided cost rate as of that date." (NWE Resp. Br. at 16). ConEdison Development agrees with this position. NWE goes on to assert

> Although Consolidated Edison Development devotes 11 pages of its opening brief to arguments about what should constitute an LEO in South Dakota, this issue does not affect the outcome of this docket. Even if Consolidated Edison Development were correct that it incurred an LEO on April 4, 2016, neither party provided an avoided cost calculated as of April 4, 2016.

Id. at 17.

ConEdison Development cannot agree with this position. First, NWE confounds the date upon which a LEO is created with the information available at the time the LEO was created. 18 C.F.R. § 292.304(d) (2) requires avoided cost to be based on information that was available at the time of the QF's LEO. "Under our regulations, [a QF] has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, *has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred.*" *JD Wind 1*, 129 FERC ¶ 61,148 at P 29 (emphasis added); "[T]he avoided cost must be determined as of the LEO date of February 25, 2011, and the Commission accordingly found that cost inputs and projections should be as of such date." South Dakota Public Utilities Commission, *Oak Tree,* Docket EL 11-06, ¶ 18 (May 17, 2013); Avoided costs should be calculated "based upon the best information available at the time . . ." North Carolina Public Utility Commission, 2014 N.C. PUC LEXIS 1827, *53 . Therefore, all case law and authority available to this Commission indicates that April 4, 2016 is the proper date for an avoided cost determination, and that the determination must be based on information reasonably available at that time. NWE has no discernible explanation for why this position is incorrect.

In fact, NWE appears to have no position at all concerning the LEO date issue. NWE engages in a discussion concerning the dates on which avoided cost was calculated for use in this proceeding. *Id.* at 16. However, NWE's discussion of various dates is irrelevant to the LEO discussion. NWE appears to suggest that if a LEO is established, the Commission may select from the various dates on which NWE previously calculated avoided cost, apparently for later use in this proceeding. NWE's suggestion is contrary to well-established precedent. If a LEO is established, avoided cost must be calculated from that date based on the information reasonably available to the QF. The Commission does not have the discretion, as implied by NWE, to select from among "option" dates in the proceeding on which avoided cost was calculated. If ConEdison

Development's interpretation of NWE's position on LEO as set forth in its brief is inaccurate, then NWE argues no position at all. If, alternatively, NWE means to suggest that the avoided cost as calculated by ConEdison Development utilizing the Ventyx/ABB ProModIV input assumptions as of October 2015 is not germane because its LEO was not established until April 4, 2016, ConEdison Development again disagrees. As discussed above, the avoided cost must be calculated from the date the LEO was established.

In either case, the date the LEO was established is relevant to the outcome of this docket, because it informs an accurate avoided cost calculation.

2. NWE Inaccurately Argues that FERC's Decisions Are Not Relevant Legal Authority.

NWE contends in its brief that it is required to "respond to some egregious errors in ConEdison Development's advocacy regarding incurring an LEO." (NWE Resp. Br. at 17). Foremost among such purported "egregious errors" is NWE's contention that FERC "does not have the legal authority to make determinations of what constitutes a LEO." *Id.* In support of this thesis, NWE first criticizes ConEdison Development's reliance on cited FERC guidance to state commissions regarding the circumstances which will result in a QF's creation of a LEO. NWE claims "Consolidated Edison Development cites four FERC orders to argue that it incurred an LEO prior to filing its Complaint. None of these citations withstands scrutiny." *Id.* Remarkably, NWE thereafter provides no further substantiation for this point in its brief and elects not to scrutinize the cases it claims do not withstand scrutiny. This unexplained lapse in NWE's support for its argument that FERC's precedent on the creation of LEO's should not inform the Commission's decision in this proceeding should cast significant doubt on NWE's thesis that FERC lacks legal authority concerning LEO establishment. Indeed, NWE appears to shift its argument on the LEO

issue, arguing at one point that FERC decisions have no legal significance, but then later arguing that FERC's PURPA decisions do have legal significance but that FERC's PURPA orders "are hortatory, not mandatory." *Id.* Although ConEdison Development believes that FERC Orders are not per se of legal force standing alone, given that federal courts will likely defer to those decisions, the Commission cannot safely disregard FERC's declaratory rulings.

Thus, NWE is technically correct that FERC's orders are declaratory. However, in the wider context, NWE is incorrect. Indeed, NWE's argument is an invitation to the Commission to commit error. The purpose of a declaratory order is to avoid future litigation of Commission orders in federal or state court by providing FERC's position on matters of PURPA implementation. FERC's interpretation of its own statute and regulations set forth in a declaratory order will then be afforded substantial deference by reviewing courts under the seminal United States Supreme Court decisions in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843; 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) and *Auer v. Robbins*, 519 U.S. 452, 457; 117 S. Ct. 905, 909 (1997). These U.S. Supreme Court decisions collectively provide a reliable answer to this Commission regarding the likely outcome of the litigation NWE is tacitly recommending that the Commission force ConEdison Development to undertake. Furthermore, the series of FERC decisions concerning QFs and the Idaho Commission culminating in *Grouse Creek Wind Park*, 142 FERC ¶ 61,187 clearly indicate that FERC's patience is limited concerning state commission intransigence regarding FERC's declaratory rulings. The Commission should find that ConEdison Development established a LEO on April 4, 2016 NWE does not even appear to oppose this finding in its Response Brief.

NWE does suggest an alternative to Consolidated Edison Development's proposed LEO date of April 4, 2016, stating "ConEd complains that the Commission cannot use a rule that has not

been adopted to determine whether ConEd incurred a LEO. While this is a true statement of administrative law, it does not prevent the Commission from using the same factors in resolving disputes on a case-by-case basis." (NWE Resp. Br. at 18). The Commission should not adopt NWE's suggestion for several reasons. First, NWE neglects to address the additional problem with applying the proposed rules, namely that the application of those factors would still be a retroactive application and therefore be impermissible for the reasons set forth in ConEdison Development's opening brief. Furthermore, *de facto* adoption of a rule without affording the appropriate process would violate South Dakota's Administrative Procedures Act, SDCL 1-26-4, which requires notice and an opportunity to be heard. Second, NWE's suggested solution is a thinly veiled end-run around the South Dakota rules against application of proposed rules. The application of the same set of proposed rules to ConEdison Development in a contested case proceeding does not change the fact that the Commission would be applying proposed rules retroactively to ConEdison Development, something it may not do pursuant to SDCL 1-26-6.8. Third, even if the Commission were to accept NWE's invitation to retroactively apply its proposed regulation to ConEdison Development's projects – which would be clear error – the Commission would still be faced with the fact that several of the standards of the Commission's proposed LEO rule have previously been found to be inconsistent with PURPA as discussed in ConEdison Development's Opening Brief at :12-14. For these reasons, the Commission should not follow NWE's suggestion to make an end run around SDCL 1-26-6.8

3. Staff's Position Regarding the LEO Issue is Both Unlawful and Incomprehensible.

Staff first argues that "The Commission has taken up only one true docket related to establishing a LEO under PURPA and this docket does not establish a precedent." Staff Resp. Br at 3. Staff offers no citation to authority for the proposition that *Oak Tree* does not establish a

precedent. Staff only offers another unsupported contention that "The facts in this case are clearly distinguishable from those in *Oak Tree* and require a different conclusion than in *Oak Tree*." *Id.* at 4. Staff again neglects to offer any explanation or argument concerning how the facts in this case are "clearly distinguishable." *Id.* Staff seems to suggest that the distinction comes because:

> In Oak Tree, the Commission did not address the issue of site control or the issue of obtaining a permit to construct a facility in determining whether a LEO was established. The initial complaint in that docket specified that Oak Tree had obtained the property rights necessary to construct the facility and it does not appear that this statement was contested at any point. Additionally, in Oak Tree, the Commission did not rule on whether the lack of the required permits necessary to build a facility affects the establishment of a LEO.

(Staff Resp. Br. at 4).

These distinctions were and are immaterial. There is nothing in the *Oak Tree* decision which suggests any factual distinctions were of significance to the Commission. Indeed, if they had been of significance, the Commission was obliged to publish those factors in its *Oak Tree* decisions such that ConEdison Development had notice and an opportunity to comply with those factors. Instead, Staff's suggestion is that it was error for ConEdison Development to rely on the *Oak Tree* case as precedent, and that instead it was consistent with due process for ConEdison Development to later be ambushed by a new LEO test only identified by Staff *after* ConEdison Development filed its application in this proceeding. Staff's position is not only grossly unfair, but inconsistent with ordered notions of due process under the United States and South Dakota constitutions.

Although Staff concedes that ConEdison Development established a LEO for Brule County Wind by April 4, 2016, it nonetheless argues that ConEdison Development had not established LEOs for the Davison and Aurora projects because ConEdison did not satisfy the Commission's

proposed LEO rule prior to April 4, 2016. (Staff Resp. Br. at 5). Staff's concession is well taken, but it should not be interpreted as lending credence to Staff's position that property rights or the security of permitting has anything to do with the establishment of a LEO. Neither security of property rights nor security of permits was necessary to the formation of a LEO in *Oak Tree* or in any FERC precedent concerning LEO formation; it is legally immaterial that the Commission did not address those issues in *Oak Tree* and would be legally problematic were the Commission to do so in this proceeding. Property rights and permitting issues do not serve to differentiate *Oak Tree* from the present case on the LEO question, because property rights and permitting issues are not a pre-requisite to the establishment of a LEO under the Commission's own precedent, or under any FERC precedent. Nevertheless, without a trace of acknowledgement that it is taking inconsistent positions, Staff erroneously recommends that the Commission depart from its precedent in *Oak Tree*, while in the same brief supporting that precedent as it pertains to the Situation 2 and 3 adjustments. (Staff Resp. Br. at 14). The Commission should instead determine that ConEdison Development did indeed establish a LEO as of April 4, 2016.

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.

As detailed in its opening brief, ConEdison Development has presented a comprehensive, fundamentals-based, 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 remains the only unbiased and 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. Nothing in NWE's or Staff's briefs counter that fact.

Instead, both NWE and Staff argue that the Commission should adopt NWE's short-term market price forecast, which is based on "futures" price for which there is no tradeable volume, and which ignores underlying fundamental changes in the SPP market, and instead simply escalates the "futures" prices by the Energy Information Administration's Annual Energy Outlook price escalation for natural gas in Louisiana (at Henry Hub). Both NWE and Staff complain about ConEdison Development's use of the Ventyx Reference case, and a claimed non-review of fundamental assumptions by Mr. Schiffman, yet the forecast proposed by both NWE and Staff contains no fundamental data whatsoever. This lack of fundamental data is a critical weakness in NWE's proposed methodology.

It is undeniable that the SPP market is undergoing fundamental shifts in the supply and demand mix, given coal plant retirements, the adoption of renewable energy resources, and a general increase in the reliance upon natural gas fueled resources. It is similarly undeniable that long-term natural gas demand is increasing due to the energy market's shift to increasing reliance on natural gas to generate electricity, as well as due to overall increases in gas usage and currently under construction LNG export terminals. It is for that reason that ConEdison Development completed a true differential revenue requirement analysis, based on a fundamentally-derived fuel and power price forecast. This contrasts with NWE's approach which ignores the fundamental factors changing in the industry. For the power price forecast, ConEdison Development relied upon the independently developed Ventyx Reference Case forecast. 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 (*Transcripts of Hearing April 11-12, 2017* at 115:8-116:19, *Tr.* at 340:7-343:23). Energy suppliers, consumers and investment banks all routinely rely upon the Ventyx/ABB Reference Case forecast. The forecast has maintained its current level of industry support for over a decade. 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 343:13-23), and at the time when ConEdison Development established a Legally Enforceable Obligation or "LEO" as set forth in 18 C.F.R. (*Tr.* at 126:13-129:7). Contrary to Staff's assertions, the Ventyx data and forecast is vetted by multiple industry participants. The forecast is designed to accurately forecast price, based on underlying (and changing) conditions of the fuel and power markets.

In contrast, NWE's forecast is deliberately biased and simplistic, and the approach used has been utilized only by NWE. It is not an industry standard approach for developing avoided cost, and is designed to be punitive and discriminatory against QF resources. NWE's approach is not capable of reflecting underlying fundamental changes in the industry. Quite simply, NWE has adopted this methodology because it results in a lower avoided cost estimate for QF resources. 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 to support the forecasted prices (*Tr.* at 107:11-109:12). Staff supports the NWE forecast for the same reason; it results in lower estimated avoided cost.

In its brief, NWE attempts to justify its forecasting approach by referencing extra-record academic evidence, which it apparently "discovered" post-hearing and post-testimony (Footnote

8 of NWE Brief). This belated effort to supplement the hearing record must be ignored by the Commission.

NWE also suggests that Mr. Schiffman's approach applies a different set of prices to off-system sales than the underlying forecast market price. This claim is misleading. While NWE simplistically applies forecast "monthly" energy prices to QF output (adjusted downward by its discriminatory Condition 1 and Condition 2 adjustments), ConEdison Development developed its avoided cost estimates by completing a detailed hourly differential revenue requirement analysis. As market sales occur during higher demand hours, the difference in value in Mr. Schiffman's forecast is due to the differences in hourly energy prices, and the times at which surplus energy sales are forecasted to occur. In other words, the reason there are different energy prices during higher demand hours, is because that is an unquestioned principle by which markets function. When demand in the Dakota region is higher, Mr. Schiffman reflects a higher to price to reflect that regional demand. To do otherwise would be counter to standard modeling market assumptions and the way in which prices should be assigned. Contrary to NWE's assertion (which was not raised at hearing and for which there is no evidence whatsoever), there is no mischief here. Instead, the "different" prices Mr. Schiffman utilized for off-system sales only highlights the greater level of accuracy and precision in ConEdison Development's approach compared to NWE's simplistic and discriminatory approach.

C. Staff's Unwavering Support of NWE's Avoided Cost Positions is Uninformed

In this case, Staff has been a staunch advocate for the majority of NWE's positions. Staff witness Maini, in her direct testimony, stated that PowerSimm is a superior model to use for developing avoided cost estimates because it "captures uncertainty across a range of inputs",

which she finds to be "superior" to a deterministic model (Staff Exhibit 2, page 16). However, despite her strong opinion, Ms. Maini admitted in discovery that she *never actually reviewed any stochastic inputs, results, or benchmarking from PowerSimm*! After Mr. Schiffman pointed out that NWE's avoided cost approach does not even use the stochastic features of PowerSimm for any purpose other than estimating its net purchase or sale position (Consolidated Edison Exhibit 3, pages 10-12), Staff abandoned its view in its Response Brief that the stochastic features of PowerSimm are superior. Regardless of Staff's backsliding on this point which was, prior to ConEdison Development's rejoinder that Staff had no idea whether what it was saying regarding PowerSimm was true or accurate, Staff nonetheless continues to maintain its advocacy for NWE in Staff's Response Brief by not so subtly shifting to the "rationalization" that because NWE claims to use PowerSimm in its resource planning evaluations, use of the model is not discriminatory and NWE should be granted deference in its choice of model. (Staff Resp. Br. at 7).

Staff's "rationalization" is legally insufficient because NWE's use of PowerSimm is clearly discriminatory, is explicitly designed to pay QF resources a lower price than the full avoided cost, and to pay lower prices than NWE receives for its own supply resources. The model used by NWE for resource planning is irrelevant to the issue of discrimination in this case, which results in Staff's opinion also being irrelevant. In fact, as stated by Mr. Schiffman, PowerSimm as a model has features that provide advantages in resource planning, but it is not a price forecasting tool, and instead just uses the prices given to it by NWE (Consolidated Edison Exhibit 3:10).

Staff witness Maini continues to support NWE by attacking a few select assumptions underlying ConEdison Development's use of the ABB/Ventyx Reference Case forecast, and then exaggerating the impact in an attempt to discredit the Ventyx forecast. For example, Staff's Initial Brief cites Ms. Maini in claiming that the Ventyx forecast overstates electric demand in the Dakotas, overstates planned gas generation in the Dakotas, and underestimates 2016 wind capacity (Staff Resp. Br. at 11). In Ms. Maini's opinion, those factors result in power prices being too dependent on natural gas fueled resources, and lead to forecast prices being "obnoxiously high." (Staff Resp. Br. at 11).

In launching these attacks, Ms. Maini reveals her own bias and her own inability to understand the inputs in the Ventyx forecast. First, Ms. Maini claims that the Ventyx forecast only included 2 GW of wind in the model, in contrast to SPP reports showing 4 GW of wind in 2016 (*Tr.* at 331:5-10). However, inspection of ConEdison Development's Data Response to PSC Staff's 5th Data Request (Load & Resource tab), shows that the Ventyx Reference case actually included 4,582 MW of non-hydro renewable capacity in 2016, most of which is wind. Ms. Maini's claim, and PSC staff attorney's questioning of this assumption, was incorrect, misleading, and should be discounted.

Second, Ms. Maini claimed that the Ventyx forecast overstated demand in the Dakotas, and overstated natural gas fueled resource additions, which, in her opinion, leads to forecast energy prices having "overreliance" upon natural gas prices (Staff Resp. Br. at 11). However, Ms. Maini is apparently unaware that Basin Electric was forecasting a 1,000 MW increase in peak demand due to oil extraction activity in the state, and that developers are assessing 800 MW natural gas fueled combined cycle capacity additions in response (*Tr.* at 88:3-22, 341:8-21).

In addition, as discussed by Mr. Schiffman, Ventyx does not independently forecast electricity demand, but instead takes the forecasts submitted by load-serving entities (*Tr.* at 341:1-25). Staff ignored that fact in its brief, and ignored the fact that ConEdison Development used NWE's own demand forecast in completing the QF-In/QF-Out analysis (*Tr.* at 348:23-349:4). These omissions of fact are extremely misleading and create severe and inappropriate bias against ConEdison Development's avoided cost proposal in this case.

Moreover, Ms. Maini's claimed concern about an overreliance upon natural gas resources in establishing market price reveals both bias and the illogic of her avoided cost position. NWE's avoided cost methodology begins with ICE futures electricity and natural gas prices (for which there is not traded volume), and then escalates energy prices based *only* on EIA natural gas price escalation. As such, NWE's approach relies *exclusively* upon natural gas resources to escalate electric energy prices. Despite being unperturbed by NWE's methodological reliance exclusively on natural gas prices, Ms. Maini is in contrast professes to be deeply concerned by ConEdison Development's approach, which fundamentally reflects a *combination* of resource types in establishing market prices, including natural gas fueled resources, coal fueled resources, and renewable resources, and which explicitly accounts for the changing energy supply mix widely known to be occurring in the industry. Ms. Maini's concern is misplaced. ConEdison Development's approach is far more likely to be accurate than NWE's biased and simplistic approach. The Commission should not be misled by Ms. Maini's analysis, which appears to do little more than offer unreasoned support for NWE's position.

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

Both NWE and Staff claim that NWE's avoided cost approach is not discriminatory. Staff bases its claim solely on the claim that NWE uses the same model and approach in making its resource planning decisions. Staff goes so far to claim that NWE should not be forced to use a different model picked by a QF developer (Staff Resp. Br. at 7). Staff's conclusion suggesting that the Condition 1 and Condition 2 adjustments are not discriminatory completely misses the point. The fact NWE reportedly uses the same flawed approach in both its resource planning activities and in its avoided cost methodology is beside the point. The point is that QFs will be treated differently in terms of pricing and cash flow as compared to NWE's owned resources. The discrimination is due to pricing policy, not the use of a particular modeling platform. For the Staff to suggest otherwise defies economic reason.

For its part, NWE admits that it will operate its power system differently than the Condition 1 and Condition 2 approaches imply, and that it will in fact sell surplus energy into the market and collect market-based sales revenue during periods when its system is long on energy. It also admits that it will not forego rate recovery for its own generating assets, during either Condition 1 or Condition 2 situations (*Tr.* at 168:2-169:19). So, NWE is basically admitting that its approach is discriminatory, but regardless would have the Commission adopt that discriminatory approach based on NWE's flawed interpretation of FERC Order 69. Put simply, NWE believes it should always enjoy full cost recovery for its own assets, but that QFs should only be paid for energy at avoided cost when NWE is in an energy short situation. This is the definition of discriminatory pricing, and is a clear violation of PURPA and FERC's PURPA policy.

E. Avoided Cost Must Be Based on the LEO Date.

In its Brief, NWE correctly points out that a large part of the difference in avoided cost estimate derives from the underlying energy price forecast. ConEdison Development developed its avoided cost forecast based on the most recently available Ventyx Reference Case data at the time of the LEO. In contrast, NWE, while refusing to negotiate in good faith, offered numerous "estimates" of its avoided cost and continually updated its estimates to reflect short-term declines in natural gas prices. Had NWE used data time-relevant to ConEdison Development's data, the avoided cost forecasts of NWE and ConEdison Development would be very close. .

F. Avoided Capacity Cost Must Be Based on the Cost of Building the Resource NWE Will Avoid

In yet another attempt to discriminate against QFs, NWE has proposed to base the cost of capacity on short-term capacity market purchases that it claims are currently available in the Southwest Power Pool ("SPP") market. NWE's reliance on SPP's short-term capacity market substantially underestimates the cost of capacity. However, NWE also freely admits that in its resource plan, and in operating its actual system, it plans to build or procure a new peaking resource, in the 2018 or 2019 time-frame. Here again, NWE plans to develop a peaking resource and achieve full capital cost recovery, but proposes to pay QFs a substantially lower amount based on short-term current market conditions. This is essentially the same approach as NWE proposes for energy payments, where the use of non-traded "futures" prices is extrapolated long-term to underestimate full avoided cost and to discriminate against QF resources. The Commission must reject NWE's discriminatory position, and should establish avoided capacity cost based on the peaking resource that NWE will actually avoid. Staff supports ConEdison Development's position (Staff Resp. Br. at 21).

G. STAFF AND NWE ENTIRELY MISS THE POINT OF THE DISCRIMINATORY FEATURE OF NWE'S SITUATION 2 AND SITUATION 3 ADJUSTMENTS

a. NWE and Staff Legal Arguments Regarding the Discriminatory Situation 2 and 3 Adjustments Are Contrary to Law

NWE offers a series of non-sequiturs, misleading statements, and misinterpretations of the law in response to ConEdison Development's arguments in its opening brief which demonstrate beyond doubt that NWE's Situation 2 and Situation 3 adjustments (Long 1 and Long 2) are, in fact, discriminatory. NWE argues that *Tri-State Generation and Transmission* is inapplicable, apparently, because "of the principle of customer indifference." (NWE Resp. Br. at 8). NWE opines that ConEdison Development's position on simply assigning market rate to every hour violates that principle, ostensibly because, according to NWE:

> Without the QF, NorthWestern's customers benefit from all off-system sales. All revenue from market sales flows to customers through NorthWestern's Delivered Cost of Fuel Adjustment Clause shown on Sheet 33b. Under [ConEdison Development's] proposal, if NorthWestern cannot sell [ConEdison Development's] excess output at [ConEdison Development's] projected price, NorthWestern's customers will be worse off. PURPA does not permit this.

(NWE Resp. Br. at 8-9).

NWE's argument is contrary to logic, common sense, and PURPA itself. First, any avoided cost rate will necessarily contain the risk that market prices will be higher or lower at any given time in relation to an administratively-determined long-term avoided cost forecast. In FERC Order 69, in deciding that the LEO principle would permit investment in new technology and promote QF resources, FERC found the difference between the long-term avoided cost rate and market was not a reason to not permit long-term QF contracts based on avoided cost:

> Some of the comments received regarding this section (18 C.F.R. § 292.304(d)) stated that if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at

> the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe that the reference in the statute to the incremental cost of alternative was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities. Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments and believes that, in the long run, "overestimations" and "underestimations" of avoided cost will balance out.

45 Fed. Reg., 12, 214, 12, 224 (1980).

Every long-term obligation, whether it is utility investment in plant or a long-term power purchase agreement, carries with it the risk that the market will be higher or lower than the long-term obligation. Every utility investment in plant and every QF contract carries that risk. Despite the risk of forecast error posed by long-term QF contracts, FERC nonetheless adopted the full avoided cost rule that NWE here essentially admits to violating. NWE does not want to credit the value of excess QF generation to the QF, even though the sale of that generation has value. NWE instead wishes to transfer that value to someone other than the QF -- either the utility or its ratepayers. The fact that the avoided cost in a QF contract may prove different from the spot-market price at any given time does not mean that the QF's long-term contract is not consistent with the utility's avoided cost over the length of the contract, and NWE has offered no evidence that it would be.

The fact is that every avoided cost methodology poses a risk that the avoided cost estimates developed will vary from the long-term market price. FERC does not require nor expect a "minute-by-minute" check of those costs in relation to market, which is essentially what NWE is suggesting. Apart from the discriminatory aspect of NWE's methodology, which NWE does not deny except to claim "consumer indifference," the consumer is decidedly

not indifferent under NWE's proposal because it constitutes a wealth transfer from the QF to ratepayers (or NWE itself, potentially) of money that would otherwise go to QFs.

NWE's argument that market sales of its excess generation go to credit ratepayers is *precisely* the point. Ratepayers pay for NWE's investment in plant. When excess generation is sold into the market, those sales benefit NWE's ratepayers as should be the case under prudent utility practice. That does not mean that NWE is paid any less for its investment in plant, rather, ratepayers are still on the hook for the entire amount of NWE's investment. The difference between utility investment in plant and QF investment in generation resources is that cost recovery by the utility of its investment in plant is not necessarily contingent on any particular level of generation supplied. NWE recovers all of its costs associated with investment on behalf of ratepayers. QF developers recover their costs solely through the mechanism of a payment based on generation delivered to the utility.

What NWE is attempting to do is to apply a discount only to sales of QF generation into the market by transferring the value of those sales to ratepayers (or, potentially NWE's shareholders). Whether it is utility generation or QF generation, the generation is supplied by the utility to ratepayers based on legal obligations and excess generation is then properly credited back to ratepayers. Thus, NWE is properly and fully reimbursed for its investments on its ratepayer's behalf, and whether the utility's resources operate or not, the utility will recover from ratepayers its capital and fixed operation and maintenance costs associated with that plant. Since QFs are only paid the rate in their contract based on sales, discounting the avoided cost by not crediting market sales to QFs jeopardizes the QF's capital and fixed O&M investment in its project in a way that utilities will not and cannot experience. Utilities are legally entitled to full cost recovery of prudent investment on behalf of their s ratepayers. What NWE would have the Commission believe is that it is fair for the utility to recover its full

investment but not for QFs to do the same. In either event, customers should be credited with all market sales in excess of generation, but that does not mean on the one hand the utility should not recover its investment in plant, or on the other hand that a QF should not be paid full avoided cost.

NWE argues that "[n]othing in PURPA requires NorthWestern's customers to guarantee [ConEdison Development's] projected market prices. Nothing in PURPA includes opportunity sales as part of a utility's avoided cost." (NWE Resp. Br. at 9). NWE's argument is unpersuasive. PURPA *does* guarantee full avoided cost, which includes all the costs and benefits to ratepayers provided by the QF generation. In the case of the utility, the ratepayer is obliged to pay for all prudent investment made on the ratepayer's behalf, regardless of how much the utility's investment in plant generates. The reason sales must be credited back to the ratepayer is so that the ratepayer is not overpaying for investment it does not need. Here, NWE not only proposes to reduce the avoided cost by sales made into the market by NWE of QF generation, but even after the reduction in avoided cost payments to QFs is established, NWE also proposes not to credit the sales back to the QF. It might be appropriate not to credit off system sales at all if NWE were proposing to pay full avoided cost to QFs (i.e., without the Situation 2 and Situation 3 adjustments), or it might be appropriate to apply the Situation 2 and Situation 3 adjustments provided that NWE credited the off-system sales to the QF. However, NWE is not proposing to take either of these approaches. Instead, NWE is both reducing avoided cost by the Situation 2 and Situation 3 adjustments *and* not crediting the off-system sales. Such double counting is not only discriminatory, but it results in paying less than full avoided cost which is required by PURPA.

Finally, NWE's argument that accounting for off-system sales of QF generation is a "subsidy" is specious. NWE Resp. Br. at 13. If this is true, then every time a QF generator

sells its power pursuant to a long-term contract based on a forecast avoided cost rate (which is the QF's absolute right), and the utility's avoided cost or the market varies from the contract rate, according to NWE, this rate is a "subsidy." The fact is that any estimate of any resource's prospective relationship to future market price is going to be wrong; it is not a subsidy for the QF unless it is also a subsidy to the utility when it overestimates its capacity requirements and ratepayers pay for generation they do not need. There is no subsidy that is caused by QFs being paid for sales. NWE is proposing not to pay full avoided cost *and* then not pay the QF for the value of the sales. That is not a subsidy; it is in fact a penalty.

NWE argues that *Tri-State* decision does not "reject" NWE's "adjustment" because Tri-State did not involve "the determination of a utility's avoided cost." NWE Resp. Br. at 9. NWE's attempt to distinguish *Tri-State* is unavailing. Although it is true that FERC did not pass judgment on the issue of avoided costs in *Tri-State*, it is also true that the import of FERC's decision in *Tri-State* guts NWE's rationale for the Situation 2 and Situation 3 adjustments. To explain again, the applicability of *Tri-State* to the present situation is simple. In *Tri-State*, as in the present case, a utility has proposed a cost-allocation mechanism that hinders the purposes of PURPA. In *Tri-State*, it was the attempt to receive cost recovery from a member cooperative for a QF contract that exceeded the 5% self-supply allowed by contract between Tri-State as generation and transmission cooperative and its purchasing cooperative members. In the instant case, it is NWE's attempt to pay the QF the variable operating cost under the Situation 2 adjustment or "zero" under the Situation 3 adjustment instead of market price.

Tri-State argued before FERC that without its ability to recoup the stranded investment made by Tri-State on behalf of its cooperative members, it would either be stuck with stranded investment costs made on behalf of its customers, or its other customers would be required to pay for those incremental costs attributable to service for Montrose. *Tri-State Generation and*

Transmission Association, Inc., 155 FEC ¶ 61,269, at PP. 20-21 (2016). FERC stated that Tri-State was not actually stuck with that investment, and could sell the power into the market, and the evidence showed Tri-State both had the ability to do so and had done so. Moreover, FERC also noted that Tri-State had not shown it would be financially harmed by QF purchases by member cooperatives.

In this case, NWE complains that what the QF is displacing are marginal generating units (which is a fiction, as NWE admitted at hearing it is not doing this). However, NWE's argument is materially the same as Tri-State's contention before FERC. Just as Tri-State's attempt to pit QF purchases against its investments on behalf of its customers was unavailing, so is NWE's effort to pit QF purchases against existing and planned generation. Although NWE's claim is that its ratepayers will be harmed, its ratepayers will not be harmed if either NWE pays full avoided costs (which includes market sales), or pays less than full avoided cost by its subtractions under the Long-1 and Long-2 scenarios, and then credits back to the QF the full value of market sales over time. What NWE cannot do, without violating the anti-discrimination principle of PURPA, is both deduct from full avoided cost under the Long-1 and Long-2 scenarios and then fail to credit to the QF the value of the sales.

The lesson of *Tri-State* is that utilities are not allowed to pit QF resources against other resources in an effort to claim economic harm when the market is easily available to sell excess generation. Yet, that is exactly what NWE is attempting to do here. The Commission should recognize the logic inherent in *Tri-State.* There is no economic, legal, or policy rationale for ignoring the market when it exists and is utilized. Moreover, the Commission should recognize that NWE has not even attempted to demonstrate or logically explain why or how its ratepayers would be harmed by simply re-selling the power into the market. This is because the ratepayers

are not harmed, and NWE's argument regarding the Long-1 and Long-2 adjustment (Situations 2 and 3) that it will "subsidize" QF generation is plainly incorrect. The only entity harmed by NWE's double counting of the Situation 2 and Situation 3 adjustment is the QF, because it will be paid less than full avoided cost in violation of PURPA. See *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 406 (1983) ("In its order accompanying the promulgation of this rule, FERC explained its decision to set the rate at full avoided cost rather than at a level that would result in direct rate savings for utility customers by permitting a utility to obtain energy at a cost less than the cost to the utility of producing the energy itself or purchasing it from an alternative source. 45 Fed. Reg. 12214 (1980)"). In other words, the Supreme Court upheld FERC's decision to require utilities to pay "full avoided cost" under PURPA, rather than a mechanism would credit ratepayers in a way that reduced avoided cost. NWE's avoided cost proposal in this case thus expressly violates PURPA and FERC's regulations implementing PURPA.

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

As noted in ConEdison Development's opening brief, the 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 3:7-10). Apart from this, as noted above, FERC's decision in *Tri-State* implicitly rejected the justification for the situation 2 and situation 3 adjustments. FERC decided that Tri-State's reliance on Order 69 was misplaced as that Order was adopted years prior to 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 the 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 (Consolidated Edison Development, Exhibit 3:9-10, *Tr.* at 166:1-14).

Furthermore, as also noted in ConEdison Development's opening brief, NWE's proposed adjustments are inaccurate in calculating avoided cost, because they do not reflect how NWE actually operates its system, and because they violate economic dispatch principles (Consolidated Edison Exhibit 3:9-10). As further noted in ConEdison Development's opening brief, under NWE's avoided cost methodology, NWE would effectively collect sales revenue based on market price, but would pay the QF projects either zero, or the variable cost of the marginal resource. This 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).

Moreover, as testified at hearing 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 168:2-169:19). 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 (Tr. 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 further discriminates against QFs, again in violation of PURPA. The Commission cannot accept NWE's Condition 2 and

Condition 3 adjustments because they are unjust, unreasonable, and discriminatory and therefore violate PURPA.

Furthermore, the Montana Public Service Commission ("MPSC") has expressly rejected the application of the Long-2 adjustment directly. *In the Matter of Crazy Mountain Wind*, Docket D2016.7.56, Order No. 7505b, at pp. 22-24 (January 5, 2017). This Commission should apply the legal and factual reasoning of the MPSC to NWE's proposed Long-2 adjustment in this proceeding.

NWE did not comment on ConEdison Development's argument that what NWE is doing in using its Situation 2 and Situation 3 adjustments is light loading curtailment by another name. ConEdison Development, in its opening brief, quoted directly from FERC's decision in *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 *de facto* curtailment whereby it proposes to pay less than full avoided cost in those periods where its loads are less than the available generation. There is no difference in practical effect between curtailing QFs under a light loading situation (the utility pays nothing), and the Situation 3 adjustment (Long 2) where the utility pays nothing to the QF. 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.

c. Staff's Arguments on the Long-1 and Long-2 Adjustments are Legally Inadequate and Promote Discrimination

Staff argues that NWE's avoided cost methodology "values long energy differently based on whether the generation at the marginal unit can be backed down. If generation at the marginal unit can be backed down, the avoided energy cost is the variable cost of the marginal unit ("Situation 2"). If generation at the marginal unit cannot be backed down, the avoided energy cost is zero ("Situation 3" or "minimum generation events")." (Staff Resp. Br. at 13). This statement ignores prudent utility practice and economic dispatch. As noted above, NWE is not backing down its generating units when it is long, but rather reselling that power into the market. This is true under both Situations 2 and 3. There is no justification for reducing payments to QFs in situations where NWE admits it is selling its power into the market and obtaining revenue for those sales. As noted above, NWE's proposal is to discriminate against QFs because NWE is not backing down its resources and it is not foregoing cost recovery of its capital investment or fixed O&M investment in those plants, which is precisely what NWE is proposing that QFs do – forego the ability to recover their capital and other fixed costs as the QFs only receive a single payment, and that payment must pay for all capital and fixed costs.

Staff also argues that NWE's proposed avoided cost calculation with respect to Situation 2 is consistent with the Commission's ruling in *Oak Tree* Docket EL11-006. (Staff Resp. Br. at 14). However, it can plainly be seen that with respect to Situation 2, NWE is discriminating against QFs as set forth above. Contrary to the Commission's finding in *Oak Tree*, it has been

plainly established that NWE is not backing down its plants in order to accept generation from the ConEdison Development projects. It is simply re-selling the power into market. Furthermore, Staff cannot defend NWE's proposed deduction from full avoided cost in Situation 3 based on the Commission's *Oak Tree* decision as no such proposal was made or accepted by the Commission. Finally, as noted above, Staff inconsistently appears to both advocate departure from the Commission's *Oak Tree* decision with respect to the LEO issue, but to adhere to that decision with respect to avoided cost methodology. It seems this advocacy can only be explained by Staff's desire to both argue against ConEdison Development's entitlement to a LEO and in favor of *Oak Tree's* methodology which would reduce avoided cost. Staff also offers the following strained interpretation of NWE's cost recovery of its own investment in generation: "These investments in generation limit NorthWestern's customers' exposure to market price risk by capping the cost of energy at the variable cost of NorthWestern's owned generation facilities." (Staff Resp. Br. at 14). However, Staff's argument is factually and legally incorrect. ConEdison Development surmises that NWE would be taken aback if the Commission were to decide it may only recover the variable cost of its generation from ratepayers. Instead, by law, NWE is entitled to recover *all* utility investment in plant, fixed and variable, from its ratepayers. If the Commission were to do otherwise, NWE would doubtless have a substantial claim that the Commission's decision to limit recovery from ratepayers to only NWE's variable cost of operating its resources is confiscatory under the United States and South Dakota constitutions. Regardless, the fact is that Staff and NWE are relying on a fiction that does not exist. NWE admits it is not backing down any of its plants, and it is selling all

excess generation into the market. That generation, including QF generation, has a value when sold.

Staff next argues that "[ConEdison Development's] avoided cost methodology does not appropriately model avoided costs for a vertically integrated utility by using market price in hours when NorthWestern's owned generation establishes a lower avoided cost." (Staff Resp. Br. at 14). Staff's position is contrary to law. The question under PURPA is what is the next incremental unit of generation that NWE will acquire, not what is the variable cost of NWE's existing generation. If NWE were to propose the use of planned generation, the appropriate calculation of avoided cost for prospective QFs would not just include the variable costs of displaced future generation, but the fixed capital, O&M and other fixed investment in that planned generation. Staff offers no legal authority for its position, because there is none. Avoided cost is not limited to only the variable costs of NWE's resources.

Staff then claims because this Commission has not ruled on Situation 3, and that because there is no "definite" FERC ruling on NWE's interpretation of Order 69, the Commission should ignore other precedent. However, in doing so, Staff's attempt to distinguish *Tri-State* is simply unconvincing, as is its attempt to avoid the reasoning of the Montana PSC.

Staff overclaims the proposition that FERC Order 69 stands for by not noting the specific language utilized by FERC in that Order from 1980, which clearly states "These rules impose no requirement on the purchasing utility to deliver *unusable* energy or capacity to another *utility* for subsequent sale." FERC Order 69, 45 Fed. Reg. 12219, Feb. 25, 1980. Note FERC's use of the terms "unusable" and "utility." In 1980, the vast majority of transactions were

between utilities, and if another utility had no need for the energy and capacity delivered by the host utility, that energy would be "unusable." Such is not the case now, and FERC made this important point in Tri-State when FERC specifically stated: "*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.*" 155 FERC ¶ 61,269, at P. 20 (2016) (emphasis added). FERC was noting that the world had changed, and that reliance on Order 69's strict language, which was based on a world where utilities were selling power to each other, is not the same world as exists in 2017, where utilities have access to organized markets. As FERC further noted: "*Unlike in 1989, Tri-State has easier access to energy markets where it can, and currently is, selling its excess power.*" *Id.* at P.20 (emphasis added). In 2017, NWE has access to organized markets where it can and does sell excess generation. The power, if purchased, is not "unusable" as it would be in the scenario envisioned by FERC in 1980. Finally, NWE has not provided anything other than a theoretical demonstration of ratepayer impacts which are refuted by the fact that 'NWE's proposed avoided cost *both* deducts avoided costs from its proposed payments to ConEdison Development's project and does not thereafter credit the actual sales to the QFs. This is simply double counting on NWE's part.

Staff then reaches for a "slippery slope argument" by stating:

> Consider a scenario where 50 additional qualifying facilities, each approximately 20 MWs, wanted to sell its energy and capacity to NorthWestern and its 305 MW system. Under [ConEdison Development's] proposal, NorthWestern would be required to pay market prices for another 1,000 MWs of energy which would

> primarily be sold into the SPP market rather than used to serve its approximate 300 MW retail system.

(Staff Resp. Br. at 16).

Simple economic principles belie this histrionic scenario. As the utility adds more and more capacity, the avoided cost will continue to decline until it is no longer economic for developers to attract the capital necessary to develop projects. NWE itself admitted this point (*Tr*. at 219:12-18). In contrast to becoming "a guarantor" of a "market forecast," NWE's ratepayers would benefit from having substantial wind generation in the portfolio, because it drives avoided cost down as NWE admitted at hearing. The Staff cannot have it both ways; either wind drives down the cost of generation on NWE's system, or it is a threat to ratepayers to have that much wind on NWE's system. However, it seems clear that adding significant wind generation to its system will drive down NWE's avoided cost.

Staff also argues that because avoided cost should incorporate periodic fluctuations in the utility's own cost of generation as well as market, it is consistent with avoided cost principles to deduct from avoided cost in Long-1 and Long-2 situations. (Staff Resp. Br. at 16). However, Staff confounds the fluctuations in avoided cost inherent in every projection of avoided cost forecast with NWE's attempt to implement a *de facto* curtailment in situations where light loading does not exist. The fluctuation in the utility's avoided cost over time (given the production cost modeling incorporated in the Ventyx/ABB ProMod model and inputs) as well as the change in market prices over time are already reflected in both NWE's and ConEdison Development's avoided cost forecasts. However, NWE by claiming deductions from that full avoided cost as represented by its Situation 2 (Long 1) and Situation 3 (Long 2) adjustments is taking a further deduction from these varying avoided cost projections over time. This is easily demonstrated by the fact that: (1) NWE is not backing down its

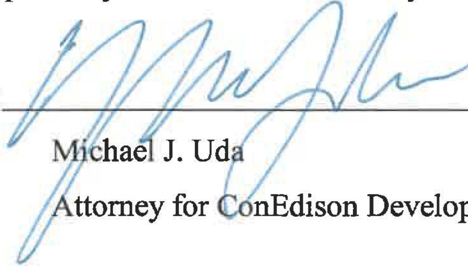
generation, but rather reselling excess and crediting it to its customers, although that credit offsets NWE's revenue requirement and allows it to earn a return on its investment, something it does not propose to allow ConEdison Development's projects to do; (2) NWE is *both* deducting from avoided cost in periods when it is long, *and* not crediting the value of those sales to ConEdison Development's projects. As noted above, NWE may do either of these things, but not both of them without discounting ConEdison Development's generation twice. Such a proposal is plainly discriminatory, and is counter to PURPA and FERC's implementing regulations.

Finally, Staff argues that because NWE's avoided cost proposal is consistent with PURPA because NWE's investment in plant is reviewed by the Commission which "evaluates and ensures NorthWestern's internal resources are used and useful for its customers, and generation resources that are primarily used for market sales would not be included in rates for cost recovery." Staff Resp. Br. at 18. This may be true as far as it goes, but it also ignores that fact that QFs are not subject to rate regulation under PURPA, and that PURPA's mechanism to ensure ratepayer indifference with utility investment in plant is the full avoided cost rule embedded in PURPA. This does not mean, as Staff seems to imply, that a utility may pay less than full avoided cost to a QF and thereby discriminate against the QF. If NWE were foregoing cost recovery for its fixed investment in generation then it might be that Staff would have a point. However, NWE is not foregoing that cost recovery and there is thus no merit to Staff's position.

III. CONCLUSION

This Commission should determine that the application of the proposed LEO rules to this matter is unlawful, and that ConEdison Development established a LEO on April 4, 2016. The Commission should further calculate the avoided cost based on the April 4, 2016 LEO date. The Commission should reject NWE's avoided cost methodology, including its discriminatory and inaccurate use of PowerSimm, and find that ConEdison Development's independent methodology, broadly accepted within the industry, provides a superior and more accurate calculation of avoided cost. The Commission should determine an avoided capacity cost based on the cost of building the next avoided resource, not on NWE's proposed discriminatory reliance on the SPP short term capacity market. Finally, the Commission should reject the Situation 2 and 3 adjustments as unlawful, discriminatory, and unnecessary. For the foregoing reasons as set forth in this brief, the Commission should accept ConEdison Development's avoided cost forecast of $49.07/MWH over the 25-year length of the Consolidated Edison's proposal.

Respectfully submitted this 26th Day of June, 2017



By:_________________________

Michael J. Uda
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ConEdison Development hereby requests oral argument before the Commission, pursuant to South Dakota Rule of Administrative Procedure 20:10:01:22.05.