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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 NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY FOR ESTABLISHING A PURCHASE POWER AGREEMENT	**NORTHWESTERN ENERGY'S POST-HEARING RESPONSE BRIEF** **EL16-021**

I. Background.

Procedural History

On June 23, 2016, Juhl Energy, Inc. filed the Complaint initiating this docket. On February 17, 2017, the Commission granted Consolidated Edison Development, Inc.'s ("ConEd") Motion to Amend the Complaint substituting ConEd for Juhl Energy, Inc. in this proceeding. On April 10 and 11, 2017, the Commission held a hearing in Pierre, SD. The Commission received the following into evidence:

Prefiled Direct Testimony of Cory Juhl;

Prefiled Direct Testimony of Roger Schiffman;

Prefiled Rebuttal Testimony of Roger Schiffman;

Prefiled Response Testimony of Bleau J. LaFave;

Prefiled Response Testimony of Luke P. Hansen;

Prefiled Rebuttal Testimony of Luke P. Hansen;

Prefiled Response Testimony of Autumn M. Mueller;

Prefiled Rebuttal Testimony of Autumn M. Mueller;

NorthWestern's Response to Staff's Data Request 4-24;

NorthWestern's Response to Staff's Data Request 8-1;

Prefiled Direct Testimony of Jon Thurber;

Prefiled Direct Testimony of Kavita Maini; and

NorthWestern's Response to Staff Data Request 6-2.

Each of the witnesses appeared in person, sponsored his or her testimony, and was offered for cross-examination.

On May 17, 2017, ConEd filed its Opening Post-Hearing Brief ("ConEd Brief"). NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") submits this response to the ConEd Brief.

NorthWestern's long-standing position in this docket is that the Public Utility Regulatory Policies Act of 1978, as amended, ("PURPA") requires it to purchase the energy and capacity from ConEd's three proposed wind generation facilities ("Projects") at rates and under terms and conditions that protect NorthWestern's customers. NorthWestern and ConEd have not been able to agree on the appropriate rate for the output of the Projects.

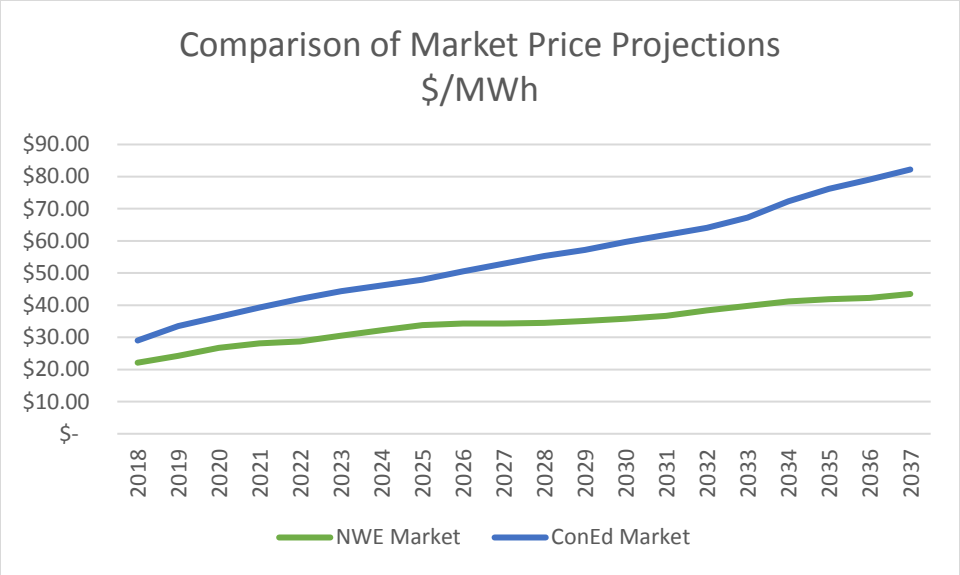
II. NorthWestern correctly calculated and offered to pay the costs that it can avoid by purchasing the output from the ConEd Projects.

The overarching contested issue in this matter is the incremental cost of energy and capacity that NorthWestern can avoid by purchasing the output from ConEd's Projects. NorthWestern, using its standard method for evaluating all new electric energy resources, calculated the 20-year levelized avoided cost for energy to be $29.63/MWh for Projects achieving commercial operation in 2018.[1] ConEd asserts the Projects are entitled to an avoided cost for energy of $47.29/MWh.[2] The difference between NorthWestern's and ConEd's avoided costs are attributable primarily to differences in market price forecasts, compensation for the Projects when purchasing the output does not enable NorthWestern to avoid any cost, and the treatment of incremental costs that purchasing the output causes NorthWestern to incur.

A. Comparison of Market Price Forecasts

Forecast market prices are a critical component of calculating avoided costs. Staff witness Kavita Maini testified that 97% of ConEd's claimed avoided cost is based on market prices.[3] NorthWestern estimated that the market price for electricity would rise from $22.12/MWh in 2018 to $43.48/MWh in 2037, an increase of 197%.[4] ConEd projected that the market price for electricity would surge from $29.02/MWh in 2018 to $82.21/MWH in 2037, an increase of 283%.[5] The chart below demonstrates the comparison of the market price projections.

[1] Exhibit NWE-2, Prefiled Response Testimony of Luke P. Hansen ("Hansen Response Testimony"), LPH-13:17-19. (NorthWestern also calculated an avoided cost for Projects commencing commercial operation in 2017. NorthWestern believes that the ConEd Projects will not achieve commercial operation in 2017.)
[2] Exhibit CED-2, Prefiled Direct Testimony of Roger Schiffman ("Schiffman Direct Testimony"), p. 4.
[3] Transcript 332:10-15.
[4] Exhibit NWE-1, Prefiled Response Testimony of Bleau J. LaFave ("LaFave Response Testimony"), Exhibit__(BJL-2).
[5] Schiffman Direct Testimony, pp. 37-38.



Approximately $13/MWh of the approximately $18/MWh difference is attributable to the difference in market forecasts. A primary driver of future electricity prices is the projected price of natural gas.

NorthWestern's forecasts of natural gas and electricity prices "are a combination of near-term market transactions and long-term escalation rates."[6] NorthWestern projected market prices by starting with the October 4, 2016, Intercontinental Exchange ("ICE") forward prices through December 2018 and escalating them by the Energy Information Administration's ("EIA") nominal natural gas escalation rate in the 2016 Annual Energy Outlook ("AEO").[7] NorthWestern's method of escalating current forward prices is supported by economic literature and is a modification of the Pindyck method.[8] NorthWestern uses this method when forecasting

[6] Hansen Response Testimony, LPH-14:14-16.
[7] Hansen Response Testimony, LPH-9:2-9.
[8] Robert S. Pindyck has published over 140 economic papers, articles, and books between 1982 and 2017. His method is based on the assumption that current forward prices embody all that is known about future events and that escalating those prices at the assumed general inflation rate will be more accurate than other methods. NorthWestern has modified the method by applying an escalation rate that exceeds the assumed general inflation rate.

market prices to evaluate all new energy resources, including QFs and potential utility-owned resources.[9]

ConEd used a proprietary 2015 ABB/Ventyx projection of future market prices. ConEd asserts that it used the ABB/Ventyx Reference Case data, which it licensed for three months,[10] but also admits that it did not have the actual reference case.[11] Mr. Schiffman testifies that he used "hourly SPP-Dakotas power prices from the Ventyx Reference Case"[12] but contradicts himself by stating that he did not use Ventyx reference price forecast for SPP energy because "it would have cost an additional $17,000 to purchase the reference case."[13] He claims to have replicated the ABB/Ventyx Reference Case[14] but admits that he did not compare his results to the Reference Case.[15]

Mr. Schiffman stated, "Forecast natural gas prices play a key role in developing long-term energy price forecasts."[16] Mr. Schiffman testified that **nominal** escalation for natural gas prices in the 2015 EIA AEO was 4.2%.[17] However, for computing NorthWestern's avoided cost, Mr. Schiffman added 2.5%/year inflation to Ventyx's natural gas projections for the Dakotas, resulting in a **nominal** escalation rate for natural gas prices of **6.7%**.[18]

Mr. Schiffman repeatedly testified that he relied on the ABB/Ventyx for all input assumptions.[19] Notably, no one in this docket testified what those assumptions were or established that they were reasonable. In fact, by the time that ConEd filed its complaint in this

[9] Transcript 241:23 – 242:7; Exhibit Staff-2, Testimony and Exhibit of Kavita Maini ("Maini Testimony"), 7:12-13.
[10] Transcript 59:8-11.
[11] Compare Schiffman Direct Testimony, pp. 25-26 with Transcript 82:6-7.
[12] Schiffman Direct Testimony, p. 26.
[13] Transcript 81:20-25.
[14] Schiffman Direct Testimony, p. 25.
[15] Transcript 59:3-7.
[16] Schiffman Direct Testimony, p. 33.
[17] Schiffman Direct Testimony, p. 34.
[18] Transcript 78:4-79:21.
[19] Transcript 82:11-12, 82:20-21, 83:10, and 86:10-11.

docket, fundamental assumptions about natural gas prices had changed. In the EIA AEO 2015, EIA projected Henry Hub natural gas price for 2040 to be $7.85/MMBTU in 2013 dollars. In the 2016 AEO Early Release, issued in May 2016, EIA projected Henry Hub natural gas price for 2040 to be $4.86/MMBTU in 2015 dollars. Mr. Schiffman's calculations are based on a price forecast that shows a 2040 Henry Hub natural gas price of $6.82/MMBTU in 2015 dollars.

Natural gas price projections are not the only notable discrepancy from known factors in Mr. Schiffman's representation of the ABB/Ventyx Reference Case. In the Southwest Power Pool ("SPP"), the Independent System Operator to which NorthWestern belongs, almost twice the amount of wind generation was added in 2016 than the ABB/Ventyx Reference Case projected just months before the beginning of 2016.[20]

The fundamental question before the Commission is who should calculate a utility's avoided cost—the utility who has an obligation to provide electricity to its customers at just and reasonable rates, or a QF whose only interest is in receiving the highest rate possible for its project. PURPA does not mandate any method of calculating avoided costs. So long as a utility uses a reasonable method and applies the method consistently to all projects, the Commission should recognize the utility's calculation. NorthWestern has used a reasonable method to estimate forward market prices.[21] The Commission should find that NorthWestern's forecast, not ConEd's, is the correct forecast for this docket.

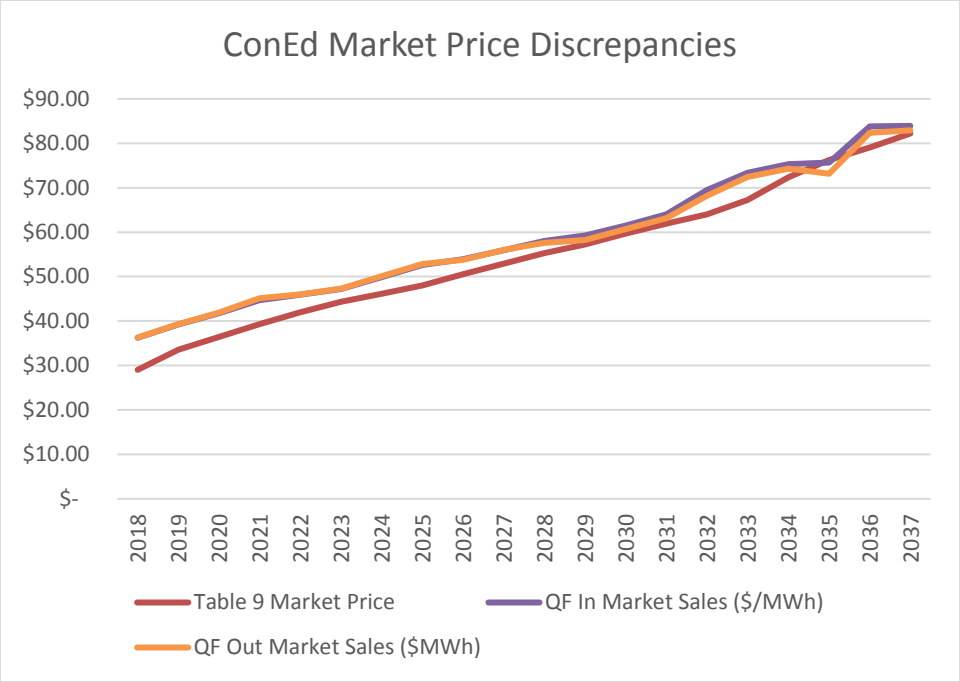
B. Treatment of Market Sales

NorthWestern calculated its avoided cost for hours in which it was long energy based on its ability to reduce its generation. During long hours when NorthWestern could reduce its internal generation, NorthWestern included the variable cost of the generator that could be

[20] Transcript 86:6-87:19.
[21] Maini Testimony, 13:3-13.

reduced in its avoided cost. During long hours when NorthWestern could not reduce its internal generation, NorthWestern placed zero value on the QF's output. NorthWestern's calculation is consistent with the statutory requirements that (1) no rate paid to a QF shall exceed the incremental cost to the utility of alternative electric energy and (2) incremental cost of energy is the cost to the utility of electric energy which, but for the purchase from the QF, the utility would generate or purchase.[22] ConEd included increased market sales in its calculation of avoided cost. According to Mr. Schiffman, the Projects will reduce NorthWestern's net present value ("NPV") of costs, net of market sales, by $134.3 million.[23] However, $98.1 million of that amount is attributable to increased market sales at ConEd's forecast market prices.[24] ConEd is requiring NorthWestern's customers to guarantee ConEd's projected market sales. What is even more striking are the discrepancies between (i) ConEd's representation of market prices in Table 9 on page 37 of Mr. Schiffman's testimony, (ii) its representation of Market Sales ($/MWh) in row 49 of his model for QF In, and (iii) its representation of Market Sales ($/MWh) in row 100 of his model for QF Out. The chart below shows the differing presentations.

[22] 16 U.S.C. §§ 824a-3(b)-(c).
[23] Schiffman Direct Testimony, p. 37.
[24] This is the NPV of the difference shown in between row 50 – QF In Market Sales and row 101 – QF Out Market Sales in Mr. Schiffman's model.



The chart shows that in every year, ConEd assigned a higher value to market sales for QF In within Mr. Schiffman's model than he projected for market prices in Table 9. ConEd has not provided any explanation as to why there are different values for market prices.

ConEd argues that NorthWestern's calculation of avoided costs is discriminatory and violates PURPA.[25] ConEd also argues that FERC's order in *Tri-State Generation and Transmission Association, Inc.*, 155 FERC ¶ 61,269 (2016) ("*Tri-State Generation*") explicitly rejected treatment of NorthWestern's two long situations.[26] ConEd further argues that NorthWestern's adjustments do not reflect how the company operates its system and violate economic dispatch principles.[27] ConEd ignores the principle of customer indifference, which is embodied in the statutory requirement cited above.

Nothing in PURPA requires NorthWestern's customers to guarantee ConEd's projected market prices. Nothing in PURPA includes opportunity sales as part of a utility's avoided cost.

[25] ConEd Brief, p. 20.
[26] *Id.*
[27] ConEd Brief, pp. 20-21.

Customer indifference requires that customers should not be worse off if the utility purchases electricity from a QF. 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 ConEd's proposal, if NorthWestern cannot sell ConEd's excess output at ConEd's projected price, NorthWestern's customers will be worse off. PURPA does not permit this.

The *Tri-State Generation* decision does not reject NorthWestern's adjustment. The *Tri-State Generation* decision did not involve the determination of a utility's avoided cost. *Tri-State Generation* involves a regional cooperative's attempt to impose additional cost on a member cooperative that purchases energy from a QF. In *Tri-State Generation,* the Petitioner, Tri-State Generation and Transmission Association, Inc., ("Tri-State") filed a Petition for a Declaratory Order finding that Tri-State's fixed cost recovery proposal was consistent with section 210 of PURPA.[28] Tri-State is a generation and transmission cooperative owned by member distribution cooperatives.[29] Tri-State's fixed recovery mechanism imposed a charge on a member cooperative if the member cooperative purchased more than 5 percent of its energy from other than Tri-State.[30] FERC had previously ruled that one member cooperative, Delta Montrose Electric Association, was obligated to purchase power from QFs offering available energy.[31] In *Tri-State Generation*, FERC ruled Tri-State's proposed fixed cost recovery mechanism would limit a QF's ability to sell to a member cooperative.[32] FERC also found that Tri-State had not demonstrated that it would not be able to recover its fixed costs without the mechanism.[33] In the

[28] 155 FERC ¶ 61,269, ¶ 1.
[29] 155 FERC ¶ 61,269, ¶ 2.
[30] 155 FERC ¶ 61,269, ¶ 5
[31] *Delta-Montrose Electric Assoc.*, 151 FERC ¶ 61,238, ¶¶ 54-56 (2015).
[32] 155 FERC ¶ 61,269, ¶ 17.
[33] 155 FERC ¶ 61,269, ¶ 21.

Tri-State Generation decision, FERC did not address the issue of avoided cost rates to be paid to a QF.

Other states authorize the types of adjustments that NorthWestern makes in the two long hour situations. The Montana Public Service Commission has authorized the adjustment to avoided costs when NorthWestern can back down its own generation.[34] The Oregon Public Utility Commission authorized regulated utilities to assign a value of zero to QF output delivered during periods in which the utility cannot reduce its other purchases or generation for non-standard QF contracts.[35] Similarly, the Idaho Public Utilities Commission permits regulated utilities regulated to make an identical calculation.[36]

ConEd simply demands that it be treated more favorably than a utility's own resources in that the benefit of off-system sales would flow to the QF rather than to utility's customers. The Commission should reject this attempted overreach.

C. Treatment of Transmission Upgrade Costs

To ensure its customers do not pay more for service when it purchases a QF's output, NorthWestern calculated the cost of network upgrades and subtracted the revenue requirement, $2.84/MWh, for those upgrades from the avoided energy costs. If this deduction is not made, NorthWestern's customers eventually will pay for the upgrades required by the ConEd Projects without receiving any reliability benefits and will pay more because NorthWestern is purchasing the QFs' output.

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[34] *In the Matter of the Petition of Crazy Mountain Wind for the Commission to set certain Terms and Conditions of Contract between NorthWestern Energy and Crazy Mountain Wind, LLC*, Docket No. D2016.7.56, Order No. 7505b, ¶ 84 (January 5, 2017). Notably, ConEd cited this order for the Montana Commission's rejection of the Situation 2 alternative but ignored this paragraph that approved the Situation 1 alternative.

[35] *See In the Matter of Public Utility Commission of Oregon Staff Investigation into Qualifying Facility Contracting and Pricing*, Docket UM 1610.

[36] *See In the Matter of the Commission's Review of PURPA QF Contract Provisions Including the Surrogate Avoided Resource (SAR) and Integrated Resource Planning (IRP) Methodologies for Calculating Avoided Cost Rates*, Case No. GNR-E-11-03, Order No. 32697 (December 18, 2012).

ConEd asserts that NorthWestern's proposed reduction is discriminatory and violates PURPA.[37] ConEd argues that the deduction is contrary to FERC Order 2003.[38] Order 2003 does not apply to the Projects. FERC stated:

> When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs.[39]

Order 2003 governs a transmission provider's relationship with Large Generators, which are energy resources having a capacity of more than 20 MWs.[40] FERC Order 2006[41] governs a transmission provider's relationship with new sources of electricity no larger than 20 MWs.[42] Order 2006 has similar language providing that the state has authority over the interconnection and the allocation of interconnection costs when the QF sells all of its output to the utility to which it interconnects.[43]

ConEd quoted Order 2003, ¶ 694[44] emphasizing that the purpose of not allowing "but for" pricing and instituting a crediting provision was to ensure "*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*." However, in a footnote to the same paragraph, FERC noted:

> When a Transmission Provider must construct Network Upgrades to provide new or expanded transmission service, the Commission generally allows the Transmission Provider to charge the higher of the embedded costs of the Transmission System with expansion costs rolled in, or incremental expansion costs, but not the sum of the two."[45]

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[37] ConEd Brief, pp. 26-30.
[38] Docket No. RM02-1-000, 104 FERC ¶ 61,103 (July 24, 2003) ("Order 2003").
[39] Order 2003, ¶ 813.
[40] Order 2003, ¶ 4.
[41] Docket No. RM02-12-000, 111 FERC ¶ 61,220 (May 12, 2005) ("Order 2006")
[42] Order 2006, ¶ 1.
[43] Order 2006, ¶ 516.
[44] ConEd Brief, pp. 27-28
[45] Order 2003, ¶ 694, note 111.

Furthermore, the evils addressed by the FERC policy never arise in the context of a QF. A QF never faces the possibility of having to pay both incremental costs and an average embedded cost rate. QFs do not pay for any transmission service.[46] ConEd asserts, "There is simply no justification 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."[47] There is a very sound reason to treat QFs different from wholesale generators—wholesale generators pay for transmission service. They provide incremental transmission revenue to the Transmission Provider. QFs do not pay for transmission service; they do not provide any incremental revenue. QFs and wholesale generators are not similarly situated. FERC has recognized that utilities may include interconnection and transmission service costs in avoided cost rates paid to QFs. In its *Pioneer Wind Park I, LLC* decision, FERC stated the following:

> PacifiCorp will be the transmission customer, taking delivery of the QF's output at the point of interconnection between Pioneer Wind and PacifiCorp, and with the resulting responsibility to transmit Pioneer Wind's QF output from the point of interconnection between Pioneer Wind and PacifiCorp across PacifiCorp's transmission system to PacifiCorp's loads. This is not to suggest that the QF is exempt from paying interconnection costs, *see* 18 C.F.R. §§ 292.101(b)(6), 292.306 (2013), which may include transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations. 18 C.F.R. § 292.101(b)(6) (2013). Such permissible interconnection costs do not, however, include any costs included in the calculation of avoided costs. *Id.* **Correspondingly, implicit in the Commission's regulations, transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations may be accounted for in the determination of avoided costs if they have not been separately assessed as interconnection costs.[48]**

[46] Transcript 277:12-16.
[47] ConEd Brief, p. 29.
[48] *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, ¶ 38, note 72 (December 16, 2013) (emphasis added).

NorthWestern's transmission department has said that it will require ConEd to pay for network upgrades and then will refund the payment with interest to ConEd as if it were a transmission service customer. In that case, ConEd will not have paid for the network upgrade costs. Therefore, the costs should be accounted for in the determination of avoided cost pursuant to footnote 73 quoted above. To do otherwise would require NorthWestern's customers to subsidize ConEd's Projects in violation of the customer indifference principle.

NorthWestern's approach to network upgrade costs is consistent with the policies in the Commission's rules for Small Generator Facility Interconnection ("Interconnection Rules").[49] For small generators interconnecting to a public utility, the Commission requires, "The actual cost of the system upgrades, including overheads, shall be directly assigned to the applicant or interconnection customer by the public utility."[50] Although the Interconnection Rules are not directly applicable to the Projects due to their size,[51] the policy that the cost-causer pays should apply.

D. Capacity Value

NorthWestern has proposed to compensate the ConEd Projects for capacity the same way that it compensates them for energy—the price for capacity will be set in this docket and the amount of capacity for which it pays ConEd will be determined by the Projects' actual performance. NorthWestern does not need any capacity until 2019 at the earliest.[52] Therefore, NorthWestern's customers should not pay ConEd for any capacity prior to when it is needed.

[49] ARSD Chapter 20:10:36.
[50] ARSD 20:10:36:21.
[51] ARSD 20:10:36:01 provides, "If a generation facility has an electric nameplate capacity of more than ten megawatts that may be subject to the commission's jurisdiction, this chapter may be used as the basis for the interconnection process."
[52] LaFave Response Testimony, BJL-15:17-20; Mr. LaFave update this at the hearing indicating that NorthWestern probably would not need capacity in 2019 and explained, "**Your forecast and your plan are continually evaluated based on what you know and what you are today. There has been changes in how SPP is**

NorthWestern is a member of SPP. SPP sets forth the method for determining the maximum net generating capacity of variable energy resources like the ConEd Projects.[53] SPP's procedure requires the following steps:

> (a) Assemble all available hourly net power output (MWH) data measured at the system interconnection point.
>
> (b) Select the hourly net power output values occurring during the top 3% of load hours for the SPP Load Serving Entity for each month of each year for the evaluation period.
>
> (c) Select the hourly net power output value that can be expected from the facility 60% of the time or greater. For example, for a 5 year period with the 110 hourly net power output values ranked from highest to lowest, the capacity of the facility will be the MW value in the 65th data point.
>
> (d) A seasonal or annual net capability may be determined by selecting the appropriate monthly MW values corresponding to the Load Serving Entity's peak load month of the season of interest (e.g., 22 hours for a typical 30 day month and 110 hours for a 5 year period).
>
> (e) Facilities in commercial operation 3 years or less:
> (i) The data must include the most recent 3 years.
>
> (f) Values may be calculated from wind or solar data, if measured MW values are not yet available. Wind data correlated with a reference tower beyond fifty miles is subject to Generation Working Group approval. Solar data correlated with a reference measuring device beyond two hundred miles is subject to Generation Working Group approval. For calculated values, at least one year must be based on site specific data.
>
> (g) If the Load Serving Entity chooses not to perform the net capability calculations as described above during the first 3 years of commercial operation, the Load Serving Entity may submit 5% for wind facilities and 10% for solar facilities of the site facility's nameplate rating.
>
> (h) Facilities in commercial operation 4 years and greater:

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calculating capacity across all the resources, and we are right on the bubble of whether or not we'll need them in 2019 or not." Transcript 167:23-168:5.

[53] LaFave Response Testimony, BJL-16:1-10 and attached Exhibit BJL-004.

(i) The data must include all available data up to the most recent 10 years of commercial operation.

(ii) Only metered hourly net power output (MWH) data may be used.

(iii) After three years of commercial operations, if the Load Serving Entity does not perform or provide the net capability calculations to SPP as described above, then the net capability for the resource will be 0 MW.

(i) The net capability calculation shall be updated at least once every three years.[54]

SPP requires NorthWestern to have adequate capacity as determined by SPP's planning criteria. The Commission should not require NorthWestern to pay ConEd for more or less capacity than the SPP accredits for the Projects. NorthWestern determined the value of capacity by using its executable offer of capacity at $3.50/kW-month starting in 2019.[55].

ConEd asks for $10.45/kW-month.[56] However, ConEd wants to convert its requested capacity value to an energy payment of$1.78/MWh. Even if the Commission accepts ConEd's capacity value, it should not accept its proposal that it be paid for capacity through an increase to the energy value. For the first three years of operation, SPP will accredit capacity for the three ConEd Projects at 5% of nameplate. At $3.50/kW-month, the Projects' capacity value for the first three years is $126,000/year.[57] At $10.45/kW-month, the Projects' capacity value is $376,200/year.[58] Under ConEd's proposal to be paid for capacity through an energy payment, NorthWestern's customers would be paying far more than either of these referenced values. Based on the information provided to it by ConEd, NorthWestern modeled the Projects' total

[54] *Id.*, Article 7.1.5.3(7), pp. 67-68.
[55] LaFave Response Testimony, BJL-15:22-29.
[56] ConEd Brief, p. 25.
[57] 60 MW *1000*.05*$3.50/kW-month *12 month/year = $126,000.
[58] 60 MW *1000*.05*$10.45/kW-month *12 month/year = $376,500.

output at 277,190 MWh/year.[59] If NorthWestern were to pay for capacity at $1.78/MWh, it would pay $493,398.20/year. Mr. Schiffman modeled the Projects' total output at 273,052 MWh/year. At this output, NorthWestern would pay $486,032.56/year. Under either output assumption, NorthWestern would be overpaying for capacity. In addition, paying for capacity through an energy payment breaks the linkage between accredited capacity and paid-for capacity. The annual energy output of the Projects is not a proxy for the accredited capacity calculated pursuant to SPP's planning criteria set forth above.

III. ConEd has not incurred a legally enforceable obligation ("LEO").

ConEd asserts that it had incurred an LEO by April 4, 2016, because it had "done everything in its power to obtain a negotiated agreement with NWE."[60] The import of if and when ConEd had incurred an LEO is relevant only to the time at which NorthWestern's avoided cost should be calculated. If ConEd incurred an LEO, then NorthWestern should calculate its avoided cost rate as of that date. NorthWestern and ConEd were still negotiating on April 5, 2016.[61] On April 5, 2016, NorthWestern was using a forward market price strip from December 5, 2015, and ConEd was using an October 2015 forecast for natural gas prices.[62] In this docket, NorthWestern used a forward market price strip from October 4, 2016. ConEd has continued to use the October 2015 price forecast. NorthWestern notes that the October 4, 2016 prices exceed those from December 5, 2015 for 2018 through 2032. The avoided cost that NorthWestern calculated with the October 4, 2016 prices exceeded those that it calculated with the December 5, 2015 prices. NorthWestern's use of the October 4, 2016 prices benefits ConEd.

[59] Hansen Response Testimony, Exhibit LPH-1.
[60] ConEd Brief, p. 4.
[61] *See* Complaint, Exhibit 9. Exhibit 9 is an email chain between Bleau LaFave and Corey Juhl exchanging calculations of avoided cost.
[62] *Id*.

Although ConEd 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 ConEd were correct that it incurred an LEO on April 4, 2016, neither party provided an avoided cost calculated as of April 4, 2016. Even if ConEd incurred an LEO on June 23, 2016, when it filed its Complaint in the docket, neither party provided an avoided cost calculated as of June 23, 2016.

Nevertheless, NorthWestern is compelled to respond to some egregious errors in ConEd's advocacy regarding incurring an LEO. ConEd states, "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."[63] The first clause of this sentence is true; the second clause omits an important qualifier. The second clause would be accurate if it were, "each state's test is valid so long as *a court of competent jurisdiction has not ruled that it conflicts* with the requirements of PURPA and FERC's implementing regulations. ConEd cites four FERC orders to argue that it incurred an LEO prior to filing its Complaint. None of these citations withstands scrutiny. More importantly, FERC does not have the legal authority to make determinations of what constitutes an LEO. FERC's orders resolving PURPA disputes are hortatory, not mandatory. One court recently commented on this:

> Although FERC's order in that case contained some language that appeared mandatory—in particular, it directed that a cooperative utility "shall" reconnect with a specific PURPA qualifying facility, 774 F.3d at 3—we nonetheless treated the order as declaratory because it contained neither any deadline . . . [for] comply[iance] nor any possible consequence of non-compliance. . . .
>
> Even so, we are mystified by FERC's continued use of mandatory language to resolve PURPA disputes in orders that it later insists are

[63] ConEd Brief, p. 3.

> purely hortatory. *See, e.g. Xcel Energy Services Inc. v. FERC*, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (per curiam); *Niagara Mohawk*, 117 F.3d at 1488. Although *Midland* holds that such mandatory language, without more, is in fact declaratory, FERC could avoid a great deal of confusion and waste of judicial resources by not using words like "shall" and "must," and by making clear in its orders—as opposed to later in this court—that its discussion of PURPA-related issues are advisory only.[64]

Simply put, ConEd's citations of FERC's advisory opinions as controlling is off the mark.

The Commission may implement PURPA adopting regulations, resolving disputes on a case-by-case basis, or by taking other action reasonably designed to give effect to FERC's rules.[65] ConEd complains that the Commission cannot use a rule that has not been adopted to determine whether ConEd incurred an LEO.[66] 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. Prior to *Oak Tree*[67], the Commission had not adopted any rules regarding creation of an LEO. In that docket, the Commission properly considered the particular circumstances to determine that Oak Tree had incurred an LEO. Although it is unnecessary in this proceeding, the Commission could evaluate the circumstances and determine whether or when ConEd incurred an LEO. The Commission may consider anything that it judges to be reasonable and useful in its determination, including Staff's advocacy.

IV. Conclusion

Based on the evidence in this docket, NorthWestern requests the Commission approve of NorthWestern's method of calculating its avoided costs for energy, which is supported by Staff, and rule that NorthWestern's full avoided cost for energy from the Projects is $26.86/MWh after

[64] *Portland General Electric Co. v. FERC*, 854 F.3d 692, 701-702 (D.C. Cir. 2017).
[65] *FERC v. Mississippi*, 456 U.S. 742, 751, 102 S.Ct. 2126, 2133 (1982) ("Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.").
[66] ConEd Brief, pp. 9-14.
[67] *In the Matter of the Complaint by Oak Tree Energy LLC Against NorthWestern Energy for Refusing to Enter into a Purchase Power Agreement*, Docket No. EL11-006.

the adjustments required to ensure customer indifference, as shown in Bleau LaFave's Exhibit BJL-002. NorthWestern further requests the Commission require that NorthWestern pay for the Projects' capacity as accredited by SPP and not include any amount for capacity in the energy rate. These requested actions, taken together, fulfill the twin mandates of PURPA—that a utility purchase energy and capacity from QFs at the utility's avoided cost and that the customers be indifferent as to the utility's purchase of energy and capacity from QFs.

Respectfully submitted this 7th day of June, 2017.

NORTHWESTERN CORPORATION,
d/b/a **NORTHWESTERN ENERGY**

By: _____

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