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Co-authored with Steven Iverson, Brady Pluimer, P.C.

Patricia Van Gerpen
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Re: RM13-002 Comments

Dear Ms. Van Gerpen:

First, I want to thank the Commission for making the decision to establish the factors that create a legally existing obligation ("LEO"). Through this hearing process, it is our hope that our state can establish clear guidelines to public utilities and independent power producers about when the two must meet at the bargaining table to establish a contract.

We reiterate that the current policy has not been effective in spurring renewable energy development in South Dakota despite our vast wind energy potential. While our wind industry and each project faces unique obstacles and hurdles, the commonality of Qualified Facilities ("QFs") in other states should be evidence enough that we have not taken the right steps to promote the goals of PURPA. If nothing else, In the Matter of the Complaint by Oak Tree Energy, LLC Against Northwestern Energy for Refusing to Enter into a Purchase Power Agreement, EL11-006 (SDPUC Apr. 28, 2011) ("Oak Tree") demonstrates that rulemaking, rather than litigation, is the most cost-effective way to guide parties negotiating a contract under PURPA. We thank the Commission for acknowledging these facts through this rulemaking.

Keeping the purpose of PURPA in mind, as well as the Federal Energy Regulatory Commission's ("FERC") regulations, we echo the comments of others for the need for fair and transparent LEO criteria. We encourage the SDPUC to formalize its stance in Oak Tree that QFs do not need to have a contract signed by an electric utility in order to create a LEO.[1] This position aligns with the Congressional purpose behind PURPA and FERC's subsequent regulations: "[O]ne of the principal reasons Congress adopted section 210 of PURPA was

[1] *See Oak Tree*, EL11-006, Final Decision and Order, at ¶ 8 (SDPUC Feb. 21, 2013).

because electric utilities had refused to purchase power from non-utility producers."[2] FERC's response to this mandate resulted in 18 C.F.R. § 292.304(d), and the following statement:

> Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.[3]

With that said, a LEO should be created once a QF submits a signed Purchase Power Agreement ("PPA") with the commitment to deliver energy and capacity to a utility at a rate equal to or less than the avoided cost of the Utility determined in good faith.[4]

However, we encourage the SDPUC to aggressively outline other factors apart from signed PPAs that establish LEOs. We strongly recommend the SDPUC to establish factors that consider project viability which evidence a LEO. We again encourage the SDPUC to review other states' rules for guidance. For example, Pennsylvania in particular has taken a similar approach regarding project viability and necessary commitments in order to obtain a LEO.[5] Apart from submitting a signed PPA, the SDPUC should consider the following factors to establish LEOs between QFs and Utilities:[6]

a. A reasonable date or range of dates for the commencement of delivery of energy and capacity with the understanding that both parties must act in good faith to deliver power on that date or range;
b. Written evidence that the QF has obtained or taken substantial action to obtain all necessary permits, site acquisition, site development, and FERC certification as a QF;
c. Written evidence that the QF has obtained or taken substantial action to acquire financing for the cogeneration facility or operation;
d. Consideration of other assets, liabilities, and net worth of the QF; and
e. Consideration of the QF's employees and consultants engaged to pursue the particular cogeneration facility or operation.

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[2] Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, ¶ 31 (Oct. 4, 2011) (quoting FERC v. Miss., 456 U.S. 742, 750 (1982)).
[3] *Id.* at ¶ 32 (Oct. 4, 2011) (quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880). The SDPUC's position in *Oak Tree* also aligns with the FERC's administrative decision in *Cedar Creek Wind, LLC*, stating that "[W]hen a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract, the state's limitation is inconsistent with PURPA, and [FERC's] regulations implementing PURPA." *Id.* at ¶ 35.
[4] *See Oak Tree*, EL11-006, Final Decision and Order, at ¶ 8 (SDPUC Feb. 21, 2013).
[5] *See e.g.,* S. River Power Partners, L.P. v. Pa. Pub. Util. Comm'n, 696 A.2d 926 (Pa. Commw. Ct. 1997).
[6] The SDPUC should adopt fair and reasonable guidelines to address project viability and operation. At issue here is whether a QF should be able to create a LEO when there is the risk of the QF not fulfilling its commitment to provide energy/capacity to the Utility. The SDPUC should take a fair and reasonable approach, taking into consideration 1) the complaints of utilities that may be required to purchase power and capacity from QFs that do not exist, 2) the purpose of PURPA in providing avenues for QFs not otherwise available, 3) to allow certainty for QFs in their attempts to obtain financing, permits, and other administrative hurdles, and 4) to promote what has otherwise been limited development of QFs in South Dakota since the passage of PURPA.

These suggestions are meant to be a starting point for the Commission and other interested parties to research potential criteria in South Dakota. We hope these comments have been beneficial in assisting the Commission in developing fair and transparent regulations.

Very Truly,

/s/ Ryan Cwach
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