



ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

February 28, 2014

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

Re: Docket No. RM13-002—In the Matter of the Consideration of Standards to Govern Avoided Cost Determinations—Comments on LEO Creation Rules

Dear Ms. Van Gerpen:

The Environmental Law & Policy Center (“ELPC”) appreciates the opportunity to submit comments in the above referenced docket for consideration by the South Dakota Public Utilities Commission (“SDPUC”). The SDPUC has requested comments on what should be required to establish a legally enforceable obligation (“LEO”) under the Public Utilities Regulatory Policies Act (“PURPA”). ELPC encourages the development of clear, transparent, and fair LEO criteria that support the PURPA’s goal of encouraging the development of qualifying facilities.

PURPA and its regulations established a clear policy of support for small power producers and cogeneration facilities, and a corresponding obligation for electric utilities to purchase energy and capacity from qualifying facilities (“QFs”). 16 U.S.C. § 824a-3(a), 18 C.F.R. § 292.303(a). The obligation for utilities to purchase energy and capacity is critical to encouraging the development of QFs. PURPA’s regulations provide clear guidance on the requirements for qualification as a QF and how a facility may certified. 18 C.F.R. § 292.203-205.

PURPA’s regulations further state that QFs may “provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term...” 18 C.F.R. § 292.304(d)(2). The Federal Energy Regulatory Commission (“FERC”) has stated that state utility regulators have an obligation to implement PURPA’s regulations, which “may be fulfilled either: 1) through the enactment of laws or regulations at the State level; 2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by [FERC]; or, 3) by any other action reasonably designed to implement [FERC’s] rules.” *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 F.E.R.C. ¶ 61,304, page 61644 (F.E.R.C. 1983).

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Following the final decision and order in *In the Matter of the Complaint by Oak Tree Energy LLC Against NorthWestern Energy for Refusing to Energy into a Purchase Power Agreement*, docket number EL11-006, the SDPUC should formally adopt a position that the existence of an LEO does not require a contract executed by a utility. As FERC has noted, “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.” *Cedar Creek Wind, LLC*, 137 F.E.R.C. ¶ 61,006, page 61,023 (F.E.R.C. 2011). Adopting a rule that the existence of an LEO does not require a contract upholds PURPA’s policy goals and signals to utilities the SDPUC’s strong support of those goals.

ELPC believes that the SDPUC’s criteria for establishing an LEO must be clear, transparent, and fair. These principles are crucial to encouraging QF development in the state and ensuring that utility customers receive the benefits of renewable energy, regardless of who develops the project. The SDPUC should set clear guidelines so that a QF developer can easily determine whether or not it meets the criteria. In addition, LEO criteria should be fair and set guidelines that do not create a burden on a QF developer that would not exist for another utility project.

Moreover, any LEO criteria must not make it more difficult for QF developers to obtain necessary financing to continue with projects. If a QF complies with the eligibility requirements set out in PURPA and its regulations and is certified by FERC as a QF, then utilities have an obligation to purchase the QF’s energy and capacity. The SDPUC should not create additional requirements for QFs to meet prior to triggering a utility’s obligation to purchase. Nor should LEO criteria be vague or subject to interpretation.

Establishing clear, transparent, and fair criteria for LEOs is an important step in realizing PURPA’s goals, including encouraging renewable energy development from QFs. Once the LEO criteria are finalized, we encourage the SDPUC to take the next step and consider a rulemaking on avoided costs. ELPC thanks the SDPUC for their consideration of these important issues and looks forward to working with the Commissioners and Staff and other interested parties. We are available for further questions or discussion.

Respectfully submitted,



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