December 3, 2013

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

RE: RM13-002 – In the Matter of the Consideration of Standards to Govern Avoided Cost Determinations

Dear Ms. Van Gerpen:

NorthWestern Corporation, d/b/a NorthWestern Energy (NorthWestern), appreciates this opportunity to submit comments regarding the above referenced docket for consideration by the South Dakota Public Utilities Commission (SDPUC).

In response to the question posed by the SDPUC in its Order dated October 16, 2013 as to whether the SDPUC should pursue a rulemaking proceeding within the confines of this docket, NorthWestern suggests that a rulemaking proceeding is needed to address two specific issues related to Qualifying Facilities (QF) under the Public Utility Regulatory Act of 1978 (PURPA), as amended. First, NorthWestern believes the SDPUC should promulgate rules regarding the criteria for when a Legally Enforceable Obligation (LEO), as provided for in 18 C.F.R. 292.304(d), is established by a QF. Secondly, NorthWestern encourages the SDPUC to develop rules as to how capacity credits related to a PURPA QF are to be determined for avoided cost calculation purposes.

1. Standards for when an LEO is created
   During the recently completed Oak Tree matter (Docket EL11-006) before the SDPUC, the issue of whether an LEO was created and what constituted an LEO in South Dakota was a significant issue of contention between the parties. There is no specific guidance given in PURPA regarding when an LEO is established. The Federal Energy Regulatory Commission (FERC), in its implementation of PURPA, has decided to grant to the states the discretion to determine the criteria for creation of an LEO. Nationwide, state public utility regulatory commissions have taken varied stances in defining when LEOs are created. The determination of when an LEO is created carries great importance as it establishes the date certain for identifying inputs used in calculating a utility's avoided costs and if capacity credits are applicable.

   It is NorthWestern's opinion that the administrative rules developed by the Texas Public Utility Commission (TXPUC) provide the most equitable criteria to be used in defining how and when an LEO is created by a QF (See Tex. Admin. Code, Rule § 25.242(f)(1)(B)). NorthWestern recommends that the SDPUC adopt rules similar to the TXPUC administrative rules governing when an LEO is created by a QF. The Texas administrative rule provides that an LEO is created when a QF notifies a public utility that the energy to be delivered is or will be available within the next 90 days.

In NorthWestern's post-hearing brief, submitted in Docket EL11-006, NorthWestern details why it believes the TXPUC rule provides a balanced approach for what constitutes an LEO (*See Attachment A – SDPUC Docket EL11-006 Post-hearing brief dated April 18, 2012; Pg. 19-20, section 2 – The JD Wind Decision*). Additionally, the TXPUC administrative rules provide a fair and reasoned standard that does not infringe upon a QF's right to create an LEO. This application of PURPA by the TXPUC also minimizes risk to a utility and its customers as the QF must demonstrate it has met significant project planning milestones that provide a reasonable assurance that the QF will meet its obligation to provide the promised energy to the utility by a date certain.

When a QF choses to establish an LEO, there needs to be some assurance to the utility that the QF will meet its obligation to provide energy by a specified date. Once an LEO is created, the utility must account for the expected delivery of power from that QF in any future energy supply planning process. Rules are necessary to govern the creation of an LEO so that both parties are held to the same obligations and standards.

NorthWestern submits that the following criteria support the proposition that a 90-day rule, similar to the administrative rules in Texas, is an appropriate standard for the creation of an LEO in South Dakota:

- An unconditional commitment to deliver energy and capacity at a price no greater than the utility's avoided cost;
- A date certain for commencement of delivery of energy and capacity and for a term set by the Commission;
- Sufficient guarantees of performance that the QF has been built;
- That a utility and its customers are held harmless from any QF-related liability if the project fails to be constructed or does not operate in the manner expected;
- Written evidence that the developer has obtained all necessary permits, site acquisition, FERC certification as a QF, and financing prior to the creation of an LEO; and
- A signed interconnection agreement with all milestones agreed to and performance of the milestones by the QF for those occurring prior to the date of the Commission's decision.

These criteria will ensure that a QF that creates an LEO will actually produce and deliver energy to the utility and that the utility can rely on the QF for performance.

2. <u>Capacity Credit Determination</u>
NorthWestern encourages the SDPUC to consider promulgating administrative rules to govern the determination of capacity credits for avoided cost calculations related to a QF. An important component to this deliberation is that a utility should be required to pay for QF capacity <u>only</u> when the availability of that capacity allows the utility to avoid capacity-related costs by either deferring costs to construct new plants or defer costs to purchase firm power resources. Another issue that should be addressed is what standard should be used in allocating capacity for a QF wind project.

With the advent of regional transmission organizations (RTO), the determination of the percentage of wind nameplate capacity that is counted as capacity has fallen under the purview of the RTOs. NorthWestern suggests that the SDPUC consider that when a utility is a member of a RTO, the RTO's valuation of wind capacity is the standard to use. As an example, MISO may provide a 12% capacity credit for QF wind while SPP may apply a different wind capacity credit. In the absence of an RTO, utilizing the wind capacity credit as determined by a regional reliability organization would be appropriate.

Other important considerations for this discussion as it relates to avoided cost determinations include:

- PURPA does not require a utility to pay for capacity that it does not need.
- The timing of when capacity credits are to be incorporated into the avoided cost determination should reflect the utility's true need for new capacity.

NorthWestern observes that although the Commission's October 16, 2013 Order referred to "what subject matter areas should be addressed," the Staff's September 25, 2013 letter to the Commission identified six specific issues. NorthWestern believes that its suggestions encompass three of those issues – (1) Requirements for the creation of a Legally Enforceable Obligation (LEO); (5) Standards for determination of when capacity credits shall be allowed; and (6) The appropriate method(s) for computing the magnitude and duration of such credits. At this time, NorthWestern believes that the other issues in Staff's letter are utility specific and, accordingly, should be determined on a case-by-case basis. Both FERC and the courts have affirmed a state regulatory commission's right to implement PURPA by adopting administrative rules, by resolving disputes on a case-by-case basis or by taking other appropriate actions. NorthWestern recommends that the Commission adopt a flexible approach to its implementation of PURPA as it relates to the other issues identified by Staff. However, if the Commission decides to proceed with rules on these other issues, NorthWestern will comment on the appropriate substance of those rules at the appropriate time.

NorthWestern looks forward to working with the Commissioners, Staff and other interested parties as the SDPUC continues its deliberations in this rulemaking proceeding. We are available further questions and discussion.

Sincerely,

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