

February 1, 2016

Ms. 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:

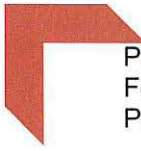
NorthWestern Corporation, d/b/a NorthWestern Energy (“NorthWestern”), appreciates this opportunity to submit comments for the South Dakota Public Utilities Commission’s (“Commission”) consideration regarding the above referenced matter.

As part of the Commission’s continued deliberations under Docket RM13-002, on November 5, 2015, Commission staff submitted a proposed set of administrative rules for public comment to define the criteria that will govern when a Legally Enforceable Obligation (“LEO”) to purchase under the Public Utility Regulatory Policies Act (“PURPA”) can be established by a Qualifying Facility (“QF”). NorthWestern appreciates the Commission efforts to balance the interests of utility customers, QFs, and utilities. We believe that the rules should provide clarity and minimize the administrative burden on the Commission and other stakeholders. Below are some preliminary observations from NorthWestern regarding staff’s proposed LEO rules. When NorthWestern has suggested modifications to the proposed rules, we have provided an explanation of the modification.

Based on its experience with QFs, NorthWestern suggests that the definitions provide more clarity. Clarity will reduce conflicts and minimize administrative burden. NorthWestern recommends that ARSD 20:10:40:01 be modified to the following:

20:10:40:01. Definitions. Terms defined in SDCL 49-34A-1 have the same meaning when used in this chapter. In addition, terms used in this chapter mean:

(1) “Avoided cost,” the incremental costs to a public utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, the public utility would generate itself or purchase from another source less any other costs that the public utility incurs which, but for the purchase from the qualifying facility, the public utility would not incur;



(2) “Legally enforceable obligation,” an unconditional obligation incurred by that the qualifying facility to willsell and deliver, which binds the affected public utility to purchase and accept, the ~~affected public utility will purchase~~ energy or capacity or both for a specified term in which the rates for purchase shall, at the option of the qualifying facility, be based on either the avoided costs calculated at the time of delivery or the avoided costs calculated at the time the obligation is incurred;

(3) “Qualifying facility,” a facility that meets the definition of a qualifying facility under 18 C.F.R. § 292.101(b)(1) (July 1, 2014).

The modifications to subsection (1) support a fundamental premise of PURPA – customers must be indifferent between purchases from a QF and a utility’s alternative supply options. The Federal Energy Regulatory Commission (“FERC”) limits the costs that may be charged to the QF to the interconnection costs directly related to the installation and maintenance of physical facilities necessary to permit interconnected operations.¹ FERC has specifically provided that other costs imposed on the utility by a QF may be accounted for in the determination of avoided costs if the QF has not paid them. A utility could incur costs related to interconnection or transmission network upgrades that are needed for interconnected operations, increased ancillary services costs that are attributable to the QF interconnection, and costs for additional regulation to accommodate the intermittent nature of the QF resource. But for purchasing from the QF, the utility would not incur these costs. Unfortunately, some QFs ignore FERC’s guidance and assert that other costs must be paid by a utility’s customers. The modification makes clear that utilities should include such costs in the determination of avoided costs.

The modifications to subsection (2) more accurately describe the nature of a legally enforceable obligation (“LEO”). LEO is a concept created by FERC when it promulgated its PURPA rules in 1980.² FERC stated that an LEO “is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract.” An LEO is a non-consensual obligation imposed on a utility by a QF. NorthWestern’s experience is that some QF developers assert the creation of an LEO to facilitate a contract, shop the contract to financiers, and, if acceptable financing is not secured, to abandon the proposed project. In a recent docket before the Montana Public Service Commission, a QF developer described project development this way. If a QF is going to rely on and receive rates based on avoided costs at the time it incurs an LEO, then the utility must be able to rely on the delivery of the output from the QF. Only if the QF’s commitment is unconditional can the utility rely on delivery. The modification to subsection (2) clarifies that a QF must make an unconditional commitment.

¹ See 18 C.F.R. § 292.106(b)(6).

² See Order No. 69, 45 Fed. Reg. 12234 (February 25, 1980).

To ensure that neither QFs nor utilities can increase administrative burdens and that both know their responsibilities, NorthWestern recommends that ARSD 20:10:40:03 be modified to the following:

20:10:40:03. Establishment of a legally enforceable obligation. A legally enforceable obligation is established when a qualifying facility notifies the public utility of the qualifying facility's intent to establish a legally enforceable obligation and the following requirements have been met:

- (1) The qualifying facility, if it has a net power production capacity of ~~500~~100 kW or more, has notified the public utility of its status as a qualifying facility at least 90 days prior, pursuant to 18 C.F.R. § 292.207(c)(2);
- (2) The qualifying facility has, for interconnection purposes, been studied as a network resource and entered into an interconnection agreement or the interconnection process is delayed as a result of a dispute that has been filed with the proper jurisdiction;
- (3) More than the greater of 90 days since the qualifying facility requested or 30 days since the QF provided all information needed by the utility for determination of the public utility's avoided cost have elapsed and the public utility has failed to provide either the avoided cost information required by 18 C.F.R. § 292.302 (July 1, 2014) or the public utility's estimate of its avoided cost for the specific qualifying facility, or the qualifying facility has filed a dispute of the public utility's avoided cost information with the Commission;
- (4) The qualifying facility has offered a signed power purchase agreement to the public utility that includes the following:
 - (a) A purchase price based on the qualifying facility's estimate of the public utility's avoided cost;
 - (b) A reasonable date or range of dates for commencement of delivery of the energy or capacity, or both;
 - (c) The length of the contract, not to exceed 10 years from the commencement of delivery of the energy or capacity, or both; and



- (d) Other terms and conditions that would be reasonable in the industry; and
- (5) The qualifying facility has shown that it has made significant progress toward bringing the qualifying facility into existence by providing:
 - (a) A list of any permits that are needed for the facility to be operational and documentation that it has completed or started the process to obtain the permits;
 - (b) A description of the site of the project and documentation that it has acquired or is in the process of acquiring the land or any necessary easements or options;
 - (c) The amount of financing that is needed and documentation that it has acquired financing or its plan for acquiring financing;
 - (d) A description of any owners, employees, or consultants' qualifications to construct and operate the qualifying facility; and
 - (e) Security acceptable to the affected public utility to guarantee the qualifying facility's performance of the obligations incurred by creating a legally enforceable obligation.

The notification of the qualifying facility's intent to establish a legally enforceable obligation shall be sent via certified mail to the public utility and shall include any necessary documentation demonstrating that the above requirements have been met. A copy of the notification and the attached documentation shall be sent to the commission.

For QFs larger than those eligible for standard rates (greater than 100 kW), NorthWestern must calculate individually the costs that it can avoid by purchasing from the QF. To perform this calculation, NorthWestern needs certain information from the QF regarding its anticipated hourly output for the life of the contract that the QF is seeking. The proposed modifications to subsections (2) and (3) reference the information that NorthWestern needs. Subsection (2) requires a QF to be studied as a network resource so NorthWestern can determine the transmission costs that it will incur to purchase from the QF. NorthWestern is not proposing that a QF would be responsible for paying network upgrade costs – only that those costs be considered in determining avoided costs. If the QF is not studied as a network resource, NorthWestern is not able to ascertain those costs and provide avoided costs in a timely

manner. Furthermore, NorthWestern believes that the utility must be given adequate time to provide a QF with an avoided cost determination before an LEO can be established or before a QF can claim a dispute over how the avoided cost determination was made by a utility. The recommended modifications to subsection (3) provide for this time. We expect that completion of those calculations will require approximately 30 days. The addition of (e) to subsection (5) provides assurance that the QF is more than a paper project and is prepared to go forward.

NorthWestern looks forward to working with the Commission and other interested parties in developing these proposed rules further.

Sincerely,



Pamela A. Bonrud
Director – Government and Regulatory Affairs

cc: Service List