

215 South Cascade Street
PO Box 496
Fergus Falls, Minnesota 56538-0496
218 739-8200
www.otpc.com (web site)



February 28, 2014

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

**Re: In the Matter of the Consideration of Standards to Govern Avoided Cost Determinations
SDPUC Docket No. RM13-002
COMMENTS**

Dear Ms. Van Gerpen:

These Comments are filed in response to the South Dakota Public Utilities Commission's ("Commission's") January 29, 2014, Order to Proceed Regarding LEO Creation Rules in the above-referenced docket. In its Order, the Commission directed that interested parties should submit comments regarding the elements to be included in the requirements for establishing a legally enforceable obligation (LEO) under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

State regulatory authorities such as the Commission are charged with implementing PURPA according to the rules established by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824a-3(f). The courts have given states broad authority to implement these rules. *See Power Resource Group, Inc. v. Public Utility Commission of Texas*, 422 F.3d 231 (5th Cir. 2005). States vary in their implementation of PURPA. NorthWestern Energy, in its comments filed December 3, 2013 in this docket, included an Attachment A that describes various state approaches starting on page 16. The information in that Attachment A is incorporated into these Comments by reference and some particular aspects of that information are addressed below.

The purpose of PURPA is a relevant consideration in establishing LEO rules for this state. PURPA was originally drafted at a time when renewable energy generation was relatively uncommon and the lack of organized energy markets into which generation developers could sell the off-take from their projects was viewed as a potential obstacle to development of generating resources. PURPA was designed to alleviate such obstacles by allowing qualifying facilities ("QFs") to sell directly to local utilities. Today, however, renewable energy has been broadly developed (for example, approximately 19 percent of the energy used to serve Otter Tail's retail customers is produced from renewable generation), and many utilities, like Otter Tail, operate in areas where there are well functioning organized electricity markets, such as the Midcontinent Independent System Operator's ("MISO's") energy market.

The changing landscape of PURPA implementation is demonstrated by the FERC's granting of exemptions from PURPA purchase obligations from QFs over 20 MW under section 292.310 of FERC's regulations. Otter Tail has been granted such an exemption because of its participation in the MISO market. Otter Tail may further seek specific exemptions for QFs below 20 MW upon a showing that such QFs have non-discriminatory access to the market.

In drafting rules for establishing an LEO, consistency, clarity, and certainty are all factors that will improve the implementation of PURPA in the state of South Dakota. Establishing a rule will create consistency within the state. If that rule is easy to understand, the rule will avoid drawn-out disputes or litigation over its application. In this manner, a simpler rule may provide greater clarity than one that is multi-faceted. If the rule clearly identifies a date certain on which an LEO is established, the Commission will avoid having to sort out ambiguous application of various elements. To fulfill its duties under PURPA, the Commission will also gain certainty by creating a rule that has been effective and upheld in other states.

The rules for establishing an LEO should also be done in a way that serves the purposes of PURPA—that is to remove functional market barriers for reasonable projects that are well-conceived and adequately along in their development. The rules for establishing an LEO should not inadvertently create a “gotcha” opportunity for parties with inadequately conceived, poorly developed or unreasonable projects to argue that they have established an irrevocable legal right to force an above-market energy sale on a utility serving South Dakota retail customers.

The administrative rule adopted by the Texas Public Utilities Commission is one that satisfies the considerations discussed above. The Texas administrative rule provides that a QF may create an LEO only upon written notice that it is able to deliver electricity within 90 days. Tex. Admin. Code tit. 16, § 25.242(f)(1)(B). This is a simple, clear threshold. It reduces ambiguity by focusing in on a single, discernable factor. While this rule may still require some determination of whether the QF will in fact be able to produce electricity, focusing on this factor as the sole determinant reduces the likelihood for disputes. It also provides a reasonable opportunity, in appropriate circumstances, for a utility to make the required demonstration at FERC that a PURPA exemption is appropriate because the QF has non-discriminatory market access.

The Texas rule also provides certainty regarding LEO establishment. Courts have reviewed this rule as a means of complying with the obligations of the state to implement PURPA. Both the federal district court and the Fifth Circuit Court of Appeals upheld the Texas PUC's rule as a proper fulfillment of PURPA duties. While not absolute, the Courts' support provides a great deal of certainty that adopting a similar rule for establishing an LEO will be construed as appropriate. Noteworthy is that the 5th Circuit is now considering the Texas PUC's determination that non-firm energy does not qualify for an LEO, an application of PURPA which FERC rejected. *See* JD Wind 1, LLC, 129 FERC ¶ 61,148 (2009). However, the Commission does not at this time need to determine with certainty the parties that may request an LEO. The Commission can create a clear and certain rule regarding when an LEO is established based on the Texas model.

Another element of certainty in any contract is that both parties intend and will be able to perform their obligations. In the context of the LEO, this requires that the QF become obligated to deliver energy at the same time as the utility becomes obligated to purchase such energy. If an LEO does not establish mutual obligations, utilities and their customers may be forced to bear the cost of procuring

additional energy on short notice and at unfavorable terms. A QF that cannot fulfill its obligation to deliver the amount of energy contemplated when the LEO was established should remain responsible for any incremental costs incurred to cover the QF's lack of performance.

Other states such as Pennsylvania and Minnesota provide that an LEO is created when the QF has performed everything within its power to establish the LEO. While such a standard is simple on its face, it leaves the Commission and others with uncertainty as to when this standard has been met. Ambiguity is ripe for dispute.

For the reasons discussed in these Comments, Otter Tail proposes the Commission adopt a rule for establishing an LEO similar to the Texas rule. A clear, consistent, and certain rule will enable the Commission to implement the rule in a definitive manner and reduce the potential for disputes.

Otter Tail appreciates the opportunity to offer comments and looks forward to working with the Commission as it continues in its deliberations in this rulemaking proceeding.

Sincerely,

/s/ MATTHEW J. OLSEN
Matthew J. Olsen
Sr. Compliance Specialist

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By electronic filing