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February 28, 2014

—Via Electronic Filing—

Ms. Patricia Van Gerpen, Executive Director  
South Dakota Public Utilities Commission  
Capitol Building, 1<sup>st</sup> Floor  
500 E. Capitol Ave.  
Pierre, SD 57501-5070

RE: IN THE MATTER OF THE CONSIDERATION OF STANDARDS TO GOVERN  
AVOIDED COST DETERMINATIONS  
DOCKET NO. RM13-002

Dear Ms. Van Gerpen:

On January 29, 2014, the South Dakota Public Utilities Commission (Commission) issued its Order to Proceed Regarding LEO Creation Rules and Establishing Comment Deadline (Order) in the above-captioned proceeding. In its Order, the Commission requested interested parties comment on what should be included in rules setting forth the framework for a legally enforceable obligation (LEO) under the Public Utilities Regulatory Policy Act of 1978 (PURPA). Northern States Power Company, doing business as Xcel Energy, submits these comments in response to the Commission's Order.

Please contact me at (605) 339-8350 if you have any questions regarding this filing.

SINCERELY,

/s/

JIM WILCOX  
PRINCIPAL MANAGER

Enclosure

## I. Introduction

### A. PURPA History

PURPA was enacted to encourage the development of cogeneration and small power production facilities at a time when there was little to no non-utility generation.<sup>1</sup> Congress intended that increased use of these sources of energy would reduce the demand for traditional fossil fuels.<sup>2</sup> In enacting PURPA, Congress provided a guaranteed market for electricity produced by small power producers, including renewable energy generators with a capacity of 80 MW or less, subject to some exceptions (qualifying facility or QF). PURPA, codified in 16 U.S.C. § 824a-3, requires electric utilities to offer to purchase all electricity that a certified qualifying facility produces at rates that: (1) are just and reasonable to electric consumers and in the public interest, (2) do not discriminate against QFs, and (3) do not exceed “the incremental costs to the electric utility of alternative electric energy.”

The Code of Federal Regulations (CFR), title 18, part 292 comprises the regulations under sections 201 and 210 of PURPA with regard to small power production and cogeneration. 18 CFR section 292.304(d) provides for rates for purchases such that a QF has the option of either (1) providing energy as the QF determines such energy to be available, in which case the rates for such purchases shall be based on the purchasing utility’s (also referred to as a host utility) avoided costs calculated at the time of delivery, or (2) providing energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates shall be based on either (a) the avoided costs calculated at the time of delivery, or (b) the avoided costs calculated at the time the obligation is incurred. 18 CFR section 292.101(b)(6) defines these “avoided costs” as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.”

Although PURPA is codified in federal law and implemented through federal regulations, much of the work of ensuring PURPA requirements are met is left to the states. The U.S. Supreme Court ruled that state commissions may issue regulations, resolve disputes, and take other actions designed to give effect to FERC’s rules.<sup>3</sup> FERC has expressly delegated to states the responsibility to determine whether a QF has incurred a legally enforceable obligation to deliver power, and if so, when the obligation arose.<sup>4</sup>

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<sup>1</sup> *Federal Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 750 (1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 751 (holding that a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking other actions reasonably designed to give effect to FERC’s rules).

<sup>4</sup> *Metropolitan Edison Co.*, 72 FERC ¶¶ 61,015, 61,050 (1995).

## **B. Energy Policy Act of 2005**

EPAct 2005 amended section 210 of PURPA by adopting 210(m), which allows a utility to be relieved, on a service-territory-wide basis, of the requirement under PURPA and FERC regulations to enter into new contracts or obligations to purchase energy and capacity from QFs that have a net capacity greater than 20 MW. EPAct 2005 authorized FERC to exempt utilities from PURPA QF purchase obligations if they are located where QFs have nondiscriminatory access to independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy or transmission and interconnection service provided by a regional transmission entity pursuant to an open access transmission tariff.<sup>5</sup>

FERC Order No. 688 found that markets administered by the Midwest Independent Transmission System Operator, Inc. (MISO) (now the Midcontinent Independent System Operator) are one of the markets that satisfy the specified criteria. Xcel Energy sought an exemption from FERC from the PURPA requirements for facilities with a net capacity greater than 20 MW. FERC granted the exemption on August 10, 2011, effective May 12, 2011.<sup>6</sup>

## **C. The Role of PURPA Today**

The power industry has changed dramatically over the last 35 years since PURPA was enacted. Whereas qualifying facilities did not generally have a market for their generation outside of PURPA in the late 1970s, the situation today is very different. Qualifying facilities and other independent power producers abound in what is a very robust wholesale power market, and many utilities, including Xcel Energy, have numerous contracts with non-utility generators. State commissions have allowed or required competitive bidding processes to select least cost resources to serve growing customer needs. Accordingly, it is questionable whether a need to guarantee a purchase obligation to support non-utility generation exists in today's environment. Therefore, the Company supports a rule that limits those required purchases to simply what is required by PURPA and no more. Such a policy encourages the most cost-effective development of new generation resources to serve our customers both in South Dakota and in the other jurisdictions we provide electric service.

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<sup>5</sup> 16 U.S.C. ¶ 824a-3(m).

<sup>6</sup> *Northern States Power Company, a Minnesota Corp.*, 136 FERC ¶ 61,093 (August 10, 2011).

## II. Standard for an LEO

### A. Proposed Requirements

FERC regulations grant the states discretion in setting specific parameters for LEOs.<sup>7</sup> In its January 29, 2014 Order to Proceed Regarding LEO Creation Rules and Establishing Comment Deadline (Order) in this proceeding, the Commission requested interested parties comment on what should be included in rules setting forth the framework for an LEO under PURPA.

The Company supports a clear standard in establishing when an LEO attaches. Accordingly, the Company supports that the standard for establishing an LEO should include the following factors:

1. Demonstrated ability to deliver firm energy within a specified period of time, which we recommend to be 90 days from the date the QF serves its LEO notice on the host utility.
2. Specific time period over which the energy and capacity shall be provided that shall be a minimum of 5 years and no greater than 20 years.
3. A mutually-agreed upon price reflecting the utility's avoided costs.

This standard is consistent with other jurisdictions applying PURPA and reflects both the need to meet PURPA's requirements and the need to protect customers in the delivery of cost-effective and reliable energy. After all, the first criteria under PURPA is that the cost be just and reasonable for the host utility's customers.

First, a rule that provides for an LEO when the applicant demonstrates that it can deliver firm energy within 90 days of the date of the LEO notice provides certainty for the applicant and the host utility in planning for the resource addition and should be adopted. PURPA requires that a host utility purchase energy from QFs as available, or as firm pursuant to an LEO, regardless of the utility's need for the energy or capacity. The host utility needs assurance that energy will be delivered as stated to ensure it can plan its system appropriately and in a way that minimizes costs for customers.<sup>8</sup> The 90-day rule limits the possibility of a utility planning for a resource that does not ultimately materialize and also puts pressure on the project proposer to have the necessary agreements, permits and facilities in place to move forward without burdening utility customers in the interim.

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<sup>7</sup> See *Power Resource Group, Inc. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 237-38 (5th Cir. 2005).

<sup>8</sup> As discussed in Section II.B. of these comments, equating the LEO with firm power is consistent with numerous other jurisdictions throughout the country.

The need for resource planning adequacy is further reflected in the requirement that the energy and capacity be delivered over a specified time period. A timeframe of five to twenty years reflects a reasonable resource planning horizon for the purchasing utility.

The Company recognizes that some projects may need a power purchase agreement in place to obtain the financing necessary to move forward. However, those projects are able to participate in the Company's competitive bidding processes. If they are cost-effective, needed, and in the interest of our customers, those projects will compete with other similarly-situated projects. Thus, purchases from a QF regardless of need should be limited in a manner that meets PURPA and that protects customers. In addition, current regional energy markets, such as exist with MISO, provide adequate opportunity for these projects to develop and sell cost-competitive energy into the market.

Finally, PURPA sets the price at the host utility's avoided costs. The Company supports a rule that includes that an LEO is established when the applicant meets the first two factors above and proposes to provide its energy and capacity at the utility's avoided costs. To further protect the host utility's customers from cost impacts related to QFs, the Company additionally supports a requirement that allows the utility to net any costs the QF imposes on the utility (such as MISO congestion charges that result from adding the QF to the system) against such avoided energy cost payments. This ensures that customers do not pay more than necessary as a result of the addition of the QF.

In addition, the Company recognizes that purchased power costs are eligible for inclusion in the Company's fuel clause adjustment. We note that the Company would include the costs of QF purchases in the South Dakota fuel clause rider similar to other purchased power costs.

## **B. Consistent with Other Jurisdictions**

Numerous other state regulatory commissions have construed the FERC rules in the same way as presented above:

- *Texas*. The Texas Commission has adopted rules providing that an LEO is established when the applicant is capable of providing firm energy within 90 days.<sup>9</sup> The Texas rules equate the "as available" option with non-firm power.<sup>10</sup>

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<sup>9</sup> *Great Plains Windpower, LLC*, 2004 WL 4979524 (Tex. P.U.C. Aug. 30, 2004) at 4. ("An electric utility is not obligated to enter into a written agreement to purchase the energy from a QF utilizing renewable energy technologies if the renewable energy will not be available within 90 days after notice from the QF.") The Company notes that the Fifth Circuit Court of Appeals has previously upheld the 90 day rule.

- *California*. The California commission has distinguished between QFs selling “firm” and “as available” energy.<sup>11</sup> The commission further noted that “FERC regulations” provide that “QFs *other than as-available QFs* have the option of avoided costs calculated at the time of delivery, or at the time the obligation is incurred, ‘pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term.’”<sup>12</sup>
- *Florida*. The Florida commission filled the gap left by FERC by equating firm power with an LEO, and by equating non-firm power with as-available power.<sup>13</sup>
- *Kentucky*. The Kentucky commission equated as-available energy with non-firm energy and LEOs with firm energy:

Each QF has the option of providing energy on an “as available” basis or pursuant to a “legally enforceable obligation.” Conceptually, these options are similar to “non-firm” power (as available) and “firm” power (legally enforceable obligation). Power delivered at the QF’s convenience is as available power. . . . Power delivered subject to a legally enforceable obligation would be delivered on a scheduled or planned basis.<sup>14</sup>

- *Louisiana*. The Louisiana commission’s definitions of “firm power” and “non-firm power” are identical to those in the Texas rules. The Louisiana rule allows a QF the option to “provide non-firm energy as the qualifying facility determines such energy to be available” or to “provide firm energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term.”<sup>15</sup>
- *Montana*. The Montana commission has distinguished between as-available energy and LEOs by adopting rules that allow sellers of as-available energy to

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<sup>10</sup> See 16 Tex. Admin. Code § 25.242 (defining non-firm power from a qualifying facility as “Power provided under an arrangement that does not guarantee scheduled availability, but instead provides for delivery *as available*”). (emphasis added). The United States District Court for the Western District of Texas has enjoined the Texas Public Utility Commission from enforcing the portion of the Texas Commission’s rule that equates an LEO with firm energy, but the injunction currently is on appeal to the Fifth Circuit. However, as noted here, rules equating an LEO with firm energy are in place throughout the country, and there is clear authority and precedent to adopt that rule here.

<sup>11</sup> See *Rules Established for Standard Offers for Cogeneration*, 1982 WL 196691 (Cal. P.U.C. Dec. 30, 1982) at 39 (“Unlike firm capacity QFs, a QF with an as-available contract is under no obligation to supply power to the utility, and it is paid only for the power it delivers.”).

<sup>12</sup> *San Diego Gas and Electric Company et. al.*, 1996 WL 651138 (Cal. P.U.C. Oct. 9, 1996) at 12 (emphasis added).

<sup>13</sup> *Amendment of Rules 25-17.80 through 25-17.89 Relation to Cogeneration*, 1983 WL 820332 (Fla. P.S.C. Oct. 27, 1983) (contrasting “as-available energy as energy produced and sold by a QF on an hourly basis for which no commitments as to the quantity, time, or reliability of delivery are given” with “firm energy and capacity . . . sold pursuant to certain contractual commitments as to the quantity, time, and reliability of delivery.”).

<sup>14</sup> *Small Power Producers & Cogenerators*, 60 P.U.R.4th 574, 586 (June 28, 1984) at 9.

<sup>15</sup> *Generic Rulemaking Proceeding Concerning Avoided Costs Estimates*, 1998 WL 223365 (Feb. 27, 1998) at § 204(d)(1).

receive avoided costs measured at the time of delivery.<sup>16</sup> Providers of “firm power” may choose between avoided costs calculated at the time of delivery or at the time the obligation is incurred.<sup>17</sup>

- *Oregon.* An Oregon QF has the option to provide non-firm energy on an as-available basis, or it can provide firm energy or capacity pursuant to an LEO.<sup>18</sup>

Clear standards are in the interests of customers and the Company and may avoid unnecessary disputes regarding interpreting various factors. If a QF proposes to deliver firm power within 90 days at a host utility’s avoided costs, the requirements of PURPA are met and the establishment of an LEO is clear.

### **III. Proposed Rules**

The Company requests that the Commission adopt the standards as proposed above. The Company includes as Attachment A proposed rules consistent with the framework presented in these comments.

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<sup>16</sup> See Mont. Admin. R. 38.5.1905.

<sup>17</sup> *Id.*

<sup>18</sup> See Or. Admin. R. 860-029-0040.

## **Proposed Rules Establishing a Legally Enforceable Obligation Pursuant to 18 CFR 292**

**Application.** The following section applies to every electric utility operating within the State of South Dakota. This section does not apply to those electric utilities granted an exemption from the FERC for purchases from qualifying facilities as provided by 18 CFR §§ 292.309 and 292.310 to the extent the qualifying facility is of a size of 20 megawatts (MW) or more.

**Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

- (1) **As available** – When a qualifying facility chooses to sell energy at its discretion and with no advance commitment to the interconnected electric utility.
- (2) **Avoided costs** -- The incremental costs to an electric utility of electric energy, which, but for the purchase from the qualifying facility or qualifying facilities, such electric utility would generate itself or purchase from another source.
- (3) **Commission** – South Dakota Public Utilities Commission.
- (4) **Electric utility** – For purposes of this section, an electric utility includes an electric utility subject to the obligations to purchase energy and capacity from qualifying facilities pursuant to the Public Utilities Regulatory Policy Act of 1978, as amended, except as otherwise exempted by the FERC pursuant to 18 C.F.R. Sections 292.309 and 292.310. An electric utility may be an investor-owned utility, a cooperative utility or municipal utility.
- (5) **FERC** – United States Federal Energy Regulatory Commission.
- (6) **Firm power** – From a qualifying facility, power or power-producing capacity that is available pursuant to a legally enforceable obligation for scheduled availability over a specified term.
- (7) **Qualifying Facility** – a cogeneration facility or a small power production facility which meets the criteria for qualification contained in 18 C.F.R. part 292 and which has obtained certification as a qualifying facility pursuant to the rules and procedures of the FERC.

### **Electric utility obligations.**

A. Each electric utility shall purchase power from a qualifying facility from the date of interconnection at the utility's avoided cost. A utility is obligated to purchase power from a qualifying facility at the utility's avoided cost regardless



of whether the utility making such purchase is simultaneously selling power to the qualifying facility. Each qualifying facility shall have the option, at its election, either:

- (1) To provide energy from the qualifying facility as available; or
- (2) To provide energy and/or capacity pursuant to a legally enforceable obligation.

B. (1) Each electric utility shall purchase energy from a qualifying facility with a design capacity of 100 kilowatts (kW) or more within 90 days of being notified by the qualifying facility that such energy is or will be available, provided that the electric utility has sufficient interconnection facilities available. To establish a legally enforceable obligation, the qualifying facility must propose to provide its energy and capacity at a rate no greater than the electric utility's avoided cost.

(2) If an agreement to purchase energy is not reached within 90 days after the qualifying facility provides such notification, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy delivered to the electric utility correspondent with the 90th day following such notice. If the electric utility determines that adequate interconnection facilities are not available, the electric utility shall inform the qualifying facility within 30 days after being notified for distribution interconnection, or within 60 days for transmission interconnection, giving the qualifying facility a description of the additional facilities required as well as cost and schedule estimates for construction of such facilities. If an agreement to purchase energy is not reached upon completion of construction of the interconnection facilities or 90 days after notification by the qualifying facility that such energy is or will be available, the agreement, if and when achieved, shall bear a retroactive effective date for the purchase of energy delivered to the electric utility correspondent with the time of interconnection or the 90th day, whichever is later. Nothing in this subsection shall be construed in a manner that would preclude a qualifying facility from notifying and contracting for energy with a utility for sale of energy prior to 90 days before delivery of such energy.

**Rates for purchases from a qualifying facility.**

(1) Rates for purchases of energy and capacity from any qualifying facility shall be just and reasonable to the customers of the electric utility and in the public interest, and shall not discriminate against qualifying cogeneration and small power production facilities.

(2) Rates for purchases of energy and capacity from any qualifying facility pursuant to a legally enforceable obligation shall not exceed avoided cost. Avoided costs for legally enforceable obligations shall be the rate or rates determined by the commission to be the interconnected utility's avoided costs and are to be determined as needed and on a case by case basis. The rate or rates determined by the commission to be applicable to a legally enforceable obligation shall not exceed the interconnected utility's avoided costs at the time the rate determination is made.

(3) Payments which do not exceed avoided cost shall be found to be just and reasonable operating expenses of the electric utility.

### **Net Costs**

The purchasing utility may recover from the qualifying facility any costs incurred by the purchasing utility that result from the addition of the qualifying facility to the system. Such costs include, but are not limited to, increased costs for congestion management, transmission service expenses, ancillary services expenses and similar items.