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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT  
BY OAK TREE ENERGY, LLC, AGAINST  
NORTHWESTERN ENERGY FOR REFUSING  
TO ENTER INTO A PURCHASE POWER  
AGREEMENT

EL11-006

=====

Transcript of Proceedings  
May 2, 2012

**ORIGINAL**

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
CHRIS NELSON, CHAIRMAN  
KRISTIE FIEGEN, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER

COMMISSION STAFF  
John Smith  
Kara Semmler  
Ryan Soye  
Greg Rislov  
Chris Daugaard  
Brian Rounds  
Demaris Axthelm

APPEARANCES  
Michael Uda, Oak Tree  
Al Brogan, NorthWestern Energy (by telephone)

Reported By Cheri McComsey Wittler, RPR, CRR

1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State  
3 Capitol Building, Room 413, 500 East Capitol Avenue,  
4 ~~Pierre, South Dakota, on the 2nd day of May, 2012,~~  
5 commencing at 10 o'clock a.m.

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1           CHAIRMAN NELSON: I will call the meeting to  
2 order. We are gathered once again on EL11-006 in the  
3 matter of the Complaint by Oak Tree Energy, LLC against  
4 ~~NorthWestern Energy for refusing to enter into a purchase~~  
5 power agreement.

6           The questions that were posted for today's  
7 agenda are how shall the Commission rule on Oak Tree's  
8 Complaint or how shall the Commission proceed?

9           I would like to begin, first of all, by thanking  
10 both parties for their responses by 5 o'clock on Monday.  
11 I will simply say from my perspective to Oak Tree I  
12 understand the rationale of your counteroffer, as it  
13 were, but I am not prepared to go there. I was not  
14 prepared to go anything above the number that I had  
15 calculated.

16           And so while I understand where you're coming  
17 from, I'm not prepared to pursue that avenue today but do  
18 thank you for your time and looking at that very  
19 seriously.

20           With that, this may be fairly free flowing. I  
21 know there's Commissioners that probably have some  
22 motions on how to proceed. But I know the one thing that  
23 I would like to do is ask Bleau LaFave some questions  
24 based on some of the additional research that I've done.

25           But I'd turn to other Commissioners if they have

1 questions that they'd like to ask of anybody at this  
2 point.

3 COMMISSIONER FIEGEN: Nope. Go ahead.

4 ~~CHAIRMAN NELSON: No other questions there.~~

5 Bleau, are you still with us?

6 MR. LAFAVE: Yes, I am, Commissioner.

7 CHAIRMAN NELSON: Thank you. I've spent some  
8 time looking at Mr. Lewis's Exhibit 9 where he has his  
9 energy forecast. And I've spent some time looking at  
10 your Exhibit 3. And perhaps in this whole process I  
11 should have picked this up someplace along the line, but  
12 I just haven't so I need you to explain to me.

13 And I want to ask some questions, first of all.  
14 And ultimately what I need to have explained is how  
15 NorthWestern arrived at the \$35 figure, given the inputs  
16 that I see on your Exhibit 3.

17 And, obviously, I'm not seeing the formulas that  
18 are on this spreadsheet, and if I could, that might have  
19 explained it to me. But since I can't see those, you  
20 might have to walk me through it.

21 The first question that I've got for you in the  
22 third column we've got NorthWestern on peak avoided cost,  
23 and then the off peak avoided costs in the fourth column.  
24 Those don't match perfectly the numbers that Mr. Lewis  
25 came up with so where did these particular sets of

1 numbers come from?

2 MS. LAFAVE: Okay. This is described in my  
3 testimony. I don't know exactly right off the top of my  
4 ~~head now how the calculation came up with the avoided~~

5 cost of 35, but I'll try to go through it where these  
6 particular numbers come from.

7 If you look at --

8 CHAIRMAN NELSON: And, Bleau, if I can just tell  
9 you, I've read your testimony a number of times and I'm  
10 still not grasping it and so that's why I'm asking. I  
11 appreciate your patience.

12 MR. LAFAVE: No. Not a problem. Not a problem.  
13 The third column over that says on peak and the fourth  
14 column over that says off peak, 2013 to 2016 is what we  
15 filed in 2011 as recorded in our avoided cost filing that  
16 fall. So those numbers come directly from that avoided  
17 cost filing.

18 Then the numbers starting in 2023 you'll see the  
19 \$49 and the \$30. Those two numbers are directly from  
20 Steve Lewis's forecast that he filed that you were  
21 referring to earlier, and they continue on down through  
22 2032. So that's where those two sets of numbers came  
23 from.

24 The numbers in between those two sets and have  
25 been discussed a couple of different times, because we

1 did not have the avoided cost calculation -- it's a  
2 complicated calculation we're working on trying to get  
3 something that we can automate it and do it quicker, but  
4 it's a very lengthy calculation.

5 So what I did, as I described, was I just did a  
6 straight line between that last avoided cost filing,  
7 which was in 2016, and the 2023 number, which is  
8 100 percent on the market as using Steve Lewis's numbers.  
9 And I took that time frame, just did a straight line  
10 divide to come up with the numbers in between those two  
11 years.

12 And then to do the overall, the 35, the light  
13 load hours represents X number of hours in a year. The  
14 heavy load are the other hours. And you average those  
15 two together for the respective hours, and you come up  
16 with the \$35.

17 CHAIRMAN NELSON: Okay. And I want to -- and I  
18 appreciate the answer as to where the numbers came from  
19 in the third and fourth column. I need to ask some other  
20 questions between that point and your \$35 point.

21 Looking at the 2023 time period where we're  
22 looking at making purchases 100 percent of the time, so  
23 at that point are you utilizing the high load numbers or  
24 the low load numbers or some combination of those?

25 MR. LAFAVE: For Steve Lewis's --

1           CHAIRMAN NELSON: And my presumption would be  
2 that if you're making a purchase 100 percent of the time,  
3 you're going to be using the high load numbers, but I  
4 ~~need to know exactly how you did that.~~

5           MR. LAFAVE: The high load numbers we've got to  
6 be very careful with the terminology. The heavy load  
7 numbers are the ones there in the third column. The  
8 light load numbers are the ones in the fourth column.

9           CHAIRMAN NELSON: Correct.

10          MR. LAFAVE: So we've got on peak, off peak. So  
11 you have heavy load in the third column and light load in  
12 the fourth column. And then there are X number of heavy  
13 load hours in a given year, X number of light load hours  
14 in a given year. So if you want to annual blend them,  
15 then you blend the two together with the respective  
16 hours.

17          CHAIRMAN NELSON: So that blend, and I see your  
18 46 and 44 number, did you use that blend for every one of  
19 these years, or did that change as you went to a higher  
20 and higher percentage of needing to purchase?

21          MR. BLEAU LAFAVE: No. That's two different  
22 blends. When I'm talking about the blend between the  
23 heavy and the light load, that doesn't change. Your  
24 heavy load hours and your light load hours stay the same  
25 regardless of what year you're in. It's just a number of

1 hours in a given year.

2 The blend as far as how much generation is  
3 included in the avoided cost calculation versus market  
4 ~~purchases after the year 2023 we assumed that we were~~  
5 100 percent in the market.

6 CHAIRMAN NELSON: Okay. That, I think, answers  
7 my question. I think --

8 MR. LAFAVE: The percentage that's in the second  
9 column is the percentage that's representing the amount  
10 of generation versus the amount of -- and it's strictly  
11 an estimate because of, you know, forecasting. The light  
12 load and heavy load are not going to progress in the  
13 future the same as far as how much generation versus  
14 purchasing.

15 We just roughly took an estimate based on our  
16 load balancing curve. And in 2023 that's where that  
17 number will -- we'll be 100 percent in the market for at  
18 least 1 megawatt hours. In likelihood we probably won't  
19 be there in light load hours. We had to make an estimate  
20 someplace.

21 CHAIRMAN NELSON: Just so I'm clear, in the year  
22 2023, you would have been using this \$49.54 number for  
23 the entire --

24 MR. LAFAVE: We would have used the 49.54 for  
25 heavy load hours and 30.25 for the light load hours.



1           CHAIRMAN NELSON: Okay.

2           MR. LAFAVE: Heavy load hours are typically  
3 between 6 o'clock and 10 o'clock, and light load hours  
4 are between -- or the remaining hours of a given day,  
5 with the exception of weekends and holidays.

6           So depending on the year it also does change on  
7 the holidays. But if you add up all the hours in any  
8 given year, that will tell you how many hours you have  
9 light load, how many hours you have heavy load, and  
10 that's the split you use between those two columns.

11          CHAIRMAN NELSON: So, I mean, what's the  
12 likelihood that you'd actually be making purchases in  
13 those light load hours even in those out years?

14          MR. LAFAVE: If we had time to go through an  
15 entire model -- and, like I said, we're working on it.  
16 We'll build it as we go. It just takes a lot of time.  
17 We have some programmers working on it right now.

18          But I'm guessing even in my career it would be  
19 unlikely that we're making purchases every hour with our  
20 current unless we get a significant load on our system.  
21 But, again, we had to pick a point at some point in time  
22 what we knew at the time we did this study.

23          We've looked a little bit more -- some of the  
24 internal people I'm talking to saying within the next  
25 20 years we still won't be purchasing all hours on the

1 light load. But it gets smaller and smaller every year.

2 CHAIRMAN NELSON: Okay. Bleau, thank you for  
3 walking me through that. I think that's the answers that  
4 I need for today.

5 With that, questions from other Commissioners?

6 COMMISSIONER FIEGEN: I don't have questions,  
7 but I'll have comments. When you're ready.

8 CHAIRMAN NELSON: Yep. I'm seeing Commissioner  
9 Hanson.

10 COMMISSIONER HANSON: Mr. Chairman, I'll have  
11 questions when we have a motion.

12 CHAIRMAN NELSON: Commissioner Fiegen, should we  
13 try and see if Commissioner Hanson has a motion, or do  
14 you want to make some comments first?

15 COMMISSIONER FIEGEN: I'll make some comments  
16 first.

17 CHAIRMAN NELSON: Okay. Commissioner Fiegen.

18 COMMISSIONER FIEGEN: Thank you, Chairman  
19 Nelson.

20 First of all, I want to thank all three parties  
21 for your hard work, and you guys have spent hundreds and  
22 hundreds of hours trying to give us information that we  
23 can evaluate and come up with a decision as a Commission.

24 First of all, I am most comfortable as a  
25 Commissioner when the three parties negotiate and then

1 actually the Commission makes a decision or a ruling on  
2 those negotiations.

3 We've learned a lot, and we have learned that  
4 ~~there are all sorts of different points of view. As I~~

5 Commissioner, I believe that Staff is on the right track  
6 of using the hybrid method and using the hybrid method  
7 with NorthWestern because NorthWestern is a vertically  
8 integrated system, which they generate most of their  
9 power most of the time right now on their own.

10 So the market price method is interesting, and,  
11 of course, we use that. I don't think that's the right  
12 method for this docket.

13 There are all sorts of other things that we need  
14 to talk about, and I know Commissioner Hanson will be  
15 talking about it and Commissioner Nelson. I also believe  
16 that NorthWestern needs to put in a carbon cost. And  
17 actually there is testimony in their briefings that talks  
18 about a \$5, \$10, \$15 carbon cost, which I do believe  
19 would be appropriate.

20 Because, of course, Oak Tree has brought that,  
21 has a carbon cost, but NorthWestern has given us  
22 information on one, but has left it out.

23 Also we need to look at the natural gas, and we  
24 need to realize that we need to look probably at current  
25 market price and look at the issues that are surrounding

1 natural gas today and not two years ago or 18 months ago.  
2 So we have to kind of reevaluate natural gas and use that  
3 of what we see today.

4 ~~Because as a Commissioner I want to make sure we~~  
5 make a ruling that is as fair as possible. And when we  
6 have new information on natural gas today, as a  
7 Commissioner, I believe we have to use that.

8 So there are all sorts of different issues.  
9 There are more points that I will certainly add to the  
10 motion, but those are the points I wanted to make in an  
11 opening statement.

12 CHAIRMAN NELSON: Thank you.

13 Commissioner Hanson, would you like to proceed?

14 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
15 I do have a motion, and it occurs to me I can ask one of  
16 the questions I have ahead of time, if that's all right.

17 CHAIRMAN NELSON: Certainly.

18 COMMISSIONER HANSON: I'm curious from the  
19 parties -- well, primarily from NorthWestern at this  
20 juncture -- I think I know what Oak Tree's position would  
21 be on the answer -- of using either the Titan 1 project  
22 or the MISO method in calculating the capacity credit for  
23 the facility's output.

24 Could I hear from NorthWestern?

25 MR. BROGAN: Commissioner Hanson, this is

1 Al Brogan. And I'm on a speaker phone so if I'm not  
2 coming over well enough, please let me know, and I'll  
3 pick up the handset.

4 CHAIRMAN NELSON: It sounds very good.

5 MR. BROGAN: Thank you.

6 With respect to determining the capacity credits  
7 for a wind farm, I think we need to recognize three  
8 things. First, although not all of us, and that includes  
9 NorthWestern and Western Area Power Administration, WAPA,  
10 are members of MISO, to a very big extent MISO is the big  
11 dog in the room.

12 Secondly, we need to recognize that MISO has  
13 established a method by which wind facilities get their  
14 initial capacity calculation, as you will, by using the  
15 system average, and then after the first year of  
16 operation that capacity credit changes every year based  
17 on the wind farm's actual output at the hours of peak.

18 So long as MISO and MRO, Midwest Reliability  
19 Organization, are working together to enforce reliability  
20 standards, I think it's incumbent on NorthWestern to  
21 follow what MISO does.

22 With respect to Titan, I'm a little unclear as  
23 to the question. If the question was should we use the  
24 same method that is used for Titan, well, that's  
25 essentially what's being done is the MISO method.

1           If the question is should we use the Titan  
2 contract, again, as we've said previously in our briefs  
3 and in testimony, the Titan contract was entered into  
4 ~~when markets were substantially different, and it does~~  
5 not represent a part of NorthWestern's avoidable cost.

6           We're going to pay for Titan for what it  
7 delivers regardless of whether we purchase from Oak Tree  
8 or not. So there's no avoidable cost associated with  
9 Titan.

10           I may have misinterpreted the question. If so,  
11 Commissioner Hanson, I apologize.

12           COMMISSIONER HANSON: No, you did not. You  
13 answered it. I appreciate your answer. I thought there  
14 was a difference between Titan 1 method and the MISO  
15 method.

16           I'm curious if any of the Staff have anything to  
17 add to that. If not, if everyone believes that they are  
18 similar --

19           CHAIRMAN NELSON: Mr. Rounds.

20           COMMISSIONER HANSON: I'm debating and trying to  
21 come up with whether I'm totally comfortable with using  
22 Titan 1 or whether I use the MISO method.

23           MR. ROUNDS: Yeah. I guess it's my  
24 understanding that Titan 1 uses the MISO method. So --

25           COMMISSIONER HANSON: So if I say Titan 1, then

1 I'm safe?

2 MR. ROUNDS: Correct.

3 COMMISSIONER HANSON: I've heard it from three  
4 ~~parties now so I appreciate that.~~

5 Mr. Chairman, if I may -- I asked questions. I  
6 didn't necessarily make comments.

7 CHAIRMAN NELSON: You may proceed.

8 COMMISSIONER HANSON: I have a number of  
9 motions. I'm wondering whether I should, I suspect, make  
10 them individually or all in one.

11 CHAIRMAN NELSON: I would be comfortable with  
12 one singular motion, and then if we have issues, we can  
13 move to amend various portions.

14 COMMISSIONER HANSON: All right. In  
15 Docket EL11-006, Oak Tree versus NorthWestern, I move  
16 that the Commission find and conclude in general  
17 agreement with Staff's conclusions in its Posthearing  
18 Brief, number 1, that given NorthWestern's status as a  
19 vertically integrated utility with predominant reliance  
20 on its own internal generation at this time, the hybrid  
21 method is the proper method to operate avoided costs for  
22 NorthWestern's South Dakota system.

23 Secondly, that NorthWestern did not, however,  
24 incorporate projected carbon cost inputs into its use of  
25 this method and also may have utilized natural gas inputs

1 and electric market inputs, and as a result the  
2 Commission did not reliably determine the proper avoided  
3 cost with the data and analysis currently in the record.

4 ~~Number three, that the carbon emission cost~~  
5 values of \$5 per ton starting in 2015 and shifting to  
6 \$10 a ton starting in 2020 and rising to \$15 a ton in  
7 2025 as estimated by Lands Energy are reasonable carbon  
8 emission cost estimates in the present environment and  
9 are the appropriate carbon emissions cost values to be  
10 included in the parties' respective hybrid method  
11 analysis of avoided cost.

12 Fourth, that NorthWestern is obligated to  
13 purchase Oak Tree's output because a legally enforceable  
14 obligation, an LEO, was created by Oak Tree on  
15 February 25, 2011.

16 Fifth, that Oak Tree is entitled to capacity  
17 credit for the facility's output commencing in 2012 with  
18 the capacity contribution to be determined and adjusted  
19 in accordance with the method NorthWestern is using for  
20 the Titan 1 project, and such capacity credit shall be  
21 incorporated into the hybrid method beginning in 2012.

22 Sixth, that the proper avoided cost contract  
23 term is 20 years.

24 I further move that on or before June 1, 2012  
25 the parties shall file with the Commission such



1 additional analysis employing a hybrid method and such  
2 additional prefiled testimony as they deem necessary to  
3 enable a Commission to determine the following:

4 ~~1, the proper application of the hybrid method;~~  
5 2, the proper natural gas inputs to use in the hybrid  
6 method based on current market conditions and  
7 projections; 3, the proper electric market rates that the  
8 parties may deem warranted to reflect current market  
9 conditions and projections taking into consideration the  
10 carbon emission costs previously approved -- excuse me.  
11 They haven't been previously approved, but they appear in  
12 the previous comments. And any adjustments to gas  
13 prices; 4, the proper capacity contribution and resulting  
14 capacity credits to be included in the avoided cost and  
15 added into the hybrid method under the Titan 1 method; 5,  
16 NorthWestern's avoided cost levelized over a 20-year  
17 period. The parties may file rebuttal testimony on or  
18 before June 13, 2012.

19 I further move that the Commission shall  
20 schedule this matter for further hearing on June 19, 2012  
21 with the hearing to begin following adjournment of the  
22 Commission's regular meeting scheduled for that date.

23 I further move that the Commission direct Staff  
24 to open a rule making docket for the purpose of  
25 considering on a statewide basis the proper standards

1 that should govern avoided cost determinations in the  
2 future in this state including, but not limited to, the  
3 requirements for creation of a legally enforceable  
4 obligation, the acceptable method or methodologies for  
5 determination of avoided cost, and the appropriateness of  
6 particular methods in specified circumstances,  
7 appropriate contract terms, and the standards for  
8 determination of when capacity credits shall be allowed,  
9 and the appropriate methods for computing the magnitude  
10 and duration of such credits.

11 Mr. Chairman, that's the complete motion, and I  
12 am concerned a bit with time lines at this point. And  
13 I'd be interested in hearing from the parties and  
14 certainly turn it over to you because you're in charge,  
15 and you will determine whether the Commissioners speak  
16 first or whether we go with questions.

17 Based on the motion, I do have some questions  
18 for the parties. And maybe the best would be for us to  
19 ask our questions of the parties, and then we can proceed  
20 with our discussion.

21 But, Commissioner Hanson, I'd let you go first  
22 with your questions.

23 COMMISSIONER HANSON: Thank you. I struggle a  
24 bit with whether I would include the carbon emission cost  
25 values as I did. It's very challenging to look at

1 Congress and try and figure out exactly what they're  
2 going to be doing.

3 And granted there's some real challenges in  
4 ~~putting something of this nature together because on one~~  
5 hand we're saying that we're making this motion to  
6 proceed under these circumstances, and yet we're asking  
7 Staff to help to work through a analysis in order to -- a  
8 rule making process as well in order to determine really  
9 what should be done with this type of a docket.

10 And so it's kind of a strange animal to go  
11 ahead -- to proceed with it and then to go through the  
12 process on determining how to go -- how to proceed with  
13 it.

14 So it's a challenge from that standpoint. It  
15 does set a precedent. But I think under the  
16 circumstances we need to proceed under that process.

17 So what I'm really curious about is something  
18 somewhat benign, and that is time lines. And I think  
19 those can actually be worked out. I don't think I need  
20 to ask the question. We don't need to go through a  
21 process on that. I think that that can be worked out by  
22 Staff.

23 So at this juncture I would just say that I echo  
24 the comments of Commissioner Fiegen and the statements  
25 that you made earlier. I sincerely appreciate the amount

1 of time and effort that the parties have gone into with  
2 this and the tremendous amount of work that Staff did in  
3 guiding us through this process.

4 Thank you, Mr. Chair.

5 CHAIRMAN NELSON: Other questions of the  
6 parties.

7 Seeing none, I do have one. And I guess, as you  
8 heard the motion, there was significant emphasis on  
9 utilizing current market conditions and projections. And  
10 I would compare that to utilizing the market projections  
11 and conditions that were in place in February of 2011  
12 when the LEO was created.

13 And I guess I'd like to hear from both parties  
14 maybe some argument if you could at this point, and if  
15 not, certainly in, you know, whatever you'll be filing  
16 from here on as to whether we should be reliant upon  
17 current conditions and current projections or those that  
18 were in place in February of 2011.

19 Mr. Uda, since you're in the room, I'll turn to  
20 you first if you'd like to comment on that question.

21 MR. UDA: I believe that the -- necessarily  
22 based on the way that the FERC rules are written and the  
23 case law on this subject matter that the determination of  
24 avoided cost as of the date of the LEO is necessarily a  
25 prospective determination.

1 I think it would be inappropriate to look at  
2 current market conditions, well, for a couple of reasons,  
3 I think. The first is because current market conditions  
4 can be misleading. And what I mean by that is, you know,

5 it wasn't so long ago that, you know, we were  
6 experiencing a situation where, you know, I had clients  
7 who were buying power in the market at market rates and  
8 they thought that was a pretty good deal, and then all of  
9 a sudden in the Western Interconnect we had the  
10 California energy crisis of 2000 and 2001 and all the  
11 sudden they were paying \$150 a megawatt hour or more for  
12 their contracts and they couldn't operate.

13 Some utilities got caught in the same  
14 situation, and that spawned years of litigation. So  
15 looking at the, you know, kind of short-term situation  
16 can be misleading.

17 And I also think that when you look at -- when  
18 you say current -- it depends on what you mean by current  
19 market conditions. I think it's appropriate to look at  
20 current market conditions as of February 25, 2011,  
21 because that was the time frame which we had to try to,  
22 you know, figure out exactly the financing for this  
23 proposal and retain experts and have them look at those  
24 kind of things.

25 And, you know, there's a lot of ways in which,

1 you know, utility planning is done similarly in a sense  
2 that, you know, the utility values that the project that  
3 it makes a proposal to State Commissions, and as long as  
4 ~~those costs are prudently incurred and the project is~~  
5 built, typically speaking there's not a retrospective  
6 look at whether or not this was substantially above  
7 market.

8 I would like to add another war story, if you  
9 will. I represented a project before the Montana  
10 Commission in 2002. And it came in and said, you know,  
11 we'd like to sell our output to NorthWestern at \$32.75  
12 for 20 years. And that would look like a real bargain  
13 now.

14 And my point is that the future is not always  
15 going to be lower. There's a certain tendency to think  
16 that whatever's going on right now is what will go on in  
17 the future.

18 And, you know, I think that, you know, one thing  
19 that we've talked about with these forecasts is, you  
20 know, they're all going to be wrong. And so the real  
21 question is, you know, what sort of acceptable range is  
22 there in terms of risk of being wrong and what sort of  
23 risk does it pose?

24 So I guess that's a long answer, and I apologize  
25 for that. But what I would say is that I think it's most

1 appropriate based on PURPA policy and regulations and to  
2 the extent we have case law to look at this as a  
3 prospective determination as of February 25, 2011 as  
4 ~~opposed to let's look at what's going on in the market~~  
5 right now, that can change on a daily basis.

6 CHAIRMAN NELSON: You mentioned case law twice.  
7 Can you cite any cases for us that would direct us to the  
8 need to use February 2011 numbers?

9 MR. UDA: Well, yeah. There are a couple of  
10 cases, and I can't remember them right off the top of my  
11 head. But I think one of them is actually a New York  
12 case, Saranac Power Partners. And I believe that the  
13 court there pointed out that QFs are allowed to lock in  
14 their rate.

15 I would also point you to two recent FERC  
16 decisions. One is the JD Wind 1 case and also the  
17 Cedar Creek Wind case in which the Commission made it  
18 very clear that -- Cedar Creek Wind, I think it's  
19 particularly illustrative of this point. Because what  
20 had happened in that case was the qualifying facility had  
21 signed a contract and sent it back to the utility. And  
22 the utility knew that a new avoided cost rate was going  
23 to go into effect, and they waited until after the  
24 deadline to sign the contract so that the new lower rate  
25 would go into effect.

1           And FERC said that's exactly why we have the  
2           legally enforceable obligation situation is to avoid this  
3           kind of situation where you have a utility that just  
4           ~~simply holds on to a contract so a lower rate applies.~~

5           So I think what the Commission is saying at that  
6           point is the point in which the legally enforceable  
7           obligation is created, that's the rate that applies. So  
8           the rate has to necessarily be the rate on the date the  
9           LEO applies, and I think you can't really base a rate,  
10          you know, on present information if you're really trying  
11          to lock it in as of the date of February 25, 2011. I  
12          think it has to be based on information at that time.

13                   CHAIRMAN NELSON: Thank you.

14                   Mr. Brogan, a response.

15                   MR. BROGAN: Chairman Nelson, I'd like to  
16          respond maybe in reverse order.

17                   First I would say that I believe that the  
18          characterization of the Cedar Wind case is not entirely  
19          in line with the details of that case. I think we need  
20          to keep in mind that that's based out of Idaho, that in  
21          Idaho QFs at that time up to 10 megawatts were entitled  
22          to what are called standard offer rates.

23                   There was a published standard offer rate. The  
24          Idaho PUC had announced that as of December 14 of the  
25          applicable year wind and solar QFs would not be eligible



1 for a standard offer rate if they were larger than  
2 100 kW.

3 The question wasn't the rate but whether or not  
4 ~~the QF was entitled to the published rate. And as~~

5 Mr. Uda correctly stated, FERC determined that when  
6 everything had been agreed upon, the utility could not  
7 just refuse to sign the contract or fail to sign the  
8 contract and then put the QF in a position where it had  
9 to compete for basically a slot in selling to the  
10 utility.

11 Whether or not this Commission is obligated to  
12 look at only information that is -- that was available on  
13 February 25 of 2011 I believe is a debatable point.

14 I think that's especially the case whereas here  
15 the Commission is deciding that a legally enforceable  
16 obligation was created even though the QF had not  
17 committed to sell power at an avoided cost.

18 I would also comment that I think the Saranac  
19 case is not comparable to this issue. In Saranac the  
20 issue was whether or not after QFs had entered into  
21 contracts, long-term contracts, at the New York  
22 Commission's mandated rate, and it turned out that that  
23 mandated rate was too high, you know, 20/20 hindsight, I  
24 guess, whether or not the utilities had some method of  
25 reforming or lowering those contract rates. And I think

1 we all know the answer to that is no.

2 But I don't think that case stands for anything  
3 about the information that the Commission may look at.

4 ~~MR. UDA: Mr. Chairman, might I just have a~~  
5 brief --

6 MR. BROGAN: May I finish?

7 MR. UDA: Oh, I apologize, Mr. Brogan. I didn't  
8 realize you weren't done.

9 CHAIRMAN NELSON: Go ahead, Mr. Brogan.

10 MR. BROGAN: Given that, as NorthWestern has  
11 argued throughout the case, we believe that the  
12 Commission has discretion to go either way.

13 Certainly if it picks the date of February 25,  
14 2011, and only wants to look at what was known or should  
15 have been known then, I anticipate there will be a lot of  
16 arguments about what was really known then. You know, we  
17 can look at what the market was, but we can't look at  
18 what was in everybody's mind then.

19 And then the final thing I would suggest is that  
20 at some point in here in this whole process we have to  
21 keep in mind its the people of South Dakota that are  
22 going to be footing the bill. And we need to have a  
23 methodology that makes sure that those people,  
24 NorthWestern South Dakota rate payers, are financially  
25 indifferent. And somebody has to speak for the interests

1 of those consumers.

2 Thank you, Mr. Chairman.

3 CHAIRMAN NELSON: Thank you.

4 Mr. Uda.

5 MR. UDA: Well, at the outset I want to  
6 apologize to Mr. Brogan. I took his pause as him being  
7 finished, and I didn't intend for that to happen. I'm  
8 sorry, Al.

9 At any rate, just a couple of things. First of  
10 all, I don't want to get too bogged down in the details  
11 of Saranac and Cedar Creek Wind. NorthWestern's position  
12 makes no sense.

13 I mean, this is one of the problems that I've  
14 had with the number of arguments that they've made. And  
15 this is why the position makes no sense:

16 If the FERC's point in Cedar Creek Wind,  
17 regardless of whether it was because the standard offer  
18 rate didn't apply and you would have to go in the cue or  
19 whatever else, the point that FERC has consistently made  
20 is that by refusing to sign a contract, you cannot change  
21 the avoided cost. Because that interferes with the  
22 reasonable investment backed expectations.

23 FERC in Order 69 could not have been clearer  
24 that the purpose of this was to promote the development  
25 of new technologies and that in order to do that, there

1 had to be some certainty.

2 So the date -- and the Saranac case, I didn't  
3 quote it because I think it's particularly apropos on its  
4 ~~facts in this situation. I quoted it because it uses the~~  
5 phrase "locked in."

6 QFs have the right to lock in a rate. That is  
7 how the legally enforceable obligation works. At the  
8 date at which it's created, it locks in the rate. Now  
9 whatever that rate is is what we're debating here.

10 And so my point would be I think, you know, the  
11 interpretation -- those cases speak for themselves. You  
12 know, I don't need to argue about them too much. By I  
13 just want to say I think that the appropriate look is --  
14 and Mr. Brogan's making a good point.

15 I don't think he's wrong to say, well, you know,  
16 we're going to have to go back and look at what people  
17 would have known. That's been kind of what our effort  
18 has been here from the beginning.

19 Mr. Lauckhart's point is, you know, when he was  
20 relying on the Black & Veatch Energy Market Perspective  
21 it only gets done twice a year. His obligation -- he  
22 consulted with people at Black & Veatch -- was to say,  
23 you know, there's movement in the gas market. Is this a  
24 temporary change, or is this a long-term fundamental  
25 change that's going to change the way we do our

1 forecast.

2           These are the kind of things Black & Veatch does  
3 an enormous amount of resources in. So I agree with him  
4 ~~to a certain extent, but that's kind of been the whole~~  
5 exercise from our standpoint.

6           What I'm saying bottom line is I think it would  
7 be substantial error -- that's as distinguished from a  
8 minor error -- for the Commission to say, well, let's  
9 look at, you know, the situation now and then sort of go  
10 back to February 25, 2011. I think you have to try to  
11 make this determination as of what the parties knew or  
12 reasonably should have known as of February 25, 2011.

13           CHAIRMAN NELSON: Thank you.

14           Other questions from the Commission?

15           I guess maybe the only -- and I do want to  
16 follow up on where Commissioner Hanson was going in  
17 regard to the dates that we've put in here to further  
18 this proceeding.

19           Are there any objections from either of the  
20 parties as to the states that we've selected?

21           Mr. Uda?

22           MR. UDA: Well, let me just say -- and I haven't  
23 had a chance to confer with my clients really on this.  
24 You know, obviously we would prefer as short of deadline  
25 as we possibly could.

1           Because, I mean, you know, the real issue for us  
2 is we're facing a situation where the production tax  
3 credits are expiring and the potential for being able to  
4 ~~use bonus depreciation is expiring as of the end of this~~  
5 year and there's a substantial risk that the product tax  
6 credit will not be renewed. We'd like it to be as short  
7 of a time frame as possible. We understand that the  
8 Commission has limited resources and you have other  
9 things that you have to do.

10           And I think at least from my experience  
11 basically a six- to seven-week process is, you know, I  
12 know from your perspective extraordinarily fast. So, you  
13 know, I think, you know, one of the things that we would  
14 have to consider is, you know, basically, you know, two  
15 separate filings consistent with the Order.

16           One would be with the production tax credit and  
17 one without, if it doesn't get renewed. Because I think  
18 that substantially effects, you know, what price we would  
19 be able to produce.

20           CHAIRMAN NELSON: But if I might, and obviously  
21 I'm the -- the Commission has been pretty sensitive to  
22 your time line, but the production tax credit whether  
23 it's there or not doesn't affect the avoided cost number.

24           MR. UDA: No. I acknowledge that.

25           CHAIRMAN NELSON: That's what we're here to

1 find.

2 MR. UDA: No. I understand. You're absolutely  
3 correct, Chairman Nelson. The only point I was making is  
4 ~~that, you know, as we move through time, I mean, the fact~~  
5 is, you know, we're not going to -- we're not going to  
6 claim that the production tax credit is part of the  
7 avoided cost.

8 We may just want to make you aware of the  
9 difference of what you're looking at. Not that it would  
10 be critical to your determination of the actual avoided  
11 cost.

12 CHAIRMAN NELSON: Thank you.

13 Mr. Brogan, your comments on the proposed time  
14 frame?

15 MR. BROGAN: Chairman Nelson, I understand the  
16 need for an accelerated schedule. However, the initial  
17 June 1 deadline is going to be very difficult, at least  
18 as I see it. And I may be analyzing it wrong.

19 But at this point it appears to me that we will  
20 need -- NorthWestern will need to apparently find a new  
21 expert with respect to electric and natural gas prices as  
22 the Commission doesn't seem to accept Lands Energy's  
23 forecast, though it does for carbon.

24 Secondly, NorthWestern is in the process of  
25 making three filings before the Montana Public Service

1 Commission that it has to have done before the end of  
2 May. And then, third, I have a prior commitment that I  
3 cannot get out of without substantial personal expense  
4 ~~that has me unavailable to work on any of this matter~~

5 from Saturday, May 19 through Saturday, May 26. And it's  
6 not a commitment for a vacation, incidentally. It is a  
7 working commitment.

8 That said, you know, we will do whatever we --  
9 you know, whatever needs to be done to fit the  
10 Commission's schedule. I just would emphasize that we're  
11 concerned about basically such a short time to develop  
12 the initial analysis by June 1 of 2012.

13 I guess the last thing I would say is that for  
14 this to work at all I think we have to be sure that we're  
15 not going to be engaging in discovery between the initial  
16 testimony on June 1 or whatever date is set and the  
17 rebuttal testimony.

18 If we have discovery that we have to develop  
19 and, more importantly, respond to during that period, the  
20 turn around I think would be impossible for us.

21 Thank you.

22 CHAIRMAN NELSON: If you'll give us just a  
23 minute, I'm conferring with Commission counsel.

24 Staff, do you have an opinion on the schedule?

25 MS. SEMMLER: Certainly it's hard for Staff to



1 comment on the parties' various schedules. But I would  
2 start by saying I don't necessarily know why they would  
3 need to find a new witness. Lands Energy doesn't have to  
4 ~~necessarily agree with your Order to follow the Order and~~  
5 to insert the numbers as you've ordered.

6 And, second of all, I don't know what discovery  
7 would need to be done. Again, you're ordering particular  
8 numbers or ordering a particular mode so -- a mode of  
9 action. So I don't know why discovery would be necessary  
10 either.

11 CHAIRMAN NELSON: Thank you. Just give us a  
12 minute while I confer with Commission counsel.

13 (Pause)

14 CHAIRMAN NELSON: Mr. Brogan, one of the things  
15 that we've just kicked around here, Mr. Smith and myself,  
16 is pushing back that June 1 date, you know, perhaps --  
17 I'm going to pull up a calendar here. Pushing that back  
18 just a bit to try to accommodate that week that you're  
19 unavailable to work on the project.

20 MR. BROGAN: Chairman Nelson, I would really  
21 appreciate that accommodation.

22 CHAIRMAN NELSON: If we push that back to  
23 June 6, would that help? And then keep any rebuttal  
24 testimony to June 13?

25 MR. BROGAN: That would be very helpful, the

1 June 6 date. And we have turned around and provided  
2 testimony in a week before, you know, in a week's time  
3 period in other stages of this docket. I think we could  
4 ~~do it again. It's not easy, but it can be done.~~

5 CHAIRMAN NELSON: I understand. I appreciate  
6 your flexibility. And that allows us to try to move this  
7 along as quickly as possible.

8 With that, discussion from the Commission on the  
9 motion.

10 I think the only comment -- Commissioner  
11 Hanson, I intend to support your motion. I appreciate  
12 your putting this together for us and bringing this to  
13 us.

14 The only question I've got -- and it was  
15 something you hinted at -- was the last paragraph about  
16 opening the rule making proceeding. And it does seem to  
17 me maybe a little bit disjointed that we open that  
18 proceeding before we finish this particular docket, that  
19 there may be questions raised in that that then all the  
20 sudden people are saying, well, why aren't you applying  
21 that in this docket. And to me that seems like it may  
22 muddy the waters as we try to wrap this docket up as  
23 quickly as possible.

24 COMMISSIONER HANSON: Yes. That's one of the  
25 reasons that I expressed what I did. It's a situation

1 where you're going to go out and tell people how to drive  
2 a car and then later on you're going to learn how to  
3 drive it yourself. And it's an interesting situation.

4 ~~But if we have further requests that come before~~  
5 us, obviously all three of us, well, all of us who  
6 participated in this recognize that we need to have a  
7 variety of things established. And in order to do that,  
8 we have to go through this process that's recommended at  
9 the very end.

10 And so it's a matter of they both need to get  
11 done, and they both need to get done pretty soon.  
12 Obviously, the Staff's directive would take place not  
13 concurrently with this but consecutively. It would take  
14 place afterwards.

15 So if you're comfortable in taking those in two  
16 different motions, that's fine. But I really think we  
17 need to get started with both of them.

18 CHAIRMAN NELSON: I would be comfortable if it  
19 would be the understanding that, frankly, that the docket  
20 be opened but that nothing be done with the docket until  
21 we've concluded EL11-006. Because I agree with you that  
22 we certainly need to do the rule making.

23 But so far as making anything publicly  
24 available or proposed rules or anything like that, I'd  
25 be very uncomfortable doing that before we wrap this one

1 up.

2 COMMISSIONER HANSON: I think Staff would  
3 appreciate knowing that they don't have to be doing both  
4 of them at the same time as well.

5 CHAIRMAN NELSON: So if that would be kind of  
6 just the understanding all the way around, then I'm  
7 certainly on board.

8 COMMISSIONER FIEGEN: Just to make it clear, do  
9 we just amend the motion that says the docket opens after  
10 the conclusion of this complaint?

11 COMMISSIONER HANSON: I think we can just -- we  
12 just basically told Staff right now, and the Chairman has  
13 that prerogative of moving forward in that directive, I  
14 believe.

15 COMMISSIONER FIEGEN: So it will reflect in the  
16 minutes.

17 CHAIRMAN NELSON: Mr. Smith.

18 MR. SMITH: Just a comment too. I mean, the  
19 opening of a docket to say that's going to be a policy  
20 thing that we're going to pursue, I mean, a docket like  
21 that's probably going to be -- it's probably a yearlong  
22 process. This is not going to be a simple thing, you  
23 know, something like that.

24 So just opening it, it opens it, and it makes  
25 some commitment on our part to move it along and proceed,

1 but I wouldn't perceive significant activity happening  
2 necessarily immediately. So I don't know that there's  
3 actually any time conflict or conflict that would happen  
4 there.

5 I think what -- I think what Commissioner  
6 Hanson's motion is attempting to do and following on  
7 Staff's recommendation is that at some point here, given  
8 what we've experienced throughout this whole docket  
9 process, this Oak Tree docket, is, you know, the  
10 Commission at some point -- it would be useful to take a  
11 broad-based look at this in terms of figuring out how do  
12 we want to run the avoided cost and the QF rights process  
13 going forward and put some direction into it on a  
14 prospective basis.

15 But just comments. Thank you.

16 CHAIRMAN NELSON: Thank you.

17 Further discussion on the motion?

18 Seeing none, all those in favor vote aye. Those  
19 opposed nay.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Fiegen votes aye.

24 CHAIRMAN NELSON: And Nelson votes aye. Motion  
25 carries.

1 I do have one additional request. Mr. LaFave,  
2 going back to my questioning on your Exhibit 3, would it  
3 be possible for me to get -- and I'm guessing it's going  
4 to end up having to be part of the record but your actual  
5 spreadsheet so I can see the formulas?

6 MR. LAFAVE: I'm sure it can be part of that.  
7 Our intention hopefully will be to have a full blown one  
8 hopefully built by June 6.

9 CHAIRMAN NELSON: Okay. Then you and I, we're  
10 tracking identically on where we need to go with this.  
11 And I appreciate that. But in the meantime if you could  
12 provide me with, you know, just what's behind that  
13 Exhibit 3, I would appreciate that.

14 MR. LAFAVE: Okay.

15 CHAIRMAN NELSON: Excellent. Thank you.

16 Mr. Smith.

17 Anything else for the good of the order?

18 Mr. Rislov.

19 MR. RISLOV: And I'm following up on Chairman  
20 Nelson's request of Mr. LaFave. I would like to ask both  
21 parties -- not to throw harpoons at this point, but I  
22 would like a little better sourcing and a little better  
23 formula, derivation, just a list so that we can replicate  
24 those exhibits, I can replicate those exhibits.

25 I'm not privy to all the material that Staff

1 gets. And the one thing I've been a stickler about with  
2 the Staff I've worked with over 35 years is you should be  
3 able to look at a exhibit and be able to follow it  
4 ~~through without playing hide and seek and a guessing~~  
5 game.

6 So I would ask both parties to more fully source  
7 and point out where the derivation comes from on those  
8 exhibits.

9 MR. UDA: On that point -- this goes to the  
10 issue of discovery, I think -- you know, I was prodded by  
11 my expert on the phone, by e-mail, that, you know, the  
12 very process that you just went through with NorthWestern  
13 is the reason that if there isn't sufficient  
14 transparency, you may need discovery just to be able to  
15 better understand somebody's exhibits.

16 And I'm not saying we need to have that in this  
17 schedule because obviously we're trying to get this done  
18 as soon as possible. But it may become an issue if we  
19 need to find out just, I mean, somebody's math. You  
20 know, make sure that there was appropriate  
21 multiplication, subtraction, you know, division.

22 So, you know, with that, you know, we're  
23 comfortable with the schedule, but, you know, it may --  
24 as Mr. Rislov points out, you know, there's less than  
25 perfect clarity. There may need to be some limited

1 opportunity for discovery at least to understand better  
2 the exhibits.

3 CHAIRMAN NELSON: I appreciate that. Mr. Smith  
4 ~~has just had a suggestion that may help in this regard.~~

5 And that would be our request that as any of these  
6 spreadsheet type documents are submitted to us that we  
7 get the actual live spreadsheets also so that we can see  
8 the math, that we can see the formulas and know how those  
9 are operating.

10 And so if that would be an understanding, that  
11 would move this along.

12 MR. UDA: We would be happy to provide that.

13 CHAIRMAN NELSON: Thank you.

14 MR. BROGAN: NorthWestern is comfortable with  
15 that also.

16 CHAIRMAN NELSON: Thank you.

17 Any other comments?

18 Seeing none, is there a motion?

19 COMMISSIONER FIEGEN: Motion to adjourn.

20 CHAIRMAN NELSON: Motion to adjourn. Those in  
21 favor vote aye.

22 Commissioner Hanson.

23 COMMISSIONER HANSON: Aye.

24 CHAIRMAN NELSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.



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CHAIRMAN NELSON: Nelson votes aye. Motion carries. We are adjourned.

(The hearing is adjourned at 10:55 a.m.)

1 STATE OF SOUTH DAKOTA )

2 :SS

CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 2nd day of May,  
11 2012, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 16th day of  
14 May, 2012.

15

16

17



18

Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter

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