

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE COMPLAINT )</b>	<b>RULINGS ON MOTION FOR</b>
<b>BY OAK TREE ENERGY LLC AGAINST )</b>	<b>COMMISSION RESOLUTION OF</b>
<b>NORTHWESTERN ENERGY FOR )</b>	<b>CONTRACTUAL PROVISIONS</b>
<b>REFUSING TO ENTER INTO A )</b>	
<b>PURCHASE POWER AGREEMENT )</b>	<b>EL11-006</b>

On April 28, 2011, Oak Tree Energy, LLC (Oak Tree) filed a Complaint (Complaint) with the South Dakota Public Utilities Commission (Commission) against NorthWestern Corporation d/b/a NorthWestern Energy (NWE). The dispute involves a proposed wind generation project located in Clark County, South Dakota (Project). Oak Tree alleges that the Project is a "Qualified Facility" under PURPA and that NWE has refused to enter into a power purchase agreement. After lengthy proceedings and hearings, on May 17, 2013, the Commission issued an Amended Final Decision and Order; Notice of Entry (Decision). The Decision contains a detailed recitation of the lengthy procedural history in this matter.

The Decision ordered NWE and Oak Tree to enter into negotiations in good faith to consummate a power purchase agreement (PPA) and file it with the Commission no later than 30 days following the date of issuance of the Decision. On June 17, 2013, the parties filed a stipulation for a 10-day extension of the 30-day contract submission deadline. On June 28, 2013, with Oak Tree's acknowledgement, NWE filed a letter notifying the Commission of its intent to request review of the outstanding unresolved contract issues between the parties. On July 17, 2013, NWE filed a Motion for Commission Resolution of Contractual Provisions and Power Purchase Agreement Approval (Motion) requesting Commission resolution of the issues of: (i) the appropriate contractual language to govern Oak Tree's responsibility for ancillary service charges that NWE may potentially incur as a result of Oak Tree's integration into NWE's, Western Area Power Administration's (WAPA), and possibly an RTO's systems (NWE's and Oak Tree's proposed § 5.5.3); (ii) the appropriate contractual language to govern curtailment of Oak Tree's energy deliveries to the system (NWE's and Oak Tree's proposed § 6.5.1, 1st ¶); and (iii) the propriety of a default provision for NWE's failure to accept delivery of energy from Oak Tree except under the contract's allowed curtailment provisions (Oak Tree's proposed § 8.2.3). On July 24, 2013, Oak Tree filed Oak Tree Energy, LLC's Response to NWE's Motion for Commission Resolution of Contractual Provisions and Power Purchase Agreement Approval. On July 26, 2013, the Commission's staff (Staff) filed a Staff Memorandum with Staff's analysis and recommendations.

The Commission has jurisdiction over this matter pursuant to 16 U.S.C. Chapter 12, §824a-3, 18 C.F.R. Part 292, and SDCL Chapters 1-26 and 49-34A, including 49-34A-93.

At its regular meeting on July 30, 2013, the Commission considered the Motion. After opening arguments by the parties, questions of the parties by Commissioners and advisors, and discussion, the Commission took the following actions. With respect to PPA § 5.5.3 dealing with ancillary services charges, Chairman Hanson moved to approve, without modification, the language proposed by NWE as set forth in Exhibit A to the Motion that requires Oak Tree to pay, within thirty days after NWE's invoice, any charges for ancillary services assessed against NWE by WAPA or a New Joint Transmission Authority that are directly attributable to Oak Tree's generation, delivery, and integration of energy into the system. Finding that future

ancillary service costs directly attributable to Oak Tree's generation, delivery, and integration of energy into the system are not avoided costs, but rather are costs that the generating facility causing such costs should properly bear, the Commission voted unanimously in favor of the motion. With respect to the second issue for decision dealing with the parties' respective proposals for the appropriate provisions in the first paragraph of PPA § 6.5.1 regarding NWE's curtailment rights, Chairman Hanson moved to approve the language proposed by NWE as set forth in Exhibit A to the Motion. Finding that NWE's right to curtail for the purpose of managing its generation portfolio and avoiding or mitigating adverse effects to NWE or its customers, when coupled with Oak Tree's right to compensation from NWE for the value to Oak Tree of lost energy delivery due to curtailment, including the associated production tax credit value on an after-tax, grossed-up basis as set forth in PPA Exhibit E, is an appropriate provision to facilitate sound system management and avoid unnecessary cost incurrence, a majority of the Commission voted in favor of the motion. Commissioner Nelson dissented. On the third issue regarding Oak Tree's proposed PPA § 8.2.3 which would make NWE's failure to accept energy other than pursuant to a curtailment permitted by § 6.5.1, Commissioner Hanson moved to remove § 8.2.3 in its entirety. Finding that NWE's non-acceptance of Oak Tree's energy except for permitted curtailments is adequately covered, and Oak Tree is adequately protected, by PPA § 8.2.4, which recognizes NWE's cure opportunity, and by the other breach provisions of the PPA, the Commission voted unanimously in favor of the motion. It is therefore

ORDERED, that the version of § 5.5.3 proposed by NWE that requires Oak Tree to pay, within thirty days after NWE's invoice, any charges for ancillary services assessed against NWE by WAPA or a New Joint Transmission Authority that are directly attributable to Oak Tree's generation, delivery, and integration of energy into the system is hereby approved and shall be incorporated in the parties' PPA. It is further

ORDERED, that the version of the first paragraph of § 6.5.1 proposed by NWE that allows NWE to curtail Oak Tree's delivery of energy as otherwise necessary for the purpose of managing its generation portfolio and avoiding or mitigating adverse effects to NWE or its customers is hereby approved and shall be incorporated in the parties' PPA. It is further

ORDERED, that Oak Tree's proposed § 8.2.3 shall not be included in the parties' PPA. It is further

ORDERED, that the PPA with the above resolutions is compliant with PURPA and just and reasonable to both parties within the parameters set by PURPA.

Dated at Pierre, South Dakota, this 5<sup>th</sup> day of August, 2013.

<b>CERTIFICATE OF SERVICE</b>
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.
By: <u>Joy Lashley</u>
Date: <u>8.5.13</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson

GARY HANSON, Chairman

Chris Nelson

CHRIS NELSON, Commissioner,  
dissenting in part

Kristie Fiegen

KRISTIE FIEGEN, Commissioner