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

**IN THE MATTER OF The Complaint By  
Oak Tree Energy LLC Against  
NorthWestern Energy For Refusing To  
Enter Into A Purchase Power Agreement**

**DOCKET NO. EL11-006**

**REBUTTAL TESTIMONY OF MICHAEL MAKENS**

1 **I. INTRODUCTION**

2

3 *Q. Please state your name and employment.*

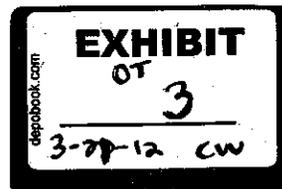
4

5 A. My name is Michael Makens. I am one of the owners of the Oak Tree Energy, LLC  
6 (Oak Tree) project in Clark, South Dakota. I have been directly and personally  
7 involved in all the major decisions regarding the Oak Tree wind project located in  
8 Clark, South Dakota.

9

10 *Q. What has been your involvement with this project and this case?*

11



1 A. As one of the owners of Oak Tree, I have been intimately involved in all aspects of its  
2 development and I have been extensively involved in attempting to obtain a power  
3 purchase agreement for Oak Tree from NorthWestern Energy (NorthWestern).

4  
5 *Q. Whose testimony are you rebutting in this case?*  
6

7 A. I am primarily rebutting the testimony of NorthWestern Energy witness Bleau LaFave  
8 regarding the existence of a Legally Enforceable Obligation (LEO). I believe Mr.  
9 LaFave significantly misstates the state of the Oak Tree project, our willingness to  
10 negotiate, and the actual history of negotiations between the parties. In summary, I  
11 believe Mr. LaFave is attempting to conceal NorthWestern's lack of willingness to  
12 actually discuss a potential power purchase agreement (PPA) with Oak Tree, and the  
13 fact that NorthWestern simply refused to negotiate. NorthWestern's position on the  
14 negotiations of the parties is a misrepresentation of what transpired between Oak Tree  
15 and NorthWestern.

16  
17 **II. SUMMARY OF TESTIMONY**  
18

19 *Q. Please summarize your rebuttal testimony*  
20

21 A. First, I will walk through all the efforts that Oak Tree made to negotiate with  
22 NorthWestern. The South Dakota Public Utilities Commission (PUC) should  
23 understand that Oak Tree has every reason to negotiate fully and fairly with  
24 NorthWestern.

25 My testimony will illustrate that Oak Tree repeatedly asked  
26 NorthWestern whether it was willing to negotiate, both in writing and via  
27 telecommunications. We only brought this complaint as a last resort. It was not  
28 anything we wanted to do.

29  
30 Second, I will discuss some basic facts about the Oak Tree project, including the need  
31 for a PPA in order to sell its output. These facts include the project's location, the  
32 work already completed, and the status of the Interconnection Agreement.  
33

1 Q. Are you offering testimony on the requirements for the existence of an LEO for Oak  
2 Tree?

3  
4 A. No. That will be offered by Thomas K. Anson, who is our rebuttal expert on that  
5 issue in this case.

6  
7 **III. HISTORY OF NEGOTIATIONS**

8  
9 Q. On pages 7-8 of his prefiled testimony, Mr. LaFave summarizes his view of the  
10 communications between Oak Tree and NorthWestern. Is his list accurate?

11  
12 A. No. There are a number of different communications that Mr. LaFave has failed to  
13 mention. The first missing item is an inquiry written by Claud Matney, an  
14 engineering consultant retained by Oak Tree to assist with developing the project.  
15 There is a letter dated May 21, 2010, written by Ms. Sarah Dannen of NorthWestern  
16 that indicates that contact took place (attached hereto as "Exhibit 1"). I will detail all  
17 the other efforts we made below.

18  
19 Q. Were all the communications between Oak Tree and NorthWestern in letter form?

20  
21 A. No. Oak Tree's representatives attempted to discuss the need for a PPA with  
22 NorthWestern numerous times informally via telephone. Those efforts were no more  
23 successful than the written attempts. These telephonic efforts were carried out in the  
24 period between June of 2010 and February 2011, when Oak Tree unsuccessfully  
25 sought to engage NorthWestern in negotiations.

26  
27 Q. Mr. LaFave states on p. 8, lines 14-21 of his testimony that "... requests for additional  
28 information and possible intent were communicated in the letters, but there were no  
29 discussions to help each party to understand positions, contract terms, feasibility,  
30 energy and capacity need, project viability, environmental and wildlife studies,  
31 company viability, Midwest Reliability Organization (MRO) process certifications,  
32 wind technology verifications, historical wind data, or WAPA connection  
33 requirements. In 2011, Oak Tree offered a one-sided agreement to NorthWestern—  
34 without any discussions and at a price significantly above NorthWestern's calculated  
35 incremental costs." Is Mr. LaFave accurately describing Oak Tree's willingness to  
36 communicate?

37  
38 A. No. In fact, the first letter sent by our counsel to NorthWestern on July 2, 2010  
39 (attached hereto as "Exhibit 2") specifically stated:

1  
2 If there are assumptions or errors in the attached spreadsheet that you  
3 can correct, or additional information that would correct Oak Tree's  
4 impression that NWE has significant needs for energy and capacity in  
5 South Dakota over the next 10 years, please let us know. For example,  
6 if the information that is required to be made public by 18 C.F.R., §  
7 292.302 would answer those questions, we respectfully request that it,  
8 or any other relevant information that would further inform Oak Tree's  
9 decision, be provided. *Please let me know no later than Thursday, July*  
10 *8, 2010, if NWE is interested in further discussing Oak Tree's proposal*  
11 *or has additional information that would bear on Oak Tree's decision.*  
12 *(Emphasis added).*

13  
14 *Q. Did NorthWestern respond that it was interested in discussing the Oak Tree project*  
15 *further, or request additional information such as those items mentioned by Mr.*  
16 *LaFave in his testimony on p. 8, lines 14-21?*

17  
18 A. No. NorthWestern responded to our letter on July 6, 2010 in a letter by Pamela  
19 Bonrud of NorthWestern (attached hereto as "Exhibit 3") as follows:

20  
21 As we previously discussed, NorthWestern's South Dakota electric  
22 system is different than our electric system in Montana in that  
23 NorthWestern is a vertically integrated electric utility with its own  
24 electric generation in South Dakota. NorthWestern does not have the  
25 need for additional base load generation at this time. We have enough  
26 baseload generation to meet current demand and are currently selling  
27 any excess generation into the open market. This results in a significant  
28 impact on South Dakota electric rates and our avoided cost rate  
29 structure. Specifically, as allowed under CFR 292.304, a utility is  
30 allowed to reflect impacts to the utility if it must sell power from a QF  
31 to the wholesale market at a loss in its avoided cost rates.

32  
33  
34 *Q. Did NorthWestern send Oak Tree the information requested pursuant to 18 C.F.R. §*  
35 *292.302 as requested in Oak Tree's letter of July 2, 2010?*

36  
37 A. No. NorthWestern never sent that information at that time or at any other time prior to  
38 this proceeding. In fact, our counsel had to file a motion to compel so that our expert  
39 could have access to that information.

40  
41 *Q. How did you view NorthWestern's response in its July 6, 2010 letter?*  
42

1 A. We were still hoping to negotiate, but NorthWestern said they didn't have any need  
2 for capacity and that it was selling its excess generation into the open market.  
3 Moreover, Oak Tree understood that the avoided cost rate stated by NorthWestern for  
4 QF projects was a short term rate for \$20/MWH, and we believed Oak Tree was  
5 entitled to a long-term rate for its project.

6  
7 *Q. Then, to your mind, did NorthWestern respond to your request for additional*  
8 *information and offer to commence negotiations?*

9  
10 A. No. We did have a teleconference with NorthWestern on or about June 10, 2010, but  
11 during that telephonic meeting NorthWestern in essence simply repeated that it had no  
12 need for capacity and that our project was well above avoided cost.

13  
14 *Q. During that meeting did NorthWestern indicate a willingness to negotiate a power*  
15 *purchase agreement with Oak Tree?*

16  
17 A. No, not at that time or any other time.

18  
19 *Q. During that meeting, did NorthWestern request information regarding the items that*  
20 *Mr. LaFave identifies on lines 14-21 or request information regarding those items?*

21  
22 A. No. Not at that time or any other time. If NorthWestern had asked, we would have  
23 been happy to provide that information since we always wanted to negotiate an  
24 agreement. Litigation was always viewed as a last resort. If NorthWestern needed  
25 additional information all it had to do was ask.

26  
27 *Q. What happened next?*

28  
29 A. We directed our counsel to follow up and indicate a willingness to continue  
30 discussions.

31  
32 *Q. Did that communication take place?*

33  
34 A. Yes. Our counsel sent another letter on July 13, 2010 (attached hereto as "Exhibit 4")  
35 in response to a communication by Mr. LaFave that NorthWestern needed three weeks  
36 from July 2, 2010 to respond to our counsel's prior letter. That letter states:

37

1           Although three weeks seems like a substantial amount of time to  
2           respond to the question of whether NorthWestern is willing to negotiate  
3           a power purchase agreement with Oak Tree Energy, in the interest of  
4           cooperation Oak Tree Energy is willing to wait until July 23, 2010 to  
5           get NorthWestern's definitive answer to that question.  
6

7           That said, as NorthWestern is aware timing is important to the success  
8           of any generation venture. In this case, Oak Tree Energy is attempting  
9           to secure federal benefits that may not be available if discussions  
10          cannot be commenced within a reasonable time frame. Thus, time is of  
11          the essence.  
12

13       *Q.     What was Mr. LaFave's response?*  
14

15       A.     Nothing new. His July 15, 2010 letter (attached hereto as "Exhibit 5") said that  
16          NorthWestern had no need for additional capacity and that our project was above  
17          avoided costs. Mr. LaFave reiterated that NorthWestern had a short-term rate of  
18          \$20/MWH and we felt we had a right and a need for a long-term avoided cost rate in  
19          order to finance our project. In fact, much of Mr. LaFave's letter simply duplicated  
20          the language of Ms. Bonrud's communication of July 6:  
21

22               NorthWestern has enough baseload generation to meet current energy  
23               needs and is currently selling excess generation into the wholesale open  
24               market. To purchase power at costs above our avoided cost and at  
25               times when not needed or when less expensive resources are available  
26               would have a significant impact on South Dakota utility rates and our  
27               avoided cost rate structure. Specifically, as allowed under CFR  
28               292.304, a utility is allowed to reflect impacts to the utility if it must  
29               sell power from a QF to the wholesale market at a loss in its avoided  
30               cost rates.  
31

32       *Q.     Did NorthWestern offer to negotiate?*  
33

34       A.     No. Not then and not ever. The letter did state "[t]he filed avoided cost rate  
35          mentioned above is the allowable rate for Qualifying Facilities. NorthWestern  
36          would be interested in any discussions that would add cost effective renewable  
37          resources to our portfolio that would maintain or reduce the costs to our  
38          customers." Again, NorthWestern's filed avoided cost rate referred to by Mr.  
39          LaFave was a short-term rate of \$20/MWH. We believe that Oak Tree has a

1 right to a long-term rate. We obviously could not obtain financing with a  
2 short-term rate.

3  
4 *Q. Why wasn't NorthWestern's statement an offer to negotiate?*

5  
6 A. Because all NorthWestern said is that Oak Tree can only have this short-term  
7 rate (approximately \$20 dollars per MWH) and that's what you can get.  
8 That's not a negotiation, that's a proclamation.

9  
10 *Q. If NorthWestern had said we are willing to negotiate above the \$20/MWH*  
11 *avoided cost proclaimed by Mr. LaFave would you have met with them to*  
12 *discuss that possibility?*

13  
14 A. Of course. We have no interest in litigation with NorthWestern. We were  
15 always willing and ready to meet with NorthWestern. We just want to be able  
16 to finish our project and sell its wind power at a fair market rate that makes the  
17 project financially viable.

18  
19 *Q. What steps did Oak Tree take next to attempt to obtain a PPA from*  
20 *NorthWestern?*

21  
22 A. After reviewing NorthWestern's letter of July 15 (received by us on July 22,  
23 2010), and after our expert and attorney had the opportunity to review the  
24 letter and the links provided by NorthWestern, we directed our attorney to ask  
25 further questions of NorthWestern. We were not attempting to cause any  
26 problems for NorthWestern, we just needed answers to our questions regarding  
27 NorthWestern's resource acquisition plans, its longer run avoided cost, and its  
28 intent to comply with South Dakota's renewable resource objective.  
29 However, we continued to be willing to discuss these matters further with  
30 NorthWestern and had no intent to commence any litigation. To that end, our  
31 counsel wrote on July 22, 2010 (attached hereto as "Exhibit 6"):

32  
33 Oak Tree finds itself under something of a time constraint in resolving  
34 the issue of potential markets for generation. Please respond to these  
35 questions by Friday, July 30, 2010, so Oak Tree can reach resolution  
36 regarding where to sell its output. We apologize for the short time  
37 frame and do not wish to visit any hardship on NWE. However, Oak

1 Tree needs answers as soon as possible. Oak Tree again wishes to  
2 thank NWE for its cooperation in assisting Oak Tree to better  
3 understand the potential market for Oak Tree's planned generation. If  
4 you have any questions or concerns, please do not hesitate to contact  
5 me. I would be happy to speak with you.  
6

7 *Q. What was NorthWestern's response? Did it contact Oak Tree or its counsel*  
8 *and attempt to set up a meeting to negotiate?*  
9

10 A. Mr. LaFave responded in a July 30, 2010 letter (attached hereto as "Exhibit  
11 7"), which essentially reiterated its prior position that NorthWestern had a  
12 \$20/MWH short-term avoided cost and did not provide any long term avoided  
13 cost information. In particular, NorthWestern did not fully answer the  
14 questions posed by Oak Tree in this letter. Again, NorthWestern did not  
15 respond to our offer to talk further so that Oak Tree might respond to any  
16 questions NorthWestern might have regarding our project.  
17

18 *Q. What happened next?*  
19

20 A. We attempted to evaluate whether it made sense to continue to try and get  
21 information from NorthWestern or sell our power elsewhere for several  
22 months. In the meantime, we attempted to shore up our interconnection with  
23 NorthWestern and were waiting for that process to get sorted out. The last  
24 thing we wanted was to litigate against NorthWestern, and so we wanted to  
25 make sure we explored all available options. Ultimately, we found there was  
26 no viable alternative.  
27

28 *Q. When did Oak Tree finally resolve that it needed to sell its output to*  
29 *NorthWestern?*  
30

31 A. After the 2010 holiday season and after we had secured our interconnection  
32 process with NorthWestern, we attempted to informally contact NorthWestern  
33 about negotiating a power purchase agreement. We also authorized our  
34 expert to prepare an avoided cost forecast for a 20-year PPA commencing by  
35 the end of 2011. We, thereafter, authorized our counsel to send another letter

1 to NorthWestern on January 25, 2011 (attached hereto as "Exhibit 8"), which  
2 stated in full:

3  
4 Dear Mr. LaFave:

5  
6 Oak Tree Energy, LLC hereby offers to sell 19.5 MW of energy and  
7 capacity to NorthWestern Energy's existing 69 kV substation at Clark  
8 Junction, South Dakota. Oak Tree is offering to sell power to NWE at  
9 \$0.5440 per KWH (or \$54.40 per MWH) for 20 years with an annual  
10 escalator of 2.5 percent. All renewable energy credits or other  
11 environmental attributes will be transferred to NWE as part of this  
12 transaction. Enclosed is a proposed power purchase agreement to  
13 effectuate the transaction if NWE deems this offer acceptable.  
14

15 Let us know if this offer is acceptable to NWE. Oak Tree believes it is  
16 a fair offer that will allow the Oak Tree project to succeed financially  
17 while being at NWE's avoided cost. We believe NWE and its  
18 ratepayers would benefit as well. We respectfully request a response  
19 no later than Wednesday, February 2, 2011. Thank you for your  
20 attention to this matter.  
21

22 *Q. How did NWE respond to your offer?*

23  
24 A. Mr. LaFave responded by letter on February 2, 2011 (attached hereto as  
25 "Exhibit 9"). NorthWestern essentially repeated what it had told us earlier  
26 with no new information. NorthWestern reiterated its position that it had a  
27 \$20/MWH short-term avoided cost and made no attempt to provide  
28 information regarding NorthWestern's long-term avoided cost. Specifically,  
29 Mr. LaFave said:

30  
31 NorthWestern has enough baseload generation to meet current annual  
32 energy needs and is currently selling any excess generation into the  
33 wholesale open market. To purchase power at costs greater than our  
34 avoided cost and at times when not needed or when less expensive  
35 resources are available would have a significant impact on South  
36 Dakota electric rates and our avoided cost structure. Specifically, as  
37 allowed under CFR 292.304, a utility is allowed to reflect impacts to  
38 the utility if it must sell power from a QF to the wholesale market at a  
39 loss in its avoided cost rates.  
40

41 *Q. In Oak Tree's view, how had NWE's position evolved since its initial responses seven*  
42 *months before?*

1  
2 A. There was no change. As you can see, this is almost the identical, what I  
3 would consider, boilerplate language from NorthWestern's letters of July 2,  
4 2010 and July 15, 2010. Again, mostly an assertion without any evidence that  
5 Oak Tree's proposal was significantly above NorthWestern's avoided costs.

6  
7 *Q. Did NorthWestern respond to the proposed PPA or offer to negotiate further?*

8  
9 A. No. NorthWestern said in response:

10  
11 NorthWestern appreciates your interest in developing renewable energy  
12 in South Dakota. The filed avoided cost rate mentioned above is the  
13 allowable rate for Qualifying Facilities. NorthWestern would be  
14 interested in any discussions that would add renewable resources to our  
15 portfolio that are priced at or below the established avoided cost but  
16 also monetarily recognizing current status of the energy and capacity  
17 requirements of the portfolio. Your offer does not meet these criteria,  
18 and NWE, via this response, rejects your offer.

19  
20 *Q. What did you take NorthWestern's response to mean?*

21  
22 A. NorthWestern had consistently taken the position that it did not agree with our  
23 position on its avoided costs and that it was not interested in negotiating further.  
24 NorthWestern reiterated that it had no interest in our project and would not cooperate  
25 with negotiations or engaging in a frank exchange of ideas. However, we could not  
26 accept NorthWestern's short-term rate and believed we were entitled to a long-term  
27 avoided cost rate.

28  
29 *Q. Did NorthWestern respond in any fashion to your proposed power purchase  
30 agreement?*

31  
32 A. No.

33  
34 *Q. If NorthWestern had offered to meet or asked questions or sent an alternative  
35 proposed power purchase agreement, what would you have done?*

36  
37 A. We would have immediately responded with whatever information NorthWestern  
38 wanted. If NorthWestern had commented or sent a different proposed PPA, we would  
39 have evaluated that and marked it up and sent it back to NorthWestern. More  
40 importantly, we would have taken it as a sign that NorthWestern was willing to

1 negotiate in good faith. This is something we feel never happened throughout this  
2 process. Had NorthWestern ever indicated a willingness to talk further, we would  
3 have done everything we could to reach a negotiated agreement, but it was obvious to  
4 us that NorthWestern had no interest in good faith discussions regarding the Oak Tree  
5 project.

6  
7 *Q. So how did Oak Tree view NorthWestern's February 2, 2011 letter?*

8  
9 A. Oak Tree viewed this as NorthWestern intransigently saying "no" to our offer without  
10 any real attempt to discuss or negotiate. In point of fact, we felt that NorthWestern  
11 was telling us to go away.

12  
13 *Q. What steps did you take next to secure a power purchase agreement from*  
14 *NorthWestern?*

15  
16 A. We took further steps to confirm that NorthWestern was the only viable  
17 market for the output from Oak Tree. Our expert confirmed that it was. Then  
18 we authorized our attorney to send a letter informing NorthWestern that due to  
19 NorthWestern's refusal to negotiate or exchange information about the Oak  
20 Tree project, that we were binding ourselves to sell our output to  
21 NorthWestern and, thus, creating a Legally Enforceable Obligation (LEO).  
22 That letter was sent on February 25, 2011 (attached hereto as "Exhibit 10").

23  
24 *Q. What did that letter say?*

25  
26 A. The letter stated:

27  
28 Accordingly, this letter serves as notice to NWE of the establishment of  
29 a legally enforceable obligation (the "LEO") for the delivery of energy  
30 and capacity by Oak Tree to NWE, pursuant to which Oak Tree will  
31 deliver all of its electric energy (other than station service) and capacity  
32 for sale to and purchase by NWE in accordance with the terms of the  
33 attached PPA signed by Leonard "Bill" Makens, Oak Tree's President  
34 and Chief Executive Officer.

35  
36 Pursuant to 18 C.F.R. § 292.304(d), Oak Tree hereby exercises its  
37 option to provide energy and capacity pursuant to an LEO over a  
38 specified term commencing with the initial delivery of energy  
39 (including test energy) to NWE from the Project, with an expected

1 commercial operation date of May 15, 2012 and ending 20 years later  
2 (the "specified term.")  
3

4 *Q. Did the letter say anything else?*

5  
6 A. Yes, it attached an analysis of both spot market prices for a 20-year term in  
7 order to calculate an avoided cost for NorthWestern, and another based on  
8 NorthWestern building, owning and operating its own wind project over a 20-  
9 year term. The first option was a "brown power" option as it did not assume  
10 the acquisition of renewable resources, and the second was a "green power"  
11 calculation that assumed NorthWestern would build, own and operate a  
12 renewable resource. Black and Veatch's forecast for "brown power" over a  
13 20-year term was \$78.92/MWH and \$70.81/MWH for green power over the  
14 same term (assuming a 44.8 % net capacity factor). However, Oak Tree's  
15 proposed sale price to NorthWestern was far below Black and Veatch's  
16 forecast for both "brown power" and "green power" at a levelized cost of  
17 \$65.12/MWH.

18  
19 *Q. Was this a "take it or leave it" offer by Oak Tree to NorthWestern?*

20  
21 A. No. As I have said, we had no interest in having to litigate these issues with  
22 NorthWestern. We have always been willing to negotiate in good faith. The  
23 letter concluded:

24  
25 Oak Tree formally requests a response to this letter by March 1, 2011  
26 on whether NWE intends to accept Oak Tree's offer or whether NWE  
27 intends to negotiate with Oak Tree to produce a mutually satisfactory  
28 arrangement for both parties. If NWE does not wish to either accept  
29 the offer or negotiate further, please so indicate. If this is the case,  
30 please be advised that, regrettably, Oak Tree will have no choice but to  
31 submit this dispute to the South Dakota Public Utilities Commission.  
32 Thank you for your attention to this matter.  
33

34 *Q. How did NorthWestern respond to this LEO letter of February 25, 2011?*

35  
36 A. With a letter of March 10, 2011 (attached hereto as "Exhibit 11") that simply  
37 repeated the same responses that NorthWestern had previously offered. This

1 letter included essentially the same boilerplate type language as in all other  
2 NorthWestern prior communications, for example:

3  
4 NorthWestern has enough baseload generation to meet current annual  
5 energy needs and is currently selling excess generation into the  
6 wholesale open market. To purchase power at costs above our avoided  
7 cost, particularly at times when not needed or when less expensive  
8 resources are available, would have a significant adverse impact on  
9 South Dakota electric rates and ultimately NorthWestern's South  
10 Dakota ratepayers. In addition, as allowed under CFR 292.304, a  
11 utility is allowed to reflect impacts to the utility if it must sell power  
12 from a QF to the wholesale market at a loss in its avoided cost rates.  
13

14 And the following reiteration of earlier language:

15  
16 NorthWestern appreciates your interest in renewable energy in South  
17 Dakota. The filed avoided cost rate mentioned above is the allowable  
18 rate for Qualifying Facilities. NorthWestern would be interested in any  
19 discussions that would add cost effective renewable resources to our  
20 portfolio that would maintain or reduce the costs to our customers.  
21 Thank you for your inquiry.  
22

23 *Q. How did Oak Tree view NorthWestern's letter of March 10, 2011?*

24  
25 A. NorthWestern was repeating it had a short-term avoided cost of \$20/MWH and  
26 it was not interested in discussing the Oak Tree project. NorthWestern instead  
27 simply repeated its rejection on the grounds our project was above its avoided  
28 costs. NorthWestern was telling us nothing other than "go away" given its  
29 constant reiteration of the very same position that never changed no matter  
30 what we said or did. Also, NorthWestern had not responded at all with any  
31 requests for further information or even commented on our project, nor had it  
32 offered a different power purchase agreement. We felt NorthWestern had left  
33 us no choice but to come to the PUC to litigate our right to a long-term  
34 avoided cost rate for our project instead of the \$20/MWH short-term avoided  
35 cost rate provided by NorthWestern. Ultimately, to move the Oak Tree  
36 project forward, we felt we had no choice but to file our complaint with the  
37 PUC.

38  
39 *Q. Did you decide to file at that time?*

1  
2 A. No. In a last gasp effort to prod NorthWestern into negotiations, we  
3 authorized our counsel to send yet another letter to NorthWestern telling it that  
4 if we did not hear from NorthWestern that it would either accept Oak Tree's  
5 offer, or that NorthWestern intended to negotiate in good faith, Oak Tree  
6 would have no choice but to file a complaint with the South Dakota PUC.  
7 That letter was sent on March 18, 2011 (attached hereto as "Exhibit 12").

8  
9 *Q. How did NorthWestern respond?*

10  
11 A. With more boilerplate type language in a letter of March 24, 2011 (attached  
12 hereto as "Exhibit 13"), including the following phrase it had repeated  
13 numerous times in prior letters:

14  
15 NorthWestern appreciates your interest in renewable energy in South  
16 Dakota and would like to discuss any opportunities that provide  
17 renewable resources and will not adversely affect South Dakota rate  
18 payers. The avoided cost rate filed with the South Dakota PUC is the  
19 allowable rate for Qualifying Facilities for South Dakota operations.  
20 NorthWestern is interested in any discussions that will add cost  
21 effective renewable resources to our portfolio and would maintain or  
22 reduce the costs to our customers. Thank you for your inquiry.

23  
24 The avoided cost rate referred to herein by NorthWestern was the  
25 aforementioned \$20/MWH short-term avoided cost. No long term avoided  
26 cost was proposed nor was any information regarding a longer-term rate  
27 provided to Oak Tree.

28  
29 *Q. Did NorthWestern offer to meet at this time or any other time to discuss its*  
30 *avoided cost structure, resource plans, project specifics, power purchase*  
31 *agreement or anything else about the project?*

32  
33 A. No.

34  
35 *Q. How did Oak Tree view NorthWestern's last communication?*

36  
37 A. As a response that said, in essence: "Go ahead and file a complaint with the  
38 PUC, but we aren't meeting with you and we aren't going to voluntarily enter  
39 into a PPA with you." At this point, we were simply left with no choice but to

1 go to the South Dakota PUC. We needed a long-term avoided cost rate to  
2 finance our project, and NorthWestern had every opportunity to meet with us  
3 and provide that information and decided not to do so. Although we were  
4 hoping to avoid litigation, we felt we had no choice. We held off taking this  
5 action as long as possible, but with the federal tax incentives expiring in 2011  
6 and the end of 2012, we felt we had to file our complaint in order to preserve  
7 the benefits of those tax incentives.

8  
9 *Q. Mr. LaFave states or implies on page 6 that it is Oak Tree's fault that there*  
10 *were no negotiations. Do you agree with this?*

11  
12 A. No. This is ridiculous. We did everything we could to negotiate an  
13 agreement with NorthWestern. Over the course of almost a year, we attempted  
14 through letters and informal communications to engage NorthWestern to talk  
15 about our project. NorthWestern is simply shifting the blame for its own  
16 unwillingness to negotiate. We have every reason to avoid litigation and  
17 every reason to work towards an agreement informally. Mr. LaFave's  
18 statement is not credible.

19  
20 *Q. In Oak Tree's view, did NorthWestern ever attempt to negotiate in good faith*  
21 *with Oak Tree?*

22  
23 A. No, never. All NorthWestern ever did is repeatedly state that it had no need for  
24 capacity, that our project was too expensive, and offer a \$20/MWH short-term  
25 rate that NorthWestern surely knew would not result in the Oak Tree project  
26 being built and operated. The project could not be financed utilizing that rate.  
27 Up until the time Oak Tree filed the complaint, we were hoping to meet with  
28 NorthWestern to explain why we thought NorthWestern's position was  
29 unlawful and unfair; but, apparently, NorthWestern wanted no such meeting or  
30 candid exchange of ideas. We had to file our complaint at the time we did in  
31 order for Oak Tree to attempt to preserve its ability to obtain the federal tax  
32 incentives. Now, NorthWestern is blaming us for its own unwillingness to  
33 communicate. That is simply wrong and makes no sense whatsoever.

34

1 **IV. THE OAK TREE PROJECT**

2  
3 *Q. Can you describe for the Commission the steps taken to ensure that Oak Tree will be*  
4 *able to deliver its power to NorthWestern pursuant to the LEO of February 25, 2011?*

5  
6 A. The Oak Tree project has several years of wind data, has had it analyzed by a power  
7 curve by a nationally respected analyst, and has secured all land rights for the project.  
8 Very little of it is leased and most of it is owned by the Makens family. The project  
9 has or will soon sign an interconnection agreement with NorthWestern which is a  
10 significant commitment of resources for Oak Tree. We have conducted environmental  
11 studies and retained experts to perform avian studies and these have found no impact.  
12 We have solid financial commitments from potential lenders provided we can obtain a  
13 PPA at the price set forth in Oak Tree's complaint. Oak Tree is fully committed to  
14 going forward with this project.

15  
16 *Q. Are you, pursuant to the February 25, 2011 letter, making a commitment to sell to*  
17 *NorthWestern at the rate of \$54.50 with an annual escalator of 2.5%?*

18  
19 A. Yes. Absolutely. We are committed to selling energy and capacity to NorthWestern  
20 at that rate.

21  
22 *Q. Are you concerned about NorthWestern's tactics in this case?*

23  
24 A. Yes. NorthWestern refused to meet with us, offered boilerplate answers to our  
25 inquiries and requests to meet, and is now blaming us. NorthWestern offered only a  
26 short-term avoided cost rate, stonewalled when we attempted to obtain longer-term  
27 avoided cost information (to the point we had to file a motion to compel in this  
28 proceeding to get the information that Oak Tree had every right to get), and generally  
29 failed to meaningfully cooperate with Oak Tree in almost every possible way.

30  
31 In the meantime, the online date in our specified term which was May 15,  
32 2012 will not be achievable, and we must meet a December 31, 2012 deadline to  
33 receive production tax credits. The SD PUC should not permit NorthWestern to  
34 derail QF projects in this manner.

1 Q. Does this conclude your testimony?

2

3 A. Yes.

4