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Attorneys for Oak Tree Energy, LLC

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

IN THE MATTER OF THE COMPLAINT
FILED BY OAK TREE ENERGY, LLC
AGAINST NORTHWESTERN
CORPORATION d/b/a NORTHWESTERN
ENERGY REGARDING THE OAK TREE
ENERGY, LLC WIND PROJECT

Docket No.: _____

COMPLAINT

I. INTRODUCTION

I. Oak Tree Energy, LLC ("Oak Tree") files this Complaint requesting the South Dakota Public Utilities Commission ("Commission") assert its jurisdiction and resolve a dispute between the Complainant and Respondent NorthWestern Corporation d/b/a NorthWestern Energy ("NWE") with respect to negotiation of a long term electric power purchase agreement. The electricity will be produced and sold pursuant to the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. § 824a-n (2003) ("PURPA") from a Qualified Facility (as defined in PURPA) with a design capacity greater than 100 kilowatts. The Oak Tree Energy project is located in Clark County, South Dakota.

II. COMPLAINANT AND RESPONDENT

2. Complainant's address is:

Oak Tree Energy, LLC
42563 168th Street
Clark, SD 57225-5814

3. Respondent's address is:

Service Address:

CT Corporation System
319 S. Coteau Street
Pierre, SD 57501-3108

Corporate Office:

NorthWestern Energy
3010 W. 69th Street
Sioux Falls, SD 57108

III. BACKGROUND FACTS

4. Oak Tree is an independent wind power developer active in Clark County, South Dakota. Oak Tree's existing project is located in Clark County, South Dakota. This project is known as the Oak Tree Project ("Project"). The Project will have an initial installed nameplate electrical generating capacity of 19.5 megawatts. The Project could begin to produce test energy as early as July 1, 2012. Oak Tree intends to own and operate the Project.

5. The legal description of this property is as follows:

NW¼, NE¼SW¼ of Section 16, Township 117 N, Range 57 W
NE¼, N½NW¼, N½SE¼ of Section 17, Township 117 N, Range 57 W
E½ of Section 18, Township 117 N, Range 57 W
NE¼, NW¼, SW¼ of Section 19, Township 117 N, Range 57 W
SW¼ of Section 20, Township 117 N, Range 57 W
SW¼ of Section 29, Township 117 N, Range 57 W
SW¼ of Section 30, Township 117 N, Range 57 W

NE¼, NW¼, SE¼ of Section 30, Township 117 N, Range 57 W
NE ¼ of Section 25, Township 117 N, Range 58 W

Oak Tree has secured the contract and real property rights needed to build and operate the Project from the landowners at the site. These rights typically run for a period of 20 years.

6. The Project is located within NWE's service territory. NWE is an electric utility within the meaning of and subject to PURPA and its implementation of federal and state regulations.

7. The Project is a Qualified Facility ("QF") under PURPA. A copy of the document qualifying the Project as a QF pursuant to 18 C.F.R. §292.207 is attached to this Complaint and incorporated by reference herein for all purposes. *See, Exhibit 1.* Oak Tree previously provided copies of this document to this Commission and to NWE pursuant to part (ii) of this regulation.

IV. REGULATORY BACKGROUND

8. Section 210(a) of PURPA requires NWE to purchase electricity from QFs, like the Project, located in their service territory. *See, 16 U.S.C. §824a-3.*

9. The price NWE must pay for electricity delivered from a QF is not to exceed the "incremental cost to the electric utility of alternative electric energy." *Id.* The FERC regulations implementing Section 210(a) of PURPA refer to this rate as the "avoided cost." *See generally, 18 C.F.R. §292.101(b)(6); 18 C.F.R. §292.304.*

10. Avoided costs are to be determined based on a number of factors set forth in 18 C.F.R. §292.304(e). Avoided cost generally includes two components: (1) avoided energy cost, which represents the variable costs associated with the production of electric energy including operating and maintenance expenses that are saved by the electric utility because of deliveries from a QF ("Avoided Energy Costs"); and (2) avoided capacity cost, which represents,

primarily, the capital costs saved by an electric utility because new plants or existing plant improvements become unnecessary as a result of deliveries from a QF (“Avoided Capacity Costs”).

11. The Commission, pursuant to its delegated authority under Section 210(f) of PURPA, issued a decision and order on December 11, 1982 in which it made certain findings and conclusions relative to avoided cost. See, *In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Power Production*, No. F-3365 (South Dakota Public Utilities Commission Dec. 11, 1982)(“Commission PURPA Order”).

12. In the Commission PURPA Order, the Commission found that “long term contracts” (defined as greater than ten years in duration) from QFs with a design capacity greater than 100 kilowatts “should be set by contract negotiated between the QF and the electric utility.” *Id.* at 11. The Commission further found that its own role in these negotiations was to assist in “resolving any disputes which arise between the parties.” *Id.*

V. HISTORY OF CONTRACT NEGOTIATIONS

13. Oak Tree has attempted for almost a year to engage NWE in contract discussions. Oak Tree and NWE exchanged several letters regarding Oak Tree’s need for a power purchase agreement (“PPA”) to sell its output to NWE as a QF. The letters between Oak Tree and NWE confirming this course of communications are attached to this complaint. See, **Exhibits 2-through 9**, inclusive. The latest effort was on February 25, 2011, when Oak Tree offered to sell 19.5 MW of power generated by the Project to NWE at the 69 kV Clark Junction substation. See, **Exhibit 10**. Oak Tree’s February 25, 2011 letter explained to NWE the methodology by which Oak Tree’s expert, J. Richard Lauckhart, calculated NWE’s avoided cost and reiterated

Oak Tree's offer to sell the output at \$54.40 with an annual escalator of 2.5 %. The letter further explained that this is substantially below NWE's actual avoided cost, producing a levelized rate of \$65/MWH over the 20 year term of the proposed PPA. For the Commission's edification, J. Richard Lauckhart's Affidavit explaining these calculations is attached. *See, Exhibit 11.* Oak Tree's February 25, 2011 letter stated that Oak Tree believed it had done everything in its power to create a legally enforceable obligation ("LEO") and that NWE had an obligation to buy output from the Project. Accompanying Oak Tree's February 25, 2011 letter to NWE was a proposed PPA signed by Oak Tree containing terms and conditions by which Oak Tree would consider itself bound if NWE agreed to execute the PPA. Oak Tree's February 25, 2011 letter further invited NWE to negotiate, but informed NWE that NWE's unwillingness to negotiate, Oak Tree would be forced to submit this dispute to the Commission for resolution.

14. On March 10, 2011, NWE rejected Oak Tree's offer by letter and declined further negotiations. *See, Exhibit 12.* Thus far, NWE's response is generally that it has no need for additional capacity at this time. Furthermore, NWE intimated that it does not intend to enter into any contracts with renewable energy generators at present, unless the renewable energy can be purchased at a rate which Oak Tree believes is substantially below NWE's long-term actual avoided costs.

15. As the Commission can see from the correspondence attached hereto, Oak Tree has done everything in its power to negotiate an agreement with NWE. NWE has refused to negotiate beyond its position that it has no need for additional capacity or energy from the Project; thus they are not interested in entering into a PPA with Oak Tree. Oak Tree has no choice but to submit this dispute to the Commission for resolution.

VI. RELIEF REQUESTED

Based on the foregoing, Oak Tree requests that the Commission grant the following relief:

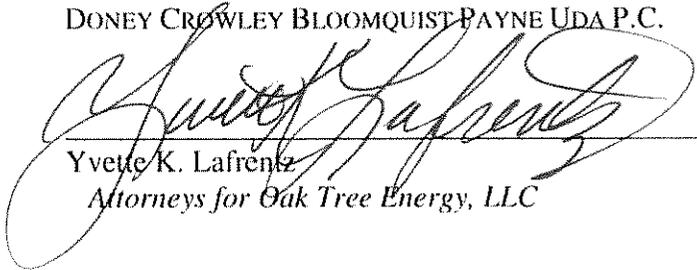
16. Hold a hearing, on an expedited basis, to consider the proposed PPA, the avoided cost criteria set forth in this Complaint and, according to the Commission's PURPA Order, determine the avoided costs over the 20 year life of the Project that NWE must pay Oak Tree for electricity generated from the Project.

17. Grant Oak Tree such other relief as is necessary for Oak Tree to obtain a Power Purchase Agreement with NWE for electricity produced from the Project on terms acceptable to Oak Tree and NWE, but in all events consistent with the requirements of PURPA and the Commission's PURPA Order.

18. Award attorney fees and costs to Oak Tree for NWE's failure to fulfill its duties under PURPA and the Commission's PURPA order.

RESPECTFULLY SUBMITTED this 27th day of April, 2011.

DONEY CROWLEY BLOOMQUIST PAYNE UDA P.C.


Yvette K. Lafrenz
Attorneys for Oak Tree Energy, LLC

CERTIFICATE OF SERVICE

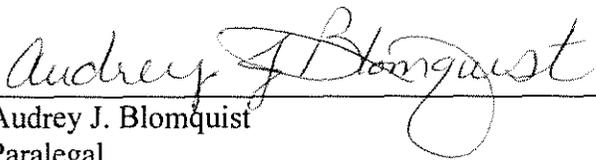
This is to certify that on the 28th day of April, 2011, a copy of this document was forwarded to the Respondent NorthWestern Corporation d/b/a NorthWestern Energy at the following address(es) by United States certified mail, return receipt requested, in accordance with South Dakota Codified Law:

CT Corporation System
319 S. Coteau Street
Pierre, SD 57501-3108

NorthWestern Corporation d/b/a NorthWestern Energy
3010 W. 69th Street
Sioux Falls, SD 57108

The foregoing was e-filed and the original was sent via regular U.S. mail to the following:

South Dakota Public Utilities Commission
Capitol Building, 1st floor
500 E. Capitol Ave.
Pierre, SD 57501-5070



Audrey J. Blomquist
Paralegal