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*Attorneys for Oak Tree Energy, LLC*

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

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<b>IN THE MATTER OF The Complaint By Oak Tree Energy LLC Against NorthWestern Energy For Refusing To Enter Into A Purchase Power Agreement</b>	<b>DOCKET NO. EL11-006  OAK TREE ENERGY, LLC'S MOTION TO COMPEL</b>
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**OAK TREE ENERGY, LLC'S  
MOTION TO COMPEL**

Pursuant to Section 20:10:01:22.01 of the South Dakota Public Utilities Commission (PUC) Administrative Rules, Oak Tree Energy, LLC (Oak Tree) moves for an order to compel against NorthWestern Energy (NWE) to respond to certain Interrogatories and Requests for Production served on or around July 15, 2011. The specific requests are Request for Production No. 1, Request for Production No. 14, Interrogatory No. 10 and Request for Production No. 22, Request for Production No. 23, and Request for Production No. 24, each discussed separately below. At the outset, Oak Tree wishes to emphasize that it has attempted informally to resolve this discovery dispute with NWE to no avail.

1. Request for Production No. 1 states as follows:

*Please provide copies of the confidential material filed with the S.D. Public Utilities Commission as a part of the June 29, 2010 Small Qualifying Facility Rider Updates.*

NWE's response was:

*NorthWestern Energy objects to Request for Production No. 1 on the grounds that it seeks to circumvent the South Dakota Public Utilities Commission's administrative rules regarding access to confidential information. ARSD 20:10:01:43 provides:*

*Requests for access to confidential information shall be handled as follows:*

- (1) The request shall be filed with the commission's executive director;*
- (2) After a request for access to confidential information has been made, the commission may establish a procedural schedule for the purposes of determining confidentiality;*
- (3) The commission shall issue a protective order for information that it determines to be confidential. The protective order may contain procedures for handling the information and for controlling access to it for hearing purposes. Any information subject to a protective order is treated as confidential;*
- (4) Upon a determination that the information is not confidential, the information shall be afforded confidential treatment for an additional period of ten days or for a longer period as ordered by the commission to give the party asserting confidentiality an opportunity to seek review by the court; and*
- (5) If the commission has made a prior ruling that the information is confidential, the commission may take notice of the prior ruling. The commission shall consider whether or not the circumstances of the request are the same as in the prior ruling in determining what weight, if any, should be given to the prior ruling.*

*NorthWestern will provide this information in compliance with the Commission's rules and a Commission order.*

Oak Tree maintains that this response is not responsive as it misapplies the administrative rule cited. ARSD 20:10:01:43 does not apply to requests for confidential information between two parties currently involved in a matter before the PUC. Rather, ARSD 20:10:01:43 pertains to information, which is deemed confidential, filed with the PUC

that another party wishes to be made public. Oak Tree has no interest, at this time, in making this information public.

Oak Tree requests the information to assist in the resolution of the current matter. Oak Tree understands the need to protect confidential information; however, NWE has filed information with the SD PUC which may be helpful in resolving this matter. Therefore, Oak Tree proposes that the information be released between the parties pursuant to a Confidentiality Agreement; as opposed to making the information available to the public as a whole. This information should be produced because it is relevant and necessary to the appropriate resolution of this proceeding, if necessary through a protective order to the extent confidential information is contained therein. The PUC should grant Oak Tree's motion to compel NWE's answer to Oak Tree Request for Production No. 1.

2. Request for Production No. 14 states as follows:

*For the Calendar years 2009, 2010, and year to date 2011, please provide any documents that indicate an hourly amount from each of the contracted firm power supplies that have been contracted for by NorthWestern as listed in response to Request for Production No. 10.*

NWE's response was:

*See documents produced in response to Request for Production No. 10.*

Again, Oak Tree considers the response given by NWE nonresponsive to the call of the question. Whether NWE was not clear on the call of the question is uncertain, but several attempts by Oak Tree obtain this information informally from NWE without a motion to compel have proven unsuccessful. The information provided in Request for Production No. 10 is related to the capacity, or maximum hourly amounts available. Oak Tree, however, requests that information be provided as to the amount *actually* scheduled on each hour, not the amount that is *available* to be *scheduled*. This information will permit Oak Tree to determine NWE's need for capacity and energy in its South Dakota service territory, and NWE should be required to produce this information. Thus, the PUC should grant Oak

Tree's motion to compel and require NWE to produce the documents requested by Oak Tree Request for Production No. 14.

3. Interrogatory No. 10 and Request for Production No. 22 states as follows:

*Please identify, with specificity, NorthWestern's avoided cost for its South Dakota utility over a 5 year period, a 10 year period, and a 20 year period. Please explain in detail your calculations and provide any workpapers not provided pursuant to a previous request for production.*

NWE's response was:

*NorthWestern Energy objects to this request as overbroad and unduly burdensome. Without waving said objection NorthWestern states that it is compiling data responsive to this request and will supplement its discovery responses.*

Oak Tree has not yet seen any response to this request. Again, informal attempts by Oak Tree to obtain an answer to Oak Tree Interrogatory No. 10 and Request for Production No. 22 have proven unavailing. The PUC should grant Oak Tree's motion to compel NWE to provide answers to Oak Tree Interrogatory No. 10 and Request for Production No. 22.

4. Request for Production No. 23 states as follows:

*Please provided copies of all contracts entered into by NorthWestern's South Dakota Utility with wind generators in the past three years.*

NWE's response was:

*NorthWestern Energy objects to this request as seeking information that is irrelevant and not likely to lead to the discovery of admissible evidence. NorthWestern Energy further objects to this request to the extent the responsive documents contain confidential or proprietary information.*

*NorthWestern Energy specifically objects to producing the Titan I Wind Project Purchase Power agreement dated December 9, 2008, between NorthWestern Corporation and Rolling Thunder I Power Partners, LLC, in accordance with the confidential provisions contained within the Purchase Power Agreement.*

Oak Tree considers this information highly relevant to resolving this matter. Oak Tree is asking the PUC to determine NWE's avoided cost over the 20 year life of the project. Information contained in any contracts entered into by NWE and other wind generators in the

past three years will likely contain information necessary to calculate avoided cost and to obtain a power purchase agreement between Oak Tree and NWE. Furthermore, NWE continues to maintain that it needs no additional energy or capacity over the next 20 years. The information obtained pursuant to this Request for Production is relevant to an inquiry into whether, in fact, NWE does need additional energy and capacity (and wind energy) over the life of the proposed Oak Tree project. In addition, existing contracts presently providing power to NWE are not typically considered confidential information since no potential bidder would gain any competitive advantage from review of already executed power purchase agreements. These contracts are, in real time, “stale” and cannot be used to “game” any future competitive solicitation held by NWE. Finally, the terms and conditions offered by NWE are highly relevant to the issue of what terms and conditions NWE may or should offer Oak Tree. These documents should all be produced, and the PUC should grant Oak Tree’s motion to compel the documents requested by Oak Tree Request for Production No. 23.

5. Request for Production No. 24 states as follows:

*To the extent not provided in response to a prior request, please provide the NorthWestern agreement with Titan Wind Project that currently sells output to NorthWestern in South Dakota.*

NWE’s response was:

*NorthWestern Energy objects to this request as the Titan I Wind Project Purchase Power Agreement date December 9, 2008 between NorthWestern Corporation and Rolling Thunder I Power Partners, LLC contains confidential provisions which prohibit its disclosure.*

Oak Tree believes that a review of the the Titan I Wind Project power purchase agreement is highly relevant to successful resolution of this matter. To the extent that the Agreement referenced in this request is not provided pursuant to Request for Production No. 23, this agreement will likely contain information beneficial to determining NWE’s avoided cost and determining issues such as NWE’s need for energy and capacity. It may also prove useful in establishing non-rate terms and conditions for the Oak Tree project. The terms of the Titan I Wind Project power purchase agreement should reflect the terms NWE is willing to offer other Qualifying Facilities; therefore, this would be relevant information in working toward an agreement between Oak Tree and NWE.

There is also no basis for assuming that confidential treatment of this document is necessary or proper. Generally, contracts of this vintage are not considered to contain confidential information. The contract is in place, not under negotiation, and any pricing information would be available through revenue requirements filings with the PUC. Oak Tree, however, understands that there may be some information that either party may still consider confidential; therefore, Oak Tree is willing to enter into a confidentiality agreement with NWE and, if necessary, Rolling Thunder I Power Partners, LLC. This presumes, of course, that NWE is willing to provide a form of confidentiality agreement, or is at least willing to discuss the matter of confidentiality further. As noted previously, Oak Tree's informal attempts to resolve the issues raised in this motion to compel have thus far proven unsuccessful.

For the reasons set forth above, Oak Tree respectfully requests the PUC grant Oak Tree's Motion to Compel by ordering NWE respond to the each of the above requests by providing the documentation requested or, in the alternative, order any relief the PUC deems appropriate. Oak Tree regrets that it has been unable to resolve this dispute informally, and only brings this motion to compel as a last resort.

Respectfully submitted this 7<sup>th</sup> day of September, 2011.



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## CERTIFICATE OF SERVICE

I hereby certify that ~~the~~ true and correct copy of the foregoing *Motion to Compel* was served electronically on this 17<sup>th</sup> day of September, 2011, upon the following:

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