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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** **OAK TREE ENERGY LLC'S POST SECOND HEARING OPENING BRIEF**

OAK TREE ENERGY, LLC'S SECOND POST HEARING OPENING BRIEF

I. INTRODUCTION

Oak Tree Energy, LLC (Oak Tree), by and through counsel and pursuant to the South Dakota Public Utility Commission's (Commission) procedural order of December 26, 2012, hereby submits its Second Post Hearing Opening Brief. The Commission has asked Oak Tree to submit a filing that: (1) summarizes the proposed changes to its avoided cost calculations for the Oak Tree project based on evidence adduced at the technical hearing conducted before the Commission on December 5-6, 2012; (2) a legal discussion of the lawfulness of establishing non-levelized energy avoided cost rates for Oak Tree as set forth in the testimony and exhibits submitted by Commission Staff witness Brian Rounds, as well as the lawfulness

of NorthWestern Energy's (NWE) proposal to adjust capacity payments to Oak Tree over the next 20 years each year, rather than projecting those capacity payments over the entire 20-year term of the proposed Oak Tree contract as proposed by Oak Tree.

II. OAK TREE'S SUMMARY OF ANALYSIS

Oak Tree believes that Mr. Lauckhart's additional testimony, submitted on November 21, 2012, provided a reasonable range of avoided cost calculations which the Commission could rely upon to establish a 20 year avoided cost for Oak Tree based on information known and available as of February 25, 2011.[1] *See* Oak Tree Exhibit 9, at pp. 15. This testimony established a range, utilizing resource acquisitions planned for by NWE in the relevant time period of February 25, 2011, and a variety of cases from both the Energy Information Administration's Annual Energy Outlook (EIA/AEO) 2010 forecasts or the 2011 EIA/AEO early release. Mr. Lauckhart prepared a table of those 10 cases, which indicated a range of avoided costs for NWE between $56 per megawatt hour (MWH) and $ 89/MWH. Mr. Lauckhart testified that he believed an average of those estimates was reasonable, and concluded that the average was approximately $69/MWH.

After reviewing the additional testimony of NWE and Commission Staff, and after a limited opportunity for informal discovery, Oak Tree witness Mr. Lauckhart submitted prefiled responsive testimony on the proper calculation of avoided costs on November 28, 2012. *See* Oak Tree Exhibit 10. Mr. Lauckhart testified that NWE's new approach to calculating avoided costs (which differed from its prior approach in its direct testimony), was seriously flawed. As is discussed in more detail below, *infra* at Section III, Mr. Lauckhart did not find NWE's method of calculating avoided costs reasonable or lawful. Apart from being highly discriminatory, Mr. Lauckhart found that NWE's calculation of avoided costs was based on a series of highly questionable assumptions. Mr. Lauckhart corrected NWE's erroneous assumptions and produced an avoided cost calculation of $59/MWH for 20 years.

Mr. Lauckhart testified that although Commission Staff witness Mr. Rounds' estimate of avoided energy costs was reasonable, his estimate of avoided capacity costs was not. Mr. Rounds' additional testimony provided an initial rate of $54.32/MWH beginning in 2013, or $55.78/MWH beginning in 2014. Mr. Rounds rolled his capacity payment, calculated by

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[1] This was the date upon which the Commission has found that Oak Tree incurred a legally enforceable obligation pursuant to 18 C.F.R. § 292.304.

utilizing a flat $20/kw year multiplied by 12.9% of name plate capacity, into the energy payment to Oak Tree.

Just prior to the second technical hearing in this matter, Mr. Rounds submitted an exhibit wherein he adjusted his capacity payment to be $20/kw year increasing annually by a 2.5 percent inflation factor. EL11-006 Dec. 2012 Hr'g Tr. 334:20-23.

[***Redacted for Public Version***]

Mr. Rounds also adjusted his avoided cost downward to reflect criticism by NWE that he had overstated NWE's loads in determining when NWE would be in the market purchasing power and when it would not. Mr. Rounds' adjustments lowered his estimated levelized avoided cost to $46.23/MWH, assuming production commenced in 2013. Staff Exhibit 6.

At hearing, Mr. Lauckhart made four adjustments to Mr. Rounds' spreadsheets to reflect what Mr. Lauckhart believed to be more reasonable assumptions. First, Mr. Lauckhart argued that it made little sense to exclude wholesale loads from the calculation of NWE's loads. Mr. Lauckhart pointed out that the relevant issue for purposes of calculating avoided costs is whether NWE will be backing down its coal plants in order to accommodate Oak Tree's generation, or whether NWE will just resell Oak Tree's generation into the market. EL11-006 Dec. 2012 Hr'g Tr. 338:3-339:2. NWE historically makes significant such sales, 220,000 MWHs in year 2010 alone. *See* Oak Tree Exhibit 18. Neither NWE nor Mr. Rounds included wholesale sales by NWE in their respective analyses, which Mr. Lauckhart points out systematically overstates the number of hours that NWE needs to back down its coal fired generation resources and thus inappropriately reduces the avoided costs to be paid to Oak Tree. EL11-006 Dec. 2012 Hr'g Tr. 338:2–339:2.

The second change that Mr. Lauckhart made is to reduce the 204 MW figure that Mr. Rounds used for NWE's baseload generation to 52 MW starting in 2016, which reflects what would happen if NWE were unable to continue to rely on both the Big Stone and Neal 4 facilities to serve its load as of 2016. EL11-006 Dec. 2012 Hr'g Tr. 340:14-18. Consistent with Mr. Lauckhart's assumption, Mr. Rounds admitted during cross examination that the environmental retrofit cost of Big Stone is still technically avoidable at this point in time. EL11-006 Dec. 2012 Hr'g Tr. 284:23-285:15. Further, as Mr. Lauckhart stated "as of

February 2011, people knew that Big Stone and Neal 4 had to be shut down by 2016 unless significant money was spent. There was no decision at that time to spend that significant money." EL11-006 Dec. 2012 Hr'g Tr. 229:19-23.

Third, Mr. Lauckhart adjusted NWE's cost of acquiring that capacity to $141/kw-year to reflect the costs of acquiring the Aberdeen plant and another similar gas-fired combustion turbine, a decision which was made by NWE in May 2008, several years before the Oak Tree LEO of February 25, 2011. Oak Tree Exhibit 2, p. 4, line 2, through p. 5, line 4. As of April 2011, NWE still had not made the decision to build the Aberdeen project and, therefore, it was still an avoidable resource as of February 25, 2011. Mr. Lauckhart felt $141/kw-year was a more appropriate number since it represents a long-term contract for capacity. EL11-006 Dec. 2012 Hr'g Tr. 334:24-335.

Fourth, Mr. Lauckhart adjusted Mr. Rounds' capacity contribution from 12.9 percent to 20 percent because, among other reasons, 20 percent is more consistent with the capacity contribution of Titan Wind in the first two years of that project. EL11-006 Dec. 2012 Hr'g Tr. 47:1-2. Mr. Lauckhart also rejected the 12.9 percent figure as unrepresentative of Oak Tree's capacity contribution because the 12.9 percent represents an average of projects throughout the Midwest Independent System Operator (MISO) footprint. EL11-006 Dec. 2012 Hr'g Tr. 58:1-10. As a result, Mr. Lauckhart testified that he believed 12.9 percent may dramatically understate the capacity contribution of Oak Tree, which is a newer project expected to have a relatively high capacity factor. Mr. Lauckhart testified he based his 20 percent calculation of capacity contribution to NWE's peak load on the Midwest Reliability Organization (MRO) recommendation of 20 percent capacity contribution for wind projects. EL 11-006 Dec. 2012 Hr'g Tr. 337:11-14. Bear in mind, NWE is part of MRO. EL11-006 Dec. 2012 Hr'g Tr. 317:22-23. Based on the entirety of the evidence he reviewed and heard at hearing, Mr. Lauckhart felt that 20 percent was a more reasonable calculation of Oak Tree's capacity contribution than using the 12.9 percent average over the MISO footprint.

With these four relatively modest changes to Mr. Rounds' spreadsheet, Mr. Lauckhart developed a 20 year avoided cost for Oak Tree of $60.38/MWH, assuming the Oak Tree project commences production in 2013. If the Oak Tree project does not commence generation until 2014, Mr. Lauckhart's adjustments to Mr. Rounds' spreadsheet produced a 20 year avoided cost for Oak Tree of $62.08/MWH. Mr. Lauckhart further indicated "you

would have to add the 7 and a half dollars REC value if you want NorthWestern to have the RECs. If you don't, then you don't have to make that addition." EL11-006 Dec. 2012 Hr'g Tr. 342:6-9. It is interesting to note that the corrected version of Mr. Round's last spreadsheet analysis (with REC value added) produces a single price that is in the middle of the range Mr. Lauckhart provided in his Additional Testimony filed in November of this year. That is, the corrected version of Mr. Round's spreadsheet analysis, when increased for the value of RECs, is about $69/MWh, which is the number Mr. Lauckhart's Additional Testimony said was in the middle of a reasonable range.

III. NWE'S AVOIDED COST CALCULATIONS ARE FLAWED AND UNLAWFUL

NWE's calculation of avoided energy and capacity costs as presented at hearing are not credible or lawful. NWE relied on "assessments" of future electricity prices in a newsletter published by Argus Media. EL11-006 Dec. 2012 Hr'g Tr. 131:3-9. NWE then relied on different "assessments" of future gas prices made by Intercontinental Exchange (ICE). EL11-006 Dec. 2012 Hr'g Tr. 145:4-15. Although NWE witness Mr. Lewis claimed these estimates represented actual market trades, there is no evidence in this proceeding that any such trades took place at the prices indicated by Mr. Lewis for either the gas or electricity prices. EL11-006 Dec. 2012 Hr'g Tr. 130:1–131:6 and 145:4-7. Mr. Lewis then reduced the published Argus newsletter electricity prices by $4.5/MWH to reflect "congestion" between the northern Illinois point on the Midwestern Independent Operator grid to a delivery point at the Big Stone facility in South Dakota. Mr. Lewis made this adjustment despite the fact that he testified at hearing he had no idea whether events in northern Illinois during the February 2011 time period were driving the electricity prices down during that period of time, EL11-006 Dec. 2012 Hr'g Tr. 133:18-24, or whether any actual volume was traded at those prices, as discussed above.

The Federal Energy Regulatory Commission (FERC) recently considered a similar avoided cost methodology to that proposed by NWE in *Exelon Wind 1, LLC et al.*, 140 FERC ¶ 61,152. In *Exelon*, FERC held that the Texas Commission could not base avoided costs on a local imbalance price at a QF's specific node on the system. FERC stated that the Texas Commission could not base avoided costs on that node because to do so ignored the fact that the QFs did not have uncongested access to the local imbalance market. FERC stated:

> 52. As to the remaining issue, payment, the Commission finds that it is inconsistent with PURPA for SPS to use the avoided cost methodology set forth in its Tariff in this situation. Avoided cost is defined in the Commission's PURPA regulations "as the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF or QFs] such utility would generate itself or purchase from another source." The SPS Tariff's payment determination provision, in contrast, provides that, as quoted above, SPS's avoided cost shall be "the SPP EIS Market LIP calculated at the registered resource Settlement Location associated with the QF at the time of production of the energy by the QF." The Texas Commission Order, we find, incorrectly accepted this SPP Energy Imbalance Service market locational imbalance price at a QF's node as SPS's avoided cost. The problem with the methodology proposed by SPS and adopted by the Texas Commission is that it is based on the price that a QF would have been paid had it sold its energy directly in the EIS Market, instead of using a methodology of calculating what the costs to the utility would have been for self supplied, or purchased, energy "but for" the presence of the QF or QFs in the markets, as required by the Commission's regulations. Moreover, and in addition, the Commission, in denying SPS' petition to be relieved of the mandatory purchase obligation pursuant to section 210(m) of PURPA, made findings that QFs in the SPS service territory lack access to third-party buyers in the SPP markets because of persistent transmission congestion. The Texas Commission Order confirms that SPS's system is still congested; thus SPS' methodology, adopting LIP as avoided costs, unreasonably assumes the full access of QFs to third-party buyers in the SPP Energy Imbalance Service Market.
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> 53. In sum, insofar as the Texas Commission Order allows SPS to set the rates in this case based on locational imbalance prices in the Energy Imbalance Service market, the Texas Commission allows SPS to not necessarily pay QFs the statutorily-required avoided cost-based rate when QFs are, in fact, entitled to the statutorily-required avoided cost-based rate.

Id.

FERC's *Exelon* decision thus stands for the proposition that a utility may not base avoided cost on a single congested point which does not permit direct QF access to that market. NWE is not a member of MISO, and NWE's transmission system is not part of the MISO grid. Just as the Texas commission wrongly used a single congested QF node to establish avoided costs, NWE is basing avoided costs on a "market"[2] calculation which represents a market which is not part of NWE's system and does not reflect NWE's own costs of generating electricity itself or purchasing it from other sources. Adding insult to injury, NWE then reduces that unrepresentative market price by approximately $4.5/MWH based on

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[2] Note again there is no evidence that there is anything like a liquid market reflected in the Argus newsletter data points provided by NWE in this proceeding.

a single, congested transmission path on MISO's system. Just as the *Exelon* petitioners lacked uncongested access to the EIS market, Oak Tree lacks any direct access to the MISO market and, thus, there is no reason to believe that relying on off-system MISO transactions has any bearing at all on a proper calculation of NWE's avoided costs. Consequently, NWE's reliance on LMPs in MISO to reduce its purported avoided costs falls far short of a legal measure of avoided costs as set forth by FERC in *Exelon.*

Even assuming it were lawful to base avoided costs on a single constrained transmission path in the manner proposed by NWE, it would be unreasonable to assume that the transmission congestion, which Mr. Lewis stated accounts for the $4.5/MWH reduction in avoided costs from the published Argus electricity prices, would remain for a 20-year period. EL11-006 Dec. 2012 Hr'g Tr. 327:24 – 327:13. Mr. Lauckhart testified at hearing that a local marginal price difference of $4.5/MWH would result in MISO making changes over the 20 year period to its transmission system to reduce the congestion that is causing the $4.5/MWH difference between northern Illinois and the Big Stone point on the MISO grid. EL11-006 Dec. 2012 Hr'g Tr. 328:8-329:13.

NWE witness Mr. Lewis' avoided cost also relied on a highly dubious market heat rate. Mr. Lewis testified that he developed a market heat rate because the Argus newsletter prices as of February 2011 only continued through 2015. Mr. Lewis testified that he developed a market heat rate by comparing the electric prices developed by Argus to the natural gas prices developed by ICE which he then extended out until 2020. There is simply no basis for assuming that the long run relationship between electric and natural gas prices would reflect the short-term relationship as of February 2011 between Argus' indicated electric prices and ICE indicated natural gas prices. Evidence that this is a flawed assumption is proven by the very low market heat rates that Mr. Lewis actually used in his calculations. Under the heat rates Mr. Lewis created to develop his avoided cost forecast, even the most economical natural gas plants, combined cycle combustion turbines, will not operate because they would have to shut down at night in order to be economical. EL11-006 Dec. 2012 Hr'g Tr. 329:14-330:4. Under Mr. Lewis' market heat rate projections, over the next three years, no peaking natural gas units (simple cycle) would ever operate because it would be uneconomical to do so. EL11-006 Dec. 2012 Hr'g Tr. 330:5-18. Mr. Lewis' heat rate thus fails the reality test because it suggests natural gas generation is not the marginal resource.

Mr. Lauckhart pointed out that no party had questioned the Market Heat Rate prepared by Black & Veatch as of Feb 2011, provided on page 221 of the Black & Veatch slide deck attached to Mr. Lauckhart's testimony in early 2012, and that Mr. Lewis's calculation of a market heat rate was far below the Black & Veatch forecast. Mr. Lauckhart testified that he believes Mr. Lewis's Market Heat Rates are not legitimate. EL11-006 Dec. 2012 Hr'g Tr. 330:29-331:11. There seems little question that Mr. Lewis' avoided cost energy calculations were designed to artificially lower the avoided cost to be paid to Oak Tree. Because Mr. Lewis' avoided cost calculations are so plainly flawed, the Commission should not rely on Mr. Lewis' avoided energy cost calculations.

IV. LEGAL LIMITATIONS TO STAFF'S NON-LEVELIZED COST RECOMMENDATION AND NWE'S ANNUAL CAPACITY PAYMENT IN A FIXED TERM CONTRACT FOR A QF UNDER PURPA.

Oak Tree agrees that an annual non-levelized energy avoided cost calculation, such as that prepared by Commission Staff witness Mr. Rounds, can properly represent avoided cost consistent with 18 C.F.R. § 292.304. However, as a policy matter, Oak Tree believes a fully levelized or partially levelized rate would better meet the objective of PURPA to encourage QF generation. For example, the Titan Wind contract rate is a partially levelized contract rate with all capacity payments rolled into the energy charge. EL11-006 Dec. 2012 Hr'g Tr. 69:4-11. In other words, there is no separate annual recalculation of the Titan capacity payment, and Titan's total energy and capacity payment is fixed and then escalated annually at 2.5 percent per year.

Mr. Lauckhart testified at hearing that an annual escalating avoided cost energy rate (which has not been fully or partially levelized), such as that proposed by Mr. Rounds, may be a potential roadblock to Oak Tree obtaining financing. EL11-006 Dec. 2012 Hr'g Tr. 350:6-10. In contrast, Mr. Lauckhart noted that "somebody" partially levelized the Titan contract to encourage Titan. EL11-006 Dec. 2012 Hr'g Tr. 350:7-11. Oak Tree believes that a levelized or partially levelized contract rate would similarly encourage the finance and construction of Oak Tree.

Oak Tree also believes that NWE's proposal to annually recalculate Oak Tree's avoided capacity payments violates this Commission's order of October 15, 2012 as the Commission required the parties to calculate avoided capacity costs using the method for

calculating capacity costs for the Titan wind project. As discussed previously, the Titan contract does not have a separately calculated capacity payment, and that payment is simply rolled into the overall contract rate paid to Titan. Consequently, NWE's proposal to annually recalculate the capacity payment to Oak Tree is flatly inconsistent with the Commission's October 15, 2012 Procedural Order. To be consistent, the avoided capacity cost would be forecast over the 20 years of Oak Tree's obligation, and then rolled into the avoided cost energy payment and then partially levelized over the 20 year term.

NWE's proposal to annually recalculate the avoided capacity cost payment to Oak Tree also violates FERC's regulations implementing PURPA. 18 C.F.R. § 292.304(d) states:

> Purchases "as available" or pursuant to a legally enforceable obligation. *Each qualifying facility shall have the option either:*
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or *capacity* pursuant to a legally enforceable obligation for the delivery of energy or *capacity over a specified term*, in which case the rates for such purchases *shall, at the option of the qualifying facility exercised prior to the beginning of the specified term*, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred*.
>
> (Emphasis added).

18 C.F.R. § 292.304(d) thus specifies that both avoided energy costs and capacity costs must be forecast from the outset of the legally enforceable obligation and extended over the term of that obligation. FERC made this clear in the preamble to its implementing regulations:

> The Commission intends that rates for purchases be based, at the option of the qualifying facility, on either the avoided cost at the time of delivery or the avoided costs calculated at the time the obligation is incurred. This change enables a qualifying facility to *establish a fixed contract price for its energy and capacity* at the outlet of its obligation or to receive the avoided costs

determined at the time of delivery.

Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of PURPA, 45 Fed. 12,214, 12,224 (February 25, 1980)(emphasis added).

The federal district court for the western district of Texas recently noted that "[t]he import of § 292. 304(d) has been repeatedly confirmed by FERC." *Exelon Wind 1, LLC, et al.*, v. *Smitherman, et al.*, 2012 WL 4465607, at p. *10 (Sept. 25, 2012). The court also noted that "'Section 292. 304(d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to *provide energy or capacity* over a specified term.'" *Id.* at p. 11(emphasis added).

FERC's PURPA regulations treat the calculation of forecast avoided capacity and energy costs identically. In either case, the QF has the option of establishing the avoided cost for its energy and capacity at the outset of its obligation over the specified term of the arrangement. Oak Tree is entitled to a forecast avoided capacity cost payment over the term of its 20-year obligation to sell to NWE.

V. CONCLUSION

The additional testimony provided by Mr. Lauckhart on November 21, 2012 contained an avoided cost calculation of $69/MWH, which was an average of a reasonable range of estimates calculated by utilizing data available as of Oak Tree's LEO date of February 25, 2011. This is not only reasonable; it is consistent with the avoided cost calculation of Commission Staff Analyst Mr. Rounds. The avoided cost calculations provided by NWE in this proceeding, on the other hand, are not credible and are, in fact, unlawful. Utilizing inconsistent and inappropriately adjusted inputs to a model in order to create an artificially low avoided cost is not consistent with the letter or the spirit of PURPA. Finally, a levelized contract rate, which includes a capacity payment, is consistent with PURPA and an option to which Oak Tree is entitled.

Respectfully submitted this 3rd day of January, 2013.

/s/ *Yvette K. Lafrentz*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically on this 3rd day of January, 2013, upon the following:

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