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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 RESPONSE TO NWE'S MOTION FOR COMMISSION RESOLUTION**

OAK TREE ENERGY, LLC'S RESPONSE TO NWE'S MOTION FOR COMMISSION RESOLUTION OF CONTRACTUAL PROVISIONS AND POWER PURCHASE AGREEMENT APPROVAL

I. INTRODUCTION

This case originated with a complaint filed by Oak Tree Energy, LLC ("OTE") with the South Dakota Public Utility Commission ("Commission") seeking an order directing NorthWestern Energy ("NWE") to purchase power from OTE's proposed 19.5 MW wind generation facility ("Project"). OTE's request was premised on the provisions of the Public Utilities Regulatory Policies Act and related regulations ("PURPA") and OTE's contention that NWE had a legally enforceable obligation ("LEO") to purchase the power. The Commission determined that NWE was subject to a LEO in favor of OTE as of February 25, 2011. Extensive evidentiary hearings were held as to the determination of NWE's avoided costs and on February 21, 2013 the Commission entered it's *Final Decision and Order: Notice of Entry* ("Order") establishing avoided cost pricing for OTE's power. Upon a request for reconsideration by NWE, the Commission modified its order on May 17, 2013 and directed the parties to complete negotiation of a power purchase agreement within thirty (30) days.

After entry of the February 21, 2013 Order, NWE and OTE commenced negotiation of the required Power Purchase Agreement ("PPA") terms in earnest. Over the course of several months, agreement was reached on most of the terms and issues presented. On July 17, 2013, NWE filed a *Motion For Commission Resolution of Contractual Provisions and Power Purchase Agreement Approval* ("NWE Resolution Motion") requesting approval of the PPA and resolution of two remaining issues between the parties.

Two primary issues remain. NWE is demanding that OTE assume all future costs for ancillary services allocable to the Project, without limitation, as reflected in NWE's proposed Section 5.5.3 of the PPA (Exh. A, *NWE Resolution Motion*). OTE believes such costs are prohibited by PURPA, and, in the alternative, that a reasonable balancing of such prospective costs which does not prevent OTE from financing is better represented in the draft Section 5.5.3 proposed by OTE. Second, NWE wants unlimited curtailment rights for economic reasons, and proposes such language in Section 6.5.1 of the PPA in addition to its other extensive curtailment rights. NWE also does not want to agree that it is in breach of the PPA if it fails to take OTE's power. OTE rejects the discretionary curtailment right proposed in

Section 6.5.1, and asks for inclusion of Section 8.2.3, which makes clear that if NWE fails to take OTE's power it is in breach of the PPA.

In several instances during the negotiations, NWE requested terms that expressly require OTE to directly pay or reimburse significant costs or which will require OTE to expend such amounts in order to comply with the PPA terms. In some cases, in order to reach agreement irrespective of possible PURPA provisions to the contrary, OTE made concessions where OTE accepts responsibility for such costs. For example, OTE agreed to assume responsibility for forecasting as required by WAPA, which is estimated to cost between $36,000-70,000 per year, escalating over time. The security requirements of the PPA will cost $10,000-15,000 per year just for a letter of credit, plus the expense to provide collateral for such a letter, as much as another $25,000 per year. Using mid-point estimates, these two items alone will add about $1.8 million to OTE's Project expenses over 20 years.

The transfer of too great an amount of costs or risk from NWE to OTE will make it impossible to finance the Project. Financing will consist of both long-term debt and tax equity investment, which is investors who wish to utilize the federal production tax credits ("PTCs") created by the Project for ten years, pursuant to Section 45 of the federal tax code, against expected corporate tax liabilities. Debt can be used to the extent Project cash flows are sufficient to make debt service payments and meet any additional coverage ratios expected by the bank. A reduction in Project cash flow, such as occurs when OTE assumes additional costs, means less debt can be serviced. Conversely, tax investors are generally not as interested in cash flows; they want to reduce their tax liability by using tax credits and other non-cash benefits, not increase their tax liability with additional taxable income. The amount of their investment will largely depend on the amount of expected tax credits and benefits produced by the Project. PTCs are currently valued at 2.2 cents/kWh of energy produced and sold by the Project; if the Project were to produce 75,000 MWh per year, over a ten-year period, the nominal value of the PTCs would be about $16.5 million. The actual investment amount will be discounted from this value to account for risk and uncertainty, the time value of money and the investor's return requirement. Any reduction in expected production causes a loss of PTCs, a corresponding reduction in this expected PTC value, and a similar reduction in the amount of investment. The ability to raise sufficient debt and equity for the Project therefore depends on maximizing net cash flow <u>and</u> production.

As set forth below, in addition to being inconsistent with PURPA, NWE's proposals, when combined with the other concessions already made by OTE, will substantially impair, and may prevent, OTE's ability to finance the Project. NWE cannot avoid its clear obligations under PURPA by imposing PPA terms that render the Project impossible to build or finance.

II. ARGUMENT

A. <u>The Proposed Transfer of Ancillary Service Costs to OTE Violates PURPA and Will Prevent Financing</u>.

NWE originally asked OTE to assume all costs that might be imposed by WAPA or any similar entity for "generator imbalance" services, services provided by WAPA to accommodate deviations between the Project's forecasted production and actual production. Currently, although there is a tariff in place that allows WAPA to charge for such services, WAPA does not charge NWE for any such services; it addresses any such imbalances using existing resources. During negotiations, and in its proposed language, NWE expanded this concept to include all possible ancillary services for which WAPA or similar entities might someday allocate as costs to the Project, not just generator imbalance charges. The proposal violates PURPA and makes Project financing impossible.

1. PURPA Permits a QF to Choose to Establish Its Obligations at the Time of the Legally Enforceable Obligation and to Sell at a Forecast Rate Over a Specified Term.

In *Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61, 219 (September 20, 2012) ("*Idaho Wind*"), FERC ruled that the provisions of 18 C.F.R. § 292.304(f) permitting a utility to curtail for operational reasons did not apply to QFs that choose to sell their generation based on "avoided costs calculated at the time the obligation is incurred." *Id.* at P 35 (citing 18 C.F.R. § 292.304(d)(2)(i)-(ii)). In doing so, FERC reiterated that when it promulgated its regulations implementing PURPA in Order 69, 45 Fed. Reg. 12,214, 12,224 (February 25, 1980), it sought to "uphold the expectations of parties to long-term contracts similar to PPAs at issue in this proceeding." *Id.* at P 35, n. 39 ("The import of [section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances.").

18 C.F.R. § 292.304(b)(5) in turn states: "In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery." In other words, once a QF makes the election to sell its output at a forecast rate over a specified term, the avoided cost rate may vary over time from the utility's actual avoided cost rate. In Order 69, FERC stated that "[m]any commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with the latter arguments, and believes that, in the long run, 'overestimations' and 'underestimations' of avoided cost

will balance out." 45 Fed. Reg. at 12,224.

Thus, avoided cost is to be fixed as of the date that the QF elects to sell its energy and capacity at a forecast avoided cost pursuant to 18 C.F.R. § 292.304(d)(2)(ii). *JD Wind 1,* 129 FERC ¶ 61,148 at P 29 ("Under our regulations, [a QF] has the right to choose to sell pursuant to a legally enforceable obligation, and in turn, has the right to choose to have rates calculated at avoided costs at the time that obligation is incurred.") (brackets added). Avoided cost is defined by FERC's regulations as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

NWE states in its Motion for Resolution and Approval that:

> Pursuant to PURPA, NorthWestern is obligated to purchase energy from a qualifying facility ("*QF*") at NorthWestern's avoided cost. *See* 16 U.S.C. § 824a-3. The Commission established a levelized-energy price in the Order. However, in this docket neither party nor the Commission considered the details of Oak Tree's interconnection to NorthWestern and WAPA along with potential financial responsibility.
>
> Oak Tree's generating facility creates the distinct possibility of additional cost, expense, and potential penalties for variable energy ancillary services. The generation and delivery of energy is the cause of the potential liability, and NorthWestern believes the monetary risk associated with ancillary services should remain, without limitation, upon Oak Tree as the responsible party.

NWE Resolution Motion at p. 3.

First, the "interconnection" process was not considered because it has nothing to do with ancillary services. Ancillary services are defined generally as:

> Those services necessary to support the transmission of electric power from seller to purchaser, given the obligations of control areas and transmitting utilities within those control areas, to maintain reliable operations of the

> interconnected transmission system. Ancillary services supplied with generation include load following, reactive power-voltage regulation, system protective services, loss compensation service, system control, load dispatch services, and energy imbalance services.

FERC: Guide to Market Oversight Glossary, http://www.ferc.gov/market-oversight/guide/glossary.asp (last visited July 22, 2013).

Obviously, this definition does not include interconnection costs, which are a separate category of costs and which are already assigned to the particular customer selling to the utility.

More importantly, at the time the LEO is created, the avoided costs expected to be experienced by the utility, including any offsetting increases in costs caused by the addition of the Project, are to be determined. If NWE expected to incur additional ancillary services expenses which would be attributable to the Project, and which might reduce its net avoided cost as of February 25, 2011, those expenses should have been presented in the original hearings establishing the appropriate avoided cost. The Commission ruled that OTE incurred a legally enforceable obligation as of February 25, 2011. *Interim Order; Order For And Notice Of Further Hearing*, May 15, 2012. The Commission further found that the basis for the forecast avoided cost rate must be based on information that was available as of that date. *Order Granting in Part and Denying in Part Motion for Partial Reconsideration and Application for Reconsideration*, October 11, 2012. It is undisputed that both parties put forth evidence on the proper calculation of avoided cost, both at the March 21-22, 2012 hearing, and the December 5-6, 2012 hearing. It is also a matter of record that the question of ancillary costs, specifically, regulatory reserves was discussed at the hearing of March 21-22. *EL11-006, Mar. 2012 Hr'g. Tr. 126:7-11* (Lauckhart); *134:1-10* (cross examination of Wagner admitting no charge for regulation). As openly admitted by NWE in its Resolution

Motion, at the time of the LEO, NWE was incurring no such costs, and NWE continues to incur no such costs. Thus, there was and is no basis for adjusting OTE's avoided costs now by requiring OTE to absorb any future NWE costs that might, someday, be incurred, in some undefined amount.

NWE cannot now circumvent its legal obligations, or present costs that do not exist, or may only arise in the future, under the guise of PPA negotiations and in flat contradiction to PURPA. It is undisputed that a QF need not have executed a contract in order to sell to a utility pursuant to an LEO based on rates calculated at the time the LEO was created. *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P 32 ("[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations."). In other words, there is no material difference in a QF's rights under 18 C.F.R. 292.304(d)(2)(ii) depending on whether the QF executed a contract or merely is selling pursuant to a legally enforceable obligation.

It is indisputable that ancillary costs are part of the cost that a utility must otherwise pay to ensure delivery of electric energy and capacity to the utility's customers. In this case, NWE belatedly realized that there may, in the future, be a cost associated with the Project that it failed to litigate as it wanted to before the Commission. However, it is indisputable that as of February 25, 2011, no such ancillary charges existed. Nor did NWE choose to provide expert testimony on such ancillary services or the potential cost associated therewith. This should properly have been part of the evidentiary record on avoided cost that the Commission considered when it adopted the avoided cost forecast rate for OTE.

NWE's description of possible future cost allocations for ancillary services, including the anecdotal discussions by the Brattle Group, is speculative and ultimately irrelevant.[1] As noted above, FERC specifically and directly refuses to allow the imposition of unknown future costs on QFs after an LEO is established, recognizing that the transfer of such risks and costs will undermine QF financing. PURPA is intended to remove barriers to QF interconnection, power sales, development and operation. FERC could not be clearer that utilities are not to be allowed to assign such future costs and risks to QFs such as OTE; the LEO, and related avoided costs, are fixed at a point in time. The prospect of costs and risks that may occur after that date is irrelevant and excluded from the agreement between the QF and utility. Despite proclamations by NWE that there is a potential risk in the future, it is merely speculation on NWE's part, and the fact remains that it is OTE's right under PURPA to have its obligations fixed as of the date of its LEO.

2. Financing

As admitted by NWE in its Resolution Motion, balancing issues are being studied by regional transmission operators, along with possible methodologies for allocating and charging such costs to specific generating facilities. It is expected that over time, such charges will start being imposed, and may increase over time to substantial levels, perhaps reaching several dollars per MWh in some regions. When costs increase, the hope is that this will drive the market to install storage and other balancing capabilities to bring such costs down again. Assuming 75,000 MWh/year production from the Project, a charge of \$1.00/MWh is \$75,000/year; \$5.00/MWh would be \$375,000/year. The effect, if OTE is expected to pay these charges, they will essentially reduce the PPA price by an equivalent

[1] NWE emphasizes Westar and the possible merger of WAPA with SPP. It seems much more likely that WAPA will merge with the larger and closer MISO system, which has greater overall capability for balancing intermittent generation. Any such merger will likely take considerable time.

amount, with concomitant reduced revenues and cash flow to service debt.

As difficult as this cash flow problem will be, it will be compounded by the substantial uncertainty surrounding the risk of unlimited charges. If there is the chance of substantial but unknown imposition of ancillary service charges sometime in the future, lenders will assume that such impositions will occur at maximum levels in establishing the amount of allowed debt, reducing financing considerably, or will simply forego lending to the Project due to the unknown and unlimited risk. Either way, without sufficient debt allowed the Project cannot proceed.

In addition, WAPA, NWE, and other major participants in the regional generation and transmission market are much better situated to address balancing issues and install storage, gas turbines, or other solutions in a size sufficient to address the balancing needs of the larger regional system, including any small contribution of the Project. WAPA currently performs such services using its hydroelectric resources, and gas and diesel turbines also can be used efficiently. It is unlikely that any small generating facility such as the Project will be able to address these issues effectively or economically, which is why the cost and responsibility more appropriately resides with WAPA and its utility members, all of whom benefit from such solutions. Currently, other utilities in the Midwest do not require renewable generation facilities to absorb these balancing and ancillary service costs.

While OTE believes no reimbursement obligation for generator balancing or other ancillary services under PURPA is allowed, OTE's proposal on this issue in the PPA represents a reasonable balancing of interests, while capping OTE's exposure to uncertainty and costs. The most recent proposal was to reimburse generator imbalance costs actually incurred by NWE up to a maximum of $39,000 per year. This amount was based on a similar

PPA for a wind project in Bonneville Power Administration ("BPA") territory, where, like WAPA, BPA uses hydroelectric facilities to balance loads. That project assumed up to about $2,000/MW per year of generator imbalance costs; for the Project, sized at 19.5 MW, this would be $39,000 per year. This represents what is probably the maximum the Project can afford and still obtain financing. By setting a cap, uncertainty over potentially larger charges in the future is eliminated, and the Project and lenders can plan the amount of financing with certainty. The Project accepts some substantial responsibility for balancing, without losing viability. In the event the Commission concludes that PURPA allows NWE to impose any balancing costs on OTE, a cap on OTE's annual exposure as proposed in OTE's Section 5.5.3 is essential to allow financing.

B. NWE's Proposed Unlimited Curtailment Right Is Unreasonable.

The parties spent considerable time negotiating the circumstances under which NWE could curtail the Project for various reasons attributable to system reliability and operation, and whether lost production from such curtailment events would be compensated by NWE. The resolution of these issues roughly tracks similar PPAs for wind projects throughout the region over the last several years. However, NWE also wants unlimited rights to curtail the project for discretionary or economic reasons; it is offering to reimburse OTE for the lost production, but the actual PTCs that an investor desires will be lost.

1. PURPA Does Not Permit Economic Curtailment of QFs or Curtailments Pursuant to 18 C.F.R. 292.304(f) for QFs with LEOs.

FERC specifically rejected a utility's ability to curtail QF deliveries in *Idaho Wind*, cited above. In *Idaho Wind*, the utility sought to curtail deliveries from a QF with which it had negotiated PPAs for economic reasons, and refused to pay the QF for the resulting lost production. FERC strongly rejected the utility's claimed right to curtail and reaffirmed the rights of a QF to deliver and sell its energy and the corresponding obligations of the utility to accept and buy such power. The utility was not allowed to evade or reduce its clear obligations to purchase power from the QF.[2] NWE attempts to distinguish FERC's holding in *Idaho Wind* on the grounds that (1) NWE's proposed contract language is not interfering with an existing contract; and (2) NWE proposes to pay OTE for the curtailments:

> Additionally, Oak Tree relies on a recent FERC case from Idaho, 140 FERC ¶ 61,219, Docket No. EL12-74-000 ("*Idaho Wind*"), for the proposition that utilities are prohibited from curtailing for economic reasons. *Idaho Wind* is clearly distinguishable. FERC prohibited the Idaho Public Utilities Commission from authorizing economic or operational curtailments under previously executed power purchase agreements subject to PURPA.
>
> *Id.* at P 40. However, the QFs were subjected to curtailment without compensation under previously executed power purchase agreements. Section 6.5.1 does not authorize uncompensated economic or operational curtailments. Nor is NorthWestern suggesting any revision to an existing contract. *Idaho Wind* is not applicable in this situation. FERC emphasized that the *Idaho Wind* decision was intended to preserve the economic expectations of the parties. NorthWestern's proposed Section 6.5.1, with other articles, preserves the economic expectations of Oak Tree with "compensated curtailments."

NWE Resolution Motion at p.8.

NWE's attempt to distinguish *Idaho Wind* is unavailing. It is true, as NWE argues, that the QFs in *Idaho Wind* were parties to executed PPAs. It is also true, as explained in *Cedar Creek Wind, LLC* and other recent FERC decisions, that a QF without a contract has no less right to a forecast avoided cost rate than one with an executed contract:

> In addition, we found that the Idaho Commission's orders' limitation on the conditions for legally enforceable obligation formation overlooked "the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing."

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[2] NWE intervened in *Idaho Wind* and argued that changed circumstances in the market required a change to FERC's view of PURPA, and greater discretion on the part of utilities. This argument was unsuccessful before FERC. NWE is essentially making the same argument here, and the result should be the same.

Murphy Flat Power, LLC, 141 FERC ¶ 61,145 at P 24 (quoting FERC's holding in *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36 (2011)). No less so than a QF that sells pursuant to a contract, a QF selling pursuant to an LEO (such as OTE) has the right to sell its energy and capacity at a forecast rate pursuant to 18 C.F.R. § 292.304(d)(2)(ii). *Grouse Creek Wind Park*, *LLC*, 142 FERC ¶ 61,187 P 40 (March 15, 2013)("We explained in *Cedar Creek* that, through the Commission's regulations implementing PURPA, namely 18 C.F.R. § 292.304(d)(1)-(2), there are two vehicles through which a QF may provide energy and capacity to a utility: a contract or a legally enforceable obligation.") 18 C.F.R. § 292.304 expressly permits a QF selling pursuant to LEO to fix its obligation, and the logic and language of *Idaho Wind* does not aid NWE's argument that only QFs with executed contracts are entitled not to have their rates adjusted over time.

In *Idaho Wind* FERC ruled that 18 C.F.R. § 292.304(f) curtailments only apply by their terms to QFs electing to sell on an "as available" basis:

> The Commission was thus concerned that a QF, if compelled to deliver as-available energy during a low loading period, could be selling at negative avoided costs and thus would actually pay the utility to accept its energy. The Commission therefore provided in Order No. 69 that the utility must inform a QF of the possibility of negative avoided costs so that the QF could opt to not sell during those periods

Idaho Wind Partners, 140 FERC ¶ 61,219, P 38.

FERC then quoted Order 69 and held:

> The Commission does not intend that this paragraph [describing the need to provide notice to the QF] override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility." Rather, the purpose behind section 292.304(f) is to preserve *contractual or other legally enforceable obligations* incurred by the electric utility to purchase from a qualifying facility.

Id. at P 39 (emphasis added)(footnote deleted).

Thus, the Commission made it clear that economic or operational curtailments could not be applied to either contractual based commitments, or those commitments made pursuant to a legally enforceable obligation. The Commission then concluded:

> In sum, therefore, a utility may not curtail unilaterally where the QF electric energy is purchased, as here, pursuant to a *long-term obligation*. . . . Moreover, and in addition, we emphasize that in the case before us we are addressing sales pursuant to long-term PPAs, i.e., sales pursuant to "*contractual or other legally enforceable obligations*."

Id. at PP 40-41 (emphasis added, footnote deleted).

FERC has been, therefore, emphatically clear that a utility may not unilaterally curtail QFs with long term obligations (either contractual or pursuant to legally enforceable obligation) for operational or economic reasons. All QFs with long-term obligations have a right under 18 C.F.R. § 292.304(b)(5) to "ensure that .. . the certainty of a[] [QF's] arrangement is not deprived of the benefits of its commitment as a result of changed circumstances." In other words, it is not only parties with executed PPAs that are protected from economic and operational curtailments of the sort contemplated by NWE in this proceeding, but also QFs, such as OTE, with an LEO.

NWE argues that its agreement to pay for lost production makes *Idaho Wind* distinguishable. The fact that NWE may ultimately compensate OTE for economic and operational reasons does not, under *Idaho Wind*, provide NWE with any unilateral right to curtail over OTE's objection. FERC has clearly stated as such, and although NWE may disagree, it has no basis for assuming that investors are not or should not be concerned with NWE deciding to reduce PTCs otherwise available to OTE's investors.

As emphasized by FERC, a QF has a right to protection of its economic expectations once the LEO is established; the economic expectation of equity investors and lenders may be different, as described below. NWE does not get to decide which of these expectations gets met and which does not. Under PURPA, NWE is prohibited from unilaterally altering OTE's rights, including those which affect its financing, by curtailment.

It follows as well that NWE's failure to accept delivery of energy from OTE must constitute a default of its obligations under the PPA, as proposed by OTE in Section 8.2.3. It makes no sense for NWE to argue that it should be allowed to breach its obligations to accept power from OTE, and OTE cannot exercise remedies, including termination of the PPA, if that happens. Proposed Section 8.2.3 merely states openly that NWE's failure in this respect is a breach and gives OTE such rights. There is no logical reason why this should not be true, and why it should not be explicitly stated in the PPA. In fact, NWE's hostility to this provision merely underscores the importance of having even the obvious stated to prevent dissembling or future efforts by NWE to avoid the consequences of its actions.

The Commission should reject NWE's language granting it broad curtailment rights, and require the inclusion of Section 8.2.3 in the PPA.

2. Discretionary Curtailment Will Have a Material and Adverse Effect on Equity Financing.

Even without the additional curtailment authority sought by NWE, the PPA already provides NWE with expansive curtailment rights, including the right to curtail if required by WAPA or NWE under the interconnection agreements or WAPA tariffs, during an Emergency or Force Majeure, and during any other events affecting transmission system operation and reliability. An "Emergency" includes "any condition or situation" that in the judgment of NWE, WAPA, OTE, or any regional transmission operator might endanger life, property or public safety or "adversely affect or might adversely affect the NorthWestern System or the ability of [NWE] or any other entity associated with the interconnected transmission system, to maintain safe and reliable electric service." It is difficult to imagine any broader language needed to authorize curtailment to address possible problems on the electric system. In addition, NWE requested substantial curtailment rights for its own maintenance and for interruptions arising from house moves required by South Dakota law, and OTE agreed to allow up to ninety hours per year for such curtailments. These curtailment rights are very broad and cover any possible circumstances that might arise with respect to the safety and reliability of NWE's system or the transmission system. If exercised, they will result in the loss of significant PTCs by OTE and its investors.

Nonetheless, NWE is insisting on the additional ability to curtail for discretionary or economic reasons in unlimited amounts, and for any reason or no reason at all. As noted above, NWE can point to no circumstance in which such authority might be needed for system protection, which is already covered. OTE offered to allow NWE another limited number of hours per year in discretionary curtailment, but NWE refused. OTE also offered unlimited discretionary curtailment (with compensation) after the PTCs for the Project expire – this was also refused. NWE wants nothing less than completely unfettered authority to shut the Project down at will. This will seriously deter equity investors who rely on the receipt of PTCs, or cause them to substantially reduce their investment to account for the risk of such curtailments.

NWE's responses, that (i) any such curtailments are likely to be limited in frequency and size, and (ii) that it will pay for the lost production, are not sufficient to address real financing concerns. The first argument is to the effect that OTE should just trust NWE and its estimates about how much discretionary curtailment might occur. The history of this proceeding, and the fact that NWE will not even agree that its unauthorized refusal to accept power from OTE is a PPA breach, provides no basis for confidence that NWE will act in good faith in this respect. NWE itself concedes that part of its justification for its request is to manage uncertainty about what might happen in the future; it cannot argue both that there is substantial uncertainty and then that OTE can expect only limited curtailments. OTE and its tax investors will be forced to assume the worst.

Second, NWE's agreement to pay cash compensation for lost production fails to address PTC investor concerns, and is therefore inadequate in the first ten years of commercial operation. A lender will not count such possible, but unknown, revenues as available for debt service, so OTE's debt capability is not increased by this provision. Tax equity investors will reduce their PTC expectations and corresponding investment amount. The net result is diminished financing capability for OTE, solely so NWE can address its speculative and unknown anxieties. This is neither acceptable under PURPA nor a reasonable balancing of the parties' interests.

Given the other significant concessions made by OTE, including any resolution of the generator imbalance issue, OTE no longer believes it can afford to offer any additional curtailment rights without jeopardizing the ability to finance the Project. NWE seems convinced that someday, for some reason other than those already covered, it might want to curtail the Project. In that case, it will simply need to come to OTE to discuss the situation; it is not fair or reasonable to transfer all such risk and uncertainty and related costs to OTE.

III. CONCLUSION

The Commission should conclude, and order, the following relief:

1. NWE's proposed imposition of ancillary service costs upon OTE is inconsistent with its legally enforceable obligation as of February 25, 2011 to buy OTE’s power at the avoided cost rate previously set in this proceeding, and NWE’s proposed Section 5.5.3 cannot be included in the PPA. Section 5.5.3 is to be deleted in its entirety, and no such costs or reimbursement obligations included in the PPA.

2. In the event the Commission determines that recovery of some ancillary service costs is not prohibited by PURPA in these circumstances, the Commission should adopt OTE’s proposed Section 5.5.3 and its balancing of the interests which limits the adverse effects on OTE.

3. NWE's proposal to curtail deliveries of OTE’s energy for economic and discretionary purposes is prohibited by PURPA and NWE's existing legally enforceable obligation to OTE, and its proposed language for Section 6.5.1 is to be excluded.

4. Even if NWE's proposed additional curtailment rights are not prohibited by PURPA, they are an unreasonable expansion of NWE's existing and generous curtailment rights under the PPA and must be rejected, along with its proposed language in Section 6.5.1.

5. Proposed Section 8.2.3 accurately reflects NWE's obligation to accept delivery of energy from OTE and it is reasonable to set forth that a failure on NWE's part to do so is a breach of the PPA. Section 8.2.3 as proposed by OTE is to be included in the PPA.

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Respectfully submitted this 24th day of July, 2013.

/s/ *Yvette K. Lafrentz*

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I hereby certify that a true and correct copy of the foregoing document was served electronically on this 24th day of July, 2013, upon the following:

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