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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 REPLY TO NORTHWESTERN ENERGY'S POST-HEARING BRIEF**

OAK TREE ENERGY, LLC'S REPLY TO NORTHWESTERN ENERGY'S POST-HEARING BRIEF

I. INTRODUCTION

Oak Tree Energy, LLC (Oak Tree), acting by and through counsel, and pursuant to the South Dakota Public Utility Commission's (PUC) Post-Hearing Procedural Order entered on April 10, 2012, hereby submits its Reply to NorthWestern Energy's ("NWE") Opening Brief.

II. EXECUTIVE SUMMARY OF ARGUMENT

- The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824-a(3) (PURPA) is still the law of the land and it requires utilities to buy output from Oak Tree. NWE has, through refusing to negotiate, stonewalling in discovery, refusing to produce avoided cost information, forcing Oak Tree into costly litigation, and discriminating against Oak Tree as compared to how it treats its own resources, attempted to thwart PURPA.

- PURPA was adopted to "encourage" the development of renewable energy and cogeneration. NWE is actively attempting to discourage Oak Tree. The PUC's directive is to make sure PURPA is implemented in South Dakota, and to ensure that NWE is complying with its PURPA obligations.
- The "just and reasonable" reference in PURPA 16 U.S.C. 824a-(b) does not refer to retail ratemaking standards but a directive to the Federal Energy Regulatory Commission (FERC) to consider customer rates in adopting its avoided cost rule. FERC properly considered the "just and reasonable" standard in adopting its full avoided cost regulation. As long as the PUC adopts a full avoided cost rate, it need not make a separate determination regarding whether the rate is "just and reasonable" to NWE's South Dakota retail ratepayers.
- Contrary to NWE's position, the PUC does not have broad discretion in adopting an avoided cost rate for Oak Tree. Although the PUC has discretion, it must set its rates consistent with FERC regulations and precedent.
- Mr. Lauckhart's "brown method" of calculating avoided cost, a "Market Estimate" approach, properly considered all sources of electricity available to NWE.

- NWE's long-term avoided cost forecast of $35.80/MWH is significantly flawed and is not a measure of NWE's full avoided costs.
- There is no evidence in this record that 18 C.F.R. § 292.304(e) would result in a lower avoided cost rate for Oak Tree. NWE made no effort to determine, whether through negotiations or through this proceeding, to verify the accuracy of these assertions.
- NWE clearly needed capacity in February 25, 2011, and NWE could have saved considerable capacity costs over time by entering into an agreement with Oak Tree on that date.
- Oak Tree's "market estimate" approach to "brown power" avoided cost is not only legal, it utilized one of the methods identified by NWE witness Mr. LaFave in his prefiled direct/rebuttal testimony. Oak Tree's "green power" calculation is lawful because states retain discretion to require the purchase of specific types of resources, including those required to fulfill renewable energy objectives.
- Well established precedent, both at FERC and in state courts, verify that the QF has the right to a fixed price, long-term contract, and to determine the length of its commitment. In this case, the record evidence dictates that NWE should pay Oak Tree $65.12 levelized over a 20 year term. The record further establishes that this rate is far below NWE's actual avoided costs as established by the testimony and exhibits provided by Oak Tree expert witness Rich Lauckhart.
- Oak Tree incurred a legally enforceable obligation ("LEO") as of February

25, 2011. Despite NWE's obstructionist tactics, Oak Tree did everything within its power to commit to sell its output to NWE. There is simply no record evidence to the contrary, and FERC's rules only require that a QF make a commitment to sell its output to a utility. Oak Tree did this as of February 25, 2011.

III. ARGUMENT

A. NWE's Position on PURPA is Misleading and Contrary to Well-Established Precedent

NWE's characterization of PURPA at the outset of its brief ignores well-established law that contradicts several of NWE's positions. NWE argues that PURPA was designed to make the "country more energy efficient and less dependent on foreign oil." NWE Post-Hearing Br. at p. 1. This statement is true insofar as it goes, but omits a very important objective of PURPA as cited by the United States Supreme Court in *FERC v. Mississippi*:

> Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) *traditional electricity utilities were reluctant to purchase power from*, and to sell power to, the nontraditional facilities

456 U.S. 742, 750 (1982)[1](emphasis added).

"To overcome the first impediment (utility reluctance to purchase from independent power) to developing nontraditional sources of power, section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), requires the FERC to prescribe "'such rules as it determines necessary to

[1] Citing remarks in 123 Cong.Rec. 25848 (1977) (remarks of Sen. Percy); id., at 32403 (remarks of Sen. Durkin); id., at 32437 (remarks of Sen. Haskell); id., at 32419 (remarks of Sen. Hart); National Energy Act: Hearings on H.R. 6831 et al. before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., 552-553 (1977).

encourage cogeneration and small power production,'" including rules requiring traditional utilities to purchase electricity from QFs. *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Com'rs of State of N.J.*, 44 F.3d 1178, 1183 (3d Cir. 1995)(quoting *FERC v. Mississippi*, 456 U.S. at 751). As the Idaho Supreme Court has stated: "[w]ithout the legal obligation to offer to purchase power from qualified facilities and the exemption from state and federal regulations, PURPA fails. Congress and the Federal Energy Regulatory Commission *knew that regulated utilities would not voluntarily purchase a qualified facility's energy and capacity* and, accordingly, provided for PURPA to explicitly require the regulated facilities to purchase (16 U.S.C. § 824a-3(a)) and for the regulations under PURPA to require the utilities to purchase 18 C.F.R. § 292.207(c)) from a qualified facility." *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 209, 755 P.2d 1229, 1247 (1987).

Whether the "energy crisis" is past is a matter of opinion. However, whether PURPA is still the law of the land is not subject to dispute, and PURPA's requirement that utilities purchase all output from qualifying facilities or "QFs" is no less needed in South Dakota today than it was in 1978 when PURPA was adopted. Evidence in this proceeding of NWE's refusal to cooperate is manifest. The utility refused to negotiate above a tariffed price for projects above 100 Kilowatts (KW) in design, despite a 1982 PUC order requiring NWE to *negotiate* with projects above 100 KW on avoided costs.. *E.g.*, EL11-006 Hr'g Tr. at 238:4-239:18 (expressing NWE's belief that it could not negotiate above its short-term avoided cost rate –approximately $20per megawatt hour ("MWH"), regardless of whether NWE's short-term avoided cost was substantially below its long term avoided cost).[2] NWE ignored calls

[2] Nowhere more evocative of this mistaken belief is the following colloquy:

Q. [Mr. Uda] Okay. So if it was the case that you weren't necessarily bound by the tariff, you could have negotiated with them; right? I mean, you could have tried to get closer.

for meetings by Oak Tree and simply repeated its position over and over again that it could not negotiate any price above it short-term tariff for avoided cost of $20/MWH. *See e.g.*, Oak Tree Exhibit 3, Attachments 10 and 11; EL11-006 Hr'g Tr. at 245:19-248:13.[3] NWE refused to produce a long-term avoided cost forecast in this proceeding or any information required to be produced by 18 § C.F.R. 292.302(b) until after Oak Tree was forced to file a motion to compel on September 7, 2011 to obtain information to which it was lawfully entitled.

NWE also thwarted Oak Tree by proposing an avoided cost forecast methodology not adopted by any regulatory authority anywhere in the country. This forecast also contains significant errors, all of which err in the same direction; namely, reducing the price that NWE will have to pay for Oak Tree's generation. These assumptions include: (1) a natural gas price forecast which assumes no real increase in natural gas prices from 2015-2031; (2) an assumption that Oak Tree is not entitled to value of economy sales because NWE's Power Cost Adjustment clause precludes it from sharing those revenues with ratepayers; (3) an assumption that EPA regulations will not result in the retirement of any coal plants with no correlative increase in natural gas consumption; (4) assuming no natural gas price increases due to costs associated with declining revenue from natural gas "sweet spots" and fracking;

A. [Mr. LaFave] But I am bound by the tariff.
Q. Okay. Well, why are you bound with the tariff when you're dealing with a project above 100 kilowatts in design?
A. Because at that time that was our filed avoided cost. It was specified for under but that was our filed avoided cost and that's what I had to use for my benchmark.
EL11-006 Hr'g Tr. at 239:14-25

[3] Another colloquy at p. 248 is revealing:
Q. There was really never any negotiation possible. Your offer was essentially here's what our tariffed rate is, take it or leave it.
A. As identified by PURPA, yes.
EL11-006 Hr'g Tr. at 248:9-13

and (5) an assumption that there is not carbon legislation in this country in the next 20 years.

Incredibly, despite refusing to negotiate and stonewalling Oak Tree on every turn, and without a shred of real record evidence to support it, NWE continues to insist that Oak Tree has not incurred an LEO. To summarize, NWE refused to negotiate, declined to offer anything other than a short-term avoided cost tariffed rate that did not apply to Oak Tree, refused to produce any real avoided cost information until Oak Tree filed a motion to compel in this proceeding, offered an ersatz "electric price forecast" utilizing a methodology never approved by any regulatory authority anywhere in this proceeding, and yet continues to claim that Oak Tree has not incurred an LEO.

Congress has considered all the arguments that NWE is impliedly making in this proceeding that PURPA has outlived its usefulness. However, PURPA has remained the law of the land. In the Energy Policy Act of 2005, Congress provided a remedy for those utilities who believed that non-utility generation had non-discriminatory access to markets by which these utilities could be relieved of their PURPA obligations. NWE has never made such a filing, nor could it satisfy the criteria. PURPA is the law in South Dakota, and the evidence in this proceeding is overwhelming that it is still needed in order for non-utility generation, particularly renewable generation, to have a market for their output.

The message has been sent loud and clear across South Dakota that any QF that attempts to negotiate a contract for its output with NWE will have to pay a dear price before it can obtain such a PPA. The evidence in this proceeding is simply overwhelming that NWE does not like PURPA, did not want to negotiate with Oak Tree, refused to cooperate in any way and forced Oak Tree at considerable expense to file a complaint. The proceeding has now taken more than a year to resolve. The PUC should not give credence to any claim by

NWE that its campaign against Oak Tree was the product of well-intentioned error. This was plainly an effort by NWE to prevent QFs from gaining any foothold in South Dakota, contrary to express PUC orders that NWE negotiate with QFs.

As the *Empire Lumber* Court noted, PURPA depends on a utility purchasing power from QFs. The record is overwhelming that NWE does not wish to do this. The PUC must ensure that NWE is not simply attempting to thwart PURPA by its actions.

Second, NWE also misstates the law claiming that avoided cost rates must be "just and reasonable" and citing 16 U.S.C. § 824a-(b). NWE Post-Hearing Br. at 3. Again, this is true insofar as it goes, but ignores the holding of *Connecticut Valley Elec. Co. Inc. v. FERC,* 208 F.3d 1037 (D.C. Cir. 2000). In *Connecticut Valley,* the District of Columbia Court of Appeals found that the FERC had not erred in refusing to grant the utility the relief sought under PURPA. The Court stated:

> Nor can we accept Connecticut Valley's second argument, which is that the Commission's failure even to consider harm to consumers was an abuse of discretion. According to Connecticut Valley, § 210(b) of the PURPA expressly requires the Commission to balance the interests of consumers against those of producers, thus:
>
> The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any [QF], the rates for such purchase ... shall be just and reasonable to the electric consumers of the electric utility and in the public interest....
>
> 16 U.S.C. § 824a-3(b). This requirement is directed, however, at the Commission's exercise of rulemaking authority over the rates utilities must pay QFs for power. The Supreme Court has already held that the full avoided cost rule satisfies the requirements of § 210(b). *See* American Paper Inst., 461 U.S. at 415-17, 103 S.Ct. 1921. *Therefore the Commission did not abuse its discretion when it omitted explicitly to consider anew the interests of consumers.*

Id. at 1046 (emphasis added).

In other words, Section 210(b) does not require a *second* consideration of just and reasonable rates apart from FERC's implementation of rules which required rates to be set at full avoided cost. The United States Supreme Court made this distinction clear in *American Paper Institute v. American Elec. Power Service Corp.*, 461 U.S. 402, 416 n. 9 (1983), stating: "But it does not follow that the full-avoided-cost rule is necessarily 'just and reasonable to the electric consumers of the electric utilities'" within the meaning of § 210(b) of PURPA. Unless the "just and reasonable" language is to be regarded as mere surplusage, it must be interpreted *to mandate consideration of rate savings for consumers that could be produced by setting the rate at a level lower than the statutory ceiling*." (emphasis added). Instead, the Supreme Court held that FERC's rule adopting the "statutory maximum" of "full avoided cost" was within FERC's discretion, explaining that FERC "recognized that the full-avoided-cost rule would not directly provide any rate savings to electric utility consumers, but deemed it more important that the rule could'provide a significant incentive for a higher growth rate' of cogeneration and small power production, and that'these ratepayers and the nation as a 'whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy.'" *Id.* Thus, it is not the case as NWE suggests that rates must be separately "just and reasonable." Instead, FERC adopted regulations to implement that requirement and decided that "full avoided cost" was the standard for utility purchases under PURPA.

NWE further argues, without citation, that the PUC has "broad discretion" in determining NWE's incremental cost. There is no support for such a proposition. Indeed, in the very case cited by NWE, *Cal Pub. Util. Comm'n*, 134 FERC ¶ 61,044 (2011), for the proposition that avoided cost is a "fact specific" determination, FERC also said: "[S]tates may have other ways of establishing avoided cost rates that may be *consistent with the Commission's PURPA regulations.* In this regard, we emphasize that the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact-specific and include consideration of many factors; *our regulations thus provide state commissions with guidelines on factors to be taken into account, '"to the extent practicable,"* in determining a utility's avoided cost of acquiring the next unit of generation.'" *Id.* At P 36 (emphasis added). Thus, FERC did say the avoided cost determination is fact specific; FERC also said the state's avoided cost determination must be consistent with FERC's PURPA regulations. In other words, if a utility attempts to set a rate that is wholly inconsistent with the utility's full avoided costs, as NWE does here, then the utility's rates violate PURPA.

NWE then goes on to say, again without citing any authority, that the PUC may not determine NWE's avoided costs without considering the characteristics of NWE's resource mix and load requirements. Although this is again true, it does not really explain that the PUC may set avoided cost based on specific resource requirements such as a state's renewable energy objective. *See SoCal Edison*, 70 FERC ¶ 61,215 at 61,676 (acknowledging a state's right to "favor particular generation technologies is the prerogative of the states, and explaining that "a state may choose to require a utility to construct … or to purchase power from … a particular type of resource" and that the state can take such action consistent with PURPA "so long as such action does not result in rates above avoided cost.") Thus, the PUC could, considering South Dakota's renewable energy objective, order NWE to utilize Mr. Lauckhart's "green power" avoided cost calculation in this proceeding.

B. NWE's Calculation of Incremental Cost is Inconsistent with Avoided Cost

NWE has provided a long-term electric price forecast that is significantly flawed. First, as set forth in Oak Tree's opening brief, NWE's "hybrid/market" approach is not recognized by any jurisdiction of which Oak Tree is aware. Nor was it one of the five methods detailed in Mr. LaFave's prefiled direct/rebuttal testimony which he testified he obtained from the Edison Electric Institute. EL11-006 Hr'g Tr. at 279:20-21. A detailed explanation of the numerous errors in NWE's electric price forecast was set forth in Oak Tree's Post-Hearing Opening Brief at Section III.B.4, and does not bear repeating here.[4] Suffice it to say, NWE's forecast makes a number of errors, including a seriously flawed gas price forecast, an electric price forecast that includes no carbon emissions, a failure to provide any fundamental analysis of electric markets in South Dakota or anywhere else, including a decision to not consider in any fashion the substantial likelihood that many coal plants will be retired rather than comply with new EPA regulations, and a decision to not permit Oak Tree to recover the value of any sales made by NWE beyond those made when it is short on generation. *Id.*

More specifically, one needs to also consider that NWE's co-owner in the Big Stone plant, Otter Tail, is projecting a 20-year levelized gas price of$9.50/MMBtu over 20 years.[5] In other words, NWE apparently is utilizing a gas price forecast that is substantially higher than the $5.14 offered by Mr. Lewis when NWE is attempting to justify to the PUC a decision to retrofit Big Stone with pollution control equipment rather than retire that asset. Just as in Montana, where NWE made entirely different arguments and used a different methodology

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[4] Oak Tree hereby incorporates the analysis of NWE's electric price forecast as though fully set forth herein.
[5] The gas price forecast of $66.44/MWH is described as a 20-year levelized busbar fuel cost and therefore the $9.50/MMBtu gas price is also a levelized number. The $9.50/MMBtu is produced by multiplying 7000 btu/kwh to equal $66.44/MWH.

when it wished to justify before the Montana Public Service Commission (MPSC) a decision to own the Spion Kop project, here NWE utilized an entirely different gas price forecast and zero carbon cost over the life of the project in order to reach the result it wishes the PUC to adopt – namely an avoided cost too low to support Oak Tree's efforts to build its project. Such discrimination violates PURPA.

There is no question, based on the record, NWE's approach to avoided cost is entirely opportunistic and unreliable. As set forth in Oak Tree's opening brief, every other wind project with which NWE recently has done business is substantially higher than the $35.80/MWH advocated by NWE in this proceeding.[6]

C. NWE's Argument regarding 18 C.F.R. § 292.304(e) is Without Foundation

NWE argues that the factors mentioned in 18 C.F.R. § 292.304(e) will reduce the amount of its avoided costs. The PUC will note that much of NWE's arguments on avoided cost are merely assertions unadorned by citations to the evidentiary record. This is evident from even a cursory examination of NWE's legal argument concerning 18 C.F.R. § 292.304(e) in its brief. First, NWE argues it has no ability to dispatch Oak Tree because it cannot turn Oak Tree "on and off" based on load and the relative seasonal availability of Oak Tree is less than other resources. NWE Post-Hearing Open. Brief at 8. NWE has made no attempt, either in its brief or at hearing, to demonstrate that either of these facts is true. The record is, in fact, devoid of any such analysis or evidence despite ample opportunity by NWE to make such a case. While the PUC may, indeed, consider the factors set forth in 18 C.F.R. § 292.304(e), the PUC it cannot base a decision on a complete lack of evidence. *See Matter of*

[6] For example, NWE witness Guldseth, Oak Tree Exhibit 2, Attachment 2, stated that using the differential revenue requirement model, the" value" of Spion Kop was $75.72/MWH. When NWE entered into a contract for the output from Titan Wind at $65.27/MWH (adjusted to 2011 start date).

Certain Territorial Electric Boundaries, 281 N.W.2d 65 (S.D. 1979)(reviewing court may reverse or modify an agency decision of the agency if it is unsupported by substantial evidence on the whole record or is an arbitrary exercise of discretion). Not a single cross examination question or any analysis offered by any NWE witness supports this assertion in NWE's brief. There is simply no evidence on this record by which the PUC may reach a decision on NWE's assertions.

NWE also neglects many other factors that might prove to offset NWE's claim that just two of the factors (dispatchability and seasonal demand) would result in a lower overall avoided cost for Oak Tree. If all factors in 18 C.F.R. § 292.304(e) were fully vetted and adequately considered, it might be that the avoided cost to be paid to Oak Tree would actually *increase*. For example, NWE does not mention the relationship between Oak Tree's energy and capacity to the ability of NWE to avoid potential future capacity additions or the reduction of future fossil fuel use. *See* 18 C.F.R. § 292.304(e)(3). NWE also did not consider the value of line losses. See 18 C.F.R. § 292.304(e)(4). Many other factors in 18 C.F.R. § 292.304(e)(2) are not even mentioned by NWE's brief.

The fact is Mr. Lauckhart's analysis, in using the Market Estimate approach, *did* take into account each of these factors in deciding whether, in each hour for 20 years, the value of Oak Tree's generation in the market. Contrary to NWE's assertion, Mr. Lauckhart considered the market price for each hour and, accordingly, did consider the appropriate seasonal relationship between Oak Tree's output to market and the price for that energy in that particular hour. There is simply no evidence in this record to suggest the factors in 18 C.F.R. § 292.304(e) justify a reduction in the rate to Oak Tree, or any rate whatsoever for that matter. As between the parties, only Oak Tree performed a valid avoided cost study over 20 years. NWE's assertions regarding 18 C.F.R. § 292.304(e) should be accorded no weight by the PUC.

D. NWE's Argument on Oak Tree's Capacity is Inaccurate

NWE argues that Oak Tree assigns a 20 percent capacity contribution to Oak Tree's project, which NWE claims is too high in determining Oak Tree's contribution to NWE's resource adequacy requirements. NWE Post-Hearing Open. Br. at 10. NWE further contends that NWE's current method of calculating capacity value from wind plants, adopted by the Midwestern System Operator ("MISO"), does not permit 20 percent of nameplate capacity to be counted towards resource adequacy. *Id.* NWE then cites Mr. Dennis Wagner as saying that although capacity contributions may vary by project, it typically ranges from 8 percent to 12.9 percent. Thus, NWE argues that Oak Tree's capacity value is likely less than 3.9 megawatts (MW), but more in the range of 2.5 MW to 1.5 MW.

Contrary to NWE's assertion, there is no evidence or testimony in this proceeding that NWE is prohibited from assigning a 20 percent capacity value to Oak Tree (or any other wind facility). NWE insists it follows MISO's requirements for assigning capacity contributions to wind generation facility, there is no evidence that MISO forced this decision on NWE. Rather, NWE *chose* to use MISO's method for calculating the contribution of wind resoures to a utility's resource adequacy, just as NWE chose to *ignore* MISO's planning reserve margin requirement of 12 percent and utilized only a 7.1 percent planning reserve margin. EL11-006 Hr'g Tr. at 334:9-25. Furthermore, NWE has no evidence that Oak Tree's capacity contribution to NWE's resource is less than 20 percent. In fact, NWE came up with a 20 percent calculation for Titan Wind at least in the first year. EL11-006 Hr'g Tr. at 333:19-21. More importantly, regardless of Oak Tree's actual capacity contribution, Oak Tree would nonetheless be entitled to a capacity payment for that contribution.

NWE asserts that Oak Tree never offered to sell NWE its capacity separate from its energy. NWE Post-Hearing Open. Br. at 10. Again, this is true insofar as it goes, but it does not deny that Oak Tree is entitled to payment for both its energy and capacity and it offered numerous times to sell both to NWE.

NWE then argues it never misrepresented its capacity needs to Oak Tree. *Id.* Whether NWE misrepresented the need for capacity is irrelevant. What matters is that as of February 25, 2011, Oak Tree offered to sell NWE capacity at a cost of $17/KW year or $17,000/MW year. EL11-006 Hr'g Tr. at 199:21-24. Although NWE admits it knew of Oak Tree's offer, EL11-006 Hr'g Tr. at 198:13-17, NWE nonetheless decided to proceed with building the Aberdeen gas plant as of April 2011, and in September 2011 NWE entered into a contract for capacity with Basin Electric to purchase capacity for Summer of 2013. EL11-006 Hr'g Tr. at 209:4-7; 212:18-21. The cost of this capacity contract with Basin Electric was substantially more expensive than Oak Tree's offer, costing $5/KW month or $5,000/MW month. If NWE had decided to buy this capacity from Oak Tree instead of ignoring Oak Tree's offer to negotiate, it could have avoided significant capacity costs.

NWE now claims it does not need capacity until 2016. NWE Post-Hearing Open. Br. At 11. However, as set forth above, this is counter to what NWE testified during the hearing, which was that it needed capacity as of April 2011 even after a decision to build the Aberdeen facility, which was not even built as of this time. NWE offers no record evidence to counter its own testimony at hearing that it needed this capacity prior to the time Oak Tree offered to sell its energy and capacity to NWE on February 25, 2011, and that despite this need, NWE refused to purchase the capacity

E. NWE's Argument that Oak Tree's Method is Improper or Illegal Is Unfounded

NWE offers a number of arguments against Oak Tree's avoided cost calculations in this proceeding. Although none of these arguments has merit, it should be recalled that Oak Tree is not requesting the full avoided cost calculated by Mr. Lauckhart in either his "brown power" calculation of $79.82/MWH or his "green power" calculation of $70.91/MWH. Instead, Oak Tree is offering $65.12 levelized over 20 years.

NWE's first argument is that Mr. Lauckhart's method is illegal. However, NWE witness Mr. LaFave identified the "market estimate" approach as a valid approach for calculating avoided costs. NWE Exhibit 1, p. 9. Furthermore, at hearing, Mr. LaFave testified that Mr. Lauckhart used the "market estimate" approach. EL11-006 Hr'g Tr. at 232:20-25. Thus, although NWE identified the precise method utilized by Mr. Lauckhart in its testimony as a proper method for calculating avoided costs, NWE is apparently now unhappy with the result it produced. As a result, NWE is now contradicting its prior testimony in making the claim that Mr. Lauckhart's "market estimate" approach is invalid. There is no basis for such a claim, and NWE is simply yet again acting in a facile manner in making this claim.

NWE cites the case of *Metro. Edison Co.*, 72 FERC ¶ 61,015, ¶ 61,049 (1995) for the proposition that any method of calculating avoided cost must consider all resources available to the utility. NWE Post-Hearing Open Br. at 12. However, Oak Tree finds no support for this proposition in this case. Instead, FERC's decision was to dismiss a challenge to six QF contracts as either untimely or premature. *Id.* at 1. However, in that case, the challenge by the utilities was to the use of a "coal proxy plant," another method identified on page 9 of Mr. LaFave's testimony identified as the "Proxy Unit/Surrogate Method." However, there is nothing in the *Metro Edison* decision which would render Mr. Lauckhart's "brown value" avoided cost calculation unlawful.

Recently FERC decided in *California Public Utilities Commission*, 133 FERC 61,059 (2010) at P 27, that a state "*may* appropriately recognize procurement segmentation by making separate avoided cost calculations." *Id.* At n. 53 (emphasis added). FERC also said, "the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations." *Id.* at P 26. In fact, many states such as Montana use the "proxy unit/surrogate method" to establish avoided costs. *See e.g.,* Docket D2010.7.77, Final Order 7108e, ¶ 68, at p. 24. NWE is undoubtedly familiar with this fact, which makes its insistence it is unlawful to not consider all sources of potential generation all the more difficult to comprehend.

Contrary to NWE's assertion on page 12 of its Post-Hearing Opening Brief, Oak Tree is not ignoring NWE's incremental avoided costs. Instead, Oak Tree is using one of the valid methods for calculating avoided cost identified by Mr. LaFave as valid – at least until NWE disliked the result. MPSC Docket D2010.7.77. Furthermore, Mr. Lauckhart's "brown power" calculation did take into account all sources of generation available to NWE by calculating the value of energy in each hour over the course of 20 years. Since Mr. Lauckhart's analysis necessarily incorporated the availability of coal-fired generation, natural gas fired generation, and renewable energy into his hourly estimates, he also considered all these resources to be available to NWE in his "brown power" calculation.

NWE cites FERC's *California Public Utilities Commission* as prohibiting a state like South Dakota from utilizing the "proxy unit/surrogate method" identified by Mr. LaFave unless that state imposes an obligation to purchase a particular type of resource. NWE Post-

Hearing Open. Br. at 13. NWE argues this decision prevents the utilization of Mr. Lauckhart's "proxy unit" calculation of "green power" price, which assumes NWE would avoid building a wind resource by purchasing from Oak Tree. However, FERC's holding in that case was whether California's Feed In Tariff violated PURPA by mandating a separate rate for particular resources. There is nothing in that decision that would suggest a state commission operating pursuant to a renewable portfolio objective (as opposed to a renewable portfolio standard) is precluded from adopting a resource-specific rate for renewable generation such as wind. Indeed, FERC cited *SoCal Edison*, 70 FERC ¶ 61,215 at 61,676 for the proposition that FERC has acknowledged "a state's ability to favor particular generation technologies is the prerogative of the states, and explaining that "'a state may choose to require a utility to construct ... or to purchase power from ...a particular type of resource'" and that the state can take such action consistent with PURPA "'so long as such action does not result in rates above avoided cost'".

There is nothing remotely improper about either Mr. Lauckhart's "brown power" calculation of avoided cost using the "market estimates" method or his "green power" which utilized the "proxy unit/surrogate resources" method. The FERC cases cited by NWE do not require the PUC to calculate avoided cost in the manner suggested by NWE which Oak Tree believes to be unlawful. Nor do these cases proscribe the use of the methodologies used by Mr. Lauckhart. NWE simply misunderstands the holdings of the cases it cites.

F. NWE Fundamentally Misreads the Law With Respect to a QF's Right to a Long-Term PPA.

NWE argues that since Oak Tree's forecast of spot market prices could be wrong that

Oak Tree's request for a long-term contract will shift risk to NWE's ratepayers. [7] NWE Post-Hearing Open. Br. at 13. Furthermore, NWE argues that the principle of "consumer indifference" in PURPA includes both costs and risks. *Id.* at 14. NWE fundamentally misunderstands FERC's policy on both counts. First, FERC has resolved the issue of the risks of a forecast being wrong long ago in Order 69, 38 Fed. Reg. Vol. 45, at p. 12,224 (1980):

> Some of the comments received regarding this section stated that if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchase that would subsidize the qualifying facility at the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.
>
> Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that, in the long run, "overestimations" and "underestimations" of avoided costs will balance out.

In *New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F. Supp.2d 211, 221 (N.D.N.Y. 2000), the court declined to grant relief to a utility from contracts with QFs that the utility claimed were in excess of avoided costs and harmed ratepayers noting that FERC had already considered this risk/benefit analysis when it adopted 18 C.F.R. § 292.304(d): "FERC recognized when the above regulation was enacted that avoided costs could change over time and attempted to reconcile the requirement that utilities pay no more than their avoided costs for purchases with the need for QFs to enter contractual

[7] NWE's concern for its ratepayers would be more convincing if it were not apparently refusing to share the revenue from economy sales with its ratepayers.

commitments based 'by necessity, on estimates of future avoided costs.'"

FERC recognized that there was a risk associated with permitting QFs to "lock in" rates pursuant to an LEO because such rates could prove to be in excess of avoided costs over the length of the contract. FERC also recognized in 1980 the argument that long term forecasts can be unreliable. However, FERC considered that risk in adopting its regulations, and felt these risks were outweighed by the need for certainty in investment in new technologies, and FERC felt that the risks of forecasting prospective avoided cost rates would balance out over time. NWE appears not to recognize that these bedrock principles of PURPA have been established for some time. The law is simply inapposite to NWE's argument on this issue. Finally, Oak Tree would note that NWE did not fear long-term electric price forecasts when it made its own investment decisions, whether it be the decision to retrofit Big Stone, build Aberdeen, or purchase the Spion Kop project from Compass Wind.

G. The Black & Veatch Price Forecast is Not Unreliable; NWE is Simply Wrong on Many of its Facts

Oak Tree has already addressed the relative experience of Mr. Lauckhart as compared with the astonishing inexperience of NWE's experts in this proceeding in its Opening Brief. *See* Section III.B.2, *infra*. That brief noted that Mr. Lauckhart has been an expert witness many times on avoided cost matters and has prepared forecasts many times. NWE's witnesses have never before testified on avoided costs or electric price forecasts in any proceeding. The relative expertise of Oak Tree's expert as compared to NWE's experts puts NWE's criticism of Mr. Lauckhart's testimony and forecast in a proper perspective. Many of NWE's objections to Mr. Lauckhart's methods and analysis ring hollow as a result.

First, NWE argues that since Oak Tree uses an "off the shelf" estimate of spot market prices prepared by Black & Veatch that the forecast is somehow suspect. NWE Post-Hearing

Open. Br. at 14. This assertion that the Black & Veatch Energy Market Perspective is unreliable is contrary to the record. The Black & Veatch Energy Market Perspective for Fall 2010 was prepared by a team of experts at Black & Veatch, among them Mr. Lauckhart. EL11-006 Hr'g Tr. at 87:21-88:9; 46:5-10. It is relied upon by banks to finance millions of dollars in projects and it costs $500,000 to prepare one such forecast every six months. EL11-006 Hr'g Tr. at 54:1-13. The forecast uses a team of experts, and is available to individual clients at a cost of of $15,000. EL11-006 Hr'g Tr. at 66:18; 54:3. For NWE to disparage Black & Veatch's Energy Market Perspective because it is an "off the shelf" product is simply a gratuitous observation without any record significance.

Although it is true as NWE claims that Mr. Lauckhart did not gather the data that were used in the Black & Veatch forecast, NWE Post-Hearing Open. Br. at 14, NWE does not explain why Mr. Lauckhart, as one of the experts who consulted and met with other experts in preparing the forecast, was required to collect the data himself. Nor does NWE explain the significance of this fact. However, Mr. Lauckhart *did* assist in preparing Black & Veatch's 2010 Energy Market Perspective and continues to consult with Black & Veatch in preparing those forecast. EL11-006 Hr'g Tr. at 66:14-67:14. And although Mr. Lauckhart did not gather the data himself, he was part of a team that made significant decisions about the data to be gathered, which data was needed, and the appropriate timing of the data to be collected. EL11-006 Hr'g Tr. at 67:12-16.

NWE fundamentally misunderstands Mr. Lauckhart's testimony regarding the assumptions that went into the Black & Veatch Energy Market Perspective. NWE Post-Hearing Open. Br. at 14. Mr. Lauckhart was asked whether he "individually" decided the assumptions in the Black & Veatch forecast. EL11-006 Hr'g Tr. at 67:16-17. Mr. Lauckhart answered that it was a broader group, but made it clear that he was in that group because he used the pronoun "we" in discussing the group's assumptions. EL11-006 Hr'gTr. at 67:18-20. NWE's attack on Black & Veatch is simply an attempt to resurrect NWE's argument at hearing that there was insufficient foundation for Mr. Lauckhart to introduce the Black & Veatch forecast. The PUC overruled NWE's objection at that time, and there is nothing in NWE's criticism of the Black & Veatch forecast or Mr. Lauckhart that warrants a reconsideration of that decision.

NWE then turns to a more substantive argument against the Black & Veatch forecast. NWE's criticism is in the form of Mr. Lewis's testimony, which is hardly unbiased. Moreover, the credibility of Mr. Lewis's opinions are in doubt given that he has adopted a natural gas price forecast that assumes no real increase in the price of natural gas between 2015-2031, a dubious assumption not shared by *any* credible forecasting agency.

Based on Mr. Lewis' opinion, NWE first argues that Black & Veatch's estimate for 2011 was substantially higher than the prices that actually occurred. However, the forecast was prepared in November 2010, and there was insignificant evidence as of February 2011 in Mr. Lauckhart's judgment, after discussing this with his colleagues at Black & Veatch, to warrant revisiting the forecast. EL11-006 Hr'g Tr. at 504:1-505:5. NWE also claims that the Black & Veatch forecast incorrectly assumed increased natural gas prices without considering "the fundamental change that the natural gas industry underwent prior to the preparation of its estimate." NWE Post-Hearing Open. Br. at 14. NWE cites for this proposition page 93, line 17, through 96, line 19 of the EL11-006 Hearing Transcript. However, there is nothing on those pages that indicates that Mr. Lauckhart or Black & Veatch missed whatever fundamental change that NWE is referring to in its brief. Black & Veatch and Mr.

Lauckhart considered the increased use of horizontal shale bed drilling and other fundamental factors in the forecast, and there is no evidence on those pages that they did not.

Finally, NWE relies on Mr. Lewis to say that Black & Veatch's forecast "incorporates significant carbon penalties that are unreasonable." NWE Post-Hearing Open. Br. at 15. However, Black & Veatch provided a detailed analysis based on the Waxman/Markey Bill in its Energy Market Perspective about how it calculated its assumptions. *See e.g.,* Oak Tree Exhibit 1, Attachment 5, at p. 119. In comparison, Mr. Lewis, who has no discernible expertise in calculating carbon prices, asked his two colleagues at Land's Energy:

> Q. [Mr. Uda]Mr. Lewis in his testimony provided NorthWestern and you with a carbon emissions cost projection of $5 a ton in 2015, $10 a ton in 2020, and 15 a ton in 2025. Do you agree with this? Do you have any objections to this level of cost?
> A. [Mr. Lauckhart] Well, this was my – a question we had to him was how did he come up with his number? Because we make a significant effort on ours. Our forecast really is built around the Waxman-Markey Bill that was passed by the House of Representatives a couple of years ago. And our belief is that will probably be close to what gets passed if ever anything gets passed by Congress. And we think it probably will be. Although now we're thinking it's going to be delayed so implementation will be after 2016.
> Suffice it to say, we do a considerable amount of work showing, well, what is the cap and what are the ways to meet the cap and go through the math, supply and demand, of figuring out how you're going do that – this is what cap and trade is all about – and what we think a market clearing price will be that allows us to meet the cap.
> So we asked Mr. Lewis on the data graphs how do you do your forecast? And he said I consult with my other two members at my company, and we just decide.

EL11-006 Hr'g Tr. at 88:23-89:22.

Put simply, all opinions are not equally valid. Black & Veatch is a reputable organization with considerable experience in preparing electric price forecasts. Mr. Lauckhart has prepared numerous avoided cost and electric price forecasts, has testified numerous times on these issues, and has 41 years of experience in the industry. NWE's witnesses have very little experience and their methodology is, at best, suspect as set forth in *See* Oak Tree's Opening Brief, Section III.B.4. NWE's witnesses' testimony should be given the weight it deserves on these subjects.

H. NWE is Incorrect on the Issue of Fixed Rates and Contract Length

NWE claims that Oak Tree has no right to a fixed rate or to specify the length of the term of its contract. NWE argues that the PUC is free to disregard Order 69 because it is "merely the preamble to current rules" and is not law. NWE Post-Hearing Open. Br. at 14. In other words, the agency's interpretation of its own rules is entitled to no weight in NWE's opinion.

NWE's construction is contrary to well established principles of administrative law and contradicts 30 years of PURPA interpretation by state and federal courts. It is clear that federal courts have afforded *Chevron*-style deference to FERC Order 69 in deciding the meaning of the Commission's regulations. *E.g., Greensboro Lumber Co. v. FERC,* 825 F.2d 518 (1987)(" Congress' clear commitment of PURPA's administration to the Commission is therefore all we need to defer to the agency if its construction of PURPA is reasonable. It is; therefore we do.") Moreover, in addition to the plain language of Order 69, state courts have interpreted PURPA to permit a QF to determine the type of payment stream it will receive, including fixing the rate at the outset of its obligation. *E.g., Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.,* 168 Or. App. 466, 470, 7 P.3d 594, 598 (2000)("Alternatively, the cogenerator may choose to have the price fixed in the contract. In that event, the price is based on a projection of avoided costs "over the life of the obligation, as calculated 'at the time the obligation is incurred.'")(citation omitted); *Armco Advanced Materials Corp. v.*

Pennsylvania Public Utility Com'n, 644 A.2d 630, 634 n. 8 (Pa.Cmwlth. 1995)("FERC has determined that PURPA permits 'lock-ins,' that is, fixed-rate long-term QF contracts. *In re West Penn Power Company,* 71 F.E.R.C. P61, 153 (order denying petition for declaratory order, May 8, 1995")); *Afton Energy, Inc. v. Idaho Power Co.,* 114 Idaho 852, 860, 761 P.2d 1204, 1212 (1988)("The reason PURPA requires fixed term/fixed rate contracts is to promote cogeneration by making financing possible. When a utility finances plants by issuing 20–year bonds, those bonds carry a fixed interest rate for their term, which interest rate is not subject to change through the rate-making process from year to year. The same type of stability is needed by cogenerators and their financing institutions.").

Thus, NWE is simply wrong that the Preamble to the FERC regulations is not authority for the proposition that Oak Tree is entitled to a fixed rate contract in order to obtain financing. NWE claims that the Commission is allowed to determine the method of payment, but there is no support in PURPA, its implementing regulations, the preamble to those regulations, or any cases that support NWE's position. PURPA was designed to encourage the development of QFs such as Oak Tree. *See e.g., Public Service Co. of Oklahoma v. State ex rel. Oklahoma Corp. Com'n,* 115 P.3d 861, 870 (Okla., 2005). Adopting NWE's position that the PUC can determine the payment schedule that the QF will receive (as opposed to determining the avoided cost upon which the payments are based, which is the PUC's prerogative) would discourage the development of QFs in violation of PURPA.

NWE also argues that the regulation does not allow the QF to specify the term of its commitment under 18 C.F.R. § 292.304(d)(2). This argument is contrary to the plain language of the regulation. Regulations, like statutes, are to be interpreted according to their plain meaning. *Tesoro Hawaii Corp. v. U.S.*, 405 F.3d 1339, 1346 (Fed. Cir. 2005). 18 C.F.R. § 292.304(d)(2) admits of no construction other than the QF deciding the length of the term of its commitment. The regulation expressly states that "Each qualifying facility shall have the option . . . (2) to provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . ." The plain language of 18 C.F.R. § 292.304(d)(2) does not mention the state commissions, nor confer any authority on those entities by this language. The only entities that are mentioned are qualifying facilities.

Oak Tree has already addressed this argument at length in its opening brief. *See* Section III.D, Oak Tree Post-Hearing Opening Brief. NWE argues that *New York State Electric & Gas Corp. v. Saranac Power Partners, L.P.*, 117 F. Supp. 211, 229 (N.D.N.Y 2000) supports its position because the New York Public Service Commission established a 15-year rate. However, nothing in *Saranac* indicates *why* the New York Commission set a 15-year rate; it merely mentions that the Commission set a 15-year rate. Contrast this ambiguity to the very clear language FERC employed in describing the QF's rights in Order 69: "Paragraph (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 . . . this … enables a qualifying facility to establish a fixed price contract at the outset of its obligation or to receive the avoided costs determined at the time of delivery." 45 Fed. Reg. 12,224.

I. An LEO was created by Oak Tree on February 25, 2011

PURPA's regulations and recent FERC decisions set a framework for the PUC to determine the existence of an LEO in this matter. NWE seems to imply that since the PUC has not addressed this issue to date Oak Tree is unable to establish an LEO absent any specific guidelines from PUC. This is plainly incorrect. PURPA's regulations and FERC's subsequent decisions provide sufficient information as to whether an LEO was created in this case and, as of February 25, 2010, an LEO was created.

The individual states have the obligation to determine whether an LEO was a created and, if so, when. Some states have developed a sort of "standard contract" by which a QF and utility are required to work within; other states have developed a competitive process where QF's bid for the opportunity to provide their energy to the utilities; still others have yet to address the issue at all. South Dakota falls into the latter category; however, the PUC is not without sufficient information to determine the existence of an LEO.

The guidance that has been provided by recent FERC decisions is in the form of what a state commission may or may not do. Many state commissions, the PUC included, play a multi-faceted role in their state; not only are they a policy making entity, they are also the finder of fact during a dispute. When an issue is presented before FERC, it, generally, stems from a situation where the commission was acting as a finder of fact. Thus, when making a ruling, FERC has been presented with a specific situation about which it must determine whether the commission was acting in a matter consistent with PURPA.

Recent FERC decisions have not established any new standards or attempted to limit a state commission's ability to address whether or when an LEO was established. Contrary to NWE's statement in their Post-Hearing Brief, p. 17-18, Oak Tree's references to recent FERC decisions illustrate instances where LEO's were discussed and FERC was able to provide additional guidance as to the implementation of PURPA at the state level. In other words, the FERC decisions further clarified the regulations already established by PURPA.

A state commission's duty to implement PURPA has boundaries. Most importantly, a state commission is required to act in a manner consistent with the regulatory scheme, as well as the spirit, of PURPA. At this point, South Dakota has not adopted any policy which addresses the formation of an LEO. Any such policy would have to be consistent with PURPA. Absent such a policy, however, the commission must rely on PURPA and FERC's clarification of the implementation of PURPA. This is exactly what must be done in this case, as it relates to an LEO.

NWE's overview of decisions in other states regarding the implementation of PURPA does little to assist the PUC in answering the question at hand. Here the PUC must decide whether and when an LEO was created by Oak Tree. That determination can only be based on PURPA's regulations and FERC's guidance in interpreting those regulations. The realization that state commissions have varied in their use of discretion while determining the existence of an LEO does little more than emphasize the importance of the PUC and its role in this matter.

An LEO is created when the QF commits to selling its output to a utility. A state commission has flexibility and discretion in the determination as to when an LEO was created, however, it does not have unlimited discretion to impose additional requirements to establishing an LEO. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006. FERC has been very consistent on this issue – an LEO is a commitment to sell, not the terms of commitment. Oak Tree made that commitment on February 25, 2011.

To impose any condition precedent in addition to Oak Tree's commitment to sell to NWE in order to establish an LEO would be patently unfair and inconsistent with PURPA and potentially a violation of Oak Tree's due process rights. PURPA was established, in part, to prevent utilities from refusing to enter into power purchase agreements with non-utility producers. *JD Wind 1, LLC*, 129 FERC ¶ 61,148 at P 24. To date, the PUC has not implemented PURPA subject to any precedential conditions. Therefore, to require Oak Tree to comply with any "criteria," such as that suggested by NWE in their Post-Hearing brief, would be completely inconsistent with PURPA and would provide inadequate notice to Oak Tree of the PUC's intent to adopt new criteria for creating an LEO and retroactively applying that criteria to Oak Tree.

NWE states that the PUC should adopt a set of criteria for the creation of an LEO in South Dakota. NWE Post-Hearing Op. Br. at p. 30. Oak Tree is not opposed to the PUC reviewing and discussing a framework by which they determine the existence of an LEO; however, any such framework should *not* apply to this case. At the time the LEO was established, Oak Tree had attempted to negotiate with NWE, to no avail. Furthermore, Oak Tree was limited to the PURPA regulations and FERC's decisions prior to February 25, 2011 for guidance as to establishing an LEO. Thus, requiring ***any*** additional conditions in this case would be unfair and prejudicial to Oak Tree.

Oak Tree has met its burden to establish the existence of an LEO as of February 25, 2011. Although NWE maintains that Oak Tree "has not met sufficient reasonable criteria to create an LEO," NWE Post-Hearing Op. Br. at 31, Oak has provided sufficient information to show the creation and existence of an LEO. One of the cases cited by both Oak Tree and NWE is *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Docket No. D2002.8.100, (June 4, 2010). This is the most recent case involving NWE and a situation that is similar to the one at hand. In the *Whitehall* case, the Montana Public Service

Commission (MPSC) established a 'bright line' rule to determine if an LEO exists.[8] If such a rule were in effect here, Oak Tree would indeed meet the criteria.

Oak Tree has no other market for the sale of its output, therefore, on February 25, 2011, Oak Tree sent a signed contract to NWE obligating itself to sell the entire output. Under PURPA, this was all that Oak Tree was required to do in order to establish an LEO. Regardless of NWE witness testimony and NWE's attempt to get the PUC to impose additional conditions on establishing an LEO, Oak Tree met its burden under PURPA – the commitment to sell. Any additional terms can be worked out later between the parties or pursuant to a PUC order.

Oak Tree has a right under 18 C.F.R. § 292.304(d), to create an LEO. On February 25, 2011, Oak Tree exercised its right by sending a letter to NWE committing to sell its entire output to NWE. In that letter, Oak Tree specified a term of 20 years and provided a calculation of NWE's avoided. Therefore, the PUC should determine that this commitment established an LEO as of February 25, 2011.

IV. CONCLUSION

For the reasons set forth herein, Oak Tree respectfully requests an order finding that Oak Tree is entitled to a contract as of February 25, 2011, at a rate of $65.10/MWH levelized over 20 years.

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[8] In that decision, the MPSC stated that "to establish an LEO, a QF must tender an executed power purchase agreement to the utility with a price term consistent with the utility's avoided costs, with specified beginning and ending dates, and with sufficient guarantees to ensure performance during the term of the contract, and an executed interconnections agreement."

Respectfully submitted this 24th day of April, 2012.

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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 24th day of April, 2012, upon the following:

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