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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

REBUTTAL TESTIMONY OF THOMAS K. ANSON

I. INTRODUCTION

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Q. Please state your name and employment.

A. My name is Thomas K. Anson. I am a partner with the law firm of Strasburger & Price, LLP. My business address is currently 600 Congress, Suite 1600, Austin, TX 78701.

Q. Please describe your professional qualifications and experience.

A. I have been engaged in the practice of energy and utility law for over 30 years, which has included matters arising under the Public Utility Regulatory Policies Act of 1978 (PURPA).

1 Q. What is the purpose of your testimony?

2 A. I have been asked by Oak Tree Energy, LLC (Oak Tree) to address the federal framework
3 regarding how a Qualifying Facility (QF) may create a Legally Enforceable Obligation
4 (LEO) as set forth in 18 C.F.R. § 292.304(d). I am testifying as a rebuttal expert in
5 response to NorthWestern Energy (NorthWestern) witness Bleau LaFave on pages 5-8 of
6 his prefiled direct and rebuttal testimony submitted by NorthWestern on January 13,
7 2011. Because the South Dakota Public Utility Commission (South Dakota PUC) has
8 not yet specified how and when a LEO is created in South Dakota, I will address the
9 requirements of the Federal Energy Regulatory Commission (FERC) with respect to the
10 creation of a LEO.

11

12 **II. CREATION OF A LEGALLY ENFORCEABLE OBLIGATION**

13

14 Q. Have you been involved in cases where the LEO issue has been litigated?

15 A. Yes. I have been involved for several years in litigation where the creation of a LEO was
16 at issue.

17 Q. Can you please summarize your experience with respect to the LEO issue?

18 A. I was involved in the litigation before the Public Utility Commission of Texas (Texas
19 PUC) which resulted in the order in *JD Wind 1, LLC, et al. v. Southwestern Pub. Serv.*
20 *Co.*, PUC Docket No. 34442, Order (May 1, 2009); in the related proceedings at FERC
21 that resulted in the decisions in *JD Wind 1, LLC et al.*, Notice of Intent Not to Act &
22 Declaratory Order, Docket No. EL09-77-000, 129 FERC ¶ 61,148, 2009 FERC LEXIS
23 2267, at *1 & *18 (Nov. 19, 2009), *order denying reh'g*, 130 FERC ¶ 61,127 FERC
24 LEXIS 313 (Feb. 19, 2010); and in the pending federal court litigation that followed from
25 that FERC decision, in *Exelon Wind 1, LLC, et al. v. Nelson, et al.*, A-09-CV-917-SS
26 (W.D. Tex.).

27 Q. Can you please summarize why you are focusing on the requirements of FERC with
28 respect to the creation of a LEO?

29 A. PURPA in 16 U.S.C. § 824a-3(a) directed the FERC to promulgate regulations to carry
30 out the PURPA requirements. FERC's PURPA regulations, adopted in its Order No. 69,
31 provide the framework of the utilities' obligation to purchase QF power at prescribed
32 rates. Order No. 69, *Small Power Production and Cogeneration Facilities; Regulations*
33 *Implementing Sec. 210 of [PURPA]*, 45 Fed. Reg. 12214, 12224 (Feb. 25, 1980), *aff'd in*
34 *part & vacated in part on other grounds*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d
35 1226 (D.C. Cir. 1982), *rev'd in part on other grounds*, *Am. Paper Inst., Inc. v. Am. Elec.*
36 *Power Serv. Corp.*, 461 U.S. 402 (1983). The statute further required in 16 U.S.C. §
37 824a-3(f)(1) that each state regulatory authority implement FERC's PURPA regulations.
38 In other words, FERC's rules set the minimum requirements which a state regulatory
39 authority's implementation of PURPA must meet.

1 Q. What are a QFs options under PURPA relevant to a LEO?

2 A. Under FERC's regulations, 18 C.F.R. § 292.304(d) provides "each qualifying facility"
3 with the option to sell its output to an electric utility either as the QF determines such
4 energy to be available or to sell energy capacity pursuant to a "legally enforceable
5 obligation" over a specified term. (This assumes the utility has not been relieved of its
6 relevant PURPA obligations pursuant to the 2005 amendments to PURPA.) If the QF
7 chooses to create a legally enforceable obligation, it has the further right to elect between
8 sales prices calculated at the time the obligation is created, or sales prices calculated at
9 the time the electric energy is delivered to the utility.

10 In other words, the QF has a series of options: to sell to the utility, or not; if it chooses to
11 sell to the utility, then either pursuant to a LEO or as the QF determines such energy to be
12 available; if pursuant to a LEO, to sell energy, capacity, or energy and capacity; also if
13 pursuant to a LEO, to specify the length of term of the obligation; and if pursuant to a
14 LEO, to select time-of-delivery avoided cost pricing for the energy or estimated avoided
15 costs at the time of the LEO creation for the energy and/or capacity.

16 Having sales prices calculated at the time the obligation is created provides price
17 certainty, which supports financing, and thus facilitates the development of the QF's
18 alternative energy project.

19 Q. Do the states play a role in how a LEO may be created by QFs?

20 A. Yes. As confirmed by *FERC v. Mississippi*, 456 U.S. 742, 751 (1982), while a state
21 regulatory authority has latitude to determine the mechanism by which it will implement
22 FERC's regulations (issuing regulations, resolving disputes on a case-by-case basis, or
23 other actions), the method must give full effect to the FERC's rules. As recounted in
24 *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 237-39 (5th Cir.
25 2005), FERC allows states discretion in determining when and how a LEO is created. As
26 a result, a range of requirements have been adopted in various states regarding how and
27 when a LEO is created. A summary of what various states have done in this regard is
28 provided in *Petition of Whitehall Wind, LLC, For QF Rate Determination*, Order No.
29 6444e, Order on Remand, Public Service Commission of Montana (June 4, 2010). As
30 noted above, the South Dakota PUC has not yet specified how and when a LEO is created
31 in South Dakota.

32 Q. Do the states have unlimited discretion in determining the creation and enforcement of
33 LEOs by QFs?

34 A. No. The states have to adopt policies that implement PURPA including FERC's
35 regulations. A failure to do this is a failure to implement PURPA and a violation of that
36 federal law. For example, the state regulatory authority's discretion on when and how a
37 LEO is created is not the same as deciding to categorically exclude certain types of QFs
38 from the right to create a LEO. The Texas PUC's categorical exclusion of wind
39 generation QFs from the eligibility to create a legally enforceable obligation led to the
40 declaration by FERC that the Texas PUC had failed to implement PURPA, in the *JD*

1 *Wind* case mentioned above. Similarly, the state regulatory authority’s discretion on
2 when and how a LEO is created is not the same as deciding to give the utility the ability
3 to effectively veto the creation of a LEO. The Idaho Public Utility Commission’s
4 requirement that a LEO can result only from a fully-executed contract obligation led to
5 the declaration by FERC that the Idaho commission had failed to implement PURPA, in
6 *Cedar Creek Wind, LLC, Notice of Intent Not to Act and Declaratory Order*, Docket No.
7 EL11-59-000, 137 FERC ¶ 61,006, 2011 FERC LEXIS 1819 (Oct. 4, 2011).

8 *Q. Please summarize FERC’s minimum requirements regarding the creation of an LEO.*

9 A. Under Order No. 69, 45 Fed. Reg. at 12224, if a QF chooses to commit the power to the
10 utility over a specified term, thereby giving up the discretion to sell the power whenever
11 it so chooses, it creates a “legally enforceable obligation.” This may be done through a
12 contract, though if the electric utility refuses to sign one the QF may create a non-
13 contractual, but still legally enforceable, obligation under PURPA. It does so by
14 committing itself to sell to an electric utility over a specified term, which in turn commits
15 the electric utility to buy from the QF. FERC has confirmed this most recently in the *JD*
16 *Wind* and *Cedar Creek* cases mentioned above. The ability of a QF to unilaterally create
17 non-contractual LEOs was also previously confirmed in *Power Res. Group, Inc.*, 422
18 F.3d at 238. Having the right as a QF to create a non-contractual LEO under PURPA
19 prevents the electric utility from avoiding its PURPA obligations by refusing to negotiate
20 or sign a contract.

21 *Q. On page 5, lines 32-35, Mr. LaFave states that “It is NorthWestern’s position that there*
22 *needs to be some certainties around purchasing from a QF before an LEO can exist. For*
23 *example, NorthWestern feels it necessary to have a QF make an offer to sell electricity at*
24 *NorthWestern’s avoided cost. Oak Tree has never indicated a willingness to sell electric*
25 *energy to NorthWestern at NorthWestern’s avoided cost.” Do you have any observations*
26 *about Mr. LaFave’s statement?*

27 A. Yes. On February 25, 2011, Oak Tree sent a letter to NorthWestern which stated that
28 Oak Tree was establishing a LEO for the delivery of its energy and capacity to
29 NorthWestern, pursuant to which it “will deliver all of its electric energy (other than
30 station service) and capacity for sale to and purchase by” NorthWestern in accordance
31 with an attached purchase power agreement executed by Oak Tree which specified a
32 length of term of 20 years. It was Oak Tree’s right under PURPA pursuant to 18 C.F.R.
33 § 292.304 to elect to sell pursuant to a LEO, instead of selling on an as-available basis,
34 and to establish a LEO on a non-contractual basis instead of on a contractual one.

35 *Q. Do FERC’s PURPA regulations and FERC’s PURPA decisions require there be*
36 *“certainties” around a utility purchasing from a QF before an LEO can exist?*

37 A. No. The FERC’s regulations and decisions do not support Mr. LaFave’s statement.
38 There is no such “certainty” requirement. The touchstone instead is that there be a
39 commitment by the QF to sell and deliver energy and/or capacity to the utility over a
40 specified term, as opposed to as the QF determines such energy to be available.

1 Q. *Mr. LaFave says that Oak Tree has never indicated a willingness to sell at*
2 *NorthWestern's avoided cost as one of those "uncertainties." Do you believe that an*
3 *uncertainty about what is the utility's avoided cost would prevent the formation of an*
4 *LEO under PURPA?*

5 A. The FERC regulations provide that a QF selling pursuant to a LEO has the choice of
6 selling its energy and capacity to a utility at the utility's avoided costs at the time the
7 legally enforceable obligation is incurred (i.e., "estimated" or "forecast" pricing). A
8 utility and a QF may disagree over what is that estimated avoided cost over the specified
9 term of the LEO. A LEO is created by the commitment to sell and deliver the energy
10 and/or capacity; any uncertainty created by a dispute between the parties on what is the
11 estimated avoided cost over the specified term is a separate matter. A state regulatory
12 authority would have to resolve such a dispute. In the case of Oak Tree, it appears that it
13 did not agree with the utility on what should be the estimated avoided costs at the time of
14 the LEO's creation, and retained Black & Veatch to calculate the estimated avoided
15 costs. The utility disputes those calculations. Therefore, the utility dispute may have
16 created uncertainty about what is the estimated avoided cost for the non-contractual LEO,
17 but the fact that the South Dakota PUC must resolve such a dispute does not negate the
18 existence of the LEO itself.

19 Q. *Do the FERC regulations or FERC decisions state that if a utility and a QF cannot agree*
20 *on avoided cost that no LEO can exist?*

21 A. No. The FERC's regulations and decisions do not have any such "certainty"
22 requirement. Again, the touchstone instead is that there be a commitment by the QF to
23 sell and deliver energy and/or capacity to the utility over a specified term. In fact, the
24 whole purpose of having the utility obligated to purchase the power from the QF is to
25 prevent the utility from refusing to do so. Just as the utility cannot avoid its PURPA
26 obligations by refusing to agree to a contract with a QF, so too the utility cannot avoid its
27 PURPA obligations by refusing to agree to one of the key components of a LEO, the
28 avoided cost price.

29 Q. *On page 6, lines 1-3, Mr. LaFave states: "NorthWestern also feels it important to have*
30 *some certainty of delivery of energy from a QF. Oak Tree has never offered any*
31 *assurances of delivery of any electric energy that NorthWestern would be able to*
32 *enforce." Do FERC policy and decisions provide any guidance on such a statement?*

33 A. It appears that he is asserting that there must be certainty of delivery of energy at the
34 times the utility needs it. For example, if the QF power is either base load power or is
35 dispatchable power (i.e., provided if and when the utility call on it), there is more
36 certainty as to when it will be delivered than for an intermittent resource like a wind farm
37 or a solar farm which delivers its output when the wind blows or the sun shines. FERC
38 policy does not require such time of delivery "certainty" or "assurances" from a QF in
39 order for a LEO to be created. If Mr. LaFave is saying that NorthWestern cannot rely on
40 delivery of energy from the Oak Tree wind power project because it is an intermittent
41 resource, FERC has made it clear in the *JD Wind* case that each QF, including
42 intermittent resources, have the right to create a LEO, by committing to deliver the output

1 to the utility. The fact that a QF utilizes an intermittent resource, rather than being base
2 load or dispatchable generation, is relevant to the calculation of the capacity value of the
3 QF, and therefore can affect the calculation of the estimated avoided capacity costs. But
4 under PURPA the right to create a LEO with estimated avoided cost pricing does not
5 depend on the type of resource.

6 *Q. On page 6, lines 4-8, Mr. LaFave states: "Furthermore, the relief that Oak Tree has*
7 *requested in this proceeding is inconsistent with an LEO. An LEO is a substitute for, not*
8 *a path to, a contract. Oak Tree has asked the Commission to resolve a dispute between it*
9 *and NorthWestern "with respect to negotiation of a long term electric power purchase*
10 *agreement. If Oak Tree had created an LEO, it would not need to negotiate a long-term*
11 *contract." How do you respond to Mr. LaFave's point?*

12 *A.* It appears that Mr. LaFave is using LEO to mean only a non-contractual obligation. My
13 perspective is that a LEO can be either contractual or non-contractual. A contractual
14 LEO results if the QF and utility agree. A non-contractual LEO results if they do not and
15 the QF, in order to sell its power to the utility under a LEO, takes the unilateral action to
16 obligate itself, and thus also obligate the utility, to the sale and purchase of the QF power
17 over the specified term. That is the QF's right under PURPA. Upon a refusal of the
18 utility to honor the LEO, the QF can ask the state regulatory authority to enforce the
19 rights of the QF against the utility with regard to the LEO created. The state regulatory
20 authority must, in turn, resolve the complaint in a manner that implements PURPA,
21 including FERC's regulations. There is nothing that appears to me to be inconsistent
22 with taking the steps necessary to create a non-contractual LEO, due to a utility's
23 unwillingness to negotiate a QF agreement, and then requesting state regulatory authority
24 assistance to resolve a dispute about whether the utility must purchase the output under
25 PURPA pursuant to the LEO.

26 *Q. On page 8, lines 14-2,8 of Mr. LaFave's testimony, he states that much additional*
27 *information would be needed to be provided by Oak Tree to NorthWestern in order for it*
28 *to enter into an agreement with Oak Tree. Is a QF required by PURPA to provide the*
29 *sorts of information to the utility in order to create a LEO?*

30 *A.* No. The FERC's regulations and decisions do not have any such requirement. The QF
31 only has to commit to sell its output to the utility over a specified term, and elect one of
32 the avoided cost pricing methods identified in 18 C.F.R. § 292.304(d), including the
33 method whereby the utilities' avoided cost is calculated over a specified term by
34 estimation at the time of the LEO's creation. It may behoove the parties to come to
35 agreement on the additional matters Mr. LaFave identifies, but those are not necessary
36 elements to the creation of a LEO.

37 *Q. Do QFs and utilities have an obligation to negotiate with one another under PURPA?*

38 *A.* A state regulatory authority may require negotiations to occur before the QF takes other
39 steps to unilaterally create a LEO, but PURPA and FERC's PURPA regulations do not
40 require negotiation by either party. Again, the utility does not have a veto right over
41 whether it purchases output from a QF, whether by refusing to negotiate a contract,

1 refusing to sign an otherwise negotiated contract, or by refusing to agree on the estimated
2 avoided costs over the specified term.

3 *Q. Assuming a utility had no long-term avoided cost forecast and claimed it would only*
4 *agree to purchase the QF power at an avoided cost that was lower than that calculated*
5 *by the QF, would that utility appear to be in violation of its PURPA purchase obligation?*

6 A. Based on the limited assumptions provided in the question, it would appear that the utility
7 is refusing to enter into a contract with a QF purchase from the QF. As discussed above,
8 utilities do not have the right to veto the purchase of generation from QFs on the ground
9 that they disagree as to the avoided cost price they would pay for that output.

10 *Q. Assuming a QF sends multiple letters to a utility indicating the QF's interest in selling its*
11 *output at the utility's avoided cost over a specified term, and the utility responds that it*
12 *has no need for additional capacity and that it will sell only at a lower price, does it*
13 *appear the QF needs to do more under federal PURPA policy and decisions to create a*
14 *LEO?*

15 A. As stated previously, under PURPA and FERC's regulations, the QF has the right to sell
16 pursuant to a LEO at the utility's avoided cost over a specified term. The utility does not
17 have the right to create a dispute over pricing and then use that as the means by which to
18 refuse to purchase QF the output under PURPA. By committing to sell and deliver the
19 generation to the utility, the QF can create a LEO.

20 *Q. Assuming a state regulatory authority permitted a utility to decline to purchase output*
21 *from a QF based on the fact that the QF and a utility could not agree on the avoided cost*
22 *price, and found on that basis that no LEO was created, would that state regulatory*
23 *authority appear to have failed to implement PURPA?*

24 A. Assuming the limited facts as set forth in the question, it would appear that the state
25 regulatory authority would have failed to implement PURPA and FERC's PURPA
26 regulations. Indeed, it would appear to be very similar to the situation that was declared
27 by FERC to be a failure to implement PURPA in the *Cedar Creek* case.

28 *Q. Does this conclude your prefiled rebuttal testimony?*

29 A. Yes it does.