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	)))))	**STAFF'S POST SECOND HEARING BRIEF** **EL11-006**

I. INTRODUCTION

The undersigned counsel, on behalf of Commission Staff of the South Dakota Public Utilities Commission (Staff), submits this Post Second Hearing Brief in the above-captioned matter, pursuant to an evidentiary hearing held on December 5-6, 2012 (Hearing), before the South Dakota Public Utilities Commission (Commission). The Complainant in this case is Oak Tree Energy, LLC (OTE or Complainant) and the Respondent is NorthWestern Corporation d/b/a NorthWestern Energy (NWE or Respondent). Throughout this document, OTE and NWE will be jointly referred to as the Parties or individually as Party. OTE has brought this matter before the Commission seeking enforcement of a Purchase Power Agreement (PPA) under the Public Utilities Regulatory Policies Act of 1978 (PURPA). Following the hearing held on December 5-6, 2012, the Commission's counsel requested the Parties to provide an analysis of what the evidence at the hearing showed the correct calculation of avoided cost to be and a legal analysis of the limitations surrounding the fixed term contact option available to QF's under PURPA with respect to Staff's non-levelized cost recommendation and NWE's variable capacity component. Transcript citations will refer to the December 5-6, 2012, hearing and be referenced as "TR" with the appropriate page and line number.

II. STATEMENT OF ISSUES

A. Analysis of the evidence as to the correct calculation of avoided cost, and

B. A legal analysis of the limitations surrounding the fixed term contact option available to QF's under PURPA with respect to Staff's non-levelized cost recommendation and NWE's variable capacity component.

III. ARGUMENT AND AUTHORITIES

A.STAFF'S ANALYSIS AS TO THE CALCULATION OF AVOIDED COST.

Staff submits that Mr. Rounds' most recent avoided cost calculation (Staff Exhibit 6, Avoided Cost Summary-Inflated Capacity) includes the most accurate figures in the record. This calculation is based on inputs that are publicly available and vetted by large stakeholder groups. TR 250:20-25; 251:1-8. Mr. Rounds' avoided cost includes payments for both avoided capacity and energy. On the capacity side, Mr. Rounds attempted to base the avoided cost on the market price of capacity in the region using the small amount of information that was placed in the record. On the energy side, Mr. Rounds used data from EIA and the EIPC to come up with an energy price forecast, which was then fed through the hybrid model.

However, in light of evidence provided at the hearing and in subsequent briefs, Staff recommends a change to Mr. Rounds' calculation. The calculation is based on Mr. Rounds' assumption that the annual accredited capacity factor of OTE must be calculated as of the LEO date, and Staff no longer agrees with this assumption. The reasoning will be explained later in this brief, but the impact to Mr. Rounds' calculation is that the avoided capacity cost (Staff Exhibit 3, OTE Capacity Value Calculation) needs to be removed from the final avoided costs listed in Staff Exhibit 6, Avoided Cost Summary-Inflated Capacity. Then, the Parties should rely on Mr. Rounds' avoided capacity cost forecast in Staff Exhibit 3 and MISO's accreditation method annually to determine Oak Tree's avoided capacity cost.

Mr. Lauckhart has suggested four additional adjustments to Mr. Rounds' calculations. Staff disagrees with each adjustment. First, Mr. Lauckhart included an additional 220,000 MWh of wholesale sales to NWE's annual load obligation. Staff recommends the Commission reject this adjustment because the wholesale sales are not a part of NWE's annual load obligation but a result of the operating characteristics of NWE's baseload plants. TR 80:13-25. Thus, the sales would not be avoided by taking power from OTE and it should not be considered in the hybrid model.

Second, Mr. Lauckhart reduced NWE's baseload generation from 204 MW to 52 MW beginning in 2016. Staff rejects this adjustment as well. The adjustment assumes Big Stone and Neal 4 are unavailable beginning in 2016 because NWE had yet to decide whether to add environmental upgrades as of the LEO date. The formal document requiring environmental upgrades at Big Stone, South Dakota's Regional Haze State Implementation Plan was not finalized until the fall of 2011. Using OTE's logic then, there was no formal requirement for NWE to make environmental upgrades as of the LEO date, and no decision had been made to close the plant. This adjustment is not realistic, and the Commission should not consider such an argument.

Third, Mr. Lauckhart adjusted the capacity cost from $20/kW-year with a 2.5% escalation factor to $141/kW-year with no escalation. Mr. Lauckhart's adjustment is based on his calculation of the cost of a combustion turbine that NWE is building. However, even with a 20-year contract, NWE's avoided cost should not be based on the cost of that plant. NWE cannot simply choose a combustion turbine that is 4 MW smaller. Although Staff agrees that NWE's decision to construct a new combustion turbine shows a need for capacity, Staff disagrees that the price of the turbine would set the avoided cost. Avoided costs are defined 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 CFR 292.101(b)(6) The only capacity costs NWE will avoid as a result of taking delivery of OTE's capacity will be those short-term, low capacity contracts similar to the Basin contract that Mr. Rounds based his calculations on. Thus, Staff recommends that the Commission reject this adjustment.

Lastly, Mr. Lauckhart adjusted the accredited capacity from 12.9% of nameplate capacity to 20% of nameplate capacity. The adjustment was based on the accredited capacity of Titan Wind, which Mr. Lauckhart argues should be similar to OTE. Staff also rejects this adjustment. Beyond proximity, there is no evidence in the record showing OTE is equal or superior to Titan Wind in technology or wind profile. As a result, the only evidence that was presented showed that as of February 2011, the MISO LOLE study showed an average capacity factor of 12.9%. TR 294:13-18. Although Staff no longer prefers to set an accredited capacity in this case, if the Commission chooses to do so, this adjustment should also be rejected.

Finally, should the Commission decide to accept the avoided cost calculation provided by Mr. Rounds and modify it, Staff would be happy to make Mr. Rounds available to adjust the model.

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

Staff would concur with both parties' analysis of the issue of whether a non-levelized avoided cost can be used, which is that, an annual non-levelized energy avoided cost calculation can properly represent avoided cost consistent with 18 C.F.R. § 292.304(d), see below:

Pursuant to 18 C.F.R § 292.304(d), a QF shall have the option to either:

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

Staff agrees that one objective of PURPA is to encourage generation and that objective was expressly included within the rules. Nothing about the phrase "avoided costs calculated at the time the obligation is incurred" requires a levelized cost nor does it prohibit a non-levelized cost. Staff would submit that a non-levelized cost better represents the actual avoided cost over the twenty-year period. Staff Exhibit 2, pg. 3, lines 3-9. Additionally, as Staff has noted previously, another objective of PURPA is to leave the ratepayer economically indifferent to the source of a utility's energy by ensuring the cost to the utility of purchasing power from a QF does not exceed the cost the utility would incur in the absence of the QF purchase. If the Commission approves a levelized cost and OTE is unable to produce throughout the contract, ratepayers will not be left indifferent.

As to the issue of whether OTE's accredited capacity can be set after the fact as a result of real data, Staff agrees with NWE. 18 CFR 292.304(d), shown above, requires **costs** to be set as of the LEO but not **accredited capacity**. Staff's interpretation of "costs" in this case includes the rate but not the estimated output of the facility. Interpreting "costs" to include **both** the rate and the estimated output of the facility would be inconsistent with the method all parties used to determine avoided energy costs. If the Parties are required to estimate OTE's energy output in the same way OTE believes is required to estimate OTE's capacity output, we would have calculated an annual payment resulting from the avoided energy cost rate multiplied by the estimated MWh output of the facility rather than the avoided energy cost rate multiplied by the actual metered output of the facility. Thus, Staff recommends the Commission approve an avoided energy cost rate and method for determining accredited capacity, but **not** a price per MWh of avoided capacity costs.

IV. CONCLUSION

Staff believes the proper avoided energy cost in this case to be the dollars per MWh figures submitted by Mr. Rounds in Staff Exhibit 6, Avoided Cost Summary-Inflated Capacity, modified to remove the dollars per MWh avoided capacity costs as calculated in Staff Exhibit 3. OTE should be paid based on that rate multiplied by its metered output at the point of interconnection. The proper avoided capacity cost should be the dollar per kW-year rate calculated by Mr. Rounds in Staff Exhibit 3 with an accredited capacity to be determined annually using MISO's methods.

Dated this 18th day of January, 2013.

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