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Attorneys for Oak Tree Energy, LLC

**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
SUPPLEMENTAL BRIEF TO MOTION
TO COMPEL**

**OAK TREE ENERGY, LLC'S SUPPLEMENTAL BRIEF TO
MOTION TO COMPEL**

On September 7, 2011, Oak Tree Energy, LLC (Oak Tree) filed *Oak Tree Energy, LLC's Motion to Compel* (Motion) with the South Dakota Public Utilities Commission (PUC). Oak Tree moved for an order to compel NorthWestern Energy (NWE) to respond to certain Interrogatories and Requests for Production served on or around July 15, 2011; specifically Request for Production No. 1, Request for Production No. 14, Interrogatory No. 10 and Request for Production No. 22, Request for Production No. 23, and Request for Production No. 24. Oak Tree wishes to emphasize that it has attempted informally, both before and after

the Motion was filed, to resolve this discovery dispute with NWE to no avail.

1. Request for Production No. 1:

Since the Motion was filed, NWE has responded to this request and provided the requested documentation.

2. Request for Production No. 14 states as follows:

For the Calendar years 2009, 2010, and year to date 2011, please provide any documents that indicate an hourly amount from each of the contracted firm power supplies that have been contracted for by NorthWestern as listed in response to Request for Production No. 10.

NWE's response was:

See documents produced in response to Request for Production No. 10.

Since the Motion was filed, NWE has communicated with Oak Tree that they do not have any information that is responsive to this request. More specifically, NWE has stated that this information "does not exist." *E-mail from Ms. Sara Greff Dannen to Ms. Yvette Lafrentz, dated October 7, 2011.* Oak Tree must assume that this response is accurate and production is not possible.

3. Interrogatory No. 10 and Request for Production No. 22 states as follows:

Please identify, with specificity, NorthWestern's avoided cost for its South Dakota utility over a 5 year period, a 10 year period, and a 20 year period. Please explain in detail your calculations and provide any workpapers not provided pursuant to a previous request for production.

NWE's response was:

NorthWestern Energy objects to this request as overbroad and unduly burdensome. Without waving said objection NorthWestern states that it is compiling data responsive to this request and will supplement its discovery responses.

Since filing the Motion, NWE has stated that they are still in the process of compiling this information and will supplement their response as soon as the information is available. Again, Oak Tree must assume that this is an accurate response; however, Oak Tree asks the

PUC to compel NWE to supplement their response at least 15 days prior to the deadline for filing of testimony.

4. Request for Production No. 23 states as follows:

Please provided copies of all contracts entered into by NorthWestern's South Dakota Utility with wind generators in the past three years.

NWE's response was:

NorthWestern Energy objects to this request as seeking information that is irrelevant and not likely to lead to the discovery of admissible evidence. NorthWestern Energy further objects to this request to the extent the responsive documents contain confidential or proprietary information.

NorthWestern Energy specifically objects to producing the Titan I Wind Project Purchase Power agreement dated December 9, 2008, between NorthWestern Corporation and Rolling Thunder I Power Partners, LLC, in accordance with the confidential provisions contained within the Purchase Power Agreement.

5. Request for Production No. 24 states as follows:

To the extent not provided in response to a prior request, please provide the NorthWestern agreement with Titan Wind Project that currently sells output to NorthWestern in South Dakota.

NWE's response was:

NorthWestern Energy objects to this request as the Titan I Wind Project Purchase Power Agreement date December 9, 2008 between NorthWestern Corporation and Rolling Thunder I Power Partners, LLC contains confidential provisions which prohibit its disclosure.

Since filing the Motion, NWE has communicated to Oak Tree that the information requested in Request for Production 23 and Request for Production 24 cannot be produced because NWE is "bound by confidentiality provisions in the [Titan Wind] agreement." *E-mail from Ms. Sara Greff Dannen to Ms. Yvette Lafrentz, dated October 7, 2011.* Oak Tree understands that the nature of the information requires discretion to be exercised by all parties. However, a similar situation has presented itself in relation to information considered proprietary to Black & Veatch Corporation (BVC) and Oak Tree took necessary steps to comply with the discovery request and ensure confidentiality.

Information, utilized by Oak Tree's expert in his analysis, was created and is maintained by a third party, BVC. As a part of the discovery process, NWE requested information provided to Oak Tree and its expert pursuant to a confidentiality agreement between Oak Tree and BVC. *See* NWE Request for Production 1-22. Oak Tree was not able to comply with this request; however, Oak Tree facilitated the establishment of an agreement between BVC and NWE where the information could be provided. Unfortunately, NWE has not been willing to initiate a similar process as it relates to Titan Wind.

As Oak Tree stated in the Motion, there is no basis for assuming that confidential treatment of this agreement is necessary or proper. Existing contracts presently providing power to NWE are not typically considered confidential information since no potential bidder would gain any competitive advantage from review of already executed power purchase agreements. These contracts are, in real time, "stale" and cannot be used to "game" any future competitive solicitation held by NWE. The contract is in place, not under negotiation, and any pricing information would be available through revenue requirements filings with the PUC. Furthermore, it is likely that the agreement itself allows for production of this information if ordered by the PUC; however, Oak Tree is not able to confirm this without having access to the agreement. On the other hand, Oak Tree understands that there may be some information that either party may still consider confidential; therefore, Oak Tree is willing to enter into a confidentiality agreement with Rolling Thunder I Power Partners, LLC.

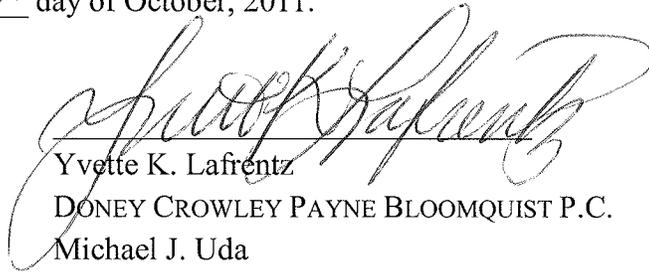
Oak Tree considers this information highly relevant to resolving this matter as Oak Tree is asking the PUC to determine NWE's avoided cost over the 20 year life of the project. Information contained in any contracts entered into by NWE and other wind generators in the past three years will likely contain information necessary to calculate avoided cost and to obtain a power purchase agreement between Oak Tree and NWE. In addition, NWE persists in its statement that it needs no additional energy or capacity over the next 20 years. Accordingly, these Requests for Production are relevant to an inquiry into whether, in fact, NWE does need additional energy and capacity (and wind energy) over the life of the proposed Oak Tree project.

Finally, the terms and conditions offered by NWE are highly relevant to the issue of what terms and conditions NWE may or should offer Oak Tree. This agreement will likely contain information beneficial to determining NWE's avoided cost and determining issues

such as NWE's need for energy and capacity. It may also prove useful in establishing non-rate terms and conditions for the Oak Tree project. The terms of the Titan I Wind Project power purchase agreement should reflect the terms NWE is willing to offer other Qualifying Facilities; therefore, this would be relevant information in working toward an agreement between Oak Tree and NWE.

For the reasons set forth above, Oak Tree respectfully requests the PUC grant Oak Tree's Motion to Compel by ordering NWE respond to the above requests, which have not yet received responses, by providing the documentation requested or, in the alternative, order any relief the PUC deems appropriate. Oak Tree regrets that it has been unable to resolve this dispute informally, and only continues to pursue this motion to compel as a last resort.

Respectfully submitted this 12th day of October, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Supplemental Brief to Motion to Compel* was served electronically on this 15th day of October, 2011, upon the following:

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