Michael J. Uda
Uda Law Firm, P.C.
7 West 6th Avenue
Power Block West, Suite 4H
Helena, MT 59601
(406) 457-5311
michaeluda@udalaw.com

Attorney for Juhl Energy, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF The Consideration of Standards to Govern Avoided Cost Determinations	DOCKET NO. RM13-02

COMMENTS OF JUHL ENERGY, INC.

I. INTRODUCTION

At the outset, Commenter Juhl Energy, Inc., ("Juhl) wishes to express its appreciation to the South Dakota Public Utilities Commission ("Commission") for this opportunity to comment on the above-captioned rule making. As an initial observation, the only comments received on the proposed rule thus far are from utilities, utilities which as a category, have been traditionally hostile to purchasing power from qualifying facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels," and it recognized that electric utilities had traditionally been "reluctant to purchase power from, and to sell power to, the nontraditional facilities." *FERC v. Mississippi*, 456 U.S. 742, 750 (1982) (footnote omitted). This "reluctance" has continued to this day, as utilities continue to place impediments in the way of qualifying facilities or "QFs." Some of the utility commenters even request that

the Commission adopt rules that are inconsistent with the plain language of the Federal Energy Regulatory Commission's ("FERC") rules implementing the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824-a3, *et seq* ("PURPA").

II. REPLY COMMENTS ON PROPOSED RULE 20:10:40:03. ESTABLISHMENT OF A LEGALLY ENFORCEABLE OBLIGATION.

A. BACKGROUND

PURPA directs the states to implement PURPA consistently with the regulations adopted by the Federal Energy Regulatory Commission ("FERC"). PURPA § 210(H)(2)(a), 16 U.S.C. 824a-3(h)(2)(B). *See also Exelon Wind 1, LLC*, 140 FERC ¶ 61,152, at P 44 (2012), *rev'd on other grounds*, *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 2014 U.S. App. LEXIS 17354, 44 ELR 20202 (5th Cir. Tex. 2014) ("As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's regulations.")

Under 18 C.F.R. 292.304(d), PURPA allows a QF the option as to how it will sell its generation to a utility. As FERC stated in *Hydrodynamics, et al.*, 146 FERC ¶ 61,193, P. 31 "Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or at a forecasted avoided cost rate pursuant to a legally enforceable obligation."

QFs often must obtain financing to construct, operate, and build a project, thus FERC adopted regulations specifying that the choice of how a utility will offer to sell its generation to a utility was best left to the QF: "Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter argumenta, and believes that. in the long run, "overestimations" and "underestimations" of avoided costs will balance out." 45 Fed. Reg., 12,214, 12,224 (1980) (hereinafter "FERC Order

69"). Consequently, it is up to the QF under PURPA to choose how to make its commitment to sell power to utilities, not up to the Commission and not up to the utilities.

Finally, the Commission will recall that its obligation is to "encourage" QF generation.

> The Montana Rule creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in Grouse Creek, and are equally unreasonable here and contrary to the express goal of PURPA to "encourage" QF development.

Hydrodynamics, ¶ 33.

Thus, the Commission must not only "encourage" QF generation, but FERC also has clearly stated that "amicable barriers to contract formation" are not consistent with FERC's regulations implementing PURPA. For the Commission to implement many of the suggestions offered by the utilities in their comments on the Commission's proposed rule would not accomplish that goal, but would rather discourage QF generation in South Dakota and create practical disincentives to amicable contract formation.

B. OTTER TAIL POWER'S COMMENTS

Otter Tail Power ("Otter Tail") generally supports the draft rulemaking, but suggests the following sentences be added to the definition of "Avoided costs" in Section 20:10:40:01:

> The purchasing utility may recover from the qualifying facility any costs incurred by the purchasing utility that result from the addition of the qualifying facility to the system. Such increased costs may include, but are not limited to, increased costs for congestion management, transmission service expenses, ancillary services expenses and similar items.

Otter Tail's suggestion is contrary to the definition of "avoided costs" set forth in FERC's regulations and is an invitation to error on the part of the Commission. FERC's existing rule implementing PURPA provides that "avoided cost" means "[T]he incremental costs to an electric

utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6). With respect to interconnection and transmission related costs, FERC has adopted regulations which address those issues as well:

> QFs have the right to purchase supplementary power, back-up power, maintenance power, and interruptible power at rates which are just and reasonable, based on accurate data and consistent system-wide costing principles, and that apply to the utility's other customers with similar load or cost-related characteristics (*see* 18 C.F.R. § 292.305), provided the selling utility has not been relieved from its QF sales obligation (*see* 18 C.F.R. § 312 - 313). QFs also have the right to interconnect with a utility by paying a nondiscriminatory interconnection fee approved by the State regulatory authority or a nonregulated electric utility (*see* 18 C.F.R. § 292.306).

http://www.ferc.gov/industries/electric/gen-info/qual-fac/benefits.asp

In addition, if the proposal is to treat the interconnection costs and transmission costs associated with QFs differently than non-QF facilities, such discrimination is prohibited under FERC's implementing regulations. *See* 18 C.F.R. § 292.304(a)(1)(ii). Otter Tail's intentions in this regard are unclear, but it appears to be arguing that avoided costs should necessarily include the costs of interconnection, transmission and ancillary related costs. Presumably, these costs should already be part of the avoided cost calculation adopted by the Commission either in standard rates or for rates negotiated between QFs and utilities. Thus, not only is Otter Tail's proposal unnecessary, but it also raises the specter of FERC-prohibited discrimination against QFs and may create a formidable barrier to amicable contract formation.

C. XCEL ENERGY COMMENTS

Xcel Energy's comments are definitely an invitation to error by the Commission. First, Xcel doubts the need for a purchase obligation, given the industry changes that have taken place since the enactment of PURPA. FERC's implementing regulations already provide a process by which a utility can be relieved of its mandatory purchase obligation pursuant to 18 C.F.R. §§

292.312 and 313). However, it is incumbent on a utility, and Xcel has, to be relieved of its mandatory purchase obligation. However, for projects which are larger than 20 megawatts ("MW") or more, the purchase obligation remains unless the utility can make a demonstration that it should be relieved of its mandatory purchase obligation under PURPA. *See Northern States Power Company*, 151 FERC ¶ 61,110, P. 31(finding that Northern States Power Company had not met the burden of showing it should be relieved of its purchase obligations for QFs with a capacity of 20 MW). Although Xcel expresses doubt regarding the continuing obligation of South Dakota utilities under PURPA, those doubts are better addressed at FERC rather than before this Commission. Adopting rules which interfere with QFs rights under PURPA to sell their energy and capacity to South Dakota utilities creates as specter of being preempted by federal law.

Second, Xcel states that it supports limiting the time-frame of an LEO to a minimum of 5 years and a maximum of 20, reasoning that such a time-frame reflects an effective resource planning horizon for the purchasing utility. Limiting contract length is nowhere supported by FERC's regulations implementing PURPA nor by PURPA itself. Limiting contract length also raises the issue of whether Xcel's proposal, if adopted by the Commission would result in discrimination against QFs in violation of PURPA.

Third, Xcel also makes suggestions to amend the language of the definition in Section 20:10:40:01 to add the following language "The purchasing utility may recover from the qualifying facility any costs incurred by the purchasing utility that result from the addition of the qualifying facility to the system." Adoption of this vague language is an invitation to disputes between QFs and utilities in contract negotiations, as well as being unnecessary because presumably these issues are already addressed by FERC regulations and are already the subject matter of a proper

calculation of avoided costs. Juhl has already commented on this sort of change to the definition with respect to Otter Tail's comments.

Fourth, Xcel, like Otter Tail, suggests additional language that makes clear that certain QFs have access to wholesale markets and may therefore be ineligible for LEOs under PURPA. As noted in response to Otter Tail's comments, this language is not only unnecessary but also raises the specter of preemption by PURPA.

D. MIDAMERICAN COMMENTS

MidAmerican, as well as Otter Tail and Xcel, also suggest clarification the purchasing utility will be entitled to recover the costs incurred as a result of the addition of the QF to the grid. As noted above, this is unnecessary and potentially discriminating, depending on implementation. The proper calculation of avoided costs, the "but for" test, will result in a discussion of whether it is or is not appropriate for a utility to deduct these costs from avoided costs. As noted previously in response to Otter Tail and Xcel, utilities may not discriminate against QFs. See 18 C.F.R. § 292.101(a)(1)(ii). If MidAmerican and other utilities are not following the FERC rules for interconnection and related system upgrade costs, this is nothing more than discrimination and these costs should not be included. If the Commission were to adopt such a rule, it would raise the specter of preemption by PURPA.

E. NORTHWESTERN COMMENTS

NorthWestern believes the definitions in the proposed draft rule are unclear, and therefore suggests the following amendments to 20:10:40:01 Definitions:

1. "Avoided cost," the incremental costs to a public utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, the public utility would generate itself or purchase from another source <u>less any other costs that the public utility</u>

incurs which, but for the purchase from the qualifying facility, the public utility would not incur.

Again, as noted previously multiple times, it is not appropriate to change the definition of avoided cost. The definition of avoided cost is set forth already in FERC's regulations, and the Commission is obligated to implement and enforce that definition. This is merely another way of attempting to recover costs that are not properly part of the avoided cost calculation -- in other words an inappropriate deduction from the calculation of avoided costs and would, if adopted by the Commission, be preempted by PURPA. Moreover, as noted previously, the proper calculation of avoided costs, and what deductions should be included, is already a subject for discussion in negotiated QF agreements.

2. "Legally enforceable obligation," an unconditional obligation incurred by ~~that~~ the qualifying facility to ~~will~~ sell and deliver, which binds the affected public utility to purchase and accept, ~~the affected public utility will purchase~~ energy or capacity or both for a specified term in which the rates for purchase shall, at the option of the qualifying facility, be based on either the avoided costs calculated at the time of delivery or the avoided costs calculated at the time the obligation is incurred;

This definition appears nowhere in any FERC decision, FERC's regulations, in PURPA itself, or in any reported court decision interpreting PURPA. Furthermore, it makes no sense. A party cannot make an unconditional obligation to sell until it knows the price it will receive from the utility. No prudent business would enter into such an arrangement. This definition is simply another invitation to error as it is inconsistent with the plain language of FERC's definition under 18 C.F.R. 292.304(d), which the Commission is obliged to implement.

NorthWestern also suggests a series of edits to section 20:10:40:03 Establishment of a legally enforceable obligation, replicated below:

1. (2) The qualifying facility has, for interconnection purposes, been studied as a network resource and entered into an interconnection agreement or the interconnection process is delayed as a result of a dispute that has been filed with the proper jurisdiction;

This is an unreasonable barrier to amicable contract formation. Imposing significant costs on a QF prior to incurring a legally obligation is inconsistent with prior FERC decisions such as *Hydrodynamics* and *Grouse Creek Wind Park*, 142 FERC ¶ 61,187, at P 40 (2013). In *Hydrodynamics*, FERC stated:

> In *Grouse Creek*, the Commission found that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation." Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held.

Requiring a QF to spend potentially a very significant amount of money (depending on the size of the facility) would chill QF development and be contrary to the Commission's responsibility to encourage QF development in South Dakota. It imposes an unreasonable barrier to amicable contract formation because it requires the expenditure of substantial amounts of money on interconnection studies and network upgrade regardless of whether the utility is willing to negotiate, whether substantial negotiations have taken place, or whether the QF has committed to sell its output to the utility. Such a result would be contrary to multiple FERC decisions interpreting its own PURPA regulations. This is yet another invitation to error by NorthWestern, one which the Commission should resist.

2. (3) More than the greater of 90 days since the qualifying facility requested or 30 days since the QF provided all information needed by the utility for determination of the public utility's avoided cost have elapsed and the public utility has failed to provide either the avoided cost information required by 18 C.F.R. § 292.302 (July 1, 2014) or the public utility's estimate of its avoided cost for the specific qualifying facility, or the qualifying facility has filed a dispute of the public utility's avoided cost information with the Commission;

Again, this amendment to the definition is not only inconsistent with FERC's regulations implementing PURPA by placing obligations on QFs that they do not presently have, it provides the utility with yet another reason not to cooperate with negotiations or to make unwarranted claims of failing to negotiate. Surely, if a QF is this lax in its negotiations with a utility and yet proceeds to file a complaint with the Commission, the Commission already will attempt to determine whether the QF fulfilled its obligation to negotiate. This is yet another pretense by which utilities can impede and interfere with contract negotiations, and by this mischief, demonstrate their traditional "reluctance" to deal with QFs, as noted by the United States Supreme Court in *FERC v. Mississippi*.

3. (4) The qualifying facility has offered a signed power purchase agreement to the public utility that includes the following: (a) A purchase price based on the qualifying facility's estimate of the public utility's avoided cost; (b) A reasonable date or range of dates for commencement of delivery of the energy or capacity, or both; (c) The length of the

contract, <u>not to exceed 10 years from the commencement of delivery of the energy or capacity, or both</u>;

As noted previously, attempting to limit a QF contract length in this fashion is contrary to FERC's implementing regulations, as set forth in FERC Order 69. It is also discriminatory in that utilities do not limit their own commitments to 10 years when they plan to build a resource for which they must obtain financing commitments and must take advantage of favorable tax incentives such as the production tax credit or the investment tax credit. It is also an unreasonable barrier to contract formation, as QFs cannot typically obtain debt or equity financing for only a ten-year term. In the case of tax incentives, typically project finance will dictate that most of the revenue will go to the tax equity investors for the first 10 years of the project, with the project's equity owners being paid thereafter. If there is no incentive for a QF's equity owners to be paid, this will actively discourage QF generation in South Dakota.

4. (5) [. . .] (e) <u>Security acceptable to the affected public utility to guarantee the qualifying facility's performance of the obligations incurred by creating a legally enforceable obligation</u>.

This is yet another example of an unreasonable barrier to contract formation, and an attempt to discourage QF generation in South Dakota. Not only does it violate the letter of PURPA, but it is unnecessary. If the proposed avoided cost rates are, as NorthWestern has stated in the past, lower than market for the first years of a power purchase agreement, there is no harm to NorthWestern or its ratepayers from replacing the QF's output. In other words, the utility's ratepayers would benefit from delayed QF production, even according to NorthWestern. Traditionally, NorthWestern has used such clauses as penalties instead of as proper liquidated damages clauses in the event of non-performance/ Legal and enforceable

liquidated damages clauses are typically used where damages are uncertain and cannot reasonably be calculated. Penalty clauses are unlawful because there is no need to punish a party for non-performance if damages can be easily calculated. Here, NorthWestern's request for security to secure performance is plainly a penalty clause. NorthWestern can easily determine the amount of damages, if any, in the event of nonperformance, by simply measuring the cost of the power it purchased and comparing it to the price paid to the QF. There is simply no reason for contract security. The effect and apparent intent of this provision, however, is to require QFs to come up with large amounts of security before incurring a legally enforceable obligation, and this sort of impediment to amicable contract formation is not only inconsistent with FERC's regulations and its decisions interpreting those regulations, it would actively discourage the development of QF generation in South Dakota by interfering with a QF's ability to create a legally enforceable obligation under PURPA.

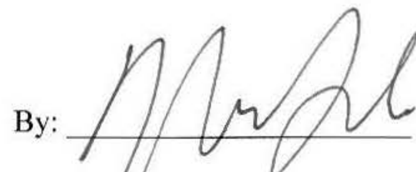
III. CONCLUSION

With respect to the comments by the utilities submitted to the Commission and commented upon herein, none of the provisions suggested by the utilities are consistent with PURPA, FERC's regulations implementing PURPA, and FERC precedent on these issues. They are little more than the creation of barriers to "amicable contract formation" in South Dakota, a breeding ground for litigation, and an attempt to discourage QF generation in South Dakota.

For these reasons, Juhl Energy respectfully requests that the Commission reject these comments and allow the rules to stand as drafted.

RESPECTFULLY SUBMITTED THIS 1ST DAY OF MARCH, 2016

UDA LAW FIRM, P.C.

By: 

Michael J. Uda
Of Attorneys for Juhl Energy, LLC