

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
BY OAK TREE ENERGY, LLC, AGAINST
NORTHWESTERN ENERGY FOR REFUSING
TO ENTER INTO A PURCHASE POWER
AGREEMENT

EL11-006

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Transcript of Proceedings
April 26, 2012

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF

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Cindy Kemnitz
Deb Gregg
Demaris Axthelm

APPEARANCES

Michael Uda, Oak Tree
Yvette LaFrentz, Oak Tree

Al Brogan, NorthWestern Energy

Reported By Cheri McComsey Wittler, RPR, CRR

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UTILITIES COMMISSION

TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State
Capitol Building, Room 413, 500 East Capitol Avenue,
Pierre, South Dakota, on the 26th day of April, 2012,
commencing at 10:20 a.m.

1 CHAIRMAN NELSON: EL11-006. And so I can lay
2 out and I think the parties are aware of the plan for the
3 remainder of the morning, but for anybody listening, I
4 just wanted to make it clear how we are going to proceed.

5 Oak Tree will have 30 minutes for your initial
6 arguments. NorthWestern will have 30 minutes for your
7 initial arguments. Staff will have 30 minutes for your
8 initial arguments. NorthWestern will have 10 minutes for
9 rebuttal, Oak Tree will have 10 minutes for rebuttal, and
10 then Commissioner discussion and questions.

11 I just want to ask my fellow Commissioners, are
12 you okay with waiting until the end to ask questions, or
13 would you like to during the presentations?

14 COMMISSIONER FIEGEN: I'm fine waiting.

15 CHAIRMAN NELSON: Okay. We will just hold our
16 questions until the end, and hopefully they will have all
17 of them answered by that point.

18 Any questions on how we will proceed?

19 Okay. If not, Mr. Uda.

20 MR. UDA: As you may notice, I have a PowerPoint
21 presentation because some of the things I'm going to be
22 reading to you are in the record either in the testimony
23 or the briefs in this case, and I wanted to have you guys
24 be able to read along with me on that. And hopefully the
25 technology will not fail us. Demaris has been most

1 gracious in assisting me.

2 So the first thing that I want to talk about
3 just briefly is the bigger picture and what I don't want
4 the Commission to lose sight of in all this. And that is
5 the Makens family.

6 They have expended a significant amount of
7 resources in this effort to build their wind farm in
8 Clark. And they're long time property owners, family in
9 Clark for generation after generation. I can't even
10 remember how many. But they've been here a long time.
11 And I just want to remind you that this is something
12 that's exceedingly important to them.

13 It's also important -- this proceeding is
14 important in terms of setting policy for the State of
15 South Dakota. I could be wrong in saying this, but I
16 think this is the first qualifying facility of any size
17 that has attempted to obtain a contract from a utility in
18 South Dakota at least since the MDU proceeding a few
19 years back, which apparently was never -- never reached a
20 decision.

21 So in a way you could look at this proceeding as
22 saying, well, we're setting a precedent here and so we
23 have to be very cautious about the approach that we use.
24 And I commend that.

25 But I also think -- and this is something that's

1 happened before in Montana, and you don't have to view it
2 as precedential if you don't want to, I think. I think
3 you can say this is a decision that was based on the
4 facts of the law that was before you and that if you want
5 to take a broader look at these issues, I think you
6 should do that.

7 I think the Staff in particular should be
8 commended for taking that view. I think it would ease
9 the administration of any potential future disputes. I
10 know as a fact that there are other projects who are
11 looking at the outcome of this proceeding to see what
12 sort of guidance they might get from the Commission.

13 And so I think from that standpoint, you know,
14 it is important to keep in mind the consequences of the
15 Commission's decision.

16 I think that the real issue that really divides
17 the parties more than anything is this whole question of
18 the calculation of avoided cost. And I think there are a
19 number of different issues. The way you could boil this
20 down essentially comes down to three issues.

21 And the first is who do you trust? Who are the
22 people that you think you can rely upon?

23 The second issue is what methodology did they
24 use, and is it an established methodology? Is it
25 something that's been tested and utilized before?

1 And I think the third question is are the
2 results that you're going to get within a certain range
3 of reasonableness? And by that I mean and Mr. Lauckhart
4 testified about this at the hearing, and what said was he
5 said, well, look. You don't base your expectations on
6 the high case or the low case.

7 Yeah. You might have a forecast with a number
8 of different results, a number of different outliers, but
9 what you want to do is try to figure out where is that
10 range of reasonableness.

11 And his point to you about the factors that
12 NorthWestern mentioned in the Spion Kop proceeding, the
13 nonprice factors, was these things are true no matter
14 where you are. These things, including things like the
15 benefits of diversification of your portfolio.

16 I know NorthWestern probably doesn't agree with
17 this, but there's a substantial prospect that if the
18 president gets reelected, there will be cap and trade
19 legislation by 2016. If that happens, what is now
20 presently very inexpensive coal generation will no longer
21 be inexpensive.

22 Now this is in addition to the proceeding that
23 Otter Tail has filed with you with respect to the
24 justification for doing a retrofit on the Big Stone Plant
25 to comply with EPA regulations with respect to coal-fired

1 generation. And when you add up and you compound those
2 factors you have to take a realistic view at the risks
3 that you potentially face.

4 The second thing is there is a substantial
5 likelihood if the president gets reelected, there will be
6 a national RPS legislation. Because not everybody's
7 moving in that same direction. It's possible it won't
8 happen, but it's possible it is. These are the kinds of
9 things you have to evaluate.

10 The other thing that will happen is even if, for
11 example, in South Dakota there is not an effort to move
12 away from coal-fired generation, there is going to be
13 substantial numbers of coal plants that are retiring in
14 the United States because of these regulations. And that
15 will have several effects.

16 One is the natural gas now that is primarily
17 used in the Eastern Interconnect to heat people's homes
18 is going to be used to fire generation. Everybody is
19 going to be chasing the same hydrocarbons. And as that
20 happens, as that fuel switching takes place, supply will
21 dry up.

22 The next issue that you have to face and you
23 have to gauge the level of risk that you face is right
24 now because of slant drilling and horizontal drilling in
25 shale bed, companies have been able to take advantage of

1 the sweet spot in these shale beds.

2 And what I mean by that, if you don't understand
3 it, is essentially there are a number of valuable liquids
4 that you're able to get by horizontally drilling through
5 the shale. And those sweet spots is what everybody's
6 hitting first. And when those sweet spots dry up, the
7 cost of extracting natural gas through shale is going to
8 go up because you will not have all of these other
9 commercially beneficial liquids that you're obtaining by
10 doing that.

11 The other issue that Black & Veatch tried to
12 analyze to the best of their ability was this whole issue
13 with fracking. Was what the cost associated with
14 fracking? It's primarily a water pollution control
15 issue. It's something that the industry thinks is
16 manageable, but there will be costs associated with it.

17 So these are the kinds of things that you have
18 to evaluate. And these are things that in the Spion Kop
19 proceeding NorthWestern told the Montana Commission are
20 benefits to having a wind generating facility in their
21 portfolio. This is not what they've told the Commission
22 here.

23 Now going back to this whole question of who do
24 you trust, in its briefs and at hearing to a degree
25 NorthWestern has tried to make an issue out of the fact

1 that Mr. Lauckhart did not himself prepare the Black &
2 Veatch Electric Market Perspective for the fall of 2010.

3 First of all, he did help prepare it. He is one
4 of the experts in a team of experts from a variety of
5 different disciplines that were collected and assembled
6 by Black & Veatch, which is a nationally respected,
7 well-known organization that puts together these
8 forecasts twice a year at an enormous expense of about
9 half a million dollars.

10 The reason that it was protected, that
11 information was protected in this proceeding, is because
12 they sell this information to people. They sell it to
13 banks, in particular, to make investment decisions about
14 the likely return on investment they will make if they
15 provide debt financing to these projects.

16 So it's extremely important to keep in mind that
17 this is an off-the-shelf product, but that's not a bad
18 thing. In fact, this is not something that was prepared
19 for this proceeding. Mr. Lauckhart used it in doing his
20 analysis of the hourly dispatch models that were run and
21 taking each hour for 20 years and saying what's the value
22 of that energy likely to be?

23 So I don't think there's anything suspect or
24 wrong about what Mr. Lauckhart did. In fact, I think it
25 was a commendable thing for Oak Tree to spend that kind

1 of money to come up with the data that they came up with
2 for this proceeding.

3 I think the second thing is Mr. Lauckhart has
4 41 years of experience in the industry. He was at
5 Puget Sound Power & Light in Washington for a number of
6 years. I think NorthWestern's Reply Brief indicated
7 Mr. Lauckhart's been mentioned in 37 different orders.

8 And it's true, as NorthWestern suggested,
9 Mr. Lauckhart -- the commissions haven't always agreed
10 with Mr. Lauckhart. But I will submit to you any time
11 you've been in any industry for 41 years you can be sure
12 that there are going to be people who disagree with you,
13 including commissions.

14 That doesn't mean that you're not an expert, and
15 it doesn't mean your opinions don't have value. It just
16 means on those particular instances there were times
17 when, you know, for whatever reason, the state agencies
18 did not agree with Mr. Lauckhart's recommendation.

19 It wasn't all 37 times. I can guarantee you
20 that. Mr. Lauckhart is widely respect in the industry,
21 or he wouldn't be working at Black & Veatch.

22 I would also like to say on this issue of who do
23 you trust, I have the greatest respect for Mr. LaFave and
24 Mr. Green and Mr. Lewis, but they're not avoided cost
25 experts. They may be experts in other areas within their

1 field, but they are not avoided cost experts. They are
2 not Electric Price Forecast experts.

3 I think the record shows that this is the first
4 time any of them have testified in any proceeding on
5 these issues. And this will become important later when
6 we talk about the methodologies that were used.

7 I think the first thing I want to point out
8 about forecasting is -- this was something that
9 Mr. Lauckhart read into the record at the hearing. This
10 is from the Northwest Power Planning Council. And this
11 addresses the criticism that's -- you know, criticism is
12 maybe overstating it. But Mr. Rounds's concern at
13 hearing that February 25, 2011 we sent our -- or Oak
14 Tree's legally enforceable obligation letter to
15 NorthWestern that the actual trends hadn't been taken
16 into account.

17 And Mr. Lauckhart testified that he looked at
18 the numbers and looked at the way that they were moving
19 but didn't think based upon this six-year period that it
20 justified an update to the natural gas price input in
21 that model.

22 And the point he made, it is often difficult to
23 distinguish short-term variations in fuel prices, which
24 are expected, from significant long-term changes that can
25 be expected to fundamentally alter the whole range of

1 future expectations. This is from the Northwest Power
2 Planning Council. Actually it's the Northwest Power
3 Conservation Council now. Rich, like I, grew up on
4 cutting our teeth on the Northwest Power Act, and that's
5 changed over time.

6 So, anyway, let's talk briefly about the
7 methodology. Mr. Lauckhart's methodology was very
8 simple. As I mentioned, what he did was he took this
9 Black & Veatch energy market perspective for 2010, he
10 took the expected output from the Oak Tree plant, and in
11 every hour over that 20-year period he just assigned a
12 value to that of the generation that could be expected
13 from Oak Tree. It's a simple one-step procedure.

14 And this is what Mr. LaFave identified in his
15 direct and rebuttal prefiled testimony as the market
16 estimates method. It's a valid method. And the method
17 that NorthWestern chose and which Staff seems to prefer
18 is this method whereby in hours where NorthWestern is
19 long you assign the incremental costs of operating the
20 coal plants to Oak Tree, regardless of its value in the
21 market, and only assign the value of the market to
22 Oak Tree in hours where the utility is short. And I'll
23 explain in a minute why I think that's problematic.

24 Now this says Confidential at the top, but I'm
25 not concerned about that, and neither is Rich. What this

1 shows is page 159, I believe, of the Black & Veatch slide
2 deck that was Exhibit 5 to Mr. Lauckhart's direct
3 prefiled testimony. And what this shows is what they
4 knew as of the fall of 2010.

5 And what you will see is on that blue line there
6 is the actuals that led up to the forecast and the
7 volatility in the gas markets up to that point. And the
8 red line is the Black & Veatch perspective, and the
9 yellow line or orange line, if you can see it, is the EIA
10 perspective. And you'll see they were almost exactly the
11 same as of the fall of 2010.

12 And the larger point here is that what you do is
13 in a fundamentals-based forecast you take into account
14 all those factors I talked about earlier with respect to
15 the moves that you're likely to see in the future over
16 the next 20 years. And in this business, you know, even
17 looking two years out can be scary business, but you try
18 and do the best job you can to try to figure out at a
19 particular point in time what you think the future is
20 going to look like. And you can see that EIA and
21 Black & Veatch were very similar at that time.

22 I would like to also point out just briefly that
23 there is -- I want to move quickly to the next slide
24 because I think this will illustrate the point better
25 than I can make it.

1 Okay. This is from Mr. LaFave's Exhibit 2. And
2 you may recall during the hearing that there was a point
3 made that starting in 2011 and going to 2031 that
4 Mr. Lauckhart's analysis basically showed a tripling of
5 electric prices during that span of time.

6 And if you look at this particular slide, what
7 you will see is over that period of time the average spot
8 price in 2008 was \$80.77 per megawatt hour for
9 NorthWestern. And you can see over time it's quite
10 likely, given again the volatility in spot market
11 pricing, that prices can jump dramatically in short
12 periods of time.

13 And, again, these are one of the things that the
14 Black & Veatch Electric Price Forecast Energy Market
15 Perspective tried to take into account.

16 The exhibit also shows from 2008 to 2011 spot
17 prices dropped by a factor of 2.3 over three years. And
18 that's the kind of volatility you can expect in spot
19 market prices. And so it's not surprising that you would
20 see an Electric Price Forecast that would say, you know,
21 in the outer years you can expect to see a range of
22 prices, but it's not unreasonable to expect \$90 a
23 megawatt hour. That was almost the price that was being
24 paid by NorthWestern in South Dakota three years ago.

25 This slide is from the EIA 2011 perspective. A

1 criticism that was raised at hearing of the -- of
2 Mr. Lauckhart's avoided cost analysis was that the EIA
3 forecast, Early Look Forecast, for 2011 was higher than
4 the Black & Veatch forecast that had been prepared in the
5 fall of 2010.

6 But as you can see, the EPA -- this is from the
7 EIA. The EPA is expected to enact several key
8 regulations in the coming decade that will have an impact
9 on the U.S. power sector, particularly the fleet of
10 coal-fired power plants. Because the rules have not yet
11 been finalized, their impacts cannot be fully analyzed,
12 and they are not included in the reference case.

13 Black & Veatch tried in the fall of 2010 to
14 analyze the likely retirement of these coal plants. EIA
15 did not. And that explains to a large degree the
16 difference in those forecasts from the fall of 2011 for
17 EIA as opposed to Black & Veatch -- excuse me. The Early
18 Look for 2011 to the fall of 2010 Black & Veatch Energy
19 Market Perspective.

20 So as I mentioned previously, the green -- the
21 Brown Power Valuation prepared by Mr. Lauckhart was
22 prepared using a one-step method of taking these energy
23 prices in every hour of every year for 20 years and
24 assigning that value to Oak Tree. The NorthWestern is a
25 two-step process.

1 When NorthWestern is short they get the value
2 that NorthWestern has calculated for hours in which it's
3 short. And then when NorthWestern's long they get the
4 incremental cost of the coal plants. But there are
5 several flaws in NorthWestern's forecast.

6 First, Mr. Lewis's gas price forecast is wholly
7 unrealistic. It makes three fundamental errors. For Oak
8 Tree calculations, NorthWestern assumed no increase in
9 the real cost of natural gas from 2015 to 2031. This
10 isn't a credible assumption. No credible forecasting
11 agency is assuming that. And I believe Staff has taken
12 the position in this proceeding that that is not a
13 reasonable assumption.

14 Two, for Oak Tree calculations, NorthWestern
15 assumed no change in the relationship of spot electricity
16 prices to spot gas prices from 2012 to 2031. Again, this
17 is an unrealistic assumption.

18 The relationship between spot energy and spot
19 natural gas prices will change, particularly as you make
20 this transition to a environment where coal plants are
21 being retired and being replaced with natural gas
22 generation.

23 Three, for the Oak Tree calculations,
24 NorthWestern Energy did not give Oak Tree its spot market
25 value whenever NorthWestern thought it would be long on

1 power. I want to talk a little bit more about that last
2 one and why that is not an appropriate measure of avoided
3 cost.

4 The thing to keep in mind -- and I don't want to
5 overstate this too much, but the thing to keep in mind is
6 that -- this is according to Mr. LaFave's testimony in
7 his response testimony to the Commission.

8 On page 2, line 8, "In 2011, 53 percent of the
9 time NorthWestern customers were served by internal
10 generation only." So, in other words, there were market
11 purchases being made.

12 This percentage is affected by load growth and
13 base load plant outages that the forecast internal
14 generation percentage for 2015 is 35 percent of the time.
15 Whatever that percentage is, it's going to go down over
16 time, according to NorthWestern. And as a result of
17 which, there will be many hours in which NorthWestern is
18 going to need energy, and this will help NorthWestern
19 avoid those costs.

20 Now one of the big issues that came up recently
21 is this whole issue of the fuel adjustment clause, and I
22 want to talk about that real quickly. This is from
23 NorthWestern's electric rate adjustment clause or power
24 purchase adjustment clause. This is the relevant
25 passage.

1 We have a bunch of stuff in our brief about this
2 to explain essentially how power cost adjustment clauses
3 are supposed to work. But they're really supposed to be
4 for fuel. They're supposed to be for changes that can
5 erode a utility's revenue position between rate cases so
6 that they don't get caught in the market and they're not
7 completely short.

8 What this clause essentially says is that
9 they're allowed to include power purchases in the power
10 cost adjustment clause if they're doing it in order to
11 take advantage of market opportunities when their cost of
12 generation is higher than market.

13 But there's no reason to be putting Titan Wind
14 or potentially Oak Tree in the fuel adjustment clause.
15 And the reason that NorthWestern has said, and Staff I
16 think agrees, is that sales that are being made pursuant
17 to these wholesale power purchase agreements with, for
18 example, Titan Wind and prospectively with Oak Tree can't
19 be credited to rate payers is because of the fuel
20 adjustment clause.

21 Well, first of all, it shouldn't be going
22 into the fuel adjustment clause anyway. This is for
23 adjustments to fuel. If they believe this is going to
24 erode their revenue requirement, they can file a rate
25 case.

1 So, anyway, the point is look very carefully at
2 this because this is a major issue in the case. It's
3 broader than this case, but it's an important issue
4 nonetheless.

5 I want to briefly summarize some other problems
6 with NorthWestern's avoided cost forecast because I think
7 it's important to point it out.

8 So I described the methodology where they're
9 short. We get the value when they're long. We get the
10 incremental cost to the coal plant. But that really is
11 the way they did it up until 2014.

12 After 2023 NorthWestern estimates that it will
13 be purchasing spot market power at all hours of the year
14 starting in the year 2023. And for this they use the
15 Lewis Electric Price Forecast, which as we pointed out,
16 contains some wholly unrealistic assumptions.

17 So what did they use for the years between 2014
18 and 2022? Well, this is really interesting. What they
19 did was they took the 2013 number from Mr. Green and the
20 number from Mr. Lewis in 2023 and drew a straight line
21 between them. And now that's really simple, but really?
22 I mean, it seems pretty unrealistic to me.

23 You compare that to the effort that goes into
24 producing something like the Black & Veatch Energy Market
25 Perspective, and you'll see that this is just not a very

1 realistic assumption.

2 Now I want to quickly jump to the next slide.
3 Now I was talking earlier about your range of
4 expectations, you know, whether you base it on your low
5 case, your high case, or your intermediate case. You can
6 see that the first bar is the Guldseth value of
7 Spion Kop, which was 75.52.

8 Mr. Lauckhart as of February 25, 2011
9 estimated a brown value avoided cost for Oak Tree at
10 78.92. Oak Tree then made an offer substantially below
11 what Mr. Lauckhart was calculating at 65.12 levelized
12 over the 20 years. And the cost of Titan Wind updated to
13 2011, in other words, starting the production in 2011
14 produces an avoided cost of 65.27.

15 And then the last bar, the one to the right,
16 substantially less than all the others, is \$35.80 a
17 megawatt hour, which is the NorthWestern Energy value of
18 Oak Tree.

19 So this sort of graphically shows you, I think,
20 the range of expectations and what would be considered to
21 be the low case and what would be considered to be the
22 high case.

23 Real quickly, I want to run through the last
24 slides because I know I'm running out of time. This is
25 the language from 18 CFR 292.304(d)(2). The main point I

1 want to make here is the plain language of this doesn't
2 mention the Public Utilities Commission at all. We have
3 substantial briefing authority to the effect that these
4 are decisions that have to be made by the qualifying
5 facility and that makes sense because the qualifying
6 facility is the one that has to go to market, obtain
7 financing.

8 If anybody other than the qualifying facility
9 can determine the length of the commitment, it
10 substantially changes the return on equity. It
11 substantially changes the cost of service to the debt.

12 And, in fact, the Commission could set it for
13 anything they wanted. They could potentially destroy
14 anybody's effort to actually try to arrange financing.
15 Since the utility is the one who has to make the
16 commitment, it makes sense to the utility to identify the
17 length of that commitment.

18 I think there's probably some range of
19 reasonableness there again. Like if I said 50 years, you
20 could probably say no, that's ridiculous, and you think
21 you'd be right. But I think 20 years as Staff has
22 suggested is a reasonable lengths of time.

23 This is from FERC Order 69. Many commentators
24 have stressed the need for certainty with regards to
25 return on investment in new technology. The Commission

1 agrees with these latter arguments and believes that in
2 the long run overestimations and underestimations of
3 avoided cost will balance out.

4 And then the last phrase from the same order,
5 paragraph D2, "Permits a qualifying facility to enter
6 into a contractor or other legally enforceable obligation
7 to provide energy or capacity over a specified term."
8 There's nothing in there about utility commissions.
9 There's nothing in there about the utility being able to
10 determine that term.

11 Thus, under our regulations -- this is from
12 Cedar Creek Wind, which was cited just a few months ago.
13 "Thus, under our regulations, a QF has the option to
14 commit itself to sell all or part of its electric output
15 to an electric utility. While this may be done through a
16 contract, if the electric utility refuses to sign a
17 contract, the QF may seek state regulatory authority
18 assistance to enforce the PURPA imposed obligation on the
19 electric utility to purchase from the QF and a
20 noncontractual but still legally enforceable obligation
21 will be created pursuant to the state's implementation of
22 PURPA."

23 In this state they ordered NorthWestern to
24 negotiate. We think the record is very clear that
25 Mr. LaFave did not believe that he could negotiate at

1 anything other than the short-term avoided cost that was
2 established for projects of design of 100 kilowatts or
3 less. This is contrary to your 1982 order.

4 Now --

5 CHAIRMAN NELSON: Mr. Uda, I think at that point
6 we've hit 30 minutes, and I'm going to respectfully ask
7 that we stop at this point, understanding you'll have
8 10 more minutes at the end.

9 MR. UDA: Thank you, Commissioner Nelson.

10 CHAIRMAN NELSON: Thank you.

11 Mr. Brogan, 30 minutes.

12 MR. BROGAN: Good morning, Chairman Nelson,
13 Commissioner Hanson, Commissioner Fiegen, and Staff.
14 It's good to be back before you, and I appreciate your
15 consideration in this matter.

16 Mr. Uda is eloquent and dramatic. I can't and
17 won't try to match that. I'm kind of a simple person.
18 But what I want to try to do is have a discussion with
19 you about what this case is about and is not about.

20 We have already a Complaint, an Answer, two days
21 of hearings, and, by my count, 167 pages of Posthearing
22 Briefs. I'm confident that the Commissioners have all
23 read all of that material. But, unfortunately, I have to
24 say that in all of that there is a fair amount of
25 irrelevant and unnecessary material that tends to

1 obfuscate the real issues before you in this matter. And
2 I guess I'd like to try to separate the grain from the
3 chaff. What is the key issue?

4 Simply you must determine what would
5 NorthWestern pay for energy and capacity if it did not
6 purchase that same energy and capacity from Oak Tree?
7 What would it cost NorthWestern to generate the
8 electricity? And to the extent that NorthWestern cannot
9 generate the electricity, what would it cost NorthWestern
10 to buy it?

11 That's the simple question. And it is all based
12 on the touch mark of what we have to go by which is
13 16 U.S.C. 824(a)(3)(D), which defines incremental cost.
14 And it says, "The cost to the electric utility which but
15 for the purchase from" the QF -- I've substituted QF for
16 longer words there -- "such utility would generate or
17 purchase from another source."

18 That's really the touchstone of what we have to
19 decide. Or what you have to decide.

20 With that as the main issue we can see that some
21 of what has been talked about is chaff. For instance,
22 how does and how will NorthWestern Energy recover its
23 power purchase agreement costs? That's not an issue.
24 That has nothing to do with what it pays or would pay to
25 purchase or to generate.

1 We've had talk about how does South Dakota allow
2 NorthWestern to treat off system sales? Again, that has
3 nothing to do with this particular docket and with what
4 you're asked to decide here. It's not an issue.

5 Now the South Dakota Commission had good reasons
6 to establish the policy that it establishes in the 1980s.
7 You may change that policy in NorthWestern Energy's next
8 general rate case, but it's not an issue here. It
9 doesn't do anything for answering that question, what
10 would NorthWestern pay but for purchasing from Oak Tree?

11 We've had talk about the regulatory compact.
12 That's a broad area. And it's great for academic
13 discussions. And, you know, as trained as both an
14 economist and an attorney, I find it fascinating. I'd
15 love to talk about it. But it has nothing to do with the
16 cost that NorthWestern would incur but for purchasing
17 from the QF. And so it's not an issue in this docket.

18 Since the incremental cost is the issue, then we
19 come to the main sub issue: How do you determine that
20 incremental cost? How do you determine it?

21 Oak Tree says use our estimate of market prices,
22 what they'll be for each hour within the next 20 years.
23 Use that because Black & Veatch is credible, because they
24 made realistic assumptions, and that they bought their
25 gas forecast from a national firm, and so it must all be

1 good.

2 Inherent in this is some sort of assertion that
3 the complexity and expense of a model is what determines
4 its accuracy. There's no empirical evidence of that.

5 NorthWestern says wait a minute. It's not
6 appropriate for you to set NorthWestern's avoided cost
7 based on market prices for those hours that
8 NorthWestern's not buying in the market. Pure and
9 simple. And then NorthWestern told you about five
10 methods that had been used in one form or another by
11 other states.

12 With respect to those five methods, I think we
13 need to remember a couple things. One, there's no magic
14 to what any other state has done. Some of those
15 decisions by states have been good ones. Some of them
16 have been real tragedies.

17 Mr. Uda just quoted Order 69 that indicated FERC
18 thought that the overestimation and the underestimation
19 would be balanced out, and yet there's testimony in this
20 docket that shows that hasn't been the case, that the
21 overestimation has vastly exceeded any underestimation.

22 Furthermore, there's nothing that requires a use
23 of one of those methods. Not every state uses one of
24 those five methods. Some of them use different ones.
25 One that comes to mind is that there are some states that

1 actually set avoided cost as a market index. The QF is
2 paid whatever the market index is.

3 In some cases it even has to be shaped by
4 another index. Nevada comes to mind for that. Other
5 states actually require QFs to be paid not off of an
6 index but some sort of actual market price.

7 But NorthWestern has offered what we've called
8 a -- or what has been called. Not NorthWestern called
9 it, but what has been called a hybrid. It's said the
10 avoided cost during those hours when we are generating
11 power and we're generating all that we need or can
12 generate all that we need, is the variable cost of that
13 power, the variable cost of that generation. For other
14 hours newspaper until the size of the QF, it's whatever
15 we're purchasing up until the size of the QF.

16 Now NorthWestern believes it's offered an
17 appropriate method with appropriate inputs. Mr. Uda says
18 there's lots of problems with it. That the gas price is
19 wholly unrealistic. It had no real increase in the cost
20 of gas from -- to 2031.

21 But if we look at EIA for 2010, which would have
22 been the EIA report available at the time that
23 Mr. Lauckhart -- or excuse me. Black & Veatch was
24 preparing their forecast, for natural gas for electric
25 generation EIA was projecting from 2008 to 2035 an annual

1 decrease in the real cost of gas of .3 percent. So it is
2 fair to say that at least some people at that time felt
3 that there wasn't necessarily going to be a real
4 increase.

5 Mr. Uda complains that Lewis assumed that the
6 market heat rate, as we would call it, the relationship
7 between the price of gas and the price of electricity,
8 would stay the same over that period of time.

9 That's true. Mr. Lewis did assume it. And I
10 would suggest that that's probably an assumption that
11 benefits QFs and Oak Tree. In all likelihood, as new and
12 more efficient natural gas plants are built and come
13 online, you will get more megawatts per dekatherm and is
14 that heat rate will improve instead of staying the same.

15 And, finally, Mr. Uda complains that
16 NorthWestern doesn't offer to pay the market when it's
17 long energy. That's right. And that's exactly what fits
18 under the statutory definition.

19 I want to back up a bit, though. Why does
20 NorthWestern even care? Now if the Commission tells us
21 to buy power from Oak Tree at \$100 a megawatt hour, we
22 will. We will recover that from our customers, and our
23 customers will pay.

24 If the Commission tells us to buy power from
25 Oak Tree at \$35 a megawatt hour, we will. We will

1 recover that from our customers, and our customers will
2 pay it.

3 So NorthWestern's real concern is not -- at
4 least in the short run, not its bottom line. Its real
5 concern is what will this do to our South Dakota
6 consumers?

7 We can talk about forecasts. They can talk
8 about methodologies. We can probably go until we're blue
9 in the face. Your task as a Commission is to do the best
10 you can, taking into account known facts.

11 I think one thing is certain: If you rely on
12 forecasts, you will be wrong. It's how you are wrong
13 that affects South Dakota consumers in different ways.
14 If you estimate too high, customers are going to pay a
15 lot more. Based on what Mr. Uda said, I would suggest
16 not just for the Oak Tree project but for other projects
17 that are watching this docket.

18 And, quite frankly, if you estimate too low,
19 that's not good either. Because then meritorious QFs
20 that should be built probably would not be.

21 The important part is to whom you want to assign
22 the risks and how do you want to manage those risks?
23 That's what it boils down to.

24 One other issue that Mr. Uda took with the way
25 NorthWestern proposed its system is NorthWestern said in

1 2023 we will be in the market for at least 1 megawatt
2 each hour of the day. We're not going to be in the
3 market for 20 megawatts each hour of the day or even 10,
4 but we'll be in there for at least 1.

5 But since we're there for at least 1, we're
6 going to give Oak Tree the market price for the whole
7 thing Oak Tree generates. That's whether or not we're in
8 the market for that whole amount. That's an assumption
9 that benefits Oak Tree.

10 Similarly, Mr. Uda complains that we just did a
11 straight line analysis. As Mr. LaFave explained in his
12 testimony, we did do the straight line analysis, and that
13 probably -- that probably overstates market purchases.
14 Especially in off peak hours.

15 I want to talk briefly about the LEO issue. And
16 I think we all recognize that the purpose of the LEO is
17 to just present utility -- prevent utilities from
18 refusing to purchase from qualifying facilities. But I
19 think we need to talk about this in terms of utility
20 resource allocation or acquisition.

21 When a utility goes out to acquire a resource
22 the first thing it has to do is be prudent. It's going
23 to come before this Commission to show you that it made a
24 prudent decision so that it can recover its costs
25 associated with that decision.

1 That's true whether it's a new generator, some
2 sort of power purchase agreement, or a QF power purchase
3 agreement. And to be prudent utility has to first look
4 at its need, what does it need, and then it has to figure
5 out how to meet that need and to show that the best --
6 that it's chosen the appropriate way.

7 It does that through competitive solicitations
8 sometimes. It does that by comparing resources to
9 alternatives. But it has to be able to show you that it
10 acted prudently.

11 Well, when we're dealing with say a QF or
12 somebody who may be a QF, that affects how we negotiate.
13 And at least at the time that the negotiations were
14 taking place NorthWestern truly believed it would not be
15 prudent, it could not prove to you that it was prudent,
16 to pay more than the tariffed rate. And that was the
17 conundrum that faced Mr. LaFave and the rest of
18 NorthWestern.

19 I would also like to point out one problem that
20 I think has been observed throughout the country. If the
21 test for establishing an LEO does not include a true,
22 real obligation, a QF -- let's say a QF could easily
23 create an LEO by telling a utility I'm glad to sell you
24 my power at \$150 a megawatt hour. Even knowing that that
25 is above the avoided cost. But there's no real

1 enforcement mechanism in that process.

2 So they go before the Commission. The
3 Commission says, oh, no. The avoided cost today is \$40.
4 The LEO walks away.

5 Let's say, though, that was close to the avoided
6 cost and then market prices moved up. We're not really
7 talking reality here, I hope. I hope we're not talking
8 200 or \$250 per megawatt power. But let's say then that
9 before there was ever a contract actually signed the
10 avoided cost was suddenly 250 because the market's moved
11 up.

12 That QF can do the same thing. Says, well, no.
13 I'm not going to honor that LEO, and you can't enforce it
14 against me. I want a new LEO based on the price today.
15 And if there is no real obligation to deliver in whatever
16 created that LEO, a QF can do that.

17 The first one might have been called Bull Run 1,
18 LLC, and it just says I'm not going to deliver. But the
19 next one is Running Bull 2, LLC. Same principle, same
20 place, but they can legitimately ask for an LEO based on
21 a new avoided cost. I think that's a real problem. I
22 think it's a problem that we have seen throughout the
23 country.

24 I want to close with just one thing to really
25 emphasize how important this can be. About 10 days

1 ago -- and it just hit the public media this Monday -- a
2 utility a couple of states over filed its annual tracker
3 asking for a \$43 million increase of which it said \$30
4 million was due to its PURPA obligations. Those are the
5 stakes that are before you if you get it wrong.

6 Thank you for your time.

7 CHAIRMAN NELSON: Thank you, Mr. Brogan. 30
8 minutes for Staff.

9 MR. SOYE: Thank you, Mr. Chairman,
10 Commissioners. This is Ryan Soye. I'm part of Staff.

11 I'll start out again by saying that due to
12 Staff's role as a third-party participant, there may be
13 overlap in arguments. We're going to apologize in
14 advance for that.

15 There are also certain arguments Staff feels it
16 has addressed sufficiently in its Posthearing Brief, and
17 we'll just shortly recap those here. We don't want to
18 delve into repeating our entire arguments again.

19 In addition, there are certain arguments that we
20 feel do not need to be addressed that were brought up in
21 the posthearing briefing stage, such as the credentials
22 and qualifications of the witnesses. The Commission's
23 already decided this issue and has determined the
24 witnesses to be credible so we will not be addressing
25 that issue.

1 In addition, Staff will not focus on proceedings
2 that took place in Montana. Staff realizes that these --
3 the issues brought up about Montana certainly speak to
4 the credibility of certain arguments. However, we feel
5 that the difference in systems does have certain
6 considerations that must be covered so we will only be
7 looking at the facts or discussing the facts as they
8 exist before us in this case.

9 Hold on one second. My notes are a little bit
10 off here.

11 Simply stated, this dispute comes down to the
12 Commission's obligation to implement PURPA. Throughout
13 this proceeding there's been a great deal of evidence
14 that has been provided, some of which Staff believes can
15 help the Commission in fulfilling its obligation under
16 PURPA and some of it which cannot.

17 The bottom line, however, as seen by Staff, is
18 that Oak Tree and NorthWestern have not provided the
19 information sufficient to enable this Commission to make
20 a final decision in this case.

21 As such, Staff has urged this Commission to
22 forego making a final decision until the parties can
23 provide the needed information. Further, the only way
24 Staff believes this can be achieved is for the Commission
25 to provide the parties with some direction on what they

1 feel needs to be addressed and then return for additional
2 proceedings to make a final decision on that issue.

3 Oak Tree has said additional proceedings will
4 not likely resolve the disputed issues. Staff agrees
5 that not all the issues will likely be resolved through
6 additional proceedings. However, what Staff used as the
7 primary issues will -- addressed in these primary issues
8 will assist the Commission in bringing the avoided cost
9 disparities, if you want, or the avoided cost estimates
10 within a more proper scope for the Commission to make a
11 decision.

12 Staff understands this recommendation of
13 additional proceedings will certainly place Oak Tree in a
14 difficult position with the possible looming expiration
15 of the production tax credits at the end of this year.
16 Oak Tree has explained that the production tax credits
17 are the key element that has allowed it to offer its
18 output at \$65.12 per megawatt hour over the 20-year
19 period and suggests that the expiration of these
20 production tax credits will represent a lost opportunity
21 to NorthWestern's customers and affordable wind in
22 South Dakota.

23 No doubt a decision today will assist Oak Tree
24 in meeting its deadline and begin construction and
25 operation of the proposed wind farm. And arguably this

1 is the most effective way to promote small power
2 production and cogeneration in South Dakota and fulfill
3 the Commission's obligations under PURPA.

4 On the other hand, whether Oak Tree will, in
5 fact, benefit NorthWestern Energy's customers depends on
6 whether Oak Tree's avoided cost rate is -- proves to be
7 at or below NorthWestern's actual incremental costs over
8 the long term. As this assumption carries a great deal
9 of uncertainty, Staff feels it is necessary to obtain
10 this additional information to ensure the pricing element
11 is properly explored.

12 Basically the potential expiration of the
13 production tax credits Staff feels is secondary to
14 determining the avoided cost, to properly determine the
15 avoided cost. Whatever benefit may be realized, the
16 production tax credit, this is beyond the scope of PURPA.
17 It is not one of the requirements in PURPA. And until
18 all of the controlling factors or elements of PURPA have
19 been satisfactorily fulfilled, Staff would say that
20 production tax credit consideration should not be a
21 consideration at all.

22 PURPA states the rates must be just and
23 reasonable to the electric consumer and in the public
24 interest, nondiscriminatory to qualifying facilities, and
25 they shall not exceed the utility's incremental cost of

1 alternative electric energy.

2 Just and reasonable is a very ambiguous term.
3 However, this is clear that the rates must be just and
4 reasonable to the utility, its consumers, and the QF.
5 The public interest includes NorthWest Energy as well as
6 Oak Tree. There is a need to protect customers against
7 high rates, but this must be balanced against the
8 obligation to give PURPA affect through promoting
9 cogeneration in small power production.

10 In its Posthearing Response Brief Oak Tree
11 argued that a simple finding of full avoided cost
12 fulfills the just and reasonable prong. And there seems
13 to be a great deal of authority to back that up.
14 However, the problem is, as we have seen throughout this
15 proceeding, what constitutes NorthWestern's full avoided
16 cost is certainly open to interpretation depending on
17 what modeling methodology has been selected and what
18 inputs have been used, so on and so forth.

19 As to the nondiscriminatory element, given
20 Staff's belief that NorthWestern's calculated incremental
21 cost is below its true incremental costs, apply and
22 separate would discriminate against Oak Tree as a QF.
23 However, it is true that PURPA does not require, and
24 Staff agrees, that there be a rate that makes a project
25 financially viable. That is also not an element in the

1 PURPA restrictions.

2 As stated in briefing, and quickly repeat this
3 here, the incremental cost standard is intended to leave
4 rate payers economically indifferent through the source
5 of the utility's energy ensuring purchasing the QF does
6 not exceed the cost in the absence of the qualifying
7 facility.

8 I apologize. I probably shouldn't have brought
9 coffee to make sure I don't get dry mouth.

10 Now true customer indifference cannot be
11 achieved when setting a long-term power purchase
12 agreement. Long-term forecasting is very uncertain, and
13 both parties have provided evidence that rates will
14 either be above or below the true avoided cost but rarely
15 equal.

16 If it is below, the customers are paying more.
17 If it is above, the customers are paying less. Both
18 scenarios actually violate the customer indifference, as
19 the customer is either better off or worse off as they
20 would be without the qualifying facility. And FERC has
21 addressed these issues saying that these long-term
22 purchase agreements need not be at the actual incremental
23 cost.

24 Although customer indifference can only be seen
25 as a guiding rule, it is something this Commission needs

1 to seek and strive for while recognizing it can never be
2 achieved. And this is the basis for Staff's
3 recommendation of additional proceedings. We need to get
4 as close as possible over the long-term of an avoided
5 cost estimate that will leave customers indifferent.
6 Right now Staff feels we have two bookends and nothing in
7 the middle that we can rely upon.

8 Staff will briefly recap its issues that it has
9 with each of these models. Oak Tree has offered an
10 avoided cost Staff believes is far too high. One
11 bookend. This is based on the particular modeling method
12 chosen by Oak Tree and certain assumptions it's used to
13 apply it.

14 And, again, Staff wants to make clear and
15 distinguish that it is not disputing the market price or
16 market estimates model. It's been referred to as both.
17 It does not dispute or object to this modeling approach
18 under PURPA, and it is certainly a viable and
19 appropriate modeling approach in certain circumstances.
20 It is simply that Staff does not believe it is as
21 accurate and appropriate under the circumstances of this
22 case.

23 This is based on Staff's understanding of the
24 requirement of PURPA with respect to setting a rate at or
25 below the incremental cost and the fact that the market

1 price approach does not properly consider when
2 NorthWestern's internal generation is sufficient to fill
3 its service requirements.

4 During these times Staff agrees that
5 NorthWestern's incremental cost is the measure of the
6 variable costs of internal generation and these are the
7 only costs to be avoided. Whether or not they can
8 actually be avoided is another issue.

9 Under Oak Tree's model, whether NorthWestern is
10 long or short an avoided cost is always measured at the
11 spot market rate. As such, NorthWestern Energy pays more
12 for energy than -- to Oak Tree than it can provide its
13 customers through internal generation.

14 Oak Tree has argued this approach does not
15 reflect NorthWestern's full avoided cost because it does
16 not consider the benefit of market sales or economy
17 sales. However, during these times NorthWestern
18 Energy -- I'm sorry. During the times when NorthWestern
19 Energy is long they are not actually avoiding any costs.

20 They can either turn down their own plants or
21 shift this additional energy to the market. But
22 NorthWestern would then pay forecasted price in these
23 times, and rate payers assume the risk of the long-term
24 price forecast.

25 Also in countering Oak Tree's argument that the

1 customers will receive a benefit, NorthWestern's current
2 tariff again does not provide for a credit of customers
3 on asset based and nonasset based margins.

4 Finally, Staff will quickly address the
5 remaining concerns of natural gas price forecast and the
6 carbon cost assumption in Oak Tree's avoided cost
7 estimate. While there has been a lot of back and forth
8 even in these closing arguments -- or, I'm sorry, oral
9 arguments on whether a change in circumstances unforeseen
10 at the time the avoided cost estimate was developed
11 justifies updating the model which Staff has suggested,
12 this is a judgment call to be made by the Commission.

13 However, Staff believes the threshold here has
14 been met. And reviewing the natural gas price forecast
15 is required due to the significant increase in the EIA's
16 estimate of technically recoverable unproved shale gas
17 resources. I had to practice saying that several times.
18 And this estimate came out shortly after the avoided cost
19 estimate was prepared.

20 CHAIRMAN NELSON: Let's take just about a 10
21 second recess.

22 (Discussion off the record)

23 MR. SOYE: Thank you, Mr. Commissioner.

24 Staff will now move on to its concerns with
25 NorthWestern's avoided cost model. In contrast with

1 Oak Tree, Staff believes NorthWestern's avoided cost
2 estimate is too low. This is primarily due to the inputs
3 used by NorthWestern in developing this avoided cost
4 calculation.

5 As has been made clear, Staff puts great weight
6 on selecting the proper avoided cost calculation method.
7 Under the circumstances, Oak Tree has suggested that the
8 hybrid peaker market method cannot be used, it is not an
9 accepted method, and points to the fact that
10 Mr. Bleau LaFave did not identify this or list this as
11 one of the acceptable methods in his testimony.

12 However, much of the information that was
13 presented on the accepted methods for calculating an
14 avoided cost was also included in the document prepared
15 for the Edison Electric Institute, which was included as
16 BPR 1. Exhibit No. BPR 1 is part of Staff's prefiled
17 testimony.

18 On page 11 of this document it specifically
19 talks about hybrid methods and the use of hybrid methods
20 by certain states. It does not contain any information
21 that the use of a hybrid method is any less reliable or
22 inappropriate as compared to strictly applying one of the
23 listed methods.

24 As such, Staff does not believe the Commission
25 is committed to applying any particular method in its

1 pure form and it's able to select a proper method under
2 the circumstances. Even it means intermixing certain
3 elements of each. And, again, FERC does not require any
4 one particular method be used.

5 That being said, although Staff believes that
6 NorthWestern has chosen the correct modeling method under
7 the circumstances, in theory, Staff believes NorthWestern
8 has, unfortunately, failed to utilize this method and has
9 not given the Commission any evidence that will allow it
10 to make a decision in this case.

11 First and foremost, NorthWestern provided a
12 five-year energy only forecast. It does not provide a
13 20-year avoided cost forecast. And as pointed out by
14 Oak Tree, that leaves only one 20-year avoided cost
15 forecast which the Commission has seen.

16 In addition, the inputs relied upon by
17 NorthWestern in its short-term energy forecast result in
18 avoided cost Staff argues cannot be relied upon.
19 Specifically, NorthWestern has included no capacity
20 element in its calculation. An avoided cost rate that
21 does not include a capacity element is contrary to the
22 specific directive of PURPA and the Commission's order in
23 F-3365. It is simply not a full avoided cost
24 calculation.

25 Second, NorthWestern's natural gas price

1 forecast. On this Staff agrees with Oak Tree that the
2 assumption that there will be no real price increases
3 between 2015 and 2031 is just unsupportable.

4 NorthWestern's witness, Mr. Lewis, even plainly admits
5 that he knows of no other entity, expert, or individual
6 in this industry making that same assumption.

7 Next NorthWestern includes a carbon component,
8 something that also seems to be commonplace in this
9 industry, and although NorthWestern has suggested that
10 this is too speculative to be included, Staff reasserts
11 its position that this Commission is more than capable to
12 determine if it feels a carbon cost element should be
13 included and at what level.

14 By not including this in the avoided cost rate
15 calculation, all the Commission can determine now is that
16 the NorthWestern's model is incomplete.

17 As to the LEO issue, whether an LEO was
18 established, the parties have spent a great deal of time
19 researching and explaining how other states have handled
20 this issue. Staff feels how other states have handled
21 this issue or approached the LEO is of little or no
22 value. All that's been determined is that almost every
23 state has a different method and a State Commission can
24 adopt any method consistent with PURPA.

25 So, again, Staff urges the Commission to forego

1 setting any precise method of establishing an LEO and
2 recommends adopting a policy of reviewing issues on a
3 case-by-case basis concerning the actions of the parties
4 in any particular circumstance.

5 So in this case PURPA and specifically the LEO
6 was created to prevent utilities from simply refusing to
7 enter a purchase power agreement with a nonutility
8 producer. So we must ask does this case present a
9 situation where -- in which PURPA and the LEO was meant
10 to prevent?

11 Staff believes there is clear evidence to show
12 the negotiation process was unsuccessful in this case.
13 And this was due to NorthWestern's refusal to negotiate a
14 purchase power agreement consistent with PURPA.

15 This is primarily due to the refusal to
16 negotiate the -- or the refusal to negotiate above the
17 short-term rate offered small power producers under
18 NorthWestern's tariff. NorthWestern seems to argue that
19 this methodology or its methodology for determining this
20 small power producer's rate -- I'm sorry. 100 kilowatts
21 is below. It's the same as it will use or should be used
22 to the 100 kilowatts above. Or above.

23 This would be a valid argument if the
24 methodology accounted for its avoided cost when
25 NorthWestern is short on coal generation or long-term

1 nature of these negotiated contracts. However, Staff
2 does not believe NorthWestern's methodology included
3 these factors.

4 NorthWestern argues an LEO has not been created
5 because the price offered by Oak Tree was not at or below
6 its true avoided cost rate. To this point Staff believes
7 NorthWestern's true avoided cost rate or incremental rate
8 has not yet been determined.

9 So Staff would argue at the time that Oak Tree
10 made its offer to negotiate it was working off of the
11 information that was available to it. It utilized an
12 industry accepted method for determining avoided cost
13 and did all that it could to begin the negotiation
14 process with NorthWestern Energy prior to sending its
15 letter and executed PPA on February 25, 2011, to which
16 NorthWestern again pointed to its lack of need for
17 capacity and its rate of \$20 per megawatt hour for
18 100 kilowatts or below.

19 As such, Staff believes the circumstances under
20 this case are of the type that PURPA meant to prevent and
21 would suggest that the Commission find a LEO was created
22 on September 25, 2011. Creating the LEO would then bring
23 us to capacity needs.

24 As mentioned before, there is no doubt capacity
25 credits must be included in the avoided cost rate for any

1 purchase power agreement resulting from this dispute.

2 However, when those capacity credits should
3 begin has been a continuing issue in this case. A lot of
4 back and forth. It is clear that NorthWestern -- well,
5 Staff believes it is clear through the contracts signed
6 with Basin Electric that it was clear that NorthWestern
7 didn't need capacity and would suggest that the capacity
8 elements apply throughout the life of the project of
9 Oak Tree.

10 We realize that this is a deviation from our
11 initial suggestion. However, it is due to the additional
12 evidence that was provided throughout this case that
13 Staff has altered its view on this point.

14 As to the accredited capacity the project should
15 receive, Staff would again just simply reassert its view
16 that Oak Tree should be treated no differently than the
17 Titan 1 project. If the Titan 1 project is accredited
18 through the MISO method, then that's how Oak Tree should
19 be treated. If the Titan 1 project received a stamp
20 value of 20 percent or accredited value, then that's what
21 Oak Tree should receive.

22 Finally, as to contract length, once again,
23 Staff will simply repeat its view that it sees absolutely
24 no reason why Oak Tree should not receive the 20-year
25 contract length it has asked for. It seems that

1 NorthWestern continually plans on this planning horizon,
2 and Oak Tree should be treated the same.

3 In conclusion, Staff believes there are issues
4 presented in this case such as LEO, contract lengths, so
5 forth, that can be resolved on the evidence that has been
6 provided. The other issues such as the proper avoided
7 cost rate, we again assert that there is insufficient
8 evidence and would recommend this Commission hold
9 additional proceedings.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 Mr. Brogan, 10 minutes for rebuttal.

13 MR. BROGAN: Thank you, Chairman Nelson. I will
14 do my best to not use all 10 minutes.

15 CHAIRMAN NELSON: Very fair.

16 MR. BROGAN: Staff indicated that NorthWestern
17 had not provided a 20-year avoided cost forecast. That
18 is correct.

19 But Staff then said NorthWestern had only
20 provided a five-year forecast. Exhibit BJL 1 is
21 NorthWestern's 20-year estimate of incremental costs
22 broken down by year, by peak, and by off peak period. So
23 the Commission does have another forecast to look at.

24 Staff reiterates its concern that NorthWestern
25 vastly underestimated the cost of natural gas going

1 forward. I think we all realize there's a lot of
2 difficulty in determining the cost of natural gas. I
3 think we realize that in NorthWestern's model if I
4 recall, Mr. Lewis was estimating AECO prices at this time
5 of natural gas for 2012 in excess of \$4. I think we all
6 know that in the last week they traded at \$1.50 or \$1.49.
7 So it's not absolutely clear that NorthWestern vastly
8 underestimated the cost of gas.

9 With respect to the negotiation process, Staff
10 seems to say that the breakdown in negotiations was due
11 to NWE's refusal to increase its rate. NorthWestern in
12 its Brief and Posthearing Briefs has also shown that a
13 substantial part of the breakdown in negotiations was due
14 to the demand of Oak Tree for the type of contract that
15 it asked for.

16 And, in fact, not only did or does that contract
17 exceed by a substantial margin NorthWestern's true
18 avoided cost, in about 65 percent of the 175,000 plus
19 hours for which it's estimated, that contract price
20 exceeds Mr. Lauckhart's market forecast price.

21 There was substantial responsibility, I believe,
22 on both parties' part that led to the failure of the
23 negotiation process and to somehow decide that because of
24 the negotiation process we're going to determine there
25 was an LEO seems to fly in the face of what it should

1 take to establish an LEO.

2 Finally, Staff says go with the fixed rate
3 20-year contract; that's consistent with planning
4 horizons, and Oak Tree should be treated the same as the
5 utility.

6 But if the utility brings in a resource, it
7 doesn't necessarily have a 20-year fixed rate. If the
8 utility brings in a resource and it justified the
9 prudence of that resource on some sort of gas cost and it
10 turns out that five years down the road gas costs are a
11 lot less, well, the price from that plant's going to be a
12 lot less. Because the actual gas cost is what's going to
13 be passed through to customers.

14 If it brings through a resource and five years
15 later is in with a new rate case and the financial
16 markets have changed and the, you know, borrowing cost is
17 down and the authorized return on equity is down so that
18 the rate of return is down, the utility is going to have
19 a lower return and get a lower price for that asset, for
20 that rate based asset. They're not going to get the
21 fixed price that they estimated at the beginning. So
22 giving a QF a 20-year fixed price is not treating it the
23 same as a utility.

24 Finally, I think that Staff raises the biggest
25 issue, and that is what do you do now? And it recommends

1 additional procedure. While NorthWestern's not
2 necessarily opposed to that, I think we would point out
3 we believe that what you will end up with is more
4 competing and conflicting expert opinion. Probably no
5 different than what we have today.

6 I personally am not sure that you gain a lot by
7 that. And I think it's back to what I had said earlier.
8 It's up to you to decide how much risk you want
9 South Dakota consumers to assume.

10 Thank you.

11 CHAIRMAN NELSON: Thank you. Mr. Uda,
12 10 minutes.

13 MR. UDA: Thank you, Mr. Chairman. I think I
14 want to just talk a little bit about the Staff -- first
15 of all, I want to thank the Staff for what I think is --
16 they have made an extraordinary effort to get their arms
17 around what is obviously a very highly complex and
18 technical case. I think they've done a really good job
19 of going kind of from 0 to 100 miles an hour in a
20 relatively short period of time.

21 And we're not opposed to having additional
22 proceedings. I mean, I think the concern is two-fold.

23 First is, and I think as Mr. Soye acknowledged,
24 you know, we do have this looming expiration production
25 tax credit. We do the potential loss of bonus

1 depreciation. You know, we've done our pro formas and
2 we've sort of figured it out.

3 And I understand that the Staff's position is
4 that it's not the obligation of the utility under PURPA
5 to make sure their avoided cost permits the financing of
6 projects, and we respect that.

7 But it leads us to our second issue, which is,
8 okay. Let's suppose Mr. Lauckhart's forecast is wrong.
9 It's possible. Of course, it's wrong. But as we showed
10 in one of the slides, look at the other contracts, and
11 then look at NorthWestern's.

12 And do you believe in your heart that there's
13 been a 24 percent error in the avoided cost for a project
14 of this kind? And I submit to you there is no evidence
15 that that's true.

16 As I said, we're not opposed to doing this, but
17 if the production tax credit expires and the bonus
18 depreciation expires, our proposal is probably going to
19 have to be higher than it would have been if the decision
20 had been made earlier and permitted us to start
21 construction by the end of the year. Or actually
22 complete construction by the end of the year I believe to
23 get the production tax credit.

24 So this is a huge issue. This was an issue for
25 NorthWestern in Montana. This is why they told the

1 Commission there you have to act on this now.

2 And I respect the Staff's position there are
3 differences between the Montana system and the
4 South Dakota system, but you have to understand the
5 avoided cost does not look at what's going on today and
6 say, okay, well, in the market gas is really low now so
7 we have to assume that's going to continue forever.

8 I can remember a time in 2000, 2001 where gas
9 prices went to \$15 a dekatherm. I can recall a time in
10 the 1990s when gas was \$2 a dekatherm or \$1 a dekatherm.
11 It changes in response to markets. And to try to get
12 your arms around that is a very difficult exercise. And
13 I understand that.

14 But you don't say, okay, let's just ignore all
15 the fundamental analysis of the market and say, okay,
16 well, we need to use this method because it seems to be
17 the way that NorthWestern operates.

18 The real question is if NorthWestern is
19 obtaining value from selling its generation when it's
20 long on generation, why aren't you giving that value to
21 Oak Tree?

22 Well, the response seems to be because that's
23 not permitted by the power cost adjustment clause. And
24 my point is if that's going on now, that should stop
25 immediately. These are utility rate based assets that

1 have been paid for by customers. And in some portion of
2 that analysis they should be getting some return on that.

3 So because the language of the tariff doesn't
4 permit it doesn't mean it's right and doesn't mean it's
5 consistent with avoided cost.

6 Now I want to talk briefly about this LEO issue.
7 I don't really think it's really that much in dispute. I
8 mean, Oak Tree did everything they could do. What else
9 were they supposed to do? Okay. We made phone calls.
10 We sent letters. We said, hey, negotiate with us. If
11 you've got any questions call us.

12 The response back was, well, we don't need a
13 need for capacity and our short-term rate is \$20 a
14 megawatt hour. If you want to negotiate at or below that
15 rate, that's fine. There was really nothing else we
16 could do.

17 So we tried to do the best job we could do
18 because we couldn't get any avoided cost information from
19 NorthWestern. They weren't producing any of the stuff
20 pursuant to 18 CFR 292.302 that they were supposed to be
21 producing before. So we hired a expert who used an
22 off-the-shelf forecast not prepared for this proceeding,
23 supposed to be an objective look at the market and came
24 up with the best judgment we could.

25 And we said, you know, hey, here's this and

1 here's this contract. How many hours are over or below
2 that rate -- our rate really is 54.50. And it's
3 levelized to 65.12, but it's really a two and a half
4 percent escalator per year. It's very similar to the
5 Titan contract. And we submit that that's kind of --
6 even though it's not an avoided resource, it's relevant,
7 nonetheless, to how this particular project is treated.

8 I think it's beyond peradventure that when a
9 utility puts an asset in rate base it's entitled to a
10 reasonable return on its investment. And if it turns out
11 that project is underperforming and they're not getting
12 that return on their investment, they can come to you and
13 ask for more money.

14 We, once we lock in a contract we take the risk
15 of that performance. We don't have rate payers as a
16 recourse. We are stuck. So I think you should also take
17 that into account.

18 I think the final point I want to make is this
19 goes to this issue of credibility. All of the errors
20 that NorthWestern made in its forecast all go in the same
21 direction, producing a \$35.80 rate. That's not an
22 accident. It's not an accident they didn't negotiate
23 with us.

24 FERC recognized long ago when PURPA was adopted
25 that utilities refuse to negotiate. They don't like

1 dealing with QFs. Understandable. We're competitors.
2 Either they build the resource or we do.

3 Okay. If you ask Coca Cola should they make
4 some kind of accommodation for Pepsi, I think they'd
5 probably say no way. But that's the nature of the beast.
6 This is a policy call that Congress made it's still the
7 law of the land, even under the Energy Policy Act of
8 2005. Especially for small projects under 20 megawatts.
9 They still don't have nondiscriminatory access to
10 markets.

11 I want to close on a note here because, you
12 know, you have a recent filing by Otter Tail, and it's in
13 your records. I think you can take administrative notice
14 of it. But Mr. Lauckhart did an analysis of the gas
15 price forecast used there to justify instead of retiring
16 Big Stone, retrofitting it, putting new pollution control
17 equipment on it, and they had to do an analysis of what
18 it could would cost to replace it with natural gas fired
19 generation.

20 He came up with \$9.50 an MMBtu levelized for
21 20 years. It's a rough approximation. They used \$5.14
22 in this proceeding, and Black & Veatch used \$8. What I'm
23 talking about here is consistency of positions. Before
24 the Montana Commission they said all these benefits
25 you'll get diversification, hedging against EPA

1 regulations, carbon tax. That's a very important issue,
2 something that shouldn't be looked over.

3 They might think ours is too high. They've got
4 zero. Okay. There is a risk that is going to happen.
5 Waxman-Markey passed the House. It's a reality we have
6 to deal with.

7 Finally, the capacity issue. They told their
8 board as of April 25, 2011 they needed more capacity.
9 They told us they didn't need any. They told you even in
10 briefing here they didn't need any. This is entirely
11 inconsistent with the record in this case. And, again,
12 it goes to the issue of credibility, which goes back to
13 the first issue that I talked about is who do you
14 believe?

15 Mr. Lauckhart has testified for utilities. He's
16 testified for qualifying facilities. He's helped banks.
17 He doesn't have any particular ax to grind other than he
18 wants to implement PURPA in South Dakota in the most
19 efficient way possible.

20 Did Mr. Lauckhart get it right with his market
21 estimate approach? It's one of the recognized
22 approaches. Is it totally appropriate for South Dakota?
23 I think it is, given the fact that 53 percent of their
24 load is going to be served by their own internal
25 resources by 2015? They are going to need -- and you

1 have to look at this over the long-term. There's this
2 incremental need for more capacity.

3 The errors that were made in NorthWestern's
4 forecast all go in the same direction. Mr. Brogan thinks
5 that they're favorable to us, but I think every reputable
6 forecasting agency in this country would disagree. I'm
7 talking Ventyx, Black & Veatch, everybody else who does
8 these things for a living.

9 In closing, what I would like to say is we did
10 make a commitment. We sent them a contract. If they had
11 signed the contract, we would have had a deal. They
12 didn't like the contract. They said, well, the contract
13 terms were a huge issue. They never told us that.

14 Look at the correspondence. I don't have to
15 make that up. They never said a word about our contract
16 terms. If they had said, hey, we don't like your
17 contract terms, we would have said fine. If they had
18 said we think your rate is too high, we would have said
19 fine.

20 CHAIRMAN NELSON: One minute.

21 MR. UDA: But they didn't say those things.
22 They forced us to come before the Commission. I'm not
23 saying that -- I'm not saying that we had to file
24 litigation. We didn't have to do that. We could have
25 gone away.

1 But all the investment, all the money, the time,
2 and the studies, and costing out the turbines, and
3 preparing the land, and the consulting work, and the
4 avoided cost forecast, all of that would have been for
5 nothing.

6 Congress requires that State Commissions
7 implement PURPA. They're supposed to encourage the
8 development of cogeneration and small power production.
9 That's the directive from PURPA.

10 CHAIRMAN NELSON: Thank you, Mr. Uda.

11 MR. UDA: Thank you.

12 CHAIRMAN NELSON: Great place to stop.

13 With that, we are now open for Commission
14 questions with no time limit.

15 Commissioner Fiegen.

16 COMMISSIONER FIEGEN: Mr. Chairman, may I have
17 like a 5-minute recess?

18 CHAIRMAN NELSON: Certainly. We are in recess.

19 (A short recess is taken)

20 CHAIRMAN NELSON: Okay. We are back in session.

21 Mr. Brogan, do you have an issue that needs to
22 be addressed or not?

23 MR. BROGAN: No, I don't believe I do.

24 CHAIRMAN NELSON: Okay. Thank you.

25 With that, Commissioner questions.

1 COMMISSIONER FIEGEN: I'll start with a couple.

2 CHAIRMAN NELSON: Commissioner Fiegen.

3 COMMISSIONER FIEGEN: I'll start with a couple
4 for Oak Tree.

5 First of all, on the natural gas. Is it
6 reasonable to think that in your forecast that natural
7 gas will change? Because, you know, your forecast was
8 done early before maybe a lot of shale gas and et cetera.
9 So is that reasonable that you think your natural gas
10 forecast would change?

11 MR. UDA: I guess, Commissioner Fiegen, if I can
12 answer that question this way: You know going in when
13 you make a forecast that you're going to be wrong. You
14 don't know the margin, the degree, the magnitude of
15 which, but the slide that we showed you showed you that
16 basically EIA and Black & Veatch were moving together in
17 the fall of 2010.

18 And, you know, the point that Staff made as
19 well, you know, EIA came up with this increased amount of
20 approval reserves subsequent to that forecast.

21 And that's true, but there's a lot of other
22 analysis that would go into that on a fundamental natural
23 gas based forecast to determine what the significance of
24 that increase was because it could be that you have an
25 increased amount approval in reserves but there's an

1 increased cost associated with it. So you have to try to
2 figure out how all of those pieces fit together. It's a
3 complicated exercise.

4 Is it reasonable to assume that things will
5 change? Yeah. I mean, of course. I think that's the
6 fundamental assumption.

7 COMMISSIONER FIEGEN: Another question on your
8 259-page report, and it talks a little bit about wind
9 energy and the different states in -- on page 173.

10 Why isn't South Dakota included in that?

11 MR. UDA: I couldn't really answer that
12 question. I think that would be a better question for
13 Mr. Lauckhart. My presumption is the reason it's not
14 specifically included in there is they for whatever
15 reason didn't choose to separately account for it in that
16 way.

17 I know that based on Mr. Lauckhart's testimony
18 they did assume the amount of wind that existed as of the
19 fall of 2010, and they added additional wind into this
20 region because they had assumptions, for example, that
21 coal plants were going to be retiring and they replaced
22 them largely with natural gas fired generation and
23 renewables.

24 COMMISSIONER FIEGEN: I'm going to go to your --
25 you really talked a lot about coal retirement today.

1 MR. UDA: Uh-huh.

2 COMMISSIONER FIEGEN: Do you know what coal
3 retirement is being retired in South Dakota because of
4 the new EPA regulations?

5 MR. UDA: Well, I think it's an issue.
6 Obviously, as you're seeing with the Big Stone filing,
7 it's an issue that every utility is having to grapple
8 with. And so the answer is I don't know. And I think
9 part of that's going to be up to you guys.

10 I think part of it's going to be depending on
11 the showing that it's not going to be less expensive for
12 rate payers to switch to natural gas fired generation as
13 the kind of base load kind of resource than it is to kind
14 of retrofit and use coal.

15 I mean, I think there's two factors. One is the
16 EPA issue, the cost-effectiveness of upgrading the
17 pollution control equipment both as capital cost and
18 fixed costs over time and the variable cost of operating
19 those facilities. And also the risk of any carbon
20 legislation that comes down. Because you could have a
21 double whammy in a very short period of time where you
22 get the EPA regulations kicking in requiring these
23 improvements, and then on top of that you get cap and
24 trade legislation, Waxman-Markey or something like it.

25 So I think it will be up to you guys to decide

1 what the most cost-effective generating portfolio is
2 going to be for NorthWestern. But the answer to
3 specifically your question do I know that any of them are
4 planning on retiring in South Dakota? No.

5 But I also know that South Dakota is in a region
6 which is connected in the Eastern Interconnect. And I
7 know that Black & Veatch is forecasting I think in the
8 Eastern Interconnect 44,000 megawatts of generation
9 they're going to retire by 2020. I know that in Oregon,
10 Portland General Electric decided to shut down its
11 Boardman plant rather than try to retrofit it because
12 they didn't think it was cost-effective.

13 I think the other factor is, you know, what is
14 the Natural Resources Defense Council going to do about
15 continuing coal generation. I can tell you from my
16 experience in Montana when people have tried to build new
17 coal plants you've had environmental organizations
18 extremely opposed that idea.

19 And one of the costs that every developer has to
20 take into account is how long, you know, projects can be
21 tied up in environmental litigation and the costs
22 associated with it.

23 COMMISSIONER FIEGEN: Okay. I think that's all
24 for now. Thank you.

25 CHAIRMAN NELSON: Additional questions? I have

1 none.

2 COMMISSIONER HANSON: Okay. Mr. Chairman.

3 CHAIRMAN NELSON: Go ahead.

4 COMMISSIONER HANSON: I have a few questions.

5 And I'm mainly dealing with the LEO, trying to establish
6 a few things in my mind.

7 Staff stated that they believe a LEO was created
8 and that -- I believe the discussion from Staff is that
9 we need to look at each LEO on an individual basis. And
10 I'll just make the comment that I believe we need to have
11 some parameters regarding what establishes a LEO as
12 opposed to leaving it up to some ambiguity because there
13 were so many different I would say machinations that
14 could be considered in one. So I think as a Commission
15 we do need to establish something of that nature.

16 Staff -- well, I'll just ask Staff if they have
17 any comment on that, on my comment?

18 MR. SOYE: Staff would -- I believe it was --

19 COMMISSIONER HANSON: No fair to take the Fifth
20 but --

21 MR. SOYE: I believe Staff suggested at one
22 point that if we were going to establish rules, we would
23 prefer to do it through a rule making docket and not
24 here. And that's if the Commission would prefer some
25 more concrete rules to -- or something to be met to

1 create an LEO, we're more than willing to put something
2 together and propose it based on what the Commission
3 thinks should be included in that.

4 But in terms of this specific case, we just
5 don't think that we're going to be able to put something
6 together and make any concrete recommendations here.

7 COMMISSIONER HANSON: Thank you.

8 Mr. Uda, NorthWestern contends that Oak Tree
9 never had any real intention of being operational before
10 September 2012 and never guaranteed that it would deliver
11 capacity at any time.

12 Do you agree with that statement? By the way, I
13 will be quoting from a few places in NorthWestern's
14 Response Brief, Posthearing Response Brief.

15 MR. UDA: So could you restate the question,
16 Commissioner Hanson? I think I lost the first part of
17 it. I'm kind of tired. I've been burying you in paper
18 for the last few days.

19 COMMISSIONER HANSON: Sure. On page 17 of
20 NorthWestern Energy's Posthearing Response Brief they
21 state -- it's not numbered, but it looks like it's line 5
22 that Oak Tree never had any real intention of being
23 operational before September 2012 and never guaranteed
24 that it would deliver capacity at any time.

25 MR. UDA: Okay. I think this issue of intent is

1 an interesting one. They had Mr. Makens on the stand,
2 and they could have asked him about what Oak Tree's
3 intentions were. The best way to establish intentions in
4 this case is to look at what Oak Tree did.

5 Oak Tree signed an Interconnection Agreement.
6 Oak Tree spent all of these money on studies. Oak Tree
7 did their environmental work. Oak Tree paid Black &
8 Veatch \$15,000 for an Energy Market Perspective so they
9 could prepare an avoided cost analysis.

10 They retained Mr. Lauckhart before they sent
11 their LEO letter. Then they sent a signed contract
12 saying they were going to deliver all of this stuff by
13 May 15, 2011. That's what the contract says.

14 If they have signed the agreement and sent it
15 back, we would have been bound. So we had every
16 intention based on the record to do exactly that and to
17 sell whatever capacity was available from our project.

18 We estimated it at 3.9 megawatts, which is the
19 20 percent calculation. NorthWestern's resource
20 adequacy, whether that number's right or not, whatever
21 capacity we had, we were willing to sell to them. And
22 there's no question but that they needed the capacity,
23 and if they needed the capacity, they were required to
24 buy it from Oak Tree.

25 COMMISSIONER HANSON: NorthWestern also stated

1 that Oak Tree did not reveal the price for any capacity
2 until after it filed the Complaint on this docket.

3 MR. UDA: That is untrue. It's actually in
4 Mr. Lauckhart's analysis. I believe it was his reality
5 check. But I think that all the spreadsheets were made
6 available to NorthWestern when we sent the LEO letter on
7 February 25, 2011. I would say that's true, subject to
8 check. I haven't looked at that in awhile, but I believe
9 that was all part of the levelized cost of the Oak Tree
10 offer.

11 COMMISSIONER HANSON: And are you referring to
12 the offer of May 17, 2011?

13 MR. UDA: The offer of February 25, 2011.

14 COMMISSIONER HANSON: You stated that they sent
15 a signed contract. They being Oak Tree sent a signed
16 contract on May 17, 2011.

17 MR. UDA: I'm sorry. If I said that, I
18 misspoke. I meant to say February 25, 2011. And along
19 with the contract we also sent the avoided cost analysis
20 for both green and brown power to NorthWestern. Brown
21 power calculation based on Black & Veatch's energy market
22 perspective, and the green power calculation based on a
23 methodology that has been used in Montana, which was the
24 surrogate unit proxy method or something like that.

25 It's basically saying assuming you were going to

1 build something like this, this is what it would cost for
2 you to build that same thing, and we'd like to displace
3 that.

4 COMMISSIONER HANSON: NorthWestern, do you have
5 any comment on that?

6 We have here two completely opposite
7 statements. Not that that's unusual in these type of
8 proceedings but --

9 MR. BROGAN: Commissioner Hanson, what was given
10 to NorthWestern in February 25 -- or on February 25 of
11 2011 was an 11-page contract. We are not aware of any
12 capacity values that were disclosed to NorthWestern at
13 that time.

14 To the best of our knowledge, the first time we
15 saw capacity values or how they were calculated was in
16 Mr. Lauckhart's Exhibit 3. And I guess that would just
17 be the response. That was filed with the -- with
18 Mr. Lauckhart's testimony.

19 COMMISSIONER HANSON: Forgive me. With all of
20 the evidence and discussions that we've had on this and
21 with all of the other dockets that we have, I do not
22 recall reading or looking at that contract.

23 Do we have that contract in evidence? We do,
24 don't we?

25 Okay. Thank you.

1 Oak Tree. Mr. Uda, a utility, according to
2 NorthWestern, is not required and should not now be
3 required in their words to pay for capacity that it does
4 not need. What do you think of that?

5 MR. UDA: Well, I think there are sometimes, you
6 know, confusion about what we're talking about with
7 respect to capacity. When I'm talking about capacity I'm
8 talking about the specific component of electricity
9 that's separate from the energy component of it.

10 Is that what you're referring to, Commissioner
11 Hanson?

12 COMMISSIONER HANSON: Well, what I'm getting at
13 and I won't be coy about it, is the concern that -- I
14 don't want to be California, and I don't want to be
15 Minnesota. I don't want to open up the gates where QFs
16 are just allowed to overflow the state with capacity so
17 that -- in a fashion where the utilities are obliged to
18 purchase capacity that they don't need, that is
19 intermittent, that is of higher cost, that is going to
20 drive up the costs to the consumers.

21 MR. UDA: Okay. I think I --

22 COMMISSIONER HANSON: That eventually is going
23 to have to be curtailed and simply millions of dollars
24 will be spent for unneeded capacity.

25 MR. UDA: Well, I have a long answer to that.

1 Is that okay?

2 COMMISSIONER HANSON: I guess I have all the
3 time in the --

4 MR. UDA: You know, I think that's -- I think
5 there's -- that's a valid concern. You know, I mean,
6 obviously you have a situation in some states where, you
7 know, they've had to grapple with these issues more than
8 others.

9 I don't think it's an issue in California. I
10 think California has effectively dealt with their issues.
11 I think, for example, Idaho Power, which may have been
12 the entity that Mr. Brogan was referring to, has
13 struggled greatly with those issues.

14 But, I mean, you have to understand I think
15 Idaho Power's -- I want to say Idaho Power's system has a
16 peak of like -- I could be getting this wrong. This is
17 just from recollection. I went to a rates conference not
18 too long ago. I think their peak is like 3,000
19 megawatts, and I think they've acquired 1,500 megawatts
20 of wind generation.

21 And that's a hell of a lot to absorb. And that
22 causes all kinds of issues for the utility. I mean, it
23 causes problems with the integration. It causes problems
24 with intermittency things, resource adequacy, those kinds
25 of things.

1 I think the Idaho Commission has dealt with that
2 in terms of sort of shutting the door to a certain extent
3 after a certain amount of megawatts were put in. The
4 Montana has tried to deal with that uncertainty in that
5 way.

6 The real issue is, though, I think, that you're
7 not deal -- you know, there's that old commercial that
8 this is not your father's Oldsmobile. This is really not
9 your father's PURPA anymore because you're dealing with a
10 new world, and the new world is moving towards renewable
11 generation.

12 And there's a likelihood there's a substantial
13 amount of fossil fuel generation is going to be replaced
14 in the next 20 years, and you're going to be looking at a
15 situation of how you hedge that risk.

16 Now coming down to the question of should the
17 utility be required to buy the capacity they don't need?
18 I think they need the capacity. I think they need the
19 capacity as a hedge. I think they need the capacity
20 because they're showing that they're going to be resource
21 deficient in a relatively short period of time.

22 And there's also the possibility that when you
23 guys look at the actual costs of continuing on with
24 Big Stone and adding the retrofit onto it, it's not going
25 to be as cost effective as switching to another form of

1 generation. And if they lose that capacity, there's a
2 substantial amount of capacity that will not be available
3 to them.

4 And so in terms of resource management, these
5 are all very complicated issues, but I would suggest that
6 these are issues that are much, much broader than the
7 little Oak Tree 19 and a half megawatt project, which is,
8 I think, fairly small in relation to any bills that
9 consumers pay.

10 And we've tried to do an analysis, but it's not
11 in the record. I'm not going to say what it is, but I
12 can tell you the impact is going to be relatively small.

13 And, finally, what I would say is -- and I think
14 this is a really important thing to keep in mind is we're
15 here in front of you saying, look, you know, it's going
16 to be really hard for us to do this project at 65 if we
17 don't get the project completed by the end of 2012.

18 My understanding from going to this rates
19 conference recently was there are no major wind
20 development companies. And big ones. Not the little
21 guys like Oak Tree. But, I mean, the big outfits that
22 build, you know 250 -- none of them are planning on
23 building anything until they know that the production tax
24 credit and the bonus depreciation treatment -- at least
25 the production tax credit is going to be renewed. And

1 nobody knows whether that will happen.

2 So I don't think you're going to get a -- you
3 know, we used to talk about in Montana the QF gold rush.
4 And the QF gold rush in Montana on a system between
5 12 and 1,500 megawatts, somewhere in there, on a peak
6 basis has gotten required 50 megawatts of wind since
7 2004. And I don't think their system is swamped or
8 overwhelmed by that.

9 COMMISSIONER HANSON: Thank you.

10 Mr. Soye, knowing the creative individuals that
11 you work with on Staff and the talents that are there and
12 understanding that your position -- Staff's position is
13 that -- in regards to avoided cost that you used the term
14 bookends, which I think is a good way of explaining the
15 difference of the high and low here, did Staff take any
16 serious effort -- not that you were required to by any
17 means -- to take a shot at what they believed using the
18 inputs that Staff believes should be a part of an avoided
19 cost analysis, come up with what they thought might be a
20 reasonable avoided cost?

21 MR. SOYE: Mr. Commissioner, we actually did
22 contemplate performing such an analysis. However, we did
23 start out this case by admitting that we are not experts
24 in developing long-term avoided cost forecasts, and we
25 never have before.

1 The information that we looked into utilizing
2 was that available off of the EIA website. But in terms
3 of getting the specifics, we would just be relying on
4 others' information. And we didn't feel that -- well, we
5 certainly thought it would be objected to if we did do it
6 so we thought it best not in this case to develop our own
7 forecast.

8 COMMISSIONER HANSON: That was a yes or no, but
9 I wasn't going to -- I promise I wasn't going to follow
10 it up if you had. I was just curious if you had.

11 NorthWestern, there's a gorilla that walks in
12 and out of the room every so often with the Titan project
13 for me at least. I keep wrestling with it. And I may --
14 I'll oversimplify this question to you.

15 But if NorthWestern was willing to purchase
16 power, provide a purchase power agreement or purchase
17 power, build Titan, whatever, at a higher cost on -- I
18 believe one of the reasons was that because there's a
19 renewable energy goal as opposed to a portfolio standard
20 or requirement in South Dakota.

21 In anticipation of being a good corporate
22 citizen, why not oblige the Maken family and -- seem like
23 a nice group of people, work hard. They did a lot of due
24 diligence here. Gosh. It just seems like something a
25 company would want to do. Why Titan?

1 MR. BROGAN: Commissioner Hanson, I think the
2 answer to that is in the record. And it's two-fold. Now
3 I haven't quickly opened the record so I may be wrong on
4 my dates here a little bit. But, you know, I want to say
5 subject to check of the years. I believe it was in 2008
6 that NorthWestern held or conducted a competitive
7 solicitation for renewable resources.

8 At that time Titan was the result of that. The
9 market was significantly higher at that time, and when
10 NorthWestern evaluated the Titan market as the result of
11 the competitive solicitation in 2008 it looked like
12 something to go forward with.

13 COMMISSIONER HANSON: Let me slow you up here
14 because everybody -- everyone here is very familiar with
15 that discussion because it's gone around and around and
16 around, and we've read it several times. And obviously
17 my question was asked because I'm just not buying that
18 argument.

19 You know, we know that natural gas jumps around
20 a lot. We know that costs are going to increase. We
21 know that capacity is going to be retired. We know all
22 of these things. So why not jump in ahead of that on a
23 capacity that is environmentally sound, which provides --
24 I mean, I'm going to regurgitate all the arguments that
25 Oak Tree has been putting out here.

1 I just don't understand -- there isn't a
2 compelling argument here why you wouldn't jump out and
3 say -- and latch onto this.

4 MR. BROGAN: Commissioner Hanson, first off, I
5 need to correct my first part of my answer. That was in
6 2007 that we had the first competitive solicitation.

7 The next point was in 2009 we had another one.
8 There the lowest bids came in. Now NorthWestern, rightly
9 or wrongly, determined the lowest bids were still too
10 high because of the change in the marketplace. But
11 those lowest bids in 2009 were substantially lower than
12 Oak Tree.

13 And it seems to NorthWestern that it would have
14 been very difficult for us to convince you that it was
15 prudent for us to contract with Oak Tree at \$65 when we
16 could have got it for 50 something in the competitive
17 solicitation.

18 COMMISSIONER HANSON: Thank you.

19 And appreciate Oak Tree's testimony and Staff's
20 testimony.

21 Thank you, Mr. Chairman.

22 CHAIRMAN NELSON: Further Commissioner
23 questions?

24 Seeing none, I can continue, but, Cheri, would
25 you like us to do a lunch break?

1 THE COURT REPORTER: I'm fine.

2 CHAIRMAN NELSON: Commissioners, would you like
3 a lunch break, or shall we move forward?

4 COMMISSIONER HANSON: What would you move
5 forward with?

6 CHAIRMAN NELSON: Well, at this point I've got
7 some observations. And I guess I would like to let
8 everybody know kind of what my position is, and hopefully
9 we can play off of that and see where we're going to end
10 up here today.

11 Cheri's okay? Just making sure we have no
12 further questions.

13 What I would like to do, and taking the
14 Chairman's prerogative, first of all, I'd like to say to
15 both sides I found this to be a greatly enjoyable docket.
16 It has real meaning in a lot of different contexts, and
17 I've enjoyed wrestling with this.

18 What I'd like to do for everybody is let you
19 know where I'm at on the various issues, and then there's
20 some questions that I think need to be answered. And I'm
21 going to use Staff's last filing and particularly work
22 off of their conclusions. Because I think they really
23 summarize the questions that we have to answer here
24 today.

25 And I'm on page 17 of Staff's last Brief. In

1 the Conclusion section Staff recommends that NorthWestern
2 Energy's hybrid method is the proper model to calculate
3 the avoided costs of NorthWestern Energy of
4 South Dakota's system. I concur with that.

5 Secondly, Staff says that NorthWestern Energy is
6 obligated to purchase Oak Tree output based on the
7 existence of an LEO created February 25, 2011. As such,
8 all model inputs shall be based on said date. I concur
9 with that conclusion.

10 Third, Staff says a capacity credit shall be
11 incorporated into the hybrid method beginning in 2012. I
12 concur with that assessment.

13 Fourthly, Staff says the proper avoided cost
14 contract term is 20 years. I concur with that
15 assessment.

16 The fifth item that Staff put in their
17 conclusion was that the parties have not provided
18 suitable inputs for this model, and as a result the
19 Commission cannot establish the proper avoided cost. I
20 would agree that neither party despite their efforts gave
21 us an accurate avoided cost number.

22 I would also agree that with all of the
23 testimony on both sides it may be difficult to find
24 exactly what that right number is. And there is a part
25 of me that would like to accept Staff's recommendation

1 that we task both parties with coming back using some
2 specific input guidance with a more appropriate number.

3 But I will say I am -- I am very sympathetic to
4 Oak Tree's reality of the production tax credit likely
5 going away.

6 Now I will agree with Staff. That's not a PURPA
7 consideration. I feel it is a significant consideration
8 for this Commission. I mean, we've had a proposed
9 business come to us with a reality that faces them that
10 this PTC may go away at the end of the year, and so I'm
11 very sympathetic to that.

12 And so I'm faced with really two options at this
13 point. One is that we accept Staff's recommendation and
14 ask for a further proceeding with some specific guidance.
15 And, you know, we can get into that if we need to.

16 The alternative to that that I would like to
17 propose is I've put together a number. Mr. Soye
18 indicated they didn't want to go there. I did. And I'm
19 going to pass these sheets around in both directions so
20 everybody knows what I'm talking about.

21 In preparing this you will find figures on here
22 and numbers that are part of the record. I firmly agree
23 with NorthWestern that there are really two components
24 here. There is the component of NorthWestern's
25 generation that is being offset, and there is a component

1 that is being purchased. And so that the percentages you
2 see at the top of 58.4 and 42.6 represent those two
3 components, and those numbers I believe come from one of
4 NorthWestern's filings or testimony.

5 Mr. LaFave's Exhibit 1 he talks about
6 NorthWestern's generated avoided cost in 2013 as being
7 \$23.35. And so for the generation component I've started
8 with that number and added 2 percent a year to that.

9 For the purchase component I have accepted the
10 Black & Veatch numbers. Not that there aren't things
11 there that can't be quibbled with, but I think there's
12 things that can be quibbled with on the generation
13 component side also. But I've accepted those. And
14 utilizing the appropriate percentage of purchase power
15 you can see how those numbers shake out, and a final
16 number in the last column with an average levelized cost
17 of \$46.47.

18 As I have already said, I believe capacity
19 payments need to be part of this. I accept the \$17,000
20 per megawatt year, and I've added an increase of
21 2 percent per year to that. The capacity calculation I
22 can accept 3.9 megawatts for 2013, but following that it
23 would absolutely need to be based on the MISO method that
24 NorthWestern is already familiar with.

25 Mr. Brogan this morning said that NorthWestern

1 would be willing to purchase at \$100 if this Commission
2 Ordered or \$35 if this Commission ordered. I found it
3 interesting that my number is between those two figures,
4 and so I will take it that NorthWestern is willing to
5 purchase at that figure if this Commission so orders.
6 And so that really takes one side of this equation off
7 the table, if you will.

8 That leaves Oak Tree. And I think what that
9 leaves is a choice on your part at least from my
10 perspective. And I'm speaking as one. I have no idea
11 what my two fellow Commissioners are thinking here. But
12 the choice that I think I'd give you at this point is I'm
13 willing to order this particular number if you are
14 willing to accept it, and if you are not totalling accept
15 it, I'm willing to pursue and accept Staff's
16 recommendation that we go to further proceedings.

17 And, hence, that's my position. At this point I
18 guess I'd appreciate maybe knowing what my fellow
19 Commissioners -- what their thoughts are.

20 COMMISSIONER HANSON: Thank you, Mr. Chairman.
21 I'll work from the same platform that you established by
22 using Staff's recommendations here.

23 And as I -- as I read through them, I'll just
24 simply state that I completely agree with you on the
25 first four statements that you made regarding -- I won't

1 reiterate those because you listed them slightly
2 differently by referring to number 5 as their statement
3 on page -- their being the Staff's statement. The
4 parties have not provided suitable inputs for this model,
5 and as a result the Commission cannot establish the
6 proper avoided cost.

7 I agree with Staff's position on that. I think
8 there's sufficient testimony and information that's been
9 provided to us, and Staff made a very good job of
10 articulating that position.

11 I would say that in regards to the amount of
12 work that you did here, I appreciate the creativity and
13 the considerable effort in putting your proposal
14 together. I think it shows a real attempt by this
15 Commission, by yourself, as attempting to resolve this
16 matter in an expeditious fashion, and I congratulate you
17 on putting it together.

18 My concern is that -- well, I don't want to
19 place those on record just because it would be
20 argumentative.

21 I would add one more item to Staff's
22 recommendations. Staff recommended that -- a request for
23 additional information and to schedule additional
24 proceedings to determine four items. And those are found
25 on page 18 of Staff's Posthearing Brief.

1 And I would simply add to that, that my
2 inclination is that we establish some parameters of what
3 establishes and when a LEO is created. I think that's
4 something that's important to come out of not necessarily
5 these specific hearings but of a future analysis so that
6 people will be guided by that.

7 But I do agree with the Commission -- excuse me.
8 Well, with the Commission's Staff on the five points that
9 they have provided to us here.

10 CHAIRMAN NELSON: Thank you.

11 Commissioner Fiegen, would you like to respond?

12 COMMISSIONER FIEGEN: What I have -- you know, I
13 just received Chairman Nelson's proposal so I certainly
14 haven't had time to look at that. I would need time to
15 look at that.

16 But when I looked at Staff's proposal, I would
17 agree with the five proposals or the five points that
18 they are making and just remembering that we have to look
19 at carbon costs, which you talk about, and getting an
20 inflated cost on natural gas will be important.

21 It will be interesting to see on capital credits
22 and et cetera what we need to do there. But I need to
23 continue to research that. And I believe we just need
24 more time on this docket.

25 CHAIRMAN NELSON: Okay. With that, I appreciate

1 both comments. What I'm going to do at this point is
2 I'm going to turn to Oak Tree, and I'm going to ask a
3 simple question. My proposal, is this something that you
4 would like to at all entertain, or is it a can't do it,
5 no way?

6 MR. UDA: I don't know the answer to that yet.
7 Can I confer?

8 CHAIRMAN NELSON: Absolutely. And here's where
9 I'm going. If it's something that you would at all
10 entertain, then I think I need to ask that same question
11 of my fellow Commissioners, and we would need to figure
12 out how much time you need.

13 If it's something no way, can't do it, then
14 that answers that question, and we move forward. So
15 let's just take a five-minute recess and allow you to
16 confer.

17 (A short recess is taken)

18 MR. UDA: Mr. Makens would like to speak for
19 himself. As you know, he can speak for himself.

20 CHAIRMAN NELSON: Okay. Knowing that, let me
21 just make sure we've got everybody back at the table.

22 MR. UDA: It's not a no, but it's not a definite
23 yes yet.

24 CHAIRMAN NELSON: Understand. Understand. We
25 will be back in session, and, Mr. Makens, welcome to come

1 to the microphone.

2 MR. MAKENS: Thank you, Chairman Nelson. I want
3 to say thank you for putting something out there that's a
4 goal to reach a negotiation. That's been our goal
5 through this whole process.

6 And wow. I'd love to say, yes, let's do it.
7 I'm not a financial expert on a 20-year \$40 million
8 commitment. So I need to crunch these numbers and make
9 sure that we can build it at this price.

10 And I think there's a hopeful possibility that
11 we can go with this, and if we can, we absolutely will.
12 But we need to talk to our financial consultants. We
13 need to -- we need to make sure these numbers are
14 accurate and right and reflect how it will be and make
15 sure we're all on the same page here.

16 My understanding here you've got a mix and match
17 of both sides' methodologies and numbers, and you have an
18 energy price levelized total here of the 46.47. And then
19 the capacity would be the extra. Recs aren't anywhere on
20 here. So those would be extra.

21 So we need to look at everything, run it by
22 financial consultants, and hopefully come back with a
23 yes, we can do this or no, it's not reasonable or -- I
24 can't answer that right now. I'd love to be able to say
25 yes or no, and I thank you again for putting something

1 out here middle ground. And I'd love to say yes, let's
2 do it, but I need to run it by our team and financial
3 experts.

4 And hopefully -- you know, it's the end of the
5 week here. Hopefully, early next week we could have an
6 answer as to whether this is a go ahead. Because we're
7 coming up on a time crunch, and we want to get going on
8 this.

9 So if this is going to work, yeah, we'd love to
10 say yes. And, again, I want to thank you for putting
11 something out here. That's a good starting point of
12 something that both parties can agree to a negotiation,
13 which we've been working towards this whole time. So
14 thank you.

15 CHAIRMAN NELSON: And your understand is
16 certainly understandable. As long as at this point it's
17 not a definite no, that gives us something that we can
18 maybe move forward to.

19 I guess with that then I'd look at my two fellow
20 Commissioners. And I think maybe you've got two choices.
21 One would be to move forward with Staff's recommendation
22 of additional proceedings, and the other choice would be
23 to give the Oak Tree folks, you know, the weekend to
24 decide whether or not this is something that they would
25 accept and that each of you would accept.

1 And I'd open it up for your commentary.

2 COMMISSIONER HANSON: Well, there's a few
3 things. I appreciate the opportunity to speak to the
4 creativity and the offer that you've presented here.

5 First, I'd just like to make a comment regarding
6 Commissioner Fiegen pointed out on page 18 of Staff's
7 memo that we've been referring to that they talked about
8 a number of items there. And carbon costs was one of
9 those items.

10 They used the word "proper" and I think they did
11 that obviously with a great intention because they used
12 it each one of the -- I probably should say proper
13 parameters of what establishes a LEO. Because that makes
14 great sense.

15 Because somehow we have to reach a conclusion of
16 what really should be the inputs. What are the -- what
17 specifically we can best define to be the proper
18 application of the hybrid method, the natural gas costs,
19 the carbon costs, the capacity credits. All of those
20 things we need to define as much as we possibly can.

21 And that's where I'm coming from in reaching a
22 conclusion of what is avoided cost. Or excuse me. At
23 least in that particular method of establishing avoided
24 cost.

25 And the reason I would struggle with a proposal

1 that -- there are a few reasons, but probably the main
2 reason -- one of the main reasons is that I look at
3 avoided cost as being avoided cost. What is the cost
4 that a utility avoids by allowing a QF to sell into its
5 market?

6 And to me it's not what the next generating unit
7 costs in the future. It's what is the cost that is
8 avoided by allowing that entity to sell into that
9 marketplace.

10 And we can come up with the cost of nuclear
11 capacity, the cost of any amounts of capacity. And that
12 really -- and we can use all sorts of carbon costs. And
13 that really distorts the -- what the actual avoided cost
14 is. And certainly we need to look at it on a 20-year
15 period.

16 I believe a LEO has been established here. At
17 the same time, the avoided cost price is -- as was
18 pointed out by Mr. Uda when he was starting out, is the
19 most contentious part of this entire proceeding,
20 obviously.

21 But I just cannot come to a conclusion that we
22 as Commissioners could come up with a dollar amount to --
23 even though we're taking it from different parts of
24 expert testimony, that we could take those parts and make
25 a -- for what I would consider a proper avoided cost.

1 And that's what I struggle with.

2 CHAIRMAN NELSON: Thank you. And I concur,
3 frankly, with all of those comments. And if we go ahead
4 with additional proceedings, I agree with you then.
5 We're going to have to really drill down and define the
6 exact costs for each of those elements. And that would
7 be, frankly, in my mind, the purpose of additional
8 proceedings.

9 Let me just make one final comment.

10 My purpose in the proposal that I laid out was
11 not to firmly define each of those individual components
12 but rather to come up with a number that I felt
13 comfortable with, had some basis in what was on the
14 record but more as an offer to the parties to say is this
15 something you can live with? Is this something you can
16 do business with? As opposed to we're going to define
17 each of those individual components. And given the time
18 constraints, that's the only way that I could see to do
19 it.

20 Commissioner Hanson.

21 COMMISSIONER HANSON: Just one last comment.
22 And I really appreciate -- by my comments did not wish to
23 in any way infringe on the generosity of your proposal.
24 But I would like to know from NorthWestern Energy as well
25 what their comments would be from -- in regards to that

1 number.

2 I know that they said that they would accept
3 whatever we required of them to do, but I would --
4 anyone's going to have to accept whatever we require them
5 to do. So I would like to know what their comment would
6 be. And at that later date as well.

7 Thank you.

8 CHAIRMAN NELSON: Commissioner Fiegen.

9 COMMISSIONER FIEGEN: I believe next week will
10 be an opportunity for us to come back and to study this
11 and take it under advisement and see where we go from
12 there.

13 CHAIRMAN NELSON: So I take that as meaning you
14 are willing to wait for an answer from Oak Tree as to
15 whether this is something that would be acceptable to
16 them?

17 COMMISSIONER FIEGEN: I'm willing to look at all
18 options and look at them next week.

19 CHAIRMAN NELSON: Okay.

20 In fairness, Mr. Brogan, I think Commissioner
21 Hanson raised a good question. Are there any comments
22 that you'd like to make at this point that don't put a
23 bull's-eye on me?

24 MR. BROGAN: With all due respect, Chairman
25 Nelson, I'm more concerned about putting a bull's-eye on

1 myself. Because comments that I may make probably are
2 substantially above my pay grade.

3 That said and never having been smart enough to
4 be cautious, I would say two things. First, a minor
5 thing and that's with respect to the capacity payment.
6 As we have stated in both our Briefs and our Response
7 Brief, we think that the escalation of the capacity
8 payment should stop at a point certain. Not that the
9 payment should stop but the escalation of it. So I think
10 we have some concern with that.

11 I think it's also obvious throughout this docket
12 that we certainly think that the Black & Veatch market
13 forecast is highly inflated. That said, again, we
14 still -- I think we're bound by law to do what you tell
15 us to do.

16 CHAIRMAN NELSON: Thank you. I appreciate those
17 comments. Anything else from the perspective of the
18 Commissioners?

19 Now I don't know if both parties are aware but
20 we have set aside or reserved temporarily some time on
21 our schedule Wednesday morning to reconvene on this
22 issue. Are you all aware of that?

23 You weren't. Okay. Because we weren't sure how
24 this was going to play out today. We weren't sure if we
25 would have a final answer today or if we would need to

1 come back next week.

2 Let me just turn to both sides. Is that time
3 frame something that you could make available to us?

4 MR. UDA: Speaking for Oak Tree, I will do
5 whatever the Commission needs me to do.

6 CHAIRMAN NELSON: Wednesday morning.

7 MR. BROGAN: Mr. Chairman, if I might ask a
8 question first. Are you contemplating the parties being
9 here in person again on Wednesday?

10 CHAIRMAN NELSON: You know, frankly, I don't
11 know that I see the need for that. I think -- I think
12 it's going to be fairly straightforward. A lot of it
13 will depend obviously on what the answer is from
14 Oak Tree. And if the answer is no, based on what I heard
15 from my fellow Commissioners, I'm thinking this could be
16 a pretty short deal. And if the answer is yes, then it
17 might be a little more involved.

18 And let me just make sure my fellow
19 Commissioners -- that I have not misspoken at all.

20 COMMISSIONER FIEGEN: I just want to make sure
21 that the parties know that I'm sure the Commission
22 appreciates conference calling and you can always call in
23 and we accept that as testimony face to face.

24 MR. BROGAN: I think for myself and I don't have
25 my calendar in front of me but this is important enough

1 obviously that I can change anything else that's on my
2 calendar. I can't speak for my South Dakota sponsor,
3 Mr. Olson.

4 CHAIRMAN NELSON: Mr. Olson, are you on the line
5 yet?

6 MR. OLSON: Yes. I'm on the line, and I can be
7 available at the Commission's convenience on Wednesday
8 morning.

9 CHAIRMAN NELSON: Thank you.

10 MR. BROGAN: So with that in mind, yes, we could
11 be available.

12 CHAIRMAN NELSON: Would it be -- and I'm going
13 to turn to my counsel. Would it be appropriate for
14 Oak Tree to have provided their answer to us in advance
15 of that so that all sides can be prepared to wrestle with
16 that?

17 MR. SMITH: That would probably be beneficial, I
18 suppose. And we just heard at least one observation from
19 NorthWestern so maybe we should make that reciprocal.
20 And we do have Staff here too. Maybe we want to hear
21 what they have to say because they've never seen this.

22 What do you think, Mr. Uda? Do you have --

23 MR. UDA: Well, here's the thing. For us this
24 isn't about necessarily -- I understand why the
25 Commission feels the obligation, and I think you're right

1 to feel that obligation to, you know, really drill down
2 into these numbers and get them right. But this is a
3 practical endeavor for us.

4 So could we find ways to fly speck this and say,
5 well, we don't agree with this assumption, we don't agree
6 with that assumption? Sure, we can do that. We'd rather
7 not.

8 And at this point I think if we can make this
9 work, that's what's important to us. Because we want to
10 build our project. And that's pretty much all there is
11 to it. So that's all -- but I would say that it is
12 reasonable from our standpoint that we get to you
13 something hopefully, you know --

14 CHAIRMAN NELSON: Can we say 5 o'clock on
15 Monday?

16 MR. MAKENS: We'll do our best. It's not all
17 dependent on me. You know, there's a lot of inputs that
18 go into the -- and I've been -- the last month I've been
19 working on getting updated inputs and costs and
20 everything, and it's a long process so we'll do our best
21 and run it by the financial consultants. And we'll get
22 something to you by 5 o'clock Monday.

23 CHAIRMAN NELSON: And that offer certainly goes
24 to NorthWestern and to Staff. And we're not talking
25 30-page briefs here. Okay. So we understand we're all

1 on the right page. Because John Smith doesn't want to
2 read 30 pages.

3 MR. MAKENS: We'll keep it simple. And I want
4 to reiterate we understand this is a move towards
5 negotiation and not a Commission stance on avoided cost
6 and anything related.

7 CHAIRMAN NELSON: With that, my assumption would
8 be we would probably be looking at 9 o'clock on Wednesday
9 morning, but we'll confirm that and John will put
10 together some kind of order.

11 MR. SMITH: We can do that. Is that okay for
12 the Mountain Standard folks? Are you okay with that?

13 CHAIRMAN NELSON: Yeah. I guess we can go
14 10 o'clock if it works better.

15 MR. UDA: Well, I'm not really an early morning
16 person, which comes as no surprise to anybody who's dealt
17 with me. So the later the better, but 10 o'clock works.

18 CHAIRMAN NELSON: That works.

19 MR. BROGAN: Unlike Mr. Uda, I am an early
20 morning person. So 10 o'clock certainly works. And if
21 you wanted to go at 7:00, that would be fine too.

22 MR. UDA: I would still be asleep.

23 CHAIRMAN NELSON: Okay. I think we've got a
24 tentative plan. We will reconvene and certainly
25 telephone access is certainly acceptable for what we need

1 to do but you're obviously welcome to be here in person.

2 Mr. Smith.

3 MR. SMITH: I'm assuming since we're doing this
4 on the record with a reporter that I don't need to send
5 out any kind of formal notice or anything like that;
6 right?

7 MR. BROGAN: No.

8 MR. UDA: No.

9 CHAIRMAN NELSON: With that, anything else for
10 the good of the order?

11 Is there a motion?

12 COMMISSIONER HANSON: Mr. Chairman, I'll move to
13 adjourn.

14 CHAIRMAN NELSON: Motion to adjourn. All those
15 in favor vote aye.

16 Commissioner Hanson.

17 COMMISSIONER HANSON: Aye.

18 CHAIRMAN NELSON: Commissioner Fiegen.

19 COMMISSIONER FIEGEN: Fiegen votes aye.

20 CHAIRMAN NELSON: Nelson votes aye. We're
21 adjourned.

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25

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 26th day of
11 April, 2012, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 14th day of
14 May, 2012.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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