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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
July 30, 2013

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

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Karen Cremer
Kristen Edwards
Greg Rislov
Brian Rounds
Patrick Steffensen
Darren Kearney
Deb Gregg
Sherry Dickerson

Reported By Cheri McComsey Wittler, RPR, CRR

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, 500 East Capitol Avenue, Pierre, South Dakota, on
the 30th day of July, 2013, commencing at 9:30 a.m.

1 CHAIRMAN HANSON: Our first docket, EL11-006, in
2 the matter of the Complaint by Oak Tree Energy, LLC
3 against NorthWestern Energy for refusing to enter into a
4 purchase power agreement. The reason I mentioned that
5 there's a potential for moving this to the end of the
6 agenda is the potential for having confidential
7 discussions and having to go off the web and go through
8 all of that process and going into an executive session
9 so to speak.

10 The power purchase and sale agreements and
11 exhibits were filed as confidential. However, both
12 NorthWestern Energy and Oak Tree included language from
13 the purchase power agreements in their motions and their
14 responses which were not confidential. So I'm curious to
15 hear from the parties whether or not they're -- I don't
16 see anything outside of that arena that we're not likely
17 to be discussing, formulas and things of that nature.

18 So if the parties would like to let me know, let
19 us know, do you think we need to go into confidential
20 session?

21 MR. BROGAN: Mr. Chairman, this is Al Brogan on
22 behalf of NorthWestern. I can say that I do not believe
23 I will be going beyond in my comments anything other than
24 what has already been made public. I do not see any
25 reason for a confidential session.

1 CHAIRMAN HANSON: Thank you. And Oak Tree?

2 MS. LAFRENTZ: At this point, Chairman, I would
3 agree with Mr. Brogan. I haven't had a chance to touch
4 base with Mr. Uda yet this morning. I was under the
5 impression he was going to be on the call, but I have
6 somebody checking on him right now.

7 CHAIRMAN HANSON: Thank you.

8 Mike, have you gotten on the phone yet?

9 Thank you. Was that Yvette?

10 MS. LAFRENTZ: Yes.

11 CHAIRMAN HANSON: Then we'll proceed with the
12 questions without any objection at this juncture. The
13 question before the Commission is how shall the
14 Commission rule on the following issues? There are three
15 questions.

16 The first is what is the appropriate contractual
17 language to govern Oak Tree's responsibility for
18 ancillary service charges that NorthWestern Energy may
19 potentially incur as a result of Oak Tree's integration
20 into NorthWestern Energy's, WAPA's, and possibility a
21 regional transmission organization's systems.

22 The second question is what is the appropriate
23 contractual language to govern curtailment of Oak Tree's
24 energy deliveries to the system.

25 The third question is is a default provision

1 appropriate for NorthWestern Energy if it fails to accept
2 delivery of energy from Oak Tree except under the
3 contracts allowed curtailment provisions. And if so,
4 what is the appropriate contractual language to be
5 included in such provisions?

6 It's difficult to take all of these at the same
7 time. But I recognize in some respects you will have to
8 be discussing each of them as you discuss different
9 items.

10 I believe I'll start with Question No. 1 with
11 NorthWestern Energy.

12 MR. BROGAN: Good morning again, Mr. Chairman,
13 Commissioners. Again, I'm Al Brogan. You have already
14 met myself, Bleau LaFave, and Phil Hanser of
15 The Brattle Group are on the phone. I would also like to
16 alert you that Pam Bonrud and Jon Oostra are also on the
17 phone in our Sioux Falls office.

18 I, of course, am in Helena. Jon is an attorney
19 admitted in South Dakota and as Commission Staff is
20 aware, our normal attorney, our normal South Dakota
21 attorney for this, Tim Olson, had a conflict and is not
22 available today. Jon is filling in to make sure that I
23 don't do anything wrong and to supervise me as a
24 pro hac vice admittant to the bar.

25 I'd like to have a brief discussion -- and I

1 really -- I know that at times when I've appeared before
2 the Commission I've been strident and hopefully
3 persuasive but I really don't want to be that today. I'd
4 like to have a brief discussion with the Commission about
5 how we got here and what really are the issues.

6 As the Commission recalled it issued an order
7 requiring the parties to negotiate a contract.
8 NorthWestern and Oak Tree engaged in those negotiations
9 and generally the parties could come to agreements.

10 Oak Tree in its brief highlighted an area or
11 areas on which it compromised. I do want to make sure
12 that the Commission's not left with the impression that
13 Oak Tree was the only party that moved from its initial
14 position.

15 NorthWestern moved on several issues also and
16 clearly security provisions, calculation of mechanical
17 availability, provision of engineering certificates,
18 compensations for PTCs and recs, reduced liquidated
19 damages and many other terms and provisions to
20 accommodate some of Oak Tree's demands. In other words,
21 what the parties did was a true negotiation.

22 Unfortunately, NorthWestern and Oak Tree could
23 not reach agreement on two issues that really involved
24 three clauses, and they agreed to bring these issues back
25 to you.

1 There are really -- the issues today are whether
2 two clauses should be included and one clause should be
3 excluded but they break down into two issues. The first
4 issue is wind integration and ancillary services, and the
5 second issue deals with curtailment and related breach.

6 I'd like to deal with each of these issues
7 sequentially starting with the wind integration and
8 ancillary services. And what we're really talking about
9 here is Section -- or proposed Section 5.5.3. But before
10 I begin talking about it I want to provide a little bit
11 of background to make sure that everybody knows exactly
12 what I'm referring to and what everybody's role is in
13 terms of this particular provision.

14 I'm going to use a bunch of acronyms so let me
15 define them up front and make sure that the Commission
16 and the court reporter are on board with them. I'm going
17 to be talking about FERC, F-E-R-C, that's the Federal
18 Energy Regulatory Commission. I'm going to be talking
19 about WAPA, W-A-P-A, the Western Area Power
20 Administration, and I'm going to be talking about OATT,
21 O-A-T-T, which is the open access transmission tariff.
22 Actually I should say tariffs because I'll be referring
23 to more than one of them.

24 And with respect to this particular provision of
25 the contract, there are basically three roles. There's

1 the role of transmission customer. The transmission
2 customer is the generator, the Oak Tree project. There's
3 the role of the transmission provider. That's
4 NorthWestern. But it's also important to remember that
5 NorthWestern, while it's a transmission provider, is not
6 a balancing area authority.

7 The balancing authority is WAPA. And both the
8 transmission customer and the transmission provider have
9 to do business and comply with WAPA's tariffs and also
10 with NorthWestern's tariffs.

11 Now the positions of the parties -- and I'll try
12 to describe both Oak Tree's and Staff's position. Please
13 keep in mind I'm not trying to put words into their
14 mouth. I'm not trying to make their argument for them.
15 I'm just explaining their arguments as I understand them.

16 NorthWestern is requesting that the contract
17 provide for the pass through to Oak Tree of charges that
18 the balancing authority imposes on NorthWestern for
19 ancillary services that are associated with generation,
20 delivery, and integration of energy and are directly
21 allocable and attributable to the Oak Tree project.

22 In other words, if there's charges that are
23 imposed by the balancing authority that aren't
24 attributable to Oak Tree but are attributable to
25 NorthWestern's service as a whole, that isn't part of

1 what would be passed through. It's only those that are
2 directly allocable and attributable.

3 Oak Tree, as I understand it, opposes the
4 inclusion of these costs. They argue that they're
5 somehow incorporated into NorthWestern's avoided cost,
6 that the Commission has determined the avoided cost rate,
7 and NorthWestern cannot effectively change that
8 determination by charging these costs to Oak Tree.

9 Staff's memorandum quotes WAPA's OATT definition
10 of ancillary services, specifically those provided for in
11 schedules 3, 5, 6, and 9. It argues that to have terms
12 different from those in the Titan Wind contract is
13 blatant discrimination. And that's Staff's words. And
14 asserts that other wind PPAs apply ancillary services to
15 load.

16 I would assert to the Commission that Oak Tree
17 and Staff are wrong for at least three reasons. First,
18 Section 5.5.3 is essentially mandated by NorthWestern's
19 OATT and WAPA's OATT. Both of which are based on FERC's
20 pro forma OATT and both of which have been filed with and
21 approved by FERC.

22 At least from my reading it appeared that
23 neither Oak Tree nor Staff considered the specific
24 language of these tariffs.

25 In Schedule 3 of the WAPA tariff and Schedule 3

1 deals with one of the ancillary services known as
2 regulation and frequency response. In the tariff -- and
3 I'm not going to read the entire Schedule 3. But there's
4 three or four sentences in it that I think are pertinent
5 to us and I would like the Commission to be aware of.

6 In the tariff it says, "The transmission
7 customer must either purchase this service from the
8 transmission provider or make comparable arrangements to
9 satisfy its regulation and frequency response service
10 obligation." And then it goes on to say, "To the extent
11 that the control area operator performs this service for
12 the transmission provider, charges to the transmission
13 customer are to reflect only a pass through of the cost
14 charged to the transmission provider by that control area
15 operator."

16 Another important part is the fact that these
17 change. And the tariff provides any change to the
18 charges to the transmission customer for regulation and
19 frequency response service shall be as set forth in a
20 subsequent rate schedule promulgated pursuant to
21 applicable federal laws, regulations, and policies
22 attached to and made part of the applicable service
23 agreement.

24 The transmission providers shall charge the
25 transmission customer in accordance with the rate then in

1 effect.

2 So while it's true that WAPA today does not
3 charge either NorthWestern or to the best of
4 NorthWestern's knowledge any of its other transmission
5 providers for this, it is provided for in the tariff. It
6 was provided for in the tariff clear back as of 2010. It
7 was filed in 2009.

8 It was there before the date of the LEO that's
9 been at so much issue in this.

10 All right. That's WAPA's tariff. NorthWestern
11 has its own tariff for Schedule 3. And it pretty much
12 follows the WAPA tariff. And Schedule 3 of
13 NorthWestern's South Dakota OATT. I want to make sure
14 I'm talking about the South Dakota OATT because
15 NorthWestern does have two, there are two really
16 important parts.

17 The first one is, again, just like in the WAPA
18 tariff it says the transmission customer must either
19 purchase this service -- again, I'm talking about
20 regulation and frequency response -- or make alternative
21 comparable arrangements to satisfy its regulation and
22 frequency response service obligation.

23 And then a little lower it says, "NorthWestern
24 corporation will provide this service indirectly. By
25 making arrangements with Western Area Power

1 Administration, Western, NorthWestern Corporation will
2 pass through western's tariff, terms, conditions, and
3 rates."

4 There is very similar language with respect
5 to -- I'd say identical language. The same language is
6 in both NorthWestern and WAPA's tariffs with respect to
7 Schedules 4, 5, and 6. There are other ancillary
8 services. There are the very comparable provisions with
9 respect to both WAPA's and NorthWestern's Schedules 9,
10 which have to do with energy and generator imbalance.

11 Now I can quote all of those provisions if you
12 desire. I guess at this point I'd ask that you give me
13 credit for it. But if you would like, I do have them
14 available, and I can quote that same language.

15 So the first reason that I think both Staff and
16 Oak Tree are wrong is that they didn't consider the
17 tariff, and the tariff mandates this charge.

18 The second reason that I believe Oak Tree and to
19 some extent Staff are wrong is that ancillary service
20 costs are not part of avoided costs. Avoided costs are
21 defined as the costs which NorthWestern would pay but for
22 taking power from Oak Tree. We've talked about the
23 avoided cost a great deal over a long period of time. I
24 don't want to go into it, other than to say it does not
25 include all costs involved in doing business when you're

1 producing and selling electricity, when you're
2 transmitting electricity, when you're delivering
3 electricity.

4 Avoided cost isn't expected to do that. And in
5 reality it can't in part because of the functional
6 separation between transmission and people who deal with
7 supply that's required by FERC rules.

8 Then finally, and I have to -- I'll try to tone
9 myself down here, but I was really somewhat, I guess, put
10 off by Staff's assertion that it would be blatantly -- it
11 would be blatant discrimination to not have provisions
12 that match those in the Titan contract.

13 The Titan contract provisions are irrelevant.
14 First, circumstances have changed. Discrimination has to
15 do with treating similarly-situated people differently.
16 Titan and Oak Tree are not similarly situated.

17 One of the biggest changes since the Titan
18 contract was negotiated in 2008 was that WAPA filed --
19 you know, created, filed, and agreed to an OATT that
20 governs us all. That was done in 2009, after
21 NorthWestern had agreed to the Titan contract. So
22 clearly that's a major change that shows that the
23 circumstances have changed.

24 Secondly, NorthWestern and the industry have
25 learned a lot about the integration of wind, about trying

1 to bring wind into our system, and the practices evolved.
2 You have before you the Affidavit and presentation of
3 Mr. Hanser that talks about how some of those processes
4 have evolved.

5 NorthWestern has certainly said that the Titan
6 contract is not its current practice. Mr. LaFave has
7 repeatedly testified that NorthWestern would not agree to
8 the terms in the Titan contract today with anybody. And,
9 in fact, as the Commission is probably well aware,
10 NorthWestern has signed at least one new QF agreement
11 without the Titan terms and with the terms pretty much
12 that NorthWestern is asking for with respect to the wind
13 integration issue in this docket.

14 Finally, there are more changes in the works and
15 it's more likely that WAPA, while it has the authority
16 now and while NorthWestern has the requirement now to
17 pass through any charges WAPA's imposed, at least in
18 NorthWestern's view it's more likely that WAPA will be
19 imposing those charges in the future. Although it
20 doesn't appear WAPA has made any public announcements, it
21 does appear that they're looking towards and working
22 towards joining SPP.

23 I note in this brief that Oak Tree indicates it
24 seems more likely that WAPA would join MISO which is
25 larger and closer. I think that's wrong for two points.

1 First off, Oak Tree hasn't recognized the breadth and
2 scope of WAPA operations. I think they're only thinking
3 about the Upper Midwest part of WAPA when they say it's
4 closer to MISO. And, secondly, it ignores the public
5 filing made by Basin Electric resource -- by Basin
6 Electric in its resource plan that was filed in Minnesota
7 where Basin says that they have been granted the
8 authority to work with WAPA for -- in WAPA's efforts to
9 join SPP.

10 So in addition to it already being there, it's
11 certainly more critical going forward.

12 The final thing I'd like to say about this
13 provision is that NorthWestern simply cannot omit
14 Section 5.5.3 and cannot not charge Oak Tree without
15 violating its FERC-approved OATT, exposing itself for
16 penalties for violating that, and it would be very, very
17 difficult.

18 Mr. Chairman, I'm prepared to go on and also
19 talk about the curtailment issue, but if you'd like me
20 to stop at the end of this one, I'm willing to do that
21 too.

22 CHAIRMAN HANSON: Thank you. Let's deal with
23 one at a time. I appreciate your comments.

24 Oak Tree, you are up.

25 MS. LAFRENTZ: This is Yvette Lafrentz,

1 Chairman. I'm going to ask if Mike Uda is on the line
2 with us at this point. I've been trying to get ahold of
3 him.

4 CHAIRMAN HANSON: Mike, are you on the line?
5 Apparently he is not.

6 MS. LAFRENTZ: He had a family emergency. He
7 almost lost his father Sunday so he may be dealing with
8 some of those issues, and I haven't been able to get
9 ahold of him in the meantime. What I did also do,
10 Mr. Paulson, are you on the line with us?

11 MR. PAULSON: I am.

12 MS. LAFRENTZ: Jeff Paulson, he is an attorney
13 that has been actively working with NorthWestern Energy
14 in this negotiation process. I would like to defer to
15 Mr. Paulson in this matter since I was not actively
16 involved in all of the negotiation process. And so if
17 Mr. Paulson can go ahead and discuss -- answer
18 Mr. Brogan's comments.

19 CHAIRMAN HANSON: Mr. Paulson, would you give us
20 an idea of who you are, et cetera.

21 MR. PAULSON: Mr. Chair, Commissioners, I'm an
22 attorney practicing in Minneapolis, Minnesota. My
23 practice focuses on renewable energy projects and the
24 representation of owners and developers of such projects.
25 I was engaged by Oak Tree to assist them specifically

1 with the negotiation of the power purchase agreements
2 because I do a lot of that.

3 As a preliminary matter I should note I am not
4 admitted to practice in South Dakota. If that is an
5 issue for the Commission or the parties, we should
6 probably get that on the table as a first procedural
7 matter. And I would request that I be allowed to, for
8 the purposes of this hearing given that Mr. Uda is
9 unavailable, participate pro hac vice. As I said, I'm
10 admitted in Minnesota and Illinois but not in
11 South Dakota.

12 So, Mr. Chair, Commissioners, I would put that
13 issue on the -- on the table first for your
14 consideration.

15 CHAIRMAN HANSON: Appreciate that. I was going
16 to ask that. Yvette, I understand you are an attorney
17 and you are licensed in South Dakota --

18 MS. LAFRENTZ: I am, Mr. Chairman. And as this
19 issue came up rather quickly I haven't had the
20 opportunity to move for the admission of Mr. Paulson pro
21 hac vice. That is something that I can do after this
22 hearing if the Commission would want me to do that.

23 CHAIRMAN HANSON: I don't know that the
24 Commission's going to have an objection, but I'm going to
25 ask NorthWestern if they have an objection.

1 MR. BROGAN: Mr. Chairman, as the Commission's
2 well aware, I'm admitted pro hac vice. I do not have my
3 sponsoring attorney available today and Mr. Smith, the
4 Commission's counsel, indicated that that would probably
5 be comfortable for today.

6 With the Commission having made accommodations
7 for NorthWestern, I think it would be inappropriate and
8 in bad faith for us not to be willing to make some
9 similar accommodations for Oak Tree.

10 CHAIRMAN HANSON: Understood.

11 Mr. Smith, did you have anything?

12 MR. SMITH: Yvette, could we have your
13 commitment then to do a pro hac filing so we can at least
14 have the record straightened out, even though it will be
15 a tiny bit late?

16 MS. LAFRENTZ: Yes, Mr. Smith, I will go ahead
17 and get that filed after the meeting today.

18 MR. SMITH: Okay. I think we're all right then.
19 He has a sponsoring South Dakota lawyer on the phone. I
20 think we can proceed.

21 CHAIRMAN HANSON: Thank you. And with that
22 being dispensed, Mr. Paulson, we will admit you on a pro
23 hac vice basis.

24 MR. PAULSON: Thank you, Mr. Chair,
25 Commissioners.

1 Given that this was an unexpected appearance on
2 my part, I clearly have not prepared any prolonged
3 commentary, but I also don't believe it's really
4 necessary.

5 I've had the opportunity to review the materials
6 that were presented in our brief and in the Staff's
7 presentation as well. I think they fairly and adequately
8 cover the issues before you with respect to the question
9 that Mr. Brogan was just discussing on ancillary services
10 and generator imbalance charges.

11 The briefs talk about the legalities of whether
12 or not those types of charges and passing them through or
13 seeking reimbursement for those charges are permissible
14 under PURPA. And I think I will rely on the brief with
15 respect to the legal arguments. We obviously don't
16 believe that PURPA allows NorthWestern to pass those
17 charges through, especially since at the time the LEO was
18 established here no such charges were being charged to
19 NorthWestern.

20 From a practical perspective, the issue is one
21 of extreme importance to the project and its viability.
22 As we discussed in our written materials, it is very
23 difficult, if not impossible, to finance a renewable
24 energy project if that project is subject to uncertain
25 and potentially very large additional expenses and

1 charges going forward in the future if it does not have a
2 set of relatively fixed obligations on which it can rely
3 to go forward in the financing market.

4 And anyone in the room or on the phone who has
5 undertaken any degree of financing, whether it's a
6 renewable project or any other kind of project, will
7 understand that lenders and investors are highly
8 skeptical of putting their money into a project where
9 there is a degree of substantial uncertainty about what
10 the expenses are going to be and whether or not the
11 project is going to be able to make debt service
12 payments.

13 This is partly why FERC has made its decisions
14 on LEO and similar obligations, in order to provide
15 renewable energy projects, QFs with an LEO or a contract
16 the certainty that they need to go out and get financed.
17 It makes no sense to have PURPA obligations if they can
18 be undermined by PPA provisions that don't allow them to
19 get financed.

20 You know, that is why this has been such an
21 important issue and why the issue has been presented to
22 you, because the parties have been unable to find a way
23 to bridge that gap. As you have seen in our materials,
24 Oak Tree has been willing to make a partial compromise on
25 this issue simply for the purpose of getting it done, of

1 reaching an agreement that might be able to accommodate
2 both parties, but still providing for a cap on our
3 ultimate exposure, which would allow us to actually
4 hopefully finance the project. And that cap was based on
5 other PPAs that we're familiar with in the market and
6 what the project could afford.

7 The new arguments such as they are that were
8 raised by Mr. Brogan, you know, it's fairly common in
9 these types of hearings to hear a parade of horrors
10 from the utility about how the world will fall apart if
11 they aren't entitled to pass through everything to a
12 third party.

13 Quite frankly, like I say, I will rely on the
14 obligations of PURPA here, which you have as the
15 Commission has seen and applied to this project and
16 this type of situation already in this proceeding
17 several times. Those obligations supersede any of the
18 other types of horrors that we've heard discussed
19 here.

20 NorthWestern simply has an obligation under
21 PURPA to do what it has to do, which is to buy the
22 power on this project, on terms that are consistent
23 with the LEO obligation. And we think that in the
24 first instance that is that it is not allowed to pass
25 these types of potential future unknown costs through

1 to the project. And, secondly, if the Commission decides
2 that it wishes to instruct the parties to adopt a
3 compromise position we'd propose that compromise position
4 as well to you.

5 I don't think I have anything further on this
6 issue to say. As I said, we'll rely a lot on our written
7 materials and allow you to continue with your
8 deliberations. I appreciate your consideration and
9 allowing me to speak.

10 COMMISSIONER HANSON: Thank you for your
11 comments.

12 Mr. Rounds.

13 MR. ROUNDS: I think Staff's just going to rely
14 on our memo and be available for questions.

15 COMMISSIONER HANSON: All right. Thank you.
16 Does counsel have any remarks that they wish to make?

17 MR. SMITH: I don't. I don't. Can I ask you
18 one question here, Mr. Brogan?

19 On the confidentiality thing, if the
20 Commissioners were to have any questions regarding the
21 formula for compensation -- and I'm not saying they do
22 but if -- and that was not included in the publicly filed
23 motion or response documents, is that an issue for you
24 guys? It didn't look like it would be to me but --

25 MR. BROGAN: Mr. Smith, I apologize. I'm not

1 sure that I understand what you mean by the formula for
2 compensation. But --

3 MR. SMITH: Well, I guess we're not quite there
4 yet because that's on curtailment so I'll shut up now.

5 MR. BROGAN: Okay. But really I don't
6 believe -- with that in mind, I don't believe that
7 NorthWestern would have a real problem.

8 MR. SMITH: Okay. I mean, it seemed pretty
9 straightforward to me, the formula. So okay. Thanks.

10 COMMISSIONER HANSON: Thank you. Any questions
11 by the Commissioners?

12 Commissioner Nelson.

13 COMMISSIONER NELSON: Mr. Paulson, in listening
14 to Mr. Brogan, he made a very short, succinct statement
15 that I think is an important one here when he said that
16 "ancillary costs are not avoided costs."

17 Apparently you're taking a different view of
18 that, and I'd like you to explain that as to why you
19 think they are part of avoided costs.

20 MR. PAULSON: Commissioner, Mr. Chair, I think
21 how we would characterize it is that avoided costs are
22 set at the time the LEO takes effect, which if I recall
23 correctly without having it in front of me was 2011 in
24 this case.

25 And avoided costs include any kind of offsetting

1 increases in costs such as ancillary services that may
2 exist at the time. When you calculate avoided costs you
3 take into account what the utility will save and what
4 they -- incremental charges might also be and you
5 determine that at that point in time.

6 Here that was determined and was to be
7 determined as of a date in 2011, at which point there
8 were no such charges for ancillary services. So there
9 was no offset to reduce the avoided cost that the
10 Commission has determined here.

11 Does that make sense?

12 COMMISSIONER NELSON: I heard what you said.
13 Whether it makes sense is something I'll reserve judgment
14 on.

15 MR. PAULSON: I'm not asking whether you agree.
16 I'm wondering if you understood.

17 COMMISSIONER NELSON: Yes. I certainly did.

18 Mr. Brogan, would you care to respond to that?

19 MR. BROGAN: I would, Commissioner Nelson.

20 And I try to make it fairly short and hopefully
21 succinct.

22 Avoided cost, I think one of the things that
23 really shows they're not the same thing is who's
24 responsible for determining and regulating them.

25 Avoided costs are costs within the

1 jurisdiction and ambit of the State Commission. It's
2 the State Commission that determines what a utility's
3 avoided cost is and what the proper avoided cost rate for
4 QFs is.

5 Ancillary services, on the other hand, are all
6 FERC jurisdictional. FERC has put out a pro forma
7 OATT. It requires utilities to file and have approved
8 open access transmission tariffs that conform to that
9 OATT.

10 The ancillary service charges are governed by
11 FERC tariffs, not by state action. And I think if we
12 look back at this matter, certainly we all knew at the
13 time of the hearings, and I said hearings plural because
14 we have had several. I think we all knew at all of those
15 times what the provisions to the various OATTs were. And
16 we couldn't sit there and say these are the costs today
17 because clearly WAPA wasn't imposing them.

18 But we could say there was a tariff obligation
19 for NorthWestern to collect them if they're ever imposed
20 by WAPA. And I would also say that's why this is
21 different from the carbon issue. But because of the
22 separate jurisdiction, because of the separate services
23 that are included, avoided costs again go back to costs
24 that the -- that the company can avoid, the utilities can
25 avoid.

1 The costs that we're talking about here in terms
2 of ancillary services, if NorthWestern were to buy from
3 any generator, that generator is supposed to be under the
4 open access tariff. That generator is obligated for
5 those costs under NorthWestern's OATT which passes
6 through the cost that it incurs under WAPA's OATT.

7 Does that explain why I believe they're
8 different?

9 COMMISSIONER NELSON: It does. If I could
10 just ask one follow-up question. And so essentially
11 what you're saying is Oak Tree knew that tariff was in
12 place at the time that they first approached NorthWestern
13 said we want to make a deal. And since that tariff was
14 in place, Oak Tree knew about it. For them at this point
15 to say, no, we need a different kind of deal is not
16 proper.

17 Is that what you're saying?

18 MR. BROGAN: With one nuance, Commissioner
19 Nelson. I'm saying that Oak Tree knew or should have
20 known about this publicly filed tariff, yes.

21 COMMISSIONER NELSON: Thank you. No further
22 questions on this question.

23 COMMISSIONER HANSON: Could I piggyback on that,
24 please, because of the three issues, that's something I
25 was wrestling with, and I was just curious if Mr. Rounds

1 has any comment on that. I do appreciate you fleshing
2 that out, though.

3 MR. ROUNDS: Thank you, Mr. Chairman. This is
4 Brian Rounds for Staff. I would just point out that
5 during at least one of the hearings -- I think it was the
6 March hearing, ancillary services did come up in the
7 discussion of what the avoided costs would be. And I
8 believe if I remember right it was Mr. Wagner said that
9 there were no charges at the time.

10 So I'm sort of looking at that as the reason
11 ancillary services should be included as an avoided
12 cost.

13 COMMISSIONER HANSON: The fact that they're
14 not -- that we don't have any at this time but when and
15 if we do have -- or those costs do exist, would you think
16 that they should be included at that time?

17 MR. ROUNDS: I think to the extent that they are
18 a avoided cost similar to what could potentially be a
19 carbon tax or a cap and trade type of cost that might put
20 something on carbon --

21 COMMISSIONER HANSON: I don't know if that's you
22 holding your mic or if that's someone breathing in from
23 elsewhere. Someone should place their phone on mute.
24 There's a lot of noise coming through here from papers
25 and such.

1 MR. ROUNDS: So to me to the extent that this is
2 an in-avoided cost or a negative avoided cost similar to
3 what carbon price would be, only opposite for
4 NorthWestern, I don't see how there's any distinction
5 between this, and a carbon tax or something like that as
6 far as being a potential cost down the road that as of
7 right now is set at zero. Or as of the LEO was set at
8 zero.

9 I think saying that this is not an avoided cost
10 would be inconsistent with that decision.

11 COMMISSIONER HANSON: Thank you.

12 Commissioner Fiegen, do you have a question?

13 COMMISSIONER FIEGEN: Yes. For Staff when you
14 wrote your recommendation and you did your comparison
15 with Titan were you aware of WAPA's tariff that they
16 wrote?

17 I don't know if it was in 2009 or was in effect
18 in 2010. Were you aware of that?

19 MR. ROUNDS: Yes.

20 COMMISSIONER FIEGEN: Did you take that into
21 consideration in your --

22 MR. ROUNDS: We did. My understanding is that a
23 transmission customer must accept those services unless
24 they get the services elsewhere. So in this instance
25 they would be basically getting those services at the

1 cost of NorthWestern.

2 COMMISSIONER FIEGEN: I might have to go reread
3 all of that.

4 COMMISSIONER HANSON: Thank you.

5 Commissioners, do you wish to proceed with
6 hearing the discussion on each one of these questions or
7 do you wish to dispose of questions as they come up?

8 Frankly, I think I'm comfortable in taking care
9 of them as we have a question before us.

10 COMMISSIONER FIEGEN: However you want to do it
11 is fine.

12 COMMISSIONER HANSON: Do you have a preference,
13 Commissioner Fiegen? Yes? No? I'll rule that we will
14 dispense with them one at a time unless -- I know 2 and 3
15 may create some challenge for us, but the first one I
16 think that we can dispose of at this juncture.

17 Is there a discussion at this point, or would
18 you prefer to have a motion before us?

19 I will make a motion then in -- well, let me
20 discuss it first because I'm still wrestling with a
21 portion of it.

22 It's never good to argue with yourself in
23 public. Then I will make a motion, and then I may or may
24 not support it.

25 In EL11-006 in regards to the question, I will

1 move that the appropriate contractual language to govern
2 Oak Tree's responsibility for ancillary service charges
3 and NorthWestern Energy may potentially incur as a result
4 of Oak Tree's integration into NorthWestern Energy,
5 WAPA's, and possibly an RTO system that we should permit
6 NorthWestern Energy to charge for those ancillary
7 services.

8 That may be a provocative motion at this
9 juncture. But Mr. Smith, was that -- in listening to
10 that motion, does succinctly take care of that, or do I
11 need to --

12 MR. SMITH: No. I think it does. I think it's
13 clear what you meant. I'm understanding you to say that
14 you would adopt the NorthWestern proposed language.

15 COMMISSIONER HANSON: That's correct.

16 MR. SMITH: Okay. There you go. Can I ask one
17 question of Mr. Brogan before?

18 COMMISSIONER HANSON: Yes, you may.

19 MR. SMITH: Al, on the OATT pass through
20 provisions by WAPA and/or you -- and, again, I don't have
21 it sitting in front of me and that's why I'm asking,
22 because you do, I think, do those pass throughs
23 explicitly state that the pass through is to the
24 transmission customer in the sense of that being the end
25 point of it or the generator for generator imbalance? Or

1 does that allow the pass through to load?

2 MR. BROGAN: Mr. Smith, the tariff says that the
3 transmission customer must either purchase this service
4 from the transmission provider or make alternative
5 comparable arrangements to satisfy it. And I think
6 that's Schedule 3, but I can go to a different schedule
7 if you'd like. To satisfy its regulation and frequency
8 response service obligation.

9 And then it says NorthWestern Corporation will
10 provide this service indirectly by making arrangements
11 with WAPA. NorthWestern Corporation will pass through
12 Western's tariff terms, conditions, and rates.

13 I think when that's read in conjunction with the
14 WAPA OATT that says the transmission provider -- excuse
15 me. To the extent the control area operator performs
16 this service for the transmission provider, charges to
17 the transmission customer are to reflect only a pass
18 through of the cost charged to the transmission provider
19 by that control area operator. I think it's clear that
20 it has to be passed through -- that NorthWestern has to
21 charge the transmission customer.

22 COMMISSIONER HANSON: Does that answer your
23 question?

24 MR. BROGAN: One other sentence I think is
25 important is the sentence that says -- and this is back

1 in NorthWestern's OATT. It says, "To the extent the
2 control area operator performs his service for the
3 transmission provider, charges to the transmission
4 customer are to reflect only a pass through of the cost
5 charged to the transmission provider by that control area
6 operator."

7 MR. SMITH: Thank you.

8 COMMISSIONER HANSON: Thank you, Mr. Smith. I'd
9 like to first comment on my motion and then hear what --
10 just so that the other fellow Commissioners and Staff and
11 folks know why I went the direction I did and then I'm
12 eager to hear what your comments are.

13 In looking at the three arguments that were made
14 by NorthWestern Energy, the third one, Titan contracts
15 are irrelevant, I agree with that. But that certainly
16 does not -- I disregard that at the same time. I don't
17 think that's conclusive in any way in making a decision
18 on this.

19 The first argument that Staff and perhaps Oak
20 Tree did not consider the tariffs, I'm not giving a lot
21 of weight to that. I think that certainly PURPA
22 obligations are extremely important. And I can see the
23 argument and perhaps agree with it.

24 The second argument, ancillary costs are not
25 part of the avoided costs, that's an interesting

1 argument. I'm still trying to wrap around that
2 completely, whether or not that's decision-making for me
3 or not.

4 I fully agree with Staff's comment that if
5 NorthWestern Energy is concerned about the magnitude of
6 the costs, it's troubling that they were never brought up
7 during the proceeding when we examined the avoided cost
8 discussions. I think that's an unfortunate challenge,
9 and I wish they would have.

10 They certainly should have brought it up, I
11 think, during the avoided cost process. Regardless of
12 whether one considers the ancillary cost to be part of
13 the avoided cost, I think that it's appropriate to have
14 discussed them at that juncture.

15 So it sounds like I'm arguing against my motion.
16 At the same time, I do believe that if and when
17 ancillary service charges are assessed, the market value
18 of those costs should be reflected. As it's an
19 imposition to NorthWestern Energy, it should be reflected
20 in the cost.

21 The fact that they don't necessarily occur now,
22 potentially would occur, the fact is that if Oak Tree's
23 existence creates a cost for NorthWestern Energy, that
24 cost should be borne by Oak Tree. It would need to be
25 passed on to others. And that's -- it's not fair to pass

1 it on certainly to other consumers. So that is how I
2 arrived at the decision that I did, that I felt that a
3 cost that is borne by NorthWestern Energy as a result of
4 Oak Tree's existence and integration into NorthWestern
5 Energy, that that cost should be borne by Oak Tree.

6 So I'm eager to hear what your thoughts are and
7 if you can convince me to vote for or against my own
8 motion.

9 Commissioner Nelson.

10 COMMISSIONER NELSON: Mr. Chairman, I'm going to
11 support your motion, and hopefully I can convince you to
12 support your motion also.

13 Let me say that my first gut reaction as I read
14 through this was the same as yours, why didn't we address
15 this as we were going through the avoided cost hearings.
16 And we certainly talked about everything else and why
17 didn't we deal with this.

18 I think at the end of the day Mr. Brogan really
19 hit it on the head this morning with his very simple
20 phrase that ancillary costs are not avoided costs and, if
21 that is true, and I believe it is -- as I have looked at
22 the definition of avoided cost, I don't see how you can
23 shoehorn ancillary costs in there, particularly when they
24 are provided for in these federal tariffs that were
25 already on file at the time that Oak Tree approached

1 NorthWestern. And because of this, it really seems to me
2 that ancillary costs are a different animal. They don't
3 fit within the definition of avoided cost and, therefore,
4 need to be treated separately from that.

5 I do want to take exception with one statement
6 that Mr. Rounds made. And I always do that with
7 trepidation. But when you say that there's no difference
8 between this and carbon costs, I think there is. Carbon
9 is a political issue, period. This is not a political
10 issue. And so in my mind they're two very, very separate
11 issues because of that.

12 And so with that, Mr. Chairman, I look forward
13 to joining you in passing your motion.

14 COMMISSIONER HANSON: Any further discussion on
15 the motion?

16 Commissioner Fiegen.

17 COMMISSIONER FIEGEN: Fellow Commissioners, it
18 has been an interesting docket over the last few years
19 and when we look at the LEO in February it appears to me
20 that that tariff was written in WAPA. This morning I'd
21 sure like to go read that sometime to make sure. And I'm
22 sure it's right. That was in effect, that they would
23 pass those charges along if that ever came to be.

24 I also appreciate Oak Tree when they tried to
25 compromise and I appreciate your compromise. The thing

1 that was bothersome today is that you came up with a
2 formula and used other people's ideas, but the bottom
3 line you said was also a portion that we could afford.

4 And sometimes as Commissioners we need to look
5 at rate payers and what they can afford and what's
6 passed along to them. So I will be supporting the
7 Chairman's motion.

8 COMMISSIONER HANSON: Thank you. Good comments,
9 good thoughts. Having no further discussion then, the
10 question is on the motion. Those in favor vote yes,
11 those opposed, no.

12 Commissioner Fiegen.

13 COMMISSIONER FIEGEN: Fiegen votes aye.

14 COMMISSIONER HANSON: Commissioner Nelson.

15 COMMISSIONER NELSON: Aye.

16 COMMISSIONER HANSON: Hanson votes aye. Motion
17 carries.

18 The second question before us is what is the
19 appropriate contractual language to govern curtailment of
20 Oak Tree's energy deliveries to the system. And since
21 the questions 2 and 3 deal with curtailment, I will also
22 read question 3 and if -- I don't see there's an
23 opportunity to discuss one without somewhat discussing
24 the other one.

25 The third question is is a default provision

1 appropriate for NorthWestern Energy if it fails to accept
2 delivery of energy from Oak Tree except under the
3 contract's allowed curtailment provisions. And, if so,
4 what is the appropriate contractual language to be
5 included in such a provision?

6 I was planning to start with Oak Tree on this
7 item. Oak Tree, would you like to go first? Excuse me.
8 Or NorthWestern Energy?

9 MR. UDA: Mr. Chairman, this is Mike Uda. I was
10 late this morning. My father was taken to the hospital.
11 And he is in serious condition. And so I broke away as
12 soon as I could to join the meeting and I apologize for
13 my tardiness.

14 COMMISSIONER HANSON: Mike, we appreciate that.
15 Yvette shared that with us and we certainly hope and pray
16 that your father pulls through here and is well and gets
17 to celebrate some more birthdays with you.

18 Please proceed.

19 MR. UDA: Thank you. Mr. Chairman, I assume --
20 I haven't seen the memo, the Order that you're referring
21 to. But I assume you're referring to the question of the
22 curtailment language for Oak Tree; is that correct?

23 COMMISSIONER HANSON: That's correct. But if
24 you're just getting up to speed here real quick on a
25 couple of items, we can certainly have NorthWestern go

1 first if that would give you an opportunity --

2 MR. UDA: That might be a good idea,
3 Mr. Chairman. I always like listening to Mr. Brogan.

4 MR. BROGAN: I'll be glad to go first. And,
5 Mike, we'll have to discuss whether I was supposed to
6 pick up sarcasm in that last statement.

7 MR. UDA: Not at all, Al. Not at all.

8 COMMISSIONER HANSON: Please go ahead,
9 Mr. Brogan. Mr. Brogan, if you're speaking, you're on
10 mute.

11 MR. BROGAN: No, I'm not on mute. I was trying
12 to gather my thoughts a little bit and trying to make
13 this as succinct as possible.

14 COMMISSIONER HANSON: Great. Thank you.

15 MR. BROGAN: Basically NorthWestern is asking
16 for right to curtail and except in cases of system
17 emergencies if it curtails for anything other than that,
18 it is agreeing to be bound to pay Oak Tree, not only the
19 amount that is due under the contract for the curtailed
20 energy and capacity but also for production tax credits
21 and for recs.

22 So in NorthWestern's view there should -- it
23 doesn't even really understand entirely why we're
24 discussing this because in NorthWestern's view
25 NorthWestern is making Oak Tree and arguably its

1 investors and lenders completely whole with respect to
2 its proposed curtailment language.

3 And I guess the first thing that I would point
4 out is that there are no rules or decisions by FERC that
5 prohibit the parties from agreeing to this type of
6 language.

7 I would direct the Commission to FERC Rule 18
8 CFR, Section 292.301, Sub B that says, "Nothing in this
9 subpart," referring to Subpart 292, "limits the authority
10 of any electric utility or any qualifying facility to
11 agree to a rate for any purchase or terms or conditions
12 relating to any purchase which differ from the rate or
13 terms or conditions which would otherwise be required by
14 this subpart or affects the validity of any contract
15 entered into."

16 COMMISSIONER HANSON: Sir, when you're reading
17 if you would speak just a little slower for the court
18 reporter. Appreciate it.

19 MR. BROGAN: And I shouldn't be reading. I
20 apologize for that. But in any case, 292.301 really
21 allows the terms that the parties want and it's really --
22 states your authority when the parties can't agree to set
23 what those terms are.

24 There's lots of discussion in Oak Tree's brief
25 about the Idaho Wind Partners case. It's neither

1 controlling nor even applicable. Unlike Idaho wind
2 power -- or Idaho Wind Power Partners case,
3 NorthWestern's not asking the Commission to unilaterally
4 adopt some sort of schedule that would change an existing
5 contract or even an existing LEO.

6 The whole concept of an LEO is a right to sell
7 at any price. It doesn't concern -- does not include
8 terms and conditions.

9 Secondly, unlike Idaho Wind, there's nothing
10 that NorthWestern's trying to do to lower the economic
11 benefits to Oak Tree. Even in that case FERC talked a
12 lot about the fact that QFs were entitled to essentially
13 the benefit of their bargain, to use a term of art.

14 There's nothing in this proposal that denies Oak
15 Tree the benefit of the bargain because of how
16 NorthWestern would compensate Oak Tree for any
17 curtailment.

18 And, finally, NorthWestern is merely trying to
19 preserve the right that will be rarely used. I think if
20 we think about it from a rational point of view, only
21 when the alternative is more than \$70 less than -- or
22 approximately \$70 less than what NorthWestern has to pay
23 Oak Tree would NorthWestern curtail for any reasons other
24 than the emergency reasons.

25 NorthWestern's not going to curtail if it's

1 going to cost customers money. When you add the cost of
2 the avoided cost rate plus the PTC amount, which is
3 currently \$22, and you add those together, it's only
4 if -- because of the circumstances there's something out
5 there that's less than -- you know, more than that, less
6 than Oak Tree.

7 Because under any circumstances NorthWestern's
8 going to have to pay that. And I -- I think that this
9 provision is needed to protect NorthWestern Energy's
10 customers.

11 We stated repeatedly NorthWestern doesn't really
12 have a lot of interest or economic interest in this
13 matter. Because these are pass through costs. And we're
14 stepping up to the plate to protect our customers'
15 interests the best we can. And we really believe that
16 this is an important provision. It doesn't harm Oak Tree
17 in any manner.

18 And we believe that Staff correctly analyzed the
19 issue of curtailment and we would ask the Commission to
20 include Section 6.5.1, the curtailment language, and to
21 eliminate then the language that would make imposing this
22 curtailment a breach of the contract. They kind of go
23 hand in hand.

24 And, Mr. Chairman, Commissioners, I thank you
25 for your attention.

1 COMMISSIONER HANSON: Thank you for your
2 comments.

3 Mr. Uda, are you ready?

4 MR. UDA: Mr. Chairman, I'm in a location
5 outside the hospital that does not appear to have
6 terrific cell phone reception. So if I cut out or you're
7 not able to hear me, please let me know and I will try to
8 speak up to make sure that everyone can hear me.

9 I understand and am in some sense happy that
10 NorthWestern has adopted the approach that they've
11 adopted with respect to curtailment in the sense that,
12 you know, it's nice that we get reimbursed. There are a
13 couple of issues -- I want to make clear that from this
14 perspective we aren't saying we think what NorthWestern's
15 attempting to do is evil or wrong.

16 We have a significant problem with it. And the
17 reason it's a significant problem is, is that we get
18 production tax credits based on production. And we
19 have -- and I'm sure you're aware tax equity investors
20 who are using these tax credits to offset taxes. They're
21 not interested so much in the revenue that the project
22 produces. They're much more interested in making sure
23 they can offset their tax obligations. And this is one
24 of the reasons they shop these things to people who have
25 these taxes -- to offset taxes.

1 And we don't, you know, have a problem with I
2 think the revenue side of it. I think it's the
3 production tax portion of it that's problematic. And
4 this is, I think, where the negotiations broke down.

5 And I think the concern is we have to go out and
6 find people to finance this project and we have people
7 working on that, and we're trying to. We're not making
8 up the fact that when we talk to these people they're
9 saying -- and I'm not arguing about the curtailment --
10 about the -- about the ancillary services issue because I
11 know that's already been decided.

12 But on both fronts we talk to the investors,
13 they say, well, you know, how is this going to work in
14 practice? And how are we going to make sure that we get
15 tax credits when we need them? And that's really an
16 unclear question and it creates uncertainty and
17 uncertainty is bad for investment. So that's general
18 trust.

19 And I believe Mr. Brogan's correct. I think
20 under PURPA a QF and the utilities can agree to pretty
21 much anything. You can even agree to a contract that's
22 above avoided cost. The utilities can agree to that.
23 But this is different. This isn't where we're sitting
24 around and we're saying, okay, we've agreed to this, now
25 can we do that, can we agree to something different than

1 PURPA.

2 This is a situation where we have a
3 disagreement, and we're asking the state's authority now
4 to implement the law. And that is the state's obligation
5 under PURPA and what we're asking you to do is we're
6 saying, look, this is creating a significant problem for
7 us with investors.

8 And if you read Order 69, which is the preamble
9 to the FERC regulations, it talks about the need for
10 certainty investment in these technologies. And when we
11 hear from investors that, you know, they're less than
12 thrilled about this particular provision, and I don't
13 know if they've said no but they've definitely said this
14 creates great concern. We have to listen to that because
15 in order for this project to be successful to be built we
16 have to gain their confidence that they want to invest in
17 this project and it's a good deal.

18 And there's a lot of discretion that is built
19 into this curtailment in a way that, you know, could be
20 problematic. I'm not saying NorthWestern would abuse it.
21 I take Mr. Brogan at his word that it would be rarely
22 used. My question, though, is if it's rarely used, then
23 why is it so important?

24 I mean, I hear two things going on here. On the
25 one hand I hear Mr. Brogan saying, well, this is really

1 not a big deal but at the same time saying, well, this is
2 really important. And I understand that this is revenue
3 neutral to them. I certainly understand that. I also
4 know that, you know, in the course of business there are
5 times when things don't go as smoothly as you would like
6 them to go.

7 And, for example, you have situations where,
8 you know, payments are delayed or whatever. Creating,
9 you know, a dispute and any kind of a dispute for a
10 project this small that we have to come back in front of
11 the Commission to litigate is an expensive proposition
12 and a daunting proposition and we would rather not do
13 that.

14 And let me talk a little bit about the Idaho
15 Wind Partners case and the reason why I think it's
16 relevant and important for the Commission's
17 consideration.

18 What happened in Idaho Wind Partners, and I was
19 personally involved in that case. I represented a
20 company out of Idaho in that case. And what was going on
21 was -- and there were a number of different parties at
22 different stages of this. There were some that were just
23 prospective QFs. There were some that had legally
24 enforceable obligations but didn't yet have contracts and
25 there were some that had executed contracts and some that

1 had executed contracts for a number of years.

2 And what Idaho power was proposing with
3 Schedule 74 was to apply this to everybody across the
4 board. And, you know, there was argument amongst the
5 parties about whether it was an economic curtailment or
6 noneconomic curtailment and there was a dispute about
7 implementation. But the Idaho Wind Partners had a
8 contract. They went to FERC to remove this uncertainty
9 about the revenues they were getting because of the
10 curtailment.

11 And I recognize what Mr. Brogan is saying, this
12 is a different case because they are talking about
13 compensation. But the point that FERC made in discussing
14 the Idaho Wind Partners case and Schedule 74 was this
15 point about certainty and investment. And they said, you
16 know, when you enter into an LEO the idea is you're
17 fixing the obligation of both the utility and the QF at
18 the same time. And so everybody knows what they're
19 dealing with.

20 And Mr. Brogan even used the term the benefit of
21 the bargain. And I understand his point that, well,
22 you're going to be reimbursed so, you know, what's the
23 problem? The problem is that because the investors
24 don't know about the stream, particularly the production
25 tax credit situation, it creates uncertainty in

1 investment.

2 We think that that kind of uncertainty doesn't
3 interfere or impede in any way with getting the
4 investment that we need and preserve the benefit of the
5 bargain that we thought we had with respect to the
6 revenue stream that we're going to get so that when we
7 go to the bank, get the financing and support this
8 project.

9 So I think in that way it is relevant and it is
10 important, and I think if, for example, and Mr. Brogan
11 has linked these two things, you know, if, for example,
12 you know, this curtail -- kind of curtailment is
13 implemented, you know, to our mind because we're not
14 getting what we were supposed to get, it is a breach of
15 contract.

16 So anyway, that's -- I think I've said enough
17 about this, and I thank the Commission for its time. And
18 hopefully I came through okay.

19 COMMISSIONER HANSON: Thank you. Yes, you
20 did.

21 Mr. Rounds.

22 MR. ROUNDS: Thank you, Mr. Chairman, this is
23 Brian Rounds for Staff. I don't know that there's a lot
24 that we can add that hasn't been said. We mostly agree
25 with NorthWestern's position. I think additionally we

1 would actually prefer slightly more broad language as far
2 as allowing NorthWestern to curtail whenever they might
3 need to. But any of those more broad or undefined
4 reasons just be listed under those for which they are
5 reimbursing Oak Tree.

6 I don't know that PURPA requires the Commission
7 to -- or PURPA requires us to ensure that Oak Tree has
8 the right mix of investors, but I will say that I think
9 given the price that we're at in today's economics of
10 building wind farms I'd be pretty surprised if they are
11 unable to finance this project.

12 COMMISSIONER HANSON: Thank you. Questions by
13 the Commission.

14 Commissioner Nelson.

15 COMMISSIONER NELSON: Question for Mr. Uda. You
16 know, Mr. Brogan has said that with the payment of energy
17 and PTC and recs that all is equal. But is there a tax
18 difference for Oak Tree?

19 It would seem to me that if NorthWestern is
20 paying compensation for curtailment, that the amount that
21 they've included for the PTC is going to be taxable
22 income for Oak Tree. Whereas, if Oak Tree is producing
23 and you've got these tax credits, that's not taxable
24 income.

25 So is there some tax implication here that

1 hasn't been talked about?

2 MR. UDA: That's a really good question, Sheriff
3 Nelson. Commissioner Nelson. And I hadn't even really
4 thought about it until now. I think that that may be an
5 issue.

6 I'm not a tax attorney, and I'm not an expert.
7 But it seems to me that there's a difference between a
8 tax credit where you're taking, you know, it off your
9 taxes over time as opposed to, you know, getting a
10 payment from someone, which might be treated as ordinary
11 income. And I'm not really qualified to say that, but
12 that could potentially be an issue, yes.

13 COMMISSIONER NELSON: No further questions.

14 COMMISSIONER HANSON: Commissioner Fiegen, do
15 you have any questions?

16 Yes.

17 MR. RISLOV: Mr. Uda, this is Greg Rislov,
18 Commission advisor. I want to go back to that issue of
19 compensation. I guess I'm a little confused. Since
20 dollars are a common denominator, if NorthWestern can
21 ensure the investors that they're equally as well off
22 with a tax credit or a cash payment, I don't understand
23 where the sticking point is for Oak Tree. If you could
24 clarify that.

25 MR. UDA: (Inaudible.)

1 COMMISSIONER HANSON: Mr. Uda, every syllable is
2 breaking up at this juncture. Perhaps you may have moved
3 to another spot.

4 MR. UDA: Is this better, Mr. Chairman?

5 COMMISSIONER HANSON: Yes, it is.

6 MR. UDA: Thank you, Mr. Rislov, for the
7 question. I think the issue is that these tax equity
8 investors -- and I appreciate Staff's comment about it is
9 a practical consideration. (Inaudible.)

10 COMMISSIONER HANSON: Sir, it started out great,
11 and then it became garbled. I'll let Cheri tell you
12 where it started being garbled.

13 MR. UDA: I was just going to say I appreciate
14 Staff's comment that it's not the Commission's obligation
15 to ensure -- to ensure there is -- (Inaudible).

16 I think it is the Commission's obligation to
17 ensure that, you know -- that the obligations that are
18 fixed at the outset enable the project to obtain
19 financing because that's -- which without that there
20 isn't any real point to the law.

21 But I do think that the issue is this: These
22 tax equity investors are not interested in revenue.
23 They're interested in getting just the tax offset. They
24 have tax obligations they're trying to offset. So
25 getting them a check is just adding to their tax problem

1 instead of helping to solve it.

2 MR. RISLOV: Mr. Uda, but, again, dollars are
3 the common denominator. If I give them enough money, I
4 don't think they really care if they get a tax credit as
5 long as the bottom line ends up the same, as long as the
6 bottom line is the same. I mean, we talk about a tax
7 credit. It does have a value, let's say 35 percent of an
8 obligation but I can give them dollars that are going to
9 get them to the same place, can't I?

10 MR. UDA: I think that that's possible that
11 that could happen. That was not my understanding of the
12 way in which that mechanism was going to work, adding to
13 the value of the tax credit was going to be paid in a
14 cash payment and not an additional balance to compensate
15 the fact that, you know -- you're not really offsetting
16 the taxes at that point, you're just adding revenue
17 instead.

18 So, yeah, would it be possible to have a
19 mechanism to do that? It was not my understanding that
20 it did that.

21 COMMISSIONER HANSON: Commissioner Nelson, do
22 you have a follow-up?

23 COMMISSIONER NELSON: Mr. Uda, here's what I'm
24 understanding, and correct me if I'm wrong, what I'm
25 understanding is that your investors in their annual tax

1 planning are looking for some certainty in the amount of
2 PTC credits that they can count on in their tax planning.
3 And that if we go with NorthWestern's language, that
4 you're not going to be able to assure them of the -- the
5 stream of credits that they are planning on for their tax
6 planning; is that correct?

7 MR. UDA: That is correct, Mr. Nelson.

8 COMMISSIONER NELSON: No further questions.

9 COMMISSIONER HANSON: Thank you. Any further
10 questions from the Commission?

11 Commissioner Fiegen?

12 COMMISSIONER FIEGEN: Just a quick question for
13 NorthWestern. Is it my understanding that this will be a
14 very rare circumstance? And this is a circumstance that
15 would increase costs to NorthWestern customers?

16 MR. BROGAN: Commissioner Fiegen, it's
17 NorthWestern's belief that this would be an extremely
18 rare circumstance, only at a time when -- when the total
19 cost to NorthWestern's customers is lowered by curtailing
20 Oak Tree and paying for the power and paying for the PTCs
21 and taking care of the -- the income tax consideration
22 that's shown in Exhibit E of the agreement.

23 We don't expect that it will happen very often,
24 but it will happen sometimes when we get to extremely
25 negative prices and maybe extremely light loads. So we

1 think it would be very rare, but we think it's extremely
2 important to protect customers.

3 And if I might, Commissioner Fiegen and
4 Mr. Chairman, I spoke a little earlier, and I'd like to
5 clear up a statement that I made, if I might.

6 COMMISSIONER HANSON: Please.

7 MR. BROGAN: This is relative to the second
8 section that we were talking about, which has to do with
9 whether or not the curtailment was a breach. I think
10 I -- I believe I said that we didn't want it to be a
11 breach. That's not true. We agree that failing to take
12 energy is a breach. And that's taken care of by the next
13 section.

14 What I should have said is we don't believe that
15 failing to take energy out of the curtailment is a
16 default that allows Oak Tree to immediately terminate the
17 contract. That's how come these work together. And I
18 apologize for misspeaking.

19 COMMISSIONER FIEGEN: Thank you. So it's my
20 understanding that the investors still will get
21 production tax credits, and we never know what those tax
22 credits will be until production, but in a very rare
23 circumstance they wouldn't get those and would get
24 revenue instead?

25 MR. BROGAN: That is NorthWestern's belief. And

1 we agree that we -- you know, we don't know what any
2 given wind farm will produce during a year. And our
3 experience, not in South Dakota but elsewhere, has been
4 that it's pretty variable year to year for the same wind
5 farm.

6 COMMISSIONER FIEGEN: Thank you.

7 COMMISSIONER HANSON: Thank you. Any further
8 questions?

9 Mr. Smith.

10 MR. SMITH: Maybe, Mr. Brogan, you know, in your
11 definition of the value for PTC that fits into the
12 compensation equation, talking Section 6.5.4, it states,
13 "PTC means an amount which would result in the seller
14 receiving an amount equal to the value of the PTC's loss
15 based on lost production on an after-tax basis calculated
16 in accordance with Exhibit E."

17 Could you explain that, particularly the last
18 phrase?

19 MR. BROGAN: First off, I was beginning to talk
20 with my mute button on. I apologize.

21 Secondly, I do not have a printed out version of
22 the whole contract in front of me. But as I recall
23 Exhibit E -- and so I'm saying I'd like to make this
24 subject to check. But as I recall Exhibit E, it shows
25 how the value of the production tax credit would be

1 grossed up to account for the income tax effect that
2 Commissioner Nelson was asking about.

3 MR. SMITH: Thank you.

4 COMMISSIONER HANSON: Are there any further
5 questions? If not, is there a motion?

6 Seeing none, did you -- in EL11-006, I will move
7 that we approve NorthWestern Energy's Section 6.5.1 and
8 remove Section 8.2.3 in its entirety.

9 Discussion on the motion. I think it's clear.
10 Commissioner Nelson, did you have any comment?

11 COMMISSIONER NELSON: Could we split these
12 two?

13 COMMISSIONER HANSON: All right.

14 COMMISSIONER NELSON: At this point -- and let
15 me just speak to the first of the two. Because I'm in
16 agreement with you that 8.2.3 does need to be removed.
17 No question about that in my mind.

18 But on the first issue I am sympathetic to Oak
19 Tree's argument. I understand the importance of tax
20 planning. I understand the importance of certainty as
21 you're dealing with business investments, at least making
22 things as certain as possible. And because of that, I
23 am sympathetic to Oak Tree's argument on the first
24 issue.

25 And so I think I will probably not support you

1 on the first motion but certainly will on the second.
2 Because 8.2.3 I think is covered elsewhere and needs to
3 come out.

4 COMMISSIONER HANSON: I think I'll reverse those
5 on you, though. I will divide the question then so that
6 the first issue will be NorthWestern Energy's Section
7 6.5.1, and the second question will be removing Section
8 8.2.3 in its entirety.

9 So with the first motion being approving
10 NorthWestern Energy Section 6.5.1, did you have further
11 discussion on that that you wanted to make?

12 COMMISSIONER NELSON: No, thanks.

13 COMMISSIONER HANSON: Commissioner Fiegen, did
14 you have something?

15 COMMISSIONER FIEGEN: Yes. I am going to
16 support the Chairman's motion. Because anytime that our
17 rate payers need to pay for negative energy and pay money
18 to put energy on the line or to curtail it or whatever
19 is -- you know, it costs a lot of money, and I think
20 NorthWestern has been fair with Oak Tree in their
21 compensation for when they would have to do that they
22 would get paid, all of it, including the production tax
23 credit.

24 Also, production tax credit's tricky because
25 of the variable output of wind energy farms. So you

1 never know as an investor how much production tax credit
2 you're going to get. And if you put a fixed amount in
3 your budgeting, it can change because that's very
4 variable.

5 So I appreciate NorthWestern bringing this to
6 our attention and making sure that rate payers aren't
7 paying for negative energy.

8 COMMISSIONER HANSON: Thank you for comments.
9 In light of that, do you have anything further?

10 Then in EL11-006 the question before us is
11 approving NorthWestern Energy's Section 6.5.1.

12 Commissioner Fiegen.

13 COMMISSIONER FIEGEN: Fiegen votes aye.

14 COMMISSIONER HANSON: Commissioner Nelson.

15 COMMISSIONER NELSON: Nay.

16 COMMISSIONER HANSON: Commissioner Hanson votes
17 aye. The motion carries.

18 The next question before us in EL11-006 is the
19 motion to remove Section 8.2.3 in its entirety. Any
20 further discussion on that motion?

21 Seeing none, Commissioner Fiegen.

22 COMMISSIONER FIEGEN: Fiegen votes aye.

23 COMMISSIONER HANSON: Commissioner Nelson.

24 COMMISSIONER NELSON: Aye.

25 COMMISSIONER HANSON: Hanson votes aye. The

1 motion carries.

2 That will conclude the discussion and votes on
3 EL11-006, and we appreciate all of the participation from
4 those testifying over the telephones and the challenges
5 that they had.

6 And Mr. Uda, we hope that things go well with
7 you today.

8 COMMISSIONER NELSON: If I could just make one
9 comment to Mr. Uda, I greatly appreciate your willingness
10 to file your brief early so that we could move this along
11 and get it resolved today, and I do wish you the very
12 best with your family situation.

13 MR. UDA: Thank you very much, Mr. Chairman and
14 Commissioner Nelson. It's a touch-and-go situation and
15 it's been --

16 COMMISSIONER HANSON: Mr. Uda, our prayers are
17 with you. We hope everything works out for you and your
18 family.

19 MR. UDA: Thank you, Mr. Chairman.

20 COMMISSIONER HANSON: Take care.

21 MR. BROGAN: Mr. Chairman, on behalf of
22 NorthWestern, thank you for the hearing today and the
23 opportunity to be heard. We appreciate all the effort
24 that the Commission and Commission Staff has put into
25 this matter.

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COMMISSIONER HANSON: Thank you. Thank you for
your participation.

(The proceeding is concluded.)

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 30th day of
11 July, 2013, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 22nd day of
14 August, 2013.

15

16

17

18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21 Certified Realtime Reporter

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