

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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

**INTERIM ORDER; ORDER
FOR AND NOTICE OF
FURTHER HEARING**

EL11-006

PROCEDURAL HISTORY

On April 28, 2011, Oak Tree Energy, LLC (Oak Tree) filed a Complaint (Complaint) against NorthWestern Corporation d/b/a NorthWestern Energy (NWE).¹ The dispute involves a proposed wind generation project located in Clark County, South Dakota (Project). Oak Tree alleges that the project is a "Qualified Facility" (QF) under PURPA and that NWE refuses to enter into a purchase power agreement. The Commission has jurisdiction in this matter pursuant to 16 U.S.C. Chapter 12, § 824a-3, 18 C.F.R. Part 292 and SDCL Chapters 1-26, 49-13, and 49-34A, including 49-34A-93. On May 5, 2011, the Commission electronically transmitted notice of the filing and the intervention deadline of May 20, 2011, to interested persons on the Commission's PUC Filings electronic notice list. No petitions for intervention were filed. On May 20, 2011, NWE filed its Answer to the Complaint. On June 17, 2011, the Commission issued a Scheduling Order.

On September 7, 2011, Oak Tree filed a Motion to Compel. On October 20, 2011, the Commission issued an Amended Scheduling Order. On November 14, 2011, the Commission issued an Order Granting in Part Motion to Compel. On December 13, 2011, Oak Tree filed its written direct testimony. On January 13, 2012, NWE filed its written direct testimony. On January 27, 2012, Staff filed its written testimony. On February 7, 2012, the parties stipulated to an amended filing schedule.

On February 8, 2012, Oak Tree filed its Second Motion to Compel and on February 9, 2012, Oak Tree filed a Motion to Expedite Hearing. At its ad hoc meeting on February 13, 2012, the Commission granted Oak Tree's Motion to Expedite, setting the Motion on for consideration at its regular meeting on February 14, 2012. On February 14, 2012, NWE filed NorthWestern Energy's Resistance to Oak Tree Energy, LLC's Second Motion to Compel. On February 16, 2012, the Commission issued an Order Granting Motion to Expedite, an Order Granting in Part Second Motion to Compel and Protective Order, and a Second Amended Scheduling Order. On February 24, 2012, Oak Tree filed its rebuttal testimony, and NWE filed its responsive testimony.

On February 28, 2012, the Commission issued an Order for and Notice of Hearing setting the matter for hearing on March 21-22, 2012, and Oak Tree filed a Motion to Allow Electronic Testimony. On March 2, NWE filed NorthWestern Energy's Pre-Hearing Motions and Brief in Support of NorthWestern Energy's Pre-Hearing Motions. On March 5, 2012, Oak Tree filed Oak Tree Energy, LLC's Prehearing Motions Regarding Right to Full Avoided Cost and Creation of Legally Enforceable Obligation and Oak Tree Energy, LLC's Motion to Exclude Testimony of Steven E. Lewis in Full and Bleau LaFave in Part and Brief in Support. On March 7, 2012,

¹The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket EL11-006 at: <http://puc.sd.gov/Dockets/Electric/2011/el11-006.aspx>

NWE filed NorthWestern Energy's Brief in Opposition to Oak Tree Energy, LLC's Motion to Allow Electronic Testimony, NorthWestern Energy's Response to Oak Tree Energy, LLC's Pre-Hearing Motions Regarding Right to Full Avoided Cost and Creation of Legally Enforceable Obligation, and NorthWestern Energy's Brief in Opposition to Oak Tree Energy, LLC's Motion to Exclude Testimony. On March 8, 2012, Oak Tree filed Oak Tree Energy, LLC's Response to Northwestern Energy's Prehearing Motions.

At an ad hoc meeting on March 9, 2012, the Commission heard Oak Tree's Motion to Allow Electronic Testimony and on March 14, 2012, issued its Order Denying Motion to Allow Electronic Testimony. On March 13, 2012, the Commission heard the parties pre-hearing motions and on March 15, 2012, issued its Order Denying Oak Tree's Omnibus Prehearing Motions and Granting in Part and Denying In Part Parties' Motions to Strike and Exclude.

The hearing was held as scheduled on March 21-22, 2012, at which Oak Tree, NWE, and Staff appeared and participated. At hearing, in response to a request by Chairman Nelson, NWE agreed to produce for the hearing record its agreement with Titan Wind I, and on March 21, 2012, NWE filed the Titan Wind I Project Power Purchase Agreement, which was received into evidence as Exhibit NW 9. TR 262, 299.² At the conclusion of the hearing, a discussion took place regarding post-hearing schedule, and agreement was reached between the Commission and the parties on the schedule for briefing and oral argument, with the oral argument procedures and time limits to be established following discussion between Commission Counsel and the parties. On April 10, 2012, the Commission accordingly issued a Post-Hearing Scheduling Order.

On April 18, 2012, NWE filed NorthWestern Energy's Post-Hearing Brief. On April 19, 2012, Oak Tree filed Oak Tree Energy, LLC's Opening Post-Hearing Brief, and Staff filed Commission Staff's Post-Hearing Brief. On April 24, 2012, NWE filed NorthWestern Energy's Post-Hearing Response Brief, and Oak Tree filed Oak Tree Energy, LLC's Reply to Northwestern Energy's Post-Hearing Brief and Oak Tree Energy, LLC's Reply to Commission Staff's Post-Hearing Brief.

On April 26, 2012, the Commission heard oral argument from the parties. Following oral argument and Commissioner questions and discussion, Chairman Nelson described for the parties and Commissioners a proposal for possible resolution of the matter if acceptable to the parties. The Commission instructed the parties to submit their responses on the proposal by close of business on April 30, 2012, and scheduled a continuation of the proceeding on May 2, 2012. On April 30, 2012, Oak Tree filed Oak Tree Energy, LLC's Response to Chairman Nelson's Question, and NWE filed NorthWestern Energy's Response to Chairman Nelson's Proposal Presented at Oral Argument on April 26, 2012.

Interim Order

On May 2, 2012, the Commission again considered what action to take on the Complaint. In light of NWE's objection to Chairman Nelson's proposal and Oak Tree's inability to agree with its terms as proposed, the Chairman withdrew the proposal. After discussion between the Commission and the parties, the Commission voted unanimously to find and conclude:

² References to the Hearing Transcript are in the format "TR" followed by the Hearing Transcript page number(s) referenced, and references to Hearing Exhibits are in the format Ex followed by the exhibit number and, where applicable, the page number(s) referenced (the exhibit number party abbreviations employed by the parties are: Oak Tree – "OT"; NorthWestern – "NW"; Staff – "Staff.")

1. That, given NWE's status as a vertically integrated utility with predominant reliance on its own internal generation at this time, the hybrid method is the proper method to calculate avoided costs for NWE's South Dakota system.

2. That NWE did not, however, incorporate projected carbon cost inputs into its use of this method and also may have utilized unjustifiably low natural gas inputs and electric market inputs, and as a result, the Commission cannot reliably determine the proper avoided cost with the data and analyses currently in the record.

3. That the carbon emission cost values of \$5/ton starting in 2015 and shifting to \$10/ton starting in 2020 and rising to \$15/ton in 2025 as estimated by Lands Energy are reasonable carbon emissions cost estimates in the present environment and are the appropriate carbon emissions cost values to be included in the parties' respective hybrid method analyses of avoided cost.

4. That NWE is obligated to purchase Oak Tree's output because a legally enforceable obligation was created by Oak Tree on February 25, 2011.

5. That Oak Tree is entitled to capacity credit for the facility's output commencing in 2012 with the capacity contribution to be determined and adjusted in accordance with the method NWE is using for the Titan I project, and such capacity credit shall be incorporated into the hybrid method beginning in 2012.

6. That the proper avoided cost contract term is 20 years.

The Commission further voted unanimously to schedule this matter for further hearing on June 19, 2012, with the hearing to begin following adjournment of the Commission's regular meeting scheduled for such date and directed that on or before, June 6, 2012, the parties shall file with the Commission such additional analyses employing the hybrid method and such additional pre-filed testimony as they deem necessary to enable the Commission to determine the following:

1. The proper application of the hybrid method.
2. The proper natural gas input(s) to use in the hybrid method based on current market conditions and projections.
3. The proper electric market rates that the parties may deem warranted to reflect current market conditions and projections, taking into consideration the carbon emission costs previously approved and any adjustments to gas prices.
4. The proper capacity contribution and resulting capacity credits to be included in the avoided cost and added into the hybrid method under the Titan I method.
5. NWE's avoided cost levelized over a 20 year period.
6. The parties may file rebuttal testimony on or before June 13, 2012.

The Commission further voted unanimously to direct Staff to open a rule-making docket for the purpose of considering, on a statewide basis, the proper standards that should govern

avoided cost determinations in the future in this state, including but not limited to, the requirements for creation of a legally enforceable obligation, the acceptable methodology or methodologies for determination of avoided cost and the appropriateness of particular methods in specified circumstances, appropriate contract term, and the standards for determination of when capacity credits shall be allowed and the appropriate method(s) for computing the magnitude and duration of such credits.

Complete findings of fact and conclusions of law will be set forth in the Commission's final decision and order in the case following hearing and Commission action thereon.

It is therefore

ORDERED, that a further hearing will be held on this matter on June 19, 2012, in Room 413 of the State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota, with the hearing to begin following adjournment of the Commission's regular meeting scheduled for such date. The issues at the hearing, if not decided prior to the hearing on the motion of a party or the Commission, will be in accordance with the Commission's findings and directives as set forth above.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 15th day of May, 2012.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.
By: <u>Joy Chung</u>
Date: <u>5/15/12</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Chris Nelson

CHRIS NELSON, Chairman

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

Gary Hanson

GARY HANSON, Commissioner