

215 South Cascade Street
PO Box 496
Fergus Falls, Minnesota 56538-0496
218 739-8200
www.otpc.com (web site)



July 3, 2018

Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101-2147

**PUBLIC DOCUMENT – NOT PUBLIC
(OR PRIVILEGED) DATA HAS BEEN EXCISED**

**RE: In the Matter of a Complaint by Red Lake Falls Community Hybrid, LLC
regarding Potential Purchased Power Agreement (PPA) Terms and Pricing with
Otter Tail Power Company
Docket No. E017/CG-16-1021
CORRECTED Answer to Request for Reconsideration of Red Lake Falls Community
Hybrid, LLC**

Dear Mr. Wolf:

Enclosed for filing is Otter Tail Power's Answer to the Request for Reconsideration of Red Lake Falls Community Hybrid, LLC in the above referenced matter. Otter Tail has electronically filed this document with the Commission and is serving a copy on all persons on the official service list for this docket. A Certificate of Service is also enclosed. On July 2, 2018 Otter Tail inadvertently filed an incorrect NOT PUBLIC Attachment 1. The enclosed includes the correct NOT PUBLIC Attachment 1.

Otter Tail has taken reasonable efforts to maintain the secrecy of the information in the enclosed Answer marked as PROTECTED DATA, which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use (the "Protected Data"). The Protected Data is therefore "trade secret information" and "nonpublic data" under Minn. Stat. § 13.37.

The information in the enclosed Answer marked as HIGHLY SENSITIVE PROTECTED DATA relates to the addition of renewable resources to Otter Tail's system and is particularly competitively sensitive to Otter Tail (the "Highly-Sensitive Protected Data"). The Highly-Sensitive Protected Data is therefore HSPD under the June 5, 2017 Highly-Sensitive Protected Data Protective Order of Administrative Law Judge Jeffery Oxley and is not disclosed in this docket. HSPD is accessible only to persons duly authorized according to the procedures identified in that Order.

Mr. Wolf
July 3, 2018
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Should you have any questions regarding this filing, please contact me at kdahl@otpc.com or (218) 739-8722.

Sincerely,

/s/KRISTIAN DAHL
Kristian Dahl
Associate General Counsel

kaw
Enclosures
By electronic filing
c: Service List

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange
Dan Lipschultz
Matt Schuerger
Katie Sieben
John Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Complaint by Red Lake
Falls Community Hybrid, LLC Regarding
Potential Purchased Power Agreement Terms
and Pricing with Otter Tail Power Company

Docket No. E017/CG-16-1021

**OTTER TAIL POWER COMPANY
ANSWER TO REQUEST FOR
RECONSIDERATION OF RED LAKE
FALLS COMMUNITY HYBRID, LLC**

PUBLIC DOCUMENT – NOT PUBLIC (OR PRIVILEGED) DATA HAS BEEN EXCISED

DATED AS OF JULY 2, 2018

Kristian M. Dahl
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56537
Telephone: (218) 739-8722

and

Richard J. Johnson
Patrick T. Zomer
Moss & Barnett,
A Professional Association
150 South 5th Street
Suite 1200
Minneapolis, MN 55402
Telephone: (612) 877-5000

Attorneys on Behalf of Otter Tail
Power Company

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STATE OF MINNESOTA
BEFORE THE
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In the Matter of a Complaint by Red
Lake Falls Community Hybrid, LLC
Regarding Potential Purchased Power
Agreement Terms and Pricing with Otter
Tail Power Company

Docket No. E017/CG-16-1021

**OTTER TAIL POWER COMPANY ANSWER TO
REQUEST FOR RECONSIDERATION OF
RED LAKE FALLS COMMUNITY HYBRID, LLC**

Otter Tail Power Company (OTP) respectfully submits the following Answer¹ to the June 20, 2018 Request for Reconsideration of Red Lake Falls Community Hybrid, LLC (Red Lake). The Commission's May 31, 2018 Order establishes just and reasonable rates, consistent with the protection of OTP's customers and the public, as required by Minnesota law.² The May 31 Order is both lawful and reasonable.³ Accordingly, Red Lake's Request for Reconsideration should be denied.

¹ Minn. R. 7829.300, subp. 4.

² Minn. Stat. §§ 216B.03, 216B.164, subd. 4.

³ Minn. Stat. § 216B.27, subd. 2 and subd. 3.

ratepayers and the public. Red Lake's flawed, inflated analysis clearly falls short of this duty. Red Lake's arguments should be rejected (again).

The May 31 Order correctly states that avoided cost can be set in three ways under Minn. Stat. § 216B.164, subd. 4(b): (1) through negotiation; (2) by the Commission; or (3) through a competitive bidding process.⁴¹ There is no provision on Minnesota law (or PURPA) that requires the Commission to utilize the peaker method to calculate avoided cost. Rather, to the extent there is any directive to the Commission, it is to use the *proxy method* when establishing avoided cost to be paid to a renewable QF.⁴² Further, as noted above, the Commission has both the power and the duty to consider the full record and exercise its judgment and expertise when setting rates and need not abdicate its decision-making to any expert.⁴³ And the Commission's determination of avoided cost is entitled to deference, as explained by the Minnesota Supreme Court:

We also adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.⁴⁴

Red Lake's position is incorrect as a matter of law and is not a basis for reconsideration.

Red Lake's position is further undermined by its continued reliance on its expert's calculation of avoided cost. After chronicling no fewer than nine deficiencies in Red Lake's avoided cost calculation,⁴⁵ the ALJ concluded Red Lake over-estimated OTP's avoided costs:

The Administrative Law Judge finds that Mr. Schiffman's avoided cost estimates overstate Otter Tail's avoided costs. The ABB/Ventyx Fall 2015 reference case provides an overestimate of future natural gas prices and an underestimate of

⁴¹ May 31 Order, p. 12.

⁴² Minn. Stat. § 216B.164, subd. 4(b) ("The full avoided capacity and energy costs to be paid a qualifying facility that generates electric power by means of a renewable energy source are the utility's least cost renewable energy facility or the bid of a competing supplier of a least cost renewable energy facility, whichever is lower....").

⁴³ Hibbing Taconite Co., 302 N.W.2d at 11. The Commission's determination of avoided cost is entitled to deference.

⁴⁴ Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977).

⁴⁵ ALJ Report, ¶¶ 246-256.

I. INTRODUCTION

Both Minnesota and federal law empower the Commission to establish OTP's avoided cost.⁴ The Commission "considered the voluminous record and lengthy proceedings"⁵ and ultimately exercised its judgement and expertise in setting OTP's avoided cost. The avoided cost determined by the Commission is based on OTP's incremental energy and capacity costs established according to the Commission's Cogeneration and Small Power Production Rules.⁶ Those incremental energy and capacity costs provide a reasonable estimate of OTP's avoided costs even though Red Lake does not qualify under to sell its output to OTP under OTP's Small Power Production (SPP) tariff. The avoided cost determined by the Commission is consistent with the Public Utility Regulatory Policy Act of 1978 (PURPA) and the protection of OTP's customers. And it is the an appropriate measure of OTP's avoided cost as of December 7, 2016, taking all factors into consideration as the Commission did in the May 31 Order.

Red Lake's Request for Reconsideration attempts to box the Commission into setting a rate that is clearly higher than OTP's avoided cost by urging a rigid approach that would force the Commission to ignore the an accurate and representative estimate of OTP's costs and instead select between other estimates of costs that are not actually representative. The Commission is not constrained by Red Lake's rigid assessment of the law or required to merely select between the opinions of any of the experts in this case. Rather, the Commission has the full authority to assess and weigh all of the information presented in the record and establish OTP's avoided cost based on that assessment.

⁴ May 31 Order, p. 10. *See also* Portland General Electric Co. v. FERC, 854 F.3d 692, 695 (D.C. Cir. 2017) ("Under PURPA, state utility commissions are responsible for calculating the avoided-cost rates for utilities subject to their jurisdiction, which they may accomplish by issuing regulations, by addressing particular issues on a case-by-case basis, or by taking any other action designed to give effect to [FERC's] rules.") (internal quotations and citations omitted).

⁵ May 31 Order, p. 13.

⁶ Minn. R. Ch. 7835.

Finally, Red Lake, a wholly-owned subsidiary of Consolidated Edison, Inc. – “one of the biggest [utilities] in the country...”⁷ that “has enough financial horsepower to do this project with their eyes closed”⁸ – contends OTP’s customers should pay Red Lake’s attorneys’ fees. Throughout this case, Red Lake has presented flawed economic analyses⁹ and untenable legal positions.¹⁰ It refused to disclose information,¹¹ resulting in wasted time and energy.¹² The ALJ and Commission have rejected its legal theories, analyses and positions on the central issues of this case, as demonstrated through Red Lake seeking reconsideration of key issues underlying the May 31 Order. This record provides no basis for Red Lake to be awarded attorneys’ fees.

II. OTP’S SPP FILING PROVIDES AN APPROPRIATE MEASURE OF OTP’S AVOIDED COST

A qualifying facility (QF) can elect to have its output purchased at a utility’s avoided cost “calculated at the time the [legally enforceable] obligation is incurred.”¹³ The Commission determined that OTP incurred a legally enforceable obligation (LEO) on December 7, 2016.¹⁴ The Commission reviewed the entire range of avoided cost estimates to determine OTP’s avoided cost as of December 7, 2016.¹⁵ The Commission determined that the avoided energy and capacity costs included in OTP’s January 3, 2017 SPP rate filing were the most appropriate

⁷ Tr. Vol. 1, p. 113-114 (Juhl).

⁸ Tr. Vol. 1, p. 144-145 (Juhl).

⁹ ALJ Report, ¶¶ 245-257.

¹⁰ ALJ Report, ¶¶ 119-143, 218-244.

¹¹ ALJ Report, ¶ 147.

¹² *See*, Tr. Vol. 1, p. 173-191.

¹³ 18 C.F.R. § 292.304 (d)(2)(ii).

¹⁴ May 31 Order, p. 8. The May 31 Order notes that the Facilities Study determined how to make the interconnection of the Red Lake project possible. May 31 Order, p. 8-9. The Facilities Study was not completed until January 20, 2017. ALJ Report, Attachment, ¶ 44. As discussed in the Department’s January 26, 2018 Reply to Exceptions, if the Commission determines that the Facilities Study is an integral part of determining the viability of the Red Lake project, then January 20, 2017 would be an appropriate LEO date. Department Reply to Exceptions, p. 2 (Jan. 26, 2018). A January 20, 2017 LEO date would moot Red Lake’s concerns regarding the timing of the 2017 SPP rate filing.

¹⁵ May 31 Order, p. 11-13.

measure of OTP's avoided costs, even though Red Lake is not eligible to sell its output under OTP's SPP tariff. The Commission's approach was reasoned and lawful.

OTP's January 3, 2017 SPP rate filing was made pursuant to the Commission's Cogeneration and Small Power Production Rules. Each SPP rate filing includes an estimate of the utility's "system average incremental energy costs by seasonal peak and off-peak periods for each of the next five years"¹⁶ and "net annual avoided capacity cost."¹⁷ There can be no question that the information provided under the Commission's Cogeneration and Small Power Production Rules is an avoided cost, as defined under PURPA and FERC's PURPA regulations.¹⁸ And there can be no question that OTP's 2017 SPP rate filing reflects *OTP's avoided cost*, which is the requirement under PURPA.¹⁹

Red Lake is not eligible to sell its output to OTP under OTP's SPP tariff.²⁰ Accordingly, a rigid adherence to the effective date of the SPP tariff rates is not required because Red Lake could not compel OTP to pay those rates. But that does not mean the Commission is prohibited from considering the avoided cost information presented in any of OTP's SPP rate filings as an appropriate measure of OTP's avoided costs.

The Commission considered OTP's 2016 SPP rate filing and 2017 SPP rate filing (along with other calculations) and determined that the 2017 rates were a more appropriate measure.

¹⁶ Minn. R. 7835.0500.

¹⁷ Minn. R. 7835.0600, subp. 5.

¹⁸ Compare 18 C.F.R. § 292.101 (6) ("*Avoided cost* means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.") with Minn. R. 7835.0100, subp. 23 (defining system incremental energy costs as "amounts representing the hourly energy costs associated with the utility generating the next kilowatt-hour of load during each hour.").

¹⁹ Compare Minn. Stat. § 216B.164, subd. 4(b) ("The qualifying facility shall be paid *the utility's* full avoided capacity and energy costs...") (emphasis added) and 18 C.F.R. § 292.304(d)(2) (providing for purchases at avoided costs); 18 C.F.R. § 292.101(b)(6) (defining "avoided costs" as "the incremental costs *to an electric utility*...") (emphasis added) with Red Lake Request for Reconsideration, p. 5 ("[T]he Commission has decided to apply a rate that is not specific to the Red Lake Falls project...").

²⁰ See Otter Tail Power Company Minnesota Electric Rate Schedule, Section 12.02 and 12.03 (limiting eligibility to QFs with generation capacity of 1,000 kW or less).

This approach is fully consistent with the Commission’s duty and power to consider all evidence available to it:

Chapter 216B gives to the [Commission] the duty as well as the power to set a just and reasonable rate after a full review of evidence and testimony. To peg an established rate to a rate advocated by any one of several expert witnesses is an arbitrary delegation of that duty.²¹

There is no basis to conclude that lesser review of the record or any more deference to experts is appropriate in setting avoidable costs, as the Commission’s determination must ultimately result in just and reasonable rates.²² The Commission is empowered to consider OTP’s SPP rate filings and is not constrained to any witness’s or party’s interpretation of the appropriate use of that information, contrary to Red Lake Falls’ argument.²³

Red Lake contends the Commission’s consideration of SPP rate filings must be limited to OTP’s 2016 SPP rate filing.²⁴ Red Lake is not correct for several reasons. First, as even Red Lake acknowledges,²⁵ it has no right (*i.e.* is not eligible) to provide service under OTP’s SPP tariffs. Since Red Lake has no right to demand OTP’s SPP rate at any point in time, the effective date of the OTP SPP tariffs is immaterial.²⁶ Second, Red Lake provides no basis to conclude that the information in OTP’s 2016 SPP rate filing (submitted on January 4, 2016 – 338 days prior to the LEO date) is a better reflection of OTP’s December 7, 2016 avoided cost than is OTP’s 2017 SPP rate filing (submitted on January 3, 2017 – 27 days after the LEO date). Rather, the information in OTP’s SPP rate filings and the clear, known and not outdated costs at which OTP

²¹ Hibbing Taconite Co. v. Minn. Pub. Serv. Comm’n, 302 N.W.2d 5, 11 (Minn. 1980).

²² Minn. Stat. § 216B.03; 16 U.S.C. § 824a-3 (b)(1) (requiring that any purchases made under PURPA “be just and reasonable to the electric consumers of the electric utility and in the public interest.”).

²³ Red Lake Request for Reconsideration, p. 6-8.

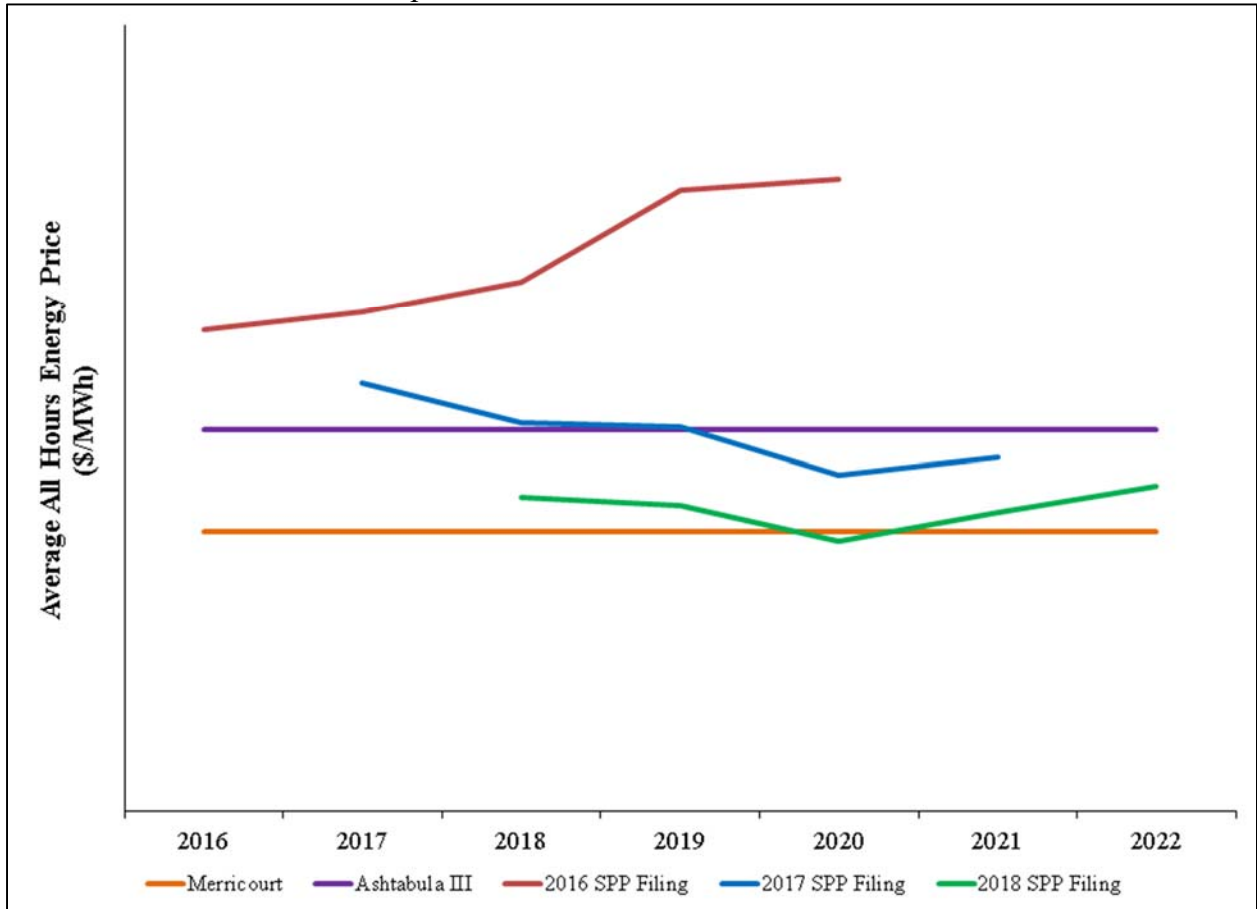
²⁴ Red Lake Request for Reconsideration, p. 4.

²⁵ Red Lake Request for Reconsideration, p. 5.

²⁶ Red Lake is therefore incorrect to assert the filed rate doctrine in anyway applies in this case. *See* Red Lake Request for Reconsideration, p. 4, n. 8.

can add resources to its system (another way to measure avoided cost)²⁷ shows that using the 2016 SPP tariff rate would result in it receiving a price *far above* OTP’s avoided cost, which is expressly prohibited under PURPA.²⁸

Figure 1
Comparison of Avoided Cost Information²⁹



The Commission acted on a sound and reasoned basis in looking to OTP’s 2017 SPP rate filing to assess OTP’s avoided cost as of December 7, 2016.

²⁷ May 31 Order, p. 10, n. 32.

²⁸ 16 U.S.C. § 824a-3(a)(2) (“No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”); 18 C.F.R. § 292.304(a)(2) (“Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.”).

²⁹ The underlying cost information Figure 1 contains a mix of Trade Secret and Highly Sensitive Trade Secret data. Attachment 1 provides the Trade Secret version of Figure 1, while Attachment 2 includes the Highly Sensitive Trade Secret version.

Ultimately, using the information in the 2017 SPP rate filing reflects a balancing of the encouragement of cogeneration and small power production with the obligation to establish just and reasonable rates consistent with the protection of ratepayers and the public.³⁰ Red Lake is incorrect to claim the May 31 Order does not encourage renewables and that the May 31 Order reflects a lower avoided cost estimate than Red Lake is legally entitled to receive.³¹ To the contrary, the May 31 Order is generous to Red Lake given:

1. The plain language of Minn. Stat. §216B.164, subd. 4 provides the avoided cost to be paid to renewable QFs is “the utility’s least cost renewable energy facility or the bid of a competing supplier of a least cost renewable energy facility.”³² Application of the plain text would result in a *lower* avoided cost than reflected in the May 31 Order.³³
2. The proxy method, which looks to the utility’s next available resource (Merricourt) to determine avoided cost,³⁴ would result in a *lower* avoided cost than reflected in the May 31 Order.³⁵
3. Red Lake would not qualify to sell capacity to OTP under OTP’s SPP tariff,³⁶ yet the May 31 Order (and OTP’s offer in settlement) included capacity value as well.
4. By utilizing the 2017 values from the 2017 SPP rate filing, the May 31 Order does not take into account the downward pressure on OTP’s avoided cost over the next several years, as shown in Figure 1, above.

The fact the Commission calculated OTP’s avoided cost using the information in OTP’s 2017 SPP rate filing instead of any of these alternatives demonstrates the Commission clearly fulfilled

³⁰ Minn. Stat. §§ 216B.03, 216B.164, subd. 1.

³¹ Red Lake Request for Reconsideration, p. 8, 9.

³² Minn. Stat. § 216B.164, subd. 4 (b).

³³ OTP’s next planned addition is the Merricourt Wind Farm project (Merricourt). OTP’s least cost renewable facility currently operating is the Ashtabula III project. Under the legislative formula, the proxy method for OTP results in avoided cost being based on Merricourt. ALJ Report, ¶¶ 202-204.

³⁴ May 31 Order, p. 10, n. 4. Red Lake’s expert identified the proxy method as being a recognized method for calculating avoided cost. Ex. 1, p. 8 (Schiffman Direct).

³⁵ ALJ Report, ¶¶ 202-204.

³⁶ See Otter Tail Power Company Minnesota Electric Rate Schedule, Section 12.02 and 12.03 (requiring on-peak capacity factor of 65% to obtain capacity payment).

its obligation to “give the maximum possible encouragement to cogeneration and small power production *consistent with protection of the ratepayers and the public.*”³⁷

Basing the determination of OTP’s avoided cost on the information in OTP’s 2017 SPP rate filing resulted in a reasonable calculation of OTP’s applicable avoided cost that is consistent with the evidence and facts in the record and with PURPA and FERC’s PURPA regulations. The information in OTP’s 2017 SPP rate filing was a reasonable basis to determine OTP’s avoided cost as of December 7, 2016. And, in relying on the information in OTP’s 2017 SPP rate filing, the Commission gave the maximum possible encouragement to cogeneration and small power production that is also *consistent with protection of the ratepayers and the public.* There is no basis to reconsider the May 31 Order.

III. THE COMMISSION IS NOT BOXED IN BY RED LAKE’S RIGID INTERPRETATION OF LAW OR LIMITED TO SELECTING BETWEEN ONLY THE POSITIONS ADVOCATED BY PARTIES

Red Lake continues to contend the Commission is limited to considering the avoided costs calculated using the peaker method.³⁸ This argument has been presented and rejected by the Administrative Law Judge and the Commission.³⁹ It is therefore not a basis upon which the Commission should reconsider the May 31 Order.⁴⁰ Further, in continuing to advocate for the avoided cost estimate prepared by its expert, Red Lake again fails to acknowledge the Commission’s obligation to establish avoided cost that is consistent with protection of the

³⁷ Minn. Stat. § 216B.164, subd. 1. Further, to the extent there is any doubt as to OTP’s avoided cost, such doubts must be resolved in favor of customers. Minn. Stat. § 216B.03.

³⁸ Red Lake Request for Reconsideration, p. 4, 9-10.

³⁹ ALJ Report, ¶¶ 221, 241; Red Lake Exceptions, p. 4-10; May 31 Order, p. 13.

⁴⁰ *Otter Tail Power Co.*, Docket No. E017/GR-15-1033, Order Granting Reconsideration in Part and Denying in Part, p. 1 (July 21, 2017) (denying portion of petitions for reconsideration that “do not raise new issues, do not point to new and relevant evidence, do not expose errors or ambiguities in the order, and do not persuade the Commission that it should rethink the decisions set forth in its order.”).

additional renewable capacity both in Minnesota and in the MISO territory. Both underestimates cause Mr. Schiffman's avoided cost estimates to be too high. Because approximately 90 percent of Mr. Schiffman's avoided cost estimate consists of energy costs, overestimating future energy costs results in overestimating Otter Tail's avoided costs.⁴⁶

Other than incorrectly attempting to equate the expert analysis in this case,⁴⁷ Red Lake does nothing to refute the ALJ's conclusion. The inherent unreasonableness of Red Lake's avoided cost, which was recognized (correctly) by the Commission,⁴⁸ means it cannot be considered in establishing OTP's avoided cost in a manner that is consistent with protection of the ratepayers and the public.

Red Lake's reliance on its expert's avoided cost calculation also demonstrates that its argument about the timing of the avoided cost analysis is a misdirection, designed to inflate the price it receives for its project. After its position that a LEO arose in October 2015 was thoroughly rejected by the ALJ, Red Lake changed course.⁴⁹ Yet, Red Lake continues to support an avoided cost that is based upon data *more than one year* separated from the LEO date chosen by the Commission.⁵⁰ If Red Lake was actually concerned about having avoided cost calculated at the time the LEO is incurred, it would not continue to support the *most* outdated avoided cost figure in the record.⁵¹ Red Lake's arguments are another manifestation of its disregard for OTP's

⁴⁶ ALJ Report, ¶ 257.

⁴⁷ Red Lake Request for Reconsideration, p. 5, 6. ("The Commission was presented with numbers calculated by experts in the field of avoided cost pricing; both parties' experts used the same methodology (i.e., the peaker method); both parties' experts incorporated the relevant information that gas was the marginal resource for the region; both parties' experts reached similar conclusions regarding that the avoided cost *for this specific project's parameters* should be. ... Using similar assumptions, Mr. Schiffman, Red Lake Falls' expert, arrived at an avoided cost rate of \$57.05 per MWh. Both experts' rates were based on in-depth modeling specific to the Red Lake Falls project."). The ALJ Report is clear that while the methods may have been similar, there is no real comparison in terms of quality of analysis between Red Lake's expert and OTP's expert. See ALJ Report, ¶¶ 245-257.

⁴⁸ May 31 Order, p. 13.

⁴⁹ Red Lake Exceptions, p. 22.

⁵⁰ ALJ Report, ¶¶ 249, 257.

⁵¹ If Red Lake's argument about timing was serious, then looking to the price of the Merricourt project or the generic resources from OTP's integrated resource plan would be more appropriate than being trapped into utilizing the peaker method.

customers and the Commission’s obligation to render a decision that is consistent with protection of the ratepayers and the public.

In addition to being incorrect as a matter of law and inconsistent with the Commission’s obligations, Red Lake’s focus on the peaker method in this case is at odds with the text and intent of PURPA. The record is clear that OTP is able to add resources at prices that are significantly lower than those calculated under the peaker method and that avoided costs in OTP’s SPP rate filings are lower than those calculated using the peaker method.⁵² Thus, reliance on the peaker method in this case *would adversely impact* OTP’s ratepayers (contrary to Red Lake’s argument).⁵³ In this case, the avoided cost calculated using the peaker method violates the express PURPA prohibition against paying more than avoided cost for output from a QF.⁵⁴ Utilizing the peaker method in this case also would be contrary to the intent of PURPA that ratepayers of a utility not subsidize cogenerators or small power producers.⁵⁵ Accordingly, Red Lake’s request should be rejected.

IV. RED LAKE IS NOT A PREVAILING PARTY AND IS NOT ENTITLED TO ATTORNEY’S FEES

Despite a thorough rejection of its peaker-based economic and legal analysis, Red Lake continues to assert it is a prevailing party and entitled to attorneys’ fees. There is no basis in law or equity for OTP, a small rural utility, to pay the fees associated with the unreasonable and untenable case presented by of one of the largest utilities in the country. The fundamental flaw in Red Lake’s position is only highlighted by the fact that it is made through a request that the

⁵² See Figure 1, above.

⁵³ Red Lake Request for Reconsideration, p. 9.

⁵⁴ 16 U.S.C. § 824a-3(a)(2) (“No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.”); 18 C.F.R. § 292.304(a)(2) (“Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.”).

⁵⁵ May 31 Order, p. 13; ALJ Report, ¶¶ 185, 242 (citing *The Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 95-1750, 9th Cong., 2nd Sess. 99).

Commission change course from the May 31 Order: if Red Lake was truly a prevailing party, no reconsideration would be necessary.

The Commission was correct in determining that Red Lake was not a prevailing party in this case.⁵⁶ Prevail means “to obtain the relief sought in the underlying action.”⁵⁷ Similarly, Minnesota law provides that “[i]n determining who qualifies as the prevailing party in an action, the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action.”⁵⁸ Red Lake initiated this proceeding seeking a \$57/MWh avoided cost rate for the output of the Red Lake project for 20 years, based on an October 2015 LEO date. The May 31 Order clearly did not give Red Lake the relief it sought – a fact highlighted by Red Lake seeking reconsideration on fundamental aspects of the Commission’s decision. The Commission correctly exercised its discretion in determining that Red Lake was not a prevailing party.⁵⁹

Red Lake now asks that it be deemed a prevailing party because the May 31 Order reflects *some* positions it ultimately adopted after its original theories were rejected.⁶⁰ But even under a standard that looks to secondary (or tertiary) theories and positions, Red Lake is not a

⁵⁶ May 31 Order, p. 14.

⁵⁷ Black’s Law Dictionary 560 (3rd Pocket Ed. 2006).

⁵⁸ Borchert v. Maloney, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted).

⁵⁹ Posey v. Fossen, 707 N.W.2d 712, 715 (Minn. App. 2006) (noting prevailing-party determination requires “a careful weighing of the relative success of the parties,” which reserves “a certain amount of discretion in the district court.”). A trial court’s discretion in awarding costs and disbursements is broad and its decision should not be disturbed absent clear abuse of discretion. *E.g.*, Cheyenne Land Co. v. Wilde, 463 N.W.2d 539, 540 (Minn. App. 1990). Further, Red Lake’s assertion that the Commission is required to award it attorneys’ fees puts the cart before the horse: proscriptive language regarding the award of fees still requires a determination that a party prevailed in the matter. Benigni v. County of St. Louis, 585 N.W.2d 51, 54-55 (Minn. 1998) (“Under Minnesota Statute section 549.04, a prevailing party ‘shall be allowed’ reasonable costs in a district court action, including cases heard in tax court. However, the district court retains discretion to determine which party, if any, qualifies as a prevailing party.”).

⁶⁰ This kind of partial success is not sufficient to meet the prevailing party standard. *See* Elsenpeter v. St. Michael Mall, Inc., 794 N.W.2d 667, 673 (Minn. App. 2011).

prevailing party. Ultimately, the May 31 Order mirrors OTP’s final offer in settlement.⁶¹ Red Lake did not accept this offer,⁶² meaning the result of the May 31 Order could not be the “relief sought” by Red Lake or that Red Lake “succeeded in the action.”

Red Lake attempts to avoid its lack of overall success by focusing on individual elements of the case. But here too, Red Lake falls short. The ALJ and the Commission both correctly recognized that OTP has always viewed price and term as interrelated concepts.⁶³ The price/term combination adopted in the May 31 Order is the same as what was included in OTP’s final offer in settlement⁶⁴ To that extent, OTP could be considered to have prevailed on the price/term issue.

Red Lake’s assertion regarding success on the LEO issue conveniently ignores the fact the ALJ and Commission rejected Red Lake’s October 2015 LEO date and the associated legal theories (and 87 pages of briefing).⁶⁵ Finally, Red Lake’s assertion that it “prevailed” on avoided cost is negated by it seeking reconsideration on the avoided cost issue and the facts that: (1) the avoided cost in the May 31 Order was the same as included in OTP’s final offer in settlement;⁶⁶ (2) the methodology used in the May 31 Order (i.e. looking at the information from the Small Power Producer rate filings) is the same methodology used by OTP in its negotiations throughout

⁶¹ TRADE SECRET OTP Status of Negotiations Letter dated March 30, 2018.

⁶² Red Lake Response to OTP’s Status of Negotiations Letter dated April 9, 2018.

⁶³ ALJ Report, ¶ 170; May 31 Order, p. 10.

⁶⁴ TRADE SECRET OTP Status of Negotiations Letter dated March 30, 2018.

⁶⁵ ALJ Report, ¶¶ 119-138; May 31 Order, p. 4-9. Approximately 75% of the 232 pages submitted by Red Lake in its Memorandum of Law, Initial Brief, Reply Brief, Exceptions and Reply to Exceptions relate to its arguments regarding the legal standard for formation of a LEO and calculation of avoided cost, both of which were rejected by the Commission and the ALJ. Further, the expert testimony of its expert was thoroughly rejected by the Commission and ALJ.

⁶⁶ TRADE SECRET OTP Status of Negotiations Letter dated March 30, 2018; ALJ Report, ¶ 262; May 31 Order, p. 13.

this case;⁶⁷ and (3) the avoided cost in the May 31 Order is much closer to OTP's negotiation position for a longer-term contract than it is to Red Lake's asserted avoided cost.⁶⁸

Because Red Lake did not prevail in this dispute, any arguments it makes regarding whether it should be entitled to recover a proportionate amount of attorneys' fees should also be rejected. None of the cases cited by Red Lake⁶⁹ require the Commission to award attorneys' fees to a party that does not prevail on the underlying merits. The Commission exercised its discretion, considered the general result of this case, and correctly determined that Red Lake was not the prevailing party. Once again, the correctness of the Commission's decision is underscored by Red Lake seeking reconsideration: Red Lake would not have moved for reconsideration if it truly believed it prevailed in this dispute.

Finally, the Commission should consider the policy implications of Red Lake's request. Red Lake has presented flawed economic analyses⁷⁰ and untenable legal positions.⁷¹ It refused to disclose information,⁷² resulting in wasted time and energy.⁷³ Awarding fees after such behaviors sends a signal to developers that there is little cost associated with unreasonable requests put forward just to advance negotiations or gain leverage. It will ultimately encourage developers to

⁶⁷ Ex. 102, p. 3-4 (Draxten Direct); Ex. 104, p. 2 (Draxten Supplemental Direct).

⁶⁸ Compare Ex. 105, p. 3 (TRADE SECRET Draxten Supplemental Direct) (identifying OTP's negotiation position for a 10-year PPA) and Ex. 102 at Exhibit 1, Emails (OTP-6), p. 153 of 157 (Draxten Direct) (stating that pricing for a longer term PPA (15, 20, 25 years) would be in the low \$20/MWh range) with Red Lake Initial Br., p. 28 (stating avoided cost should be \$57.05/MWh).

⁶⁹ Each of the cases cited by Red Lake is inapposite to its position. For example, the plaintiffs in *Hensley* were clearly prevailing parties – they sought and were granted an order finding their confinement conditions were unconstitutional. *Hensley v. Eckerhart*, 461 U.S. 424, 427-28 (1983). The actual issue in *Hensley* was how to award fees to a *prevailing party*, which clearly is not Red Lake. The fee provision in *Riverview Muir Doran, LLC* was contractual, not statutory. *Riverview Muir Doran, LLC v. JADT Development Group, LLC*, 776 N.W.2d 172, 179 (Minn. Ct. App. 2009). And *Scott* involved award of fees following a finding of violations of the Motor Vehicle Retail Installment Sales Act. See *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 668 N.W.2d 45, 50 (Minn. Ct. App. 2003) (noting reasonable attorneys' fees can be awarded under Minn. Stat. § 168.75, which was subsequently re-numbered as Minn. Stat. § 53C.12).

⁷⁰ ALJ Report, ¶¶ 245-257.

⁷¹ ALJ Report, ¶¶ 119-143, 218-244.

⁷² ALJ Report, ¶ 147.

⁷³ See, Tr. Vol. 1, p. 173-191.

bring complaints before the Commission that have little or no merit. And granting Red Lake’s request is especially perverse in this case where Red Lake has the financial backing of Consolidated Edison, Inc. – “one of the biggest [utilities] in the country...”⁷⁴ – and OTP has incurred its own costs advocating on behalf of customers.

Red Lake’s Request for Reconsideration does not raise new issues, does not point to new and relevant evidence, does not expose errors or ambiguities in the May 31 Order regarding attorneys’ fees, and the Commission’s decision is consistent with the facts and the law.

V. CONCLUSION

The May 31 Order is lawful and reasonable. Red Lake’s Request for Reconsideration should be denied.

Dated: July 2, 2018

Respectfully submitted,

Otter Tail Power Company

By: /s/ KRISTIAN M. DAHL

Kristian M. Dahl
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56537
Telephone: (218) 739-8722
and

Richard J. Johnson
Patrick T. Zomer
Moss & Barnett,
A Professional Association
150 South 5th Street
Suite 1200
Minneapolis, MN 55402
Telephone: (612) 877-5000

Attorneys on Behalf of Otter Tail
Power Company

⁷⁴ Tr. Vol. 1 at 113-114 (Juhl). Consolidated Edison, Inc. is the 11th largest utility in the country based on market capitalization. See EEI Market Capitalization Data.

[PROTECTED DATA BEGINS...

...PROTECTED DATA ENDS]

[HIGHLY SENSITIVE PROTECTED DATA BEGINS...

HIGHLY SENSITIVE PROTECTED DATA ENDS]

CERTIFICATE OF SERVICE

**RE: In the Matter of a Complaint by Red Lake Falls Community Hybrid, LLC
regarding Potential Purchased Power Agreement (PPA) Terms and Pricing with
Otter Tail Power Company
Docket No. E017/CG-16-1021**

I, Kim Ward, hereby certify that I have this day served a copy of the following, or a summary thereof, on Daniel P. Wolf and Sharon Ferguson by e-filing, and to all other persons on the attached service list by electronic service or by First Class Mail.

**Otter Tail Power Company
CORRECTED Answer to Request for Reconsideration of
Red Lake Falls Community Hybrid, LLC**

Dated this **3rd** day of **July 2018**.

/s/ KIM WARD
Kim Ward, Regulatory Filing Coordinator
Otter Tail Power Company
215 South Cascade Street
Fergus Falls MN 56537
(218) 739-8268

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1800 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_16-1021_Official
George	Crocker	gwillc@nawo.org	North American Water Office	PO Box 174 Lake Elmo, MN 55042	Electronic Service	No	OFF_SL_16-1021_Official
Kristian	Dahl	kdahl@otpc.com	Otter Tail Power Company	215 South Cascade Street Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-1021_Official
Lisa	Daniels	lisadaniels@windustry.org	Windustry	201 Ridgewood Ave Minneapolis, MN 55403	Electronic Service	No	OFF_SL_16-1021_Official
Timothy	DenHerder Thomas	timothy@cooperativeenergyfutures.com	Cooperative Energy Futures	3500 Bloomington Ave. S Minneapolis, MN 55407	Electronic Service	No	OFF_SL_16-1021_Official
Ian	Dobson	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012130	Electronic Service	Yes	OFF_SL_16-1021_Official
Brian	Draxten	bhdraxten@otpc.com	Otter Tail Power Company	P.O. Box 496 215 South Cascade Street Fergus Falls, MN 565380498	Electronic Service	No	OFF_SL_16-1021_Official
John	Farrell	jfarrell@ilsr.org	Institute for Local Self-Reliance	1313 5th St SE #303 Minneapolis, MN 55414	Electronic Service	No	OFF_SL_16-1021_Official
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_16-1021_Official
Jeffrey	Hammons	jhammons@elpc.org		35 East Wacker Dr Suite 1600 Chicago, IL 60601	Electronic Service	No	OFF_SL_16-1021_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Dan	Juhl	djuhl@juhlenergy.com	Juhl Energy Inc.	1502 17th St SE Pipestone, MN 56164	Electronic Service	No	OFF_SL_16-1021_Official
Brad	Klein	bklein@elpc.org	Environmental Law & Policy Center	35 E. Wacker Drive, Suite 1600 Suite 1600 Chicago, IL 60601	Electronic Service	No	OFF_SL_16-1021_Official
Gregg	Mast	gmast@cleanenergyeconomymn.org	Clean Energy Economy Minnesota	4237 24th Avenue S Minneapolis, MN 55406	Electronic Service	No	OFF_SL_16-1021_Official
Marcus	Mills	Marcus@communitypowermn.org	Community Power	2720 E 22nd St Minneapolis, MN 55406	Electronic Service	No	OFF_SL_16-1021_Official
Duane	Ninneman	duane@cureriver.org	Clean Up the River Environment	117 South 1st St Montevideo, MN 56265	Electronic Service	No	OFF_SL_16-1021_Official
Matthew	Olsen	molsen@otpc.com	Otter Tail Power Company	215 South Cascade Street Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-1021_Official
Jeff	Oxley	jeff.oxley@state.mn.us	Office of Administrative Hearings	600 North Robert Street St. Paul, MN 55101	Electronic Service	No	OFF_SL_16-1021_Official
Dean	Pawlowski	dpawlowski@otpc.com	Otter Tail Power Company	PO Box 496 215 S. Cascade St. Fergus Falls, MN 565370496	Electronic Service	No	OFF_SL_16-1021_Official
Roger	Schiffman	roger_schiffman@yahoo.com	Red Lake Falls Community Hybrid, LLC	1701 Arena Drive Davis, CA 95618	Electronic Service	No	OFF_SL_16-1021_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	7400 Lyndale Ave S Ste 190 Richfield, MN 55423	Electronic Service	Yes	OFF_SL_16-1021_Official
David	Shaffer	shaff081@gmail.com	Minnesota Solar Energy Industries Project	1005 Fairmount Ave Saint Paul, MN 55105	Electronic Service	No	OFF_SL_16-1021_Official
Cary	Stephenson	cStephenson@otpc.com	Otter Tail Power Company	215 South Cascade Street Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-1021_Official
Randy	Synsteliën	rsynsteliën@otpc.com	Otter Tail Power Company	215 S Cascade St Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-1021_Official
Michael J	Uda	michaeluda@udalaw.com	Uda Law Firm, P.C.	7 W 6th St Suite W4H Helana, MT 59601	Electronic Service	No	OFF_SL_16-1021_Official
Kim	Ward	kaward@otpc.com	Otter Tail Power Company	215 South Cascade Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-1021_Official
Josh	Winters	N/A	MPIRG	2722 University Ave SE Minneapolis, MN 55414	Paper Service	No	OFF_SL_16-1021_Official
Daniel P	Wolf	dan.wolf@state.mn.us	Public Utilities Commission	121 7th Place East Suite 350 St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_16-1021_Official
Patrick	Zomer	Patrick.Zomer@lawmoss.com	Moss & Barnett a Professional Association	150 S. 5th Street, #1200 Minneapolis, MN 55402	Electronic Service	Yes	OFF_SL_16-1021_Official