BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie J. Sieben	Commissioner
John A. Tuma	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

ISSUE DATE: May 31, 2018

DOCKET NO. E-017/CG-16-1021

DOCKET NO. E-017/CG-17-464

ORDER ESTABLISHING DATE OF LEGALLY ENFORCEABLE OBLIGATION, TERM LENGTH, AND AVOIDED COST OF ENERGY FOR THE RED LAKE FALLS HYBRID SOLAR/WIND PROJECT

PROCEDURAL HISTORY

Consolidated Edison Development (ConEd) is the parent of Red Lake Falls Community Hybrid, LLC (Red Lake or ConEd), which is a small power producer of electricity. On December 7, 2016, ConEd filed a complaint against Otter Tail Power Company (Otter Tail), claiming that Red Lake's offer to sell electricity to Otter Tail created a legally enforceable obligation requiring Otter Tail to enter into a power purchase agreement (PPA) for the output of Red Lake's proposed facility. The Complaint was filed under Minn. Stat. § 216B.164, subd. 5, which governs disputes between utilities and cogeneration or small power producer facilities (qualifying facilities, or QFs).[1]

The Complaint alleged that Otter Tail violated its obligation to purchase electricity by failing to offer terms and pricing consistent with federal regulations implementing the Public Utility Regulatory Policy Act of 1978 (PURPA).[2]

On January 9, 2017, Otter Tail filed an answer to the Complaint denying the allegations and recommending that the Commission dismiss the Complaint. In the alternative, Otter Tail asked that the Commission refer the Complaint to the Office of Administrative Hearings for contested case proceedings. Otter Tail stated that there is no legally enforceable obligation (LEO) between the two entities, and that Red Lake insisted on terms and conditions that would have required Otter Tail to offer purchase rates above its avoided costs in violation of PURPA.

[1] Small power production facilities produce energy (fewer than 80 megawatts) primarily by using biomass, waste, renewable resources, geothermal resource, or any combination thereof.

[2] 16 U.S.C. § 824a-3.

On May 10, 2017, the Commission issued a Notice of and Order for Hearing, referring this matter to the Office of Administrative Hearings (OAH) for contested case proceedings.

On December 27, 2017, the ALJ filed his Findings of Fact, Conclusions of Law, and Recommendations (ALJ Report). The ALJ also filed an attachment to the ALJ Report, reciting the parties' stipulated dates relevant to this proceeding.

Between January 16 and January 26, 2018, the parties filed Exceptions and Replies to Exceptions to the ALJ Report.

On April 26, 2018, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Summary

In this matter the Commission has applied Minnesota law to find that December 7, 2016 is the date the legally enforceable obligation was established, the term of the LEO is 20 years, and the avoided costs of the project should be based on Otter Tail's 2017 Small Power Production Tariff rates.

II. The Red Lake Falls Project

The Red Lake Falls Project is a 4.6 megawatt (MW) hybrid wind/solar generation project (Project) being developed by ConEd through its wholly owned subsidiary Red Lake Falls. The Project is designed to combine a 4.6 MW wind turbine with a 1 MW solar installation. The combined wind/solar facility is designed to generate a maximum of 4.6 MW of power. The Project's solar generation will provide energy to supplement wind generation during daylight periods of little or no wind.

The Commission relies on the timeline of facts set forth in the ALJ Report, and the parties' stipulated facts pertinent to this proceeding, including the commercial discussions between Red Lake and Otter Tail which occurred prior to the filing of the Complaint, the proposed project details, and the generation interconnection process with the Midcontinent Independent System Operator (MISO). These are set forth in Attachment 1 to the ALJ Report. [3]

III. Summary of the Issues

In this proceeding the parties addressed the following contested issues:

- Whether and when a legally enforceable obligation (LEO) was established between Red Lake Falls and Otter Tail for the 4.6 megawatt (MW) hybrid wind/solar generation project being developed by ConEd through its wholly owned subsidiary Red Lake Falls;

[3] Stipulated Dates of Red Lake Falls and Otter Tail. The Commission notes that the Department was not a participant in the Stipulation.

- If a LEO does exist for the Project, for how long are the prices of Otter Tail's purchase obligation fixed; and

- What is a reasonable avoided cost rate at which Otter Tail should make those purchases.

IV. The Administrative Law Judge Proceeding

The Administrative Law Judge (ALJ) assigned to this matter was Jeffrey Oxley. The ALJ received and reviewed the testimony of fact and expert witnesses; initial, reply, and post-hearing briefs from the parties; and the parties' proposed findings of fact. At the request of the ALJ, ConEd and Otter Tail also filed a stipulated statement of the relevant facts leading up to the filing of the Complaint.[4]

On December 27, 2017, the ALJ filed his Findings of Fact, Conclusions of Law, and Recommendations. He made 267 findings of fact, two conclusions of law, and three recommendations on contested issues. By January 26, 2018, ConEd, Otter Tail, the Department, and the Competitive Clean Energy Advocates (CCEA) had filed exceptions to the ALJ Report.

The Commission thanks the ALJ for his work on this matter. The Commission has itself examined the record, considered the ALJ Report, considered the exceptions to that Report, and heard oral argument from the parties. Based on the entire record, the Commission adopts without modification most of the ALJ's findings and his alternative recommendation concerning the date the LEO was established, and his recommendation regarding the term of the LEO. With respect to the avoided costs for the Project, the Commission reaches a different decision, as delineated and explained below.

V. Regulatory Background

A. Public Utilities Regulatory Policy Act

PURPA as amended, and related regulations, are intended to promote U.S. energy independence by requiring electric utilities to accept and distribute electricity from independent power producers and co-generators.[5] When a generator meeting certain qualifications – called a qualifying facility (QF) – makes a viable offer to sell its electricity to a specific electric utility, the offer may establish an LEO on the part of the utility to purchase the electricity at either the utility's avoided cost or a negotiated rate.[6]

PURPA directs states to adopt state policies implementing its provisions.[7] Minnesota has implemented PURPA through the adoption of Minn. Stat. § 216B.164 (Cogeneration and Small Power Production) and Minn. R. Chap. 7835. Accordingly, under PURPA's statutory scheme,

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[4] ConEd and Otter Tail had been in discussions about the Project for more than a year and were unable to reach agreement on the issues identified above.

[5] Public Utility Regulatory Policies Act of 1978 § 210(b), 16 U.S.C. § 824a-3 (2012).

[6] 16 U.S.C. § 824a-3(d). Avoided costs are defined as the cost to the utility which, but for the purchase from the qualifying facility, would be incurred by the utility in generating the electricity itself or purchasing the electricity from another source.

[7] 16 U.S.C. § 824a–3(f).

states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by the Federal Regulatory Energy Commission (FERC), including the establishment and term of an LEO.

B. Minnesota's Implementation of PURPA

To implement PURPA, Minnesota adopted Minn. Stat. § 216B.164. Subdivision 4(b) provides the following guidance on the determination of avoided cost under the statute:

> The utility to which the qualifying facility is interconnected shall purchase all energy and capacity made available by the qualifying facility. The qualifying facility shall be paid the utility's full avoided capacity and energy costs as negotiated by the parties, as set by the commission, or as determined through competitive bidding approved by the commission. 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, unless the commission's resource plan order, under section 216B.2422, subdivision 2, provides that the use of a renewable resource to meet the identified capacity need is not in the public interest.

The Commission also promulgated rules to implement PURPA in Minn. R. Ch. 7835.

Further, the statute provides, among other things, for the Commission to resolve disputes between electric utilities and qualifying facilities.[8] Commission rules require each utility to file tariffs containing the operational and financial information necessary for a baseline calculation of avoided costs, to update the tariffs annually, and to file annual reports on all transactions with qualifying facilities over the course of the year.[9]

VI. Date the LEO Was Established

A. Introduction

In determining whether a legally enforceable obligation was created by parties who meet the statutory requirements of a qualifying facility, this Commission focuses on the viability of a QF's proposal. For example, in 1993, a developer of gas-fueled electric generators, LS Power Corporation, sought to compel Northern States Power Company to recognize a duty under PURPA to purchase electricity from the corporation. In that case the Commission noted that a legally enforceable obligation may arise when a qualifying facility does everything within its power to establish its project's viability:

[8] Minn. Stat. § 216B.164, subd. 5.

[9] Minn. R. 7835.0300, 7835.0500 (referring to "incremental cost").

> Commissions and courts in other jurisdictions have generally found an LEO to exist when a QF has done everything within its power to create an enforceable obligation such that only an act of acceptance by the utility or approval by the state regulatory authority remains to establish the existence of a contract. This inquiry is very fact-specific and involves the consideration of a number of factors, including but not limited to (1) price; (2) site and design details of the proposed QF; (3) interconnection plans; (4) financing for the project; and (5) fuel supply.[10]

ConEd challenges the breadth of the Commission's discretion to specify criteria for determining when a legally enforceable obligation arises in Minnesota, citing a long list of FERC rulings, including FERC's *JD Wind* decision, which it argues justifies the various dates it proposed.[11] But *JD Wind* merely stands for the proposition that a commission may not reject viable projects merely because they may provide an intermittent supply of energy. Far from limiting the Commission's role, PURPA and FERC delegate to states the authority to implement PURPA's policies,[12] which necessarily requires states to exercise their own judgment on matters not specified by federal law.[13]

B. Final Positions of the Parties

All parties to this dispute agree that an LEO exists—the question to be addressed is the date on which the LEO was created for the purchase and sale of power.

The parties differed as to this date with their positions evolving over the course of the proceeding, from as early as October 13, 2015, (ConEd) to as late as August 21, 2017 (Otter Tail). The final positions of the parties are set forth below:

Proposed LEO Date	**Party**	**Basis for Recommendation**
December 7, 2016	ConEd	Date Complaint filed
January20, 2017	CCEA/Department alternate date	Date Facilities Study completed
May 8, 2017	Department	Date Generation Interconnection Agreement (GIA) executed
August 21, 2017	Otter Tail	Date of first payment under the GIA

[10] *In the Matter of the Complaint of LS Power Corporation Against Northern States Power Company*, Docket No. E-002/C-92-899, Order Requiring Negotiations (April 12, 1993)(*LS Power Order*).

[11] *JD Wind 1, LLC, JD Wind 2, LLC, JD Wind 3, LLC, JD Wind 4, LLC, JD Wind 5 LLC, JD Wind 6, LLC*, 129 FERC ¶ 61,148 (2009), order on rehearing, 130 FERC ¶ 61,127 (2010).

[12] 16 U.S.C. § 824a-3(f).

[13] See, for example, *JD Wind* on rehearing, *supra*, 130 FERC ¶ 61,127 (2010) at ¶ 24 ("[FERC] generally does leave to state commissions the issue of when and how a legally enforceable obligation is created….").

1. December 7, 2016

ConEd argued that December 7, 2016, the date on which ConEd filed its Complaint against Otter Tail, is the date the LEO in this matter was created. ConEd asserted that FERC has found the filing of a complaint with a state commission to be an acceptable date for the creation of an LEO, relying on a number of FERC declaratory rulings.[14] ConEd also argued that by December 2016, it had reached an impasse in its power purchase agreement negotiations with Otter Tail, which had begun in October 2015.

Dan Juhl, the principal of Juhl Energy (the former parent company of Red Lake), also testified that the date the Complaint was filed is the appropriate date of the LEO.[15]

2. May 8, 2017

The Department stated that the record supports multiple dates that the Commission might select for the date an LEO was established. The Department analyzed the issue by applying the factors the Commission had considered in 2013 in assessing a QF's viability, including the existence of performance guarantees, financing, turbine supply, easements, site permits, site and design details, and interconnection plans.[16] The Department concluded that ConEd had done everything in its power to create an LEO by May 8, 2017, because that was the date that ConEd had executed the GIA with Otter Tail and MISO.

As an alternate date, the Department proposed January 20, 2017 as the date the LEO was established. The Department explained that this was the date that the Facility Study (which established how interconnection could be achieved for the Project) was completed.

3. August 21, 2017

Otter Tail questioned FERC's authority to bind the Commission through the declaratory rulings relied on by ConEd and CCEA. Instead, Otter Tail argued that FERC left to the states the authority to set the parameters and conditions giving rise to an LEO.

Otter Tail argued that before an LEO is established, the utility must have done everything in its power to establish the viability of the power purchase agreement, and the utility must be ready, willing, and able to go forward. Otter Tail argued that interconnection, commercial, and operational issues prevented the establishment of an LEO in this matter until August 21, 2017, when ConEd made a construction milestone payment to commence work on interconnecting with Otter Tail's transmission line.

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[14] *See, e.g., Virginia Electric Power Co.*, Order Denying Application to Terminate Mandatory Purchase Obligations, 151 FERC 61,038 (April 16, 2015) ALJ Finding of Fact 94.

[15] ALJ Finding of Fact 99 (Juhl Supplemental Direct at 2).

[16] *See, In re Petition by Highwater Wind L.L.C. and Gadwall Wind L.L.C. for Resolution of a Cogeneration and Small Power Production Dispute with Minnesota Power under Minn. Stat. § 216B.164, Subd. 5.*, Docket No. E-015/CG-11-1073, Order Denying Claim of Legally Enforceable Obligation (Feb. 25, 2013).

C. Recommendation of the ALJ

1. Federal Versus State Law

The ALJ considered whether federal or state law controls the issue of whether an LEO has been established. The ALJ found that state law controls the issue, and that the legal analysis used by the Commission in its prior cases addressing the date an LEO is established is not inconsistent with PURPA or with FERC's rules implementing PURPA.[17] Further, the ALJ found that ConEd had not shown that the Commission's test for the establishment of an LEO as set out by its prior cases (*LS Power* and *Highwate*r) violates PURPA or FERC's rules implementing PURPA.[18] Finally, the ALJ found that Otter Tail did not intentionally delay the Project's process through MISO.

2. Establishment of the LEO

The ALJ made alternative recommendations for the Commission to consider as to the date an LEO was established. The ALJ agreed with the Department that it is not reasonable to require the QF to make a significant investment in interconnection facilities in order to establish an LEO, and it is therefore unreasonable to require ConEd to pay for interconnection facilities before the Commission determines the avoided costs. The ALJ concluded that ConEd had demonstrated viability of the Project by May 8, 2017, the date ConEd executed the GIA with Otter Tail and MISO.[19]

Alternatively, the ALJ recommended December 7, 2016, as the date an LEO was established, finding that:

> . . . By that date, Red Lake Falls had made a substantial commitment to project because it: (1) had paid for the Facility Study, which established how interconnection could be achieved, (2) had executed a Land Lease and Wind Easement, (3) had necessary approvals from government entities, (4) had wind study results, (5) had reserved equipment, and (6) had filed the Complaint in this matter with the MPUC. The GIA instructed the parties on interconnection, but the Facility Study determined how to make interconnection possible. It is true that Red Lake Falls did not self-certify as a QF until March 2016, but that filing scarcely represents a substantial commitment of time or money.[20]

[17] ALJ Finding 125.

[18] ALJ Finding of Fact 125.

[19] ALJ Finding of Fact 142.

[20] ALJ Finding of Fact 143.

D. Commission Action

The Commission agrees with the ALJ and Otter Tail that Congress, through PURPA, left to state commissions the responsibility and discretion to determine if and when an LEO occurs.[21]

On two prior occasions the Commission has considered whether and when an LEO had been established. In *LS Power vs. Northern States Power*, the Commission rejected the cogenerating facility's contention that an LEO had been established either by submitting a term sheet to the utility or by submitting a contract to the commission without evidence of interconnection details, financing, and other important details. The Commission endorsed the actions of other jurisdictions that:

> [H]ave generally found a LEO to exist when a QF has done everything within its power to create an enforceable obligation such that only an act of acceptance by the utility or approval by the state regulatory authority remains to establish the existence of a contract. This inquiry is very fact-specific and involves the consideration of a number of factors, including but not limited to: (1) price; (2) site and design details of the proposed QF; (3) interconnection plans; (4) financing for the project; and (5) fuel supply.[22]

The Commission also considered the Commission's decision in the *Highwater* matter.[23] In 2013, developers of two separate wind turbine projects asked the Commission to find that LEOs had been created, compelling Minnesota Power to purchase their power. The Commission found that neither petitioner's project had advanced sufficiently to indicate the project's viability.[24] The Commission noted the absence of performance guarantees, the lack of evidence that financing had been finalized or commitments obtained from manufacturers to provide wind turbines, and that the parties had not applied for site permits, developed site and design details, nor finalized interconnection plans.

The Commission has considered the dates proposed by the parties for the creation of an LEO and the recommendations of the ALJ. The Commission finds that by the ALJ's alternative date, December 7, 2016, an LEO had been established in this matter. As noted by the ALJ, by that date ConEd had made a substantial commitment to the Project because it: (1) had paid for the Facility Study, which established how interconnection could be achieved, (2) had executed a Land Lease and Wind Easement, (3) had obtained necessary approvals from government entities, (4) had wind study results, (5) had reserved equipment, and (6) had filed the Complaint with the Commission.

As recognized by the ALJ, the generation interconnection agreement, which instructed the parties on interconnection, is not determinative. Instead, the Facility Study (which was

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[21] ALJ Finding of Fact 120. FERC has given each state the authority to decide when an LEO arises in that state. *Power Res. Group., Inc. v. Public Utilities Commission of Texas,* 422 F3d 213, 239 (5th Cir. 2005).

[22] ALJ Finding of Fact 108.

[23] *Highwater,* Docket No. E-95/CG-11-1073.

[24] *Id*. at 8-9..

completed shortly after the Complaint was filed) determined how to make interconnection possible. And, the fact that ConEd did not self-certify as a QF until March 2016 did not represent a substantial commitment of time or money, and also does not compel a later date.

Finally, the Commission recognizes that the many delays in the parties' negotiation process slowed the resolution of the establishment of an LEO. Despite ConEd's arguments, the Commission cannot conclude that these delays were intentionally caused or prolonged by Otter Tail, but by other factors or processes necessary to establishment of a PPA. For example, to establish the viability of the Project, the parties needed first to work through a number of MISO processes in which reliability issues were raised. The Commission agrees with the ALJ's findings tracking the Project's process through MISO, and the stipulated facts regarding that timeline.

The Commission will, however, modify the ALJ's Finding of Fact 128, as set forth below:

> 128. In addition, the project needed to work through a number of MISO processes. ~~In addition, MISO's Fast Track process was not fast. One problem that Mr. Pawlowski noted was the person at MISO working with Red Lake Falls seemed to lack any familiarity with the relatively low voltage (41.6 kv) line with which Red Lake Falls sought to interconnect.~~ Red Lake Falls' interconnection proposal raised reliability issues when the line was assessed as a radial line that terminated at an end point. According to Otter Tail, it represented the line to MISO as a radial because it operates the line in that manner - power flows one way. In fact, the line is physically a loop. With the addition of relay settings, power can flow both ways. Mr. Juhl pushed back when on June 6, 2016, MISO relayed Otter Tail's conclusion that because the Project failed one of the Fast Track criteria, it would have to proceed via the regular interconnection process. Ultimately a GIA was achieved under the Fast Track process. (footnotes omitted)

VII. Contract Term

FERC regulations give QFs the right to sell electricity over a specified term for a price established at the time an LEO is established, but the regulations do not dictate how long the specified term should be.[25] It is up to the states to decide the length of an LEO as long as it is not inconsistent with PURPA and FERC's implementing regulations.

ConEd and CCEA argued that a 20-year PPA term is required, based on commercial financing concerns. ConEd also argued that Otter Tail had failed to meet its burden to show why a 10-year term was fair or reasonable. The Department noted the absence of evidence in the record from entities that finance QFs, and concluded that the record does not clearly support finding that a 20-year term should be required for most QFs, including Red Lake Falls.[26]

[25] 18 C.F.R. § 292.304(d) (2017).

[26] ALJ Finding of Fact 173.

Otter Tail initially argued that a 10-year PPA term is most appropriate, as "the changing economics of renewable energy have altered the terms upon which developers can obtain capital, making a 20-year fixed price term unnecessary." However, Otter Tail later conceded that a 20-year PPA term would be appropriate at the right price.[27] And at oral argument on this matter, Otter Tail confirmed that a 20-year term would be appropriate if the Commission accepted the avoided cost rate proffered by the Company in its March 30, 2018 letter.

The ALJ found that a 10-year term would deny Red Lake Falls a reasonable opportunity to access financial markets, and concluded on that basis that the PPA term should be 20 years.[28]

The Commission agrees with the parties and the ALJ that the term of the PPA should be 20 years, based on the avoided cost price established in this Proceeding (as explained in the following paragraphs).

VIII. Avoided Cost

A. Introduction

Qualifying facilities have the right under PURPA to sell their output to a utility at the utility's avoided cost, calculated at the time the obligation is incurred or at the time output is delivered.[29] FERC defines avoided costs as the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source.[30]

Under PURPA, state utility commissions are responsible for calculating the avoided-cost rates for utilities subject to their jurisdiction. The Minnesota Legislature requires the utility purchasing from the QF to pay the utility's full avoided capacity and energy costs as negotiated by the parties, as set by the commission, or as determined through competitive bidding approved by the commission.[31]

B. Positions of the Parties

1. Offers Extended During the Proceeding

The parties recommended a variety of avoided cost calculations for the purchase price of energy during this proceeding, using some 12 different methodologies or variations thereof. Several calculations rely on the proxy method of setting avoided costs,[32] and several rely on the peaker method of setting avoided costs.[33]

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[27] ALJ Finding of Fact 170.

[28] ALJ Findings of Fact 180 and 182.

[29] 18 C.F.R. 292.304(d)(2).

[30] 18 C.F.R. 292.101(6).

[31] Minn. Stat. § 216B.164, subd. 4(b).

[32] The proxy method relies on the costs associated with the utility's next planned addition of a generation resource. The method avoids the risk of forecast errors.

[33] The peaker method was described by ConEd's expert witness, Roger Schiffman, as follows:
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Only three of the avoided cost calculations proffered by the parties are based on public information: (1) the Department's determination of the appropriate avoided cost based on the Company's 2016 Integrated Resource Plan (IRP) ($33.41 per MWh), (2) ConEd's calculation of avoided costs using the peaker method ($57.05 per MWh), and (3) ConEd's last settlement offer made in October 2015, prior to the filing of the Complaint ($44 per MWh.) The remaining avoided cost calculations are subject to trade secret protection pursuant to a Nondisclosure Agreement–Highly Sensitive Protective Data agreed to by the parties in June 2017, and the Minnesota Government Data Practices Act.[34]

The parties used the following methods of calculating avoided costs, ranked roughly in order of lowest to highest costs:

- costs of Otter Tail's proposed Merricourt renewable project, using the proxy method
- costs of the averaged Ashtabula III and Merricourt projects, using the proxy method
- costs of Otter Tail's Ashtabula III renewable project, using the proxy method
- costs developed for wind and solar resources from Otter Tail's 2016 Integrated Resource Plan (IRP) ($33.41 per MWh)
- costs from Otter Tail's 2017 Small Power Production Tariff
- costs developed using the 10-year peaker method with the weighted average cost of capital (WACC) adjustment
- costs developed using the 10-year peaker method
- costs from Otter Tail's 2016 Small Power Production tariff
- costs developed using the 20-year peaker methodology w/ WACC adjustment
- costs developed using the 20-year peaker methodology
- costs per Red Lake Falls/ConEd's last settlement offer made prior to the Complaint ($44 per MWh)
- costs of Red Lake Falls peaker method ($57.05 per MWh).

> With the peaker method, avoided energy costs are based upon the system marginal costs of the underlying market and utility system, capital recovery costs of a simple-cycle peaking resource, under the theory that such a resource best represents incremental capacity costs that can be avoided due to a QF resource.

[34] Minn. Stat. § 13.37, subd. 1(b).

ConEd proposed the peaker method to set Otter Tail's avoided costs, as well as its last settlement offer. Otter Tail proposed a number of alternative methods for determining avoided costs: the Small Power Producer Tariff, the proxy method, the peaker method, and the cost of incremental generation resources in Otter Tail's IRP.

C. ALJ Findings

The ALJ applied Minn. Stat. § 216B.164, subd. 4(b), to set the avoided costs in this matter. The ALJ interpreted subdivision 4(b) as plainly giving the Commission the authority to set avoided cost rates for QFs, and plainly instructing the Commission how to determine the avoided costs. The ALJ also reasoned that subdivision 4(b) does not require that the least cost renewable energy facility used to calculate avoided cost be the same type of renewable energy facility as the QF. In view of the unambiguous language of the statute, the ALJ found no reason to explore the legislative intent of the statute.

The ALJ recommended that Otter Tail's full avoided costs for the Project be based on a simple average of the PPA price for the Ashtabula III wind project and the competitive bid price for the Merricourt wind project. The ALJ found that calculation most closely accords with Minn. Stat. § 216B.164, subd. 4(b). Alternatively, the ALJ recommended the Department's proposed rate of $33.41 per MWh, which combines the costs of wind and solar power from Otter Tail's 2016 IRP.

Finally, the ALJ noted that the Commission could consider Otter Tail's 2017 Small Power Production Tariff filing in determining the avoided cost rate, but was reluctant to propose avoided costs under this rate because Otter Tail had argued that it only offers those rates on a 10-year term.

The ALJ rejected ConEd's claim that the use of Ashtabula III and Merricourt wind projects as a basis for determining Otter Tail's full avoided costs for the Project is preempted by PURPA's definition of avoided cost, and also rejected ConEd's various proposals. Finally, the ALJ did not find that Minnesota needs FERC's permission to apply subdivision 4(b).

D. Commission Action

Minnesota implemented PURPA by enacting Minn. Stat. § 216B.164. Subdivision 1 of the section provides:

> This section shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production *consistent with protection of the ratepayers and the public*. (Emphasis added.)

Subdivision 4(b) of the statute provides more specific guidance on Commission options in determining what the utility must pay a QF for energy and capacity: "[t]he qualifying facility shall be paid the utility's full avoided capacity and energy costs as negotiated by the parties, *as set by the commission*, or as determined through competitive bidding approved by the commission."

The Commission has considered the voluminous record and lengthy proceedings, largely devoted to the discussion of the appropriate avoided costs Otter Tail should be obligated to pay ConEd for the output of its Project. Further, the Commission has carefully analyzed the numerous and

disparate methodological options advanced by the parties to calculate avoided costs. Finally, the Commission has considered the recommendation of the ALJ on avoided cost, with which it respectfully disagrees.

Having considered the record and the last negotiating positions of the parties, the Commission will exercise the discretion accorded it under Minn. Stat. § 216B.164, subd. 4(b), to set avoided costs. The Commission will set the purchase price of energy per MWh for the Red Lake Falls hybrid solar/wind project equal to an estimate of avoided costs based on Otter Tail's 2017 Small Power Production Tariff filing of January 3, 2017. The Small Power Production Tariff is one of the 12 options advanced by the parties, considered by the ALJ, and is a calculation specifically supported by both Otter Tail and the Department.[35]

According to Otter Tail, the Small Power Production rates are based on Otter Tail's avoided costs and the updates to energy and capacity rates which are established annually, consistent with Minnesota Rules, Chapter 7835. Importantly, the Small Power Production Tariff price of energy set in early 2017[36] also closely corresponds to the time the LEO was established in this matter in December 2016.

In making this determination, the Commission has applied the plain language of Minn. Stat. § 216B.164, subd. 4(b), which accords the Commission the discretion to set the avoided cost of energy and capacity. The Commission finds no need to determine if there is any conflict between PURPA and state law. Both were written to encourage renewables, at a time when renewable prices were high and could not effectively compete in the marketplace. The Commission is cognizant that renewable prices have dropped significantly in recent years; however, neither PURPA nor the state statute has been updated to address that change. Accordingly, the results in this matter may not specifically benefit or encourage the development of small power producers such as Red Lake Falls.

The Commission finds, however, that its determination results in just and reasonable rates that are consistent with the protections of customers and public, and are well founded in this record. PURPA is not intended to require customers to subsidize developers. And, as noted by the ALJ, the fact that the Project may not be economically viable at Otter Tail's avoided cost is simply not relevant to the analysis under PURPA or Minnesota law. As noted by the ALJ, the conclusion reached here may render QFs of a size and technology similar to the Project not economically viable, at least not for utilities with access to large wind power installations. But that is an issue that can only be addressed by the Legislature, not the Commission.

The Commission notes parenthetically that the interpretation of avoided costs advanced by ConEd would result in costs per ratepayer of some $57 MWh. This is hardly a fair and equitable rate in an environment where the record developed in this matter shows that current avoided cost of renewables is significantly less.

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[35] ALJ Finding of Fact 262, referring to Ex. 102 at 3 - 4 (Draxton Direct); Department's Initial Brief at 20 (October 6, 2017).

[36] ALJ Findings of Fact 258 (Annual Rate Filing January 3, 2017 – Not Public Document) and Draxton Supplemental Direct – Not Public Document).

IX. Conclusion

The Commission finds that Con Ed is not a prevailing party to this litigation, and therefore is not entitled to payment of costs, disbursements, or attorney's fees under Minn. Stat. § 216B.164, subd. 5.

Finally, the Commission will accept and adopt Commission staff's modification to the ALJ Report Finding of Fact 128 and the minor modifications to the ALJ Findings of Fact 29 and 170 referenced by the Department.

> 128. In addition, the project needed to work through a number of MISO processes. ~~In addition, MISO's Fast Track process was not fast. One problem that Mr. Pawlowski noted was the person at MISO working with Red Lake Falls seemed to lack any familiarity with the relatively low voltage (41.6 kv) line with which Red Lake Falls sought to interconnect.~~ Red Lake Falls' interconnection proposal raised reliability issues when the line was assessed as a radial line that terminated at an end point. According to Otter Tail, it represented the line to MISO as a radial because it operates the line in that manner - power flows one way. In fact, the line is physically a loop. With the addition of relay settings, power can flow both ways Mr. Juhl pushed back when on June 6, 2016, MISO relayed Otter Tail's conclusion that because the Project failed one of the Fast Track criteria, it would have to proceed via the regular interconnection process. Ultimately a GIA was achieved under the Fast Track process.[footnotes omitted]
>
> 29. At the request of the Administrative Law Judge Red Lake Falls and Otter Tail, ~~and the Department~~ prepared a list of dates to which they stipulated. To be clear, the list "does not address the relevance of the stipulated dates, the weight to be given to dates or the interpretation of the stipulated dates." The list groups related events into three categories: Commercial Discussions, Project Details, and Interconnection, as is reproduced below the heading "Stipulated Dates by Category." [footnotes omitted]
>
> 170. Notwithstanding Otter Tail's resistance to a 20-year term, it could agree to a 20-year term at the right price. Otter Tail informed Red Lake Falls at for a 15-, 20- or 25-year term, Otter Tail's avoided costs would be in the low $20s/MWh. [footnotes omitted]

ORDER

1. The Commission finds that an LEO for the Red Lake Falls hybrid solar/wind Project was established on December 7, 2016.

2. The Commission finds that the contract length for the Red Lake Falls hybrid solar/wind Project is 20 years.

3. The purchase price of energy per MWh for the Red Lake Falls hybrid solar/wind project is equal to an estimate of avoided costs based on Otter Tail's 2017 Small Power Production Tariff.

4. The Commission finds that Con Ed is not a prevailing party to this litigation, and therefore is not entitled to payment of costs, disbursements, or attorney's fees under Minn. Stat. § 216B.164, subd. 5.

5. The Commission modifies the ALJ Report to reflect the Commission's decisions in this case.

6. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf

Daniel P. Wolf
Executive Secretary

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