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August 22, 2011

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Gentlemen:

In a Memorandum dated August 9, 2011, you requested an informal opinion addressing the jurisdictional aspects of a transaction involving the transfer of controlling interest in a Nebraska electric power supplier from one holding company to another. Specifically, your question is whether a privately-owned holding company's purchase of a controlling interest in another privately-owned holding company whose subsidiary owns and operates a Nebraska wind generation facility would constitute an acquisition that subjects the transaction to the jurisdiction of the Nebraska Power Review Board ("NPRB") under Nebraska law. For the reasons set out below, the NPRB finds that the transaction described in your memorandum would not constitute an acquisition as described in the NPRB's controlling statutes, and the NPRB would therefore not have jurisdiction to approve or deny the transaction.

The parties submitting the request, through legal counsel, are Third Planet Windpower LLC ("Third Planet Windpower"), TPW Petersburg LLC ("TPW Petersburg"), Edison Mission Energy, Laredo Ridge Wind LLC ("Laredo Ridge Wind"), Omaha Public Power District ("OPPD") and the Nebraska Public Power District ("NPPD"). The facts are set out in detail in your memo, but the basic facts will be restated below.

TPW Petersburg owns and operates a 40.5 megawatt wind farm in Boone County, Nebraska. TPW Petersburg is a wholly-owned subsidiary of Third Planet Windpower,

MEMBERS

Michael Siedschlag *Omaha* *Chair*	**Mark T. Graham** *Lincoln* *Vice Chair*	**Patrick J. Bourne** *Omaha*	**Stephen M. Lichter** *Waterloo*	**Rick A. Morehouse** *Scottsbluff*

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LLC. Third Planet Windpower is owned by Morgan Stanley Renewable Development Fund, LLC ("Morgan Stanley"). Laredo Ridge Wind owns and operates a 79.9 megawatt wind farm that is also located in Boone County, Nebraska. Laredo Ridge Wind is a wholly-owned subsidiary of Edison Mission Energy. Both wind farms were approved as qualifying facilities by the Federal Energy Regulatory Commission ("FERC") through the self-certification process provided by the Public Utility Regulatory Policies Act of 1978 ("PURPA"). TPW Petersburg has a power purchase agreement ("PPA") to sell 100% of the output from its facility to OPPD. Laredo Ridge Wind has a PPA to sell 100% of the output from its facility to NPPD. The two facilities are separated by less than one mile.

Edison Mission Energy now wishes to purchase Morgan Stanley's stock that constitutes a controlling interest in Third Planet Windpower. If Edison Mission Energy purchases Morgan Stanley's stock and acquires control of Third Planet Windpower, both generation facilities would ultimately be owned by the same holding company. The parties have been informed that it is possible FERC may review the transaction and take the position that both facilities no longer constitute qualified facilities under PURPA due to the commonality of ownership at the holding company level, that together they total over 80 megawatts capacity, and that they are within one mile of each other.

The NPRB's jurisdiction to approve the construction or acquisition of generation facilities is based on Neb. Rev. Stat. § 70-1012. Under that statute, before any generation facility is constructed or acquired by an electric supplier, an application must be filed and approved by the NPRB. Facilities approved by FERC under PURPA are exempt from NPRB approval requirements, as the NPRB's jurisdiction is preempted by the federal approval process. See Neb. Att'y Gen. Opinion No. 04024 (2004). The parties requesting the informal opinion are uncertain if the NPRB would believe the loss of qualified facility status for both facilities ends the federal preemption, thus subjecting Edison Mission Energy's purchase of Morgan Stanley's controlling interest in Third Planet Windpower (and ultimately in TPW Petersburg) to NPRB approval requirements as an "acquisition" under Neb. Rev. Stat. § 70-1012.

In pertinent part, Neb. Rev. Stat. § 70-1012, states: "Before any electric generation facilities . . . are constructed or acquired by any supplier, an application, filed with the [NPRB] and containing such information as the Board shall prescribe, shall be approved by the [NPRB] . . . ." The statute limits its applicability to "suppliers." The term "electric suppliers" or "suppliers of electricity" are defined in Neb. Rev. Stat. § 70-1001.01(3) as "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail." The NPRB staff has confirmed that TPW Petersburg and Laredo Ridge Wind are both legal entities registered to conduct business in the State of Nebraska with the Nebraska Secretary of State's office. Both have a separate registered agent. Both TPW Petersburg and Laredo Ridge Wind own and operate wind power generation facilities that produce and supply electricity within the state for sale at wholesale, pursuant to their PPA's with OPPD and NPPD. Therefore, TPW Petersburg and Laredo Ridge Wind are "electric suppliers" as defined by Nebraska law. Although the NPRB believes that Edison Mission Energy, Third Planet Windpower and Morgan Stanley are legal entities, they do not directly produce, supply, or distribute electricity in the State of Nebraska. As the NPRB understands it, these entities merely own controlling interest in the entities that own and operate the generation facilities (TPW Petersburg and Laredo Ridge Wind), but do not play a role in the operations of those facilities. Under those facts, Edison Mission Energy, Third Planet Windpower and Morgan Stanley do not meet the definition of "electric supplier" under Nebraska law. The NPRB acknowledges that two additional holding companies would be created in order to consummate the transaction, referred to as the "Petersburg Holdco" and "Holdco" in your memorandum. These additional entities would not alter our analysis, since it is the NPRB's understanding that neither of the two additional holding companies would constitute "suppliers" under Nebraska law.

The NPRB's determination in the present situation is supported by the analysis set out in a previous informal opinion issued by the NPRB on April 5, 2010. In that informal opinion, a parent corporation that owned an ethanol plant wanted to construct a generation facility to serve its ethanol plant with its electric power needs, and sell any excess electricity on the wholesale market. Both the ethanol plant and the generation facility would ultimately be owned by the same non-utility holding company, but the ethanol plant and the generation facility would be separate legal entities in Nebraska. The corporation requested the Board's opinion regarding whether forming the separate entity to own and operate the generation facility would constitute self-generation for its ethanol plant, or whether the generation facility would be subject to NPRB approval requirements. Any person or entity that generates electricity solely for its own use may construct a generation facility without NPRB approval because the facility's output would not be sold at wholesale or retail, and thus the person or entity would not meet the definition of "electric supplier" under Nebraska law. The NPRB determined that the generation facility would be subject to the NPRB's approval process. The NPRB pointed out that both the ethanol plant and the generation facility would be separate legal entities, and the generation facility would be producing and supplying electricity within the state to a separate legal entity that would be its customer. Nebraska law prohibits any electric supplier from serving a customer located inside another electric supplier's certified service area. The proposed generation facility would therefore be unlawfully serving a third-party customer located inside another electric supplier's service area. The opinion shows the NPRB has previously found that separate legal entities that own and operate generation facilities are separate and distinct entities from their parent holding companies. Under existing Nebraska law, it is the legal entity producing, supplying and/or distributing electricity that is the "electric supplier." This finding supports the NPRB's present determination that TPW Petersburg and Laredo Ridge Wind, not their parent holding companies, are the only "electric suppliers" in your scenario.

In additional support of its decision, the Board also notes the ruling of the Nebraska Public Service Commission ("NPSC") in a Clarification Order dated March 10, 1998 in Application No. C-1746/PI-19. In that decision, the NPSC addressed the question of whether it had approval jurisdiction over a transaction where a telecommunications holding company purchased controlling interest in a Nebraska common carrier. Although the statutory authority upon which the NPSC based its decision was different than the NPRB's statute, it did have an important similarity — it dealt with the issue of whether the agency had jurisdiction to review and approve a transaction where a holding company would acquire ultimate ownership of a service provider (a common carrier). The NPSC's statute, in pertinent part, states "No common carrier other than a railroad shall consolidate its stock, property, franchise or earnings, in whole or in part, with any other competing common carrier without permission of the Commission . . . ." Neb. Rev. Stat. § 75-146. A "common carrier" was defined in Neb. Rev. Stat. § 75-109(1), as it existed in 1998, as an entity furnishing communication services for hire in Nebraska intrastate commerce. The NPSC examined the issue of when it had jurisdiction to authorize acquisitions, mergers or other transfers of control of a Nebraska common carrier. The NPSC found that "it is the certificated carrier actively providing service in the state of Nebraska which is the entity whose consolidation or transfer of control requires prior approval by the Commission." NPSC Clarification Order, page 3. The NPSC went on to state that "Transactions at the holding company level or above do not typically involve a change in the actual ownership or control of the certificated carrier." NPSC Clarification Order, page 4. The NPSC ruled that "Acquisition, merger or other change of control transactions involving holding companies or other parent entities one or more levels upstream from the Nebraska certificated common carriers, which holding companies and/or other upstream parent entities significantly engaged in interstate commerce beyond the borders of the State, and which transactions only indirectly affect the Nebraska certificated carrier, shall not be subject to Commission jurisdiction." NPSC Clarification Order, page 6. Although the two agencies have different controlling statutes, the analysis involving jurisdiction over a holding company acquiring a controlling interest in a Nebraska entity is similar. In both situations, the Nebraska entity (whether a telecommunications common carrier or an electric supplier) directly provides the services involved and is the entity over which the agency has jurisdiction under Nebraska law, not holding companies that only own a controlling interest in the service provider.

It appears this situation is the first time the NPRB has dealt with the issue of stock transactions, mergers, or acquisitions involving private companies. The statutes pertaining to the NPRB anticipate that all power suppliers operating in the State of Nebraska will be consumer owned entities, most of which are political subdivisions of the State. However, the NPRB must analyze the situation under its controlling statutes, even if they were not designed to specifically address the present situation. If the Legislature wishes to clarify or alter the NPRB's statutes to lead to a different result, that is a matter to be taken up by Legislature.

At its public meeting held August 12, 2011, the NPRB considered your request for an informal opinion on this issue. Pursuant to a motion, second and vote by a majority of the Board members (by a 3 to 0 vote, with two members absent), the NPRB determined that Edison Mission Energy's purchase of controlling interest in Third Planet Windpower from Morgan Stanley (through another holding company to be created and referred to as "Holdco") would not constitute an "acquisition" under Neb. Rev. Stat. § 70-1012, that the NPRB does not have jurisdiction over the transaction under Nebraska law, and that the parties would not be required to file an application with the NPRB for approval prior to the transaction. The Board also determined that under Nebraska law TPW Petersburg and Laredo Ridge Wind are "electric suppliers" in the State of Nebraska, but the holding companies that own controlling interest in those entities are not. It is important to the NPRB's decision that the transaction described in your memorandum does not transfer or alter the operational control of either TPW Petersburg or Laredo Ridge Wind. It is the Board's understanding that both facilities will remain separate legal entities registered and operating in the State of Nebraska.

At the August 12 public meeting, some of the parties' representatives present expressed concern that investors involved in the proposed transactions may not be entirely certain what status or weight the NPRB would accord this informal opinion. In order to provide the parties with a greater degree of clarity, we provide the following: The NPRB considers the determination in this informal opinion to be binding on the NPRB, so long as additional information that contradicts what was presented to the Board is not discovered. The NPRB will follow the determination in this opinion until and unless the decision is rescinded or modified pursuant to formal action taken by the NPRB, or if it is informed the determinations herein are incorrect or must be rescinded or modified by the Nebraska Attorney General's Office or a court of competent jurisdiction.

The Board appreciates that the parties consulted with the NPRB to address these issues prior to completing the transaction. If you have additional questions, please contact the NPRB's executive director and general counsel, Tim Texel.

Sincerely,

Mark Graham
Vice Chairman