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RECEIVED

SEP 16 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

HAND DELIVERED

Pam Bonrud
Executive Secretary
Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

RE: **MONTANA-DAKOTA; SUPERIOR COMPLAINT**
Docket EL04-016
Our file: 0069

Dear Pam:

Enclosed are the original and ten copies of Montana-Dakota's Deferral Motion, which please file. Thank you very much.

If you have any questions, please telephone me at my office.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

DAG:mw

Enclosures

cc/enc: Service List
Dan Kuntz

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

RECEIVED
SEP 16 2005
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE FILING BY) EL04-016
SUPERIOR RENEWABLE ENERGY LLC)
ET AL AGAINST MONTANA-DAKOTA)
UTILITIES CO. REGARDING THE) **MONTANA-DAKOTA'S**
JAVA WIND PROJECT) **DEFERRAL MOTION**

COMES NOW Montana-Dakota Utilities Co. ("Montana-Dakota"), by its undersigned counsel of record and moves the Commission as follows:

1. To defer further proceedings in this docket until the Federal Energy Regulatory Commission ("FERC") has decided the issues in the pending petition for declaratory order, Docket No. EL05-143-000, before it concerning the obligation of Alliant Energy Corporate Services, Inc., to enter into a new contract or obligation to purchase energy from a Qualified Facility ("QF") in view of the newly-enacted § 210(m) of the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"), 16 U.S.C. § 824a-3(m). PURPA Section 210(m) was enacted as part of the Energy Policy Act of 2005 ("EP Act 2005") and was signed into law on August 8, 2005;

2. To defer further proceedings in this docket until FERC has decided the issues in Montana-Dakota's petition which it intends to file shortly seeking a determination that it is not obligated to enter into a contract with Superior Renewable Energy LLC ("Superior") or any other QF pursuant to the newly-enacted PURPA § 210 (m);

3. To enter such orders as may be appropriate following the FERC decisions, including dismissal of this docket.

The foregoing motion is based upon the following:

1. Montana-Dakota has filed a motion for intervention in the Alliant FERC docket, Docket No. EL05-143-000. Attached as Exhibit A is a copy of Montana-Dakota's petition to intervene. Montana-Dakota believes that the Alliant petition will be dispositive of the entitlement of members of Midwest ISO, including Montana-Dakota, to relief from the obligation to purchase electricity from QFs under new PURPA § 210 (m). Additionally,

Montana-Dakota intends to file its own petition for relief with FERC seeking a determination that it is not obligated to enter into a new contract with Superior or any other QF within Montana-Dakota's service territory. Under new PURPA § 210 (m) (3), "[a]ny electric utility may file an application with the Commission for relief from the mandatory purchase obligation [arising under PURPA § 210] pursuant to this subsection on a service territory-wide basis."

2. As stated in Montana-Dakota's petition to intervene, Montana-Dakota's situation is very similar to that of the Alliant Companies which are the subject of the FERC docket. EP Act 2005 amended Section 210 of PURPA by, among other things, adding the following provision:

(1) OBLIGATION TO PURCHASE.--After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to--

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the

Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Proof before FERC, and available to this Commission, will show that Montana-Dakota qualifies for relief from any requirement to enter into a new contract or obligation to purchase electric energy from a QF. The Midwest ISO offers access of QFs to "(i) independently administered, auction-based day ahead and real-time wholesale markets for the sale of electric energy; "(ii)wholesale markets for long-term sales of capacity and electric energy..." have been available in the upper Midwest among Mid-Continent Area Power Pool (MAPP) members for many years, as evidenced by the large number of such transactions that have been contemplated and completed by and between power pool members including Montana-Dakota. Through the Midwest ISO, as well as other existing opportunities under MAPP, Superior will have access "(i) to transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-term sales, to buyers other than the utility to which the qualifying facility is interconnected.

Finally, within the Midwest ISO footprint, Superior will have access to "wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B)."

3. The amendatory language of new PURPA § 210 clearly and succinctly deals with existing rights and remedies in subparagraph (6), which provides:

(6) NO EFFECT ON EXISTING RIGHTS AND REMEDIES.-- Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate

State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

The language provides that the termination of mandatory purchase and sale requirements does not affect any contract or obligation **in effect or pending approval** before this Commission. Clearly, no power purchase agreement ("PPA") exists or is in effect between the parties. Just as clearly no PPA has been signed or submitted to the Commission for approval and therefore cannot be "pending approval." While the parties have earnestly and in good faith pursued negotiations concerning avoided costs and other contractual terms since Superior's motion for continuance dated July 21, 2005, no contract has been signed and no contract has been submitted to the Commission for approval. Indeed, Commission approval of a PPA is not required nor is it requested as relief in this proceeding.

This is consistent with the Commission's order in Docket F3365 where the Commission said,

The Commission finds that rates for purchases from QFs with a design capacity of more than 100 kilowatts should be set by contract negotiated between the QF and the electric utility. The Commission agrees with the recommendations of all parties that the Commission should play a minimal role in the negotiation of such contracts, a role limited to resolving any contract disputes which arise between the parties.

4. It is clear from the foregoing that PURPA has been amended effective August 8, 2005, that the amendment to PURPA is designed to terminate its mandatory purchase and sale requirements when QFs have access to electric energy and capacity markets, that the circumstances calling for termination of mandatory purchase and sale requirements exist in Montana-Dakota's service territory, that no existing rights and remedies will be affected by the granting of this motion under the clear meaning of the language of the legislation; that Montana-Dakota is exempt from the mandatory purchase requirements of PURPA; and that the interests of justice dictate that the proceeding before FERC should proceed to a

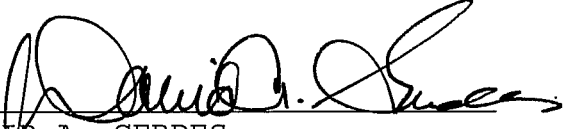
decision. As provided in new PURPA § 210 (m) (3), FERC clearly has jurisdiction over the determination, thus preempting this Commission's ability to proceed further.

5. The Edison Electric Institute ("EEI") has moved to intervene in the Alliant docket. EEI's members serve 97 percent of the ultimate consumers served by the shareholder-owned segment of the electric utility industry, serve 71 percent of all electric utility ultimate consumers in the nation and generate almost 60 percent of the electricity produced by U.S. electric generators. EEI's comments in its motion to intervene discuss in detail the manner in which the Midwest ISO satisfies the requirements of PURPA § 210 (m) (1), thus relieving Midwest ISO utilities of the obligation to purchase from QFs. The EEI petition demonstrates the public interest importance of this proceeding as reflected in the policy of the EP Act 2005 that public utilities and their customers should not be required to bear the market risk for QFs that have access to electric energy and capacity markets.

WHEREFORE Montana-Dakota prays that the Commission grant this motion for continuance, await the determination of the Federal Energy Regulatory Commission and thereafter issue such orders as may be appropriate, including dismissal of this docket.

Dated this 16th day of September, 2005.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 16th day of September, 2005, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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A handwritten signature in black ink, appearing to read "David A. Gerdes", written over a horizontal line.

David A. Gerdes

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Alliant Energy Corporate Services, Inc.)

Docket No. EL05-143-000

MOTION FOR LEAVE TO INTERVENE OF
MONTANA-DAKOTA UTILITIES CO.

Pursuant to Section 308 of the Federal Power Act and Rule 214 of the Federal Energy Regulatory Commission's regulations thereunder, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc ("Montana-Dakota") hereby moves for leave to intervene in the captioned proceeding, which involves a Petition for Declaratory Order (the "Petition") filed by Alliant Energy Corporate Services, Inc. ("Alliant") on behalf of two electric utilities with which it is affiliated, Interstate Power and Light Company ("IPL") and Wisconsin Power & Light Company ("WPL").

Montana-Dakota is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 400 North Fourth Street, Bismarck, ND 58501.

Communications with respect to this motion should be addressed to the following:

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Montana-Dakota is a combination electric and gas public utility that, *inter alia*, owns and operates generation, transmission and distribution facilities for the purpose of providing reliable electric service in portions of the states of North Dakota, South Dakota, Montana and Wyoming.¹

In 2002, Montana-Dakota transferred operational control over certain of its FERC-jurisdictional transmission facilities to the Midwest Independent Transmission System Operator, Inc. (the “Midwest ISO”), which is a FERC-approved Regional Transmission Organization.² At the present time, the Midwest ISO provides transmission service on a non-discriminatory basis across an extensive transmission network throughout the Midwestern United States that includes the facilities of Montana-Dakota. The Midwest ISO also operates auction-based day-ahead and real-time energy markets throughout the region.

On August 12, 2005, Alliant filed the Petition in the captioned proceeding, in which it is seeking a determination that as a result of the recent enactment of the Energy Policy Act of 2005, IPL and WPL are not required to enter into any new contract or obligation to purchase electric energy from Qualifying Facilities (“QFs”) located within the region in which they operate. Alliant noted in the Petition that because both IPL and WPL operate in markets controlled by the Midwest ISO, QFs in the region in which they operate have nondiscriminatory access to competitive markets in which they may freely sell their output.

In a Notice of Filing issued on August 22, 2005, the FERC provided for the submittal of motions for leave to intervene and protests in this proceeding on or before September 12, 2005.

The Energy Policy Act of 2005 amended Section 210 of the Public Utility Regulatory Policies Act of 1978 by the addition of the following provision:

¹ Montana-Dakota’s electric utility operations in Wyoming are separate from its electric utility operations in other states.

² See, Montana-Dakota Utilities Co., 98 FERC ¶62,049 (2002).

After the date of enactment of this subsection [August 8, 2005], no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has non discriminatory access to—

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Montana-Dakota is in a situation which is very similar to that of IPL and WPL as portrayed in the Petition. As discussed above, both Montana-Dakota and IPL/WPL are participants in wholesale electricity markets that are administered by the Midwest ISO. As a result, QFs connected to their respective systems have non-discriminatory access to independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy and to competitive wholesale markets for long-term sales of capacity and electric energy. Both Montana-Dakota and IPL/WPL have been asked to enter into long-term agreements to purchase power at state-determined avoided-cost rates from generators that are intended to operate as QFs but that are currently in their formative stages and are not expected to begin operation until some future date.

A FERC decision with respect to the issues raised in the Petition may affect the obligation of Montana-Dakota to enter into new contracts or obligations to purchase electric energy from QFs in its region. For that reason, Montana-Dakota is an interested party in this proceeding within the meaning of Section 308 of the Federal Power Act. Accordingly, its intervention and participation in this proceeding as a party will be in the public interest. Although Montana-Dakota may be bound or adversely affected by the Commission's action in this proceeding, its interest is not adequately represented by any other party.

WHEREFORE, for the foregoing reasons, Montana-Dakota respectfully requests that it be permitted to intervene in this proceeding with full rights as a party.

Respectfully submitted,

MONTANA-DAKOTA UTILITIES, CO.
A division of MDU Resources Group, Inc.

By _____
James K. Mitchell
Thelen Reid & Priest LLP
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Washington, DC 20004
202-508-4002

Its Attorney

September __, 2005