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RECEIVED
OCT 3 2005
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

Dear Pam:

Enclosed are the original and ten copies of Montana-Dakota's Reply to Superior's Comments on the Deferral Motion and Request for Affirmative Relief, which please file. Thank you very much.

With a copy of this letter service by mailing is made upon the service list. 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

07-03-2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE FILING BY) EL04-016
SUPERIOR RENEWABLE ENERGY LLC)
ET AL AGAINST MONTANA-DAKOTA) MONTANA-DAKOTA'S REPLY TO
UTILITIES CO. REGARDING THE) SUPERIOR'S COMMENTS ON THE
JAVA WIND PROJECT) DEFERRAL MOTION AND REQUEST
) FOR AFFIRMATIVE RELIEF

Montana-Dakota Utilities Co. ("Montana-Dakota") responds to the filing of Superior Renewable Energy LLC ("Superior") in response to Montana-Dakota's deferral motion, as follows:

1. While Superior spends a great deal of time arguing that Montana-Dakota intentionally delayed the proceeding and failed to negotiate in good faith, even if it were true, it has no bearing on the question before the Commission. In point of fact, Superior did not become a QF until April 15, 2004, so Superior's complaint about the period of time starting in 2003 is simply surplusage. At that time Superior was nothing more than one of many independent power producers seeking to sell its commodity to Montana-Dakota. Superior filed its complaint on May 12, 2004, and the Commission has presided over these proceedings ever since. Suffice it to say that Superior can take credit for its fair share of any delay which has occurred.

A major cause of delay in reaching a contract following the initial continuance of this proceeding was Superior's attempt to obtain a higher price under the proposed purchase power agreement than what it originally agreed to accept. This was after it allegedly learned that its projected costs were higher than anticipated. When Montana-Dakota refused to negotiate an increase in the price and was prepared to proceed to hearing, Superior found a way to cut costs and requested the Commission by motion of July 21, 2005, to continue the hearing while the parties renewed their negotiations. During these negotiations, Montana-Dakota certainly did not know if or when an energy act would be passed, let alone what final provisions, if any, would be included in the act. It was only after the EP Act 2005 became law, and the parties still

had not reached a final agreement, that Montana-Dakota decided that prudence required that the company await the outcome of the Alliant petition rather than execute a long term contract with Superior. Simply put, Montana-Dakota believes it has a responsibility to its ratepayers and stockholders to know and consider all its options before agreeing to any long-term purchase power agreement.

2. Superior has interjected a legal argument which was not before the Commission in this proceeding, and which actually supports Montana-Dakota's motion for deferral. This legal issue is whether a ". . . contract or obligation [is] in effect or pending approval before . . ." this Commission (new PURPA § 210 (m) (6)). Notwithstanding Superior's arguments to the contrary, no contract or obligation was in effect or pending approval before the Commission at the time the Energy Act was enacted. Even the most basic terms of a contract or obligation, such as the price, quantity or term of such contract or obligation do not exist, let alone await approval by the Commission.

In its complaint, Superior asks for relief ". . . necessary for Superior to obtain a power purchase agreement with MDU for electricity produced from the Java Wind Project on terms acceptable to Superior and MDU . . . (emphasis supplied)" The fact Superior has requested this relief, to define the terms of a contract or obligation is a clear indication that no contract or obligation currently exists.

3. It makes no sense whatsoever for the Commission to go forward and hold an evidentiary hearing to determine prices and other contract terms, when the parties have spent the last several months negotiating these very items. If the Commission believes Montana-Dakota's deferral motion is well-taken, the hearing should be deferred until after FERC has determined the pending petitions of both Alliant and Montana-Dakota. As Superior points out in its filing, the Alliant proceeding is expected to be decided in early December of this year and Montana-Dakota's application in late December. Superior's response to deferral motion, page 16.

Montana-Dakota suggests that the Commission not address the legal issue raised by Superior until after FERC has ruled on the Alliant and Montana-Dakota petitions. If FERC determines that the MISO markets do not meet the requirements of the Energy Act, then the issues raised by Superior are moot and the parties would

determine whether a final purchase power agreement can be agreed upon, or whether the Commission need determine the purchase price and other contract terms upon which agreement has not been reached. If FERC determines the MISO markets meet the requirements of the Energy Act, then FERC or the South Dakota Commission will be called upon to address the so-called savings clause. Although Superior argues this to be a question for the Commission to decide, no South Dakota specific laws or tariffs obligate Montana-Dakota to purchase Superior's electricity independent of PURPA. Rather, the PURPA requirements were created by Congress and Congress has set forth the conditions for exemption from the requirements. Therefore, the issue is one to be determined by FERC, not this Commission. In either instance, it makes no sense to proceed with an avoided cost evidentiary hearing before this determination is made.

On the other hand, if the Commission believes that it needs to conduct a hearing to determine the applicability of the savings clause, the issue should be fully briefed and properly presented to the Commission for hearing and/or oral argument. This would be a more useful purpose for the current November 3-4 hearing dates (Montana-Dakota prefers to await FERC adjudication of the pending petitions, but believes this course of action is preferable to an avoided costs hearing). Montana-Dakota believes that it is clear that no contract or obligation is in effect or pending approval. But if the Commission finds the question is unclear, it should be determined before an avoided costs proceeding gets underway.

4. One last portion of Superior's filing deserves comment. Superior contends that FERC explained the distinction between a "contract" and an "obligation" when it stated in Order 69 that the use of the phrase "legally enforceable obligation" in 18 CFR 292.304(d) was intended to prevent utilities from circumventing the PURPA purchase requirement by refusing to enter into a contract. Superior's position that a purchase obligation can exist without a contract begs the question. In this case there is no separate legally enforceable obligation such as a tariff that obligates MDU to purchase power from Superior's nonexistent wind generator. Webster's Collegiate Dictionary defines "obligation" as follows: "The agreement, promise, contract, oath or the like, by which one is bound." In other words, it cannot be said that the complaint filed by Superior or any other tariff, statute or rule of law

within the Commission's jurisdiction obligates Montana-Dakota to purchase power from Superior:

Unless the Commission is specifically empowered by the South Dakota Legislature to enforce the provisions of PURPA, it is powerless to act beyond the limited grant of authority to determine avoided costs delegated to it by PURPA. The South Dakota Supreme Court has clearly stated both that the PUC must have statutory authority to act and that it is not a court and cannot exercise purely judicial functions. Petition of Northwestern Public Service Company, 1997 SD 35, 560 NW2d 925, 930 (holding that the PUC exceeded its statutory authority by interpreting and enforcing a contract between a rural electric cooperative and its customer).

CONCLUSION

Montana-Dakota proposes a deferral of further proceedings in this docket until the Alliant and Montana-Dakota petitions before FERC are decided. Alternatively, the Commission should utilize the November hearing date to call for briefs and obtain a thorough analysis of the nature of the obligation contemplated by the PURPA amendments in EP Act 2005 and whether such an obligation exists with regard to the Java facility. Proceeding with an avoided costs proceeding at this juncture does not represent the best use of either the Commission's time or the parties' time.

Dated this 3rd day of October, 2005.

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 3rd day of October, 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