BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY SUPERIOR RENEWABLE ENERGY LLC, ET AL, AGAINST MONTANA-DAKOTA UTILITIES CO. REGARDING THE JAVA WIND PROJECT	Docket No. EL04-016 **Superior's Motion for Reconsideration**

Pursuant to Rule 20:10:01:29 of the Commission's rules, Superior Renewable Energy LLC (Superior) on behalf of itself and its subsidiary, Java LLC, hereby files its Motion for Reconsideration of the Commission's October 4, 2005 decision granting a motion by Montana-Dakota Utilities Company (MDU) to defer the hearing that was scheduled for November 3-4, 2005 in this proceeding. A key issue for the Commission that was discussed at the October 4, 2005 Commission meeting was whether the Commission has jurisdiction to decide whether MDU has an existing obligation as stated in the newly enacted Section 210(m) of the Public Utilities Regulatory Act (PURPA).[1] This important issue was raised late in the afternoon of the day before the hearing and Superior did not have an opportunity to brief the issue or fully respond at the hearing. Superior believes it is essential for the Commission to have a complete record on this issue and to re-examine its ruling with the benefit of all the relevant law.

As discussed below, the Commission indeed has jurisdiction -- and the duty-- to decide the existing obligation question pursuant to its PURPA implementation rules in Order

[1] 16 U.S.C. § 824a-3(m). New Section 210(m) was enacted as part of the Energy Policy Act of 2005 (2005(Act), which was signed into law by the President on August 8, 2005.

F-3365[2] and should therefore reconsider its motion granting a deferral of the hearing. Superior respectfully requests that the Commission reinstate the November 3-4 hearing date.

BACKGROUND

On September 16, 2005, MDU filed a Motion for Deferral of the hearing requesting that the Commission defer this proceeding until after the Federal Energy Regulatory Commission (FERC) decides a petition for declaratory order filed by Alliant Energy Corporate Services (Alliant) regarding whether the newly enacted Section 210(m) of PURPA removes the mandatory purchase obligation as it relates to Alliant and Qualifying Facilities (QFs) in the Alliant service territories. MDU also requested that the Commission defer this proceeding until after FERC decides a similar application, filed by MDU on September 22, 2005, regarding MDU's obligation to purchase the output of Superior.

On September 27, 2005, Superior filed its response objecting to MDU's motion to defer the hearing because neither one of the referenced proceedings will affect the outcome of this proceeding. Superior also requested affirmative relief in two forms: (1) that the Commission enter an order finding that MDU has an existing obligation and/or contract pending approval under PURPA and is thus subject to PURPA's mandatory purchase obligation[3] as its relates to Superior; and (2) that the Commission issue an order to show

[2] *In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Power Production*, Decision and Order F-3365 (December 14, 1982) (Order F-3365).

[3] Although the new Section 210(m)(1) of PURPA permits FERC to terminate PURPA's mandatory purchase obligation under certain circumstances on a case-by-case basis, Section 210(m)(6) contains a "savings clause" that protects pre-existing rights granted under PURPA. That section states that nothing in subsection 210(m) affects the "rights or remedies (continued…)

cause why MDU is not in violation of its PURPA obligation by engaging in intentional delays of this proceeding to avoid its PURPA obligations.[4]

On October 3, 2005, MDU filed a reply to Superior's September 27, 2005 response. MDU argued, among other things, that the question of whether a contract or obligation is "in effect or pending approval" before the Commission (as provided in the newly enacted Section 210(m)(6)) is a legal issue that the Commission should not address until FERC has ruled on the Alliant and MDU petitions. MDU further claimed that the Commission is not specifically empowered by the South Dakota Legislature to enforce the provisions of PURPA beyond the "limited grant of authority to determine avoided costs delegated to it by PURPA." Citing *Petition of Northwestern Public Service Company*, 560 N.W.2d 925, 930 (S.D. 1997) (*"Northwestern"*), a South Dakota Supreme Court case, MDU claims that this question is beyond the Commission's statutory authority to decide. As discussed below, MDU has misinterpreted the PURPA implementation statute and the applicable law.

DISCUSSION

I. State Implementation of FERC's Rules Under PURPA Has Been Upheld By the U.S. Supreme Court.

In its October 3, 2005 Reply to Superior's Comments ("Reply"), MDU takes the position that the SDPUC has not been empowered by the state legislature to enforce the

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of any party under ***any contract or obligation, in effect or pending approval before the appropriate State regulatory authority***...on the date of enactment..." (emphasis added).

[4] On September 29, 2005, Superior filed a Motion to Lodge Decision of the Iowa Utility Board's decision denying a similar motion to defer pending avoided cost proceedings. On September 30, 2005, Superior submitted an Affidavit of Jeff Ferguson detailing Superior's expenditures in connection with the Java Project.

provisions of PURPA. In support of this position, MDU cites *Northwestern*, which held that the PUC had no authority to interpret a contract between an electric utility and a rural electric cooperative. MDU's reliance on *Northwestern* in this case is misplaced.

Northwestern considered the general administrative powers of the SDPUC granted by the South Dakota legislature, as codified in S.D.C.L. § 49-34A. The court reviewed the list of authorities delegated to the SDPUC, and concluded that those authorities "did not include contract interpretation…."[5] The court then found that "[t]he PUC is not a court, and cannot exercise purely judicial functions."[6]

Superior does not quibble with the proposition that contract interpretation issues are generally a matter for the appropriate state judicial forum. However, the question in this proceeding is not a contract interpretation issue. This proceeding, rather, involves PURPA, a *federal* statute that leaves to the states the responsibility for implementing rules prescribed by FERC. In determining whether there is an existing obligation in this case, the Commission would not be exercising a "purely judicial function" but rather would be acting within the scope of its PURPA implementation order (Order F-3365).

The question of whether Congress can impose on a State regulatory agency the duty to implement FERC's rules under Section 210 of PURPA has long been answered. In *FERC v. Mississippi*, 456 U.S. 742 (1982) ("*Mississippi*"), the United States Supreme Court reversed an appellate court holding that certain PURPA provisions (including Section 210) impermissibly intruded on state jurisdiction. In that case, the State of Mississippi and the

[5] *Northwestern*, 560 N.W.2d at 930.

[6] *Id.*

Mississippi Public Service Commission (collectively, MPSC) challenged Titles I and III and Section 210 of PURPA as unconstitutional because they exceeded Congressional power under the Commerce Clause and constituted an invasion of state sovereignty in violation of the Tenth Amendment to the U.S. Constitution. With respect to PURPA Section 210, the Court found it significant that state commissions were given options for implementing the rules including, among other things, an undertaking to resolve disputes between qualifying facilities and electric utilities.[7] The Court stated:

> In essence, then the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission. …. [the MPSC] can satisfy § 210's requirements simply by opening its doors to claimants. That the [MPSC] has administrative as well as judicial duties is of no significance. Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the nation, and the congressional determination that the federal rights granted by PURPA can be appropriately enforced through state adjudicatory machinery.[8]

The Supreme Court's finding with respect to PURPA § 210 resolves the question of whether state agencies have the jurisdiction and, consequently, the responsibility, to implement the standards established by the PURPA federal statutory scheme. In determining whether there is an existing obligation in this case, the Commission would thus not be exercising a "purely judicial function" but rather would be acting in accordance with its PURPA implementation responsibilities.

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[7] *FERC v. Mississippi*, at 760.

[8] *Id.* at 760-61 (omitting internal citations).

II. PURPA Granted State Regulatory Authorities Broad Authority and Mandatory Obligations Under PURPA to Encourage Development of Small Power Production.

PURPA's grant of authority to the states is not limited to determining avoided costs as MDU contends. PURPA's grant of authority is much broader. PURPA required FERC to implement rules for the purpose of encouraging the development of cogeneration and small power production facilities by, among other things, requiring electric utilities to purchase power from, and sell power to, QFs.[9] Section 210 of PURPA requires states to implement *any rules* prescribed by FERC:

> (a) ….[FERC] shall prescribe … *such rules as it determines necessary to encourage cogeneration and small power production, …,* which rules require electric utilities to offer to --(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase electric energy from such facilities. ….
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> (f) IMPLEMENTATION OF RULES FOR QUALIFYING COGENERATION AND QUALIFYING SMALL POWER PRODUCTION FACILITIES.--(1) Beginning on or before the date one year after any rule is prescribed by the [FERC] under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised Rule) for each electric utility for which it has ratemaking authority.

In addition, paragraph (c)(1) provides that an electric utility must make an interconnection with a qualifying facility that may be necessary to permit purchases from or sales to the qualifying facility. FERC has held that a *"State regulatory authority or nonregulated electric*

[9] "Purchase" means the purchase of electric energy or capacity or both. Section 292.101(b)(2). "Sale" means the sale of electric energy or capacity or both. Section 101.2(b)(3); *see FERC Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utilities Regulatory Policy Act of 1978*, Docket No. PL83-4000, 23 FERC ¶ 61,304, at 61,143.

utility must enforce this requirement as part of its implementation of the Commission's rules."[10]

In Order No. 69, FERC adopted regulations as required in Section 210 of PURPA (codified at 18 C.F.R. §§ 292.101, *et seq*. (2005)), and left implementation of those rules to State regulatory authorities and nonregulated authorities:

> The implementation of these rules is reserved to the State regulatory authorities and nonregulated electric utilities. Within one year of the issuance of the Commission's rules, each State regulatory authority or nonregulated utility must implement these rules. That implementation may be accomplished by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to the Commission's rules.[11]

"State regulatory authority" is defined as "any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility…"[12] The term "nonregulated electric utility" is defined as any electric utility other than a State regulated electric utility.[13] The SDPUC has ratemaking authority regarding MDU's retail sale of electric energy. Thus, the SDPUC is a "State regulatory authority" as defined in PURPA. As such, MDU is not a "nonregulated electric utility."[14]

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[10] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, Regulations Preamble, FERC Stats. and Regs. 1977-1981 ¶ 30,128, at 30,874, Feb. 25, 1980, 45 Fed. Reg. 12214, *on reh'g* Order No. 69-A, Regulations Preamble, FERC Stats. and Regs. 1977-1981 ¶ 30,160, May 15, 1980, 45 Fed. Reg. 33958. (emphasis added).

[11] Order No. 69 at 30,864.

[12] PURPA, Section 3(17).

[13] PURPA, Section 3(9).

[14] At the hearing, there was a question whether MDU would be considered a "nonregulated electric utility" under PURPA if the Commission did not have jurisdiction.

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To fulfill its State regulatory authority obligations, the SDPUC issued Order No. F-3365 to implement Section 210. The SDPUC found that in implementing PURPA, it would not require utilities to implement a standard rate for QFs with a design capacity of greater than 100 kW and instead would require such contracts between the utility and the QF to be negotiated. The SDPUC further found that regarding such negotiations, *its role would be to resolve any contract disputes that arose between the parties.*[15] The SDPUC's role of resolving disputes in connection with negotiated rates is consistent with FERC's Order 69 implementing Section 210 of PURPA, which states:

> Paragraph (a) of § 292.401 sets forth the obligation of each State regulatory authority to commence implementation of Subpart C within one year of the date these rules take effect. In complying with this paragraph the State regulatory authorities are required to provide for notice of and opportunity for public hearing. As described in the summary of this subpart, such implementation may consist of the adoption of the Commission's rules, *an undertaking to resolve disputes* between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement Subpart C.[16]

Regarding judicial review and enforcement of FERC's rules prescribed under Section 210, Section 210(h)(2) provides that FERC may enforce the rule implementation provisions of Section 210(f) against any State regulatory authority or non-regulated electric utility. For

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Based on the definition of State regulatory authority, MDU is not a nonregulated electric utility.

[15] Order F-3365 at 11.

[16] 45 Fed. Reg. 12214, at 30,893 (February 25, 1980).

purposes of such enforcement, the requirements of (f)(1) shall be treated as a rule enforceable under the Federal Power Act.[17] FERC has interpreted Section 210(h)(2) as follows:

> the Commission believes that review and enforcement of implementation under section 210 of PURPA can consist not only of review and enforcement as to whether the State regulatory authority or nonregulated electric utility has conducted the initial implementation properly -- namely, put into effect regulations implementing section 210 rules or procedures for that implementation, after notice and an opportunity for a hearing. *It can also consist of review and enforcement of the application by State regulatory authority or nonregulated electric utility, on a case-by-case basis, of its regulations or of any other provision it may have adopted to implement the Commission's rules under section 210.*[18]

Here the SDPUC's failure to meet its commitment to resolve disputes between the parties in this case can be viewed as a failure of the SDPUC to carry out its PURPA implementation responsibilities.

III. The Hearing Should Not Be Delayed.

MDU's argument that determining whether MDU has an existing obligation to Superior is a "purely judicial function," ignores FERC's PURPA implementing rules and the straightforward legal precedent interpreting those rules. Determining whether MDU has an existing obligation to Superior is a regulatory determination that falls squarely within the state's duty to act pursuant to PURPA implementation.[19] Because the Commission undertook

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[17] The 2005 Energy Act granted FERC broad new authority to impose civil penalties for violations of rules. Amended FPA Section 316A.

[18] Order 69 at 30,892-93 (emphasis added).

[19] As discussed further in Superior's September 27, 2005 pleading, the question of whether there is an existing obligation is a question for the state regulatory authorities to decide. To the extent there is any question whether or not there is an obligation in effect, the Commission has delegated to the state regulatory authorities the responsibility for making this determination. *Metropolitan Edison Co.*, 72 FERC ¶ 61,269, at 62,184 (1995). In *Metropolitan*, FERC found that the determination of when a legally enforceable obligation

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"*to resolve any contract disputes that arose between the parties,*" the Commission should not allow further delay in this proceeding.

A decision in the Alliant proceeding is expected on or about November 10, and a decision on MDU's application will be expected in late December. Nevertheless, even after an initial determination is issued after the 90-day decision period, there is no guarantee that all of the issues will be fully resolved in that time, and subsequent appeals could follow. Waiting for final decisions in those dockets could take years. Given that the Commission has broad jurisdiction over this matter, and further delays will be harmful to Superior, the Commission should reinstate the November 3-4, 2005 hearing date.

CONCLUSION

Superior requests that the Commission reconsider its October 4, 2005 order delaying the hearing in this case. The Commission should reinstate the November. 3-4 hearing date.

Respectfully submitted,

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has been incurred implicates the ability of the state commission to determine the date on which the avoided cost purchase rate should be calculated. This determination, according FERC, is a matter for the states to decide in the first instance. *Id.* In that case, FERC refused to overturn a Pennsylvania Commission determination that avoided costs should be calculated as of the date the QF has tendered a contract to the utility or has petitioned the Pennsylvania Commission to approve a contract or compel a purchase. *Id.*

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