RECEIVED THE PUBLIC UTILITIES COMMISSION - een 14 2005 OF THE STATE OF SOUTH DAKOTA UTILITIES COMMISSION IN THE MATTER OF THE FILING BY SUPERIOR RENEWABLE ENERGY, LLC, ET AL. EL04-016 AGAINST MONTANA-DAKOTA UTILITIES CO. REGARDING THE JAVA WIND PROJECT ORIGINA Transcript of Proceedings October 4, 2005 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ BEFORE THE PUBLIC UTILITIES COMMISSION, GARY HANSON, CHAIRMAN BOB SAHR, VICE CHAIRMAN DUSTY JOHNSON, COMMISSIONER COMMISSION STAFF Rolayne Ailts Wiest John Smith Karen Cremer Sara Greff Greg Rislov Harlan Best Keith Senger Dave Jacobson Michele Farris Bob Knadle Tina Douglas Heather Forney Pam Bonrud

APPEARANCES

David A. Gerdes, Montana-Dakota Utilities Brad Moody, Superior Renewable Energy Linda Walsh, Superior Renewable Energy

Reported By Cheri McComsey Wittler, RPR, CRR



105 S FUCLID AVE SUITE F • DIFDEF SD 57501 • (605) 045-0573

Case Compress

1	Compress		
	THE PUBLIC UTILITIES COMMISSION		3
2	OF THE STATE OF SOUTH DAKOTA	1	CHAIRMAN HANSON: EL04-016, In the
3			
3		2	Matter of the Filing by Superior Renewable Energy,
4	IN THE MATTER OF THE FILING BY SUPERIOR RENEWABLE ENERGY, LLC, ET AL. EL04-016	3	LLC Against Montana Dakota Utilities Regarding the
5	AGAINST MONTANA-DAKOTA UTILITIES CO.	4	Java Wind Project.
6	REGARDING THE JAVA WIND PROJECT	5	The question before the Commission today is
		1	
7	Transcript of Proceedings	6	shall the Commission grant the Deferral Motion;
8	October 4, 2005	7	two, shall the Commission issue an order finding
9		8	that MDU has an existing obligation and/or contract
10	BEFORE THE PUBLIC UTILITIES COMMISSION, GARY HANSON, CHAIRMAN	9	pending; and, three, shall the Commission issue an
11	BOB SAHR, VICE CHAIRMAN	10	order to show cause to MDU?
12	DUSTY JOHNSON, COMMISSIONER	1 11	I believe MDU has a Motion for Deferral before
13	COMMISSION STAFF	12	us.
13	Rolayne Ailts Wiest John Smith		
14	Karen Cremer Sara Greff	13	MR. GERDES: Mr. Chairman, members
15	Greg Rislov	14	of the Commission, my name is Dave Gerdes. I'm a
16	Harlan Best Keith Senger	15	lawyer from Pierre, and I represent Montana Dakota
	Dave Jacobson	1 1	5
17	Michele Farris Bob Knadle	16	in this proceeding. I do have my notes with me but
18	Tina Douglas	17	I thought I had left them at the office. But I
19	Heather Forney Pam Bonrud	18	found them in this pile of stuff that's in front of
		19	me.
20	APPEARANCES	1	
21	David A. Gerdes, Montana-Dakota Utilities Brad Moody, Superior Renewable Energy	20	The first thing I'd like to say, Mr. Chairman,
22	Linda Walsh, Superior Renewable Energy	21	members of the Commission, because this is a very
23		22	high interest topic in this state and in the plains
24	Reported By Chart McCorrow Wittler BDB CBB	23	states generally, I want it to be clearly
	Reported By Cheri McComsey Wittler, RPR, CRR	24	understood that Montana Dakota is not against wind
25			-
1		25	power. It is not against nonrenewables, is not
	2		4
1	APPEARANCES BY TELEPHONE	1	
2	Denny Law		against any other energy type of energy.
3	Marlene Bennett Talbot Wieczorek	2	MDU believes that it has a responsibility to
4	John Burke Paul Leighton	3	its rate payers and to its stockholders to evaluate
	Chris Madsen	4	all offers in the marketulage. This is but one of
5			au ollers in the markelplace. This is but one of the
	Dick Augustine Sugar Stewart		all offers in the marketplace. This is but one of
6	Suzan Stewart Melissa Thompson	5	several approaches of this kind that MDU has
1	Suzan Stewart Melissa Thompson Mark Holling	5	several approaches of this kind that MDU has received, and MDU believes that it needs to
7	Suzan Stewart Melissa Thompson Mark Holling Colleen Sevold Letty Friesen	1	several approaches of this kind that MDU has
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7	Suzan Stewart Melissa Thompson Mark Holling Colleen Sevold Letty Friesen Natalie Baker Dave Chorzempa Don Ball	6 7 8	several approaches of this kind that MDU has received, and MDU believes that it needs to evaluate all such applications. And so I want that on the table so that it's understood that it has
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	ompress 5		
1	delay this process until FERC has decided, which it	1	does. And that's why we made the Motion.
2	will decide very shortly after the time that the	2	As I have said, I think that the question of
3	hearing in this matter is now scheduled.	3	whether or not an obligation exists really is a
4	So do we want to go ahead and have an avoided	4	subsidiary question and needs to be answered by
5	cost hearing on something that has been already	5	this Commission not definitely but only as to
6	negotiated between the parties, or do we want to	6	whether or not there's a reasonable basis to
7	see what FERC has to say about whether or not the	7	believe that an obligation does in fact exist.
8	Energy Policy Act has sort of changed the rules in	8	And on that basis we believe that there is no
9	the middle of the game.	9	contract or obligation in effect and pending before
10	And we would submit that it is a small delay	10	the Commission.
11	when we think about what could happen if we go	11	And we would disagree with staff's position in
12	ahead with the current plan, the current schedule.	12	their filing that an obligation exists. Because if
13	I would like to make a comment about the	13	Congress had intended that the savings clause appl
14	issues that are before the Commission. It's our	14	to every QF certified before passage of the act, it
14	-	14	
	view that the issue before the Commission is the		could have easily have said as much but it did not
16	Deferral Motion. Now I know that the agenda states	16	say that. The fact that the Act refers to a
17	and that staff has stated that the issue before the	17	contract or obligation in effect or pending
18	Commission also involves whether or not there is an	18	approval clearly means more than a simple demand
19	obligation on the part of MDU to purchase energy	19	purchase by a nonexistent QF.
20	under the Federal Energy Act.	20	In other words, what are the price, quality,
21	We would submit that the only thing before the	21	term, and delivery conditions? None of that part
22	Commission is the Motion to Defer. And there are	22	of the obligation is defined. And if an obligation
23	other grounds to support the Motion to Defer other	23	is in effect, it must be reciprocal. What are
24	than whether or not an obligation to an	24	Superior's responsibilities under this obligation?
25	obligation exists. And so, thus, while there is	25	Because there have to be reciprocal obligations.
	6		
11	consideration of whether or not there is an	1	Again, we don't know what those are.
2	obligation, that's part of the analytical process	2	So why do we if this was an obligation, why
3	that the Commission is going to go through,	3	do we need to have a hearing to determine what the
4	nonetheless, the actual question before the	4	terms of the obligation are? By very definition
5	Commission is simply whether or not it will defer.	5	the obligation is an obligation and it should be
6	And I think it's important to keep that in	6	clearly defined. So it's our belief that as it
7		7	· · · · · · · · · · · · · · · · · · ·
	mind necause orderwise we would subrid final the	1 /	relates to the amendment to PURPA we believe the
8	mind because otherwise we would submit that the Commission perhaps maybe is straying beyond its	8	•
8	Commission perhaps maybe is straying beyond its	8	Congress did not intend that the mere fact that a
9	Commission perhaps maybe is straying beyond its statutory jurisdiction. We also would suggest that	9	Congress did not intend that the mere fact that a QF has qualified gives rise to an obligation.
9 10	Commission perhaps maybe is straying beyond its statutory jurisdiction. We also would suggest that perhaps the Commission would be setting a precedent	9 10	Congress did not intend that the mere fact that a QF has qualified gives rise to an obligation. I mean, current law is that the obligation is
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1		1	not that much is going to happen in the other three			
2		2	dockets anyway. So they were saying no harm, no			
3		3	foul, we don't need to postpone.			
2	5 5	4	So we would submit that the lowa decision is			
5		5	clearly distinguishable. We would submit that this			
e	-	6	Commission is treading we submit on thin ground			
;	And, again, we would submit that if you look	7	in making a clearly federal decision based upon the			
		8	statutory authority that this Commission has to			
		9	act. There are other grounds not involving the			
1		10	PURPA amendments that exist and other reasons that			
1		11	this Commission should delay the hearing date from			
1		12	its current early November date to see what FERC			
1		13	does in these matters.			
1	-	13	And, again, I would just reiterate the issue			
		14				
1			of whether or not an obligation exists in front of			
	6 the provisions of the Federal Telecommunications	16	FERC in both of the petitions, the Alliant petition			
1		17	and the MDU petition. So if you want to talk about			
1		18	preemption, we can talk about that too. Has the			
	9 granted authority to implement PURPA. So therefore	19	federal act preempted this Commission's ability to			
	0 we submit that this question, whether or not	20	address that issue? Certainly it's before FERC now			
2	•	21	before anyone else.			
	2 question and it's in fact in front of FERC and it	22	And with that, we would ask that the			
1	3 should be decided by FERC.	23	Commission grant the Motion to Defer.			
	4 Finally, I'd like to just very briefly touch	24	CHAIRMAN HANSON: Thank you, Dave.			
2	5 on the lowa decision that was submitted by	25	In your remarks towards the beginning, and I was			
ſ	10		12			
	1 Superior. They submitted it saying that they think	1	trying to follow the I just have a quick			
1	2 the Commission should consider this as in	2	question. You stated that the only issue before us			
	3 reaching its decision. There are numerous things	3	was that MDU had filed a Deferral Motion requesting			
	4 that distinguish the lowa decision from the	4	the continuance and that we didn't have the other			
	5 questions that the Commission has before it. First	5	item before us. Not withstanding your remarks			
	6 of all, in the Iowa decision it involved a	6	arguing against that particular position, Superior			
	7 statutory stay procedure that is not applicable	7	did file a response to your Deferral Motion and			
	8 here. There were issues, concerns, whether or not	8	requested that the Commission deny your Deferral			
	9 a deadline would be missed in order for the	9	Motion and to grant affirmative relief in the form			
	10 applicant to receive a state tax incentive. Those	10	of an order finding that MDU has an existing			
	11 issues are not present here. And so our knowledge	11	obligation and/or contract pending.			
	12 there really isn't any reason why under South	12	So would that not place that item before us?			
	13 Dakota Law this matter could not be continued if	13	MR. GERDES: Well, I guess the way I			
	14 the Commission so ordered.	13	read the Superior filing, it was more in the nature			
		14	of a "request" than in the nature of a "Motion."			
	15 The Iowa decision also was based upon the fact 16 that at least one of the dockets before the Iowa	16	•			
		10	And it's my experience anyway that Motion practice			
	17 Commission had been fully briefed and was	18	involves a specifically defined issue that is			
	18 Doughnut time.		placed before the Commission. And I was reading			
1	19 VICE CHAIRMAN SAHR: Normally that	19	the Superior filing as being less than that.			
	20 happens to you.	20	Obviously the Commission needs to address it			
- I	21 MR. GERDES: It just happens to me.	21	as the Commission views it. But it says it's a			
2.1	I was reaching for my phone, as a matter of fact.	22	request for affirmative relief. Well, we make			
	23 And the other reason is that one of those	23	motions around here, and I didn't read it that way.			
	dockets was ready for decision and the lowa board	24	CHAIRMAN HANSON: Thank you. Any			
	25 said in the case of the other three in 90 days that	25	further questions?			

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	1	VICE CHAIRMAN SAHR: Mr. Gerdes, do	1	VICE CHAIRMAN SAHR: I'm just going
	2	you know, has this Commission handled issues	2	to note one thing. And it's very, very minor but
	3	involving avoided costs in the past, to your	3	if people who are on the line or in the room do
$\left(\right)$	4	knowledge, or any other PURPA interpretation or	4	what I do and follow along through the live links
	5	delegation?	5	or the links on our own website, it's very, very
	6	MR. GERDES: Well, of course,	6	minor but under electric the agenda item number 1
	7	avoided costs, yes, I believe this Commission has	7	the Docket is should be EL04-016 and it's
	8	handled avoided costs questions. But it's my	8	EL05-016. And I checked the link and, again,
	9	that is something that is delegated to the states	9	it's wonderful to have this. I'm not criticizing.
	10	by PURPA, and it's something that nobody's objected	10	l want to let people know, though, if you
	11	to.	11	click on the link and it's right in the printed
	12	If you're addressing my point about there	12	agenda. But if you click on the link, you will get
	13	being a statutory impediment to the Commission	13	to the right Docket. For those of you who are on
	14	going to the question of an obligation, nobody's	14	the line or in the room that bounce back and forth
	15	objected to it.	15	like I do and check it out versus carrying the
	16	VICE CHAIRMAN SAHR: No. But I did	16	files up, it is correct if you actually click on
	17	think it was an interesting point, and I was kind	17	the link.
	18	of curious to flesh out a little bit more I may	18	CHAIRMAN HANSON: Thank you. We'll
	19	have some questions for you after we hear from the	19	hear from Superior attorneys, Brad or Linda.
	20	other parties. So thank you.	20	MR. MOODY: Hi. Good morning,
	21	MR. GERDES: Yeah. And I'll be	21	Mr. Chairman and members of the Commission. This
	22	happy to answer them. But I think here, you know,	22	is Brad Moody in Houston, Texas for Superior
	23	if you look at the Northwestern Public Service	23	Renewable Energy and with us on the telephone is my
	24	petition, I think it's the same thing. I think the	24	co-counsel Linda Walsh in Washington, D.C.
	25	Commission had interpreted contracts similar to the	25	l want to speak initially to some of the
(14		16
A sume	1	one that was involved in Northwestern Public	1	comments made by Mr. Gerdes on behalf of MDU and
	2	Service before, but nobody objected.	2	also in general address this question of whether or
	3	VICE CHAIRMAN SAHR: Okay. So your	3	not the Commission should grant the Motion to
	4	distinction would be in cases where perhaps we did	4	Defer. And then I want to turn the core, so to
	5	handle something that was delegated under PURPA or,	5	speak, over to Ms. Walsh to discuss some of the
	6	you know, similar federal electricity laws that in	6	particulars of the petitions that have been filed
	7	those cases to your knowledge nobody objected to	7	by MDU and Alliance and how those petitions may
	8	jurisdiction?	8	impact the Motion and the requests that Superior
	9	MR. GERDES: Excuse me. That would	9	has made for a finding that there is an obligation
	10	be my understanding, yes.	10	in effect that is protected even under the recent
	11	VICE CHAIRMAN SAHR: Thank you.	11	amendments to PURPA.
	12	CHAIRMAN HANSON: Further questions?	12	When Mr. Gerdes was speaking at the beginning
	13	John.	13	of his remarks he said that it was totally
	14	MR. SMITH: Would you address the	14	irrelevant how much delay how much delay MDU has
	15	Metropolitan and Edison cases from FERC back in	15	caused by its failure to negotiate. And this
	16	1995 that were cited by Superior and their relation	16	comment mirrors the pleadings that MDU filed
	17	to the issue of whether this Commission has	17	yesterday afternoon. I want to read the first
	18	authority to make this decision?	18	sentence of the first paragraph of that pleading
	19	MR. GERDES: Well, I believe the	19	because I think it's really important in terms of
	20	answer is that my objection is under state law or	20	illuminating exactly what's been going on over the
	21	lack of statutory authority for the Commission to	21	course of the last two years. That sentence says,
ĺ.	22	act.	22	"While Superior spends a great deal of time arguing
\sim	23	MR. SMITH: Okay. Thank you.	23	that Montana Dakota intentionally delayed the
	24	VICE CHAIRMAN SAHR: Mr. Chairman.	24	proceedings and failed to negotiate in good faith,
	25	CHAIRMAN HANSON: Yes.	25	even if it were true, it has no bearing on the
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1	questions before the Commission."	1	As my co-counsel Ms. Walsh will explain in
2	In plain terms what that sentence says to me	2	greater detail, that obligation has existed since
3	is that MDU is asking this Commission to ignore the	3	19 excuse me, since 2003 when Superior filed its
4	fact that for almost three years Superior has been	4	qualified facility and first asked MDU to provide
5	trying to obtain a power purchase agreement with	5	Superior with the avoided cost information so that
6	MDU under the PURPA statute, that during that time	6	the PPA negotiations could go forward. Those kind
7	MDU has been unwilling to negotiate with Superior,	7	of preexisting obligations are protected from the
8	that MDU has failed to provide the required costs,	8	limited exemption that MDU is using as a basis for
9	avoided costs information necessary to complete	9	its deferral motions.
10	that agreement, that MDU has misrepresented its	10	So as we sit here today, MDU's obligation to
11	avoided costs to this Commission and to Superior	11	take power from the Java wind facility still
12	during the course of the proceedings.	12	exists. PURPA is still the wall and the
13	And in effect what they're saying is ignore	13	Commission's decision and order implementing PURPA
14	all of this off deviation and ignore this delay	14	is still in effect. MDU has not been granted an
15	because if you let me keep bootstrapping my delay	15	exemption by this Commission or by the FERC and it
16	long enough maybe Superior will get tired or run	16	continues to be obligated to negotiate in good
17	out of money and go away. Well, Superior believes	17	faith with Superior for a long-term power purchase
18	that the law says you've got to take all of that	18	agreement.
19	prior conduct into account when deciding whether or	19	Now isn't MDU negotiating in good faith?
20	not to grant this Motion. And I'm here to tell you	20	Well, right now MDU isn't talking to Superior at
21	that Superior has absolutely no intentions of going	21	all. It has simply cut off negotiations and come
22	away.	22	to the Commission and said we need more time to
23	Superior is ready, willing, and able to	23	resolve these complicated issues and appeals and
24	operate the Java Wind Project. The only problem	24	whatnot. May take who knows how long but that's
25	with this project has been getting MDU to comply	25	what we want.
	18		20
	with its obligations under the PURPA statute. We	2	Now if you knew that there was a pending
23	filed an affidavit from Superior's executive	3	amendment to the PURPA statute in the Energy Policy Act of 2005, would it be good faith not to disclose
	Jeff Ferguson documenting that Superior has spent	4	
4	almost \$600,000 so far to develop this Java Wind		the your intentions to invoke that amendment as
5	Project. Superior has acquired wind easements,	5	the basis to halt negotiations? I think it sounds
6	measured wind data, conducted engineering studies,		like MDU was negotiating during this March to
	and paid interconnection fees to MISO and certainly		September time period with its fingers crossed
8	has incurred substantial legal expense going before	8	behind its back.
9	this Commission to try to bring MDU to the table	9	So, in any event, we've got significant delay.
10	and do what it's required to do under the PURPA		What are the consequences of this delay? In the
11	statute.	11	last year the price of steel, turbine, concrete,
12	Everything about the Java Wind Project looks	12	and other construction costs have risen
13	great, except for the fact that MDU will not do	13	substantially. Besides adversely affecting the
14	what it's supposed to do under PURPA and negotiate	14	economics to the Java Wind Project, these costs are
15	in good faith for a PPA.	15	affecting MDU's avoided costs as well. They're
16	Now Superior didn't spend \$600,000 on the	16	causing them to go up. And that's a problem for
17	Java Wind Project because it had some vein hope	17	MDU and it's a problem for MDU's rate payers to the
18	that someday MDU might decide that wind power was a	18	extent that MDU is going to be asking this
19	good thing and that it should sit down and	19	Commission to pass those costs through. The longer
20	negotiate at arms length for a power purchase	20	we delay this proceeding, the worse that problem is
21	agreement. Superior invested that money in the	21	going to become.
22	project because at the time it began the activity	22	Superior believes that PURPA, even the recent
23	the PURPA statute gave Superior as a qualified	23	amendments to PURPA, do not allow this delay to
24	facility the absolute right to sell energy and	24	take place. Take a look at the recent lowa
25	capacity to MDU at MDU's avoided costs.	25	Utilities Board decision, which ruled that no delay
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2 In that decision the baard adopted is four-part test 2 discuss. So if it, would be appropriate, could 1 3 applicable to stay and said that based on all four 3 ask those now, Mr. Chairman? 4 of these portions of the tests is the proceedings 4 CHAIRMAN HANSON: Bo ahead. 5 should be allowed to go invard. The test - the Mr. Moody, a couped of questions. Thirs is under 6 four parts of the tests are whether three would be Mr. Moody, a couped of questions. Thirs is under 9 the stay. How the public interest will be affected MR. MOOO?: Well, again, the 10 by grant nor ond granting the stay and the 10 11 by oscielity that the NOU will prevent at the stay is denied. MR. MOOO?: Well, again, the 12 We think this is a god decision and we think 12 13 the commission hear 13 14 exidence of irreparable harm. As the lowa 14 15 the parties to conduct this hearing is not. 16 16 the parties to conduct this mater is a similar time frame. 17 17 irreparable harm. On the chire side of the cosi, 17 18 there will be that bawa. 16	Γ		21		23
3 applicable to stay and said that based on all four a ask these now, Mr. Chairmain 4 of those portions of the tasts the proceedings s Similar Simila		1	should be forthcoming in a very similar situation.	•	other one that he said his co-counsel was going to
4 of those portion of the tests the proceedings 4 CHARMAN HARSON: Go alted. 5 should be allowed to go forward. The test - the 5 W. Moddy, couple of quastions. First is under 7 irreparable harm to MDU if the stay is denied. W. Moddy, couple of quastions. First is under 9 the stay. How the public interst will be affected 9 W. Moddy, exceptions that are is tisse here? 9 the stay. How the public interst will be affected 9 W. Moddy, exceptions that are is tisse here? 10 by granting on ord granting the stay and the 10 Wethink this is a good decision and we think 13 the commission stoud follow: M. MOU has storwn no 12 Utilities Sources of the state Public Utilities 14 evidence of irreparable harm. As the lowa 15 Commission the authority for deciding the type of 16 the parties to conduct this harring is not 16 The rantine Ouperior it his matter is 17 18 there will be avain file forerand 18 there will be MMIN MARMA SHE. The MOU Main for - to 21 Agreement with MISO that has a similar time frame 21 And if or watever react that the fore on the state will have and the resources on the state of the public interest; 22 22			In that decision the board adopted a four-part test		discuss. So if it would be appropriate, could I
5 should be allowed to go forward. The test – the four parts of the test ere whether there would be irreparable harm to MDU if the stay is denied. 6 WC CHAIRMAN SHIE. Thank you. 6 Wether there's any herry to any party for granting 9 the stay. How the public interest will be affected. 7 PURPA if a stad does lack jurisdiction. Then who would decide the cuestions. First is under 10 by granting on at granting the stay and the 10 0 We think this is a god decision and we think 13 10 We think this is a god decision and we think 14 10 MR MOODY. Well, again, the 10 MR MOODY. Well, again, the 10 Wether the MOU will prevel at FERC. 14 evicence of incarable harm. As the lowa 15 11 withink this is a god decision and we think 16 12 MR MOOY. Well, again, the 10 Wether there's a existing 16 14 eucline the congress and the FERC have 11 11 Wether there's a existing 16 16 Wether there's a existing 16 16 Wether there's a existing 16 16 Wether there's a existing 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17 17		3	applicable to stay and said that based on all four	3	ask those now, Mr. Chairman?
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8 Whether there's any harm to any party for granting 9 9 would decide the quastions that are at issue here? 9 the stay. How the public interact will be afteded 10 year and the stay and the possibility that the ADU will prevail at FERC. METADELIE Edison case that Superior sites in its 11 12 We think its is a good decision and we think 13 the Commission should follow it. MDU has shown no evidence all irreparatole harm. As the lowa 14 Utilities beard beharm to superior if this matrix 16 the arrise to conduct this hearing is not 16 the arrise to conduct this hearing is not 17 and if for whatever reason the FERC changed 16 the arrise to suppion if this matrix 19 the arrise to conduct this hearing is not 10 the Metropolitic interest. the arrise to conduct this hearing is not 18 the arrise to conduct this hearing is not 19 the first mod and said, no, in fact the states hear 19 the ther will be arrise to conduct this hearing is not 10 the site of the coin, 17 And if for whatever reason the FERC changed 10 the site of the coin, 18 the site of the coin, 19 the site of the coin, 19 the site of the coin, 10 the site of the co	Ì	6	four parts of the test are whether there would be	6	Mr. Moody, a couple of questions. First is under
9 the stay. How the public interest will be affected 9 NR. MOODY: Well, again, the 10 by granting or not granting the stay and the 10 Metropolitan Edition case that Superior cites in its 11 possibility that the MDU Mitor prevail at FERC. 11 Metropolitan Edition case that Superior cites in its 12 We think this is a good decision and we think 12 Utilities Board heid, the time and the resources of 13 the commission should follow it. MDU has shown no 13 Communications come there's an existing 16 Utilities Board heid, the time and the resources of 15 defer, namely whether there's an existing 18 there will be harm to Superior if this matter is 16 17 And if for whatever reason the FERC changed 19 further delayed. Three's an exprining fledral 19 adder that responsibility. I suppose it would 20 production tax credit and an Interconnection 20 20 20 24 danger. 23 VIEC CHAIRMAN SAHE: Well, I know in 24 sate che Stut It edition for the public interest; 24 24 Superior believes that the Commission has 3 <		7	irreparable harm to MDU if the stay is denied.	7	PURPA if a state does lack jurisdiction, then who
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25 And they don't involve the Alliant filing or the 25 would be unable to legally act if that argument					
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	25		
1	does prevail.	1	does not otherwise reside with the tribunal.
ו ס		ו ר	
2	Do you have any perspective on whether or not	2	That's why if you could, if you could
3	you think this Commission has authority either	3	elaborate on - and I realize you're late in the
4	under state or under some sort of federal	4	game and maybe need some more time. Just say so
5	catch-all?	5	But here we have a party and albeit several months
6	MR. MOODY: Sure. And I'll tell you	6	into the Docket has made the contention that we
7	briefly because we, again, only had the benefit of	7	don't have jurisdiction. If we don't have it, I
8	seeing this argument at 4:15 yesterday afternoon,	8	don't know how we can proceed. I mean, so I think
9	but I would tell you that ever since the initial	9	it is an important issue for you to address, you
10		10	know, beyond all the - you know, the arguments
11		11	that you're making about, you know, general
12	5	12	fairness in past practice, I think we do need to
13	statute.	13	hit that question or address the question of
			•
14	And I'd go further and say that MDU has	14	whether or not we have jurisdiction. Because
15	acknowledged that as well by continually making the	15	frankly in my mind, you know, while certainly
16	required filings under the PURPA statute for small	16	compelling to some extent, I don't know if it
17	generators. There is a tariff in effect right now	17	carries much legal weight to say past practices was
18	approved by the Commission for the small generator	18	this and looking at the course of negotiations and
19	PURPA tariff. So if there's a problem with	19	so on and so forth if we don't have the
20	jurisdiction, it's never been raised in the many,	20	jurisdiction in the first place.
21	many years that the statute has been in effect.	21	MR. MOODY: Well, I don't have much
22	VICE CHAIRMAN SAHR: So just so l	22	to add to the argument at this point. And
23	understand that last point, so would it be your	23	certainly if this is a great concern to the
24		24	
	contention that because there is a tariff filing	25	Commission, Superior needs to go back and look at
25	that that somehow possibly brings MDU under state	20	the cite that appears in MDU's brief on this
	26		
1	jurisdiction?	1	question. It is surprising that, you know, in the
2	MR. MOODY: No, I'm not arguing	2	almost two years that we've been in front of the
3	that. I think what I'm trying to say is that we	3	Commission we're suddenly hearing that there's a
.J	that. I think what i it trying to say is that we		Commission were successly hearing that there's a
4		4	
4	certainly haven't seen any behavior by either the	4	problem.
4 5	certainly haven't seen any behavior by either the Commission or MDU to this point to suggest that	4 5	problem. Usually these kind of jurisdictional issues
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4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	certainly haven't seen any behavior by either the Commission or MDU to this point to suggest that there's any jurisdictional problem with respect to MDU's excuse me. With respect to the delegation by the FERC to the Commission to implement PURPA. We've had these tariff filings made consistently for many, many years without ever anybody, MDU in particular, saying that somehow under state law the Commission doesn't have the authority to review and accept these tariffs for filing. And certainly in the original decision and order implementing PURPA that the Commission didn't question its own jurisdiction. VICE CHAIRMAN SAHR: Well, and I appreciate kind of that historical and maybe practical perspective but thinking back to my days in law school and private practice and government practice and here at the Commission, I mean,	4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	problem. Usually these kind of jurisdictional issues are raised initially because people, you know, see the problem and bring it to the Commission's attention. So with that, I guess I'd say let us go back and study on this and if necessary, submit supplemental briefs. VICE CHAIRMAN SAHR: Well, and I'll also look to PUC staff on that issue and see what their perspective is. They may be able to answer the question that I'm asking. So I appreciate you taking these questions now and perhaps the other parties may be able to help flesh out some of those details. I just didn't want to lose my train of thought on the jurisdiction issue. So thank you. MR. MOODY: Certainly. CHAIRMAN HANSON: Any further questions? If not, we will hear from Linda Walsh.

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6the FERC cases in this proceeding. We have an Alliant petition that was filed in August, and we Nave an MDU petition that was filed just about two weeks ago. And I noticed in Superior's response we put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision in the Alliant proceeding was to put that a decision the to put the the alliant proceeding was to put that a decision that the alliant proceeding was to put that a decision that the alliant proceeding was to put that a decision that the alliant proceeding was to put that a decision was to put that a decision that the alliant proceeding was to put that a decision that the alliant proceeding was to put that a decision was to put that a decision was to put that a decision was to put tha		to go that far into the question.		FERC's precedent is that it turned that
7Alliant petition that was filed in August, and we7they're going to do the same thing because there's8have an MDU petition that was filed just about two8no way they can make a generic rule on what an9weeks ago. And I noticed in Superior's response we9existing obligation is because it's necessarily10put that a decision in the Alliant proceeding was10very state-specific depending on how each state11expected in early December. It's really in11implemented PURPA.12November that it's expected. So there was an error12So my guess is they're going to say that that13there. I think I just calculated the dates wrong.13particular question with respect to any particular14But the and that corresponds to the 90 days14facilities is for the state to decide and the15that's in the Energy Act of 2005. And that15energy bill itself says that FERC is to make a	5		1	•
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11expected in early December. It's really in11implemented PURPA.12November that it's expected. So there was an error12So my guess is they're going to say that that13there. I think I just calculated the dates wrong.13particular question with respect to any particular14But the and that corresponds to the 90 days14facilities is for the state to decide and the15that's in the Energy Act of 2005. And that15energy bill itself says that FERC is to make a	9	weeks ago. And I noticed in Superior's response we	F	existing obligation is because it's necessarily
12November that it's expected. So there was an error12So my guess is they're going to say that that13there. I think I just calculated the dates wrong.13particular question with respect to any particular14But the and that corresponds to the 90 days14facilities is for the state to decide and the15that's in the Energy Act of 2005. And that15energy bill itself says that FERC is to make a		put that a decision in the Alliant proceeding was	l	very state-specific depending on how each state
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14But the and that corresponds to the 90 days14facilities is for the state to decide and the15that's in the Energy Act of 2005. And that15energy bill itself says that FERC is to make a	1	November that it's expected. So there was an error		
15 that's in the Energy Act of 2005. And that 15 energy bill itself says that FERC is to make a	1	there. I think I just calculated the dates wrong.		particular question with respect to any particular
		But the and that corresponds to the 90 days		
16 requires FFRC render its decision within 90 days of 16 service-territory-wide determination, not a		that's in the Energy Act of 2005. And that	1	energy bill itself says that FERC is to make a
	16	requires FERC render its decision within 90 days of	16	service-territory-wide determination, not a
17 the petition filed. Now the act specifically 17 project-by-project determination on the question.		the petition filed. Now the act specifically		
18 states that FERC is to determine whether or not a 18 So Mr. Gerdes said earlier that there would be		states that FERC is to determine whether or not a		
19 service territory of the applicant, in this case 19 a small delay if we wait for FERC to issue its		service territory of the applicant, in this case		a small delay if we wait for FERC to issue its
20 Alliant or MDU, has met the competitive I'll 20 decisions. I don't think it will be a small delay.		Alliant or MDU, has met the competitive I'll		decisions. I don't think it will be a small delay.
21 call them the competitive tests. There's those 21 It has the potential to be a very long delay first		call them the competitive tests. There's those		It has the potential to be a very long delay first
22 three requirements to indicate whether or not there 22 if FERC doesn't decide all of the issues. And		three requirements to indicate whether or not there	1	if FERC doesn't decide all of the issues. And
23 is access to the markets essentially. 23 also, you know, there could be appeals of FERC's	Card In	is access to the markets essentially.	23	also, you know, there could be appeals of FERC's
24 The act does not specifically state that FERC 24 decision. That could extend things out who knows		The act does not specifically state that FERC	24	decision. That could extend things out who knows
25 should consider whether there's an existing 25 how long. And there's no reason to delay the	25	should consider whether there's an existing	25	how long. And there's no reason to delay the

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1	2	hearing when FERC may not give any clear guidance	2	cause the ultimate costs to go up. So it's
	2 3	on the particular issues here.	3	Superior's preference to go ahead and have the
	С И	I think also that one of the questions that	1	hearing, get all of these issues decided and MDU
	4	Mr. Gerdes had answered was about whether it's	4	will presumably appeal and it will all be decided
	5	necessary to decide the question about whether	5	upon.
	6	there's an existing obligation in this case, and l	6	CHAIRMAN HANSON: Mr. Gerdes, did
	7	think it is necessary for the Commission to make	7	you have something to add to that?
	8	that determination. It's certainly necessary for	8	MR. GERDES: Mr. Chairman well, I
	9	purposes of determining whether to grant the Motion	9	do have some response to the argument of counsel.
	10	to Defer. Because, you know, by definition the	10	l don't have anything to add to the specific point
	11	statute is you know, is removes mandatory	11	raised by Mr. Smith.
	12	purchase obligations for obligations that are not	12	CHAIRMAN HANSON: All right. I'm
	13	existing.	13	debating whether to have you folks going back and
	14	I think we have an existing obligation here.	14	forth or whether we should allow staff to jump into
	15	We need to get that established and move forward.	15	it at this point.
	16	And because it's an existing obligation there's	16	MR, GERDES: Go ahead. That's fine.
ļ	17	really no need to defer the hearing. The only way	17	CHAIRMAN HANSON: Karen.
		, , , , , , , , , , , , , , , , , , , ,		
	18	you would need to defer the hearing is if there's a	18	MS. CREMER: Well, this is
	19	question on that.	19	Karen Cremer from staff. You can read staff's
	20	So I think that it's necessary to determine	20	response and we do believe that an obligation
	21	that definitively. I think it will also help FERC	21	exists. I will just quickly address some of the
	22	in the sense that FERC can take guidance from some	22	points they've made because I do know time is a
	23	states on the very question that FERC has before	23	factor here.
	24	it. And that will help resolve that piece of the	24	l would agree with Ms. Walsh on her take on
	25	puzzle at FERC which really belongs to the states	25	what the FERC Act or the PURPA Act of 1978 did.
- 1		34	 	36
8 m. 1	1	in the first place.	1	I don't have mine in front of me, the Commission's
	2	And I think that's all that I wanted to add.	2	order, 3365, but my memory of that would coincide
	3	If there's any questions, I'd be happy to answer	3	with her.
		them.	Å	And as to the Hub City case, if I remember
	5	CHAIRMAN HANSON: Are there any	5	2
			5	that one correctly also, the court there did
	6	questions by the Commission?	6	recognize and acknowledge that agencies have
	7	John.	7	implied authority. And as I remember that case.
	8	MR. SMITH: Either Mr. Moody or	8	And so I think the Commission does have
	9	Ms. Walsh, you know, we just looked at the	9	jurisdiction here. We've certainly acted as
	10	Affidavit of Mr. Ferguson that you filed yesterday	10	requested under the PURPA of 1978 with the Order
	11	that lists all of those costs. Do you have	11	and that FERC clearly anticipated State Commissions
	12	concerns that if we forge ahead here and go to	12	have some active role in these matters. So I do
	13	hearing, I mean, that's going to be another lump of	13	believe we have jurisdiction.
	14	cost for you guys and is that of concern to you	14	Staff's concern with deferring this Motion is
	15	that you do that and then things turn around and go	15	the appeal process. You know, if it were to go to
	16	the other way?	16	FERC and FERC were to make a decision in November,
	17	I mean, I'm assuming by making your Motion	17	December, whatever it may be, that may be the most
	18	you're willing or by resisting MDU's Motion	18	effective way and cost-effective, but my concern
	19	you're willing to undertake that risk.	19	becomes when everybody starts appealing, you're
	20	, .	1	
	120	MR. MOODY: This is Brad Moody.	20	talking a year, year and a half down the road and
	104	I'll take a stan at answering that The answer is	21	we're still sitting here waiting to hear this
	21	I'll take a stab at answering that. The answer is	00	
	22	yes. We think that going forward is the right	22	matter. Sometimes it's just best to do it and be
	22 23	yes. We think that going forward is the right answer and maybe even the most cost effective	23	done with it. And that's staff's position.
	22	yes. We think that going forward is the right		•

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		That's a factual matter. That's nothing we can	1	service territory wide basis."
		decide. I've got notes all over but if you've got	2	That's just what we've done. And it talks
	3	a particular question, I would take that.	3	about relief from the mandatory purchase option.
	4	CHAIRMAN HANSON: I would like you	4	Now we have just got done talking about that, and
	5	to address the semantics of request versus Motion.	5	it would be my position that FERC in fact does have
	6	MS. CREMER: I don't see one. I	6	the jurisdiction to make that same decision and
	7	would agree with Mr. Gerdes in a courtroom	7	it's now in front of them.
	8	situation that there is a difference probably, but	8	VICE CHAIRMAN SAHR: Mr. Chairman,
	9	we don't we're not very formal here and by	9	if I may. Mr. Gerdes, is that under the new
1	10	choice in administrative law. And I believe	10	provision of the Energy Act?
	11	that and that's what he's more accustomed to is	11	MR. GERDES: Yes.
	12	the courtroom law where motions are made more	12	VICE CHAIRMAN SAHR: Because one of
1	13	formally. Here it's just real informal. So I know	13	the things, of course, that we're grappling with is
	14	what you were saying, but I didn't buy it.	14	do we follow the old provisions or do we follow the
1	15	CHAIRMAN HANSON: Thank you.	15	new provisions. And I think there's some pretty
1	16	Mr. Gerdes, I'd like to give you an opportunity to	16	good arguments both ways on that.
1	17	respond to staff's presentation and some of the	17	Do you know, was there a similar I don't
1	18	discussion that took place with MDU.	18	want to call it backstop, but was there a similar
1	19	MR. GERDES: Thank you,	19	procedure do you know under the previous
2	20	Mr. Chairman. I appreciate this opportunity. And	20	provisions? Or maybe at this point in time it's
12	21	I will try to keep it oh, I'm not sitting close	21	probably irrelevant. Probably in your mind you
2	22	enough to it. Thank you.	22	like the new provisions. That's not relevant;
	23	I appreciate the opportunity, and I will try	23	right?
	24	to keep this brief. I do have copies of the	24	MR. GERDES: In my mind I like the
	25	Northwestern Public Service Company decision with	25	new one and I cannot answer your question as to
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S	1	me taking up one of the last items first, and I'd	1	what existed previously. It's been my general
	2	be happy to pass them out to staff and the	2	experience that I think it bounces back to the
	3	Commission.	3	federal agency. If you talk about preemption as a
	4	(Documents are distributed)	4	concept, of course, it falls on the federal agency.
	5	And I won't belabor the point, but if you go	5	But beyond that, I can't comment.
	6	to the very last paragraph in the decision, the	6	I really don't want to get into this argument
	7	court says, "The PUC is not a court and cannot	7	about, you know, he said, she said, who delayed
	8	exercise purely judicial functions." And then	8	what. If you look at our comments, however,
1	9	going down in that same paragraph it said, "The PUC	9	Mr. Moody talked about, you know, MDU isn't talking
	10	has exceeded its statutory authority by	10	to Superior. Well, our comments talk about a point
	11	interpreting and enforcing the contract between a	11	in time when Superior wasn't talking to MDU. So,
	12	rural cooperative and its customer."	12	you know, without going into that any further, I'll
	13	Now that was the holding. So I will stand by	13	just leave it at that.
	14	the characterization of that decision as I made to	14	Mr. Moody, I think, made a mistake in his
	14	the Commission.	15	comments. He talked about Superior being a QF
	16		16	since 2003. I think the record will show that the
		Secondly, I think with respect to Commissioner	17	
	17	Sahr's question as to whether or not the question	18	QF filing was on April 15 of 2004.
	18	reverts back to FERC, I believe that in the		And then as far as the questions that the
	19	amendment to PURPA Congress has already given us	19	lowa decision, Mr. Moody said that lowa adopted a
	20	that answer. If we look at Subparagraph M, which	20	four-part test. Well, if you read the decision it
	21	is added to Section 210 of PURPA, Subparagraph 3	21	was a statutory four part test that exists in lowa,
	22	entitled Commission Review, the first sentence	22	which does not exist here. And it doesn't it
i I				
\bigcirc	23	says, "Any electric utility may file an application	23	doesn't apply to this proceeding, I would submit.
\bigcirc		says, "Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this section on a	23 24 25	doesn't apply to this proceeding, I would submit. And then finally the question of jurisdiction and I think Commissioner Sahr

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1	pointed it out and that is jurisdiction is never	1	regulatory provisions under that act for
2	waived. If a lack of jurisdiction exists, it can	2	unregulated utilities, which generally means
3	be brought up at any time. And the fact that MDU	3	co-ops, et cetera? But if none of our utilities
4	has participated in this proceeding does not	4	are regulated at that point, is that the set of
5	prejudice its right to assert a lack of	5	procedures that would obtain and would put this
6	jurisdiction.	6	back in the hands of FERC or to arbitrate or to
7	Quite frankly, I think that probably the	7	adjudicate unreasonable actions by you?
8	question can be divided. I view it that even	8	MR. GERDES: I don't believe so,
9	though we go along in an avoided costs proceeding,	9	Mr. Smith, because, I mean, Montana-Dakota is a
10	when we start talking about the federal question of	10	regulated utility under state law certainly. And
11	whether or not a an obligation exists under the	11	so I don't know how that changes that fact.
12	new PURPA language, then that can really be a	12	I do not know under PURPA whether it is viewed
13	different question, I believe.	13	by PURPA as being regulated or not. It's my
14	So those would be my comments. I don't want	14	impression that it is. But I haven't looked at
15	to drag this out too long.	15	that for a long time so I can't answer that.
16	CHAIRMAN HANSON: Thank you. Did	16	MR. SMITH: The answer to that would
17	you have additional?	17	be no one would have authority to deal with this
18	VICE CHAIRMAN SAHR: I have a	18	issue literally? There would be no agency out
10	question. I think Mr. Smith was first.	10	there capable of hearing the avoided cost
20	MR. SMITH: This one is I think for	20	· · ·
		20	proceeding in this case?
21	probably Ms. Walsh and maybe you too, Mr. Gerdes.		MR. GERDES: No. I'm saying that I
22	Is not the way it worked under the old	22	think Montana-Dakota is a regulated utility both
23	PURPA and I think still works when viewed	23	for FERC's purposes and for the state's purposes is
24	from the QF's point of view the statute you're	24	what I'm saying.
25	referring to, Dave, is a statute that gives the	25	MR. SMITH: And is that does that
	42		44
1	requested utility those rights?	1	extend to this Commission's authority to determine
2	MR. GERDES: That's correct.	2	avoided cost and the other terms and conditions as
3	MR. SMITH: But with respect to who	3	originally envisioned by the PURPA act?
4	oversees an avoided cost proceeding and the other	4	MR. GERDES: You know, I haven't
5	proceedings relative to overseeing the PPA process,	5	really analyzed that. I've always had the
6	right, I mean PURPA clearly indicated that with	6	impression that the Commission could do it because
7	respect to regulated utilities that would be State	7	no one objected to it. But, I mean, I haven't done
8	Commissions; correct?	8	the extended research that I would know. The
9	MR. GERDES: That's true. But,	9	research I did related to the question of whether
10	again, the fact that PURPA can delegate all it	10	or not an obligation exists or not. I can't answer
11	wants, but the only way this Commission can respond	11	your question completely at this point.
12	to a delegation of authority is pursuant to	12	MR. SMITH: Do you have anything to
13	statutory authority given by the Legislature to	13	add on that, Ms. Walsh?
14	this Commission to respond.	14	MS. WALSH: Yes, I do, actually. I
15	MR. SMITH: Right. Here's my	15	think the question of what how the Commission
16	question. And maybe Ms. Walsh, I'd like your	16	exercises jurisdiction depends on the issue. And
17	response too. Let's assume then if we were	17	bringing in the Northwest Public Service case, that
18	assuming certainly without deciding that we find we	18	case was a question of contract interpretation.
19	don't have jurisdiction to do anything here and	19	And I think what we're talking about here is not a
20	I think we either have jurisdiction to do most of	20	particular contract term that we're interpreting.
21	it or none.	21	We're interpreting a regulatory obligation, which
22	Does that then mean that MDU under the terms	22	is squarely within the Commission's jurisdiction.
23	of the PURPA law, and I don't have it here with me,	23	And, you know, even FERC will not generally
23	I'm sorry, becomes an unregulated utility under the	23	get in the middle of a contract dispute between two
24	•••••••••••••••••••••••••••••••••••••••	24	parties, which is where I think the Northwest case
	terms of the PURPA act and therefore subject to the		parties, which is where i think the Northwest case

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45	4	47
1 was the issue that the Northwest case was	1	obligation to purchase from a qualifying facility."
2 dealing with. FERC will tell the parties to go to	2	And then it continues on "if there are competitive
3 a state court to interpret a contract provision.	3	markets."
4 For example, you know, who has to deliver at what	4	So I don't think that 210M applies at all and
5 time or how much or, you know, who has the	5	that the old rules are in effect, which has the
6 liability or those kind of issues are contract	6	mandatory obligation purchase obligation in
7 issues, and those FERC won't decide.	7	them.
8 If it has to do with rates, if it has to do	8	MR. SMITH: Let me clarify just a
9 with any terms and conditions of service that are	9	little bit. What I'm getting at and I just
10 jurisdictional, those are things that FERC will	10	don't have the act right in front of me. If we
11 hear under its jurisdiction.	11	have no authority under PURPA to do anything
12 And I think the same is true with the State.	12	because we're lacking in explicit legislative
13 And if we're dealing with the regulatory question	13	delegation here at the state level, then does MDU
14 of things that are regulated by the State, which	14	become an unregulated utility and subject to the
15 would include the PURPA obligation, the State	15	unregulated utility provisions under the original
16 certainly has jurisdiction.	16	PURPA act?
17 Now if we were before the Commission asking	17	MS. WALSH: Well, if if I
18 you to decide what a particular contract provision	18	understand correctly, what you're saying is that
19 means or what the parties intended by that, that	19	the State did not have the authority to accept the
20 would be another question, and I think that would	20	delegation from FERC in the first place?
21 be the situation where the State probably shouldn't	21	MR. SMITH: That's right. You know,
22 exercise the jurisdiction.	22	that's right. And, again, that's not quite the
23 The question of what existed previously under	23	Hub City case, but what I'm getting at is to the
24 PURPA and PURPA 210 of PURPA, 1A through L	24	extent that we don't have the authority to
25 essentially and the Energy Act of 2005 added	25	regulate, does that render MDU an unregulated
	20	
46	4	48
1 Section M. And M has many different subsections	1	utility under PURPA and therefore subject to those
2 and one of which allows utilities to apply to FERC	2	provisions, that particular regulatory regime that
3 for relief from the mandatory purchase obligations.	3	applies to unregulated utilities like co-ops?
4 And the Section M also contains provisions	4	MS. WALSH: Well, maybe. Yeah. 1
5 explaining how the utility should go about doing	5	guess I can't answer that question. Unregulated
6 that.	6	utilities is certainly covered by PURPA, and I
7 It also, though, contains a provision and this	7	think it's essentially the same obligation. It's
8 is 210M6, which says that nothing in 210M is	8	just not enforceable by a PUC. But FERC has
9 intended to and I'll read the language	9	enforcement authority. So if an unregulated
10 specifically. It's entitled No Effect On Existing	10	utility were to fail to comply with PURPA, parties
11 Rights And Remedies. "Nothing in this subsection,"	11	can go to FERC and seek enforcement.
12 which is referring to Subsection M, "affects the	12	FERC has rarely done that. We did cite one
13 rights or remedies of any party under any contract	13	case. One recent case is the Swecker case where
14 or obligation in effect or pending approvals before	14	FERC did in fact exercise enforcement authority and
15 the appropriate state authority or nonregulated	15	that was against an unregulated utility.
16 electric utility on the date of enactment of this	16	MR. SMITH: Thank you.
17 subsection." And it continues on, but I think	17	MS. WALSH; Thank you.
18 that's the relevant piece of it.	18	VICE CHAIRMAN SAHR: I have one more
19 And that's I think where we are now. The	19	question, if I could, please.
20 question is whether 210M applies at all in this	20	CHAIRMAN HANSON: Please go ahead.
21 case, which we think it doesn't because this only	20	VICE CHAIRMAN SAHR: Dave, when you
	21	· · · · · ·
22 affects new obligations. In fact, from the very	1	talk about jurisdiction here and I'm trying not
23 beginning 210M1 states that "After the date of	23	to lose I want to make sure I understand your
24 enactment of this subsection no electric utility	24	argument. Is your argument that if we possibly
25 shall be required to enter into a new contract or	25	lack jurisdiction for anything before us or,

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49 51 1 excuse me, before all matters within this Dodel and not just some aspects of it and we can pursue other aspects with jurisd chan or an anyou just 1 MR GERDES: Yep. And I think 2 and not just some aspects of it and we can pursue out a signing that you option is into we have no jurisdiction act under state law, therefore, we can to de anything with this Docket 1 MR SMITH: Well, that may be the declaration act under state law, therefore, we original - whether an obligation is under the original - whether an obligation act owath the declaration act what the obligation is under the original - whether an obligation act owath the declaration act what the obligation is under the original - whether an obligation act out the declaration act was the declaration and would like to have this no concents that conclusion and would like to have this no concents of Fridag I was thinking only of the - only as it deal with the question of whether or not an obligation exist. And to before a State Commission and the statutes with that thought in mind. When I is write this no concents on Fridag I was thinking only of the - only as it deal with the question of whether or not an obligation exist. And to believe that it do the othink is one commistion Fridag I was thinking on you there on an an obligation exist. And to believe that it do the othink is one commistion fridag I was thinking only of the - only as it deal with the question is on the position vas takes. And it would be no jurisdiction to address an aw died dost proceeding as well. Immed, the position is a short one. The position vas takes. And to poly we state, I gagee with you that the second diafwort mit position is vas an aw died dost is proceeding as well. Immed, a wald to out the second the the sthat disters the posing sthas a brow at this bas. And theo	Case Compress				
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3 other aspects with jurisdiction are reput jurisdiction acts under state lew, therefore, we can't do arything with this Docket? 3 MR S.WITH: Well ther may also mean that we're being asked to render a decision as to what the colligation arcse under the original – whether an obligation arcse under the original – whether and black that the 11 Arcs is then the question is does this 11 NR GERDES: It hink that the 12 Arcs is then the question is does this 11 NR GERDES: It hink that the 13 Commission have jurisdiction over an avoided cost 11 NR GERDES: Mell, it was any other or out it can go forward. 14 proceeding that have tho gast in min. When I 14 16 16 15 of whether or not an obligation exists. And it 20 MR SMITH: Mark Mell. Arc I do just 21 dovetalles is a stratte or think that I dored think 21 17 16 24 c	1	excuse me, before all matters within this Docket	1	MR. GERDES: Yep. And I think	
4 flat out saying that your oprion is that we have no jurisdiction act under state law, therefore, we can't do anything with this Docket? 4 case I man, it necessarily is the case, but it may also mean that we're being asked to render a discing at the wet being not have the statutory authority to interpret the the statute dealing with whether or not an obligation rends being with wether or not an obligation rends being wether wether and being the statute and law statute and law statute and rends being wether wether and that the used rends being wether wether and the statute and the statutes with that thought it in mind. When 1 the statutes with that thought it mind. When 1 the statutes a question means on Friday law thinking only of the - only as it dealt with the question and whether or not an obligation exist. And it 20 they've taken would indicate that perhaps there would be no jurisdiction to adviess an avoided cost they've taken would indicate that perhaps there would be no jurisdiction that was properly before the 21 they've taken would indicate that perhaps there would be no, jurisdiction the adviess an avoided cost they we taken would indicate that perhaps there would be no, jurisdiction to adviess an avoided cost they we taken would indicate that perhaps there would be no, jurisdiction to adviess an avoided cost they we taken would indicate that perhaps there would be no, jurisdiction to adviess an avoided cost they've taken would indicate t	2	and not just some aspects of it and we can pursue	2	that's up to PURPA.	
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	24	MR. SMITH: Are we? Well, I guess	24	CHAIRMAN HANSON: Thank you,	
	25	we are.	25	Commissioner Johnson. We'll be off the record for	

Case Compress

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1	a moment.
2 3	(Discussion off the record) VICE CHAIRMAN SAHR: I would move
4 5	that at the end of the regular PUC hearing that we
с 6	go into executive session in this Docket. CHAIRMAN HANSON: Did you have that
o 7	on record?
8	THE COURT REPORTER: Yes.
9	CHAIRMAN HANSON: Thank you. I
10	second the Motion.
11	COMMISSIONER JOHNSON; Concur.
12	(A recess is taken at which time the Commission
13	meets in executive session)
14	CHAIRMAN HANSON: 1 will move that
15	the Commission grant a continuance until FERC has
16	released its decision in Alliant Energy Corporate
17	Services, Incorporated in relationship to EL04-016.
18	VICE CHAIRMAN SAHR: Second.
19	COMMISSIONER JOHNSON: I concur.
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2	STATE OF SOUTH DAKOTA) :SS CERTIFICATE
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2 3 4 5	STATE OF SOUTH DAKOTA) :SS CERTIFICATE COUNTY OF HUGHES) I, CHERI MCCOMSEY WITTLER, a Registered
2 3 4 5 6	STATE OF SOUTH DAKOTA) :SS CERTIFICATE COUNTY OF HUGHES) I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter and Notary Public in and for the
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