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OCT 12 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 Motion for Reconsideration, 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

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OCT 12 2005

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

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**
UTILITIES CO. REGARDING THE) **TO SUPERIOR'S MOTION**
JAVA WIND PROJECT) **FOR RECONSIDERATION**

Montana-Dakota Utilities Co. ("Montana-Dakota") responds to the motion for reconsideration of Superior Renewable Energy LLC ("Superior"), as follows:

1. In its motion Superior takes issue with Montana-Dakota's position that the Commission's jurisdiction is constrained by the limits of its statutory authorization from the legislature. Superior also posits the proposition that state implementation of FERC's rules under PURPA has been upheld by the U.S. Supreme Court and inferentially that this Supreme Court holding frees the Commission to do that which South Dakota statute fails to otherwise authorize. This position is supported by neither logic nor the very legal authorities cited by Superior.

The Tenth Amendment to the U.S. Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This provision was one of the fundamental tenets demanded by the states in return for ratification of the Constitution. It reserves to the states those powers not delegated to the federal government. In this context, states retain their sovereignty.

In point of fact, the Supreme Court, discussing the Tenth Amendment, addressed precisely the issue presented by Superior's brief, and said:

Whatever all this may forebode for the future, or for the scope of federal authority in the event of a crisis of national proportions, it plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity. Titles I and III of PURPA require only *consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, *it need not even entertain the federal*

proposals. As we have noted, the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities. In a sense, then, this case is only one step beyond Hodel v. Virginia Surface Mining & Recl. Assn., *supra*. There, the Federal Government could have pre-empted all surface mining regulations; instead, it allowed the States to enter the field if they promulgated regulations consistent with federal standards. In the Court's view, this raised no Tenth Amendment problem: "We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." 452 U.S., at 290, 101 S.Ct., at 2367. "[T]here can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program." *Id.*, at 288, 101 S.Ct., at 2366 (emphasis added).

F. E. R. C. vs. Mississippi, 456 U.S. 742, 763 - 765 (1982)

As the court in Mississippi stated, "the choice put to the states - that of either abandoning regulation of the field altogether or considering the federal standards - may be a difficult one." F. E. R. C. vs. Mississippi, 456 U.S. 742, 766 (1982). Furthermore, the court noted that although "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements ... this does not change the constitutional analysis: as in Hodel vs. Virginia Surface Mining & Recl. Assn., "[t]he most that can be said is that the ... Act establishes a program of cooperative federalism that **allows** the States, within limits established by federal minimum standards, to **enact** and administer their own regulatory programs, structured to meet their own particular needs.'" *Id.* at 767 (citing Hodel v. Virginia Surface Mining & Recl. Assn., Inc., 452 U.S. 264, 291, 101 S.Ct. 2389, 2367 (1981)) (emphasis added). As Superior explains in its own brief, PURPA is a "federal statute that **leaves to the states the responsibility for implementing rules** prescribed by FERC. (Superior's Motion for Reconsideration p. 4) (emphasis added). In the present case, South Dakota could have adopted statutes and implemented regulations that would have given SDPUC the ability to enforce the provisions of PURPA, but the state did not do so.

In other words, FERC does not and cannot supervise this Commission nor can it mandate its jurisdiction. Logically, then, the enforcement of PURPA falls back to FERC.

Superior argues that Section 210 of PURPA requires states to implement any **rules** prescribed by FERC. That may or may not be

true¹, but it is not relevant to the Commission's inquiry with respect to the motion to reconsider. What concerns this Commission is the effect of the amendments to PURPA by EP Act 2005, specifically new § 210 subsections (m)(1) and (6). These subsections of federal statute present the legal question of whether §210 subsection (m)(1) extinguishes Montana-Dakota's obligation to purchase power from a QF, or whether subsection (1) is not applicable to Superior's QF because of subsection (6) which provides a savings clause for ". . . any contract or obligation, in effect or pending approval before the appropriate State regulatory authority . . .".

Superior completely misses the point in arguing that this Commission has some obligation to implement PURPA rules. The new material in EP Act 2005 affecting PURPA section 210 is not a FERC rule, it is a United States statute passed by Congress. Thus, the arguments made by Superior concerning implementation of FERC rules by the Commission are totally irrelevant. The question here is the interpretation of an act of Congress. We are here dealing with the interpretation of a new statute-- a legal question. FERC is the jurisdictionally correct entity to interpret it.

2. Superior seeks to minimize the holding in Petition of Northwestern Public Service, 560 NW2d 925, 930 (SD 1997) which clearly holds that the jurisdiction of this Commission cannot extend beyond the authority granted by statute. While Superior is entitled to its opinion, the case states basic principles of state administrative law, is good authority and has been followed by this Commission. As Montana-Dakota mentioned in argument on the deferral motion, this Commission openly advocated passage of SDCL § 49-31-81 during the 1998 legislative session to give it the jurisdiction to implement the Federal Telecommunications Act of 1996, in recognition of this very proposition.

The legal principle that an administrative body's jurisdiction is constrained by the provisions of statute is well grounded in the jurisprudence of this state and surrounding states. Application of Megan, 6 SD 1, 5 NW2d 729, 735 (1942) ("The Commission is not clothed with an unlimited discretion. The statutes from which its powers are derived serve also to mark the boundaries of those powers."); Capital Electric Cooperative, Inc. vs. Public Service Commission of State of North Dakota, 534 NW2d 587, 589 (ND, 1995) ("Jurisdiction is the power to hear and determine a proceeding. [citation omitted] The PSC has only the powers and duties conferred upon it by the legislature."); Application of Minigasco, 565 NW2d 706, 711 (MN, 1997) ("As a creature of statute, the

¹In Mississippi the Court says states can choose to stop regulating in the field, according to the quote on page 1.

Commission enjoys only the authority granted to it by the legislature.'').

3. This Commission spent a great deal of time at its October 4, 2005, meeting considering the arguments of the parties and deliberating before it rendered its decision. Montana-Dakota submits that the Commission rendered the correct decision in view of all the circumstances. It makes very little sense for the parties and the Commission to go through an avoided cost determination while the issue of Montana-Dakota's entitlement to an exemption from the purchase requirements of PURPA is pending before the FERC.

Montana-Dakota is entitled to have the legal issues presented to the FERC resolved. It is clear under the law that FERC is the entity which must determine whether Montana-Dakota's purchase obligation exists.

CONCLUSION

Montana-Dakota believes that the rights of the parties are best protected by an interpretation of the provisions of EP Act 2005 at issue in this matter by the Federal Energy Regulatory Commission. The Commission for good reason and upon due deliberation determined that the ends of justice best benefited from a deferral of further proceedings in favor of a FERC determination. The issues in this docket should await FERC's determination.

Dated this 12TH day of October, 2005.

MAY, ADAM, GERDES & THOMPSON LLP

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 12 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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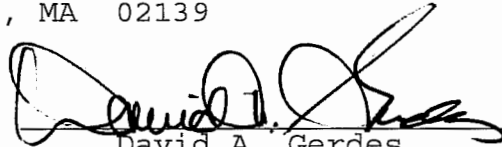
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