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	)	EL04-016
	)	**MONTANA-DAKOTA'S REPLY TO SUPERIOR'S SUPPLEMENTAL MEMO SUPPORTING MOTION FOR RECONSIDERATION**

Montana-Dakota Utilities Co. (``Montana-Dakota''), responds to the supplemental memorandum of Superior Renewable Energy LLC (``Superior'') supporting its motion for reconsideration, as follows:

1. As Montana-Dakota stated in its reply to Superior's Motion for Reconsideration, it is clear that United States Supreme Court authority relied upon by Superior in fact supports the conclusion that there is no federal power to compel state regulatory activity in areas of regulation reserved to the United States government where the states have chosen not to do so. It is further clear that South Dakota and surrounding states recognize the proposition that an administrative body's jurisdiction is constrained by the provisions of statute, and this Commission enjoys only the authority granted to it by the Legislature.

2. Superior contends that the Metropolitan Edison case[1] supports the proposition that the determination of whether an obligation is in effect or pending approval under PURPA § 210(m)(6)is for the states to decide. That case had nothing to do with the termination of the mandatory purchase requirement of PURPA § 210 and predated the passage of EP Act 2005 by 10 years.

The Metropolitan Edison case dealt with the issue of the date of a ``legally enforceable obligation'' for purposes of determining the date upon which avoided costs should be determined. Since the responsibility for calculation of avoided costs and other contract terms was given to the states, FERC in that case held the determination of the existence of a legally enforceable obligation under state law for purposes of determining avoided costs was also properly with the state. That is a far different issue than whether ``any contract or obligation, in effect or pending approval before the State regulatory authority . . . on August 8, 2005,'' exists for purposes of the saving clause.

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[1]Metropolitan Edison Co., 72 FERC ¶ 61, 015 (Order Denying Petition for Enforcement and Declaratory Order) and 72 FERC ¶ 61, 269 (1995).

Congress did not delegate adjudication of the savings clause to the states in EP Act 2005. Compare PURPA § 210(f)(1)(part of the 1978 act) which provides:

> (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 Commission under subsection (a) of this section 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.

Clearly, in this instance Congress delegated to the states implementation of QF rules, including the determination of a ``legally enforceable obligation.'' Congress could have said the same thing in § 210(m), **but it did not do so.** Nor to this date has FERC delegated that question to the states. Moreover, the question of determination of an obligation is not an issue of state law, since there is nothing in South Dakota law that creates an obligation on the part of MDU to purchase power from Superior.

Unless FERC decides to delegate this question to the states, which it has not done, this is a question of federal law which has not been delegated to this Commission by Congress or FERC. On the other hand, there is no question that FERC could decide this issue or issue guidelines for its decision. Finally, as Montana-Dakota has previously stated in at least two of its previous filings, the South Dakota Legislature has not given the Commission jurisdiction by statute to implement PURPA.

CONCLUSION

Montana-Dakota continues to believe that the rights of the parties are best protected by awaiting the determination of the Federal Energy Regulatory Commission concerning the applications of EP Act 2005 to this proceeding, given the clear language of Congress terminating the PURPA purchase obligation and the likely inapplicability of the saving clause to the relationship between the parties to this proceeding. This Commission once believed that deferral served the ends of justice and best benefited the parties. The issues in this docket should await FERC's determination.

Dated this 21st day of October, 2005.

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 21st 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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