MONTANA-DAKOTA
UTILITIES CO.
A Division of MDU Resources Group, Inc.

400 North Fourth Street
Bismarck, ND 58501
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November 22, 2005

Ms. Heather Forney
Acting Executive Director
South Dakota Public Utilities
Commission
State Capitol Building
500 East Capitol
Pierre, SD 57501

Re: Docket No. EL04-016

Dear Ms. Forney:

Montana-Dakota Utilities Co. (Montana-Dakota), a Division of MDU Resources Group, Inc. herewith submits an original and eleven (11) copies of the following motions to the Commission: Motion to Dismiss and to Redefine Issues set forth in the Commission's Notice of Investigation dated October 26, 2004; Motion in *Limine* to Limit Introduction of certain prefiled testimony and exhibits; and Motion for Summary Judgment dismissing the complaint in this proceeding.

Please acknowledge receipt by stamping or initiating the duplicate copy of this letter attached hereto and returning the same in the enclosed self-addressed, stamped envelope.

Sincerely,

Donald R. Ball
Assistant Vice President –
Regulatory Affairs

Attachment
cc: Service List

Montana-Dakota Utilities Co.
Docket No. EL04-016
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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED	)	
BY SUPERIOR RENEWABLE ENERGY LLC ET	)	Case No. EL04-016
AL. AGAINST MONTANA-DAKOTA UTILITIES	)	
CO. REGARDING THE JAVA WIND PROJECT	)	

MONTANA-DAKOTA'S MOTION TO DISMISS AND REDEFINE ISSUES, MOTION IN *LIMINE*, AND MOTION FOR SUMMARY JUDGMENT

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), submits the following motions to the Commission: Motion to Dismiss and to Redefine Issues set forth in the Commission's Notice of Investigation dated October 26, 2004; Motion in *Limine* to Limit Introduction of certain prefiled testimony and exhibits; and Motion for Summary Judgment dismissing the complaint in this proceeding.

I. MOTION TO DISMISS AND REDEFINE ISSUES.

On May 12, 2004, Superior Renewable Energy, LLC and its subsidiary, Java, LLC ("Superior"), filed a complaint with the Commission seeking relief to obtain a power purchase agreement with Montana-Dakota for the sale of electricity generated from a Qualified Facility ("QF") under to the Public Utility Regulatory Act of 1978 ("PURPA"). The complaint included a request for disclosure of certain information primarily related to the calculation of Montana-Dakota's avoided costs of alternative electric energy.

On October 26, 2004, the Commission issued its Notice of Investigation under SDCL 49-34A-26; and an Order for and Notice of Procedural Schedule and Hearing. The Notice of Hearing set forth eight issues to be considered at the hearing if the issues were not decided prior to the hearing on the motion of a party or the Commission. The

Commission noted that some of the issues, particularly issues 1-5, appeared to be appropriate for decision on a pre-hearing motion and invited the parties to file appropriate pre-hearing motions to narrow the issues. Montana-Dakota's current motion is in response to that invitation. As discussed below, many of the issues have been resolved or addressed in the discovery process in this proceeding or are appropriate for summary disposition. Accordingly, Montana-Dakota requests the Commission to dismiss or refine the following issues for consideration at the hearing to be held in this matter on December 13-16, 2005.

A. Issue 1.

Whether MDU should be required to file with the Commission all of the information relative to avoided costs that MDU is required by 16 U.S.C. §2643, 18 C.F.R. §292.302(b)(1)-(3) and the SDPUC PURPA Order to File and Disclose?

Federal regulations, at 18 C.F.R. § 290.102, require all non-exempt electric utilities to file the data required by § 133(a) of PURPA, (16 U.S.C. § 2643) with their state regulatory authorities. However, as explained in the pre-filed testimony of Montana-Dakota witness Donald R. Ball, under § 290.101, Montana-Dakota is an exempt utility and has not been required to file the § 133 data for a number of years. The relevant regulations are included as Attachment 1. Page one of the attachment contains the two referenced sections and page two shows Appendix A which denotes Montana-Dakota as an exempt utility. Even if available, much of the § 133 data would be inapplicable in the context of this proceeding as it dealt with costs (generation, transmission and distribution) of serving various customer classes at retail.

With respect to the information required by § 292.302(b)(1)-(3) and the SDPUC 3365 Order, Montana-Dakota has routinely filed similar information with the Commission

as part of the annual update of its qualifying cogeneration and small power production tariffs denoted as Montana-Dakota rates 95, 96 and 97. These filings have been always publicly available.

For the foregoing reasons Issue 1 should be dismissed from consideration in this proceeding.

B. Issue 2.

Whether the information referred to in Issue 1 should in any case be required to be disclosed to Superior?

With respect to the § 133 data, Montana-Dakota does not have the data as it was long ago exempted from filing such information and therefore never prepared it. Accordingly, it is not able to disclose such information to Superior.

With respect to the § 292 data and the SDPUC 3365 Order information, Montana-Dakota has already supplied such information to Superior as part of the discovery in this proceeding. Montana-Dakota also provides similar information in its annual update filing with the Commission for its qualifying cogeneration and small power production rates. Montana-Dakota advised Superior regarding the availability of § 292 data in Montana-Dakota's discovery responses.

For the foregoing reasons, Issue 2 should be dismissed from consideration in this proceeding.

C. Issue 3.

"Whether the information required to be filed and/or disclosed pursuant to Issues 1 and 2 must include any or all of the following information:

a. MDU's Integrated Resource Plan filed in North Dakota on July 1, 2003?

b. With respect to MDU's in-service and planned generation facilities, including the coal-fired power plant currently being studied for construction in western North Dakota:

- **(i) The most recent installed (or planned) cost ($/KW)**
- **(ii) Burner tip fuel costs ($/Mmbtu)**
- **(iii) Heat rate (Mmbtu/kwh)?**
- **(iv) Annual capacity factor?**
- **(v) Operation and maintenance costs, including the cost to operate any emissions control technology?**
- **(vi) Water consumption?**

c. Existing capacity and energy purchase contracts?

d. Terms of any proposed new contracts?

e. Hourly system load data for the last 5 years?

With respect to Item a, Montana-Dakota provided a copy of its 2003 Integrated Resource Plan in its Response #3 to Superior's first set of interrogatories. Montana-Dakota has also routinely provided the Commission with a copy of its Integrated Resource Plan at the same time it is filed in North Dakota. Accordingly, this document has always been available for public inspection at the Commission's offices. Montana-Dakota also provided a copy of its 2005 Resource Plan to the Commission and served a copy on Superior with Montana-Dakota's supplemental responses to Superior's discovery requests.

With respect to Item b, Montana-Dakota provided the requested information for the proposed coal-fired plant in western North Dakota in responses to Superior's first set of interrogatories, questions 23-28, and in responses to Superior's third set of interrogatories, questions 3-8. Montana-Dakota also provided similar information for the Big Stone II coal-fired plant in eastern South Dakota in its supplemental responses to Superior's discovery requests. Regarding in-service generation facilities, Montana-Dakota provided relevant information in accordance with its "Guidelines for Montana-Dakota's Data Response" with its discovery responses. Montana-Dakota provided

calculations of its avoided costs, including confidential work papers and input information, in its October 20, 2004 responses to Superior's discovery requests; the pre-filed testimony and supplemental testimony of Mr. Ed Kee, Montana-Dakota's expert witness in this proceeding; and in its supplemental discovery responses.

With respect to Item c, Montana-Dakota provided copies of its existing capacity and energy purchase contracts as of December 3, 2004 in compliance with the Commissions November 24, 2004 Order Granting Motion to Compel and Protective Order. Montana-Dakota also supplemented that information in its recent supplemental discovery responses.

With respect to Item d, the only "proposed" new contract is with Superior. Montana-Dakota's proposed terms for a purchase contract with Superior are discussed in its prefiled testimony. The terms of a new power purchase agreement that was executed on September 12, 2005 between Northern States Power Company and Montana-Dakota, were provided in Montana-Dakota's supplemental discovery responses.

With respect to Item e, Montana-Dakota provided the relevant information in its response to Superior's discovery requests on October 20, 2004 as part of Montana-Dakota's estimated avoided cost calculations.

Full copies of Montana-Dakota's discovery response have been served on the parties including the Commissions' staff. Because of the voluminous nature of the discovery responses, Montana-Dakota has not included them with this filing. Montana-Dakota, however, is prepared to supplement this filing with its discovery responses if the Commission so requests.

For the foregoing reasons, Issue 3 should be dismissed from consideration at the hearing.

D. Issue 4.

Whether MDU should be required to file with the Commission and disclose to Superior all work papers and information used by MDU to calculate the monthly capacity payment of $14.50/kw mo. set forth as tariffed rate in MDU State of South Dakota Electric Rate Schedule, Section No. 3, Sheet Nos. 30 – 30.2, "Long Term Purchase Rate 97 Time Differentiated?

As part of its annual filing with the Commission, Montana-Dakota routinely provides the referenced information to the Commission including the work papers supporting the filing. None of this information is considered confidential and is publicly available. Montana-Dakota also provided the information relevant to this issue in its responses to Superior's first set of interrogatories in answers to questions 5 through 8 and 15.

Accordingly, this issue should be dismissed from consideration in this proceeding.

E. Issue 5.

Whether MDU should be required to file with the Commission and disclose to Superior MDU's forecast of annual emission by constituent to include, but not limited to, NOX, SO2, mercury, PM10 and VOC associated with MDU's proposed coal fired generation capacity addition(s) as well as for MDU's existing coal-fired generation capacity?

Superior requested this information regarding generation plant emissions in its interrogatories 20, 21, and 22 in its first set of interrogatories. Montana-Dakota objected to providing this information on the grounds it is not relevant to the subject matter of this proceeding which is the extent and terms of Montana-Dakota's obligation, if any, to purchase electricity from Superior's QF.

The requested information is not relevant to the calculation of avoided energy or capacity costs. Montana-Dakota's existing coal-fired generation capacity complies with existing environmental emission regulations. Montana-Dakota has no plans to retire those facilities within the next 20 years. The purchase of electric energy from the Superior facility would not avoid energy or capacity costs at these existing facilities as the costs for those facilities have already been incurred. As the Commission made absolutely clear in its Order 3365, the PURPA rules do not require Montana-Dakota to pay a QF for costs that are not avoided.

Similarly, the avoided cost information for the proposed Big Stone II coal-fired electric generation facility planned for 2011 incorporates the cost of the latest proven technology to effectively control environmental emissions. The proposed QF does not avoid any additional capacity or energy costs for environmental emissions beyond those included in the avoided costs of the planned facility.

For the foregoing reasons, Issue 5 should be dismissed from consideration in this proceeding.

F. Issue 6.

Whether, and in what amounts, MDU should be required, pursuant to 16 U.S.C. § 24a-3 and 18 C.F. R. §§ 292.303 and 292.304, to pay Superior over the life of the Java Wind Project for electricity made available to MDU from the project? The determination of this issue will require consideration of the avoided cost issues presented by 18 C.F.R. § 292.304 including, but not limited to, both avoided energy costs and avoided capacity costs.

Montana-Dakota requests this issue be redefined. As currently stated, this issue suggests the Commission will determine the amount that MDU should be required to pay "over the life of the Java Wind Project." Montana-Dakota believes the issue is more correctly stated as the amount Montana-Dakota should be required to pay "over the

term of the legally enforceable obligation" for electricity made available from the Java Wind Project.

As noted by the Commission in its Notice of Hearing, determination of this issue requires consideration of § 292.304. Section 292.304(d) gives qualifying facilities the option of either providing energy "as available" or pursuant to a "legally enforceable obligation." Superior apparently intends to exercise the option of providing energy and capacity pursuant to a legally enforceable obligation. Section 292.304(d)(2) defines this QF option as follows:

> To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) the avoided costs calculated at the time of delivery; or
> (ii) the avoided costs calculated at the time the obligation is incurred.

Consistent with the mandates of PURPA at 16 U.S.C. § 824a-3, the FERC's PURPA rules provide that an electric utility cannot be required to pay more than its avoided costs for purchases from a QF. 18 C.F.R. § 292.304(a)(2). Because payments to a QF cannot exceed a utility's avoided costs, payments must be determined based on avoided costs over the term of the obligation rather than over the life of the project. After the obligation terminates and the QF is no longer required to deliver energy or capacity, the electric utility no longer avoids energy and capacity costs as a consequence of the QF. This is implicitedly recognized in § 292.304(b)(5).

> In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates differ from avoided costs at the time of delivery. (Emphasis Added)

Because Montana-Dakota's avoided capacity costs are higher in the years after the Big Stone II base load generation facility is scheduled to come on-line, and because Superior apparently seeks a levelized payment based upon average avoided costs, a levelized purchase price for the QF based on avoided costs must be calculated over the life of the power purchase agreement rather than the life of the QF. Otherwise, Montana-Dakota customers would effectively pay Java more than Montana-Dakota's avoided costs over the term of the legally enforceable obligation.

For the foregoing reasons, Issue 6 should be redefined as the amount Montana-Dakota should be required to pay "over the term of the legally enforceable obligation."

G. Issue 8.

Whether Superior should be awarded attorney fees and costs as "terms" for MDU's failure to fulfill the purposes of PURPA and the SDPUC PURPA Order?

Superior's complaint requested an award of attorney fees and costs as "terms" for MDU's alleged "failure to fulfill its duty to fulfill the purpose of the Commissioners Rules and PURPA." This request was incorporated as Issue 8 in the Commission's notice of hearing. There are several reasons why this issue should be dismissed from consideration in this proceeding.

1. The Commission is not allowed to award attorney fees under South Dakota law.

SDCL Ch. 49-1 establishes the Public Utilities Commission and SDCL § 49-1-1 establishes that the Commission ". . . may in all cases conduct its proceedings, when not otherwise particularly prescribed by law, in such manner and places as will best conduce to the proper dispatch of business and to the ends of justice." SDCL § 49-1-11 authorizes the Commission to promulgate rules regulating proceedings before the

Commission. Nowhere in this chapter is the Commission given the authority to award attorney's fees nor has the Commission attempted to authorize itself by rule to award attorney's fees or costs. No rule remotely addressing attorney's fees or costs appears in Article 20:10, the compilation of Commission rules.

It is the longstanding public policy of the State of South Dakota that attorney's fees are not recoverable unless specifically authorized by statute. Ofstad vs. South Dakota Dept. of Transportation, 387 NW2d 539 (SD 1986) (decided under SDCL § 15-17-7, the predecessor of the current statute, SDCL § 15-17-38).

The present public policy of the State of South Dakota is set forth in SDCL § 15 - 17-38. It expresses the general prohibition against the award of attorney's fees unless specifically allowed by statute:

> Award of attorneys' fees--Taxed as disbursements. The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. However, attorneys' fees may be taxed as disbursements if allowed by specific statute. The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all cases of divorce, annulment of marriage, determination of paternity, separate maintenance, support, or alimony. The court may award the fees before or after judgment or order. The court may award attorneys' fees from trusts administered through the court as well as in probate and guardianship proceedings. Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement.

Nor are "costs" awardable by the Commission. Neither Ch. 49-1 nor Ch. 1-26, the Administrative Procedures Act, authorize the award of costs (since 1992, being identified as disbursements in SDCL § 15-17-37).

2. **The Commission does not have jurisdiction to enforce PURPA.** The Commission's role under PURPA is limited to the implementation of the FERC rules requiring electric utilities to purchase electric energy from qualified facilities. 16 U.S.C.

§ 824a-3(f). Indeed, in its Order 3365 implementing PURPA, the Commission specifically limited its future role under PURPA to "resolving any contract dispute which arises between the parties."

The state commissions were not given responsibility or authority to enforce PURPA. 16 U.S.C. § 824-3(g) and (h). Indeed, Congress delegated to the courts enforcement responsibility for any requirement established under PURPA by a state regulatory authority. 16 U.S.C. § 824a-3(g).

Certainly, under no circumstance, were the state commissions given authority to award damages, fees, expenses or any other compensation to a QF for an alleged violation of PURPA. Accordingly, even if Superior were able to establish a violation of PURPA or the FERC rules, which it cannot, the Commission does not have authority to award attorney fees and costs to Superior for the alleged violation.

3. The Commission cannot award fees and costs as "terms." Apparently recognizing that the Commission does not have authority to award attorney fees and costs to a party in this proceeding, Superior makes the disingenuous request that the Commission award such fees and costs as "terms." Superior seeks the Commission to do indirectly what it is not authorized to do directly by increasing the payments due under a power purchase agreement to include not only avoided costs but also attorney fees and expenses of the QF.

For the reasons stated above, the Commission does not have authority to award, directly or indirectly, attorney fees and costs for an alleged violation of PURPA. Moreover, as stated above, the Commission's role under PURPA is limited to implementation of the FERC's rules regarding utility purchases from a QF. The FERC's

rules specifically provide that the rates for such purchases must be based solely on avoided costs. The factors prescribed by FERC for determining avoided costs do not include attorney fees, expenses, or alleged violations of PURPA. 18 C.F.R. § 292.304(d) and (e). Including a "term" in a power purchase agreement that required payment of attorney fees and expenses would result in a payment in excess of avoided costs in clear violation of the PURPA statute and the FERC's PURPA rules. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a).

4. Superior's complaint fails to state a claim for violation of PURPA. Although Superior seeks attorney fees and expenses for relief as the result of an alleged violation of PURPA by Montana-Dakota, Superior's complaint fails to state any basis for such a violation.

Montana-Dakota is required under PURPA to purchase electric energy from a QF. 16 U.S.C. § 824a-3(a). To the extent the QF elects to provide its energy for a specified term rather than when it determines the energy is available for such purchase, the utility's obligation to purchase does not arise until the QF has created a "legally enforceable obligation" under PURPA. 18 C.F.R. § 292.304(d). Although the FERC's rules do not define "legally enforceable obligation," the term, contrary to prior assertions by Superior in this proceeding, requires more than mere certification as a QF. Rather, a legally enforceable obligation occurs when the QF makes a binding commitment to deliver energy and capacity to the utility. Armoco Advanced Materials Corporation v. Pennsylvania Public Utility Commission, 664 A.2d 630, 633 (Pa. Cmwlth. 1995). Although a legally enforceable obligation typically arises at the time a contract is signed between the utility and the QF, the QF has the right under PURPA to unilaterally create

the legally enforceable obligation in the absence of agreement with the utility. The QF has the right to create this legally enforceable obligation by making a binding commitment to deliver the energy and capacity to the utility. Id. This commitment then triggers the utility's obligation to purchase. As discussed in more detail in Montana-Dakota's Motion for Summary Judgment, Superior has not created a legally enforceable obligation under PURPA. In the absence of that legally enforceable obligation, Montana-Dakota has no obligation to purchase Superior's power and therefore could not have violated PURPA. Accordingly, Superior's request for attorney fees and expenses based upon an alleged violation of PURPA is on its face without merit and should be dismissed as an issue for consideration at the hearing.

For the foregoing reasons, issue 8 should be dismissed from consideration in this proceeding.

II. Motion in *Limine*

Montana-Dakota moves to strike page 7 (lines 16-27) and page 8 (lines 1-19) of the prefiled testimony of Jeff Ferguson; page 7 (lines 6-30), page 8, page 9 (lines 1-2), page 15 (lines 18-32), page 16, page 17 (lines 1-17), page 20 (lines 23-25), and pages 21-31 of the prefiled testimony of John E. Calaway; Exhibits 6-11 to the prefiled testimony of John E. Calaway; and page 2 (lines 8-25) page 3 (line 9), page 9 (lines 9-26), page 10, page 11 (lines 1-16), page 13 (lines 20-27), page 14, and page 15 (lines 1-6) of the prefiled rebuttal testimony of John E. Calaway.

Pursuant to the terms of the Commission Order 3365, the issue in this proceeding should be limited to resolving disputes regarding contract terms including prices based on Montana-Dakota's avoided costs.

Even if the determination of contract terms and avoided costs were ripe for Commission decision, the prefiled testimony and exhibits identified above should be stricken and Superior should be directed not to offer or solicit testimony or exhibits that are not relevant to disputed contract terms or avoided costs. The prefiled testimony and exhibits identified above are not relevant to the pertinent issues in this proceeding for the following reasons:

Jeff Ferguson Prefiled Testimony:

Page 7 (lines 16-27) and page 8 (lines 1-19) – This testimony reflects Superior's views of whether Montana-Dakota negotiated in good faith and is apparently offered to support Superior's request for attorney fees. Montana-Dakota disagrees with Superior's characterization and is prepared to fully address all of the events and negotiations between the parties and explain why the parties have not reached agreement on a power purchase agreement. The explanation, however, is ultimately not relevant to the Commission's determination of the disputed issues of contract terms including price based on avoided costs.

John E. Calaway Prefiled Testimony and Exhibits:

Page 7 (line 6) through page 9 (line 2) – This testimony discusses the status of wind power development in South Dakota and on Montana-Dakota's system and contains Mr. Calaway's speculation regarding that development. The testimony is speculative and not relevant to the pertinent issues.

Page 15 (line 18) through page 17 (line 17) and page 20 (line 23) through page 31, and exhibits 6 through 11. This testimony discussed Mr. Calaway's viewpoint of negotiations with Montana-Dakota and should be stricken for the same reasons as discussed regarding the direct testimony of Mr. Ferguson. In addition, Mr. Calaway discusses Montana-Dakota's prior contract with the Omaha Public Power District and its 2004 Request for Proposals for generation capacity. The relevant issue in this case is the determination of avoided costs at the time of a "legally enforceable obligation." Because a legally enforceable obligation has not yet been created, discussion regarding historic contracts and historic avoided costs is not relevant.

John E. Calaway Rebuttal Testimony:

Page 2 (line 8) through page 3 (line 9). This testimony relates to prior negotiations and should be stricken for the reasons discussed above.

Page 9 (line 9) through line 11 (line 2). – This testimony, obviously prepared by Superior's counsel, is a summary explanation and argument of the testimony of Superior's witnesses. This is not proper rebuttal testimony and should be stricken.

Page 11 (lines 3 through 16). This testimony is hearsay and legal argument and should be stricken.

Page 13 (line 20) through page 15 (line 6). This is not factual rebuttal testimony but rather argument offered to bolster the testimony and position of Superiors' other witnesses. The testimony is not proper rebuttal or relevant and should be stricken.

III. Motion for Summary Judgment

PURPA gives a QF the option to have avoided costs determined at the time of delivery or at the time a legally enforceable obligation is created. 18 C.F.R. § 292.304(d). By its filings in this proceeding, Superior has indicated its intent to have avoided costs determined at the date of a legally enforceable obligation. The creation of a legally enforceable obligation, however, does not arise on the date of certification of a QF or even the date of serious negotiations in which the parties agree in principle upon a price, but rather is created when the QF makes a binding commitment to deliver energy and capacity. Armco Advanced Materials Corporation v. Pennsylvania Public Utility Commission, 135 Pa: Cmwlth. 15, 579 A.2d 1337 (1990), affirmed per *curium*, 535 PA. 108, 634 A.2d 207 (1993), cert. *denied*, 513 U.S. 925, 115 S.Ct. 311, 130 L.Ed.2d. 274 (1994). See also Snow Mountain Pine Co. v. Mauldin, 84 Or. App. 590, 734 P.2d 1366 (1987); Appeal of Public Service Co of New Hampshire, 130 N.H. 285, 539 A.2d. 275 (1988). Although the states have latitude in interpreting the requirements

for creation of a legally enforceable obligation, they can not contravene the substance of FERC's rules. Id.

> Although the "legally enforceable obligation" language does permit a QF to lock in avoided cost projections even without a contract from a recalcitrant utility, the phrase does not encompass a QF that has incurred no obligation at all.

Id. at 31.

The FERC's PURPA rules contemplate that a QF can trigger the date for calculation of avoided costs by creating a self imposed obligation to deliver power. The legally enforceable obligation, however, does not exist if the QF has not obligated itself and remains free to walk away without liability. Id. Obviously, a utility is not in a position to avoid costs by canceling or foregoing generation construction or purchase contracts if the QF has not legally bound itself to provide the energy or capacity that would otherwise be provided by the construction or purchase contract. Typically, the QF can create the legally enforceable obligation by tendering a signed contract to the utility or petitioning the state regulatory authority to approve a signed contract or compel a purchase to which the QF has obligated itself. The QF, however, cannot compel a purchase arrangement by a utility to which the QF has not yet obligated itself. The mere filing of a petition by a QF with a state utility commission seeking to compel a purchase by a utility does not create a legally enforceable obligation by the qualified facility to deliver energy.

Even the tender of a contract by the qualified facility is not sufficient to create a legally enforceable obligation unless the qualified facility also demonstrates that it is a viable project. In a recent case similar to this proceeding, South River Power Partners, a limited liability partnership, tendered a contract for a sale of capacity and energy from

its proposed qualified facility to West Penn Power Company after it contended that West Penn refused to negotiate an agreement because it believed it did not have a future need for power. South River Power Partners, LP v. Pennsylvania Public Utility Commission, 696 A.2d 926. (Pa. Cmwlth. 1997). South River filed a complaint with the Pennsylvania PUC requesting an order directing West Penn to enter into a long term contract for the capacity and energy from the proposed QF. The administrative law judge granted West Penn's motion for summary judgment on the grounds that South River had not created a legally enforceable obligation, notwithstanding it's tendering of an executed contract, because it had not shown its project was viable or developed. The ALJ found the QF was a paper project; South River was a shell corporation created for the purpose of filing a complaint with the PUC; and there was no evidence South River was able, financially or otherwise, to provide the power it was offering. The PUC affirmed the ALJ and South River appealed. Id. On appeal, South River argued the PUC was obligated to order West Penn to enter into a contract with South River without determining the viability of its project because a legally enforceable obligation had been created. The court disagreed and cited the following considerations by the PUC's regarding South River:

- it had no assets, liabilities or net worth,
- it had no limited partnership or limited partnership agreement,
- it had no current or past employees,
- it had not associated with any other power production project ,
- it had not applied for or obtained any of the governmental permits and approvals that would be required for the project,

- it had not engaged any consultant to assist in applying for those permits and approvals,
- it had only held discussions with investment bankers but had not received financing for the project.

The Court also noted that South River had not made any effort to obtain geotechnical, architectural design, engineering, construction and construction management services. The Court agreed that South River had not shown that it was anything more than a paper project and therefore was not sufficiently viable to create a legally enforceable obligation. Because South River had done nothing more than tender a contract to West Penn and file a petition with the PUC, the Court affirmed the summary judgment dismissal of South River's petition.

Similarly, in Smith Cogeneration Management v. Oklahoma Corporation Commission, 1993 OK 147, 863 P.2d 1227, the Supreme Court of Oklahoma recognized there must be a required degree of project development before a QF can show it is a viable project capable of creating a legally enforceable obligation. In Smith, the Court affirmed the PUC's order denying a cogenerator's request to have avoided costs determined before the cogenerator had either established a legally enforceable obligation by presenting a contract that obligated it to deliver power to the utility or obtained a contract for construction, operation and maintenance of the proposed project. Id. at 1234-1235.

The Minnesota PUC has also rejected a complaint by a QF seeking to require Northern States Power Company to enter into a contract for the purchase of the QF's power. The Minnesota Commission observed that commissions and courts in other jurisdictions have generally found a legally enforceable obligation to exist "when a QF

has done everything within its power to create an enforceable obligation such that only an act of acceptance by the utility or approval by the state's regulatory authority remains to establish the existence of a contract." In the Matter of the Complaint of LS Power Corporation Against Northern States Power Company, Minnesota PUC Docket No. E-002/C-92-899 (April 12, 1993). The Commission found that a term sheet submitted by the QF was not sufficient to create a legally enforceable obligation because it did not create the required commitment to provide energy and capacity when it had no signature page and lacked detail in a number of fundamental areas such that it could not have been intended as more than a basis for future negotiation.

In this proceeding, Superior, or rather Java LLC, has not shown the creation of either a legally enforceable obligation or a sufficiently viable project to support any claim to require Montana-Dakota to enter into a power purchase agreement based upon today's avoided costs. The only semblance of a contract submitted by Superior in this case is a template contract included as Exhibit 3 to the prefiled Rebuttal Testimony of Jeff Ferguson. Mr. Ferguson describes the document as a proposed contract and does not suggest it binds Superior or that it was previously submitted to Montana-Dakota. The document is unsigned and excludes a number of key terms such as the price and plant description. Even if it had been signed by Superior, the contract would not be a binding commitment to sell power because section 3.1 gives the buyer the right to terminate the agreement without liability in the event of a failure to secure project financing by July 31, 2006 or commencement of construction by September 31, 2006, a clear indication that Superior has not arranged either financing or construction for the Java project. Likewise, the security to be provided by Superior under section 2.4 would

be woefully inadequate to compensate Montana-Dakota and its customers for damages suffered as a result of a breach of the agreement. Clearly, Superior has not met any threshold for the creation of a legally enforceable obligation to support its demand for an avoided cost determination and a legally enforceable obligation with Montana-Dakota.

Superior's prefiled testimony also fails to establish the existence of a viable project and demonstrates that the Java project is currently little more than a paper project. There is no evidence of the financial assets of Java which is to be the project developer and owner. Rather, the prefiled testimony indicates that Java has not obtained either equity or debt financing for this project. Indeed, there is no indication that Java is anything but a shell limited liability company without any employees or assets of its own. Other testimony demonstrates Superior is not irrevocably committed to this project and has not entered into the most basic of contracts for the procurement of equipment or construction of the project. Indeed, Superior is quite candid that it has no intention of proceeding with the project unless the outcome of this proceeding is one to its liking. The following are excerpts from Superior's prefiled testimony:

> A project developer needs these [PPA] contractually assured cash flows to serve as security for any loan or similar debt financing. Without the leverage that comes from debt financing, the rates of return on wind energy projects are usually not high enough to attract the equity needed to build the project. Direct Testimony of John E. Calaway, page 11.
>
> Because of the potential expiration of the federal wind power production tax credit, Superior will need to have a power purchase agreement relatively early in the year 2005 to keep the project on track. Direct testimony of John E. Calaway, page 12.
>
> Without some certainty regarding these price terms, Superior has been unable to pursue financing of the Java Wind Project. Direct testimony of John E. Calaway, page 31.

> I do not believe a ten year contract will enable Superior to obtain financing to construct the project because it does not yield a long enough period of predictable, stable cash flows to be able to attract both a debt and equity component for the financing. Rebuttal testimony of Jeff Ferguson, page 4.

> That milestone [for finance, construction and commissioning] is no later than December 31, 2006. It is dependent, however, on the cessation of all appeals and related legal activity coming from this proceeding. Until these legal uncertainties are resolved, Superior believes that additional time must be provided for Superior to reach first commercial operation. Rebuttal testimony of Jeff Ferguson, page 5.

Superior's apparent position that it is first entitled to a determination of avoided costs before it commits to a legally enforceable obligation is contrary to the course of requirements in the PURPA statutes and rules. In Armco Advanced Materials Corporation v. Pennsylvania Public Utility Commission, 135 Pa. Cmwlth. 15, 579 A.2d 1337 (1990), the court rejected an order of the state PUC that would have allowed QF's to lock in avoided costs at the time of "serious negotiations" rather than at the time a legally enforceable obligation is created:

> The policy reason that gave rise to the PUC's practice of permitting QFs to lock in rates as of the time of serious negotiations is that most cogeneration or small power production projects are project financed, and the early determination of the stream of income facilitates arranging the financing. That is a serious concern; however, such policy considerations may not overcome a contrary result required by law. Furthermore, we believe that the FERC regulations and commentary noted above express a policy of their own. In PURPA Congress conferred an extraordinary benefit on QFs in service of the overall goal of reducing the nation's dependence on unreliable energy sources. QFs may compel utilities to purchase the power they produce, and at a very good price. The FERC regulations and commentary imply that FERC made a deliberate choice not to confer the benefit of capacity credits until a QF was willing and able to make a commitment to deliver power and actually made such a commitment.

It at 1347.

Because Superior has not created a legally enforceable obligation that commits it to deliver power and capacity to Montana-Dakota and because it has not shown that Java is anything more than a paper project, Superior is not entitled to have avoided costs fixed for the term of a nonexistent power purchase agreement. Accordingly, Superior's complaint must be dismissed.

Dated this 22nd day of November, 2005.

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Subpart A—Coverage, Compliance and Definitions

[¶ 25,001]

§ 290.101 Applicability and exemptions.

(a) Except as provided in paragraph (b), this part shall apply to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceed 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(b) The Commission exempts from compliance with this part any utility:

(1) Listed by name in Appendix A to this part; or

(2) That has total sales of electric energy for purposes other than resale of less than 2 billion kilowatt-hours per year.

.01 Subsection (a), 48 F.R. 55438 (December 13, 1983); subsection (b), 49 F.R. 4938 (February 9, 1984).

.05 ***Historical record.*—Section 290.101 originated in 44 F.R. 33847 (6/13/79), effective 7/15/79, and was republished without change in 44 F.R. 58687 (10/11/79), effective 10/29/79.**

Section 290.101, appearing in 44 F.R. 58687 (10/11/79), effective 10/29/79, read as follows until its amendment in 48 F.R. 55438 (12/13/83), effective 2/21/84:

§ 290.101 Coverage

This part shall apply to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

Subsection (b)(1), appearing in 48 F.R. 55438 (12/13/84), effective 2/21/84, read as follows until its amendment in 49 F.R. 4938 (2/9/84), effective 2/6/84:

(1) Listed by name in Appendix A to the part; and

[¶ 25,002]

§ 290.102 Information gathering and filing.

All nonexempt electric utilities must file the data required by section 133(a) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2643, with their state regulatory authorities. All nonexempt, nonregulated electric utilities shall, to the extent the data are collected and compiled, make these data publicly available. All nonexempt electric utilities shall file an affidavit with the Commission certifying that the requisite state filing was made. All nonexempt, nonregulated electric utilities shall file an affidavit with the Commission certifying that the data were made publicly available.

.01 57 F.R. 53991 (November 16, 1992).

.05 ***Historical record.*—Section 290.102 originated in 44 F.R. 33847 (6/13/79), effective 7/15/79, and read as follows until its amendment in 44 F.R. 58687 (10/11/70), effective 10/29/79:**

Each utility covered under this part shall gather and report information specified in Subparts B, C, D and E of this part as follows:

(a) *Information gathering and filing.* Each electric utility shall gather and report such information in accordance with § 290.103 and shall file an original and one copy of the information with the Federal Energy Regulatory Commission (Commission) and an additional copy of the information with any State regulatory authority for such utility. The utility shall retain additional copies of such information for a period of 5 years from the date of filing with the Commission, shall make copies of such information available for public inspection at the principal offices of the utility and shall provide copies to the public at the cost of reproduction.

(b) *Form of the information.* Such information shall be submitted on suitable standard forms prescribed by the Commission or in any

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Attachment 1

[¶ 25,105]

Appendix A—Nonexempt Electric Utilities

Electric utilities that are not exempt from Part 290, as of the date of publication of the Commission's Order No. 545 are as follows:

Department of Water and Power of the City of Los Angeles, California

Pacific Gas & Electric Company

San Diego Gas and Electric Company

Southern California Edison Company

Western Area Power Administration

.01 57 F.R. 53991 (November 16, 1992).

.05 *Historical record.*—Appendix A originated in 48 F.R. 55438 (12/13/83), effective 2/21/84, and was amended in 49 F.R. 4938 (2/9/84), effective 2/6/84, by adding more utilities to the lists of investor-owned and publicly owned utilities.

Appendix A, appearing in 49 F.R. 4938 (2/9/84), effective 2/6/84, was amended in 49 F.R. 23609 (6/7/84), effective 6/4/84, by deleting, in the list entitled "Investor-Owned Utilities", "Dallas Power and Light Company", "Texas Electric Service Company" and "Texas Power and Light Company", and by adding in the list entitled "Investor-Owned Utilities", in appropriate alphabetical order, the name "Texas Utilities Electric Company".

Appendix A, originated in 48 F.R. 55438 (12/13/83), effective 2/21/84, and amended by 49 F.R. 4938 (2/9/84), effective 2/6/84 and by 49 F.R. 23609 (6/7/84), effective 6/4/84, read as follows until its removal by 57 F.R. 53991 (11/16/92), effective 12/16/92:

Appendix A—Exempt Utilities

Electric utilities that are exempt from Part 290 pursuant to the Commission's Order No. 353, are as follows:

Investor-Owned Utilities

Arizona Public Service Company
Arkansas Power & Light Company
Baltimore Gas & Electric Company
Black Hills Power & Light Company
Carolina Power & Light Company
Central Hudson Gas and Electric Corporation
Central Louisiana Electric Company
Central Power & Light Company
Central Tele. & Utility Corporation
Commonwealth Electric Company
Connecticut Light & Power Company
Consolidated Edison Company of New York
Consumers Power Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Power Company
El Paso Electric Company
Empire District Electric Company
Florida Power & Light Company
Georgia Power Company
Gulf Power Company
Gulf States Utilities Company
Houston Lighting & Power
Illinois Power Company
Indiana & Michigan Electric Company
Iowa Electric Light & Power Company
Iowa-Illinois Gas & Electric Company
Iowa Power and Light Company
Iowa Southern Utilities Company
Kansas Power & Light Company
Kentucky Power Company
Kentucky Utilities Company
Kingsport Power Company
Louisiana Power & Light Company
Louisville Gas & Electric Company
Madison Gas & Electric Company
Massachusetts Electric Company
Michigan Power Company
Minnesota Power & Light Company
Mississippi Power Company
Mississippi Power & Light Company
Missouri Public Service Company
Monongahela Power Company
Montana-Dakota Utilities Company
Montana Power Company
Narragansett Electric Company
New Orleans Public Service, Inc.
Northern Indiana Public Service Company