

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

IN THE MATTER OF THE COMPLAINT)	STAFF'S RESPONSE TO
FILED BY SUPERIOR RENEWABLE)	MOTION FOR
ENERGY LLC ET AL. AGAINST MONTANA-)	RECONSIDERATION
DAKOTA UTILITIES CO. REGARDING THE)	
JAVA WIND PROJECT)	EL04-016

PROCEDURAL HISTORY

On May 12, 2004, Superior Renewable Energy LLC and its wholly owned subsidiary, Java LLC (Superior) filed a complaint against Montana-Dakota Utilities Co. (MDU). A procedural order was issued on October 26, 2004, setting March 21-25, 2005, as hearing dates. On March 21, 2005, the parties requested a continuance which was granted. The hearing was then scheduled for August 2-5, 2005. On July 21, 2005, Superior requested another continuance which was granted. The hearing was then scheduled for November 2-4, 2005.

On September 16, 2005, MDU filed its Deferral Motion. MDU requested that the Commission defer further proceedings in this docket until the Federal Energy Regulatory Commission (FERC) has decided the issues in the pending petition for declaratory order, Docket No. EL05-143-000, before it concerning the obligation of Alliant Energy Corporate Services, Inc. (Alliant) to enter into a new contract or obligation to purchase energy from a Qualified Facility (QF) in view of the newly-enacted § 210(m) of the Public Utility Regulatory Policies Act of 1978, as amended (PURPA), 16 U.S.C. § 824a-3(m). PURPA § 210(m) was enacted as part of the Energy Policy Act of 2005 (EP Act 2005) and was signed into law on August 8, 2005. Superior filed its Response to Deferral Motion and Request for Affirmative Relief on September 27, 2005. At its October 4, 2005, meeting, the Commission granted MDU's Deferral Motion until FERC has made a decision in the Alliant matter.

Following the Commission's ruling on MDU's Deferral Motion, on October 7, 2005, Superior filed a Motion for Reconsideration. Superior requested "(1) that the Commission enter an order finding that MDU has an existing obligation and/or contract pending approval under PURPA and is thus subject to PURPA's mandatory purchase obligation as it relates to Superior; and (2) that the Commission issue an order to show cause why MDU is not in violation of its PURPA obligation by engaging in intentional delays of this proceeding to avoid its PURPA obligations." Superior's Motion for Reconsideration pgs. 2-3. MDU filed its Reply to Superior's Motion for Reconsideration on October 12, 2005. Superior then filed a Supplemental Memorandum in Support of Motion for Reconsideration on October 14, 2005.

ISSUES

The issues before the Commission on this Motion for Reconsideration are:

- (1) Whether the Commission can decide Superior's Motion for Reconsideration.
- (2) Whether MDU has an obligation to purchase electric energy from a qualified facility in light of the passage of the Energy Policy Act of 2005.
- (3) Whether the Commission should enter an order to show cause as to allegations by Superior that MDU caused intentional delays in this proceeding and is in violation of its PURPA obligation.

MOTION FOR RECONSIDERATION

Superior has petitioned the Commission to reconsider its decision to defer the hearing on this matter until after FERC has made a decision in the Alliant matter. According to the Commission's administrative rules:

A party to a proceeding before the commission may apply for a rehearing or reconsideration as to any matter determined by the commission and specified in the application for rehearing or reconsideration. The commission may grant reconsideration or rehearing on its own motion or pursuant to a written petition if there appears to be sufficient reason for rehearing or reconsideration. ARSD 20:10:01:29.

To apply for reconsideration a party must merely file a written petition within thirty (30) days from the issuance of the commission decision or order. The petition must clarify the alleged grounds for error and the party applying for reconsideration must provide service of the petition to all parties involved in the proceeding. ARSD 20:10:01:30.01.

Superior has properly petitioned the Commission for reconsideration. The order granting MDU's Deferral Motion went into effect on October 5, 2005. Superior filed its Motion for Reconsideration on October 7, 2005. Superior clearly has met the statutory deadline for filing the Motion for Reconsideration. Superior has also enumerated its alleged grounds for error in its Motion. See Superior's Motion for Reconsideration and Superior's Supplemental Memorandum in Support of Motion for Reconsideration. Superior argues that the Commission has jurisdiction over this matter and there is no need to await a FERC ruling in the Alliant matter.

Staff would submit that Superior's Motion for Reconsideration is properly before this Commission, however a ruling on the matter is not necessary. The Commission's order states, "that the Deferral Motion is granted and the hearing is continued until after FERC makes its ruling in Alliant Energy Corporate Services, Inc." See Commission Order Granting Motion for Continuance. FERC has made a ruling in the Alliant matter.

On October 11, 2005, FERC dismissed Alliant's Petition for Declaratory Order citing that Alliant did not provide "sufficient notice" to all affected QFs. See *In the Matter of Alliant Energy Corporate Services, Inc.*, 113 FERC ¶ 61, 024 (Oct. 11, 2005). Since a FERC decision has been made, there is no need to reconsider the ruling on MDU's Deferral Motion. Staff would recommend that the Commission proceed to hearing in this matter.

EXISTING OBLIGATION

Under the new EP Act of 2005, electric utilities are not obligated to enter into new contracts or obligations with a qualified small power production facility. See 16 USC § 824a-3(m). Under the new provision, MDU claims that it has no obligation to enter into a purchase power agreement with Superior. However, Superior argues the exception to the rule. Subparagraph 1 of the EP Act 2005 amended Section 210 of PURPA allows for certain exceptions to this newly enacted provision. The entire section states as follows:

- 1) OBLIGATION TO PURCHASE. -- After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the

qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

(A) (i) independently administered, auction based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B) (i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Superior believes that MDU already has an existing obligation in this matter. Staff agrees with this proposition.

In this docket, MDU is not faced with a new obligation, its obligation already existed. Superior's complaint in this matter was filed in May of 2004, in accordance with PURPA and the South Dakota Public Utilities Commission's Order F-3365. MDU had received a demand from Superior, a self-certified QF, to purchase electricity at the required avoided cost price. The obligation to purchase electric energy or capacity from Superior existed before the August 8, 2005, passage of the Energy Act and that obligation remains today. Commission Staff would support that an obligation arose at that time.

MDU argues that the Commission does not have the authority to decide whether or not a previous obligation exists. MDU claims that the Commission has no authority beyond which it was granted through the legislature. The crux of MDU's argument asserts that FERC may have given the Commission some authority over co-generation and small power production; however, the South Dakota Legislature has not. Therefore, the Commission lacks authority to decide whether or not a previous obligation exists.

MDU's argument is contrary to well settled law. In 1982 the United States Supreme Court decided that Congress can impose on duties and obligation on a state regulatory agency. *FERC v. Mississippi*, 456 US 742 (1982). It was in the *Mississippi* case that Supreme Court held that specific PURPA provisions do not impede on state jurisdiction. *Id.* It can therefore be concluded that the Commission has the authority to act in accordance with duties prescribed to it under PURPA. Staff would submit that the Commission has the authority under the power given to it under PURPA and adopted by the Commission in its Order F-3365, *See In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Power Production*, Decision and Order F-3365 (December 14, 1982).

ORDER TO SHOW CAUSE

Superior has asked the Commission to issue an order to show cause, alleging that MDU is in violation of PURPA for engaging in intentional delays in this matter. The Commission plays a very limited role in PURPA matters. On December 14, 1982, the Commission issued a Decision and Order addressing its role regarding cogeneration and small power production under PURPA. The Commission purposefully limited its role involving these issues.

The Commission finds that in light of the recommendations of all the parties to this proceeding, it will not implement standard rates for purchases from QFs with a design capacity of greater than 100 KW. The Commission finds that rates for purchases from QFs with a design capacity of more than 100 KW should be set by contract negotiated between the QF and the electric utility. The Commission agrees with the recommendations of all parties that the Commission should play a minimal role in the negotiation of such contracts, a role limited to resolving any contract disputes which arise between the parties. The Commission finds such a limited role to be consistent with the provisions of 18 C.F.R. Section 292.403(a) that an acceptable method of implementation of the FERC's rules by a state regulatory authority is "an undertaking to resolve disputes between qualifying facilities and electric utilities. . . .".

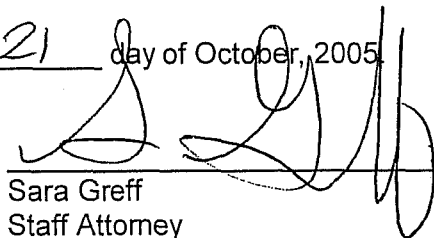
See In the Matter of the Investigation of the Implementation of Certain Requirements of Title II of the Public Utilities Regulatory Policy Act of 1978 Regarding Cogeneration and Small Power Production, Decision and Order F-3365 (December 14, 1982). In its Order F-3365 the Commission did not make any findings as to its role in enforcing PURPA violations and providing sanctions in regards to potential PURPA infractions.

Staff would recommend that the issuing of an Order to Show Cause would be a departure from the Commission's role involving PURPA cogeneration and small power production issues as set forth in Order F-3365. Therefore, Staff would recommend that the Commission deny Superior's request to issue an Order to Show Cause.

CONCLUSION

Commission Staff respectfully recommends that Superior's Motion for Reconsideration is properly before the Commission and that the Commission has the authority to rule on the Motion. Staff would also recommend that the Commission find that MDU has an existing obligation and that Superior's request for an Order to Show Cause be denied.

Dated at Pierre, South Dakota, this 21 day of October, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Response to Motion for Reconsideration were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 21 day of October, 2005.

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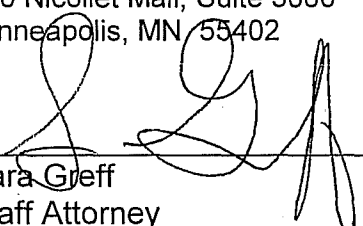
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