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FILE NO:

September 27, 2005

Ms. Pam Bonrud
Executive Secretary
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

RE: In the Matter of the Filing by Superior Renewable Energy LLC, et al., against Montana-Dakota Utilities Co. Regarding the Java Wind Project, Docket No. EL04-016

Dear Ms. Bonrud:

I have enclosed Superior Renewable Energy LLC's Response to Deferral Motion and Request for Affirmative Relief for filing in the above-captioned proceeding. A hard copy of this motion is also being sent to you by first class mail. A copy of this letter and motion are being sent (electronically and by mail) to each of the parties on the service list.

Please call if you have any questions.

Very truly yours,

Linda L. Walsh
Counsel for Superior Renewable Energy LLC and Java LLC

cc: Service List

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	Docket No. EL04-016 **Superior's Response to Deferral Motion** **Superior's Request for Affirmative Relief**

Superior Renewable Energy LLC (Superior) on behalf of itself and its subsidiary, Java LLC, hereby files its response in opposition to Montana-Dakota Utilities Company's (MDU's) Motion for Deferral of the hearing in the above-captioned proceeding. MDU requests that the Commission defer this proceeding until after the Federal Energy Regulatory Commission (FERC) decides a petition for declaratory order filed by Alliant Energy Corporate Services (Alliant) regarding whether the newly enacted Section 210(m) of the Public Utility Regulatory Policies Act (PURPA)[1] removes the mandatory purchase obligation as it relates to Alliant and Qualifying Facilities (QFs) in the Alliant service territories. MDU also requests that the Commission defer this proceeding until after FERC decides a similar, application filed by MDU on September 22, 2005, regarding MDU's obligation to purchase the output of Superior.[2] Because neither one of these filings will affect the outcome of this proceeding, MDU's motion should be denied.

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[1] 16 U.S.C. § 824a-3(m). New Section 210(m) was enacted as part of the Energy Policy Act of 2005 (2005 Act), which was signed into law by the President on August 8, 2005.

[2] Superior received a copy of MDU's filing on the day this response was due and therefore has not had time to address any specific allegations.

I. SUMMARY OF RESPONSE

Section 210(m) does not entitle MDU to termination of its mandatory purchase obligation as it relates to Superior. First, Section 210(m) does not apply to any obligation that was in effect or pending state approval on August 8, 2005. Superior's complaint was filed on May 12, 2005, in accordance with PURPA and this Commission's Order F-3365,[3] for a determination of the specific rates to be paid by MDU. Superior's complaint thus was pending approval on August 8, 2005. Second, elimination of the mandatory purchase obligation applies only to new obligations. MDU's obligation to purchase from Superior is not new. Consequently, any petition filed by MDU at FERC for termination of its mandatory purchase obligation regarding Superior would violate the express terms of the Act.

In addition to denying MDU's motion to defer, Superior requests that the Commission grant the following affirmative relief:

(1) The Commission should enter an order finding that MDU has an "existing" obligation and/or contract pending approval under PURPA and thus is subject to PURPA's mandatory purchase obligation.

(2) In light of three years of MDU's purposeful delays to avoid its PURPA obligations, the Commission should issue an order to show cause why MDU is not in violation of its PURPA obligations.

Such affirmative relief is warranted given the intentional delay and lack of good faith bargaining that MDU has exhibited from the beginning in this proceeding. MDU's actions have been in

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[3] *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, 1978) (Order F-3365).

direct violation of PURPA and this Commission's order implementing PURPA. Moreover, MDU's actions have caused a huge delay in the development of beneficial wind generation in the region.

II. SUPERIOR'S RESPONSE IN OPPOSITION TO MDU'S MOTION TO DEFER

A. The 2005 Energy Act's Addition of Section 210(m) to PURPA Did Not Repeal PURPA or Change the Purpose for Which It Was Enacted.

PURPA was enacted to increase the development of independent and environmentally-friendly power generation. That purpose is as valid today as it was in 1978, when PURPA was enacted. The 2005 Act does not repeal PURPA or indicate a change in its original purpose. Although the new Section 210(m)(1) of PURPA permits FERC to terminate PURPA's mandatory purchase obligation under certain circumstances on a case-by-case basis, Section 210(m)(6) preserves the existing rights and remedies of QFs with respect to any obligation that was in effect or pending approval before the appropriate state regulatory authority on the date of enactment.[4]

Under Section 210(m)(1), to be relieved of the mandatory purchase obligation with respect to "new" contracts or obligations, FERC must find that a QF 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

[4] A copy of the full text of Section 210(m) is included in Attachment A.

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

Under Section 210(m)(3), any electric utility can file an application at FERC for relief from the mandatory purchase obligation with respect to new obligations on a service territory-wide basis if it can show, on a factual basis, that the competitive wholesale market conditions as described in Section 210(m) have been met.

Section 210(m)(6) contains a "savings clause" that protects pre-existing rights granted under PURPA. This section states that nothing in subsection 210(m) affects the "rights or remedies of any party under ***any contract or obligation, in effect or pending approval before the appropriate State regulatory authority***...on the date of enactment..." (emphasis added). By its plain language, this "savings clause" protects not only power purchase agreements previously executed by a QF and a utility under PURPA, *i.e.* contracts "in effect" and contracts pending approval, but also obligations in effect and obligations pending approval. As discussed in more detail below, by virtue of the actions taken by Superior in this proceeding, Superior falls within the terms of this savings clause. In fact, the current proceeding is more than an obligation pending approval it is in fact a contract pending approval given that Superior has tendered a pro forma PPA in its testimony and requested the Commission to approve a PPA as part of Superior's request for relief in the complaint.

MDU claims that because of the existence of a competitive market in the Midwest ISO, it is entitled to relief from the mandatory purchase obligation under PURPA. Whether or not there

is a competitive market that meets the criteria in Section 210(m)(1), however, is a secondary question. The 2005 Act permits termination of the mandatory purchase obligation only for new contracts and obligations where there exists a competitive market. The Act has no effect on "existing rights or remedies" regardless of whether or not competitive markets exist. Thus, the primary inquiry must necessarily be whether there is an existing obligation under PURPA. As discussed below, MDU has an existing obligation to purchase Superior's output, which is in no way affected by the PURPA amendments in the 2005 Act.

B. The Newly-Enacted Section 210(m)(1) Provisions Do Not Apply to Contracts or Obligations Pending Approval.

Section 210(m) does not give MDU the right to seek termination of its mandatory purchase obligation as it relates to Superior. The savings clause in Section 210(m)(6) states that Section 210(m) does not apply to any contract or obligation that was "in effect or pending approval before the appropriate state regulatory authority" on August 8, 2005. Superior's complaint was filed on May 12, 2005, in accordance with PURPA and this Commission's Order F-3365 for a determination of the specific avoided cost rates to be paid by MDU. Superior's complaint was thus "pending approval before the appropriate state regulatory authority" on August 8, 2005.

C. Under Section 210(m), FERC is Only Permitted to Terminate the Mandatory Purchase Obligation with Respect to New Contracts or Obligations

Termination of the mandatory purchase obligation is permitted only with respect to "new" contracts or obligations. MDU's obligation to purchase from Superior is not new. Consequently, any petition filed by MDU at FERC for termination of its mandatory purchase obligation regarding Superior would violate the express terms of the Act.

1. Whether There is An Existing Obligation Under PURPA is for the SDPUC to Decide.

MDU seeks a deferral in this case until after FERC decides the Alliant proceeding in Docket EL05-143-000 and the MDU application filed on September 22, 2005. There is no need for this Commission to defer the proceeding until after FERC renders its decisions in the referenced proceedings. The question of whether there is an existing obligation is a question for the state regulatory authorities to decide.

To the extent there is any question whether or not there is an obligation in effect, the Commission has delegated to the state regulatory authorities the responsibility for making this determination. *Metropolitan Edison Co.*, 72 FERC ¶ 61,269, at 62,184 (1995). In *Metropolitan*, FERC found that the determination of when a legally enforceable obligation has been incurred implicates the ability of the state commission to determine the date on which the avoided cost purchase rate should be calculated. This determination, according FERC, is a matter for the states to decide in the first instance. *Id.* In that case, FERC refused to overturn a Pennsylvania Commission determination that avoided costs should be calculated as of the date the QF has tendered a contract to the utility or has petitioned the Pennsylvania Commission to approve a contract or compel a purchase. *Id.*

2. An Obligation to Purchase Is Recognized Long Before a Project is Actually Built or a PPA is Signed.

MDU takes the unsupportable position that the phrase "any contract or obligation in effect or pending approval" means a power purchase agreement that has been signed and is

pending approval. MDU gives no effect to the obvious intent of the drafters to make a distinction between a "contract" and an "obligation."[5]

When MDU received a demand from Superior, a self-certified QF under PURPA, to purchase electricity at the required avoided cost price, MDU's mandatory purchase obligation under PURPA was "in effect" and the only question that remained is the avoided cost price to be obtained. FERC's Order No. 69, implementing PURPA, recognizes that the mandatory purchase obligation necessarily precedes a contract for the sale of electricity at the avoided cost price. To give the parties more certainty as to what the avoided cost price will be over the life of the QF, FERC anticipated that a power purchase contract would be negotiated prior to construction of the QF. Indeed, the Commission has recognized the need for certainty (*i.e.,* a current obligation) regarding the price a QF will receive before a QF is built in order to facilitate the financing:

> in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output.[6]

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[5] MDU's position necessarily implies that a project developer will only be a QF when it is constructed and placed in service. This is not a correct interpretation of PURPA. In fact, if a project has filed under the applicable FERC regulations to become a QF, then it is a QF until FERC finds otherwise. 18 C.F.R. § 292.207(a)(1) (2005). The fact that a QF is as yet unbuilt does not affect the QF's rights under PURPA to receive a price for electricity equal to the utility's avoided cost.

In addition, Section 292.207(a)(1)(ii) of the FERC regulations contemplates that self-certifying QFs will be operational at some point in the future after obtaining self-certification QF status. That section states that "[t]he owner or operator of a facility or its representative self-certifying under this section must file with the Commission, and concurrently serve on each electric utility with which ***it expects to*** interconnect, transmit or sell electric energy ...a notice of self-certification...." 18 C.F.R. § 292.207(a)(1)(ii) (Emphasis added).

[6] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, Regulations Preamble, FERC Stats. and Regs. 1977-1981 ¶ 30,128, at 30,868, Feb. 25, 1980, 45 Fed. Reg.

(continued...)

Moreover, FERC has explained the distinction between a contract or obligation in its PURPA implementation orders and its regulations. Section 292.304(d)(2) permits a qualifying facility to enter into a contract or other "legally enforceable obligation" to provide energy or capacity over a specified term. In Order No. 69, FERC stated that the use of the term "legally enforceable obligation" was intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility ***merely by refusing to enter into a contract with the qualifying facility***. Thus, FERC contemplated that an obligation to purchase would be established even without the existence of a contract. To do otherwise, would encourage utilities to perpetually avoid entering into contracts with QFs and thereby easily circumvent PURPA's requirements.

D. Alliant's Petition Is Irrelevant to this Proceeding and Provides No Basis for a Deferral of this Proceeding .

MDU gives the mistaken impression that Alliant's petition is likely to be granted by FERC (and correspondingly MDU's petition). This is highly unlikely given the plain language of Section 210(m) and the glaring deficiencies in Alliant's petition.[7]

12214, *on reh'g* Order No. 69-A, Regulations Preamble, FERC Stats. and Regs. 1977-1981 ¶ 30,160, May 15, 1980, 45 Fed. Reg. 33958. A utility's obligation to purchase from a QF usually is long established by the time an avoided cost proceeding is initiated (as established under PURPA regulation section 292.303(a) entitled "***Obligation*** to purchase from qualifying facilities") (emphasis added).

[7] Alliant's petition is highly protested at FERC with parties from all parts of the country filing in opposition, including the American Wind Energy Association, Electric Power Supply Association, Electricity Consumers Resource Council, American Iron and Steel Institute, American Chemistry Council, Association of Businesses Advocating Tariff Equity, Wisconsin Industrial Energy Group, California Cogeneration Council, Industrial Energy Users-Ohio, Granite State Hydropower Association, Calpine Corporation, Cogeneration Association of California and Midwest Renewable Energy Projects, LLC.

1. Alliant's Petition for Declaratory Order Does Not Establish on a Factual Basis That QFs Have Non-discriminatory Access to Competitive Markets.

Alliant requests that it be relieved of the mandatory purchase obligation with respect to QFs in its service territories. According to Alliant, the Midwest ISO region now offers auction-based, day-ahead and real-time LMP energy markets (Midwest ISO's Day 2 markets) and, without any factual support to show how these markets actually function, Alliant argues that it has satisfied the criteria specified in Section 210(m)(1)(A), (B), and (C).

Alliant's petition fails to set forth the factual basis to support a finding by the Commission that the competitive conditions specified in Section 210(m)(1)(A), (B), and (C) have been met. The mere existence of the Midwest ISO's Day 2 markets is only half the story. Alliant must also show that QFs located in its service-territories have ***access*** to such markets and that such markets are in fact functioning as they were intended.[8] Alliant has failed to make this showing.

2. Any Determination Made Regarding the Alliant Service Territories Would not Automatically Apply to Other Service Territories in the Midwest ISO.

Even if FERC determines that Alliant has made the requisite showing under Section 210(m)(1) to warrant an exemption from the mandatory obligation under PURPA in the Alliant service territories, that exemption would not automatically apply to other service territories in the Midwest ISO. As specified under the legislation, FERC can grant relief from this mandatory

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[8] Other entities filing protests in the Alliant proceeding have provided examples of how access to existing markets may be a problem, such as (1) the existence of significant transaction costs, including congestion, that could create barriers to trading opportunities, (2) projects that are interconnected at voltage levels below the level that Midwest ISO operates may have additional hurdles in exporting power and (3) there may be significant costs of market participation, such as bidding and financial security requirements may preclude meaningful access.

purchase obligation only after application by a utility and then only as to that utility's service territory. (Section 210(m)(3)).

III. THE COMMISSION SHOULD GRANT SUPERIOR'S REQUEST FOR AFFIRMATIVE RELIEF TO PREVENT FURTHER DELAY

A. MDU Has Exhibited a History of Intentional Delays in this Proceeding.

From the beginning, MDU has engaged in a series of delay strategies to avoid its obligation to enter into a contract with Superior. A series of purposeful and effective delay tactics began immediately after Superior first approached MDU in late 2003 and continued until the passage of the 2005 Energy Act in August 2005. Superior suspects that MDU's delays were intentional and geared to avoid PURPA until the passage of the 2005 Energy Act. As shown below, MDU's actions show a consistent pattern of delay and failure to fulfill its obligations under PURPA:

1. In the fall of 2003, MDU rejected the applicability of a capacity payment, effectively cutting off preliminary negotiations with Superior.

2. In April 2004, after several additional months of unsuccessful negotiations with MDU, Superior filed a self-certification under PURPA to attain the right to sell power as a QF at MDU's avoided cost. MDU represented that it was not short of capacity either in the short term or the long term. MDU also stated that it was still working on an agreement with the Dakota I wind project, which MDU knew was not likely to be built because it missed milestone deadlines.

3. When negotiations failed even after filing its QF Self-Certification at FERC, Superior filed a complaint against MDU on May 12, 2004 in this proceeding to enforce its rights under PURPA.

4. During discovery, between July and November 2004, MDU provided incomplete and misleading responses and documents regarding its current power purchase contracts. Superior was forced to move to compel production of documents. Despite receiving data requests from Superior that specifically requested as much information as possible about MDU's avoided costs and energy and capacity, MDU never provided Superior or the Commission's staff with any information relative to the Big Stone or Resource Coalition units, which MDU later relied upon in its pre-filed testimony for their impact on MDU's avoided costs.

5. MDU listed its OPPD Contracts as "existing power purchase contracts" without disclosing that MDU was aware that it could not purchase power from OPPD because of MDU's inability to obtain firm transmission service. Nevertheless, relying on the OPPD Contracts, MDU stated "Montana-Dakota will not need additional capacity until 2011" and included that contract in its October 20, 2004 calculation of avoided costs.

6. In September 2004, Montana-Dakota disclosed for the first time that it had signed the Product K Contract. Montana-Dakota, however, signed this contract on July 15, 2004 before it answered Superior's interrogatories and before it submitted its first avoided cost calculation. Even after disclosing the existence of the Product K Contract, Montana-Dakota failed to provide any of the detailed information about the contract requested in Superior's interrogatory and failed to disclose that MDU could not obtain transmission service to purchase power under this contract.

7. MDU has persistently refused to execute the FERC's *pro forma* interconnection agreement with Superior and has insisted on making changes to the FERC's *pro forma*

agreement that have caused several delays in that proceeding.[9] In addition, MDU has argued to FERC that FERC should not rule on issue of the reimbursement of network upgrades because that issue is pending before the SDPUC. MDU now seeks a deferral of the SDPUC proceeding.

8. MDU has stated in data request responses and in multiple representations to Superior and Superior's counsel that it did not need capacity. However, on November 4, 2004, MDU abruptly reversed course and told Superior and the Commission that contrary to all previous statements, it lacks 70-100 megawatts of electrical energy and capacity and was actively soliciting proposals to satisfy that shortage. Montana-Dakota issued a Request for Proposal (RFP) on October 25, 2004 for this amount of energy and capacity and sent it to all members of the Mid-Continent Energy Marketers Association and the members of the MAPP Reliability Council. Failure to disclose the existence of the RFP or MDU's need for capacity that gave rise to the issuance of the RFP was a misrepresentation or omission of material facts regarding a core issue in this proceeding.

9. In March 2005, as the scheduled March 21, 2005 hearing approached, MDU and Superior agreed to preliminary terms for a long-term PPA and asked the SDPUC for a continuance of the hearing date. Negotiations continued, albeit at a slow pace. During the time period of these negotiations, Superior's construction estimates (for the cost of turbines, among other things) took a sudden turn upward due to the sharp rise in the price of steel at that time. As a result, Superior determined that the price being negotiated at the time would no longer support Superior's construction costs. Increases in the price of steel were likely to increase MDU's avoided cost in a similar manner thus justifying an increase in the negotiated price.

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[9] *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,002 (2005).

Nevertheless, MDU refused to consider further price negotiations at this point and the hearing was rescheduled to commence on August 2, 2005.

10. In July 2005, as the August hearing date approached, Superior was again encouraged with renewed progress on contract negotiations with MDU. Superior was able to get the negotiations back on track by proposing changes in the construction of certain transmission-related facilities that would reduce the cost of the project upgrades. At this point, Superior was encouraged enough to seek a further extension of the hearing date. Had Superior known that MDU was planning to suspend negotiations as soon as the 2005 Act was issued, Superior would never have sought an extension.

11. When the 2005 Act was passed in early August 2005, MDU abruptly cut off contract negotiations and indicated it would seek a deferral of the proceeding in light of the new Section 210 of PURPA. The provisions of Section 210(m) were actually proposed in Congressional conference reports as early as 2003. MDU, however, never indicated to Superior (or this Commission) that it would use this provision to avoid a purchase obligation to Superior.

B. MDU has Failed to Negotiate in Good Faith

Under PURPA Montana-Dakota is required to negotiate with Superior and act at all times in good faith.[10] Montana-Dakota's efforts to secure alternative sources of energy and capacity at the same time telling Superior that its needs are filled through 2011 do not constitute good faith behavior. Moreover, MDU's actions have occurred repeatedly, first with the OPPD Contracts, then with the Product K Contract and then with the RFP, among other things.

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[10] *See, e.g. Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 (1983); *see also Central Iowa Power Cooperative, et al.*, 108 FERC ¶ 61,282 at P 10 (2004).

Superior believes MDU's actions constitute a pattern of intentional delays to keep from entering into a PPA with Superior before the passage of the energy bill. Such delays constitute an unfair attempt by MDU to avoid its PURPA obligations. Having successfully delayed finalizing a PPA until the passage of the 2005 Act, MDU now conveniently claims that because there is no PPA in effect, MDU should now be entitled to terminate is mandatory purchase obligation. MDU's delays are in direct contravention of PURPA's intent to encourage small power producers. In fact, MDU's actions have had the direct effect of discouraging such development, to the detriment of consumers in the state. Moreover, MDU has undoubtedly gone to considerable expense to effectuate these delays to the detriment of its ratepayers.

To fulfill its state regulatory obligation, the SDPUC issued its Order No. F-3365 to implement FERC's PURPA requirements.[11] The SDPUC found that in implementing PURPA, it would not require utilities to implement a standard rate for QFs with a design capacity of greater than 100 KW and instead would require such contracts between the utility and the QF to be negotiated. The SDPUC further found that regarding such negotiations, its role would be to resolve any contract disputes that arose between the parties. Order F-3365 at 11. The SDPUC's role of resolving disputes in connection with negotiated rates is consistent with FERC's Order 69 implementing Section 210 of PURPA, which states:

> Paragraph (a) of § 292.401 sets forth the obligation of each State regulatory authority to commence implementation of Subpart C within one year of the date these rules take effect. In complying with this paragraph the State regulatory authorities are required to provide for notice of and opportunity for public hearing. As described in the summary of this subpart, such implementation may consist of the adoption of the Commission's rules, an undertaking to resolve disputes between qualifying facilities and electric utilities

[11] *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, 1978) (Order F-3365).

arising under Subpart C, or any other action reasonably designed to implement Subpart C.

45 Fed. Reg. 12214, at 30,893 (February 25, 1980).

According to Order No. 69, States are required to implement PURPA and that such implementation may consist of "the adoption of the Commission's rules, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, *or any other action reasonably designed to implement Subpart C*." (emphasis added).

C. The Commission Should Rule that MDU has an Existing Obligation and/or Contract Pending Approval under PURPA.

The Commission should enter an order finding that MDU has an "existing" obligation and/or contract pending approval under PURPA and thus is subject to PURPA's mandatory purchase obligation. Indeed, as discussed above, the ultimate effect of the new Section 210(m) of PURPA on this proceeding is a question for this Commission, not FERC, to decide in the first instance. Should MDU file a petition at FERC for termination of the mandatory purchase obligation with respect to Superior, FERC would benefit from this Commission's views on the existence of an obligation.

D. The Commission Should Issue an Order To Show Cause Why MDU is Not in Violation of Its PURPA Obligations.

The Commission's Order F-3365 implementing PURPA contemplates that the rate for QFs with a design capacity of greater than 100 KW would be negotiated between the utility and the QF, and the Commission would step in to assist only if necessary. In this case, not only have the negotiations failed but the hearing process has been rendered ineffective because of MDU's failure to provide the appropriate avoided cost information from which the Commission could make a determination. MDU now seeks a suspension of the hearing in this proceeding. FERC

must rule within 90 days of filing an application under Section 210(m)(3). A decision in the Alliant proceeding is expected in early December 2005, and a decision on MDU's application will be expected in late December. Nevertheless, the hearing in this proceeding should take place as scheduled because even with the 90-day decision period there is no guarantee that the matter will be fully resolved in that time. For example, a subsequent appeal of FERC's decision could follow, FERC could dismiss the application without prejudice to refile with new factual support thereby restarting the 90-day decision timeframe, or FERC could find it unnecessary to rule on all issues raised in the filings.

The Commission should issue an order to show cause why MDU is not in violation of PURPA. Given the lengthy delays MDU has caused, it is time for the Commission to send a clear message that it will enforce PURPA and encourage small power production in the state. Without the help of the Commission, Superior must consider pursuing an enforcement action at FERC.[12] FERC has previously indicated its disapproval of such attempts to avoid dealing with QFs.[13]

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[12] *See Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 at P 18 (2003) (stating that "that initiating an enforcement proceeding is appropriate in this instance because for over five years Midland has abused its role, as 'nonregulated electric utility' under PURPA to frustrate Mr. Swecker's attempts to exercise his rights as a QF).

[13] In *Swecker*, FERC noted that:

> Midland argues that it has repeatedly attempted in good faith to reach an agreement that would be acceptable to both parties. Nevertheless, the fact remains that after more than five years of litigation on numerous fronts, Mr. Swecker's wind generator remains unused. Midland, in arguing how reasonably it has behaved in its dealings with the Sweckers, points out the "small amounts" in terms of dollars that separate the Sweckers and Midland. However, Midland has obviously spent a great deal of money fighting the Sweckers' QF. It appears to us that Midland's resources would have been better spent seeking a compromise with Mr. Swecker. In this regard, we strongly encourage Midland to

(continued...)

III. CONCLUSION

Superior respectfully requests that the Commission take the following action:

(1) Deny MDU's motion to defer the hearing currently scheduled to begin on November 3, 2005.

(2) Enter an order finding that MDU has an "existing" obligation and/or contract pending approval under PURPA and thus is subject to PURPA's mandatory purchase obligation.

(3) Issue an order to show cause why MDU is not in violation of its PURPA obligations.

Respectfully submitted,

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do more to accommodate Mr. Swecker in a manner that would be consistent with PURPA. Mr. Swecker has had his wind powered generator for five years without being able to use it. It is time for Midland to find a way to enter into an agreement with Mr. Swecker.

105 FERC ¶ 61,238, at P 20.

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Attorneys for Superior Renewable Energy LLC and Java LLC

Attachment A

and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to the standard established by paragraph (14) of section 111(d).".

(h) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following:

"In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

(i) PRIOR STATE ACTIONS REGARDING SMART METERING STANDARDS.—

(1) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(e) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standard established by paragraph (14) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility within the previous 3 years; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility within the previous 3 years.".

(2) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

SEC. 1253. COGENERATION AND SMALL POWER PRODUCTION PURCHASE AND SALE REQUIREMENTS.

(a) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a–3) is amended by adding at the end the following:

"(m) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—

"(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).

"(2) REVISED PURCHASE AND SALE OBLIGATION FOR NEW FACILITIES.—(A) After the date of enactment of this subsection, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

"(B) For the purposes of this paragraph, the term 'existing qualifying cogeneration facility' means a facility that—

"(i) was a qualifying cogeneration facility on the date of enactment of subsection (m); or

"(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n).

"(3) COMMISSION REVIEW.—Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

"(4) REINSTATEMENT OF OBLIGATION TO PURCHASE.—At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe

why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

"(5) OBLIGATION TO SELL.—After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that—

"(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

"(B) the electric utility is not required by State law to sell electric energy in its service territory.

"(6) NO EFFECT ON EXISTING RIGHTS AND REMEDIES.—Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

"(7) RECOVERY OF COSTS.—(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

"(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

"(n) RULEMAKING FOR NEW QUALIFYING FACILITIES.—(1)(A) Not later than 180 days after the date of enactment of this section, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to section 210 of this Act to ensure—

"(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

"(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

"(iii) continuing progress in the development of efficient electric energy generating technology.

"(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to section 210 of this Act. For all other purposes, except as specifically provided in subsection (m)(2)(A), qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

"(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that—

"(A) was a qualifying cogeneration facility on the date of enactment of subsection (m), or

"(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).".

(b) ELIMINATION OF OWNERSHIP LIMITATIONS.—

(1) QUALIFYING SMALL POWER PRODUCTION FACILITY.—Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) is amended to read as follows:

"(C) 'qualifying small power production facility' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;".

(2) QUALIFYING COGENERATION FACILITY.—Section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) is amended to read as follows:

"(B) 'qualifying cogeneration facility' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;".

SEC. 1254. INTERCONNECTION.

(a) ADOPTION OF STANDARDS.—Section 111(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) is amended by adding at the end the following:

"(15) INTERCONNECTION.—Each electric utility shall make available, upon request, interconnection service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term 'interconnection service' means service to an electric consumer under which an on-site generating facility on the consumer's premises shall be connected to the local distribution facilities. Interconnection services shall be offered based upon the standards developed by the Institute of Electrical and Electronics Engineers: IEEE Standard 1547 for Interconnecting Distributed Resources with Electric Power Systems, as they may be amended from time to time. In addition, agreements and procedures shall be established whereby the services are offered shall promote current best practices of interconnection for distributed generation, including but not limited to practices stipulated in model codes adopted by

associations of state regulatory agencies. All such agreements and procedures shall be just and reasonable, and not unduly discriminatory or preferential.".

(b) COMPLIANCE.—

(1) TIME LIMITATIONS.—Section 112(b) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(b)) is amended by adding at the end the following:

"(5)(A) Not later than 1 year after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated utility shall commence the consideration referred to in section 111, or set a hearing date for consideration, with respect to the standard established by paragraph (15) of section 111(d).

"(B) Not later than two years after the date of the enactment of the this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to each standard established by paragraph (15) of section 111(d).".

(2) FAILURE TO COMPLY.—Section 112(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following: "In the case of the standard established by paragraph (15), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of paragraph (15).".

(3) PRIOR STATE ACTIONS.—

(A) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(f) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standard established by paragraph (15) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.".

(B) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of each standard established by paragraph (15) of section 111(d), the reference contained in this subsection to the date of enactment of the Act shall be deemed to be a reference to the date of enactment of paragraph (15).".

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