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OCT 12 2004

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Pam Bonrud  
Executive Secretary  
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 EL04-016  
Our file: 0069

Dear Pam:

Enclosed are original and ten copies of Montana-Dakota's  
Objection to Proposed Filing Fee Assessment in the above-entitled  
docket, which please file.

With a copy of this letter, I am serving a copy of the enclosure  
upon the service list.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

  
DAVID A. GERDES

DAG:mw

Enclosures

cc/enc: Service List

Don Ball

Douglas Schulz

Phil Lookadoo

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

**RECEIVED**

**OCT 12 2004**

IN THE MATTER OF THE FILING BY ) EL04-016  
SUPERIOR RENEWABLE ENERGY LLC )  
ET AL AGAINST MONTANA-DAKOTA ) **SOUTH DAKOTA PUBLIC**  
UTILITIES CO. REGARDING THE ) **UTILITIES COMMISSION**  
JAVA WIND PROJECT ) **MONTANA-DAKOTA' S**  
 ) **OBJECTION TO PROPOSED**  
 ) **FILING FEE ASSESSMENT**

Montana-Dakota Utilities Co. ("Montana-Dakota"), respectfully objects to Commission Staff's proposed assessment of costs in this case, as follows:

1. Montana-Dakota has received an e-mail message from Staff suggesting that SDCL § 49-1A-11 authorizes the Commission to assess costs in this case against Superior, 40 percent; Montana-Dakota, 40 percent; and each intervenor, five percent. Neither the precise language of the statute cited, nor the purpose of the Public Utilities Commission Gross Receipts Tax Fund contemplates such an assessment.

2. SDCL § 49-1A-1 states the purpose of the Gross Receipts Tax Fund as follows:

It is hereby declared to be in the public interest, in order to permit full and adequate regulation of public utilities as defined in chapter 49-34A, and telecommunications companies as defined in subdivision 49-31-1(28), to establish a fund known as the South Dakota Public Utilities Commission gross receipts tax fund.

Chapter 49-34A is the legislation that was adopted in 1975 to provide electric regulation in the state of South Dakota. Prior to 1965 the state was without any formal statewide regulation of electrical service in terms of price, conditions of service or territory served. Cities were served by either municipal utilities or investor-owned utilities. Investor-owned utilities were required to obtain a franchise from each city, and such regulation of prices and conditions of service as existed was exerted by that city. Municipal utilities were regulated only to the extent that they were operated by city government. Rural electric cooperatives were not regulated.

3. In 1965 a law governing service areas was adopted, establishing a mediation panel to settle disputes over service territories. That law was declared unconstitutional in 1968. In 1969 legislation creating an Electric Consumers Council regulating rates, conditions of service and territories was adopted applicable to the entire industry. That law created a political firestorm and was repealed in 1970. The Consumers Council was never implemented. The Electric Mediation Board was reenacted in a manner that cured its constitutional infirmity. None of the three players in the industry were happy with the manner in which the Electric Mediation Board operated. This resulted in 1975 in all segments of the industry compromising and agreeing upon the current framework for public utility regulation, including the keystone that service territories were "cast in stone." The Public Utilities Commission now regulates rates and conditions of service for investor-owned utilities, defined as "public utilities" in the act. SDCL § 49-34A-1(12). The Commission regulates conditions of service for municipal utilities and rural electric cooperatives on a complaint only basis. They are defined in the statute as "electric utilities." SDCL § 49-34A-1(7).

4. This history shows that the industry has been very careful in structuring the manner of its regulation due to the problems of the past. The Gross Receipts Tax Fund was established to supplement the Commission's budget to finance a portion of the Commission's budget as it relates to the regulation of investor-owned utilities and telecommunications companies, which were the companies that were primarily regulated by the Commission. This then brings us to SDCL § 49-1A-11. With some emphasis supplied, the statute is hereafter set forth:

**49-1A-11. Actual costs assessed to electric or gas utility or to a utility's supplier.** If an electric utility or gas utility, as defined in subdivisions 49-34A-1(7) and 49-34A-1(9), respectively, or any person providing or who proposes to provide wholesale electric or gas service to an electric or gas utility for resale, which is exempt from payment of the gross receipts tax fund assessed under § 49-1A-3, is a party to a docket before the South Dakota Public Utilities Commission, the commission may assess the actual cost to the party for its respective cost. The assessment shall be limited to actual amounts expended by the commission for commission employee time, expert witnesses, court reporter fees, document and exhibit preparation, and other necessary and

related expenses incurred by the commission. The party may, within thirty days after the assessment is mailed, file written objections with the commission stating the grounds upon which it claims that the assessment is not reasonable. The commission shall within thirty days of receiving such objections hold a hearing and issue an order in accordance with its findings as to the proper amount to be assessed to the party. The order may be appealed pursuant to chapter 1-26.

Grammatically Staff's proposed assessment is not supported by the language of the statute. Montana-Dakota is **not** exempt from payment of the gross receipts tax because it is a public utility which is expressly required to pay into the fund. The statute, 49-1A-11, applies to those who do **not** contribute to the fund. Therefore, if anyone is to be assessed costs in this matter it is Superior. It would be reasonable for the Commission to prorate Superior's assessment against an assessment against the Gross Receipts Tax Fund for the regulation of the public utilities that are part of this proceeding. The last antecedent doctrine, used in statutory construction by the courts, does not apply in this instance because the two subjects of the prepositional phrase (electric utility or gas utility and any person providing or who proposes to provide) are linked by the conjunction "or", giving them equal status as to the modifying phrase beginning "which is exempt."

5. Secondly, the statute itself establishes the purpose of the fund, as quoted above. Montana-Dakota and the other public utilities have already paid their dues to the fund. They have paid for this regulation. It is the purpose of SDCL § 49-1A-11 to permit entities who do not contribute to the fund to join in paying their fair share for regulatory services they are receiving.

#### CONCLUSION

Both the history of the creation of the Gross Receipts Tax Fund and the grammatical construction of SDCL § 49-1A-11 militate against the conclusion drawn by Staff. Montana-Dakota therefore requests that the Commission reject the suggestion that the regulated utilities contribute over and above what has already been paid for the regulatory services being provided in this docket.

Respectfully submitted this 11<sup>th</sup> day of October, 2004.

MAY, ADAM, GERDES & THOMPSON LLP

BY 

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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 11<sup>th</sup> day of October, 2004, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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