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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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IN THE MATTER OF THE FILING BY SUPERIOR
RENEWABLE ENERGY LLC ET AL. AGAINST
MONTANA-DAKOTA UTILITIES CO. REGARDING
THE JAVA WIND PROJECT

EL04-016

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Transcript of Proceedings
November 1, 2005

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest
John Smith
Karen Cremer
Greg Rislov
Harlan Best
Keith Senger
Dave Jacobson
Bob Knadle
Deb Gregg
Tina Douglas
Heather Forney
Pam Bonrud

APPEARANCES

David Gerdes, Montana-Dakota Utilities Company

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING
L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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5 RENEWABLE ENERGY LLC ET AL. AGAINST EL04-016
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1 CHAIRMAN HANSON: EL04-016. We've
2 been here for a little over an hour. Are you all
3 right to continue?
4 In the matter of the filing by Superior
5 Renewable Energy LLC et al. against Montana-Dakota
6 Utilities Company regarding the Java Wind Project.
7 The question before the Commission is shall
8 the Commission grant the Motion for
9 Reconsideration, and shall the Commission issue an
10 Order finding that MDU has an existing obligation
11 and/or contract pending approval under PURPA and
12 thus is subject to PURPA's mandatory purchase
13 obligations, and shall the Commission issue an
14 Order to Show Cause to MDU?
15 Do we have persons representing Superior? I
16 believe, Linda Walsh, are you on the phone?
17 MS. WALSH: Yes, Mr. Chairman. I'm
18 here.
19 CHAIRMAN HANSON: Is there anyone
20 else with you?
21 MS. WALSH: No. Mr. Meierhenry, I
22 believe, was going to call in, but I'm not sure if
23 he has.
24 CHAIRMAN HANSON: Thank you. When
25 you're pressing your button and speaking we're

1 APPEARANCES BY TELEPHONE
2 Jeff Larson
3 Doug Eidahl
4 Talbot Wiczorek
5 Meredith Moore
6 John Miller
7 Jeff Decker
8 Mary Sisak
9 Melissa Thompson
10 Jim Adkins
11 Lynn Ratanvale
12 Mary Lohnes
13 Don Ball
14 Linda Walsh
15 =====
16 TRANSCRIPT OF PROCEEDINGS, held in the
17 above-entitled matter, at the South Dakota State
18 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
19 South Dakota, on the 1st day of November 2005,
20 commencing at 1:30 p.m.
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<p>5</p> <p>1 which Superior thinks keeps the door open for them 2 to file at any point and, you know, really giving 3 them the ability to pull the rug out from under 4 this proceeding at any point in time. 5 So we believe that the Motion is still alive. 6 It's not mooted by MDU's agreement to go forward 7 with the hearing. So we would ask that the 8 Commission rule on the Motion. 9 Regarding the merits of the Motion itself, 10 regarding the Commission's legal authority to rule 11 on the existing obligation questions, I think you 12 can look at it sort of in a simple way. You know, 13 on the one hand you have MDU arguing that the 14 Northwestern Public Service case supports MDU's 15 argument that the State Legislature has not granted 16 specific authority for the Commission to adjudicate 17 this matter or to rule on this matter in any way. 18 On the other hand, you have just a whole -- a 19 whole array of support for the contrary position. 20 First of all, there's no express prohibition in the 21 state -- that the State Legislature has expressed 22 for the Commission's authority. The Northwest 23 Public Service case dealt with contract 24 interpretation and did not expressly prohibit the 25 Commission from ruling in this type of a proceeding</p>	<p>7</p> <p>1 for hearing, and it has been going through the 2 process rather slowly, but going through on the 3 assumption that there is a PURPA obligation here. 4 Why else would we all be here? 5 If someone had come in to try to enforce a 6 PURPA obligation and they didn't meet the 7 requirements of PURPA, the case never would have 8 been set for hearing. It would have been summarily 9 dismissed. 10 Regarding how we proceed, a couple of things. 11 Superior's Motion for Reconsideration has 12 essentially two aspects to it -- or three aspects, 13 I should say. Number one, to reconsider the Order 14 deferring the hearing and to go ahead and setting a 15 hearing date for this proceeding. Number two, 16 ruling on the question of the existing obligations 17 question. And the third thing would be issuing an 18 Order to Show Cause that MDU is in violation of 19 PURPA. 20 With the -- with the last item, the Order to 21 Show Cause item, the -- MDU and also the Commission 22 staff tend to view that as a question of 23 enforcement of PURPA that goes beyond the state's 24 authority. And, you know, I'd like to, you know, 25 explain how I view this in a different way.</p>
<p>6</p> <p>1 regarding PURPA implementation. 2 If you take PURPA itself that supports -- or 3 that requires state implementation of the PURPA 4 regulations, the Commission's Order in F-3365 5 carried that out where the Commission stated it 6 would resolve disputes that arise regarding PURPA 7 implementation, FERC's Order 69 specifically says 8 that FERC has the authority to enforce the state 9 regulatory authorities -- not only the compliance 10 with the implementation of the PURPA rules but also 11 the enforcement of those rules on a case-by-case 12 basis. 13 And then, of course, we have the <u>FERC v.</u> 14 <u>Mississippi</u> where the State -- the Supreme Court of 15 the United States upheld the PURPA implementation 16 regime and found that it did not violate the 17 Tenth Amendment of the Constitution. So I think if 18 you weigh all of this, you have to conclude that 19 the Commission has the authority to rule on -- on 20 the Motion. 21 And arguably, the State Commission, you have 22 already ruled in a sense on this Motion regarding 23 existing obligations simply by setting this 24 proceeding for hearing. This matter came before 25 the Commission more than a year ago. It was set</p>	<p>8</p> <p>1 The Commission, of course, has the authority 2 to ensure that matters that come before it proceed 3 in an efficient and timely manner. And I don't 4 think anyone would argue with the Commission's 5 ability to order a participant in a hearing to 6 follow the rules, follow deadlines, that sort of 7 thing. I think if you look at it this way, that 8 the Order to Show Cause is really just a message to 9 MDU that this proceeding needs to go forward and 10 that delays won't -- further delays won't be 11 tolerated. 12 Regarding the hearing date, I believe there's 13 an open date, December 12 through 16. Superior 14 would like to have those dates set for the hearing 15 if they are so available. Also Superior would like 16 to have the opportunity for both parties, of 17 course, to file supplemental testimony in this case 18 and Superior would request the opportunity to file 19 rebuttal testimony. 20 I think that we could probably work out some 21 dates with MDU that are mutually agreeable for 22 that. We do not believe that additional discovery 23 is appropriate here because that would cause 24 further delay in the proceeding. 25 And that's it. Thank you.</p>

<p>9</p> <p>1 CHAIRMAN HANSON: Thank you,</p> <p>2 Ms. Walsh. Are there any questions by</p> <p>3 Commissioners at this time?</p> <p>4 Mr. Gerdes.</p> <p>5 Excuse me. Mr. Meierhenry, did you have</p> <p>6 anything first?</p> <p>7 MR. MEIERHENRY: No, I did not.</p> <p>8 CHAIRMAN HANSON: Okay. Thank you.</p> <p>9 Mr. Gerdes.</p> <p>10 MR. GERDES: Mr. Chairman, members</p> <p>11 of the Commission, my name is Dave Gerdes. I'm a</p> <p>12 lawyer from Pierre, and I represent Montana-Dakota</p> <p>13 Utilities Company in this matter.</p> <p>14 I think the first thing that we have to keep</p> <p>15 in mind here is that the first question posed on</p> <p>16 the agenda is shall the Commission grant the Motion</p> <p>17 for Reconsideration -- or grant the Motion for</p> <p>18 Reconsideration.</p> <p>19 I would submit that that is -- that question</p> <p>20 and that -- the Motion for Reconsideration itself</p> <p>21 is moot because the Commission's Order deferred</p> <p>22 this matter until after PURPA had acted on the</p> <p>23 Alliant Petition. PURPA has acted on the Alliant</p> <p>24 Petition, and they dismissed it.</p> <p>25 In addition to that, PURPA has acted on MDU's</p>	<p>11</p> <p>1 the Commission had somehow decided that question,</p> <p>2 you simply can't say that. Because the act was not</p> <p>3 passed until August 5.</p> <p>4 And so what we're talking about here is</p> <p>5 something in context with the passage of the</p> <p>6 Energy Policy Act itself. And the only reason we</p> <p>7 are here is as it relates to the question of</p> <p>8 whether or not the mandatory purchase -- the</p> <p>9 termination of the mandatory purchase obligation is</p> <p>10 effective in this matter.</p> <p>11 That is mooted simply because, number one, MDU</p> <p>12 does not have a Petition pending and says it won't</p> <p>13 file one and we won't and we want to go ahead with</p> <p>14 this hearing.</p> <p>15 Now I'll say it however you want. We're not</p> <p>16 laying in wait for Superior to jump out from behind</p> <p>17 a tree at them in December. We do intend to go</p> <p>18 ahead with this hearing, and I can tell you we</p> <p>19 won't file a Petition as it relates to Superior</p> <p>20 until after a hearing is held in this matter.</p> <p>21 That's not the point. The point is we do not</p> <p>22 want to set other precedents which might occur in</p> <p>23 other cases that may have application to other QFs.</p> <p>24 As I told counsel for staff earlier when we were</p> <p>25 talking about this, it's a very fundamental</p>
<p>10</p> <p>1 Petition for a termination of the mandatory</p> <p>2 purchase obligation and dismissed that as well. So</p> <p>3 procedurally before this Commission, the Motion to</p> <p>4 grant the -- to reconsider is out of order and is</p> <p>5 mooted because of the act of FERC. That is, the</p> <p>6 condition stated by this Commission has been met</p> <p>7 and, therefore, by the very terms of the Order it's</p> <p>8 no longer in effect.</p> <p>9 Secondly, as it relates to this Commission</p> <p>10 entering an Order to find that MDU has an existing</p> <p>11 obligation, we would again submit that this issue</p> <p>12 is moot at the present time. And it's for a very</p> <p>13 simple reason. Montana-Dakota does not have a</p> <p>14 Petition pending before FERC to terminate the</p> <p>15 mandatory purchase obligation.</p> <p>16 This entire issue only arose after August 5</p> <p>17 when the Energy Policy Act of 2005 was adopted.</p> <p>18 And so when that happened that's the first time</p> <p>19 anybody ever thought about whether or not there</p> <p>20 was -- and I'm using the legislative language here.</p> <p>21 Any contract or obligation was in effect or pending</p> <p>22 approval at the time this Act was adopted.</p> <p>23 Well, that's when it first came up. So to</p> <p>24 argue that by becoming a QF back in April and by</p> <p>25 this Commission setting a hearing in this matter,</p>	<p>12</p> <p>1 proposition, the practice of law, that you don't</p> <p>2 stipulate yourself out of a case that doesn't yet</p> <p>3 exist. And that's the point here.</p> <p>4 The point is that there's no reason that the</p> <p>5 Commission should decide whether or not there is an</p> <p>6 obligation because the question isn't before the</p> <p>7 Commission.</p> <p>8 Then to take the other point, I respectfully</p> <p>9 disagree with Ms. Walsh in her reading of <u>FERC vs.</u></p> <p>10 <u>Mississippi</u>, and we quoted that in one of the, I</p> <p>11 think, four filings we made with the Commission on</p> <p>12 this subject, the ones dated October 12 where, if I</p> <p>13 may read just briefly, the Supreme Court said,</p> <p>14 "Titles 1 and 3 of PURPA require only consideration</p> <p>15 of federal standards, and if a state has no public"</p> <p>16 -- excuse me -- "if a state has no Public Utilities</p> <p>17 Commission or simply stops regulating the field" --</p> <p>18 or I might add or if they never regulated it in the</p> <p>19 first place -- "it need not even entertain federal</p> <p>20 proposals."</p> <p>21 Clearly what the Supreme Court has said in</p> <p>22 this decision is that there is no supervisory</p> <p>23 capacity that FERC has over this Commission. It</p> <p>24 can't tell this Commission what to do because of</p> <p>25 the Tenth Amendment to the United States</p>

13

1 Constitution. They can't tell you what to do. You
 2 can voluntarily agree to participate in federal
 3 actions, but you cannot be told to do something
 4 that you -- that you or, I should say, the State
 5 has decided not to do. And it's our position that
 6 the State has decided not to do this simply by not
 7 authorizing this Commission to implement PURPA,
 8 especially the '05 Act.

9 So we submit that the Commission is without
 10 jurisdiction to do so. And we cited, I think, six
 11 cases from three different states in this area, two
 12 from North Dakota, two from South Dakota, and two
 13 from Minnesota, that say if the Commission does not
 14 specifically authorize this Commission to act, it
 15 has no jurisdiction or statutory authority to act.
 16 And we would submit that that is good law, that
 17 the -- our friends from Superior have not shown us
 18 any concrete authority to the contrary, and that is
 19 simply that if -- if the legislature has not
 20 authorized this Commission to act in a way -- in a
 21 specific way, then it can't do so.

22 We have the best example in the world. I
 23 don't remember exactly what year it was now. It's
 24 in one of these briefs that I wrote. But I think
 25 it was in like '98 or '99. This Commission went to

14

1 the Legislature and specifically asked the
 2 Legislature to give it the authority to implement
 3 the 1996 Telecommunications Act. And if you go to
 4 the Telecommunications Statutes that define the
 5 jurisdiction of this Commission, they very
 6 specifically talk about how this Commission is
 7 empowered to implement the Act.

8 And I would submit to you, members of the
 9 Commission, that that's the point we're talking
 10 about, that -- now it can very easily be remedied.
 11 All you have to do is go to the Legislature in
 12 about two months and say, hey, we need a statute
 13 that says we can implement PURPA. But right now
 14 you don't have that jurisdiction, I would submit,
 15 based upon very clear authority from the
 16 South Dakota Supreme Court.

17 So really there are at least three reasons why
 18 this Motion that the Commission issue an order
 19 finding that MDU has an existing obligation is not
 20 well taken. Number one, it's mooted, but even
 21 secondly, if it were not mooted, we would submit
 22 that the Commission does not have the jurisdiction
 23 to entertain the question. We think these are
 24 substantial rights that the Commission should not
 25 ignore.

15

1 Finally, as far as the point on the -- the
 2 hearing itself, Montana-Dakota will cooperate with
 3 the Commission, with Superior. I should tell you
 4 that the people from Montana-Dakota and the people
 5 from Superior are negotiating even as we sit here
 6 trying to get this thing settled so that we don't
 7 have to go to a hearing. But I don't disagree that
 8 we have to set a hearing date. If it's going to be
 9 the 12th to the 16th, I seem to remember having
 10 seen some e-mails from some of the parties to this
 11 proceeding that said we probably need to update
 12 figures and that we probably need some discovery
 13 and we certainly need to update the testimony.

14 Now I will leave it to this Commission to
 15 decide whether or not the 12th to the 16th is a
 16 proper time to do it. I can't make that decision
 17 today. It seems to me that what the Commission
 18 ought to do is have Mr. Smith consult with the
 19 parties and come up with what is appropriate. And
 20 if the 12th through the 16th of December fits,
 21 that's fine. But I think we ought to take some
 22 time to make sure that the case can be properly
 23 prepared for the Commission so that the Commission
 24 can act and hopefully we'll get the thing settled
 25 beforehand.

16

1 Thank you very much.

2 CHAIRMAN HANSON: Thank you. John,
 3 did you have a question?

4 MR. SMITH: I do have some
 5 questions.

6 First with respect to the FERC vs. Mississippi
 7 language, I just want to get your take on this.
 8 Both of those -- or the language you quoted by my
 9 reckoning is found in the overall Subdivision IV of
 10 the decision entitled the Tenth Amendment.

11 The first section of that particular
 12 subdivision of the opinion deals with Section 210,
 13 which is the avoided cost rights proceedings, the
 14 purchase obligation rights proceedings before State
 15 Commissions that were mandated by PURPA.

16 The second of that deals with the mandatory
 17 consideration of standards which dealt with things
 18 like declining rates and so on and so on.

19 If I read this case right, the provisions that
 20 you quoted related to that second category of thing
 21 which dealt with mandating substantive standards to
 22 states, and the Supreme Court seemed much more
 23 concerned and hesitant in that area than they did
 24 with respect to adjudications under Section 210.
 25 Whereas, I read this decision, the Supreme Court

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1 did not hesitate at all to say that the Mississippi
 2 Commission was instructed and by law directed by
 3 Congress to do these -- perform these adjudications
 4 and that the absence of a particular enabling
 5 statute in Mississippi was not a bar to that and
 6 not an excuse for the Commission to decline to
 7 hear.
 8 And could you please maybe give me your take
 9 on the way I read this? And I looked up those
 10 Mississippi statutes, by the way. None of those
 11 statutes reference adjudications under PURPA. Only
 12 two of them even reference electric. They're both
 13 certificate of convenience of necessity statutes.
 14 The other two statutes involve telecommunications.
 15 MR. GERDES: But to answer your
 16 question, Mr. Smith, I'm familiar with what you're
 17 talking about, and it seemed to me that in reading
 18 this that they were setting out a broad standard
 19 against which these things are judged. And we're
 20 talking here about a third thing, and that is the
 21 Energy Policy Act of 2005. And that's not the same
 22 context that the Supreme Court was talking about in
 23 the FERC vs. Mississippi case, I don't believe.
 24 Because here we have yet a third context for this,
 25 and that is who adjudicates, who decides what is a

18

1 contract or obligation in effect or pending
 2 approval.
 3 And it seems to me that that falls more
 4 closely under the conceptual. It falls more
 5 closely under the language that I've been talking
 6 about and not under the secondary standards
 7 discussion in the case that you're talking about.
 8 And so I -- we can maybe disagree but that's my
 9 take on it and that's simply we're talking about an
 10 entirely different thing here than the standards
 11 thing that was talked about in the second section
 12 of the FERC vs. Mississippi.
 13 MR. SMITH: In your view is there a
 14 question of fact currently at issue regarding the
 15 issue of whether there's a current obligation, or
 16 is that a pure issue of law?
 17 MR. GERDES: I think it's both, both
 18 a question of fact and a question of law.
 19 MR. SMITH: And could you identify
 20 for the Commission what the issue of fact would be?
 21 MR. GERDES: Well, the issue of fact
 22 would be if, in fact -- depending on what we mean
 23 by obligation, do we mean obligation in the
 24 traditional sense of a contract? Does it have to
 25 have terms? Does it have to have a price? Does it

19

1 have to have a time frame? Does it have to talk
 2 about delivery terms? Does it have to talk about
 3 who's going to transmit power or not?
 4 Because none of those things are decided, and
 5 if you view the term "obligation" in its
 6 traditional legal context, it seems to me there's
 7 no obligation because none of the details of the
 8 obligation has been established yet, and so that's
 9 a question of fact as well as a question of law.
 10 MR. SMITH: If -- if -- assuming,
 11 without deciding -- obviously I don't decide
 12 anything here. But just assuming for the purpose
 13 of argument that the term "obligation" in that
 14 statute could be construed to mean an obligation to
 15 purchase under PURPA pending before a State
 16 Commission, assuming that, if that is the issue
 17 here, then is there an issue of fact?
 18 MR. GERDES: Well, yes. Because my
 19 understanding of PURPA is that the obligation of
 20 purchase is depending upon the ability of the
 21 parties to get together on the terms and conditions
 22 of the purchase. That's what the whole avoided
 23 cost proceeding is about. And if they can't get
 24 together, either -- if one of them's totally
 25 unreasonable, if they can't get together, then they

20

1 won't have a contract.
 2 MR. SMITH: But isn't it true --
 3 isn't the entire purpose of a PURPA adjudication
 4 under Section 210 and the only reason why it would
 5 ever be pending before a State Commission to
 6 resolve those issues when they cannot be resolved
 7 voluntarily, as was specifically envisioned by the
 8 Commission's Order back in 1981?
 9 MR. GERDES: Well, the Commission's
 10 1981 Order said that we're not going to order
 11 anyone to do anything. We're going to act as a
 12 mediator.
 13 MR. SMITH: Okay.
 14 MR. GERDES: Solve disputes between
 15 the parties. That's the way I read it. I think I
 16 quoted some of the language. Excuse me.
 17 MR. SMITH: Exclusive of the
 18 Energy Policy Act of 2005, does this Commission
 19 have the ability to determine whether there's an
 20 obligation existing under PURPA as it pertains to
 21 the current proceeding we're looking at here? In
 22 other words, I'm going to Ms. Brown's -- or
 23 Ms. Walsh's point about if there is no obligation
 24 under PURPA, what are we doing here and shouldn't
 25 we be looking at a Motion to Dismiss and stop

21

1 wasting our time?

2 MR. GERDES: If there is an

3 obligation under PURPA, what are we doing here?

4 We're --

5 MR. SMITH: If there is not an

6 obligation under PURPA.

7 MR. GERDES: Well, the obligation

8 under PURPA before the '05 Energy Act, I believe,

9 was for a utility to purchase from a QF at avoided

10 costs, and then the parties were supposed to get

11 together and decide what those avoided costs are.

12 And if they can't get together on the avoided

13 costs, then it's up to the Commission to determine

14 what those avoided costs are.

15 MR. SMITH: Thank you. That's all I

16 have.

17 CHAIRMAN HANSON: Thank you. Are

18 there any questions by the Commissioners at this

19 time?

20 If not, staff. Karen.

21 MS. CREMER: Thank you. This is

22 Karen Cremer from staff. Ms. Greff was originally

23 going to argue this matter, and so my knowledge of

24 it runs very brief -- very thin, we should say.

25 Therefore, I would rely on the brief that she has

22

1 filed as to the Motion to Reconsider, that

2 Motion's -- you know, if you're looking at it

3 purely in terms of procedurally, yes, it is

4 certainly improperly in front of the Commission.

5 However, a rule on it is not necessary, as

6 Mr. Gerdes pointed out that FERC has made its

7 determination. This matter is set to go to

8 hearing. I believe the dates are December 13

9 through 16 are the dates we're looking at.

10 Whether there's an obligation, an existing

11 obligation, staff believes that there is an

12 existing obligation. However, the Commission,

13 should it wish to, can withhold judgment on that

14 until the hearing and make its determination at

15 that point.

16 As to the Order to Show Cause, staff would

17 recommend that the Commission deny that. I believe

18 that staff can work with the parties to work on

19 dates for prefiled testimony, updating that. The

20 last I recall on that, Mr. Gerdes, is we were kind

21 of waiting for MDU to see if MDU wanted to file

22 updated testimony. Superior had replied that they

23 wanted to file updated testimony but not discovery.

24 They thought that was -- that would probably extend

25 it too long. So we were just kind of waiting to

23

1 hear if you guys wanted to also file some updated

2 testimony.

3 MR. GERDES: Yes.

4 MS. CREMER: Okay. So --

5 MR. GERDES: I thought I had

6 communicated that, but if I haven't, I apologize.

7 MS. CREMER: Our e-mail system

8 hasn't been working the best this week so you may

9 have sent it and I may not have got it.

10 MR. GERDES: My scheduling system at

11 my office hasn't been working very well either.

12 MS. CREMER: So that being the case,

13 I think we can get some dates worked out and some

14 time frames to get testimony filed.

15 COMMISSIONER JOHNSON: Mr. Chairma

16 if I could ask a clarification question.

17 CHAIRMAN HANSON: Please go ahead.

18 COMMISSIONER JOHNSON: The Decemb

19 dates that were discussed, I mean, is gathering

20 additional testimony, would that affect potential

21 dates and all?

22 MS. CREMER: Well, that's what I'm

23 hoping, that we can get an idea of how much

24 testimony they think they're going to need to

25 provide. I wouldn't think it would be a whole lot

24

1 of update, you know. And they could file

2 simultaneously the first go-around and then allow

3 Superior an opportunity. Or we could stagger it in

4 and then staff's expert could weigh in on whether

5 or not based on what they file he needs to file

6 something. But I wouldn't think it would be a lot

7 of testimony.

8 COMMISSIONER JOHNSON: Would staff

9 prefer the Commission not set a date certain for

10 the hearing or would that guidance be helpful?

11 MS. CREMER: I think we should set

12 say date certain, and if the dates of the 13th

13 through the 16th work, then I think we go for it.

14 COMMISSIONER JOHNSON: Gee, my

15 calendar is just as free as all can be. Thank you

16 for the guidance.

17 CHAIRMAN HANSON: Any further

18 questions?

19 Karen, do you have anyone else from staff to

20 testify?

21 MS. CREMER: No, I do not.

22 CHAIRMAN HANSON: All right. Thank

23 you. I don't know if I asked for redirect or not,

24 but is there anyone from -- Linda or Mark, did you

25 have anything to add at this time?

25

1 MS. WALSH: Yeah. This is
2 Linda Walsh. I would like to add just a few
3 things.
4 I agree with Mr. Smith and, yes, he correctly
5 pointed out that the language coded by Mr. Gerdes
6 doesn't relate to the Section 210 discussion in the
7 FERC v. Mississippi. And if you look at the quote
8 that Superior has in its Motion for
9 Reconsideration, that really shows that -- the
10 court's view on the Section 210 implementation
11 process, and that is that the states had options to
12 implement PURPA and South Dakota Commission, of
13 course, chose the path of order of F-3365, which
14 was to undertake to resolve disputes.
15 I also would like to point out that all of
16 that took place more than two decades ago, and I
17 think if the Legislature -- the South Dakota
18 Legislature found something offensive there, they
19 probably would have done something by now. So I
20 would take the view that it's safe to say that the
21 Commission is always in its authority to act on not
22 only its own Orders but the Supreme Court Orders as
23 well.
24 Whether there's any issues of fact here, I
25 don't think there are. I think that's something

26

1 that you can decide here without any hearing. But
2 if the Commission is inclined to find that the
3 existing obligation question be -- that it's moot
4 and you're inclined to dismiss it on that ground, I
5 think we would prefer that you defer decision on
6 the Motion. I think that it's certainly within the
7 realm of possibility that MDU will file another
8 Petition at FERC and that can happen at any time.
9 So I don't see the Motion as moot, and I
10 don't -- I don't see us having to refile the
11 Motion. I think, if anything, if we can hold it in
12 abeyance, that piece of it. Of course, we prefer
13 that the Commission rule that there is an existing
14 obligation and resolve the question once and for
15 all. I think that would be the best way to
16 proceed.
17 Thanks. Thank you.
18 CHAIRMAN HANSON: Thank you. I'm
19 going to ask that the Commission go into executive
20 session for 5 to 10 minutes. Is there a Motion?
21 COMMISSIONER JOHNSON: I move that
22 the Commission go into a 5-minute executive
23 session.
24 VICE CHAIRMAN SAHR: Second.
25 CHAIRMAN HANSON: I will concur.

27

1 (A recess is taken at which time the Commission
2 meets in executive session)
3 CHAIRMAN HANSON: Commission will
4 come to order. On ELO4-016 I move the Commission
5 grant Superior's Motion to Reconsider on the
6 grounds that FERC has dismissed the QF Purchase
7 Obligation Suspension Petition of Alliant Energy
8 Corporate Services and that the Commission has
9 jurisdiction to hear and decide Superior's
10 Complaint.
11 I further move that this matter be scheduled
12 and noticed for hearing on December 13 through the
13 16th, 2005 and that the parties confer immediately
14 following this hearing to resolve any prehearing
15 scheduling issues.
16 COMMISSIONER JOHNSON: Mr. Chairma
17 I'll second the Motion.
18 VICE CHAIRMAN SAHR: And I concur.
19 CHAIRMAN HANSON: On the second
20 question I move that the Commission deny without
21 prejudice Superior's request for a ruling on the
22 issue of whether there is an existing obligation
23 pending before the Commission and that we rule on
24 this issue in our final decision after hearing the
25 evidence.

28

1 COMMISSIONER JOHNSON: Second.
2 VICE CHAIRMAN SAHR: And I concur.
3 CHAIRMAN HANSON: And on the third
4 question I move that the Commission deny Superior's
5 request that the Commission issue an Order To Show
6 Cause against MDU.
7 COMMISSIONER JOHNSON: Second.
8 VICE CHAIRMAN SAHR: Concur.
9 CHAIRMAN HANSON: That concludes th
10 hearing on ELO4-016.
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1 STATE OF SOUTH DAKOTA)
2 :SS CERTIFICATE
3 COUNTY OF HUGHES)

4
5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 1st day of
11 November 2005, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 7th day
14 of November 2005.

15
16
17 
18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21
22
23
24
25

Word Index

		21 20:11 20:18 21:8 25:21	Aspects [2] 7:12 7:12	Capacity [1] 12:23
'05 [2] 13:8 21:8	Acted [3] 9:22 9:23 9:25		Associated [1] 4:2	Capitol [2] 2:12 2:12
'98 [1] 13:25	Actions [1] 13:3		Assuming [3] 19:10 19:12 19:16	Carried [1] 6:5
'99 [1] 13:25	Add [3] 12:18 24:25 25:2		Assumption [1] 7:3	Case [10] 5:14 5:23 7:7 8:17 12:2 15:22 16:17 17:23 18:7 23:12
1	Addition [1] 9:25		Attached [1] 29:11	Case-by-case [1] 6:11
1 [2] 1:8 12:14	Additional [2] 8:22 23:20		August [2] 10:16 11:3	Cases [2] 11:23 13:11
10 [1] 26:20	Address [1] 4:15		Authorities [1] 6:9	Category [1] 16:20
12 [3] 4:10 8:13 12:12	Adjudicate [1] 5:16		Authority [12] 5:10 5:16 5:22 6:8 6:19 7:24 8:13:15 13:18 14:2 14:15 25:21	Certain [2] 24:9 24:12
12th [3] 15:9 15:15 15:20	Adjudicates [1] 17:25		Authorize [1] 13:14	Certainly [3] 15:13 22:4 26:6
13 [2] 22:8 27:12	Adjudication [1] 20:3		Authorized [1] 13:20	Certificate [2] 17:13 29:2
13th [1] 24:12	Adjudications [3] 16:24 17:3 17:11		Authorizing [1] 13:7	CERTIFY [1] 29:8
16 [2] 8:13 22:9	Adkins [1] 2:6		Available [1] 8:15	Chairman [27] 1:10 1:11 3:1 3:17 3:19 3:24 4:7 9:1 9:8 9:10 16:2 21:17 23:15 23:17 24:17 24:22 26:18 26:24 26:25 27:3 27:16 27:18 27:19 28:2 28:3 28:8 28:9
16th [5] 15:9 15:15 15:20 24:13 27:13	Adopted [2] 10:17 10:22		Avenue [1] 2:12	Cheri [3] 1:23 29:5 29:18
1981 [2] 20:8 20:10	Affect [1] 23:20		Avoided [6] 16:13 19:22 21:9 21:11 21:12 21:14	Chose [1] 25:13
1996 [1] 14:3	Agenda [1] 9:16		B	Cited [1] 13:10
1:30 [1] 2:14	Ago [2] 6:25 25:16		Ball [1] 2:7	Clarification [1] 23:16
1st [2] 2:13 29:10	Agree [2] 13:2 25:4		Bar [1] 17:5	Clear [2] 4:1 14:15
2	Agreeable [1] 8:21		Based [2] 14:15 24:5	Clearly [1] 12:21
2005 [9] 1:8 2:13 4:10 10:17 17:21 20:18 27:13 29:11 29:14	Agreement [1] 5:6		Basis [1] 6:12	Closely [2] 18:4 18:5
210 [5] 16:12 16:24 20:4 25:6 25:10	Ahead [4] 7:14 11:13 11:18 23:17		Becoming [1] 10:24	CO [1] 1:5
3	Ailts [1] 1:13		Beforehand [1] 15:25	Coded [1] 25:5
3 [1] 12:14	Al [2] 1:4 3:5		Begin [1] 4:9	Commencing [1] 2:14
4	Alive [1] 5:5		Behind [1] 11:16	Commission [71] 1:1 1:10 1:12 3:7 3:8 3:9 3:13 5:8 5:16 5:25 6:5 6:19 6:21 6:25 7:21 8:1 9:11 9:16 10:3 10:6 10:9 10:25 11:1 12:5 12:7 12:11 12:17 12:23 12:24 13:7 13:9 13:13 13:14 13:20 13:25 14:5 14:6 14:9 14:18 14:22 14:24 15:3 15:14 15:17 15:23 15:23 17:2 17:6 18:20 19:16 20:5 20:18 21:13 22:4 22:12 22:17 24:9 25:12 25:21 26:2 26:13 26:19 26:22 27:1 27:3 27:4 27:8 27:20 27:23 28:4 28:5
412 [1] 2:12	Alliant [3] 9:23 9:23 27:7		Believes [1] 22:11	Commission's [7] 5:10 5:22 6:4 8:4 9:21 20:8 20:9
5	Allow [1] 24:2		Best [4] 1:15 13:22 23:8 26:15	COMMISSIONER [9] 1:11 23:15 23:18 24:8 24:14 26:21 27:16 28:1 28:7
5 [3] 10:16 11:3 26:20	Amendment [3] 6:17 12:25 16:10		Between [1] 20:14	Commissioners [2] 9:3 21:18
5-minute [1] 26:22	Answer [1] 17:15		Beyond [1] 7:23	Commissions [1] 16:15
500 [1] 2:12	Apologize [1] 23:6		Bit [1] 4:2	Committing [1] 4:24
6	APPEARANCES [2] 1:19 2:1		Bob [2] 1:11 1:16	Communicated [1] 23:6
69 [1] 6:7	Application [1] 11:23		Bonrud [1] 1:18	Company [3] 1:20 3:6 9:13
7	Appropriate [2] 8:23 15:19		Brief [2] 21:24 21:25	Complaint [1] 27:10
7th [1] 29:13	Approval [3] 3:11 10:22 18:2		Briefly [1] 12:13	Compliance [1] 6:9
A	April [1] 10:24		Briefs [1] 13:24	Conceptual [1] 18:4
Abeyance [1] 26:12	Area [2] 13:11 16:23		Broad [1] 17:18	Concerned
Ability [4] 5:3 8:5 19:20 20:19	Arguably [1] 6:21		Brown's [1] 20:22	
Above-entitled [2] 2:11 29:10	Argue [3] 8:4 10:24 21:23		Button [1] 3:25	
Absence [1] 17:4	Arguing [1] 5:13		C	
Act [17] 10:5 10:17 10:22 11:2 11:6 13:8 13:14 13:15 13:20 14:3 14:7 15:24 17:21 20:11 20:18 21:8 25:21	Argument [2] 5:15 19:13		Calendar [1] 24:15	
	Arise [1] 6:6		Cannot [2] 13:3 20:6	
	Arose [1] 10:16			
	Array [1] 5:19			

Word Index

<p>[1] 16:23 Conclude [1] 6:18 Concludes [1] 28:9 Concrete [1] 13:18 Concur [4] 26:25 27:18 28:2 28:8 Condition [1] 10:6 Conditions [1] 19:21 Confer [1] 27:13 Congress [1] 17:3 Consideration [2] 12:14 16:17 Constitution [2] 6:17 13:1 Construed [1] 19:14 Consult [1] 15:18 Context [4] 11:5 17:22 17:24 19:6 Continue [1] 3:3 Contract [6] 3:11 5:23 10:21 18:1 18:24 20:1 Contrary [2] 5:19 13:18 Convenience [1] 17:13 Cooperate [1] 15:2 Corporate [1] 27:8 Correct [1] 29:12 Correctly [1] 25:4 Cost [2] 16:13 19:23 Costs [4] 21:10 21:11 21:13 21:14 Counsel [1] 11:24 COUNTY [1] 29:3 Couple [1] 7:10 Course [5] 6:13 8:1 8:17 25:13 26:12 Court [8] 6:14 12:13 12:21 14:16 16:22 16:25 17:22 25:22 Court's [1] 25:10 Cremer [9] 1:14 21:21 21:22 23:4 23:7 23:12 23:22 24:11 24:21 CRR [1] 1:23 Current [2] 18:15 20:21</p>	<p>David [1] 1:20 Deadlines [1] 8:6 Deals [2] 16:12 16:16 Dealt [3] 5:23 16:17 16:21 Deb [1] 1:17 Decades [1] 25:16 December [6] 8:13 11:17 15:20 22:8 23:18 27:12 Decide [6] 12:5 15:15 19:11 21:11 26:1 27:9 Decided [4] 11:1 13:5 13:6 19:4 Decides [1] 17:25 Deciding [1] 19:11 Decision [6] 12:22 15:16 16:10 16:25 26:5 27:24 Decker [1] 2:4 Decline [1] 17:6 Declining [1] 16:18 Defer [1] 26:5 Deferred [1] 9:21 Deferring [1] 7:14 Define [1] 14:4 Delay [1] 8:24 Delays [2] 8:10 8:10 Delivery [1] 19:2 Deny [3] 22:17 27:20 28:4 Details [1] 19:7 Determination [2] 22:7 22:14 Determine [2] 20:19 21:13 Different [3] 7:25 13:11 18:10 Directed [1] 17:2 Disagree [3] 12:9 15:7 18:8 Discovery [3] 8:22 15:12 22:23 Discussed [1] 23:19 Discussion [2] 18:7 25:6 Dismiss [2] 20:25 26:4 Dismissed [4] 7:9 9:24 10:2 27:6 Disputes [3] 6:6 20:14 25:14 Don [1] 2:7 Done [1] 25:19 Door [1] 5:1 Doug [1] 2:2 Douglas [1] 1:17</p>	<p>Down [1] 4:3 Duly-appointed [1] 29:8 DUSTY [1] 1:11</p>	<p>Expert [1] 24:4 Explain [1] 7:25 Explanation [1] 4:18 Express [1] 5:20 Expressed [1] 5:21 Expressly [1] 5:24 Extend [1] 22:24</p>
D		E	F
<p>Dakota [11] 1:2 2:11 2:13 13:12 13:12 14:16 25:12 25:17 29:1 29:7 29:13 Date [6] 7:15 8:12 8:13 15:8 24:9 24:12 Dated [2] 12:12 29:13 Dates [9] 8:14 8:21 22:8 22:9 22:19 23:13 23:19 23:21 24:12 Dave [2] 1:16 9:11</p>	<p>Down [1] 4:3 Duly-appointed [1] 29:8 DUSTY [1] 1:11</p>	<p>E-mail [1] 23:7 E-mails [1] 15:10 Easily [1] 14:10 East [1] 2:12 Effect [3] 10:8 10:21 18:1 Effective [1] 11:10 Efficient [1] 8:3 Eidahl [1] 2:2 Either [2] 19:24 23:11 EL04-016 [4] 1:4 3:1 27:4 28:10 Electric [1] 17:12 Empowered [1] 14:7 Enabling [1] 17:4 Energy [8] 1:4 3:5 10:17 11:6 17:21 20:18 21:8 27:7 Enforce [2] 6:8 7:5 Enforcement [2] 6:11 7:23 Ensure [1] 8:2 Entering [1] 10:10 Entertain [2] 12:19 14:23 Entire [2] 10:16 20:3 Entirely [1] 18:10 Entitled [1] 16:10 Envisioned [1] 20:7 Especially [1] 13:8 Essentially [1] 7:12 Established [1] 19:8 Et [2] 1:4 3:5 Evidence [1] 27:25 Exactly [1] 13:23 Example [1] 13:22 Exclusive [1] 20:17 Excuse [4] 9:5 12:16 17:6 20:16 Executive [3] 26:19 26:22 27:2 Exist [1] 12:3 Existing [12] 3:10 5:11 6:23 7:16 10:10 14:19 20:20 22:10 22:12 26:3 26:13 27:22</p>	<p>F-3365 [2] 6:4 25:13 Fact [8] 18:14 18:18 18:20 18:21 18:22 19:9 19:17 25:24 Falls [2] 18:3 18:4 Familiar [1] 17:16 Far [1] 15:1 Federal [3] 12:15 12:19 13:2 FERC [15] 4:20 4:25 6:8 6:13 10:5 10:14 12:9 12:23 16:6 17:23 18:12 22:6 25:7 26:8 27:6 FERC's [1] 6:7 Few [1] 25:2 Field [1] 12:17 Figures [1] 15:12 File [13] 4:24 5:2 8:17 8:18 11:13 11:19 22:21 22:23 23:1 24:1 24:5 24:5 26:7 Filed [3] 4:10 22:1 23:14 Filing [2] 1:4 3:4 Filings [1] 12:11 Final [1] 27:24 Finally [1] 15:1 Fine [1] 15:21 First [12] 4:12 4:15 5:20 9:6 9:14 9:15 10:18 10:23 12:19 16:6 16:11 24:2 Fits [1] 15:20 Follow [2] 8:6 8:6 Following [1] 27:14 Forney [1] 1:18 Forward [2] 5:6 8:9 Four [1] 12:11 Frame [1] 19:1 Frames [1] 23:14 Free [1] 24:15 Friends [1] 13:17 Front [1] 22:4</p>

Word Index

Fundamental [1] 11:25	[1] 18:19 Ignore [1] 14:25 Immediately [1] 27:13 Implement [5] 13:7 14:2 14:7 14:13 25:12 Implementation [6] 6:1 6:3 6:7 6:10 6:15 25:10 Improperly [1] 22:4 Inclined [2] 26:2 26:4 Instructed [1] 17:2 Intend [1] 11:17 Interpretation [1] 5:24 Involve [1] 17:14 Issue [16] 3:9 3:13 4:16 10:11 10:16 14:18 18:14 18:15 18:16 18:20 18:21 19:16 19:17 27:22 27:24 28:5 Issues [3] 20:6 25:24 27:15 Issuing [1] 7:17 Item [2] 7:20 7:21 Itself [5] 5:9 6:2 9:20 11:6 15:2 TV [1] 16:9	Last [2] 7:20 22:20 Law [6] 12:1 13:16 17:2 18:16 18:18 19:9 Lawyer [1] 9:12 Laying [1] 11:16 Least [1] 14:17 Leave [1] 15:14 Legal [2] 5:10 19:6 Legislative [1] 10:20 Legislature [8] 5:15 5:21 13:19 14:1 14:2 14:11 25:17 25:18 Linda [5] 2:8 3:16 4:13 24:24 25:2 LLC [2] 1:4 3:5 Lohnes [1] 2:7 Look [3] 5:12 8:7 25:7 Looked [1] 17:9 Looking [4] 20:21 20:25 22:2 22:9 Loud [1] 4:1 Lynn [1] 2:6	[1] 5:9 Message [1] 8:8 Met [1] 10:6 Might [3] 4:3 11:22 12:18 Miller [1] 2:4 Mind [1] 9:15 Minnesota [1] 13:13 Minutes [1] 26:20 Mississippi [9] 6:14 12:10 16:6 17:1 17:5 17:10 17:23 18:12 25:7 Montana-Dakota [7] 1:5 1:20 3:5 9:12 10:13 15:2 15:4 Months [1] 14:12 Moore [1] 2:3 Moot [7] 4:16 4:18 4:23 9:21 10:12 26:3 26:9 Mooted [5] 5:6 10:5 11:11 14:20 14:21 Motion [27] 3:8 4:10 4:11 4:16 4:18 4:22 4:25 5:5 5:8 5:9 6:20 6:22 7:11 9:16 9:17 9:20 10:3 14:18 20:25 22:1 25:8 26:6 26:9 26:11 26:20 27:5 27:17 Motion's [1] 22:2 Move [5] 26:21 27:4 27:11 27:20 28:4 Mutually [1] 8:21
G	J	M	
GARY [1] 1:10 Gathering [1] 23:19 Gee [1] 24:14 Gerdes [20] 1:20 4:9 9:4 9:9 9:10 9:11 17:15 18:17 18:21 19:18 20:9 20:14 21:2 21:7 22:6 22:20 23:3 23:5 23:10 25:5 Go-around [1] 24:2 Grant [5] 3:8 9:16 9:17 10:4 27:5 Granted [1] 5:15 Greff [1] 21:22 Greg [1] 1:14 Gregg [1] 1:17 Ground [1] 26:4 Grounds [1] 27:6 Guess [1] 4:15 Guidance [2] 24:10 24:16 Guys [1] 23:1	Jacobson [1] 1:16 Java [2] 1:5 3:6 Jeff [2] 2:2 2:4 Jim [1] 2:6 John [3] 1:13 2:4 16:2 JOHNSON [9] 1:11 23:15 23:18 24:8 24:14 26:21 27:16 28:1 28:7 Judged [1] 17:19 Judgment [1] 22:13 Jump [1] 11:16 Jurisdiction [6] 13:10 13:15 14:5 14:14 14:22 27:9	Mandated [1] 16:15 Mandating [1] 16:21 Mandatory [7] 3:12 4:20 10:1 10:15 11:8 11:9 16:16 Manner [1] 8:3 Mark [2] 4:13 24:24 Mary [2] 2:5 2:7 Matter [15] 1:4 2:11 3:4 5:17 5:17 6:24 9:13 9:22 10:25 11:10 11:20 21:23 22:7 27:11 29:10 Matters [1] 8:2 McComsey [3] 1:23 29:5 29:18 MDU [17] 3:10 3:14 4:10 4:17 4:24 5:13 7:18 7:21 8:9 8:21 10:10 11:11 14:19 22:21 22:21 26:7 28:6 MDU's [3] 5:6 5:14 9:25 Mean [4] 18:22 18:23 19:14 23:19 Mediator [1] 20:12 Meet [1] 7:6 Meets [1] 27:2 Meierhenry [5] 3:21 4:5 4:6 9:5 9:7 Melissa [1] 2:5 Members [2] 9:10 14:8 Meredith [1] 2:3 Merits	
H	K	N	
Hand [2] 5:13 5:18 HANSON [18] 1:10 3:1 3:19 3:24 4:7 9:1 9:8 16:2 21:17 23:17 24:17 24:22 26:18 26:25 27:3 27:19 28:3 28:9 Harlan [1] 1:15 Hear [4] 4:12 17:7 23:1 27:9 Hearing [25] 4:1 5:7 6:24 7:1 7:8 7:14 7:15 8:5 8:12 8:14 10:25 11:14 11:18 11:20 15:2 15:7 15:8 22:8 22:14 24:10 26:1 27:12 27:14 27:24 28:10 Heather [1] 1:18 Held [2] 2:10 11:20 Helpful [1] 24:10 HEREBY [1] 29:8 Hesitant [1] 16:23 Hesitate [1] 17:1 Hold [1] 26:11 Hopefully [1] 15:24 Hoping [1] 23:23 Hour [1] 3:2 HUGHES [1] 29:3	Karen [4] 1:14 21:20 21:22 24:19 Keep [1] 9:14 Keeps [1] 5:1 Keith [1] 1:15 Kind [2] 22:20 22:25 Knadle [1] 1:16 Knowledge [1] 21:23	Name [1] 9:11 Necessary [1] 22:5 Necessity [1] 17:13 Need [6] 12:19 14:12 15:11 15:12 15:13 23:24 Needs [2] 8:9 24:5 Negotiating [1] 15:5 Never [2] 7:7 12:18 Noise [1] 4:2 None [3] 17:10 19:4 19:7 North [1] 13:12 Northwest [1] 5:22 Northwestern [1] 5:14 Notary [2] 29:6 29:18 Noticed [1] 27:12 November [4] 1:8 2:13 29:11 29:14 Number [4] 7:13 7:15 11:11 14:20	
I	L	O	
Idea [1] 23:23 Identify	Language [6] 10:20 16:7 16:8 18:5 20:16 25:5 Larson [1] 2:2	Obligation [34] 3:10 5:11 7:3 7:6 10:2 10:11 10:15 10:21 11:9 12:6 14:19 16:14 18:1 18:15 18:23 18:23 19:5 19:7 19:8 19:	

Word Index

13 19:14 19:19 20:20 20:23 21:3 21:6
21:7 22:10 22:11 22:12 26:3 26:14 27:
7 27:22
Obligations
[4] 3:13 4:21 6:23 7:16
Obviously
[1] 19:11
Occur
[1] 11:22
October
[2] 4:10 12:12
Offensive
[1] 25:18
Office
[1] 23:11
Once
[1] 26:14
One
[8] 5:13 7:13 11:11 11:13 12:10 13:24
14:20 19:24
Ones
[1] 12:12
Open
[2] 5:1 8:13
Opinion
[1] 16:12
Opportunity
[3] 8:16 8:18 24:3
Options
[1] 25:11
Order
[21] 3:10 3:14 6:4 6:7 7:13 7:18 7:20
8:5 8:8 9:21 10:4 10:7 10:10 14:18
20:8 20:10 20:10 22:16 25:13 27:4 28:
5
Orders
[2] 25:22 25:22
Originally
[1] 21:22
Ought
[2] 15:18 15:21
Overall
[1] 16:9
Own
[1] 25:22

P

P.m.
[1] 2:14
Pam
[1] 1:18
Participant
[1] 8:5
Participate
[1] 13:2
Particular
[2] 16:11 17:4
Parties
[8] 8:16 15:10 15:19 19:21 20:15 21:
10 22:18 27:13
Passage
[1] 11:5
Passed
[1] 11:3
Path
[1] 25:13
Pending
[8] 3:11 10:14 10:21 11:12 18:1 19:15
20:5 27:23
People
[2] 15:4 15:4
Perform
[1] 17:3
Persons
[1] 3:15
Pertains
[1] 20:20
Petition
[9] 4:25 9:23 9:24 10:1 10:14 11:12
11:19 26:8 27:7
Petitions

[1] 4:19
Phone
[1] 3:16
Piece
[1] 26:12
Pierre
[3] 2:12 9:12 29:13
Place
[2] 12:19 25:16
Pleading
[2] 4:17 4:24
Point
[12] 5:2 5:4 11:21 11:21 12:3 12:4 12:
8 14:9 15:1 20:23 22:15 25:15
Pointed
[2] 22:6 25:5
Policy
[4] 10:17 11:6 17:21 20:18
Posed
[1] 9:15
Position
[2] 5:19 13:5
Possibility
[1] 26:7
Potential
[1] 23:20
Power
[1] 19:3
Practice
[1] 12:1
Precedents
[1] 11:22
Prefer
[3] 24:9 26:5 26:12
Prefiled
[1] 22:19
Prehearing
[1] 27:14
Prejudice
[1] 27:21
Prepared
[1] 15:23
Present
[2] 4:25 10:12
Pressing
[1] 3:25
Price
[1] 18:25
Procedurally
[2] 10:3 22:3
Proceed
[3] 7:10 8:2 26:16
Proceeding
[9] 5:4 5:25 6:24 7:15 8:9 8:24 15:11
19:23 20:21
Proceedings
[6] 1:7 2:10 16:13 16:14 29:9 29:12
Process
[2] 7:2 25:11
Professional
[2] 29:6 29:19
Prohibit
[1] 5:24
Prohibition
[1] 5:20
Project
[2] 1:5 3:6
Proper
[1] 15:16
Properly
[1] 15:22
Proposals
[1] 12:20
Proposition
[1] 12:1
Provide
[1] 23:25
Provided
[1] 4:17
Provisions
[1] 16:19

Public
[8] 1:1 1:10 5:14 5:23 12:15 12:16 29:
6 29:18
Pull
[1] 5:3
Purchase
[12] 3:12 4:20 10:2 10:15 11:8 11:9
16:14 19:15 19:20 19:22 21:9 27:6
Pure
[1] 18:16
Purely
[1] 22:3
PURPA
[29] 3:11 6:1 6:2 6:3 6:6 6:10 6:15 7:
3 7:6 7:7 7:19 7:23 9:22 9:23 9:25 12:
14 13:7 14:13 16:15 17:11 19:15 19:
19 20:3 20:20 20:24 21:3 21:6 21:8
25:12
PURPA's
[1] 3:12
Purpose
[2] 19:12 20:3

Q

QF
[3] 10:24 21:9 27:6
QFs
[1] 11:23
Questions
[5] 5:11 9:2 16:5 21:18 24:18
Quote
[1] 25:7
Quoted
[4] 12:10 16:8 16:20 20:16

R

Ratanvale
[1] 2:6
Rates
[1] 16:18
Rather
[1] 7:2
Read
[5] 12:13 16:19 16:25 17:9 20:15
Reading
[2] 12:9 17:17
Really
[4] 5:2 8:8 14:17 25:9
Realm
[1] 26:7
Reason
[4] 10:13 11:6 12:4 20:4
Reasons
[1] 14:17
Rebuttal
[1] 8:19
Recess
[1] 27:1
Reckoning
[1] 16:9
Recommend
[1] 22:17
Reconsider
[4] 7:13 10:4 22:1 27:5
Reconsideration
[8] 3:9 4:11 4:23 7:11 9:17 9:18 9:20
25:9
Redirect
[1] 24:23
Reference
[2] 17:11 17:12
Refile
[2] 4:19 26:10
Regarding
[10] 1:5 3:6 5:9 5:10 6:1 6:6 6:22 7:
10 8:12 18:14
Regime
[1] 6:16
Registered
[2] 29:5 29:19
Regulated

[1] 12:18
Regulating
[1] 12:17
Regulations
[1] 6:4
Regulatory
[1] 6:9
Relate
[1] 25:6
Related
[1] 16:20
Relates
[3] 10:9 11:7 11:19
Rely
[1] 21:25
Remedied
[1] 14:10
Remember
[2] 13:23 15:9
Renewable
[2] 1:4 3:5
Replied
[1] 22:22
Reply
[1] 4:10
Reported
[1] 1:23
Reporter
[3] 29:6 29:9 29:19
Represent
[1] 9:12
Representing
[1] 3:15
Request
[3] 8:18 27:21 28:5
Require
[1] 12:14
Requirements
[1] 7:7
Requires
[1] 6:3
Resolve
[5] 6:6 20:6 25:14 26:14 27:14
Resolved
[1] 20:6
Respect
[2] 16:6 16:24
Respectfully
[1] 12:8
Responding
[1] 4:15
Rights
[3] 14:24 16:13 16:14
Rislov
[1] 1:14
Rolayne
[1] 1:13
Room
[1] 2:12
RPR
[1] 1:23
Rug
[1] 5:3
Rule
[7] 5:8 5:10 5:17 6:19 22:5 26:13 27:
23
Ruled
[1] 6:22
Rules
[3] 6:10 6:11 8:6
Ruling
[3] 5:25 7:16 27:21
Runs
[1] 21:24

S

Safe
[1] 25:20
SAHR
[5] 1:11 26:24 27:18 28:2 28:8

Word Index

Scheduled [1] 27:11 Scheduling [2] 23:10 27:15 Second [8] 16:16 16:20 18:11 26:24 27:17 27:19 28:1 28:7 Secondary [1] 18:6 Secondly [2] 10:9 14:21 Section [7] 16:11 16:12 16:24 18:11 20:4 25:6 25:10 See [4] 4:23 22:21 26:9 26:10 Seem [1] 15:9 Senger [1] 1:15 Sense [2] 6:22 18:24 Sent [1] 23:9 Service [2] 5:14 5:23 Services [1] 27:8 Session [3] 26:20 26:23 27:2 Set [8] 6:25 7:8 8:14 11:22 15:8 22:7 24:9 24:11 Setting [4] 6:23 7:14 10:25 17:18 Settled [2] 15:6 15:24 Shall [4] 3:7 3:9 3:13 9:16 Shorthand [2] 29:9 29:9 Show [6] 3:14 7:18 7:21 8:8 22:16 28:5 Shown [1] 13:17 Shows [1] 25:9 Simple [2] 5:12 10:13 Simply [7] 6:23 11:2 11:11 12:17 13:6 13:19 18:9 Simultaneously [1] 24:2 Sisak [1] 2:5 Sit [1] 15:5 Six [1] 13:10 Slowly [1] 7:2 Smidgen [1] 4:4 Smith [13] 1:13 15:18 16:4 17:16 18:13 18:19 19:10 20:2 20:13 20:17 21:5 21:15 25:4 Solve [1] 20:14 Someone [1] 7:5 Sort [2] 5:12 8:6 South [10] 1:2 2:11 2:13 13:12 14:16 25:12 25:17 29:1 29:7 29:13 Speaking [1] 3:25 Specific [2] 5:16 13:21	Specifically [5] 6:7 13:14 14:1 14:6 20:7 SS [1] 29:2 Staff [10] 1:12 7:22 11:24 21:20 21:22 22:11 22:16 22:18 24:8 24:19 Staff's [1] 24:4 Stagger [1] 24:3 Standard [1] 17:18 Standards [5] 12:15 16:17 16:21 18:6 18:10 State [18] 1:2 2:11 5:15 5:21 5:21 6:3 6:8 6:14 6:21 12:15 12:16 13:4 13:6 16:14 19:15 20:5 29:1 29:7 State's [1] 7:23 States [5] 6:15 12:25 13:11 16:22 25:11 Statute [3] 14:12 17:5 19:14 Statutes [5] 14:4 17:10 17:11 17:13 17:14 Statutory [1] 13:15 Still [1] 5:5 Stipulate [1] 12:2 Stop [1] 20:25 Stops [1] 12:17 Subdivision [2] 16:9 16:12 Subject [2] 3:12 12:12 Submit [7] 9:19 10:11 13:9 13:16 14:8 14:14 14:21 Substantial [1] 14:24 Substantive [1] 16:21 Summarily [1] 7:8 Superior [17] 1:4 3:4 3:15 4:11 4:12 5:1 8:13 8:15 8:18 11:16 11:19 13:17 15:3 15:5 22:22 24:3 25:8 Superior's [5] 7:11 27:5 27:9 27:21 28:4 Supervisory [1] 12:22 Supplemental [1] 8:17 Support [1] 5:19 Supports [2] 5:14 6:2 Supposed [1] 21:10 Supreme [8] 6:14 12:13 12:21 14:16 16:22 16:25 17:22 25:22 Suspension [1] 27:7 System [2] 23:7 23:10	Tend [1] 7:22 Tenth [3] 6:17 12:25 16:10 Term [2] 19:5 19:13 Terminate [1] 10:14 Termination [3] 4:20 10:1 11:9 Terms [5] 10:7 18:25 19:2 19:21 22:3 Testify [1] 24:20 Testimony [11] 8:17 8:19 15:13 22:19 22:22 22:23 23:2 23:14 23:20 23:24 24:7 Them's [1] 19:24 Therefore [2] 10:7 21:25 Thin [1] 21:24 Thinks [1] 5:1 Third [4] 7:17 17:20 17:24 28:3 Thompson [1] 2:5 Three [3] 7:12 13:11 14:17 Timely [1] 8:3 Tina [1] 1:17 Titles [1] 12:14 Today [1] 15:17 Together [5] 19:21 19:24 19:25 21:11 21:12 Tolerated [1] 8:11 Took [2] 25:16 29:9 Totally [1] 19:24 Traditional [2] 18:24 19:6 Transcript [2] 1:7 2:10 Transcription [1] 29:12 Transmit [1] 19:3 Tree [1] 11:17 True [2] 20:2 29:11 Try [1] 7:5 Trying [1] 15:6 Turn [1] 4:3 Two [9] 7:12 7:15 13:11 13:12 13:12 14:12 17:12 17:14 25:16 Type [1] 5:25	[1] 19:25 Up [4] 10:23 15:19 17:9 21:13 Update [3] 15:11 15:13 24:1 Updated [3] 22:22 22:23 23:1 Updating [1] 22:19 Upheld [1] 6:15 Utilities [7] 1:1 1:5 1:10 1:20 3:6 9:13 12:16 Utility [1] 21:9
V			
VICE [5] 1:11 26:24 27:18 28:2 28:8 View [6] 7:22 7:25 18:13 19:5 25:10 25:20 Violate [1] 6:16 Violation [1] 7:18 Volume [1] 4:3 Voluntarily [2] 13:2 20:7 Vs [4] 12:9 16:6 17:23 18:12			
W			
Wait [1] 11:16 Waiting [2] 22:21 22:25 Walsh [9] 2:8 3:16 3:17 3:21 4:14 9:2 12:9 25:1 25:2 Walsh's [1] 20:23 Wasting [1] 21:1 Week [1] 23:8 Weigh [2] 6:18 24:4 Welcome [1] 4:7 Whereas [1] 16:25 Whole [4] 5:18 5:19 19:22 23:25 Wieczorek [1] 2:3 Wiest [1] 1:13 Wind [2] 1:5 3:6 Wish [1] 22:13 Withhold [1] 22:13 Wittler [3] 1:23 29:5 29:18 Words [1] 20:22 World [1] 13:22 Wrote [1] 13:24			
Y			
Year [2] 6:25 13:23 Yourself [1] 12:2			