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JAN 11 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

January 10, 2005

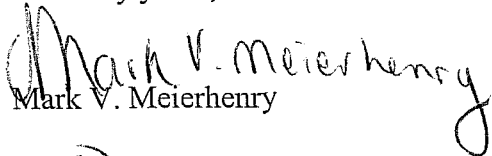
Karen Cremer
South Public Utilities Commission
Capitol Building
1st Floor
500 E. Capitol Ave.
Pierre, SD 57501

Re: Superior Renewable Energy LLC v. Montana Dakota Utilities Co.

Greetings:

Enclosed please find the original and ten copies of Superior Renewable Energy, LLC's Brief in Opposition to Assessment of Costs under SDCL §49-1A-11.

Sincerely yours,


Mark V. Meierhenry

MM/ai

C: Bradford Moody

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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JAN 11 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

**SUPERIOR’S BRIEF IN OPPOSITION TO ASSESSMENT OF COSTS UNDER SDCL
§49-1A-11.**

INTRODUCTION

Superior objects to any assessment of costs under SDCL § 49-1A-11. The Motion of the South Dakota Public Utilities Commission Staff requests that the Commission assess costs such as “commission employee time, expert witnesses, court reporter fees, document and exhibit preparation, and other necessary and related expenses incurred by the commission.”

SDCL § 49-1A-11 permits assessment “if an electrical utility or gas utility as defined in subdivisions 49-34A-1(7) and 49-34A-1(9), respectively, or any other person providing or who proposes to provide wholesale electric or gas service to an electric or gas utility for resale which is exempt from the payment of the gross receipts tax fund assessed under §49-1A-3, is a party to a docket before the South Dakota Public Commission, the Commission may assess the actual cost to the party for its respective cost.”

A. COMMISSION REGULATORY POWER

The South Dakota Public Utilities Commission has authority under the Public Utility Regulatory Policies Act of 1978 (PURPA) for implementation of regulations of the Federal Energy Regulatory Commission (FERC) to set “avoided costs.” Avoided costs are those costs which a public utility would otherwise incur for electric energy and/or capacity, either purchasing from another source or through its own production. 18 CFR §292.101(b)(6)(1995). The purpose of the South Dakota Commission setting “avoided costs” is in order for electrical utilities to purchase power from small power producers and to implement FERC rules. PURPA §210, 210(a), and 210(f); 16 USCA §824A-3(a)(f).

“Congress passed PURPA in 1978 in response to the prevailing energy crisis. Its purpose was to encourage the promotion and development of renewable energy technologies as

alternatives to fossil fuels and the construction of new generating facilities by the electric utilities. Section 210 of PURPA requires that electric utilities offer to purchase power produced by co-generators or small power producers that obtain qualifying facility status under Section 201. However, under PURPA Section 210(b) the rate to be paid for such power is not to exceed the “incremental costs to the utility of alternative electric energy.” 16 USC 824A-(b), (d). “Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission, 917 P2d 766, 770 (ID 1996).”

Superior filed a complaint requiring, in essence, Montana Dakota Utilities to comply with Federal Law and file with the South Dakota Public Utilities Commission its avoided costs. The Commission on its own motion treated the complaint by Superior as a “docket.”

SDCL § 49-1A-11 permits the assessment of costs only when a “docket” is established. Superior first objects in that the essence of this action is a complaint that Montana Dakota Utilities had not filed its avoided costs in order that small power producers could determine the feasibility of constructing facilities that would implement the Federal Policy under Federal Energy Regulatory Commission Rules. Furthermore, PURPA requires that electric utilities offer to purchase power from small power producers such as wind energy facilities.

Had MDU filed its “avoided cost” filing as contemplated by federal law; this matter would not be before the Commission. The necessity of this action is not to set rates for charges to the public but to determine a number which should have been available under the ambient of PURPA.

B. THE ASSESSMENT IS NOT REQUIRED BY STATUTE

Superior urges the Commission to decline to assess costs against Superior. SDCL § 49-1A-11 is not mandatory. The statute permits the Commission discretion through the Legislature’s use of the word “may” in SDCL § 49-1A-11.

The South Dakota Legislature “intended to clothe the commission(er) with authority to exercise sound discretion in the public interest.” Tubbs v. Linn, 70 NW2d 372, 376 (SD 1955).

Superior is not in the utility business in South Dakota. Until MDU files its mandatory filing, Superior does not have the knowledge to make such a decision.

Superior is similar to other wind energy developers because no project can be developed until developers know what it will be paid for its energy. The Commission has on numerous occasions declared its support for wind energy projects.

Requiring potential developers to expend money to determine South Dakota utilities avoided costs will chill potential developments. The cost is a matter of regulatory requirement of the national energy policy and not a matter of local rate determination.

Superior should not be assessed the cost of requiring MDU and this Commission to determine the “avoided costs” under PURPA.

C. ORIGINS OF SDCL §49-1A-11.

The present statute began in 1991. Section 10, Chapter 381 of the 1991 Session Laws states:

Whenever an “electric utility”, 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 electric utility for its respective cost as a party to such docket. The assessment shall be limited to actual amounts expended by the commission for expert witnesses, court reporter fees, documents and exhibit preparation, and other necessary and related expenses incurred by the commission, which are payable to parties who are not employees of the state.

The Legislature amended the 1991 enactment in 1994. Section 7, Chapter 352, 1994 Session Laws amended the statute to its present form.

SDCL 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.

The intent of the 1991 and 1994 acts was as the titles indicate “To Fund the Public Utilities Commission.”

A reading of the statutes indicates that the legislature intended to finance government services from companies subject to regulation. The 1994 amendment, however, included any person “who proposes to provide wholesale electric . . . service to an electric utility . . . for resale.” However the legislature did not make the assessment mandatory as it did the tax on utilities actually in business and receiving gross receipts on intrastate business. SDCL § 49-1A-3.

SDCL § 49-1A-8 permits the Commission in its discretion to require a utility to deposit up to one hundred and twenty-five thousand dollars for a rate case. However, SDCL §49-

1A-9 permits the utility to recover the money through its charges to customers. The purpose of the 1991 and 1994 Legislation appears to place the ultimate cost of utility regulation on utility customers and not the general fund.

In this matter, Superior has no gross receipts to tax. The staff would have Superior pay from its resources rather than from its South Dakota customers as MDU and the other utilities are permitted. The scheme is that the tax of .0015 on utilities gross receipts of operating utilities will pay for those items of Commission cost set out in SDCL § 49-1A-11. The Legislative scheme produces sufficient revenue to administrator utilities regulation without resort to those who "propose" to construct wind energy projects.

D. SUPERIOR IS RESPONSIBLE FOR ITS OWN COSTS

This proceeding attempts to establish MDU's "avoided cost." Superior's effort will assist not only itself but also all other prospective producers of wind energy. The business nature and its role in the state and national energy policy requires that utilities take acts required under PURPA when a company calls upon the power of this Commission to enforce these requirements, the complainant should not be assessed large regulatory costs.

The tax upon utilities is added to the bills of South Dakota consumers. Superior has no customers to obtain its regulatory costs. Superior has assumed its own costs to require MDU to follow the law.

All costs should be paid by MDU or the pool of money taxed for regulatory purposes. Superior wants to do business in South Dakota. If and when Superior is able to do so; only then should it be required to support the Public Utilities regulatory process.

CONCLUSION

Superior requests the Commission deny the Staff's request for assessment of costs under SDCL § 49-1A-11.

Dated this 10th day of January, 2005.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF SERVICE

This is to certify that on January 6, 2005 a copy Superior Renewable Energy LLC's Brief in Opposition to Assessment of Costs Under SDCL §49-1A-11 was forwarded to the following by United States mail, in accordance with South Dakota Codified Law:

Mr. David Gerdes
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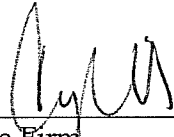
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A handwritten signature in black ink, appearing to be 'Danforth', written above a horizontal line.

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