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November 8, 2004

RECEIVED

NOV 09 2004

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

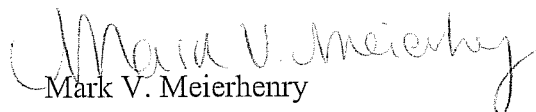
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

Dear Public Utilities Commission:

Enclosed please find the original and ten copies of Superior Renewable Energy, LLC's Motion to Compel. By copy of this letter service is made on the service list.

Sincerely yours,


Mark V. Meierhenry

MM/ai

C: Bradford Moody
Linda Walsh

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

RECEIVED

NOV 09 2004

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT FILED)
BY SUPERIOR RENEWABLE ENERGY LLC)
ET AL. AGAINST MONTANA DAKOTA)
UTILITIES CO. REGARDING THE JAVA)
WIND PROJECT)
_____)

Docket No. EL04-016

SUPERIOR RENEWABLE ENERGY LLC'S AND JAVA LLC'S MOTION TO COMPEL

Pursuant to Section 20:10:01:22.01 of the South Dakota Public Utility Commission's Administrative Rules, Complainants Superior Renewable Energy LLC and Java LLC (collectively "Superior") move for an order to compel Respondent Montana-Dakota Utilities Co. ("Montana-Dakota") to respond to certain interrogatories served upon Montana-Dakota on or about July 16, 2004. The particular interrogatory that is the subject of this motion is Number 1. In support of that motion, Superior states as follows:

1. Superior's Interrogatory No. 1 asked Montana-Dakota to provide the following information relative to Montana-Dakota's power purchase agreements:

Regarding the load and capability data, noted as Appendix "A", that was submitted by MDU to the Mid-Continent Area Power Pool ("MAPP") as of January 1, 2004, for inclusion in the 2004 MAPP Regional Reliability Council Report on Coordinated Bulk Power Supply Program (EIA-411), for line 18, Full Responsibility Purchases, please provide a copy of all of MDU's existing energy and capacity purchase contracts for each year identified in the table (2003-1013). In addition, for each contract, please specify the following details for each year identified in the table (2003-2013):

- a. When was the agreement fully executed by each party?
- b. What is the start date, end date and terms of the purchase?
- c. What is the capacity payment in \$/kW-month and \$/kW-year?
- d. What months of the year is the capacity being purchased?
- e. What is the energy payment in \$/MWh?
- f. Are there any additional transactional costs, for example transmission or ancillary service costs?

- g. Does the agreement contain a periodic nomination provision and or any other provision that provides flexibility to modify the amount of capacity being purchased?
- h. What are the termination provisions in the agreement?

2. Montana-Dakota answered this interrogatory as follows: “All power purchase agreements are business confidential information.” Montana-Dakota went on to quote from line 18 (titled “Full Responsibility Purchases”) of its submission to the 2004 MAPP Regional Reliability Council Report on Coordinated Bulk Power Supply Program (EIA-411). *See Montana-Dakota Utilities Co. Superior Renewable Energy Data Request Dated July 16, 2004.* As this document was publicly available, none of the provided information was newly disclosed to Superior.

3. Although the main point of the interrogatory was to obtain the power purchase contracts, Montana-Dakota failed to provide them to Superior. Montana-Dakota also failed to provide Superior with much of the information about the contracts requested in the interrogatory. For example, part “a.” of the interrogatory plainly states that Montana-Dakota is to disclose the date that the contracts were fully executed by the parties. Montana-Dakota’s responses are vague, saying for example with respect to one contract only that “[i]n January 2004, Montana-Dakota signed...” without stating if or when the counter parties signed. The responses also fail to distinguish between execution date and effective date. In the same vein, Montana-Dakota failed to respond to the portion of the interrogatory seeking details about flexibility in the amounts of capacity being purchased.

4. From the information that Montana-Dakota did provide in its response, Superior can see that two of the contracts have been in place since well before Superior first contacted Montana-Dakota about a power purchase agreement for the Java Wind Facility. These contracts are with Basin Electric Power Cooperative and the Western Area Power Administration. The other two contracts are with the Omaha Public Power District (the “Omaha PPA’s”). The Omaha PPA’s were purportedly entered into in “January 2004”—at or about the same time that Superior was trying to negotiate a power purchase agreement for the Java Wind Facility. These responses are so vague that Superior cannot discern the extent to which these contracts relate to or were influenced by Superior’s efforts to obtain a power purchase agreement with Montana-Dakota. *See Montana-Dakota Utilities Co. Superior Renewable Energy Data Request Dated July 16, 2004, Response No. 1.*

5. Because of MDU’s expressed concerns about confidentiality, the parties entered into a confidentiality agreement that strictly controls the disclosure and use of the contracts by Superior. A copy of this confidentiality agreement is attached as Exhibit “A” and incorporated by reference for all purposes.

6. Notwithstanding the execution of this confidentiality agreement, Montana-Dakota still refused to provide Superior with copies of the contracts, despite repeated requests made by counsel for Superior. In an effort to compromise, Superior proposed that Montana-Dakota not

provide the contracts to Superior but instead disclose to Superior certain information about the contracts and the circumstances surrounding their negotiation and execution. Montana-Dakota refused to accept this compromise proposal, making a counterproposal that would further restrict the type of information about the contracts that it would disclose. Superior rejected this counterproposal, believing that its original proposal was fair and reasonable and further believing that the information Montana-Dakota proposed to withhold was highly relevant to the issues raised by Superior in this proceeding. A copy of the letters to and from counsel for Montana-Dakota and Superior relative to these proposals is attached as Exhibits "B" and "C" and incorporated by reference.

7. Section 20:10:01:22.01 of the Commission's General Rules of Practice provides that "[t]he taking and use of discovery shall be in the same manner as in the circuit courts of this state."

8. SDCL 15-6-26(b) of the rules of procedure for South Dakota Circuit Courts states as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

9. Other than Montana-Dakota's statement that the power purchase contracts that are the subject of the disputed interrogatory are "business confidential" in nature, Montana-Dakota has made no other written objection based on privilege, burden or expense. Moreover, Montana-Dakota never objected to Superior's interrogatory based on relevancy, a circumstance not at all surprising considering that Montana-Dakota expressly relied upon these contracts when it calculated its avoided costs.

10. For example, Montana-Dakota uses two of the contracts to support its own avoided cost calculation. In a document titled "Montana-Dakota Utilities Co. Estimated Avoided Costs" that Montana-Dakota provided to Superior on or about October 20, 2004, Montana-Dakota stated:

Montana-Dakota's Current Plan for Resource Additions

Montana-Dakota's existing power purchase contracts include the following:

1. Power purchased from the Antelope Valley Station Generating Unit No. 2,
2. Capacity received from Western Area Power Administration,
3. Peaking capacity purchased from Omaha Public Power District, and
4. Baseload capacity and energy purchased from Omaha Public Power District.

With these power purchase contracts and its existing generating units, Montana-Dakota will not need additional capacity until 2011.

(Emphasis added). A copy of this document is attached to this motion as Exhibit "D." Exhibit "D" will be referred to hereinafter from time to time as the "MDU Avoided Cost Document."

11. In other words, Montana-Dakota says that the amount of avoided capacity costs payable to Superior through 2009 based on these contracts is \$0.00. Montana-Dakota then goes on to say that as a result of the planned construction of a new coal-fired plant in 2010, avoided costs of capacity payable to Superior rise from \$0.00 (\$/kw-year) for years 2005-2009 to \$338.33 (\$/kw-year) for years 2010 through 2015. *See Table 2 of the MDU Avoided Cost Document, Page 4.*

12. Having relied upon these contracts to support its avoided cost calculation, Montana-Dakota cannot under any reading of law or equity prevent Superior from obtaining these contracts to verify that they say and do all of the things that Montana-Dakota claims. As this Commission has recognized, this proceeding is adversary in nature. As such, the Commission's rules give Superior all of the rights to discover the facts that are given to a civil litigant in South Dakota courts. *See Section 20:10:01:22.01 of the Commission's General Rules of Practice.* Those rules clearly provide that parties like Superior may have discovery as to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." *SDCL 15-6-26(b).* *See also Kaarup v. St. Paul Fire & Marine Ins., 436 N.W.2d 17, 20 (S.D.1989).* As a core component of Montana-Dakota's own avoided costs calculations, these contracts are highly relevant to this proceeding.

13. To the extent that the alleged "business confidential" nature of the contracts might provide a basis for Montana-Dakota to withhold the contracts from discovery, the parties have already executed a confidentiality agreement to accommodate Montana-Dakota's concern. In considering this issue, however, this Commission should take into account that SDCL 15-6-26(b) does not recognize any right to withhold otherwise discoverable information based on business confidentiality. Unless such information is subject to a recognized privilege like the doctor-

patient privilege, or fits one of the explicit exceptions set forth in SDCL 15-6-26, it must be produced. *See e.g. Kaarup 436 N.W. 2d at 20.*

14. To illustrate further the reasons why Superior needs to review the contracts, consider the effect on Montana-Dakota's avoided cost of energy if there is any flexibility in the amount of capacity to be purchased and delivered to Montana-Dakota under the contracts. FERC's Order No. 69 implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA") makes firm capacity purchases a key piece of the avoided cost determination:

In the proposed rule, the Commission stated that if a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating plant, to enable it to build a smaller, less expensive plant, *or to purchase less firm power from another utility than it would otherwise have purchased*, then the rates for purchase from the qualifying facility must include the avoided capacity and energy costs. As indicated by the preceding discussion, the Commission continues to believe that these principles are valid and appropriate, and that they properly fulfill the mandate of the statute.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978; Order No. 69, 1977-81 FERC Stats. & Regs. ¶ 30,128, at 30,883, 45 Fed. Reg. 12214 (February 25, 1980) (hereinafter "FERC Order 69") (emphasis added).

15. As FERC Order 69 makes clear, in order for every kilowatt-hour of capacity identified in Montana-Dakota's interrogatory responses not to be avoided and therefore not to be included as part of the price payable to Superior, such capacity must be contracted for on a pure "take or pay" basis. In order to be treated as take or pay, the capacity in the contracts must not be subject to any nomination, scheduling, cancellation or similar terms that would enable Montana-Dakota to purchase less than the full contract quantities or that would enable Omaha Public Power District to deliver less than the full contract quantities. Because Superior has not seen the contracts, it has no way to analyze whether or not this flexibility is present.

16. Finally, there is another important reason why the contracts and the circumstances surrounding their negotiation and execution are significant to this proceeding. Applicable law requires Montana-Dakota to negotiate in good faith with Superior with respect to a power purchase agreement based on avoided cost. In the December 14, 1982 decision and order implementing PURPA, the Commission states that "it agrees with the recommendations of all parties that the Commission should play a minimal role in the negotiation of such contracts, a role limited to resolving any contract disputes which arise between the parties. *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, at 11 (hereinafter "Order F-3365"). It is axiomatic to this framework, under which the Commission's stated role in this proceeding is to resolve contract disputes, that both parties to the negotiation of a power purchase agreement are expected to act in good faith. Indeed, FERC left it to the states in the first instance to ensure good faith negotiations:

With regard to review and enforcement, the Commission's role is generally limited to ensuring that the State regulatory authority-or nonregulated electric utility-established implementation plan is consistent with section 210 of PURPA and with the Commission's regulations. Once this is ensured, the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a manner consistent with locally-established regulation.

See 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) (stating that the Commission was "particularly concerned with the strategy of CIPCO, as demonstrated by its member Midland, to fight vigorously a QF's right to sell rather than negotiate with the QF in good faith").

17. In addition, several states have enacted statutes or promulgated regulations specifically requiring parties to PURPA contracts to negotiate in good faith. See, e.g. *In the Matter of the Petition of Independent Energy Producers of Idaho for an Order Increase in the Size at Which a QF Is Entitled to Published Avoided Cost Rates*, 2003 Idaho PUC LEXIS 37 at *5 (March 28, 2003) (citing Idaho law, agency states that "[s]hould a utility fail to negotiate in good faith with a qualified QF, a complaint can be filed with this Commission."); *In the Matter of the Complaint of LS Power Corporation Against Northern States Power Company*, 1993 Minn. PUC LEXIS 78 at *10 (April 12, 1993) (citing state law and regulations, agency states that "[a] utility is obligated under both state and federal law to negotiate in good faith with a QF developer."); California Public Utilities Commission, *Commission Rules Regarding Electric Utility Purchases From Cogeneration and Small Power Production Facilities*, 1982 Cal. PUC LEXIS 1202 at *147 (Jan. 21, 1982) ("Protracted negotiations that lead nowhere are exactly what this regulatory scheme [*i.e.*, PURPA] is intended to avoid. The utilities are expected and shall be required to bargain conscientiously toward a conclusion.").

18. Superior believes that that the timing and circumstances surrounding execution of the Omaha PPA's are critical to a determination regarding Montana-Dakota's good faith. If for example, Montana-Dakota entered into the Omaha PPA's in an effort to frustrate Superior's rights as a Qualified Facility under the Public Utilities Regulatory Policy Act of 1978, then this Commission may well determine that the Omaha PPA's should be disregarded in determining Montana-Dakota's avoided costs. Such frustration could occur if, for example, Montana-Dakota deliberately dragged out its discussions with Superior regarding a power purchase agreement so

that it could secure the Omaha PPA's and then tell Superior that its avoided capacity costs were zero.

19. Although this Commission has sufficient authority pursuant to Order F-3365 and the Commission's Rules of Practice to grant Superior's motion to compel, Superior's request for the Montana-Dakota power purchase agreements is likewise supported by FERC's implementation of PURPA. Section 292.302(e) of FERC's PURPA regulations provides:

(e) State Review.

(1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

18 C.F.R. § 292.302(e) (2004); see also FERC Order No. 69, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, Regulations Preamble, 1977-1981 ¶ 30,128, at 30,870 (adding Section 292.302(e) in response to numerous comments complaining that the proposed rule did not address the issue of validation of the data to be provided by utilities). This regulation places the burden squarely on Montana-Dakota to provide this Commission and Superior with the power purchase agreements to justify its calculation of avoided cost.

Conclusion

For the reasons set forth herein, Superior respectfully requests that the Commission grant Superior's Motion to Compel and either order Montana-Dakota to answer Superior's Interrogatory No. 1, such answer to include production of the four power purchase agreements referenced in the MDU Avoided Cost Document or alternatively, to order such other relief as this Commission sees fit to grant.

Respectfully submitted,

DANFORTH, MEIERHENRY & MEIERHENRY, L.L.P.

By: 

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Attorneys for Superior Renewable Energy LLC and Java LLC

EXHIBIT "A"
Motion to Compel of
Superior Renewable Energy, et al.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY)	EL04-016
SUPERIOR RENEWABLE ENERGY LLC)	MONTANA-DAKOTA'S
ET AL AGAINST MONTANA-DAKOTA)	CONFIDENTIALITY
UTILITIES CO. REGARDING THE)	AGREEMENT
JAVA WIND PROJECT)	

This Confidentiality Agreement is made as of the ____ day of September, 2004, between Superior Renewable Energy, LLC, Java LLC (collectively "Superior") and Montana-Dakota Utilities Co. ("Montana-Dakota").

RECITAL

1. Montana-Dakota hereby states that it will, under the terms of the following Confidentiality Agreement, allow inspection and review of certain data and information claimed by Montana-Dakota to be of a confidential nature to the signators of this Agreement. The information covered by this Confidentiality Agreement is any information sought to be reviewed and required to be disclosed pursuant to agreement, rule or order in the referenced proceeding.

2. In connection with this case Superior desires to have access to and to review certain documents of Montana-Dakota mentioned in paragraph 1 of the Recital.

3. Montana-Dakota submits that many, if not all, of the documents Superior wishes to review contain confidential information, trade secrets, proprietary information and/or other information which, if disclosed to competitors of Montana-Dakota or others, could result in irreparable damage and injury to Montana-Dakota.

4. The parties desire to provide a means by which the documents described in Recital number 1 can be provided to Superior for review without resulting in irreparable damage or injury to Montana-Dakota.

EXHIBIT A

THEREFORE, Superior and Montana-Dakota agree as follows:

1. For purposes of this Agreement, the following terms shall be defined in the following manner:

- (a) "Documents" shall mean and include all documents, data, information, studies, computer programs, and other matters both written and electronic furnished in response to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed to be a trade secret or confidential in nature and furnished under the terms of this Agreement, as constituting trade secret, confidential, commercial, and financial information (here referred to as "confidential"), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Agreement. Any and all documents, records or graphic matters of any kind whatsoever shall extend to any subsequent compilation, summary, quotation, or reproduction thereof prepared at any subsequent time in any subsequent form or proceeding, in whole or in part.

To the extent there may be information which Montana-Dakota believes requires extraordinary protection beyond that provided for in this Agreement, Montana-Dakota shall file the information with the Commission, only, under seal together with a motion seeking such extraordinary protection. The motion shall state the grounds for seeking the relief and advise all other parties of the request together with a description of the subject matter of the material at issue, including the identity and date of authorship.

- (b) "Confidential Information" shall mean and include any documents and all contents thereof which are marked "CONFIDENTIAL," "PROPRIETARY" or so identified in some similar manner by Montana-Dakota.
- (c) "Use of Confidential Information and Persons Entitled to Review." All confidential information made available pursuant to this Agreement may be disclosed to the Commission and its staff from time to time as part of this proceeding; provided, however, that access to any specific confidential information also may be authorized by counsel for Superior, solely for the

purpose of this proceeding, to those persons indicated by Superior as being its employees, experts or advisors with a need to know in order to participate in the above captioned matter. For purposes of this Agreement, disclosure shall be strictly limited to persons employed or retained by Superior who are directly involved in this case as an employee, attorney, advisor, expert, or witness for Superior. Such persons shall be hereinafter referred to as "Authorized Persons."

- (d) "Disclose," "make disclosure of" or "disclosure" shall mean and include the dissemination to any person, firm, corporation or other entity of the contents of a document, whether that dissemination is by means of the transmittal or transfer of the original or a copy of that document or any verbal or other dissemination of the contents of said document. No access to confidential information shall be authorized under the terms of paragraph 1(c) of this Agreement until the Authorized Person signs a Nondisclosure Agreement in the form that is attached and incorporated as Exhibit A. The Nondisclosure Agreement shall require the persons to whom disclosure is to be made to certify in writing that they have read this Agreement and agree to be bound by its terms. The Nondisclosure Agreement shall contain the signatory's full name, permanent address, and employer, and the name of the party with whom the signatory is associated. This Nondisclosure Agreement shall be delivered to counsel for the providing party and the Commission at the time of review of the documents, or as soon thereafter as practicable.

2. All Confidential Information and the disclosure thereof shall be subject to the following restrictions:

- (a) Superior shall not disclose any Confidential Information to anyone other than an Authorized Person(s) for the sole purpose of his or her review, analysis, participation and decision making in the above-captioned matter.
- (b) The foregoing notwithstanding, Superior may not disclose Confidential Information to an Authorized Person(s) unless, prior to the disclosure of such Confidential Information, said

Authorized Person(s) has signed a Nondisclosure Agreement as set forth in Article 1 (d) above.

3. Confidential Information will be marked as such and delivered to counsel. Any information sent unmarked and later determined by the sender to be confidential shall thereafter be treated as confidential information by the recipient, upon notice in writing.

4. In the event Superior objects to Montana-Dakota's designation of a document or its contents as Confidential Information, the materials shall be treated as Confidential Information until a contrary ruling by the Commission, or if appropriate, a Court of competent jurisdiction. Prior to the time any objection to a designation of Confidential Information is brought before the Commission or a court of competent jurisdiction for resolution, Superior and Montana-Dakota shall attempt to resolve the objection by agreement. If Montana-Dakota and Superior are unable to reach an agreement, then either of them may bring the objection before the Commission or court of competent jurisdiction in accordance with the applicable rules of that forum. The party bringing the objection before the Commission or court of competent jurisdiction has the burden of satisfying the Commission or court of the need for protection or production.

5. In the event Superior desires to disclose Confidential Information to a person, firm, corporation or entity other than an Authorized Person, Superior shall designate the Confidential Information it wishes to disclose, identify the persons or entities to whom it wishes to make disclosure and advise Montana-Dakota in writing of its desire to make such disclosure. If, after Montana-Dakota's receipt of such communication from Superior, Montana-Dakota and Superior are unable to agree on the terms and conditions of such disclosure, such disclosure may be made only on such terms and conditions as the Commission or, if appropriate, a Court of competent jurisdiction may order.

6. Nothing in this Agreement shall preclude Montana-Dakota from using or disclosing any of Montana-Dakota's Confidential Information for any purpose or to any person.

7. Nothing in this Agreement shall preclude Montana-Dakota from refusing to make any disclosure of any Confidential Information to Superior even if Superior agrees that such disclosure shall be in accordance with the terms of this Confidentiality Agreement. If Confidential Information is withheld by Montana-Dakota pursuant to this Article 7, Montana-Dakota shall provide Superior with a written statement regarding the basis for withholding the Confidential Information together with a description of the subject matter of the material at issue, including the identity and date of authorship.

8. All persons who are afforded access to any confidential information by reason of this Agreement shall neither use nor disclose the confidential information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated here, and shall take all reasonable precautions to keep the confidential information secure and in accordance with the purposes and intent of this Agreement.

9. Any disclosure of confidential information by Montana-Dakota pursuant to this Agreement shall not act as a waiver of Montana-Dakota's right to question, challenge, and object to the admissibility of any and all data, information, studies, and other matters furnished under the terms of this Agreement or a Commission issued Protective Order on the grounds of relevancy or materiality.

10. This Agreement shall in no way constitute a waiver of the rights of any party or person to contest any assertion or finding of trade secret, confidentiality, or privilege, or to appeal any determination of the Commission or assertion by a party.

11. The provisions of this Agreement are specifically intended to apply to information supplied by Montana-Dakota to Superior pursuant to this proceeding, and to any nonparty in possession or control of information belonging to Montana-Dakota that supplies documents, testimony, or other information pursuant to process issued by the Commission.

12. Within ten (10) days after the final disposition of the case, including any and all appeals therefrom, all hard copy, other

originals and any reproductions of all documents containing Confidential Information subject to this Confidentiality Agreement shall either be returned to Montana-Dakota or destroyed.

13. The provisions of this Confidentiality Agreement, insofar as they restrict the disclosure and use of Confidential Information governed by this Confidentiality Agreement, shall, without the written permission of Montana-Dakota or further order of the Commission or, if appropriate, a court of competent jurisdiction, continue to be binding after the conclusion of the case.

14. The obligations of this agreement do not apply to any Confidential Information which:

(a) at the time of disclosure to the recipient or thereafter has become part of public knowledge or literature without breach of the said obligations by the recipient;

(b) the recipient can show was in its possession at the time of disclosure, as evidenced by written records in existence at that time, and was not acquired by it under an obligation of confidence; or

(c) the recipient can show was received by it after the time of disclosure hereunder from a third party (other than one disclosing on behalf of Montana-Dakota, Superior or their affiliates) who could lawfully do so and who did not derive the Confidential Information from Montana-Dakota, Superior or any of their affiliates; provided, however, that

(d) the foregoing exceptions (a) through (c), inclusive, do not apply to (i) specific information merely because it is embraced by or included with other information which falls within any one or more of such exceptions; or (ii) any combination of information merely because specific information (but not the combination itself) falls within any one or more of such exceptions.

15. In the event that Superior or any Authorized Person acting for Superior is required or requested by any court, legislative or administrative body to disclose any Confidential Information, then the recipient, party or Authorized Person will

promptly and prior to disclosure notify Superior and Montana-Dakota and shall provide full documentation concerning the disclosure sought, so that an appropriate protective order can be sought and/or other action can be taken if possible. In the event that a protective order is not, or cannot be, obtained, then

(a) Superior or any Authorized Person acting for Superior may disclose to the appropriate body that portion of the Confidential Information which it is advised by written outside legal advice it is legally required to disclose and shall use reasonable efforts to obtain assurances that confidential treatment will be accorded the Confidential Information; and

(b) Superior or any Authorized Person acting for Superior shall not be liable for such disclosure unless the disclosure was caused by or resulted from a previous disclosure by the recipient or its representatives that was not permitted by this Agreement.

16. The attorneys for the parties to this Confidentiality Agreement have authority to sign the Agreement and to bind the companies and their employees to the terms herein.

WHEREFORE, the undersigned have set their hands and seals as of the first date set forth above.

MAY, ADAM, GERDES & THOMPSON

BY: 

DAVID A. GERDES

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WATT, BECKWORTH, THOMPSON & HENNEMAN LLP

BY:



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EXHIBIT A

NONDISCLOSURE AGREEMENT

The undersigned executes this Nondisclosure Agreement for all purposes contemplated by Superior Renewable Energy LLC and Montana-Dakota Utilities Co. in their Confidentiality Agreement dated the _____ day of September, 2004, as follows:

1. I certify in writing that I have read the aforesaid Confidentiality Agreement between the parties.
2. I agree to be bound by the terms of that Confidentiality Agreement.

Dated this _____ day of September, 2004.

Printed Name: _____

Permanent Address: _____

Employer: _____

Name of the Party with whom
associated: _____

EXHIBIT A

Motion to Compel of
Superior Renewable Energy, et al.

**WATT BECKWORTH
THOMPSON & HENNEMAN, L.L.P.**

(A REGISTERED LIMITED LIABILITY PARTNERSHIP)
ATTORNEYS AT LAW

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FACSIMILE (713) 650-8141

October 15, 2004

*Via Facsimile (605)224-6289
and Certified Mail
7160 3901 9848 5495 5925
Return Receipt Requested*

David A. Gerdes, Esq.
May, Adams, Gerdes & Thompson LLP
503 South Pierre Street
Pierre, South Dakota 57501

Re: In The Matter of the Filing by Superior Renewable Energy LLC Against
Montana Dakota Utilities Co. Regarding the Java Wind Project, PUC Docket No.
EL04-016

Dear Mr. Gerdes:

This letter is a final attempt to find a mutually satisfactory resolution to a discovery dispute in the referenced proceeding. This dispute began when your client Montana-Dakota Utilities Co. ("MDU") on September 1, 2004 refused to provide Superior with a copy of certain contracts to which MDU is a party. MDU identified these contracts in its response to Superior's interrogatory request number one, but provided only summary information about their terms and conditions. With a firm date now set by the Commission for hearing Superior's complaint, this issue needs to be resolved quickly, either by agreement or, if necessary, by action of the Commission.

There are four energy and capacity purchase contracts that appear to be in dispute. MDU entered into two of the contracts subsequent to Superior's efforts to secure a power purchase agreement with MDU and are particularly important in determining MDU's avoided costs and also MDU's good faith in negotiating with Superior. In its written response to Superior's first interrogatory, MDU disclosed in summary form the existence of the contracts, the counter parties and an end date. MDU's response further identified energy and/or capacity that MDU "would be receiving" or "would purchase" under these contracts but did not disclose the amounts of energy or capacity that had already been received or purchased. Even though the interrogatory required MDU to provide Superior

EXHIBIT B

with a copy of the contracts, MDU refused, stating that they "are business confidential in nature."

In subsequent telephone calls, MDU said that Superior is entitled under PURPA to receive only "data" from the contracts and not the contracts themselves. MDU said in these phone calls that this data will be used by MDU to make a "generic" avoided cost calculation that it would provide to Superior (with supporting "data") on October 11, 2004. When Superior received this avoided cost calculation, two things were immediately clear: (1) there was no supporting "data" showing how the contracts affected or determined avoided cost - only final, conclusory figures for avoided cost, and (2) given the figures shown in MDU's previous PURPA-related filings, MDU relied upon these contracts when it represented that its avoided cost of energy capacity for years 2005-2009 is \$0.00.

Although you told me that MDU would provide "appropriate work papers and documentation underlying the calculations" when MDU delivers the "specific" avoided cost figures for the Java Wind Facility, it is not at all clear to me what information or "data" relative to the contracts will be disclosed. Also, I note that MDU told Superior that these work papers would be provided contemporaneously with its "generic" avoided cost calculations. Those cost calculations were provided to me on October 11th without any of these work papers. Now I understand from you that Superior must wait until the "specific" avoided cost figures (based on the wind energy information provided by Superior on October 6th) are disclosed before Superior will receive any backup information. That information is supposed to be delivered by MDU to Superior no later than October 20th, assuming MDU adheres to its originally promised two-week time frame. Even with this delay, it remains completely unclear what backup information or "data" relative to the contracts MDU intends to provide.

In order to determine MDU's avoided costs of energy and capacity, Superior must perform a thorough and complete review of the contracts. It was no accident that Superior asked for these contracts in its very first interrogatory. Superior believes that applicable law, including but not limited to PURPA, the SDPUC Decision and Order and the SDPUC rules of discovery give Superior the right to inspect these contracts. In the same vein, MDU does not have the right to pick and choose which "data" about the contracts it will disclose to Superior. Similarly, MDU does not have the right to select the "data" to include in its avoided cost calculation and which "data" to ignore.

Moreover, Superior believes that in an adversary proceeding, Superior is not required to take MDU's word with respect to what terms and conditions are contained within the contracts. For core information of the type contained in these contracts, Superior's rights to discovery under applicable law entitle it to probe into every detail of these contracts to ensure that the facts are well understood and correct. Superior has entered into a confidentiality agreement with MDU that will protect MDU's interest in ensuring that confidential information is not disclosed to third parties or used by Superior for some

purpose outside of this proceeding. The sole objection that MDU made in its interrogatory response related to the "business confidential" nature of the contracts. That objection appears moot now that the confidentiality agreements are in place.

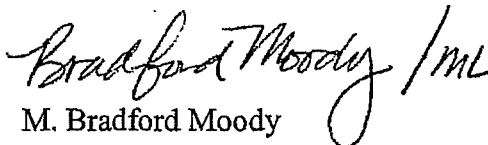
Nevertheless, in an effort to work with MDU and to avoid taking the Commission's time with a motion to compel, Superior would like to enter into a negotiated solution with MDU that bridges the gap between the parties' positions. In lieu of receiving a copy of the contracts from MDU, Superior proposes that MDU disclose to Superior on or before October 18, 2004 the following information about the contracts: (a) the negotiators and signatories for each party, (b) the time period during which negotiations were initiated and completed, (c) the effective and execution dates, (c) the term, including any cancellation terms and conditions, (d) whether any capacity purchased under the contracts is firm capacity or peaking capacity, (d) the nominating and/or scheduling provisions of all contracts, (e) any "out" provisions or similar provisions that would enable either party to take more, less or none of the maximum quantity specified in the contract for either energy or capacity, (f) a statement of the actual amounts of energy and capacity received by MDU under the contracts relative to the energy and capacity amounts listed by MDU in its interrogatory response, (g) copies of all MDU internal memoranda or correspondence relating to the contracts, and (h) copies of all correspondence between the parties relating to the contracts.

To verify that the information set forth in the preceding paragraph is accurate and complete, MDU will submit the contracts to the Commission staff for an in camera inspection. The Commission staff will then represent to Superior that the information is complete and correct. In the event that the information is not complete and correct, the Commission staff will be given the right to provide Superior with any information in the contracts that is either missing or incomplete in the disclosure made by MDU to Superior.

Please consider this proposal carefully and advise me at your earliest opportunity whether it is acceptable to MDU. If the parties have not successfully resolved this issue one way or the other by October 22nd, Superior has asked me to seek relief from the Commission.

Thank you for your prompt attention to this matter and I look forward to hearing from you soon.

Regards,


M. Bradford Moody

MBM:ds

Mr. David Gerdes
October 15, 2004
Page 4

cc: Superior Renewable Energy LLC

Attn: John Calaway
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**Motion to Compel of
Superior Renewable Energy, et al.**
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November 3, 2004

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SENT VIA FACSIMILE

M. Bradford Moody
Watt, Beckworth & Thompson, LLP
1010 Lamar, Suite 1600
Houston, TX 77002

RE: In The Matter Of The Filing By Superior Renewable Energy, LLC, Against Montana
Dakota Utilities Company; Regarding The Java Wind Project
South Dakota PUC Docket: EL04-016
Our file: 0069

Dear Mr. Moody:

This letter is a response to your e-mail of November 1, 2004, and your letter of October 15, 2004, regarding a discovery dispute in the above referenced proceeding.

The third page of your letter of the 15th proposed disclosures regarding four energy and capacity purchase contracts.

Montana-Dakota Utilities agrees to the general tenor of your proposal but would object to disclosure of

- a) the negotiators and signatories for each party,
- b) the time period during which negotiations were initiated and completed,
- g) [the provision of] copies of all Montana-Dakota Utilities internal memorandum or correspondence relating to the contracts, and
- h) [the provision of] copies of all correspondence between the parties relating to the contracts.

EXHIBIT C

November 3, 2004

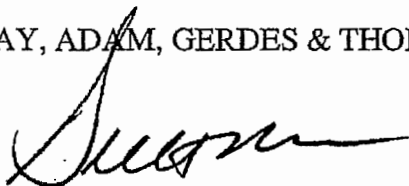
Page 2

Have you contacted the Commission staff yet to inquire whether they would be willing to assist us in this resolution?

I look forward to hearing from you.

Very truly yours.

MAY, ADAM, GERDES & THOMPSON LLP

A handwritten signature in black ink, appearing to read "Brett M. Koenecke", written in a cursive style.

BRETT M. KOENECKE

BMK:njh

cc: Don Ball

EXHIBIT C

EXHIBIT "D"
Motion to Compel of
Superior Renewable Energy, et al.

Montana-Dakota Utilities Co.
ESTIMATED AVOIDED COSTS
October 20, 2004

The purpose of this paper is to provide:

1. The estimated avoided costs on Montana-Dakota's system, solely with respect to the energy component, for power purchase from a 31.5 MW (nameplate) wind farm for the current calendar year 2004 and each of the next 5 years; and
2. The estimated capacity costs at the completion of Montana-Dakota's planned capacity additions and planned capacity firm purchases during the succeeding 10 years.

A detailed description of the assumptions used in the calculations of these energy and capacity avoided costs is also given.

ENERGY AVOIDED COSTS

The estimated energy avoided costs provided in this paper are the marginal costs, or system lambdas, on Montana-Dakota's system for power purchase from a 31.5 MW (nameplate) wind farm. At a certain customer load level, or the corresponding generation level to meet that customer demand, marginal cost is the cost of generating the "next" megawatt-hour (MWh) of the customer load. Montana-Dakota uses the PROSYM model to calculate the marginal costs.

PROSYM Model

The PROSYM Chronological Production Modeling System is a computer model used for electric utility analysis and accounting. This computer model simulates the operations of Montana-Dakota's electric generating resources to meet the customer demand on an hour-by-hour basis. The data input to the model consists of:

- Forecast hour-by-hour customer demand for the time period under study;
- Operational characteristics such as capacity, forced outage rate, maintenance schedule, and heat rate; and cost data such as fixed and variable operating and maintenance costs, and fuel costs for Montana-Dakota's electric generating resources; and
- Data for the power purchases from the wholesale market.

For each hour under consideration, as in real life situations, PROSYM dispatches the generating resources economically to meet customer demand and wholesale purchase obligations while maintaining system reliability at that hour. When dispatching the generating resources, the model takes into account their maintenance schedules, which are time periods when they are planned to be down for regular maintenance, as well as their forced outage rates, which are the probability they are down due to mechanical failures. The fuel costs, maintenance and operating costs, and other pertinent information are calculated at each hour and then summed for monthly or yearly periods for reporting purposes.

Assumptions on the Wind Farm

The hourly generation profile, or "Gross Production of Farm (MW)" information, of the 31.5 MW (nameplate) wind farm provided by Superior on October 6, 2004 was used in this calculation. Those data, given for May 1, 2003 to September 22, 2004, were modeled in PROSYM, as follows:

1. Data for the most recent time period September 2003 - August 2004 were chosen to represent the wind farm's generation output for a typical calendar year. This period was used for all the years under consideration.
2. At each hour, the wind farm's output X megawatt (MW) was assumed to be used to replace an amount of Montana-Dakota's generation sufficient to serve $X / 1.15$ MW of load, taking into account the MAPP minimum reserve requirement of 15 percent.
3. Montana-Dakota's hourly load profile was reduced by the corresponding amounts calculated in Step 2 for all hours. The hourly load values are rounded off to the nearest MW numbers because generating units are dispatched based on whole MW increments.
4. The resulting hourly load profile was used as input to the PROSYM model to calculate Montana-Dakota's marginal costs.

Estimated Energy Avoided Costs

As a result of the PROSYM runs, the estimated energy avoided costs in dollars per megawatt-hour (\$/MWh) for the on-peak and off-peak periods for the winter and summer seasons are shown in Table 1. The on-peak and off-peak time periods are as defined in Montana-Dakota's Rate 97 on file with the South Dakota Public Utilities Commission.

**Table 1: Estimated Energy Avoided Costs
(\$/MWh)**

Year		With 31.5 MW Wind Farm		
		On-Peak	Off-Peak	Total
2004	Winter	14.88	11.68	
	Summer	15.85	11.82	
	Annual			13.38
2005	Winter	14.22	12.02	
	Summer	14.69	11.47	
	Annual			12.97
2006	Winter	14.69	12.37	
	Summer	15.36	12.32	
	Annual			13.55
2007	Winter	14.80	12.44	
	Summer	15.92	12.24	
	Annual			13.71
2008	Winter	14.73	12.52	
	Summer	15.74	12.32	
	Annual			13.70
2009	Winter	14.96	12.55	
	Summer	15.46	12.33	
	Annual			13.69

CAPACITY AVOIDED COSTS

The estimated capacity avoided costs provided in this paper are based on Montana-Dakota's current plan for resource additions.

Montana-Dakota's Current Plan for Resource Additions

Montana-Dakota's existing power purchase contracts include the following:

1. Power purchased from the Antelope Valley Station Generating Unit No. 2,
2. Capacity received from Western Area Power Administration,
3. Peaking capacity purchased from Omaha Public Power District, and
4. Baseload capacity and energy purchased from Omaha Public Power District.

With these power purchase contracts and its existing generating units, Montana-Dakota will not need additional capacity until 2011. The company is studying the feasibility of constructing a coal-fired baseload unit, known as the Lignite Vision 21 (LV 21) Project, in the year 2010. For the purpose of this estimation of capacity avoided costs, the LV 21 unit is considered as the planned capacity addition in 2010.

Assumptions on the Lignite Vision 21 Unit in 2010

The LV 21 unit, rated at 175 MW, is estimated to cost \$374.2 million in 2003 dollars, or

$$\$374,200,000 / 175,000 = \$2,138 / \text{kW in 2003\$}$$

Assuming an escalation rate of 2.15% per year for the construction cost, the estimated capacity costs in 2010 dollars would be:

$$\$2,138 \times 1.0215^7 = \$2,481 / \text{kW in 2010\$}$$

Montana-Dakota's current levelized fixed charge rate calculated for a book life of 33 years (for a baseload unit) is 13.637%. Therefore, the annual cost in 2010\$ for the LV 21 unit is:

$$\$2,481 \times 0.13637 = \$338.33 / \text{kW-Year}$$

Estimated Capacity Avoided Costs

As a result of Montana-Dakota's current plan for capacity additions and based on the assumptions for the LV 21 unit, the estimated capacity avoided costs in dollars per kilowatt (\$/kW) are shown in Table 2.

Table 2: Estimated Avoided Capacity Costs

<u>Year</u>	<u>Avoided Capacity Costs (\$/kW-Year)</u>
2005	0.0
2006	0.0
2007	0.0
2008	0.0
2009	0.0
2010	338.33
2011	338.33
2012	338.33
2013	338.33
2014	338.33

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED

NOV 09 2004

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)
_____)

CERTIFICATE OF SERVICE

This is to certify that on November 8, 2004 a copy Superior Renewable Energy LLC's Motion to Compel was forwarded to the following by United States mail, in accordance with South Dakota Codified Law:

Mr. David Gerdes
Attorney at Law
PO Box 160
Pierre, SD 57501

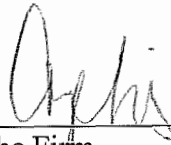
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A handwritten signature in cursive script, appearing to read 'A. Phillips', is positioned above a horizontal line.

For the Firm

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Sioux Falls, SD 57104

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