BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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 **MONTANA-DAKOTA'S RESPONSE TO MOTION TO COMPEL**

COMES NOW Montana-Dakota Utilities Co. ("Montana-Dakota"), by and through its attorneys, and hereby responds to the Motion to Compel filed by Superior Renewable Energy LLC and Java LLC ("Superior") on November 10, 2004.

MONTANA-DAKOTA'S CURRENT POSITION

It is Montana-Dakota's position that Superior is not entitled to copies of the power purchase agreements that Superior has requested, but that Superior is entitled to receive certain data contained in those agreements in order to determine Montana-Dakota's avoided costs, which Montana-Dakota is very willing to provide to Superior.

While some data contained in these contracts is relevant to a determination of Montana-Dakota's avoided costs, pursuant to the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.* ("PURPA"), and Section 292.302 of the Regulations of the Federal Energy Regulatory Commission ("FERC"), 18 C.F.R. § 292.302 (2004), the bulk of the information contained in these agreements is not relevant to any such determination.

Moreover, since Superior's complaint in this proceeding before the Public Utilities Commission of the State of South Dakota ("Commission") indicates that Superior seeks the Commission's assistance in resolving a conflict over Montana-Dakota's avoided costs, so that Superior can enter into a power purchase agreement with Montana-Dakota, Montana-Dakota also

objects to disclosure of these agreements as a disclosure of proprietary business information that would give Superior an unfair competitive advantage over Montana-Dakota either in negotiating any resulting power purchase agreement between Superior and Montana-Dakota or as competitors attempting to negotiate power purchase agreements with third party purchasers in the unregulated wholesale power markets.

In addition, Montana-Dakota objects to the characterizations of Montana-Dakota's actions as in any way "bad faith." In Superior's Interrogatory No. 1, Superior made the following request:

> 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, ... please provide a copy of all of MDU's existing energy and capacity purchase contracts for each year identified in the table (2003-1013)."

Montana-Dakota interpreted Superior's Interrogatory No. 1 as requesting copies of all the contracts identified in Appendix A (the "PPAs") to Montana-Dakota's MAPP filing of January 1, 2004. While Montana-Dakota may have misinterpreted Superior's inquiry, its interpretation was logical based on the language in Superior's Interrogatory No. 1.

Moreover, if Montana-Dakota was practicing "bad faith" in trying to hide any relevant information from Superior, Montana-Dakota would not have voluntarily notified Superior on November 5, 2004, of the existence of an additional power purchase agreement, which was not listed in Appendix A to Montana-Dakota's MAPP filing, and of a Request for Proposals issued by Montana-Dakota on October 25, 2004.

As will be explained further, rather than acting in "bad faith" with respect to Superior, Montana-Dakota was simply ensuring that it satisfies its public utility obligation to provide reliable electric service to its ratepayers, which includes responding to unexpected events, such as the increasing likelihood of its inability to arrange for transmission service to utilize the capacity and energy Montana-Dakota had hoped to purchase under two of the short-term PPAs requested by Superior, namely its PPAs with Omaha Public Power District ("OPPD").

ADDITIONAL BACKGROUND

In addition to requesting copies of the subject PPAs, in a letter dated November 3, 2004 to Montana-Dakota ("November 3 Letter"), Superior also sought additional information regarding these PPAs, much of which Montana-Dakota agreed to provide. Montana-Dakota did not agree to provide the following additional information that Superior sought regarding each of the subject PPAs (identified by alphabetical reference as set forth in the November 3 Letter):

"a. the negotiators and signatories for each party

b. the time period during which negotiations were initiated and completed

[...]

g. copies of all Montana-Dakota Utilities internal memoranda or correspondence relating to the contracts

h. copies of all correspondence between the parties relating to the contracts."

In response to the November 3 Letter, Montana-Dakota agreed to provide certain information, but declined to provide the foregoing information request under clauses (a), (b), (g) and (h). Counsel for Montana-Dakota, Dave Gerdes, sent an email dated November 9, 2004

("November 9 Email") to Superior, offering the following concessions and explanation of Montana-Dakota's position regarding its objections to Superior's inquiry:

> Brad, in response to your attached email, MDU has again reviewed its power purchase agreements and concluded that the WAPA Agreement identified in its answers to Superior's data requests dated July 16, 2004, question 1, responses a-h, subparagraph 2, is not a power purchase agreement and MDU will produce the contract in its entirety. The contract also does not contain a confidentiality clause. For clarity, in the answers it was described as follows:
> 2. Capacity received from Western Area Power Administration (WAPA). In January 2001, Montana-Dakota entered into an agreement with WAPA by which the company would be receiving from 2.2 to 2.8 MW of capacity and associated energy under Bill Crediting Program Arrangements with the U.S Department of Energy. This agreement is in effect until 2015.
>
> As to any remaining power purchase contracts, the company believes it has gone about as far as it can. As I have explained in previous conversations, while we have a confidentiality agreement, most of the additional information which Superior demands (and to which MDU objects as outlined in Brett's letter) would be confidential as to any competitor of MDU, including Superior. Stated otherwise, while this proceeding is to ascertain avoided costs relevant to a legally mandated power purchase agreement between the parties, Superior becomes MDU's competitor as to the negotiation of all terms except avoided costs in the power purchase agreement which will ultimately result from this proceeding. Thus, MDU cannot divulge that information in existing power purchase agreements that may compromise its negotiating technique or strategy. It is that information MDU legitimately declines to divulge.
>
> Referring to MDU's compromise position as stated in Brett Koenecke's letter of November 3, and in an effort to protect both companies' legitimate interests, as to each contract identified, MDU would further agree to the following:
>
> a) MDU will identify the negotiators and signatories for each party, but MDU reserves its right to limit any deposition inquiry to nonconfidential matters;
>
> b) MDU will provide the time period during which negotiations were initiated and completed;
>
> c) MDU will provide copies of all internal memoranda or correspondence not otherwise confidential (we know of none but have not reviewed the file) and which do not reveal negotiating strategy or technique; and
>
> d) MDU will provide copies of all correspondence between the parties relating to the contracts not otherwise confidential (we know of none but have not reviewed the file) which do not reveal specific contract terms, and which do not reveal negotiating strategy or technique.

> All material would be produced to staff for review of compliance to our agreement (if it has agreed to do so) as suggested previously by you.
>
> While MDU remains willing to discuss any further avenue of compromise, it does appear that each party has reached the end of its perceived limit beyond which compromise cannot occur. Thus if this proposal is unacceptable, unless Superior has some acceptable alternative proposal, we apparently must agree to disagree and permit the Commission to decide the issue.

A copy of this November 9 Email is attached as Exhibit A to this pleading. As the November 9 Email clearly demonstrates, Montana-Dakota has been trying to work amicably with Superior to provide them with the relevant facts necessary to establish Montana-Dakota's avoided cost.

MONTANA-DAKOTA'S OBJECTION

Montana-Dakota objects to providing copies of the PPAs to Superior based on two arguments, relevance and privilege. Montana-Dakota further objects to Superior's injection of a bad faith argument into this discussion.

RELEVANCE

Montana-Dakota agrees that certain data contained in the PPAs is necessary to determine avoided costs. The great bulk of the information in each of the PPAs, however, is not relevant to any determination of Montana-Dakota's avoided costs. As the November 9 Email demonstrates, Montana-Dakota is willing to provide the relevant information from those PPAs to Superior as necessary to enable calculation of Montana-Dakota's avoided costs. Further, to enable Superior to confirm the data, Montana-Dakota is willing to disclose the copies of the PPAs to Commission Staff, provided, that Commission Staff is willing to do so, and maintains the confidentiality of such PPAs.

The threshold requirement of discoverability is whether the information sought is "relevant to the subject matter involved in the pending litigation." Of course, to be discoverable,

the information "need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." F.R.Civ.P. 26(b)(1). The standard, therefore, is widely recognized as one that is necessarily broad in its scope, in order to allow the parties essentially equal access to the operative facts.

Notwithstanding the liberality of discovery, however, it is not without bounds. The Eighth Circuit Court of Appeals has observed:

> [T]his often intoned legal tenet should not be misapplied as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and produce a variety of information which does not reasonably bear upon the issues in the case.
>
> Therefore, despite the liberality of discovery, "we will remain reluctant to allow any party to 'roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'"

Even when dealing with requests for relevant information, the rules recognize that discovery may be limited when the benefits to be obtained are outweighed by the burdens and expenses involved. According to F.R.Civ.P 26(b)(2), courts are directed to limit discovery upon a determination that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issue at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

These considerations are not talismanic. Rather, they are to be applied in a commonsense and practical manner." Brown v. Sandals Resorts Intl. 2000 DSD 14, [internal citations omitted].

Montana-Dakota respectfully urges the Commission to fully consider the requirements in the FERC regulations as the boundaries of relevance for this proceeding. Those regulations, fully considered and promulgated by an agency with expertise, should represent the standard for relevance in an avoided cost determination.

Montana-Dakota set forth its justification for withholding copies of the subject PPAs and other data on the basis of a lack of relevance in its response to Superior's interrogatory as follows:

> **Guidelines for Montana-Dakota's Data Response:**
> In determining an electric utility's avoided costs under the Public Utility Regulatory Policies Act ("PURPA"), the South Dakota Public Utilities Commission ("South Dakota PUC"), in its Order F-3365 issued on December 14, 1982 (at page 13 thereof), found that the "data required to be filed under Section 133 of PURPA" by an electric utility was an appropriate source for determining that utility's avoided energy costs. In 1982, Montana-Dakota and other electric utilities were required to file substantial amounts of data, for retail ratemaking purposes, under Section 133 of PURPA. Today, however, there is no longer any "data required to be filed under Section 133 of PURPA" by Montana-Dakota. In fact, the most recent data required to be filed by Montana-Dakota under Section 133 of PURPA was filed nearly two decades ago and would not be relevant to any inquiry by Superior today.
>
> Under Section 292.302(b) of the FERC's Regulations (18 CFR 292.302(b)), Montana-Dakota is obligated to make available data from which avoided costs may be derived.[1] Montana-Dakota has responded to the following interrogatories in accordance with Section 292.3029(b).

[1]Under Section 292.302(b) of the Federal Energy Regulatory Commission's ("FERC") Regulations (18 CFR 292.302(b)), an electric utility is required to "make available data from which avoided costs may be derived, not later than ... June 30, 1982, and not less often than every two years thereafter, ... to its State regulatory authority, and shall maintain [such data] for public inspection."

To the extent that Superior has asked Montana-Dakota to disclose data that does not constitute Avoided Energy Cost Data or Avoided Capacity Cost Data, Montana-Dakota objects to providing any such data as irrelevant to the purpose of this proceeding before the South Dakota PUC.

Thus, for example, data relevant to its Avoided Capacity Cost Data relates to Montana-Dakota's planned purchases, additions, and retirements of capacity and the costs thereof over the next 10 years. Accordingly, any data related to Montana-Dakota's existing generation facilities and its existing firm purchases of capacity are only relevant to Avoided Capacity Cost Data to the extent that any such existing generation facility is planned for retirement in the next 10 years or any existing firm capacity purchase is set to expire in the next 10 years. That limited information is provided herein, but copies of any existing firm capacity purchase contracts are not relevant to any such determination of Avoided Capacity Cost Data and will not be provided.

Montana-Dakota will provide information regarding its planned capacity additions, planned firm capacity purchases, and planned facility retirements during the next 10 years, and the anticipated costs thereof, as it is required to do under Section 292.302(b) of FERC's Regulations, because this information constitutes Montana-Dakota's Avoided Capacity Cost Data.

Similarly, Montana-Dakota will provide the data that indicates its estimated avoided cost of energy on a cents per kWh basis during daily and seasonal peak and off-peak periods by year for the current year and the next 5 years, as it is required to do under Section 292.302(b) of FERC's Regulations, because this information constitutes Montana-Dakota's Avoided Energy Cost Data. Montana-Dakota will not, however, provide copies of any contracts under which it purchases fuel for its generation facilities or purchases electric energy in the marketplace, because those markets are unregulated and disclosing its contracts and individual prices there under could severely jeopardize Montana-Dakota's

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Section 292.302(b)(1) requires the provision of "the estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities ... stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods by year, for the current calendar year and each of the next 5 years."

Section 292.302(b)(2) requires the provision of "the electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years."

Section 292.302(b)(3) also requires the provision of "the estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases."

ability to procure fuel and energy at competitive prices for its customers in the future.

In addition, data related to the environmental emissions of Montana-Dakota's existing operations do not relate directly to Montana-Dakota's estimated costs of "energy" during the next 5 years and, therefore, do not constitute Avoided Energy Cost Data. Similarly, data related to the environmental emissions of any planned power plant do not relate directly to Montana-Dakota's estimated costs of planned capacity additions during the next 10 years and, therefore, do not constitute Avoided Capacity Cost Data.

Montana-Dakota respectfully submits that, just as it indicated in its initial response to Superior's interrogatories, the FERC's Regulations define that "data" which is necessary for a utility to make available to a QF to determine the utility's avoided costs and Montana-Dakota stands ready to meet that standard by providing all the data necessary to determine Montana-Dakota's avoided costs under PURPA and the FERC's underlying regulations.

To the extent that Superior believes that it is entitled to additional data, rather than submitting broad requests for copies of Montana-Dakota's PPAs and any and all correspondence or memoranda referring to those PPAs, thereby potentially encompassing masses of information that are totally unrelated to any determination of Montana-Dakota's avoided costs, Montana-Dakota respectfully requests that Superior take the time needed to draft interrogatories that request information that is relevant to an avoided cost determination.

PRIVILEGE

Montana-Dakota objects to providing copies of the PPAs, because they contain privileged and confidential business propriety information. As a result, disclosure of such information to any competitor of Montana-Dakota would give such competitor an unfair advantage over Montana-Dakota.

This case is not one in which the trier of fact is presented with a set of facts, which have already occurred, and from which to fashion a remedy, but rather is a proceeding to determine the avoided costs that Montana-Dakota is required to pay Superior for reliable capacity and available energy from a QF under PURPA. If resolution of Montana-Dakota's avoided costs produces a price that is attractive to Superior, then Superior has requested that Montana-Dakota be ordered to enter into a power purchase agreement with Superior based on that avoided cost price. This proceeding will, therefore, set the stage for negotiations between the parties.

Montana-Dakota takes the position that it and ultimately its ratepayers will be harmed by the disclosure of the PPAs to Superior. The wholesale purchase and sale of power is largely unregulated and Montana-Dakota buys wholesale power for its ratepayers in freely negotiated power purchase agreements. In fact, all the terms and conditions of any power purchase agreement between Superior and Montana-Dakota, other than the avoided cost price, would be freely negotiated between Montana-Dakota and Superior.

Disclosure of these PPAs would severely compromise Montana-Dakota's ability to negotiate a fair contract with Superior, because Superior would then be privy to all the previously negotiated terms of Montana-Dakota's PPAs. The terms and provisions in these PPAs were negotiated as part of the give and take process of negotiating an arms-length contract in an unregulated market. Armed with the knowledge of the tiniest details of Montana-Dakota's other PPAs, Superior would have an unfair competitive advantage in negotiating any power purchase agreement with Montana-Dakota. Accordingly, Montana-Dakota's ability to negotiate normal contract concessions with Superior, that would ultimately benefit Montana-Dakota and its ratepayers, will be severely compromised if Superior has such information.

In addition, Montana-Dakota occasionally sells power in the wholesale power markets. To the extent that Superior and Montana-Dakota do not enter into a power purchase contract for electric energy, Superior will be a competitor trying to sell electric power to customers in the same wholesale markets with Montana-Dakota. In this instance too, Superior will have an unfair competitive advantage over Montana-Dakota, because of Superior's knowledge of the terms, conditions and obligations under Montana-Dakota's PPAs.

Such an unfair competitive advantage would ultimately have a detrimental impact on Montana-Dakota and its ratepayers.

GOOD FAITH

Superior, at paragraphs 16 through 18 of its Motion, calls into question whether Montana-Dakota has or will negotiate in good faith with Superior. Prior to April 8, 2004, Superior was one of many potential suppliers of power that Montana-Dakota was considering to meet its customer's future requirements for reliable electric supplies. Prior to April 8, 2004, Superior was seeking to negotiate a power purchase agreement with Montana-Dakota that would be freely negotiated in the unregulated wholesale power markets, including the price applicable under such power purchase agreement, just like any other utility, power marketer, exempt wholesale generator, or QF seeking to sell power to Montana-Dakota.

On April 8, 2004, however, Superior advised Montana-Dakota that it was no longer seeking to freely negotiate a power purchase agreement in the unregulated power markets, but Superior now notified Montana-Dakota that it would "invoke Superior's rights under PURPA and the implementing federal and state regulations ... [which] requires your company to purchase electricity from QF's like the Java Wind Facility." At this time, then, the process

changed from Superior competing with other suppliers to negotiate a power purchase agreement with Montana-Dakota, to Superior "invoking" the mandatory QF purchase obligations of Montana-Dakota as a utility under PURPA. See attached Exhibit B, Brad Moody's letter of April 8, 2004.

Accordingly, any power purchase agreements negotiated or signed prior to April 8, 2004, could not be considered as attempts by Montana-Dakota to violate Superior's PURPA rights as a QF because Superior had not given Montana-Dakota any indication prior to that date of its seeking to invoke those PURPA mandatory purchase rights.

In addition, after April 8, 2004, Montana-Dakota's public utility obligation continued to require Montana-Dakota to secure supplies of electric capacity and energy necessary to reliably meet its customer's electricity requirements, even after Superior first raised its PURPA claim on April 8, 2004.

On this basis, when it appeared to Montana-Dakota that two of its previously executed PPAs would not be available (the OPPD PPAs) to provide energy and capacity, due to the unavailability of sufficient transmission capacity, Montana-Dakota quickly entered into a short-term agreement to replace the energy and capacity it would have purchased under the OPPD PPAs and, on October 25, 2004, Montana-Dakota issued a request for proposals ("RFP") seeking additional short-term energy and capacity supplies to meet the electric capacity and energy needs of is customers from November 1, 2006 through December 31, 2010. To do otherwise would have been imprudent.

By letter dated November 5, 2004, Montana-Dakota disclosed to Superior both the existence of this new short-term power purchase agreement and the RFP.

CONCLUSION

For the reasons and on the grounds set forth herein, Montana-Dakota respectfully requests that the Commission deny Superior's Motion to Compel by concluding that Montana-Dakota's proposed answer does satisfy Superior's Interrogatory No. 1 by providing the necessary factual data relevant to the avoided cost inquiry in this proceeding without providing copies of the PPAs at issue in this matter.

Respectfully submitted this 17th day of November, 2004.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____

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EXHIBIT A

Brett Koenecke

From: David A. Gerdes
Sent: Tuesday, November 09, 2004 10:58 AM
To: 'Brad Moody'; Brett Koenecke
Cc: Linda L. Walsh (E-mail); Mark Meierhenry (E-mail); James Thompson; John E. Calaway (E-mail); Jeff Ferguson (E-mail); Ball, Don; Schulz, Douglas; Lookadoo, Phillip; Stomberg, Andrea
Subject: RE: Outstanding Superior Interrogatory Request

Brad, in response to your attached email, MDU has again reviewed its power purchase agreements and concluded that the WAPA Agreement identified in its answers to Superior's data requests dated July 16, 2004, question 1, responses a-h, subparagraph 2, is not a power purchase agreement and MDU will produce the contract in its entirety. The contract also does not contain a confidentiality clause. For clarity, in the answers it was described as follows:

2. Capacity received from Western Area Power Administration (WAPA). In January 2001, Montana-Dakota entered into an agreement with WAPA by which the company would be receiving from 2.2 to 2.8 MW of capacity and associated energy under Bill Crediting Program Arrangements with the U.S Department of Energy. This agreement is in effect until 2015.

As to any remaining power purchase contracts, the company believes it has gone about as far as it can. As I have explained in previous conversations, while we have a confidentiality agreement, most of the additional information which Superior demands (and to which MDU objects as outlined in Brett's letter) would be confidential as to any competitor of MDU, including Superior. Stated otherwise, while this proceeding is to ascertain avoided costs relevant to a legally mandated power purchase agreement between the parties, Superior becomes MDU's competitor as to the negotiation of all terms except avoided costs in the power purchase agreement which will ultimately result from this proceeding. Thus, MDU cannot divulge that information in existing power purchase agreements that may compromise its negotiating technique or strategy. It is that information MDU legitimately declines to divulge.

Referring to MDU's compromise position as stated in Brett Koenecke's letter of November 3, and in an effort to protect both companies' legitimate interests, as to each contract identified, MDU would further agree to the following:

a) MDU will identify the negotiators and signatories for each party, but MDU reserves its right to limit any deposition inquiry to nonconfidential matters;

b) MDU will provide the time period during which negotiations were initiated and completed;

c) MDU will provide copies of all internal memoranda or correspondence not otherwise confidential (we know of none but have not reviewed the file) and which do not reveal negotiating strategy or technique; and

d) MDU will provide copies of all correspondence between the parties relating to the contracts not otherwise confidential (we know of none but have not reviewed the file) which do not reveal specific contract terms, and which do not reveal negotiating strategy or technique.

All material would be produced to staff for review of compliance to our agreement (if it has agreed to do so) as suggested previously by you.

While MDU remains willing to discuss any further avenue of compromise, it does appear that each party has reached the end of its perceived limit beyond which compromise cannot occur. Thus if this proposal is unacceptable, unless Superior has some acceptable alternative proposal, we apparently must agree to disagree and permit the Commission to

Dave Gerdes; dag@magt.com
May, Adam, Gerdes & Thompson

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605/224-8803; fax 605/224-6289

-----Original Message-----
From: Brad Moody [mailto:Bmoody@wattbeckworth.com]
Sent: Thursday, November 04, 2004 10:58 AM
To: David A. Gerdes; Brett Koenecke
Cc: Linda L. Walsh (E-mail); Mark Meierhenry (E-mail); James Thompson; John E. Calaway (E-mail); Jeff Ferguson (E-mail); Ball, Don; Schulz, Douglas; Lookadoo, Phillip
Subject: RE: Outstanding Superior Interrogatory Request

Dave, good morning. I placed a call to Karen Craemer yesterday to discuss in camera contract review but she was out. I have not yet heard back from her.

In the meantime, I received Brett's letter late yesterday afternoon proposing limitations on MDU's disclosure of information relative to the power purchase contracts. Those limitations are not acceptable to Superior.

Superior has always believed that the contracts and the circumstances surrounding the negotiation and execution of the contracts are important to a resolution of the case. Applicable law allows Superior to obtain its discovery with respect to these contracts. Superior believes that the confidentiality agreement executed by the parties will protect MDU's interest if the contracts are indeed "business confidential." In an extra effort to address MDU's concerns, Superior presented what it believes to be a fair compromise proposal. This proposal would accomodate MDU's desire to avoid disclosing the contracts in their entirety while still allowing Superior to obtain most of the information that it needs to prepare for the hearing. Further limitations imposed by MDU to this compromise proposal would prevent Superior from learning the facts necessary to prepare for the hearing. Accordingly, Superior has asked me to bring this matter before the Commission for a resolution.

If MDU would be willing to accept Superior's compromise proposal as it was made in my letter to you, Superior considers this proposal still open so long as the requested information can be provided to Superior by the time set forth in my letter.

Best Regards.

Brad

-----Original Message-----
From: David A. Gerdes [mailto:DAG@MAGT.COM]
Sent: Thursday, November 04, 2004 9:34 AM
To: Brad Moody; Brett Koenecke
Cc: Linda L. Walsh (E-mail); Mark Meierhenry (E-mail); James Thompson; John E. Calaway (E-mail); Jeff Ferguson (E-mail); Ball, Don; Schulz, Douglas; Lookadoo, Phillip
Subject: RE: Outstanding Superior Interrogatory Request

Brad, in our last conversation you said you would talk to staff about fulfilling the function of reviewing the contracts to ensure that the information MDU provided was accurate and complete. I suggested you call Karen Cremer, and you were inclined to call John Smith. I have not heard back from you on that.

As I previously reported, MDU is agreed in principle with doing something along the lines you have suggested, and we need to work out the details. Brett and I are certainly willing to work on the details.

Dave Gerdes; dag@magt.com
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-----Original Message-----
From: Brad Moody [mailto:Bmoody@wattbeckworth.com]
Sent: Monday, November 01, 2004 10:44 AM

To: David A. Gerdes; Brett Koenecke
Cc: Linda L. Walsh (E-mail); Mark Meierhenry (E-mail); James Thompson; John E. Calaway (E-mail); Jeff Ferguson (E-mail)
Subject: Outstanding Superior Interrogatory Request

Dave and Brett:

Good morning. I talked with John Calaway at Superior late last week about the status of Superior's outstanding discovery request relative to MDU's power purchase contracts. Superior is very concerned that almost three weeks have passed since I wrote to you on October 12th and suggested a compromise with respect to MDU's failure to produce the requested contracts. Although in conversations, Dave has indicated that MDU is generally interested in this compromise proposal, he has been unable to tell me either: (a) whether MDU finally accepts the proposal or (b) when Superior will be provided with the information described in the compromise proposal.

Now that a scheduling order is in place that provides for a discovery cut off in early December, time is critical. Accordingly, unless MDU is able to provide Superior with a definitive response to Superior's compromise proposal by close of business November 3, 2004, Superior will file a motion to compel with respect to the contracts. Moreover, unless the response includes a definitive time by which the data will be provided and the contracts submitted to the Commission staff, Superior will likewise move for an order to compel. Superior believe that given the three weeks that have passed since the proposal was made, MDU should be able to provide the data within a week.

Thank you for your consideration of this matter.

Best,
Brad

EXHIBIT B

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

(A REGISTERED LIMITED LIABILITY PARTNERSHIP)

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VIA FAX 701-222-7607 AND CERTIFIED MAIL---RRR

April 8, 2004

Montana Dakota Utilities Company
Attn: Andrea Stromberg
Vice President of Electric Supply
400 North Fourth Street
Bismarck, North Dakota 58501

Re: Java Wind Facility

Dear Ms. Stromberg:

I represent Superior Renewable Energy LLC ("Superior"). Superior is an independent wind energy developer active in five states. One of Superior's projects is within your service territory in Walworth County, South Dakota. This project is known as the Java Wind Project. The Java Wind Project will have an initial installed nameplate capacity of 25.5 megawatts. Superior anticipates that the Java Wind Project will begin electricity production by October 15, 2004. The project will be operated as a Qualified Facility ("QF") pursuant to the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. § 824a-n (2003) ("PURPA"), and the implementing federal and state regulations. Superior is currently completing the self-certification process for QF's pursuant to 18 C.F.R.§ 292.207 (2003). Superior will provide you with a copy of the self-certification that it files with the Federal Energy Regulatory Commission ("FERC") as required by subpart (ii) of that regulation.

Despite nearly two years of good faith effort on Superior's part, Superior has been unable to obtain a long-term power purchase agreement with your company for the Java Wind Facility. The year-end expiration of the federal income tax accelerated depreciation bonus available to the Java Wind Facility and the operational requirement for the installation of an interconnection in October of this year have made it critical to reach closure on the terms under which Superior will sell and deliver electricity to your company. Accordingly, Superior asked me to write you to invoke Superior's rights under PURPA and the implementing federal and state regulations as more generally set forth

below. Superior would like to reach an amicable resolution of the power purchase agreement negotiations without resort to PURPA but Superior is fully prepared and does now exercise its rights under this law in the absence of such resolution.

Section 210(a) of PURPA requires your company to purchase electricity from QF's like the Java Wind Facility. See 16 U.S.C. § 824a-3 (2003). The rate at which electricity must be purchased is not to exceed the "incremental cost to the electric utility of alternative electric energy." Id. The FERC regulations implementing Section 210 (a) refer to this rate as the "avoided cost." See generally 18 C.F.R. § 292.101(b)(6) (2003); 18 C.F.R. § 292.304 (2003). Avoided costs are to be determined based on a number of factors set forth in 18 C.F.R. § 292.304(e) (2003). Avoided cost generally includes two components: (1) energy cost representing the variable costs associated with the production of electric energy including operating and maintenance expenses and (2) capacity cost representing primarily the capital costs of energy generating facilities. In South Dakota, PURPA requires electric utilities to file with their state regulatory authority must file with the South Dakota Public Utilities Commission (the "SDPUC") information on a two-year cycle relative to "avoided cost." See 18 C.F.R. § 292.303(b)(1)-(3) (2003). This obligation is sometimes referred to hereafter as the "Section 133 Obligation."

Based on a delegation of authority contained in Section 210(f) of PURPA, the South Dakota Public Utilities Commission (the "SDPUC") issued a decision and order on December 11, 1982 in which it made certain findings and conclusions relative to avoided cost. See 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, No. F-3365 (South Dakota Public Utilities Commission Dec. 11, 1982) (hereinafter the "SDPUC PURPA Order"). The SDPUC found that "long term contracts" (defined to mean of greater than ten years' duration) from QF's with a design capacity greater than 100 KW "should be set by contract negotiated between the QF and the electric utility." Id. at p. 11. The SDPUC further found that its own role in these negotiations was to assist in "resolving any disputes which arise between the parties." Id.

To provide "parameters" for those negotiations, the SDPUC found that "capacity credits included in long-term contract should be based on the avoided cost of base load generation." Id at 12. The SDPUC further found that: (1) "capacity credits included in long-term contracts should reflect the average KW supplied by the QF for each month during the utility's on-peak period," (2) "capacity credits included in long-term contracts should be made constant over the duration of the contract" and (3) "long-term contracts should include an energy credit based on the average of the expected hourly incremental avoided costs calculated over the hours in the appropriate on-peak and off-peak hours as defined by the utility." Id. To aide the parties negotiating an avoided cost contract, the SDPUC stated that "hourly energy cost data" filed by an electric utility pursuant to its

Section 133 Obligation is an appropriate data source for determining avoided energy costs." Id.

Besides "hourly energy cost data," an electric utility must file and "make available for public inspection" as part of its Section 133 Obligation the following information: (1) the estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities...stated on a cents per kilowatt-peak and off-peak periods, by year, for the current calendar year and each of the next five years, (2) the electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years, and (3) the estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour...expressed in terms of individual generating units and of individual planned firm purchases." 18 C.F.R. § 292.302 (b) (1) (2003).

Based on the foregoing, please know the following:

1. Superior intends pursuant to PURPA to put to your company all of its electrical output available for sale from the Java Wind Facility, receiving from your company a price for such electricity equal to your company's avoided cost as determined by applicable federal and state law.
2. Superior desires to negotiate with your company in good faith within the parameters set forth by the SDPUC toward a mutually acceptable power purchase agreement for the Java Wind Facility. Because of the federal income tax accelerated depreciation and the interconnection issues referenced earlier in my letter, these negotiations must be concluded with the next two weeks. Superior stands ready to resume negotiations with your company at any time or place in order to reach an agreement satisfactory to both sides. However, I understand that in a phone conversation conducted today between you and Jeff Ferguson, Superior's Chief Operating Officer, the parties recognize that negotiations will already be at an impasse if MDU remains unwilling to acknowledge the long-term capacity contribution of the Java Wind Project using the Mid-Continent Area Power Pool variable capacity accreditation procedure. I further understand that your company told Mr. Ferguson that it would inform Superior no later than Monday, April 12, whether or not MDU will utilize the MAPP approach.
3. To aide in the negotiation of a power purchase agreement, Superior requests that your company immediately provide it with all of the information required to be filed and disclosed pursuant to your company's Section 133 Obligation. In particular, Superior asks that you disclose the most recent cost estimates of MDU's proposed coal fired power plant to be built in western North Dakota, your existing purchase agreement(s) with Basin Electric, the terms of any proposed new purchase agreements with Basin Electric or other third party, and your most recent Integrated Resource Plan. Superior also asks that you provide the

information used by your company to calculate the monthly capacity payment shown on your company's tariff sheet for "Long Term Power Purchase Rate 97 Time Differentiated" filed with the SDPUC on or about June 3, 2003. Although this rate, as required by FERC, is filed for generators of 100 kW or less, the methodology used to calculate this rate has merit and can provide valuable insight into the avoided cost determination.

4. If the parties cannot reach a satisfactory result as to any of the matters, including the pending issue regarding the use of the MAPP variable capacity accreditation procedure, Superior will ask the SDPUC to exercise its authority under the SDPUC PURPA Order to help the parties resolve their disputes. Superior will ask that the SDPUC give expedited treatment to this request.

Superior reiterates its desire to reach a mutually acceptable resolution without resort to PURPA. Electricity produced from wind energy is safe, clean and reliable. Given the quality of wind resources at the Java Wind Project, Superior believes that it can provide electricity at a fair and reasonable price for years to come. Superior believes that South Dakotans have realized the value of the resource in their state and will welcome this addition to your company's supply portfolio.

Please give these matters your full and prompt attention.

Very Truly Yours,

M. Bradford Moody
Counsel for Superior
Renewable Energy LLC

MBM:lh
cc: Mr. John Calaway