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

EL04-016

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Transcript of Proceedings
November 19, 2004

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BEFORE THE PUBLIC UTILITIES COMMISSION

ROBERT SAHR, CHAIRMAN
GARY HANSON, VICE CHAIRMAN
JIM BURG, COMMISSIONER

COMMISSION STAFF

John Smith
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Jim Mehlhaff
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APPEARANCES

Brett Koenecke

APPEARANCES BY PHONE

Mark Meierhenry
Brad Moody

Reported by Leslie A. Hicks, Professional Reporter

TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol,
Room 412, 500 East Capitol Avenue, Pierre, South Dakota, on
the 19th day of November 2004, commencing at 9:30 a.m.

1 CHAIRMAN SAHR: On the agenda the first item
2 of the Ad Hoc meeting is Electric, EL04-016, In the Matter of
3 the Filing by Superior Renewable Energy, LLC et al. against
4 Montana-Dakota Utilities Company regarding the Java Wind
5 Project. And the question today is shall the Commission
6 grant the Motion to Compel.

7 Mr. Smith, how would you recommend we proceed?

8 MR. SMITH: I think we should proceed to hear
9 from the Movant, and I think you're on the phone, right?
10 I'm not sure whether Mr. Meierhenry or Mr. Moody is going to
11 handle the argument, so you guys -- which one are we on?

12 CHAIRMAN SAHR: You're right.

13 MR. SMITH: Yeah. So, Mark, do you want to
14 proceed then, Mark? I think I'll note this too is that
15 originally you submitted the Motion to Compel and then
16 subsequently submitted a motion to shorten time and to extend
17 the discovery deadline. Since those were not included on
18 the agenda within our minimum notice time frames the second
19 two motions will not be heard today. Does everybody
20 understand that?

21 MR. MEIERHENRY: Okay. Yes.

22 MR. SMITH: And we will schedule those on for
23 November 30th. With that, would Superior please proceed.

24 MR. MEIERHENRY: This is Mark Meierhenry.

25 MR. SMITH: Mark, your phone is cutting out.

1 MR. MEIERHENRY: This is Mark Meierhenry, and
2 Brad Moody will argue for Superior on the Motion to Compel.

3 Brad, are you on?

4 MR. MOODY: I am on. Thank you, Mark.

5 May it please the Commission. Good morning.
6 We're here, of course, on -- on Superior's Motion to Compel
7 with respect to some contracts and contract-related
8 information, and I'd like to start with just sort of a
9 general statement and then we'll move very quickly into the
10 specifics of the Motion to Compel.

11 The facts that Superior is trying to obtain
12 through this Motion to Compel are critical to the development
13 not only of the Java Wind Project but of South Dakota wind
14 resources in general. I think everyone knows that South
15 Dakota is blessed with abundant wind resources, but a
16 significant hurdle to the development of those resources up
17 until now has been statements by Montana-Dakota Utilities
18 regarding its capacity and energy needs and the future.

19 And to put those statements in simple English,
20 what -- what Montana-Dakota has said is we're full up, we
21 have all of our capacity and energy needs taken care of for
22 the foreseeable future so don't even talk to us about the
23 development of a new wind project because we simply don't
24 need the energy and capacity that can be produced from such a
25 facility.

1 Well, on November 5th that story changed very
2 dramatically. In a supplement to the initial interrogatory
3 responses that Montana-Dakota provided to Superior,
4 Montana-Dakota disclosed for the first time that it was, in
5 fact, short of energy and capacity and had decided to and had
6 gone ahead and issued a request for proposal soliciting an
7 additional 70 to 100 megawatts of energy and capacity through
8 the time period 2006. And so now we're faced with a
9 situation where the story has changed, and trying to
10 understand the origins of the story and the reasons why the
11 story changed and what the true facts are today is really
12 what we're dealing with with respect to this Motion to
13 Compel.

14 Now, to -- to get to the specifics of what
15 we're asking for, there is one interrogatory that is the
16 subject of this motion, it's Superior's first interrogatory
17 that was served on Montana-Dakota way back in July of this
18 year, and what it asked for were the power purchase contracts
19 that Montana-Dakota had entered into for energy and capacity
20 in its system. And basically it's the most important
21 question when you're trying to figure out what avoided costs
22 are, and I think the Commission is familiar at this point
23 with that phrase "avoided cost."

24 It comes from the federal statute Public
25 Utility Regulatory Policy Act 1978, but, again, in plain

1 English what it means is how much money do you save if you
2 take energy for capacity from a wind power project like the
3 Java Winds facility, and in order to answer that question you
4 need to understand what are the present energy and capacity
5 supply that Montana-Dakota Utilities has versus what is the
6 future demand going to be, so that you can understand whether
7 in the future there may be need for additional construction
8 of generating facilities, purchases of energy capacity in lieu
9 of construction of new facilities.

10 And all of that comes from an examination of
11 the contracts, so it was the first item that Superior asked
12 for in the interrogatories, and the response that came back
13 from Montana-Dakota with respect to those contracts was we
14 object, these are business confidential, we don't have to
15 produce them, but here is a capsule description of four
16 contracts that we have previously disclosed to the
17 coordinating industry utility map. And -- that basically
18 was public information that Superior was already aware of.

19 Superior for the last two months has tried to
20 work with MDU and its counsel to resolve this objection and
21 the -- with the stated objection being business
22 confidentiality, the obvious solution was to enter into a
23 confidentiality agreement that would protect whatever
24 commercial sensitivities existed with respect to the
25 contracts, and the parties have, in fact, signed a

1 confidentiality agreement. It's attached to Superior's
2 motion, and you can see that it's got very strict protections
3 in place to make sure that the information is not disclosed
4 to third parties who have no reason to see it, and that the
5 use of the information is confined to this proceeding, so the
6 -- the objection that was made should have been resolved by
7 the execution of a confidentiality agreement.

8 In fact, the -- the further response from
9 Montana-Dakota Utilities was, well we don't think we have to
10 provide this to you still because of FERC regulations. And
11 FERC is the Federal Energy Commission Regulations regulating
12 these FERC regulations. We think the FERC regulations only
13 require us to produce data and not the contracts themselves.
14 Now our position is the FERC regulations don't control what
15 discovery rights Superior has under South Dakota state law
16 and the rules and regulations of this Commission.

17 But, again, in a further effort to try to
18 resolve the matter and avoid bringing this motion, Superior
19 proposed to -- that Montana-Dakota provide certain
20 information about or data, if you will, about these contracts
21 to Superior and that the contract and the disclosures then be
22 submitted to Commission staff for an in-camera review to
23 verify the accuracy and completeness of the answers that have
24 been filed.

25 The response that came back from

1 Montana-Dakota to that proposal was, well, no, we think that
2 you're asking for too much and we're not going to provide all
3 of these -- all of this information that you asked for. At
4 that point it became clear that the parties were not going to
5 be able to reach an agreement and -- and that's the reason
6 why the motion has -- is in front of the Commission this
7 morning. So that is the sort of background for -- for why
8 we're here.

9 I think it's also important for the Commission
10 to understand that the course or the pattern of conduct in
11 this discovery process has created some significant issues in
12 the mind of Superior as to whether or not any disclosures by
13 Montana-Dakota with respect to these contracts should be
14 taken at face value. And the reason for that is it goes
15 back to my -- to my opening comments about how Montana-Dakota
16 has consistently thrown up a hurdle to wind power development
17 based on its claim that it was not short of energy and
18 capacity.

19 If you look in Superior's Motion to Compel
20 you'll see that -- that very consistently this has been the
21 position stated by Montana-Dakota to Superior before this
22 proceeding was ever instituted. That position continued
23 through initial interrogatory responses and calculations of
24 avoided costs that were provided by Montana-Dakota to
25 Superior pursuant to the discovery process. And as -- as we

1 looked at the answers that were initially filed by
2 Montana-Dakota what we saw was two contracts that
3 Montana-Dakota was asserting provided energy and capacity to
4 Montana-Dakota's system in a way that -- that basically
5 satisfied their assertion that -- that they were not short of
6 energy and capacity. Those contracts are with the Omaha
7 Public Power District and were signed at by Montana-Dakota at
8 about the same time that the negotiations were beginning to
9 break down between Montana-Dakota and Superior.

10 But, in any event, they disclosed these
11 contracts, said that they were providing sufficient energy
12 and capacity to the system to basically fill them up, and
13 then they, again, in October provided Superior with the
14 document which purported to be an avoided cost calculation
15 for Montana-Dakota system, and in that document they showed
16 Superior these two Montana-Dakota contract -- I'm sorry,
17 these two Omaha Public Power District contracts again and
18 said with these contracts in place we're filled up and
19 accordingly your avoided costs -- or our avoided costs
20 payable to you for capacity through the year 2006, I believe,
21 are zero, zero dollars.

22 So we have repeated assertions by
23 Montana-Dakota about these contracts that basically say that
24 they're in effect and that they are contributing energy and
25 capacity to the system. Well, that story changed very

1 dramatically on November 5th when Montana-Dakota filed a
2 supplement to its interrogatory and disclosed for the first
3 time that there was a -- a material contingency or condition
4 in the Omaha contracts that related to transmission service.
5 And, again, in simple English, the problem was that Omaha had
6 energy and capacity to sell but it did not by itself have
7 transmission capability to deliver that to Montana-Dakota and
8 so the parties agreed that the contract would not have and
9 could not deliver energy or capacity unless and until firm
10 transmission service was obtained.

11 As it turns out, in July of this year, which
12 is before Montana-Dakota answered any of Superior's
13 interrogatories, and before it -- it performed its avoided
14 cost calculation, Montana-Dakota knew that it could not
15 obtain firm transmission capacity, and therefore those Omaha
16 contracts could not be providing energy and capacity and
17 therefore could not have been included in an avoided cost
18 calculation.

19 So with that disclosure, Superior is now
20 looking at all of the previous answers that have been given
21 by Montana-Dakota with respect to these contracts and it's --
22 and it's saying to itself out of the Commission why should we
23 take Montana-Dakota's word with respect to these contracts?
24 We have now clear signs that there has been less than the
25 complete story told with respect to these contracts, and the

1 only way that we're going to get the complete story is to
2 look at them with our own eyes so that we can understand them
3 and see what the true energy and capacity needs of
4 Montana-Dakota are because only then will we have an
5 understanding of avoided costs, and when we have an
6 understanding of avoided costs then we'll be able to make our
7 presentation to the Commission regarding what we think the
8 terms and conditions of a power purchase agreement should be.

9 CHAIRMAN SAHR: Thank you very much,
10 Mr. Moody.

11 I'll let everybody know too that we only have
12 our bridge until 10 o'clock this morning. We have some
13 other items on the agenda so I would ask everyone to keep
14 their remarks as focused as possible, and we would like to
15 take some action one way or another by 9:40 this morning to
16 attend to other items on the agenda. That should leave
17 everybody plenty of time to put their case forward. And we
18 are trying to see if we can extend that time. If we could
19 obtain time we can spend extra time on this if need be.

20 MDU, would you care to respond?

21 MR. KOENECKE: We would, Commissioner. Good
22 morning. Brett Koenecke from Pierre appearing on behalf of
23 Montana-Dakota. With me at the table is Don Ball from
24 Bismarck this morning.

25 In keeping the Chairman's comments in mind, I

1 won't respond to every point, but suffice it to say we see
2 things somewhat differently from our side of the table.

3 The contracts were requested July 16th. We
4 responded on September 1st. As you see in our filed
5 submission, we've taken a relevant portion from that filing
6 we made on September 1 and included it in the document and it
7 starts on Page 7, and we said clearly in Paragraph 4, I
8 believe, that we don't think the contracts themselves are
9 relevant, but that data from those contracts is. We've
10 provided that data. We'd still be willing to provide more
11 data from the contracts. And you can see in Dave Gerdes'
12 e-mail -- it's also contained in our filing -- we're willing
13 to go that far.

14 We think an avoided cost determination is what
15 we're seeking here, that the data is available and we've --
16 we've stood on that. We think that the contracts we've
17 entered into with other entities are confidential and we want
18 to hold to that confidentiality. We think that the
19 contracts are not relevant from a FERC standpoint. The
20 avoided cost determination is what we should be seeking and
21 what we're talking about and not the terms of the contracts
22 as indicated by Counsel.

23 If -- if we have to turn over the contracts in
24 total we think we've given up a large portion of our ability
25 to negotiate past the avoided cost determination with

1 Superior and perhaps with anybody else. Our situation here
2 is not one in which we're seeking to fashion a remedy from a
3 set of facts, but to form an avoided cost determination so
4 negotiations can go forward. And we don't want to give up
5 every scrap of negotiating ability that we have for our
6 ratepayers in this matter.

7 It's -- it's timely to say something about the
8 Omaha Power contracts, I think. They were entered into in
9 January of this year. One contract was to provide capacity
10 and energy for the summers of '04, '05 and '06. We didn't
11 require any energy or capacity under this year in the
12 conditions of the summer which we had. The company has made
13 numerous attempts over time to acquire firm transmission for
14 that and they still have not given up acquiring transmission
15 or contracts that are covered under this matter.

16 It's -- I think it's important to say that
17 Montana-Dakota is appreciative of the importance that
18 Superior thinks they have with respect to the company.
19 Well, what we want to say is that the customers are what's
20 important to Montana-Dakota and the rates they have to pay
21 and the reliability that they get, and we've entered into
22 contracts for -- for power that exists to make sure that the
23 lights are on when somebody turns on the switch, that the
24 machines run at somebody's factory and that -- that's the --
25 the -- where we're coming from on this matter. The

1 reliability has to be the key and Superior's talking about a
2 project and capacity that doesn't even exist yet at this
3 point. We need to be ready to take care of people's needs
4 when they need power right now, this summer, next and going
5 forward.

6 So if I can just sum up. With respect to the
7 contracts, we don't think they're relevant. Some of the
8 data was obtained in the minutes. We've given that. We've
9 shown an avoided cost preparation from our standpoint.
10 We're willing to give the data, we're willing to have a third
11 party review the contracts to verify, but we've been turned
12 down in that respect. We would, I guess, express regret
13 that we're here before the Commission on a Motion to Compel
14 this morning, but we're -- we're willing to be here for the
15 principle that we're on. Thank you.

16 CHAIRMAN SAHR: And thank you. And I just
17 received notice that if -- I'll give you the chance to come
18 back, Mr. Koenecke, and make additional comments. I just
19 received notice that with a little bit of effort we can
20 continue on after 10 o'clock.

21 (Short discussion off the record.)

22 CHAIRMAN SAHR: All right. Mr. Koenecke,
23 with that in mind, I do think you hit the salient issues.
24 Anything else you want to add?

25 MR. KOENECKE: No. We'd be glad to answer

1 questions for the Commission and Counsel.

2 CHAIRMAN SAHR: Thank you. Why don't we see
3 what comments staff may have.

4 MS. CREMER: Thank you. This is Karen Cremer
5 from Staff. Staff has not seen these contracts nor has
6 Superior or anyone else so we don't -- we don't know what's
7 in them and I don't even pretend to understand what is in it
8 or what it is that they want to keep confidential, so Staff's
9 recommendation is kind of like what we do in the telephone
10 cases where if Superior has an attorney that has nothing to
11 do with marketing or participating or partaking in any other
12 further contract making, that that attorney see the contract
13 that Superior wants, that Superior's attorney look at the MDU
14 contracts.

15 If that's not possible, because I don't know
16 how big a firm Brad Moody's group is, I think they have an
17 attorney out of Washington maybe that could look at these,
18 but if that's not workable with a new confidentiality
19 agreement then it -- it may be possible for either Commission
20 staff or the Commissioners to have the contracts put before
21 them and then review it.

22 The other thing that had been mentioned by MDU
23 at one point was to have Judge Moreno as a completely neutral
24 third party look at them and determine if the data that MDU
25 has given Superior is accurate information.

1 CHAIRMAN SAHR: With the review that you're
2 talking about that would be done by staff or commissioners,
3 some type of in-camera review?

4 MS. CREMER: Right. The only question I have
5 about that, say Staff comes back saying you ought to turn
6 over this. Does MDU have some sort of avenue to say, no,
7 we're not going to do it? And if the Commission looks at it
8 and we say you ought to turn it over, what is their avenue
9 for saying, no, we're still not going to turn those over?
10 Do they take some sort of intermediate appeal? I'm not
11 sure. Or if they're going to say, fine, have it.

12 CHAIRMAN SAHR: Thank you.

13 Mr. Smith.

14 MR. SMITH: Just in terms of the general
15 proposition about a party's ability to represent himself in a
16 case like this, how is Mr. Moody and Mr. Meierhenry to
17 represent their client in this matter if they can't see basic
18 documentation that in any other kind of case I've ever seen
19 would form the basis for analysis and preparation of
20 examination and cross-examination? You know, a fundamental
21 document like a contract. Maybe you could address that,
22 Mr. Koenecke.

23 MR. KOENECKE: Thank you. It -- I would
24 agree with you, Mr. Smith, that it's an unusual circumstance
25 that we find ourselves in, and I hope I've detailed enough

1 for you our -- our view that we're trying to set a baseline
2 for further negotiations, and it's not a case like -- like
3 the normal case that one might see in civil practice.

4 We are holding firm, I guess, to the notion
5 that what's relevant is the data required to make the avoided
6 cost determination, and not as Mr. Moody said, the -- the
7 other shall we say vagaries that might be in those contracts
8 with respect to other terms that we'd have to negotiate with
9 Superior as a competitor either for the purchase or as a
10 competitor for the other wholesale, you know, provision of
11 power to other people.

12 MR. SMITH: Let me take one example. The --
13 the transmission service contingency condition in the Omaha
14 Public Power District contracts, would not the presence of
15 such a condition be possibly a term that is not data
16 specifically, but that an attorney representing Superior
17 certainly might want to argue could have an impact upon
18 whether that really is a firm capacity contract or not? And
19 how could he do that without being able to see the language
20 of the contract?

21 MR. KOENECKE: It -- I appreciate the
22 question, and obviously they have argued that, but it strikes
23 me that any contract going into the future might be subject
24 to any vagaries regarding transmission. I know I can think
25 of a myriad of possibilities that might come up for the

1 purchase of power to come into question, and I don't know
2 that any of those are relevant to the avoided cost
3 determination. A tower goes down, a semi hits it,
4 transmission goes out. For awhile --

5 (Short interruption in proceedings.)

6 CHAIRMAN SAHR: Back on the record.

7 MR. KOENECKE: Those things don't have
8 anything to do with costs I don't think and that's our
9 position.

10 MR. SMITH: Might they not have something to
11 do with whether or not the -- with whether or not those costs
12 are, in fact, avoided costs or not? In other words, in
13 order for something to not be an avoided cost under the
14 argument that MDU has made that there is no avoided costs for
15 a series of years because there is, in fact, no -- no
16 capacity needed in MDU system, and might not there be
17 provisions in those contracts which an attorney for Superior
18 might reasonably question as bearing on that issue? And
19 without being able to see that, how -- how can one do that?
20 And I'm just asking.

21 And I'm going to let you address one other
22 question. MDU has brought up in a general way the presence
23 of terms within these contracts that it believes have such
24 significant business importance that they ought not be
25 disclosed to the other side in a litigation here that is, you

1 know, involving rights that are guaranteed to a qualifying
2 facility by federal law, and I guess my question would be
3 what kind of provision are you talking about in those
4 contracts with some level of specificity? I mean, not what
5 the precise negotiated balance of rights is, but what are you
6 talking about? What is it in there? I mean, I'm never seen
7 contracts like that that provisions that sensitive could --
8 where it's going to totally upset the balance of a party's
9 ability to deal with it. I mean, in industries like this
10 people pretty well know what's going to be in a contract like
11 this in terms of the general provisions. The material terms
12 are usually the ones you have to disclose, which are price,
13 conditionalities and the like.

14 MR. KOENECKE: Would you give me a minute?

15 MR. SMITH: Uh-huh.

16 (Short pause in proceedings.)

17 CHAIRMAN SAHR: Mr. Koenecke?

18 MR. KOENECKE: Thank you, Mr. Chairman.

19 I want to preface my remarks by saying that I
20 haven't seen the contracts. They're apparently of such
21 confidential nature that they can't be shared even with me.
22 And for those of you on the phone, I winked when I said that.
23 It is true I have not seen them. No "nucleus" secrets are
24 contained therein, and we are on the proposition that -- that
25 they're confidential certainly as to our -- our other parties

1 in the contracts and have an expectation of confidentiality,
2 but they would contain the terms and conditions of the sale
3 and transmission of power and that we think we'd be at a
4 competitive disadvantage in the marketplace with Superior if
5 we were required to turn over the contracts. I don't know
6 what level I can answer your question not having seen those.

7 CHAIRMAN SAHR: I'll ask, I guess, a bigger
8 picture question then. This case obviously is of great
9 significance, and I think we can see that by the number of
10 utilities that have intervened and the level of interest in
11 this, and obviously we have both sides making some strong
12 policy arguments here today that may not be particularly
13 pertinent to the issue of discovery, but it is one of if not
14 first impression, it is a case where we -- we're looking at
15 this issue from a fresh perspective. And when I -- when I
16 weigh the -- the decision between having all the documents,
17 all the information go to one party, and especially if that's
18 done with some confidentiality provisions and possibly some
19 of the other conditions recommended by Staff against the
20 potential downside, and it may be remote, but the potential
21 downside that somehow we could be injuring or making it more
22 difficult for a party, in this case Superior, to put on their
23 case, I think like most -- most people who grapple with that
24 type of issue, I would tend to favor full disclosure with as
25 many conditions we can to make sure confidentiality is

1 assured.

2 In the area of telecommunications, as
3 Ms. Cremer very aptly pointed out, this is done on a regular
4 basis, and during my time I -- we haven't -- although we
5 sometime fight over discovery and for some very valid
6 reasons, I cannot think a time where we've had anyone
7 violating or breaching the confidentiality provisions.

8 Mr. Koenecke, my -- my question would be, at
9 this point in time you're saying you don't think they need
10 the information, they're saying we need it. As long as they
11 keep it confidential where is the harm? As long as it's not
12 used for marketing or for getting that type of competitive
13 advantage, as long as we have those sort of conditions in
14 place, where is the harm in making sure that they have all
15 the information they have to -- to put on their case? And
16 certainly you already have that information to defend
17 yourself.

18 MR. KOENECKE: The -- the harm is not in -- my
19 telecommunications experience -- I'll back up a bit -- has
20 been that we've put up Chinese walls -- to use the term from
21 the legal world -- separating lawyers from information and
22 legal or contract information from sales and marketing
23 people. I don't know that we have those kind of walls in
24 place with respect to Superior, and I don't know that they
25 can be in place because of the -- of the negotiations that

1 are going to have to go on after. This is an avoided cost
2 proceeding and there are a myriad of other things that will
3 have to be negotiated.

4 Please do be mindful that we have gone so far
5 as to suggest that we give the information from the contracts
6 to Superior's lawyers and seek either staff or another
7 independent third party to verify the information that we've
8 given them that they think is relevant to their
9 determination. And we -- we are not seeking to hide the
10 ball on the avoided costs determination, but we don't think
11 those other portions of the equation are relevant. That's
12 the best answer I can give you and I hope it's satisfactory.

13 CHAIRMAN SAHR: Thank you. And I think I do
14 understand your position.

15 Mr. Moody and Mr. Meierhenry, are you
16 confident that if this information were turned over that it
17 would be kept confidential and that it would not be used in
18 any way that it should not be used, it will just strictly be
19 used for preparing your case and putting on your best
20 argument?

21 MR. MEIERHENRY: Absolutely.

22 CHAIRMAN SAHR: And are there any assurances
23 or any suggestions you would have on the structure of what
24 persons would have access to that information to make sure
25 that you can have it but we don't have to have any additional

1 concerns about that information being used inappropriately?

2 MR. MOODY: Right now the confidentiality
3 agreement that has already been signed by the parties
4 basically restricts the dissemination of information to
5 counsel and to, you know, basically experts who would assist
6 counsel with the preparation of the case. And each party
7 that -- each person that would be reviewing confidential
8 information is required to sign a nondisclosure agreement
9 that acknowledges the strict terms and conditions of the
10 confidentiality agreement and promises to abide by those
11 terms and conditions so I think that that agreement is -- is
12 extensive. It was represented to Superior to be something
13 of a -- of a standard provision or confidentiality agreement
14 in South Dakota public utilities practice, so I think that's
15 the document to look at to -- to -- to decide what
16 restrictions should be placed on the use of the information.

17 CHAIRMAN SAHR: At this point in time I'd like
18 to see if the other commissioners on the phone line --
19 Commissioner Hanson, are you on the line?

20 COMMISSIONER HANSON: Yes, I am, thank you.

21 CHAIRMAN SAHR: Great. Thank you. If the
22 other commissioners have any questions for the parties or for
23 staff.

24 COMMISSIONER BURG: Well, the only question
25 I'd have, and a general question I think it's pretty fared up

1 in the commitment --

2 CHAIRMAN SAHR: This is Commissioner Burg,
3 right?

4 COMMISSIONER BURG: Yes.

5 CHAIRMAN SAHR: I only mention because we have
6 a court reporter in the room.

7 COMMISSIONER BURG: Is that -- is that some of
8 those conditions to me that are in the contract might
9 contribute to what the -- might affect what the total avoided
10 costs are. I mean, all the parts of a contract may make up
11 what that final avoided cost issue is. And I'm just saying
12 with -- with it looking like it's sort of selectivity of what
13 amounts to an affect on avoided costs being determined here
14 I'm not sure whether we can reach that not knowing what all
15 the parts are.

16 MR. MOODY: This is Brad Moody for Superior.
17 I couldn't agree more. At this point we've seen in black
18 and white the perils of selective disclosure of contract
19 terms. The failure of Montana-Dakota to reveal the material
20 contingency regarding transmission service with respect to
21 the Omaha contract exactly your point, I think, and that --
22 that's why trying to go down the road of making these sort of
23 partial disclosures we don't think works any longer. We
24 need to see and understand the entirety of the contract.
25 "Firm capacity" as that phrase is used in the avoided costs

1 regulations. It's a difficult subject at best and what a
2 person's firm capacity may not be another person's firm
3 capacity. We need to understand every term and condition of
4 the contract so we can see whether or not it's firm capacity.

5 CHAIRMAN SAHR: Thank you, Mr. Moody.

6 Any other questions from commissioners?

7 COMMISSIONER HANSON: I don't have any
8 questions right now. Thank you.

9 COMMISSIONER SAHR: Thank you.

10 Well, I appreciate the -- the parties coming
11 and stating their cases, and as is often in the case of
12 discovery, we have two different viewpoints and both from
13 legitimate positions. My -- my concern is that this case is
14 of great importance. We have some questions as to being --
15 as was debated here today, whether or not the information
16 would be of importance, and I think the best strategy clearly
17 is to err on the side of requiring that the information be
18 provided, but to do so in a manner that will ensure
19 confidentiality and ensure that the information is not used
20 inappropriately.

21 With that in mind, I am going to move that we
22 grant the Motion to Compel of Superior -- Superior Renewable
23 Energy, LLC with the provisions that the information is kept
24 confidential, that the recommendations of Staff to limit the
25 information to persons who could not use it to some

1 inappropriate competitive advantages be included in -- in
2 this motion, and I would further instruct general counsel for
3 the Commission to put in any other restrictions that are
4 appropriate to make sure that the information is dealt with
5 in a manner that ensures the confidentiality and the
6 appropriate use of that information.

7 COMMISSIONER HANSON: I -- this is Chairman
8 Hanson. I'll second that motion. I didn't have a question.
9 I had somewhat of a comment. If precedent is set we cannot
10 make a comment while we're voting, but I -- I did want to
11 state that I was uncomfortable with the fact that there is --
12 there were comments that the -- first of all, from MDU that
13 they, meaning Superior, don't even have a project yet, and
14 that places them in a pretty difficult catch-22.

15 Secondly, if all MDU ever needed for any
16 utility only needed to say that there is no excess capacity
17 available that would universe fully. They could simply take
18 that position and there would never be any opportunity for --
19 to afford any process, so I think the motion is very
20 appropriate and we need to move forward in that fashion.
21 I'll second it.

22 COMMISSIONER BURG: I will concur.

23 CHAIRMAN SAHR: Thank you. And I would ask,
24 there's a number of people who are on the line, and I'll ask
25 Suzan Stewart, Chris Clark, Alan Dietrich, are you on for

1 anything else other than this case?

2 MS. STEWART: No.

3 UNIDENTIFIED SPEAKER: This is Jeff on behalf
4 of Alan. This is the only thing we are on for.

5 CHAIRMAN SAHR: If you all would be nice
6 enough not to dial in at 10 o'clock, we're about to lose our
7 bridge and we only have a limited number of lines and if any
8 of you dial in we're going to lose any people having pending
9 cases coming before the Commission later or we're going to
10 lose one of the commissioners dialing in. If everyone at
11 this point in time would drop off the phone line. And let me
12 find that number again.

13 COMMISSIONER BURG: Before we lose them, are
14 these -- these are intervenors, aren't they? Did any of
15 them have any comments as intervenor or do they get that
16 opportunity on something like this? I'm not sure.

17 CHAIRMAN SAHR: I don't know if they filed any
18 briefs.

19 MR. SMITH: They haven't been actively
20 involved in this.

21 CHAIRMAN SAHR: Normally, Jim, I think they
22 would, but at this point in time I do not know if they have
23 filed any sort of documents indicating a position on the
24 Motion to Compel. Frankly, they're not a party as to those
25 documents so you ask a good question, but I think it's okay

1 to not hear from them.

2 MS. CREMER: They did all e-mail me that they
3 were not taking a position on the motion.

4 COMMISSIONER BURG: Just making sure.

5 CHAIRMAN SAHR: We're about to lose the phone
6 line. The new number is 605-773-6140. And, again, thank
7 you very much for appearing this morning, and thank you for
8 your bearing with us with some of the phone problems we've
9 had. We're going to go off and come back into the hearing
10 in approximately five to ten minutes. Thank you.

11 (Hearing concluded at 9:55 a.m.)
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1 STATE OF SOUTH DAKOTA)

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CERTIFICATE

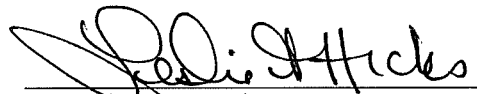
3 COUNTY OF HUGHES)

4
5 I, LESLIE A. HICKS, a Professional Reporter and
6 Notary Public in and for the State of South Dakota;

7 DO HEREBY CERTIFY that the foregoing pages 1-29,
8 inclusive, are a true and correct transcript of my stenotype
9 notes made during the time of the taking of the proceedings.

10 I FURTHER CERTIFY that I am not an attorney for, nor
11 related to the parties to this action and that I am in no way
12 interested in the outcome of this action.

13 In testimony whereof, I have hereto set my hand and
14 official seal this 2nd day of December 2004.

15
16 
17 Leslie A. Hicks,
18 Notary Public and
19 Professional Reporter
20
21
22

23 SEAL
24
25