

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

IN THE MATTER OF THE COMPLAINT FILED)	NOTICE OF INVESTIGATION
BY SUPERIOR RENEWABLE ENERGY LLC ET)	UNDER SDCL 49-34A-26;
AL. AGAINST MONTANA-DAKOTA UTILITIES)	ORDER FOR AND NOTICE
CO. REGARDING THE JAVA WIND PROJECT)	OF PROCEDURAL
)	SCHEDULE AND HEARING
)	EL04-016

On May 12, 2004, Superior Renewable Energy LLC and its wholly owned subsidiary, Java LLC, (Superior) filed a complaint (Complaint) requesting the Commission to settle a dispute regarding the long term purchase price of electricity generated from a Qualified Facility pursuant to the Public Utility Regulatory Policy Act of 1978.

On May 13, 2004, the Commission electronically transmitted notice of the filing and the intervention deadline of May 28, 2004, to interested individuals and entities. On May 27, 2004, the Commission received a Petition to Intervene from Montana-Dakota Utilities Co. (MDU). At its regularly scheduled meeting on June 8, 2004, the Commission granted intervention to MDU. On June 15, 2004, the Commission received a Petition to Intervene Out of Time from MidAmerican Energy Company (MidAmerican), on June 17, 2004, the Commission received a late-filed Petition to Intervene from NorthWestern Corporation (NorthWestern), and on June 18, 2004, the Commission received a late-filed Petition to Intervene from Black Hills Power, Inc. (BHP). At its regularly scheduled meeting on June 22, 2004, the Commission granted intervention to MidAmerican, NorthWestern and BHP. On July 16, 2004, the Commission received a late-filed Petition to Intervene from Northern States Power Company d/b/a Xcel Energy (Xcel). At its regularly scheduled meeting on August 17, 2004, the Commission granted intervention to Xcel.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-34A, specifically § 49-34A-26, ARSD 20:10:01, 16 U.S.C. Chapters 12 and 46, particularly §§ 824a-3 and 2601-2645 and 18 C.F.R. Part 292.

On September 23, 2004, a pre-hearing teleconference was held among the parties and the Commission's counsel to discuss scheduling and concerns of the parties regarding a potential jurisdictional/standing issue. At a duly noticed *ad hoc* meeting on September 30, 2004, the Commission found that the Complaint stated good cause, pursuant to the Public Utility Regulatory Policy Act of 1978, 16 U.S.C. §§ 824a-3 and 2601-2645 and SDCL 49-34A-26, for the Commission, upon its own motion, to proceed, with notice, to make an investigation into the matters as stated in the Complaint and thereupon to take such action as the Commission, after hearing, deems necessary and appropriate, such proceeding to be concurrent with, and consolidated with, the proceedings on the Complaint. The Commission found that such action was prudent to avoid any potential jurisdictional objections arising from whether Superior has standing as a "public utility" to bring a complaint pursuant to SDCL 49-34A-26. Although it may be true that the retention of jurisdiction by the Commission in *Matter of 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*, Docket No. F-3365 (1982) (SDPUC PURPA Order) may mean that there is an open investigation under SDCL 49-34A-26, the Commission's initiation of an investigation particular to this case should remove any doubt as to its authority to hear and decide this matter.

Whereupon, the Commission voted unanimously to approve Chairman Sahr's motion that the Commission, on its own motion, proceed, with notice, to investigate the matters set forth in Superior's Complaint and, after notice and hearing thereon, to take such action as the Commission shall deem necessary and appropriate. The Commission directed MDU to file an answer to the Complaint, which MDU filed on October 4, 2004. The Commission further voted unanimously to establish a procedural schedule and hearing date as set forth below.

Procedural Schedule

The following actions, including filing with the Commission and service upon the parties, shall be taken by the parties on or before the following dates:

Discovery concluded	December 6, 2004
Superior's Pre-Filed Testimony filed	January 6, 2005
MDU's Pre-Filed Testimony filed	January 31, 2005
Intervenors' Pre-Filed Testimony filed	February 10, 2005
Staff's Pre-Filed Testimony filed	February 18, 2005
All Parties' Rebuttal Testimony filed	March 7, 2005
Pre-Hearing Conference (if needed)	March 15, 2005

In addition to filing and service pursuant to ARSD 20:10:01, the parties shall, on or before such dates, serve electronic copies of all filings on the other parties and Commission Counsel via email, which shall be text readable files to the extent available.

Notice of Hearing

A hearing will be held on this matter beginning at 10:00 A.M. on March 21, 2005, and continuing at 8:30 A.M. on March 22-25, 2005, concluding at Noon on March 25, 2005, in Room 412 of the State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota. On the first day, the parties shall appear one-half hour prior to the hearing for the marking of exhibits.

The issues at the hearing, if not decided prior to the hearing on the motion of a party or the Commission, will be:

1. Whether MDU should be required to file with the Commission all of the information relative to avoided costs that MDU is required by 16 U.S.C. § 2643, 18 C.F.R. § 292.302(b)(1)-(3) and the SDPUC PURPA Order to file and disclose?

2. Whether the information referred to in Issue 1 should in any case be required to be disclosed to Superior?

3. Whether the information required to be filed and/or disclosed pursuant to Issues 1 and 2 must include any or all of the following information:

- a. MDU's Integrated Resource Plan filed in North Dakota on July 1, 2003?
- b. With respect to MDU's in-service and planned generating facilities, including the coal-fired power plant currently being studied for construction in western North Dakota:
 - (i) The most recent installed (or planned) cost (\$/KW)?
 - (ii) Burner tip fuel costs (\$/Mmbtu)?
 - (iii) Heat rate (Mmbtu/kWh)?
 - (iv) Annual capacity factor?
 - (v) Operation and maintenance costs, including the cost to operate any emissions control technology?
 - (vi) Water consumption?
- c. Existing capacity and energy purchase contracts?
- d. Terms of any proposed new contracts?
- e. Hourly system load data for last 5 years?

4. Whether MDU should be required to file with the Commission and disclose to Superior all work papers and information used by MDU to calculate the monthly capacity payment of \$14.50/kW-mo. set forth as a tariffed rate in *MDU State of South Dakota Electric Rate Schedule*, Section No. 3, Sheet Nos. 30 - 30.2, "Long Term Purchase Rate 97 Time Differentiated"?

5. Whether MDU should be required to file with the Commission and disclose to Superior MDU's forecast of annual emission by constituent to include, but not limited to, NOX, SO2, mercury, PM10 and VOC associated with MDU's proposed coal fired generation capacity addition(s) as well as for MDU's existing coal-fired generation capacity?

6. Whether, and in what amounts, MDU should be required, pursuant to 16 U.S.C. § 824a-3 and 18 C.F.R. §§ 292.303 and 292.304, to pay Superior over the life of the Java Wind Project for electricity made available to MDU from the project? The determination of this issue will require consideration of the avoided cost issues presented by 18 C.F.R. § 292.304 including, but not limited to, both avoided energy costs and avoided capacity costs.

7. Whether additional relief should be granted to Superior as necessary for Superior to obtain a power purchase agreement with MDU for electricity produced from the Java Wind Project on terms that are consistent with the requirements of PURPA and the SDPUC PURPA Order and are as consistent as possible with the respective positions of the parties and with the interests of MDU's rate payers and public?

8. Whether Superior should be awarded attorney fees and costs as "terms" for MDU's failure to fulfill the purpose of PURPA and the SDPUC PURPA Order?

The Commission notes that some of these issues, particularly Issues 1-5 appear to be appropriate for decision on pre-hearing motion, and the Commission invites the parties to file appropriate pre-hearing motions to narrow the issues. The Commission acknowledges Superior's concerns regarding a discovery deadline, but the Commission believes adequate protection can be afforded the parties via motions to compel and for relief from the cut-off should that prove necessary. The Commission requests that the parties respond to discovery requests in a timely fashion and in good faith and that parties act promptly to file motions to compel when they deem responses to have been untimely or inadequate.

The hearing will be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights may be forfeited if not exercised at the hearing. If a party or its representative fails to appear at the time and place set for the hearing, the Final Decision may be based solely on the testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20. After the hearing, the Commission will consider all evidence and testimony that was presented at the hearing. The Commission will then enter Findings of Fact, Conclusions of Law, and a Final Decision. As a result of the hearing, the Commission may either grant or deny the relief requested by Superior. The Commission's Final Decision may be appealed to the state Circuit Court and the state Supreme Court as provided by law. It is therefore

ORDERED, that the parties shall take NOTICE that as of the date hereof, the Commission, on its own motion, initiates an investigation pursuant to SDCL 49-34A-26 into the matters as set forth in the Complaint; and it is further

ORDERED, that the parties shall comply with the procedural schedule set forth above; and it is further

ORDERED, that a hearing shall be held at the time and place specified above on the issues set forth above except as modified between now and the hearing date by decisions on motions or agreement of the parties.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 26th day of October, 2004.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Alaine Kelbo</u>
Date:	<u>10/27/04</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Gary Hanson
GARY HANSON, Vice Chairman

James A. Burg
JAMES A. BURG, Commissioner