

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

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In the Matter of the Complaint by Prelude,  
L.L.C. against Basin Electric Power  
Cooperative and its Various Cooperative  
Members for Refusing to Provide Actual  
Avoided Costs for Wind Farms and  
Otherwise Refusing to Enter Into QF Power  
Purchase Agreements with Prelude, L.L.C.

Docket No. EL14-042

**REPLY BRIEF OF  
BASIN ELECTRIC POWER  
COOPERATIVE**

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**I. Introduction**

Basin Electric Power Cooperative (“Basin Electric”) and the other named Respondents submit this Reply Brief pursuant to the briefing schedule established by the parties in support of its motion asking the South Dakota Public Utilities Commission (“Commission”) to dismiss the complaint filed by Prelude, L.L.C. (“Prelude”) in the above-captioned docket (“Complaint”).

**II. Background**

On May 5, 2014, Prelude filed a Complaint with the Commission alleging that Basin Electric and five of its member cooperatives (collectively, “Respondents”)<sup>1</sup> failed to offer Prelude actual avoided costs rates and provide sufficient avoided costs data to Prelude wind farms that are self-certified as qualifying facilities (“QFs”) and are in the service territories of several of the Respondents. Complaint at ¶¶ 1, 12-22. On May 29, 2014, Basin Electric filed a Motion to Dismiss (“Basin Electric’s Motion”), explaining

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<sup>1</sup> The six distribution cooperatives named in the Complaint are Butte Electric Cooperative, Inc. (“Butte”), Grand Electric Cooperative, Inc. (“Grand”), Moreau-Grand Electric Cooperative, Inc. (“Moreau”), Rosebud Electric Cooperative, Inc. (“Rosebud”), and Rushmore Electric Power Cooperative, Inc. (“Rushmore”). Although Prelude identified Touchstone Energy Cooperative (“Touchstone”) in connection with Grand in its Complaint, Prelude did not reference Touchstone in its Brief Opposing Basin Electric’s Motion.

that the Commission lacks proper subject matter jurisdiction to provide Prelude with the relief requested in its Complaint and, even if the Commission did have jurisdiction, Prelude failed to state a claim upon which relief may be granted.

On June 2, 2014, Commission Staff filed a Brief in Support of Basin Electric's Motion ("Staff's Brief") agreeing that Respondents are cooperatives whose rates are not regulated by the Federal Energy Regulatory Commission ("FERC") or the Commission, and the Commission therefore lacks subject matter jurisdiction to provide Prelude with the relief requested in its Complaint.

On June 14, 2014, Prelude filed a Brief Opposing Basin Electric's Motion ("Prelude's Brief"). Prelude's Brief asserts that the Commission does have subject matter jurisdiction to grant the relief it requests because the Respondents do not meet the definition for "rural electric cooperative" as defined in South Dakota Codified Law ("SDCL"), and restates the arguments in the Complaint that Basin Electric has failed to provide Prelude with the data and avoided costs rates it is entitled to under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

### **III. Argument**

#### **A. Prelude's Brief Fails to Establish that the SD PUC has Subject Matter Jurisdiction over Basin Electric's and the Other Respondents' Rates**

Prelude's Brief fails to set forth any basis for the Commission to assert jurisdiction over the avoided costs rates of Basin Electric and the other Respondents. Prelude incorrectly asserts that Basin Electric is subject to the jurisdiction of the SD PUC because it does not meet the definition for "rural electric cooperative" in the SDCL. Prelude's

Brief at 5-7. This assertion is based on a misinterpretation of SDCL §§ 49-34A-6 and 49-34A-1. SDCL § 49-34A-6 states that the Commission has jurisdiction over the rates of public utilities, and SDCL § 49-34A-1 states that the term “public utility” does not apply to “a rural electric cooperative as defined in § 47-21-1.” SDCL § 47-21-1 defines “cooperative” as “any corporation organized under this chapter or which becomes subject to this chapter in the manner hereinafter provided.” Both Basin Electric’s Motion (at 3) and Staff’s Brief (at 2) assert, and Prelude does not dispute, that Basin Electric meets the requirements for “rural electric cooperative” under these sections of the SDCL. However, Prelude claims that Basin Electric is nevertheless regulated by the SD PUC because it has not complied with the filing requirements for a “foreign cooperative” under § SDCL 47-21-74. In fact, Basin Electric received a Certificate of Authority to transact business in South Dakota from the South Dakota Secretary of State on June 16, 1968, and attached hereto as Exhibit A is a Certificate of Fact from the Office of the Secretary of State of South Dakota indicating that Basin Electric remains in good standing with the State.

Therefore, Basin Electric’s rates are not regulated by the SD PUC because Basin Electric does not meet the definition of “public utility” as defined in the SDCL. Because PURPA defines “non-regulated electric utility” as “any electric utility other than a State regulated electric utility” (16 U.S.C. § 2602(9)), Basin Electric is a non-regulated electric utility for the purposes of PURPA. Moreover, because the other Respondents are all-

requirements customers of Basin Electric, their avoided costs rates are Basin Electric's avoided costs rates,<sup>2</sup> and such rates are also not subject to Commission regulation.

Prelude further argues that Rosebud is regulated by the SD PUC because it purchases power from both the Western Area Power Administration ("WAPA") and Basin Electric and is therefore not an all-requirements customer of Basin Electric. Prelude's Brief at 10. However, this argument contradicts the statement made earlier in Prelude's Brief that the "Respondents are all requirements customers of Basin Electric" (Prelude's Brief at 7), and in any case, Rosebud only has a fixed allocation of power from WAPA, and the remainder of its requirements are purchased from Basin Electric. It is Basin Electric that will avoid generation or purchased power costs if Rosebud purchases QF output because it is legally obligated to supply all of Rosebud's power requirements in excess of the fixed amount purchased from WAPA. Therefore, because Rosebud is an all-requirements customer of Basin Electric, its avoided costs rate is Basin Electric's avoided costs rate, which is not regulated by the SD PUC. The Commission should grant Basin Electric's Motion to Dismiss for lack of jurisdiction over the rates of all the Respondents.

Prelude's final argument that the SD PUC has subject matter jurisdiction to provide it with the relief requested in its Complaint is that Basin Electric violated PURPA by failing to furnish Prelude with Basin Electric's PURPA implementation plan and data

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<sup>2</sup> FERC first made this determination in Order No. 69, which implemented section 210 of PURPA, and has consistently followed this determination in its case law. *See, e.g., Western Farmers Electric Cooperative*, 115 FERC ¶ 61,323, at P 27 (2006); *Wahl v. Allamakee-Clayton Elec. Coop.*, 115 FERC ¶ 61,318, at P 10 (2006); *City of Longmont*, 39 FERC ¶ 61,301 at p. 61,974 (1987).

related to the Respondents' avoided costs. Prelude's Brief at 7-9. This argument is without merit and should be dismissed by the Commission because, even if it is true, Basin Electric's purported failure to provide such information does not impact its status as a non-regulated utility under the SDCL and PURPA.

Furthermore, Prelude's basis for this argument is a fundamental misunderstanding of the PURPA regulations. Prelude repeatedly asserts throughout both its Complaint and Brief that 18 C.F.R. § 292.302 requires the Respondents to provide Prelude with their PURPA implementation plans and comparable avoided costs data. However, § 292.302 only requires a non-regulated host utility to provide certain system cost data, such as estimated avoided costs, and Basin Electric has already provided Prelude with its avoided costs rates. Section 292.302 contains no requirement that Basin Electric must provide Prelude with its PURPA implementation plan or comparable avoided cost data.

**B. Prelude's Complaint and Brief Fail to State a Claim on which Relief May be Granted**

Even if there were a basis for the Commission to assert jurisdiction over the Respondents' avoided costs rates, Prelude's Complaint and Brief mischaracterize the PURPA regulations and fail to set forth any claim on which relief may be granted by the Commission. Rehashing inherently flawed arguments from its Complaint, Prelude asserts in its Brief that the Crow Creek articles attached to its Complaint show that Basin Electric has not offered Prelude its actual avoided costs rates. Prelude's Brief at 11. As explained in Basin Electric's Motion, such a comparison is irrelevant and has no bearing on the Respondents' avoided costs rates. The proposed Crow Creek facility would not

qualify as a small power production QF under FERC's PURPA regulations because its generating capacity would have been greater than 80 MW (*see* 18 C.F.R. § 292.204(a)(1)). Thus, Prelude's comparison of the rate for purchased power from a non-existent generator has no relevance to the determination of Basin Electric's or any of its members' avoided costs rates under PURPA. Furthermore, Crow Creek has not been built, and Basin Electric has never made an offer to purchase the output of Crow Creek.

Prelude also asserts that it is entitled to review the rates paid by each Respondent to Basin Electric for energy and capacity under their all-requirements contracts.

Prelude's Brief at 12. The Respondents do not object to this request and will provide Prelude with such data. However, FERC precedent makes it clear that such data is not relevant to the Respondents' avoided costs rates, because the all-requirements wholesale rate paid to Basin Electric does not have any impact on Basin Electric's avoided costs, which are defined as the incremental power costs that Basin Electric would incur if the all-requirements Respondents did not purchase QF output.<sup>3</sup>

#### **IV. Conclusion**

Prelude's Complaint and Brief fail to set forth any basis for Commission jurisdiction over the avoided costs rates that Respondents must pay Prelude for QF output, so Basin Electric and the other Respondents respectfully request that the

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<sup>3</sup> *Roger & Emma Wahl v. Allamakee-Clayton Electric Cooperative*, 115 FERC ¶ 61,318, at P 10, *order denying reconsideration*, 116 FERC ¶ 61,134 (2006) ("Nor do we find any merit in the [Complainants'] contention that the Cooperative's avoided cost should be the price at which it purchases power from its supplier, rather than the supplier's avoided cost which the Cooperative is using as its avoided cost. ... [T]he Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this rule.").

Commission dismiss Prelude's Complaint for lack of jurisdiction. Challenges to a non-regulated electric utility's implementation of PURPA are properly brought before an appropriate court, not a State regulatory authority, and the Commission can therefore not provide the relief requested by Prelude.

Dated this 27th day of June, 2014.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: /s/ Gene N. Lebrun

Mr. Gene N. Lebrun

Mr. Miles F. Schumacher

Attorneys for Respondents

909 St. Joseph Street

PO Box 8250

Rapid City, SD 57709-8250

Phone: 605-342-2592

Fax: 605-342-5185

glebrun@lynnjackson.com

mschumacher@lynnjackson.com

SCHIFF HARDIN LLP

Peter K. Matt

John E. Dearborn, Jr.

Attorneys for Respondents

901 K Street, N.W.

Suite 700

Washington, D.C. 20001

Telephone: 202-778-6400

Facsimile: 202-778-6460

E-Mail: pmatt@schiffhardin.com

jdearborn@schiffhardin.com