

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

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 Motion to Dismiss
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**MOTION TO DISMISS OF
BASIN ELECTRIC POWER COOPERATIVE**

I. Introduction

Basin Electric Power Cooperative (“Basin Electric”) and the other named Respondents submit this motion pursuant to South Dakota Codified Law (“SDCL”) 15-6-12(b)(1) and SDCL 15-6-12(b)(5) 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”). The basis for this motion is that (1) the Commission lacks proper subject matter jurisdiction to provide Prelude with the relief requested in its Complaint and (2) even if the Commission did have jurisdiction, Prelude fails to state a claim upon which relief may be granted.

II. Background

Basin Electric is a consumer-owned rural electric cooperative corporation headquartered in Bismarck, North Dakota. Basin Electric owns and maintains approximately 2,200 line miles of electric transmission facilities that are operated at voltages from 115 kV to 345 kV. Basin Electric operates electric generating power plants with a total capacity of more than 4,900 megawatts providing supplemental wholesale power to 137 rural electric member systems in

Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota and Wyoming, as well as to non-member customers. The member systems serve approximately 2.8 million customers in the Eastern Interconnection and the Western Interconnection.

As a rural electric cooperative, Basin Electric's and the other Respondents' rates for the transmission and sale of electric energy are not regulated by the Federal Energy Regulatory Commission ("FERC") or the Commission. Under Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, FERC has jurisdiction over the rates of public utilities, and Basin Electric is not a public utility as that term is defined in Section 201(e) of the FPA because it has outstanding Rural Utilities Service debt. Under SDCL 49-34A-6, the Commission has jurisdiction over the rates of public utilities, but the SDCL's definition of public utility "does not apply to an electric or gas utility owned by a municipality, political subdivision, or agency of the State of South Dakota or any other state or a rural electric cooperative." SDCL 49-34A-1(12). Because Basin Electric is not regulated by the Commission, and the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 2602(9), defines "non-regulated electric utility" as "any electric utility other than a State regulated electric utility," Basin Electric is therefore a non-regulated electric utility for the purposes of PURPA. Moreover, as discussed in detail further below, because the other Respondents are all requirements customers of Basin Electric, either directly or indirectly, their avoided costs rates are Basin Electric's avoided costs rates, and such rates are also not subject to Commission regulation.¹

¹ Butte Electric and Moreau Grand Electric are all requirements customers of Rushmore Electric, which, like Grand Electric and Rosebud Electric, are all requirements customers of Basin Electric.

Prelude states it is an independent wind power and wind farm developer active throughout South Dakota. Complaint at ¶¶ 10.

On May 5, 2014, Prelude filed a Complaint with the Commission alleging that Basin Electric and five of its member cooperatives (collectively, “Respondents”)² failed to enter into good faith negotiations for long-term power purchase agreements with Prelude wind farms that are self-certified as qualifying facilities (“QFs”) and are in the service territories of several of the Respondents. *Id.* at ¶¶ 1, 12-22. Specifically, Prelude makes the three following claims against Basin Electric and its members: (1) the avoided costs rates offered by the Respondents do not conform to the requirements for avoided costs rates set forth by the PURPA regulations (*id.* at ¶ 27); (2) Respondents “have repeatedly failed to provide Complainant Prelude, L.L.C., and its [sic] QF Wind Farms, and agents and representatives with any...comparable actual avoided cost data” (*id.* at ¶ 34); and (3) Respondents have failed to enter into a Power Purchase Agreement (“PPA”) with Prelude’s wind farms (*id.*).

Prelude requests that the Commission (1) hold a hearing to determine the avoided costs that Respondents must offer the Prelude wind farms; (2) require each of the Respondents to provide Prelude with “their PURPA rates that they pay Basin and other suppliers, and their comparable data and actual avoided costs” for wind farms; (3) establish a “multi-tiered resource approach for determining avoided costs” for wind energy; (4) award attorney fees to Prelude for Respondents’ “failures to each of the...duties under PURPA and the SD PUC

² The cooperatives named in the Complaint are Basin Electric Power Cooperative (“Basin Electric”), 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”).

Commission's...orders" and award "damages for lost Production Tax Credits, lost Investment Tax Credits, lost depreciation, and related damages"; and (5) grant Prelude "such other relief and enforcement orders as is necessary" for the Prelude wind farms to obtain PPAs with the Respondents. Complaint at pp. 24-25.

III. Argument

A. The Commission Lacks Subject Matter Jurisdiction to Provide Prelude with the Relief it Seeks in its Complaint

The Respondents respectfully request that the Commission dismiss Prelude's request on the basis that the Commission lacks proper subject matter jurisdiction to provide Prelude with the relief it seeks because the Commission does not have avoided costs ratemaking authority with respect to Basin Electric or the other Respondents.

In administrative law the term "jurisdiction" has three aspects: (1) personal jurisdiction, referring to the agency's authority over the parties and interveners involved in the proceedings; (2) subject matter jurisdiction, referring to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs; and (3) the agency's scope of authority under statute. *O'Toole v. Board of Trustees*, 648 N.W.2d 342, 345 (S.D. 2002) (citing *AmJur 2d Administrative Law* § 274 (1994)).

PURPA and FERC precedent make it clear that the Commission does not have subject matter jurisdiction to hear a challenge concerning the avoided costs rates for energy and capacity that the Respondents pay QFs. Under PURPA, non-regulated electric utilities, such as Basin

Electric, have the authority to implement section 210 of PURPA,³ 16 U.S.C. § 824a-3, which includes the authority to set their own avoided costs rate.⁴ Any challenge to Basin Electric's or any other non-regulated electric utility's avoided costs rate is properly brought in an appropriate court, not before the State regulatory authority.⁵ Prelude also has the option under section 210(h) of PURPA to petition FERC to initiate an enforcement action against Basin Electric or the other Respondents with respect to avoided costs. 16 U.S.C. § 824a-3(h). In order to address any alleged miscalculation of avoided costs, therefore, Prelude must pursue its challenge before an appropriate court or FERC.

B. Prelude Mischaracterizes the PURPA Regulations and Fails to State a Claim on which Relief May be Granted

Prelude's assertion that the avoided costs rates offered to Prelude by Respondents do not conform to the FERC regulations is based on a false premise. Prelude's only support for this claim is a "National Wind Water[sic]" article from December 2010 indicating that a proposed 400 MW Crow Creek wind farm project could sell its output to Basin Electric at a rate of \$38-\$42 per kilowatt hour, which Prelude explains is higher than the \$23-\$25 per MW-hour long-

³ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,864, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶30,160 (1980), *aff'd in part and vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

⁴ Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978, 23 FERC ¶ 61,304 at 61,646 (1983) ("With regard to review and enforcement, the Commission's role is generally limited to ensuring that the State regulatory authority -or non-regulated electric utility-established implementation plan is consistent with section 210 of PURPA and with the Commission's regulations. Once this is ensured, the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a manner consistent with locally-established regulation.").

⁵ *See id.*; *see also id.* at 61,644 ("Section 210(g)(1) of PURPA provides for judicial review, generally to be pursued in a State court forum, respecting any proceeding conducted by a State regulatory authority or non-regulated electric utility for the purpose of implementing the requirements of section 210(a) of PURPA."); Order No. 69 at 30,892.

term avoided costs rate offered by Basin Electric for the energy and capacity from Prelude's wind farms. *Id.* at ¶¶ 28-30. As proposed, Crow Creek 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.

As Basin Electric indicated in its January 13, 2014 Letter to Prelude attached to the Complaint as Exhibit 14, Basin Electric determined its long-term avoided cost based on its June 2013 request for proposal ("RFP") for power supply proposals to be factored into its power supply planning process. The RFP generated 73 responses from various entities with a total MW capacity of over 10,600 MW. The proposed electric capacity included wind, solar, gas and potential capacity sales from utilities with an existing mix of surplus capacity. As a result of the RFP, Basin Electric received thousands of megawatts of proposals for wind generation (including Prelude) and short-listed more than 600 MW of proposals for further analysis and discussion. Basin Electric selected proposals from the short list wind projects that ranged in price from approximately \$23.00 to \$25.00 per MW-hour for fixed 25-year to 30-year terms. Aside from news articles about non-existent generation that do not even mention Basin Electric's avoided costs rate, Prelude fails to offer any evidence to call into question the comprehensive process undertaken by Basin Electric to determine its avoided costs rate.

Second, Prelude's assertion that Basin Electric's member cooperatives have failed to offer their own independent avoided costs rates misunderstands FERC precedent concerning the avoided costs rates of all requirements customers. *See* Complaint at ¶ 55. As explained by Basin Electric in its letter to the Commission attached to the Complaint as Exhibit 8, FERC precedent makes it clear that the avoided cost of an all requirements customer is the avoided cost of its all requirements supplier because it is the supplier that avoids generation costs when the all requirements customer uses QF output. 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.⁶ Since all of Basin Electric's member cooperatives named in the Complaint are all requirements customers of Basin Electric, either directly or indirectly, their avoided costs rate is the avoided costs rate of Basin Electric, and they are under no obligation to provide Prelude with an independent avoided costs rate.

Third, Prelude's claim that Basin Electric is required by the PURPA regulations to present Prelude with "comparable actual avoided costs" that Basin Electric offers other wind farms misrepresents the PURPA regulations' requirements for non-regulated electric utilities. Complaint at ¶¶ 42, 57-58, 60, 62. The PURPA regulations only require a non-regulated host utility to provide certain system cost data, such as estimated avoided costs (*see* 18 C.F.R. § 292.302), and Basin Electric has already provided Prelude with its avoided costs rates. *Id.* The FERC regulations contain no requirement that Basin Electric must provide a QF "comparable" data for similar QFs.

⁶ *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).

Lastly, Prelude's assertion that Respondents "have repeatedly failed to...enter into a [PPA] under their Legally Enforceable Obligation under PURPA to do so" (Complaint at ¶ 34) also misrepresents the PURPA regulations. The PURPA regulations provide that a QF has the option to (1) provide energy to the purchasing utility as it determines such energy is available, in which case the rates for such purchases shall be the purchasing utility's avoided costs calculated at the time of delivery, or (2) provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term. 18 C.F.R. § 292.304(d). As such, the legally enforceable obligation is not for the parties to enter into a PPA, but is for the QF to provide energy or capacity to the host utility, and the host utility to purchase that energy or capacity at its avoided costs rate. Moreover, Basin Electric has not refused to enter into a PPA with Prelude. Prelude has simply refused to accept Basin Electric's offered avoided costs rate.

IV. Conclusion

Basin Electric and the other Respondents respectfully request that the Commission dismiss the 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. Even if the Commission could provide such relief, the Complaint fails to state a claim upon which relief may be granted.

Dated this 29th day of May, 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
605-342-2592
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