

**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, BUTTE)
ELECTRIC COOPERATIVE, INC.,)
GRAND ELECTRIC COOPERATIVE,)
INC., MOREAU-GRAND ELECTRIC)
COOPERATIVE, INC., ROSEBUD)
ELECTRIC COOPERATIVE, INC.,)
AND RUSHMORE ELECTRIC)
POWER COOPERATIVE, INC. FOR)
REFUSING TO ENTER INTO)
QUALIFIED FACILITIES)
PURCHASE POWER AGREEMENTS)

EL14-042

**STAFF'S BRIEF IN SUPPORT
OF RESPONDENTS' MOTION
TO DISMISS**

I. Introduction

On May 5, 2014, Prelude, L.L.C. ("Prelude") filed a complaint against Basin Electric Power Cooperative, Butte Electric Cooperative, Inc., Grand Electric Cooperative, Inc., Moreau-Grand Electric Cooperative, Inc., Rosebud Electric Cooperative, Inc., and Rushmore Electric Power Cooperative, Inc. ("Respondents"). Prelude stated in its complaint that it has projects located in Respondents' service territories. Prelude alleges that Respondents have failed to enter into good faith negotiations of long term electric power purchase agreements, pursuant to the Public Utility Regulatory Policy Act of 1978. On May 25, 2014, the South Dakota Electric Utility Companies filed a Petition to Intervene.

On May 29, 2014, Respondents filed a Motion to Dismiss on the grounds that 1) the Commission lacks subject matter jurisdiction, and 2) Prelude failed to state a claim on which relief could be granted. Commission Staff ("Staff") agrees with Respondents as to the issue of

jurisdiction. Therefore, it is the opinion of Staff that the Commission need not reach the second issue.

II. Jurisdiction

Plaintiff's claims, citing the Public Utility Regulatory Policy Act of 1978 ("PURPA"), are not claims that arise under the jurisdiction of the South Dakota Public Utilities Commission and, therefore, must be brought in a court of competent jurisdiction. Staff agrees with Respondent's statement that Respondents are cooperatives whose rates are not regulated by the Federal Energy Regulatory Commission ("FERC") or this Commission.

Section 210(g) of PURPA provides a detailed enforcement scheme and provisions for judicial review. *Windway Technologies v. Midland Power Cooperative*, No. COO-3089MWB (N.D. Iowa Mar. 5, 2001)¹, citing 16 U.S.C. § 824a-3(g)-(h). Section 210(h)(1) provides that for enforcement purposes, rules and regulations promulgated pursuant to PURPA shall be treated like the Federal Power Act ("FPA") rules. *Id.* at 4. The FPA does not provide the Commission with jurisdiction over non-regulated utilities.

Plaintiff cites to 16 U.S.C. § 824a-3 as a basis for their complaint. However, that regulation specifically addresses state regulatory authorities as having jurisdiction over electric utilities for which they have ratemaking authority. *See* 16 USC § 824a-3(a). The Commission does not have ratemaking authority over any of the entities listed as respondents in the complaint. SDCL § 49-34A-6 provides the Commission with the authority to "regulate all rates, fees and charges for the public utility service of all public utilities." As Respondents stated in their motion, none of the Respondents are public utilities, as defined by SDCL § 49-34A-1(12).

¹ In this case, the United States District Court found that it lacked jurisdiction to hear a claim brought by the qualifying facility against an electric cooperative, holding that the proper venue was state court. The federal court held that the plaintiffs had not properly invoked federal jurisdiction when they alleged that the utility's tariffs violated PURPA. The cause of action was ultimately brought in state court.

In the case of non-regulated utilities, PURPA requires their governing boards to implement the standards of PURPA. The FERC has addressed the issue of jurisdiction with regard to complaints against non-regulated electric utilities for failure to implement a lawful PURPA implementation plan. In a policy statement issued on June 27, 1983, the FERC provides the following:

[W]here a nonregulated electric utility has promulgated rules appropriately implementing [the FERC]'s regulations, and a qualifying facility alleges that a contract offered to it by the nonregulated utility contains unreasonable interconnection requirements, for example, this allegation is one which is properly raised under section 210(g)(2) before a State judicial forum, and not before [the FERC].

Id. at 5. Citing, *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 48 FR 29475, 29476 (1983). Staff believes that FERC was correct in its assessment of jurisdiction and, therefore, the proper venue for this complaint lies with a court of competent jurisdiction, rather than with the Commission. PURPA did not extend the jurisdiction of state regulatory authorities to non-regulated utilities.

III. Failure to State a Claim on which Relief May be Granted

If the Commission finds it appropriate to dismiss for lack of subject matter jurisdiction, it need not reach this issue. Therefore, Staff does not take a position on this issue at this time, but reserves the right to do so at the time of the hearing should the Commission find that it does have jurisdiction.

IV. Conclusion

Staff respectfully recommends the Commission grant Respondents' Motion to Dismiss based upon lack of jurisdiction.

Dated this 2nd day of June, 2014.



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