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**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 It's 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 NUMBER EL 14-042 PRELUDE LLC'S BRIEF OPPOSING MOTION TO DISMISS OF BASIN ELECTRIC POWER COOPERATIVE
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**PRELUDE LLC'S BRIEF OPPOSING MOTION TO DISMISS
OF BASIN ELECTRIC POWER COOPERATIVE**

I. INTRODUCTION

On May 5, 2014, Prelude, L.L.C. (Prelude) filed it's Complaint against Basin Electric Power Cooperative (Basin), Butte Electric Cooperative, Inc., Grand Electric Cooperative, Inc., Moreau-Grand Electric Cooperative, Inc., Rosebud Electric Cooperative, Inc., and Rushmore Electric Power Cooperative, Inc. (Respondents) with the South Dakota Public Utilities Commission (Commission). Prelude, L. L. C. has wind farm Qualified Facility projects and other wind farm interests located in Respondents' service territories in South Dakota.

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, and have otherwise failed to disclose to Prelude, L.L.C., directly, avoided cost and rates.

On May 29, 2014 Basin Electric Power Cooperative on behalf of itself and all other Electric Utility Cooperative Respondents filed the within subject Motion to Dismiss.

Additionally, on May 23, 2014, the South Dakota Public Utility Commission received a Petition to Intervene from South Dakota Electric Utility Companies (SDEUC), which was granted at the hearing on June 10, 2014. and at which other potential parties appeared that may likewise petition for intervention in the future in the within case docket, primarily on issues not directly related to Basin's motion to dismiss.

II. BACKGROUND

Prelude, L.L.C.'s position is that South Dakota needs more electricity, particularly alternative energy sources, like wind farms, than it currently has, due to economic and other growth factors increasing business and consumer demands for limited supply and generation. Because South Dakota is also in a wind corridor, Prelude, L.L.C. came to South Dakota to acquire and develop wind farms to meet this market need. Prelude, L.L.C. has met opposition by Basin Electric Power Cooperative and its member electric cooperative Respondents, in what, apart from Utility regulation, would otherwise be described as appearing to be a virtual monopoly and monopsony, or otherwise a combination of oligopoly actions and structures, that PURPA law ameliorates by requiring electric utilities to purchase electricity from Qualified Facility (QF) small power generators such as the Wind Farms wind energy to be produced by Prelude, L.L.C., But that Basin in particular and Respondents generally have prevented Prelude, L.L.C. from being able to negotiate in good faith with Basin and the other Respondents, where the other respondents, as in this docket file, have all their actions orchestrated by or through Basin and its representatives.

This has had the effect that Prelude, L.L.C., has not been able to obtain rate data, avoided cost data, (other than that in the letter from Basin marked as an exhibit to Prelude's complaint), nor any true comparable avoided cost data or information from any of the Respondent for Wind Farm Energy projects, when all other public information appears to indicate that the various rates offered by or through Basin appear to be about half of the other reported rates or avoided costs, and the rate from the electrical plants that Basin would turn off thereby creating the avoided cost.

This has made it practically impossible for outsiders ("outlanders" as the Wisconsin based Prelude, L.L.C. are apparently called) to acquire and develop their wind farms or enter into Purchase Power Agreements (PPAs) with the Respondents for wind farms, Qualified Facilities (QFs), in the Respondents various service territories, requiring Prelude, L.L.C. to file the within complaint in this docket, seeking the various relief requested, basically requesting the SD PUC to intercede to order Basin and the other Respondents to provide Prelude, L.L.C. with the requested avoided cost data, rates, and data, and otherwise negotiate in good faith under the purposes and requirement of PURPA.

Prelude, L.L.C.'s complaint, has been met by the within Basin Electric Power Cooperative Motion to Dismiss, on its own behalf, and on behalf of all the Respondents which Basin represents in this matter, in lieu of filing an answer or response to the complaint, which is actually in the nature of both a Motion to Dismiss and also combined Brief, (hereafter "Motion-Brief") without any supporting affidavit or other evidentiary support to the Basin Motion-Brief,

seeking dismissal on the alleged grounds of: 1. Lack of subject matter jurisdiction of the SD PUC and 2. Failure to state a claim upon which relief can be granted; both of which alleged grounds for dismissal Prelude, L.L.C. opposes and now responds to herein.

III. ARGUMENT

A. The South Dakota Public Utilities Commission Has Subject Matter Jurisdiction to Provide Prelude with the Relief it Seeks in its Complaint

Basin Electric Power Cooperative's Brief reads as if Basin considers itself and the other Respondents to be "unregulated" by the FERC or SD PUC or the PURPA laws and regulations entirely, when in fact they are merely "nonregulated", not unregulated utilities, and only nonregulated as to some parts of the law and regulation and regulators, and subject to the laws and regulations and regulatory agencies as to other parts PURPA and the regulatory scheme, as will be expounded and explained further herein. Granted the Dakotas and other States in which Basin operates are the West, but they are not the wild wild west, the rule of law applies to everyone, no one is totally above the law. U.S. v. Nixon, 418 U.S. 683 (1974).

Section 201 of the Federal Power Act (FPA), codified as 16 U.S. Code § 824 does regulate wholesale electric utilities selling and buying and transmitting electricity interstate, such as Basin Electric Power Cooperative, as provided in § 824(b), other than for those cooperatives that are excepted per § 824(f): "that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year," There is no evidence in the present record, such as by an accompanying affidavit to Basin's Motion to Dismiss, other than their counsels' assertion in their motion-brief that Basin "because it has outstanding Rural Utilities Service debt" and "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..." as the reason it is exempt from the FERC regulations and FPA. Basin Motion-Brief pages 2 and 1 respectively. The same § 824(d) wholesaler jurisdictional argument would apply to Rushmore Electric, since Respondents assert "Butte Electric and Moreau Grand Electric are all requirements customers of Rushmore Electric". Basin Motion-Brief, fn. 1, page 2, especially since Rushmore is not asserted in the evidentiary record anywhere as having any "Rural Utilities Service debt".

The applicable provisions of Section 201 of the Federal Power Act (FPA) defining Federal and State jurisdiction applicability and defining a public utility for purposes of Part II and Part III of the FPA, as codified are:

"16 U.S. Code § 824 - Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b (a)(2), 824e (e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b (a)(2), 824e (e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

© Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e (e), 824e (f), [1] 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the

books, accounts, memoranda, contracts, and records of-

(A) an electric utility company subject to its regulatory authority under State law,
(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and
© any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall-

(A) preempt applicable State law concerning the provision of records and other information; or
(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].”

Likewise Basin asserts, without any evidence nor affidavit, that it is a rural electric cooperative, that is not subject to the Commission’s [sic. SD PUC] jurisdiction pursuant to the exclusion under SDCL 49-34A-1(12) for rural electric cooperatives. Basin Motion-Brief, page 2.

However, SDCL 49-34A-1(12) Provides as follows:

“(12) "Public utility," any person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part, in this state. However, the term 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 as defined in § 47-21-1 for the purposes of §§ 49-34A-2 to 49-34A-4, inclusive, §§ 49-34A-6 to 49-34A-41, inclusive, and § 49-34A-62. The term, public utility, does apply to a rural electric cooperative which provides gas service;”

However, Basin as it will be shown does not appear from the evidentiary record to meet the definition of being organized under South Dakota law as it appears to be a foreign miscellaneous North Dakota entity, nor does it appear to have properly become subject to South Dakota rural electric cooperative law either per § 47-21-1, which provides as follows:

“SDCL § 47-21-1 Definitions. Terms used in this chapter mean:

(1) "Cooperative," any corporation organized under this chapter or which becomes subject to this chapter in the manner hereinafter provided;”

2012 South Dakota Codified Laws, Title 47 CORPORATIONS, Chapter 21. Rural Electric Cooperatives only allows foreign cooperatives to come under the South Dakota rural cooperatives chapter by the procedures and requirements of SDCL § 47-21-74, which provides as follows:

“47-21-74. Foreign cooperatives--Conditions to local operation--Statement to secretary of state--Contents of statement. Any foreign nonprofit or cooperative corporation supplying or authorized to supply electric energy and owning or operating electric transmission or distribution lines in an adjacent state may construct or acquire extensions of such lines in this state and operate such extensions. Any such corporation, before constructing or operating such extensions, shall, by its president or vice-president, under its seal attested by its secretary, make and forward to the secretary of state a statement, duly sworn to, setting forth:

(1) The name of such corporation and the location of its principal office or place of business without this state, and in case such corporation is to have any place of business or principal office within this state, the location thereof;

(2) The names and addresses of the officers of such corporation and the name and address of the agent or manager of such corporation who will represent it in this state; and

(3) That it constitutes and appoints the secretary of state its true and lawful agent upon whom the summons, notices, pleadings, or process in any action or proceeding against it may be served in respect of any liability arising out of any business, contract, or transaction in this state and that it stipulates that service thereof upon the secretary of state or his deputy shall be accepted irrevocably as a valid service upon it and that such appointment and stipulation shall continue in force irrevocably so long as any liability of such corporation remains outstanding in this state.

Upon compliance with the requirements of this section such corporation shall have all the rights, powers, privileges, and immunities of a cooperative.”

However, the South Dakota Secretary of State’s corporate name search records webpage for Basin Electric Power Cooperative maintained at the internet URL (uniform resource locator) webpage address of: “<https://sos.sd.gov/business/Documents.aspx?cid=FM003174>”, shows only under the name of Basin Electric Power Cooperative a “Corporate ID: FM003174”; and that it has either an incorporation or qualification date of: “12/16/1968”; “Home State NORTH DAKOTA”; “Status Active”; “Last Annual Report 1968”; “Corporation Type Foreign Miscellaneous”; and under the tab, “Registered Agent”, it lists: “Registered Agent Name & Address C T CORPORATION SYSTEM 319 SO. COTEAU ST. PIERRE, SD 57501-3108”; but under the tab “Documents” it states: “No documents are available online, contact us for more information.”; and under the tab “Officers” it states: “No records to display.”

Prelude, LLC requests the SD PUC to take judicial notice of the factual information contained in the above public record webpage maintained by the South Dakota Secretary of State, pursuant to SDCL 19-10-2, SDCL 19-10-3, SDCL 19-10-4, SDCL Title 19, Rules of Evidence.

Prelude, LLC argues, based on the evidentiary record, that Basin Electric Power Cooperative has not complied with the filing prerequisites of SDCL 47-21-74 and is not therefore an exempt, or excluded, or nonregulated rural electric cooperative under South Dakota law, and therefore is subject to the jurisdiction of the South Dakota Public Utilities Commission as any other public utility and subject to the provisions of SDCL 49-34A-6, which provides that: “49-34A-6. Rates to be reasonable and just--Regulation by commission. Every rate made, demanded or received by any public utility shall be just and reasonable. Every unjust or unreasonable rate shall be prohibited. The Public Utilities Commission is hereby authorized, empowered and directed to regulate all rates, fees and charges for the public utility service of all public utilities, including penalty for late payments, to the end that the public shall pay only just and reasonable rates for service rendered.” Likewise, the other respondent cooperatives, being

under an all requirements agreement with Basin, would likewise then have their rates, including avoided cost rates offered to Prelude LLC's QFs likewise subject therefore to the SD PUC regulation and rate setting jurisdiction in all respects.

Therefore, Because Basin Electric is regulated by the South Dakota Public Utilities Commission, it is also not exempt under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 2602(9), which defines "non-regulated electric utility" as "any electric utility other than a State regulated electric utility," Basin Electric is therefore not a non-regulated electric utility for the purposes of PURPA, and neither are the other respondents, since the Basin rates, under their all requirements agreements with ultimately Basin, are subject the SD PUC jurisdiction and regulation. 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 therefore subject to Commission regulation, since when Basin's exemption or exclusion from SD PUC jurisdiction falls, so fall they all¹. Basin Motion-Brief page 2, fn 1, Id.

Furthermore, Prelude, L.L.C, has never been furnished with any implementation plan, nor data, relating to the avoided costs of the Respondents, Basin in particular and the other Respondents generally, nor the other electric cooperatives' rates that they pay Basin for the various capacity they purchase from Basin.

Therefore in failing to produce their implementation plans, or other avoided cost and rate information, the Respondents, even if they are an otherwise each a nonregulated utility, are not in compliance with PURPA purposes and law, as they noted: 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."). State judicial forums are, even in the instance of nonregulated utilities, only a resort AFTER, or ONCE [emphasis added] an establish implementation plan consistent with PURPA section 210 and FERC regulations have been ensured, so far, no implementation plan has been produced to Prelude, L.L.C., just a letter citing some Basin self declared avoided cost rates, which Prelude, L.L.C., upon information and belief as alleged in its complaint are about half the actual avoided cost rates. .

Whether Basin and the other Respondent electric utilities are regulated or nonregulated they are required to disclose either to the SD PUC or the general public, which include Prelude, L.L.C., the avoided cost rates and date pursuant to FERC's PURPA regulations, which Prelude,

¹ The affected Respondents 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").

L.L.C. has requested and not been provided now for many years, numerous times, as alleged in the Complaint.

PURPA requires and directs States (such as the SD PUC) and also nonregulated utilities (if Basin and the other Respondents are determined to be Nonregulated utilities) to “implement” FERC rules. 16 U.S.C. § 824a-3(f) (2012); accord *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Independent Energy Producers Association v. California Public Utilities Commission*, 36 F.3d 848, 856 (9th Cir. 1994); *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 (1980), order on reh'g, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), aff'd in part and vacated in part, *American Electric Power Service Corporation v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), rev'd in part, *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402 (1983); *Cogeneration Coalition of America, Inc.*, 61 FERC ¶ 61,252, at 61,925-26 (1992).

18 C.F.R. §292.302 Availability of electric utility system cost data, provides at (b):

“(b) General rule. To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, **each regulated electric utility** described in paragraph (a) of this section **shall provide to its State regulatory authority**, and shall maintain **for public inspection**, and **each nonregulated electric utility** described in paragraph (a) of this section **shall maintain for public inspection**, the following data:[emphasis added in bold]

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

© Special rule for small electric utilities. (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(I) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the

electric utility) or the Commission for an order requiring that the information be provided.

(d) Substitution of alternative method. (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) State Review. (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.”

It should also be noted, that avoided costs have been defined in FERC Order 69 be the higher incremental avoided costs under the economic dispatch principle:

“The Commission has added the term “incremental” to modify the costs which an electric utility would avoid as a result of making a purchase from a qualifying facility. Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost. At any give time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility. The utility’s avoided incremental costs (and not average system costs) should be used to calculate avoided costs. With regard to capacity, if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity and not the average embedded system cost of capacity should be used.” FERC Order 69 at 12216, 45 Fed. Reg. No. 38. See also: 18 C.F.R. §292.304(e).

It should also be noted, that whether or not the higher quoted avoided costs of Basin relating to Crow Creek wind farm project as being not from a small power production Qualified Facility, is irrelevant, just the avoided cost to Basin in that example are relevant, as is the alleged facts that all of Prelude, L.L.C.’s QFs are small power production qualified facilities per 18 C.F.R. § 292.204(a)(1). Prelude, LLC Complaint, and Ex. 15.

Prelude, L.L.C. has brought this complaint, for the reasons stated above, that it appears that Basin and therefore the other Respondents are subject to SD PUC jurisdiction and therefore must disclose this information for public inspection through the SD PUC, but it should be noted, that even if Basin’s Motion-Brief is correct, and that Respondents are nonregulated, they still must disclose the Prelude, L.L.C. requested avoided cost rate, data and information, to Prelude, L.L.C. as a member of the general public, the only difference then being that Prelude, L.L.C. would need to seek the FERC to enforce the public’s and Prelude, L.L.C. right to access of the avoided costs rates, data and information, which Prelude, L.L.C. , certainly will pursue, if Basin and Respondents persist in refusing to provide all the said required disclosures.

It is true that if the Respondents are determined to be nonregulated, that avoided cost calculations would be the province of a State court forum, or Prelude, L.L.C. under section

210(h) of PURPA could also petition FERC for enforcement against the Respondents with respect to avoided costs. 16 U.S.C. § 824a-3(h), but that if, as Prelude, L.L.C., contends, Basin Electric Power Cooperative is determined to not to be a rural electric cooperative properly filed in the state of South Dakota, then it is a regulated utility under the SD PUC, and as to implementation and public disclosures of avoided costs, data and information, that would be the province of the SD PUC if a regulated utility, and if nonregulated, then FERC.

Regardless of the applicable forum, in the end, Prelude, L.L.C. just wants the actual avoided cost rates, data and information, and good faith negotiations free from interference, of Purchase Power Agreements, pursuant to PURPA that they are entitled to, no more, no less. South Dakota and FERC and the United States as a whole, Prelude, L.L.C. would argue wants the development of the wind energy that Prelude, L.L.C. and the Respondents should be agreeing to generate, and all the economic and energy growth that the same implies, and which, Prelude, L.L.C., argues underpins the broader purposes and policy of the PURPA and FPA laws and regulations.

Likewise, Rosebud is quoted in its article stating that it buys energy from both WAPA and Basin, which appears to indicate that their avoided costs are not solely Basin's avoided cost under the all requirements FERC rulings as Respondents would have us believe, but are a mix of various suppliers or their own avoided costs, at specified rates, for specified capacities, and other data and information all of which they have failed to produce to date to Prelude, L.L.C. Prelude Complaint ¶ 33. See also Prelude LLC Ex.18, Rosebud quoting a rate of 5.3 cents per kilowatt hour. There is also a question of whether Rosebud, in purchasing energy from both Basin and WAPA can be said to come under the exclusions of all requirements supplier's avoided costs, where they certainly are not purchasing from just Basin, as it would appear, from Ex. 18., and therefore are further a regulated utility subject to SD PUC jurisdiction and FERC in that regard.

Since the SD PUC has authority to "regulate all rates, fees and charges for the public utility service of all public utilities." pursuant to SDCL § 49-34A-6, the fact that Basin Electric Power Cooperative, and questionably Rosebud as well, on the evidentiary record thus far has not been proven to properly be a filed rural electric cooperative under South Dakota law, the SD PUC has jurisdiction of its, and therefore all of its "all requirements" other Respondents herein.

B. Failure of Basin's SDCL 15-6-12(b)5 Failure To State A Claim Motion

South Dakota Rule 12(b)(5) is similar to Federal Rule of Civil Procedure 12(b)(6). South Dakota's version provides in part:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) Failure to state a claim upon which relief can be granted. . ." SDCL 15-6-12(b)(5).

"[A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading,

not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." Nygaard v. Sioux Valley Hosp. & Health Sys., 2007 SD 34, ¶9, 731 N.W.2d 184, 190 (citing Guthmiller v. Deloitte & Touche, LLP, 2005 SD 77, ¶24, 699 N.W.2d 493, 496). "The motions are viewed with disfavor and seldom prevail." Id. (citing Elkjer v. City of Rapid City, 2005 SD 45, ¶6, 695 N.W.2d 235, 238). "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action." Thompson v. Summers, 1997 SD 103, ¶7, 567 N.W.2d 387, 390. Further, "[t]he rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations." Id. "The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom." Id. ¶5. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.]” citations, supra, cited in North American Truck & Trailer, Inc., v. M.C.I. Communication Services, Inc., 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712.

First, Basin in its opening volley states that Prelude, L.L.C.’s claims of Respondents’ avoided costs not conforming to PURPA are based on a false premise (regarding the Crow Creek project’s higher quoted Basin avoided costs, Prelude LLC EXHIBIT 15), however, in the procedural context here, as cited supra, all of Prelude, L.L.C.’s allegations and premises and inferences in their complaint are to be taken as true. Therefore the discrepancy in the Crow Creek reported rates must be taken as true, for the purposes of testing the motion to dismiss, and the recent Basin letter avoided cost rate(s) (Ex. 8), make out a prima facie case that the Basin Respondents are not providing Prelude, LLC with the accurate or the same avoided cost rates, and are misrepresenting avoided costs and rates in one or the other, as they do not match up, also proving up that the Basin Respondents have not disclosed to Prelude, LLC avoided costs rates, data and other informational disclosures as required by PURPA. The same Basin rate discrepancies are evident in the “CATCH THE WIND”, by Steve Thompson, USDA Rural Development, wherein Basin admits its “projected power generation costs at 5.5 to 6 cents per kilo-watt hour.” Complaint ¶ 44, and Prelude LLC Ex. 25 thereto.

It should be noted, that Prelude, L.L.C.’s complaint, contains the same or similar allegations made out recently in the complaint in the Oaktree case, with additional factual allegations, and can hardly be said to fail to state a claim, or any claim for relief as the Basin Respondents contend, which a brief comparison by the Commission will become self evident, whereby very little time need be spent on this Basin Motion-Brief issue. See and Compare: In the Matter of the Complaint by Oak Tree Energy LLC against NorthWestern Energy for refusing to enter into a Purchase Power Agreement, SD PUC EL-006, Complaint. Cf. Prelude, L.L.C.’s Complaint, SD PUC EL14-042.

"A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." Guthmiller v. Deloitte & Touche, LLP, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496. "[T]hese motions are viewed with disfavor and seldom prevail." Elkjer v. City of Rapid City, 2005 SD 45, ¶ 6, 695 N.W.2d

235, 238 (quoting *Fenske Media Corp. v. Banta Corp.*, 2004 SD 23, ¶ 7, 676 N.W.2d 390, 392-393 (citations omitted)).” *Nygaard v. SIOUX VALLEY HOSPITALS*, 2007 SD 34, 731 N.W.2d 184.

Basin’s Motion-Brief can not assert facts extrinsic to the evidentiary record, which at this point consists of Prelude, LLC’s Complaint and Exhibits, which allegations and facts must be taken as true as well as inferences and judicially noticed public facts, in a light most favorable to Prelude, LLC, whereby the facts asserted or suggested or implied by the Basin Respondents’ attorneys are not to be considered as facts or evidence, that would be the purpose of filing a formal answer to the complaint or other responsive pleadings, especially so as here, where the Basin Respondents have not filed any affidavits or other evidence contesting the alleged facts submitted by Prelude, L.L.C. It may well be, that extrinsic to the evidentiary record here, that Basin may well be able to prove it is a rural electric cooperative properly filed as a foreign entity under South Dakota laws, but that is not the test based on the motion to dismiss here, which only takes Prelude, L.L.C.’s allegations as contained in the complaint as true. The effect may be that Basin is determined to be a regulated utility, as “The Law Of The Case”, in this case until relieved from that distinction. *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303.

Secondly, Basin’s Motion-Brief at page 7, relating to Prelude, LLC’s complaint that it has not received disclosures from the other respondents, asserting that under FERC precedent “avoided cost of an all requirements customer is the avoided cost of its all requirements supplier” misses the point that Prelude, L.L.C. is entitled to more than the one recent Basin letter’s cited avoided cost quotes (see Prelude LLC Ex. 8), but is entitled to know in addition to each Respondents’ implementation plan, which must be disclosed to the SD PUC if regulated, or made available for public inspection by the nonregulated utilities themselves also, in regards to the other respondents, each price that each of them has paid for each electrical capacity amount purchased from Basin, which they have not provided to Prelude, L.L.C. as repeatedly requested over the past years as alleged in the complaint. See Prelude, L.L.C., Complaint generally, and Complaint ¶ 34:

“34. The Respondents, each acting individually, or by or through authorizing Respondent Basin Electric Power Cooperative to act as their agent or representative, or under the guise of their “all requirements” contracts with Basin and others, have repeatedly failed to provide Complainant Prelude, L.L.C., and it’s QF Wind Farms, and agents and representatives with any data, or comparable actual avoided cost data generally or for wind energy avoided costs, at all times material hereto, or to otherwise enter into a Purchase Power Agreement (“PPA”) under their Legally Enforceable Obligation (“LEO”) under PURPA to do so, at the proper PURPA rate(s), only quoting rates that are about half the alleged actual avoided costs rates to discourage or otherwise prejudice Prelude, L.L.C.’s Wind Farms development.” *Id.* See also Prelude, LLC’s Complaint at ¶ 55.

18 CFR 292.302(b), {c} : “(b) General rule. To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each

nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

© Special rule for small electric utilities. (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(I) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.”[emphasis added in bold].

That is what Prelude, L.L.C. has been forced to do, *i.e. subpara. (2), *supra*. in bringing its Complaint before the SD PUC as the State regulatory authority herein) as a result of years of the Respondents not providing such requested avoided cost rates, data and informational disclosures to Prelude, LLC and its representatives. See Prelude LLC Complaint.

Prelude, LLC is simply requesting the SD PUC to tell the Basin Respondents to follow the PURPA law and regulations and provide Prelude LLC with the avoided cost rates and data and informational disclosures that they are required to but have failed to do, since they are either regulated or somewhat nonregulated, whereby they must follow the law, as none of them are unregulated. The FERC has discretionary authority under Section 210(H)(2)(A), (B) of PURPA to enforce PURPA rules against the state regulatory commissions and the nonregulated utilities to require the state regulatory commissions and nonregulated commissions to comply with PURPA. The recent Idaho PUC federal lawsuit is an example that FERC is now willing to protect the purpa QF mandate, and impress upon State PUCS to implement PURPA law as FERC has determined it to be, and that FERC is now willing to exercise these dormant discretionary

enforcement powers even against State Public Utility Commissions to protect the PPA rights of QFs Qualified Facilities under PURPA. See the recent December 24, 2014 Federal Energy Regulatory Commission (FERC) and the Idaho Public Utilities Commission (Idaho PUC) signed a Memorandum of Agreement under which they will dismiss their court claims related to interpretation and enforcement of the Public Utility Regulatory Policies Act (PURPA), See for illustration: FERC v. IPUC, No. 1:13-cv-141, Compl. (March 2, 2013, D. Idaho) (IPUC Complaint).

Thirdly, the Basin Respondents in their Motion-Brief at page 7 are incorrect as to the comparable avoided cost rates and data and informational disclosures that not only Basin but the other Respondents are required to disclose to Prelude, L.L.C., pursuant to 18 C.F.R. § 292.302), and as quoted verbatim supra, since the required implementation plans, avoided cost rates, data, purchase prices for various capacities, and other informational disclosures would indeed permit, or have permitted Prelude, L.L.C. to calculate actual avoided cost rates which follow order 69, from which comparable wind energy avoided cost data can be derived, from that information, which has never been provided or disclosed for inspection to Prelude, L.L.C., as complained of in the Complaint.

Lastly, it is just fact that neither Basin nor the other respondents have entered into any PPA with Prelude, L.L.C. The Basin Respondents at page 8 of their Motion-Brief miss the point of Prelude, LLC's complaint when they state that "Prelude has simply refused to accept Basin Electric's offered avoided costs rate", it is not just the Basin "offered" rate (or rates, see Basin's letter, Prelude LLC Exhibit 8), it is the rest of the disclosures that Basin and the other Respondent electric utility cooperatives have failed to disclose to Prelude, L.L.C. as required by PURPA that has made it financially impossible for Prelude, L.L.C. to be able to determine whether it can financially and appropriately develop its wind farms and enter into any Purchase Power Agreements (PPAs) with any of the Respondents based on inaccurate information or information that enables it to test the "offered" avoided cost rate(s) submitted by Basin, contrary to the purposes of PURPA to afford small power qualifying facility producers such and the Prelude, LLC's wind farm energy project in South Dakota, an even and fair playing field, and the ability to compete with and enter the electric utility market in order to provide alternative green energy in an otherwise closed monopoly, monopsony, oligopoly electric utility system as appears to be the case here with the Basin Respondents opposing and interfering, and stifling and suppressing and stalling Prelude LLC's efforts in investment in growing the energy and economy of South Dakota, and its wind farmers, construction industry, and electric utility consumers and customers, taxpayers and public interest, as alleged in the Prelude, L.L.C. complaint throughout the last several years.

IV. CONCLUSION

For all the reasons above and as alleged in the Prelude, LLC Complaint and Exhibits, we ask that the Basin Respondents' motions to dismiss the Complaint be denied by the SD PUC, and that the said Respondents be held to answer to the Prelude, L.L.C. complaint and an SD PUC order specifying that the Basin Respondents are to provide the required avoided cost rates, data,

and informational disclosures to Prelude LLC that PURPA law and regulations requires all parties to follow and abide by, and for such other equitable relief and further orders that the South Dakota Public Utility Commission deems just under the circumstances,

In the alternative, as the motions to dismiss do not reach the issue of Prelude, LLC's request for the SD PUC to establish a separate "multi-tiered resource approach for determining avoided costs" encompassing what would include a Feed In Tariff ("FIT") for Wind Energy, and to otherwise establish all applicable PURPA rates and tariffs applicable for new capacity Wind Farm electric production generation and delivery or to other set tariff rates under "Renewable Energy Standard Offer (RESO) contracts" for Wind Energy renewable PPAs like those involving or affecting qualified facility alternative green energy producers such as Prelude, L.L.C., and affecting the intervening parties, that the said matter be held open to proceed on those issues, and related allegations and public interest issues raised in Prelude, L.L.C.'s complaint.

Dated this 13th day of June, 2014.

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