

**STATE OF MINNESOTA**

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**

Katie Sieben	Chair
Dan Lipschultz	Vice Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
John Tuma	Commissioner

**In the Matter of Basin Electric Power  
Cooperative’s Optional Integrated  
Resource Plan**

**Docket No. ET6125/RP-19-425**

**COMMENTS OF BASIN ELECTRIC POWER COOPERATIVE**

**I. INTRODUCTION AND “OTHER ISSUES OR CONCERNS”**

Basin Electric Power Cooperative (Basin Electric or Cooperative) submits these comments in response to the Notice of Comment Period (Notice) issued by the Minnesota Public Utilities Commission (Commission or PUC) on November 21, 2019. The Notice relates to the Sierra Club, Minnesota Center for Environmental Advocacy, and Fresh Energy’s (Environmental Intervenors) Motion to Compel (Motion to Compel or Motion). The Notice requested comments on eight topics:

1. Are IRs 1-SCFEMCEA-1 (a), (c), (d), (i), and (j); IR 1-SCFEMCEA-2(b); IR 1-SCFEMCEA-4; and IR 1-SCFEMCEA-6 [(Remaining IRs)] within the scope of Minn. Stat. § 216B.2422, subd. 2b [(O-IRP Report Statute or Statute)]? If any of the above is not within the scope, please provide a detailed reason why the specific inquiry is beyond the scope of Minn. Stat. § 216B.2422, subd. 2b.
2. Subd. 2b states a “cooperative may, in lieu of filing a resource plan under subdivision 2, elect to file a report to the commission.” What is the significance of the term “report” to describe the filing to be made, relative to the term “Resource plan,” defined in subdivision 1? Please describe how a “report” may differ from a “Resource plan” as well as how a “report” may be similar to a “Resource plan.”
3. Subd. 2b states, “The report must include projected demand levels for the next 15 years and generation resources to meet any projected generation

deficiencies.” Does this sentence limit the discovery for O-IRP to only the content referenced in this sentence? If so, please explain how and why.

4. Subd. 2b states, “to supply the information required in a report under this subdivision, a cooperative may use reports submitted under section 216C.17, subd. 2, reports to regional reliability organizations, or similar reports submitted to other state utility commissions.” Does this sentence impact the Commission’s ability to compel additional information? Why or why not?
5. Subd. 2b also states, “The commission may take whatever action in response to a report under this subdivision that it could take with respect to a report by a cooperative under subdivision 2.” Does this sentence impact the Commission’s ability to compel additional information? Why or Why not?
6. Are there any practical or policy implications the Commission should be aware of for multi-jurisdictional cooperative utilities filing O-IRPs, or IRPs?
7. In interpreting Minn. Stat. § 216B.2422, subd. 2b, what weight should be given to regulatory or legislative history? What conclusions should be drawn from the regulatory or legislative history if it is given any weight, and are there any other factors that should be considered?
8. Are there other issues or concerns related to this matter?<sup>1</sup>

With respect to “other issues or concerns,” Basin Electric contends there are two critical issues not among the topics for comment:

1. Since Environmental Intervenors admit the Remaining IRs relate to resource planning, how can the Remaining IRs be deemed relevant, and the Motion to Compel granted, given the Commission’s limited jurisdiction over Basin Electric? (This issue is independent of the question whether the Remaining IRs fall within the scope of the O-IRP Statute.)
2. Applying the discovery rules used by the Office of Administrative Hearings (OAH), have Environmental Intervenors carried their burden to show that their discovery (a) “is needed for the proper presentation” of their case, (b) “is not for purposes of delay”, and (3) “that the issues or amounts in controversy are significant enough to warrant the discovery.”<sup>2</sup>

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<sup>1</sup> Not. of Cmt. Period.

<sup>2</sup> Minn. R. 1400.6700, subp. 2.

There is no dispute (as Environmental Intervenors admit) that the IRs are aimed at issues relating to Basin Electric’s resource planning. But there should also be no dispute that, as a matter of law, the Commission has no regulatory jurisdiction over Basin Electric’s resource planning. “The Public Utilities Commission does not have broad regulatory authority over electric cooperatives . . . .”<sup>3</sup> The Public Utilities Act provides that the Commission’s jurisdiction is limited “because . . . cooperative electric associations . . . are effectively regulated and controlled by the membership.”<sup>4</sup> Because of its limited jurisdiction, the Commission only acts in an advisory, and not in a regulatory, capacity.<sup>5</sup> To date, neither the Commission nor Environmental Intervenors have addressed the limited nature of the PUC’s jurisdiction over Basin Electric. The Commission’s limited jurisdiction is fatal to the Motion. When the limited extent of the Commission’s jurisdiction is taken into account, it is clear that the IRs are not relevant because they relate to issues clearly outside of the Commission’s jurisdiction. The ultimate question in the proceeding inherently limits legal relevance. Since the Commission lacks resource-planning jurisdiction with respect to Basin Electric, the IRs relating to resource planning are not relevant, and the Commission must deny the Motion to Compel.<sup>6</sup>

The Motion to Compel should also be denied because Environmental Intervenors cannot meet their burden. The Commission frequently turns to the rules of the OAH in the absence of a relevant PUC rule. Under the OAH’s discovery rules,<sup>7</sup> Environmental Intervenors, as the parties

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<sup>3</sup> *Taylor v. Beltrami Elec. Coop., Inc.*, 319 N.W.2d 52, 54 (Minn. 1982).

<sup>4</sup> Minn. Stat. § 216B.01.

<sup>5</sup> *See, e.g.*, Minn. Stat. § 216B.2422, subd. 2(b).

<sup>6</sup> Given the Commission’s limited jurisdiction, the Motion to Compel should be denied whether this matter was proceeding as a traditional IRP or by filing of a streamlined O-IRP report. In both cases, Commission lacks resource-planning jurisdiction. Under Minnesota law, that right rests with Basin Electric’s Board of Directors. With that right comes the Board’s responsibility to ensure the Cooperative complies with the requirements of various state laws, as well as the requirements of the Midcontinent Independent System Operator, Southwest Power Pool and North American Electric Reliability Corporation.

<sup>7</sup> , Minn. R.1400.6700, subp. 2.

bringing the Motion, carry the burden of showing, among other things, that the discovery is needed for the proper presentation of their case. But Environmental Intervenors cannot meet this burden because there is no case to be made with respect to resource planning because regulatory oversight over Basin Electric's resource planning lies outside of the Commission's jurisdiction. At most, the Commission is called upon to confirm that Basin Electric has satisfied the requirements of a report submitted under the O-IRP Report Statute to provide projected demand levels for the next 15 years and generation resources to meet any projected generation deficiencies. There is no dispute regarding whether Basin Electric met these requirements. Nonetheless, Environmental Intervenors contend the Commission can go beyond the Statute's requirements and examine resource-planning issues over which the Commission clearly has no jurisdiction. Under any reasonable discovery regime, this result is both absurd and unduly burdensome to Basin Electric (since the potential discovery does not relate to the ultimate issues in the matter), and thus a waste of time and resources as the Legislature recognized when it passed the O-IRP Report Statute.

The case for denying the Motion to Compel becomes even stronger when one recognizes that the available sanctions under the OAH discovery rules for failure to comply with an order to compel would have no consequence in this matter. If a party fails to comply with an order to compel, an Administrative Law Judge may 1) "order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order" and 2) "refus[e] to allow the party failing to comply to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence."<sup>8</sup> Neither of these sanctions are workable in

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<sup>8</sup> Minn. R. 1400.6700, subp. 3.

connection with the IRs under the O-IRP Report Statute. Under the first sanction, it is difficult to imagine how the Commission could “order that the subject matter of the order for discovery or any other relevant facts . . . be taken as established.”<sup>9</sup> Perhaps the Commission could take it as established that resource alternatives exist that are lower cost and have lower environmental impacts than those identified in the Report. But that “finding” would be outside the Commission’s jurisdiction and also would have no bearing on whether the Report projects demand for 15 years and includes generation resources necessary to meet demand. Accordingly, the “sanction” would be meaningless. The second sanction—“refus[ing] to allow [Basin Electric] . . . to support or oppose designated claims or defenses” related to the topics of the IRs—would fare no better for the same reasons. Specifically, Basin Electric makes no claims related to resource planning because such claims are not relevant to this proceeding.<sup>10</sup>

## **II. COMMENTS ON SPECIFIC TOPICS**

Basin Electric welcomes the opportunity to respond to the specific topics the Commission raised. If Basin Electric addressed these topics in previous filings, the Cooperative cross-references those filing.

### **1. Are the Remaining IRs within the Scope of the O-IRP Report Statute?**

No, because the Remaining IRs concern resource planning. Since the Commission lacks resource-planning jurisdiction, the IRs are not relevant in this matter, and the Commission lacks power to address these matters with respect to Basin Electric or to compel the Cooperative to

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<sup>9</sup> Minn. R. 1400.6700, subp. 3.A.

<sup>10</sup> See Minn. R. 1400.6700, subp. 3.B. Similarly, the sole statutory sanction under the O-IRP Report Statute would be to preclude the Cooperative from relying on the Commission’s decisions as “prima facie evidence which may be rebutted by substantial evidence in all other proceedings.” Minn. Stat. 216B.2422, subd. 2(b). With Basin’s previous O-IRP reports, the Commission typically accepted the report but declined to impute any prima facie weight to the report. See, e.g., In the Matter of Basin Elec.’s Optional Integrated Res. Plan Compliance, Docket No. ET6125/RP-16-565, Notice Closing Docket (Dec. 19, 2016); In the Matter of Basin Elec.’s Optional Integrated Res. Plan Compliance, Docket No. ET6125/RP-15-643, Notice Closing Docket (Sept. 8, 2015). Consequently, the Statute provides no effective statutory sanction for the failure to comply with discovery requests.

respond to the IRs. The Remaining IRs also are outside the scope of the O-IRP Report Statute because they do not relate to the limited issues raised in an O-IRP proceeding: “projected demand levels for the next 15 years and generation resources to meet any projected generation deficiencies.”<sup>11</sup> (It is worth noting that Environmental Intervenors did not move to compel production in response to IR 1-SCFEMCEA-2a and 1-SCFEMCEA-5. Basin Electric voluntarily produced documents in response to those two IRs. Presumably, Environmental Intervenors were satisfied with those productions.)

(Basin Electric addressed this topic in the IR Responses at pages 4-5, 10, 14-17, 20-22, 24-25, and 27-30; and pages 7-10 and the Cooperative’s Response in Opposition to Motion to Compel (Opposition Brief.))

## **2. What Is the Significance of the Statute’s Use of the Term “Report”?**

The O-IRP Report Statute’s use of the word “report” in place of a “resource plan” is extremely significant. Indeed, in 2012 the Commission agreed “the O-IRP should not be considered a resource plan.”<sup>12</sup> A resource plan must include alternative “resource options.”<sup>13</sup> A report need not include resource options.<sup>14</sup> Environmental Intervenors concede the IRs are directed at soliciting information regarding alternative resource options. For example, Environmental Intervenors state their IRs will assist them in “analyzing whether it would be economic and in the interest of Minnesota customers for Basin to transition away from fossil fuel resources to additional renewables.”<sup>15</sup> These issues are appropriate to address in the context of a resource plan but not in response to the narrow confines of an O-IRP report.

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<sup>11</sup> Minn. Stat. § 216B.2422, subd. 2b.

<sup>12</sup> In the Matter of Basin Elec. Power Coop.’s Optional Integrated Res. Plan Compliance Rpt., Docket No. ET6125/RP-13-562, Staff Briefing Papers at 6 n.3 (Aug. 27, 2013).

<sup>13</sup> Minn. Stat. § 216B.2422, subd. 1(d).

<sup>14</sup> Minn. Stat. § 216B.2422, subd. 2b.

<sup>15</sup> Mot. to Compel at 15.

The use of the word “report” is also consistent with the lack of jurisdiction the Commission has over Basin Electric’s resource planning issues. Given the jurisdictional concerns, it is especially important that the informational requirements in the O-IRP Report Statute be strictly applied. In an O-IRP proceeding, parties should not be allowed to use discovery to probe for resource planning analysis and data that cannot be helpful to the Commission in fulfilling the limited role that it has in the matter.

(Basin Electric addressed this topic on page 11 of the Opposition Brief.)

**3. Does the O-IRP Report Statute Limit Discovery to “Projected Demand Levels for the Next 15 Years and Generation Resources to Meet Any Projected Generation Deficiencies?”**

Yes, any discovery must be limited to projected demand and the inclusion of resources necessary to meet demand.<sup>16</sup> Under the Minnesota Rules of Civil Procedure, discovery must be relevant.<sup>17</sup> Under the O-IRP Statute, Basin is only required to provide “projected demand levels for the next 15 years and generation resources to meet any projected generation deficiencies.”

Discovery is relevant only if it is helpful to the decision maker.<sup>18</sup> The Commission’s order on the Report is “advisory” only.<sup>19</sup> The Cooperative’s Board has decision-making authority over resource planning. And Basin Electric has made clear that this discovery is unhelpful to the Board’s resource planning.

(Basin Electric addressed this topic in Section II.1 above, in its Opposition Brief at pages 7-10, and in its IR Responses at pages 4-5.)

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<sup>16</sup> See *supra* § II.2.

<sup>17</sup> See Minn. R. Civ. P. 26.02(b);

<sup>18</sup> *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 920 (Minn. 1990).

<sup>19</sup> Minn. Stat. § 216b.2422, subd. 2(b).

**4. Does the Ability of Qualifying-Cooperatives to Meet the Statute’s Requirements by Filing Reports Submitted under Other Statutes or to Other Entities, Limit the Commission’s Ability to Compel Discovery?**

Yes. The ability to meet the Statute’s requirements through existing reports demonstrates that once a cooperative satisfies the requirements of the Statute—either through submission of an existing or new report—the cooperative has no further obligations. Accordingly, discovery requests seeking additional information are improper because they are unnecessary once the cooperative meets the requirements of the Statute.

This provision also reinforces that one of the main reasons the Legislature enacted the O-IRP Report Statute was to ease the burden on qualifying cooperatives to meet the reporting requirements. The fact that the reporting requirements could be met with reports prepared elsewhere underscores that the information sought by the Legislature was to be limited to demand projections and identification of generation resources. Given the limited jurisdiction of the Commission in an advisory proceeding, the Legislature weighed in favor of minimizing the burden on the reporting parties. This is also consistent with standard discovery practice. Under the OAH discovery rules, one of the grounds for denying a motion to compel is that the issues or amounts in controversy are not significant enough to warrant the discovery.<sup>20</sup> That same principle applies here.

**5. Does the Statement that “The Commission May Take Whatever Action in Response to a Report under this Subdivision that It Could Take with Respect to a Report by a Cooperative under Subdivision 2” Impact the Commission’s Ability to Compel Additional Information?**

No. These provisions incorporate the advisory nature of an IRP for a cooperative into the O-IRP Report Statute.<sup>21</sup> The language also allows the Commission to “consider the filing

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<sup>20</sup> Minn. R. 1400.6700, subp. 2.

<sup>21</sup> See Minn. Stat. § 216B.2422, subd. 2(b).



requirements and decisions in any comparable proceedings in another jurisdiction.”<sup>22</sup> Finally, the language confirms that the Commission can accept or reject an O-IRP report—on an advisory basis.<sup>23</sup> Interpreting this provision to incorporate all the requirements of a traditional IRP would defeat the purpose of O-IRP Report Statute.

The Statute anticipates that the cooperative will give a “[p]resentation of the annual report . . . in accordance with procedures established by the commission.”<sup>24</sup> The presentation was meant as a substitute for a discovery process. During the presentation, the Commission could ask the cooperative questions about the report and resource adequacy.

(Basin Electric addressed this topic in its IR Responses at page 5 and in its Opposition Brief at pages 10-12.)

**6. Are There Practical or Policy Implications the Commission Should Be Aware of for Multi-Jurisdictional Cooperative Utilities Filing O-IRPs, or IRPs?**

Basin Electric notes only that the Statute allows the Cooperative to meet the Statute’s requirements by submitting reports submitted in other jurisdictions. This provision is applicable to O-IRP reports, not IRP’s. Allowing Basin Electric to meet the Statute’s requirements through the submission of existing reports saves cooperatives with a limited presence in Minnesota time and resources by allowing them to use reports developed in jurisdictions where they have a greater share of their operations.

The Commission’s handling of Basin’s first and only IRP may also be instructive. As detailed in Basin Electric’s prior filings,<sup>25</sup> the Cooperative filed its 2008 IRP including all of the confidential load and demand information for its 12 local distribution cooperatives in

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<sup>22</sup> Minn. Stat. § 216B.2422, subd. 2(b).

<sup>23</sup> Minn. Stat. § 216B.2422, subd. 2(a).

<sup>24</sup> Minn. Stat. § 216B.2422, subd. 2b.

<sup>25</sup> Basin Elec.’s Resps. to First Set of Info. Reqs. at 2-3, 6-7.

Minnesota.<sup>26</sup> The Department insisted it was unable to complete its analysis without the Cooperative providing the detailed, confidential load and demand forecasts from its remaining 124 out-of-state local distribution cooperatives located in eight other States. Basin Electric refused to provide this information, provoking the initial jurisdictional objection.<sup>27</sup> The Department asked the Commission to Order Basin to provide this information. Although not conceding jurisdiction, the Commission declined to so Order, stating it was doing so as a matter of comity.<sup>28</sup>

Additionally, Basin Electric notes that, in connection with Dairyland Power Cooperative's (Dairyland) initial O-IRP report in 2013, environmental intervenors served extensive IRs.<sup>29</sup> Dairyland, in turn, raised multiple objections to the IRs.<sup>30</sup> Although the Commission noted the existence of this dispute, the PUC declined to order Dairyland to respond to the IRs.<sup>31</sup> Instead, the Commission merely set forth an abbreviated annual procedure for future O-IRP proceedings for Dairyland (which are identical to the procedures established for Basin Electric).<sup>32</sup>

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<sup>26</sup> In the Matter of Basin Elec. Power Coop.'s 2008 Integrated Res. Plan, Docket No. ET6125/RP-08-846, 2008 Integrated Res. Plan (July 18, 2008).

<sup>27</sup> Basin Elec.'s Resps. to First Set of Info. Reqs. Ex. A.

<sup>28</sup> Docket No. ET6125/RP-08-846, Order Accepting Plan (Feb. 11, 2010).

<sup>29</sup> In the Matter of Dairyland Power Coop.'s Optional Integrated Res. Plan, Docket No. E-002/RP-13-565, Information Request Nos. 1-9 of IWLA, Fresh Energy, Sierra Club, and MCEA to Dairyland Power (July 29, 2013).

<sup>30</sup> Docket No. E-002/RP-13-565, Reply Comments of Dairyland Power Coop. (Aug. 12, 2013).

<sup>31</sup> Docket No. E-002/RP-13-565, Order Acknowledging Receipt of Compliance Report and Closing Docket at 1, 3 (Oct. 3, 2013).

<sup>32</sup> Docket No. E-002/RP-13-565, Order Acknowledging Receipt of Compliance Report and Closing Docket at 3 (Oct. 3, 2013).

## 7. What Weight Should Be Given to the Statute’s Legislative and Regulatory History?

Because the Statute is unambiguous, the Commission does not need to consult the regulatory or legislative history.<sup>33</sup> If the Commission concludes the Statute is ambiguous, the PUC should place significant weight on the legislative and regulatory history.

The legislative history confirms that the purpose of the Statute was to offer a streamlined compliance report alternative to the IRP resource-planning process.<sup>34</sup> The Legislature meant for the Statute to provide significant time and cost savings to cooperatives with a limited presence in Minnesota.<sup>35</sup> Compelling Basin Electric to respond to extensive IRs would defeat the Statute’s goals of streamlining the resource-planning process down to a mere report—and saving the Cooperative time and money.

The regulatory history also confirms that any discovery should be limited. In response to Basin Electric’s first three O-IRP Reports, the Commission simply acknowledged their receipt, found them complete, and closed the docket.<sup>36</sup> More recently, while acknowledging Basin Electric’s O-IRP statutory compliance, the Commission has noted it was making no finding on the Report’s merits.<sup>37</sup> Based on the Commission’s past practice, the Commission at most determines whether the Report is complete. Any discovery should be limited to the issue of

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<sup>33</sup> *Peterson v. W. Nat’l Mut. Ins. Co.*, 930 N.W.2d 443, 453 (Minn. Ct. App. 2019) (citing *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 718 (Minn. 2014)); In the Matter of the Pet. of Certain Subscribers in the Winnebago Exchange for Extended Area Service to the Blue Earth Exchange, Docket No. P-403/CP-89-930, Order Granting Pets. to Intervene 9-10 (July 2, 1992) (“When, as here, the statute read as a whole is clear and unambiguous, the Commission is precluded from attempting to change the legislative expression through recourse to extrinsic considerations such as legislative history.”).

<sup>34</sup> Basin Elec.’s Resps. to First Set of Info. Reqs. Ex. D.

<sup>35</sup> Basin Elec.’s Resps. to First Set of Info. Reqs. Ex. D.

<sup>36</sup> In the Matter of Basin Elec.’s Optional Integrated Res. Plan Compliance, Docket No. ET-6125/RP-14-534, Order Acknowledging Receipt of Compliance Rpt. and Closing Docket at 5 (Dec. 16, 2014); Docket No. ET-6125/RP-13-562, Order Acknowledging Receipt of Compliance Rpt. and Closing Docket at 2 (Sept. 26, 2013); In the Matter of Basin Elec.’s Optional Integrated Res. Plan Compliance, Docket No. E-6125/RP-12-723 Order Acknowledging Receipt of Compliance Rpt. and Closing Docket at 2 (Dec. 19, 2012).

<sup>37</sup> Docket No. ET6125/RP-16-565, Notice Closing Docket (Dec. 19, 2016); Docket No. ET6125/RP-15-643, Notice Closing Docket (Sept. 8, 2015).

whether the Report includes projected demand for 15 years and generation resources to meet any anticipated generation deficiencies.

(Basin Electric addressed this issue in its Opposition to Environmental Intervenors' Petition to Intervene at pages 3-4, its IR Responses at pages 5-13, and the Opposition Brief pages 9-10 and 13-14.)

**8. Are There Other Issues or Concerns Related to this Matter?**

Basin Electric responded to this topic in the Introduction to these Comments.

**III. CONCLUSION**

Basin Electric appreciates the opportunity to submit comments on these topics. The issue before the Commission is whether the Cooperative satisfied the requirements of the O-IRP Report Statute by submitting a report that "include[s] projected demand levels for the next 15 years and generation resources to meet any projected generation deficiencies." There is no serious dispute regarding whether Basin Electric has satisfied the requirements of the Statute. Accordingly, any additional discovery would not be relevant to the Commission's advisory decision regarding whether the Report is complete. Therefore, the Commission should deny the Motion to Compel.

Dated: December 20, 2019

BASIN ELECTRIC POWER COOPERATIVE

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