

157 FERC ¶ 61,080
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Vote Solar Initiative and
Montana Environmental Information Center

Docket No. EL16-117-000

v.

Montana Public Service Commission

ORDER DISMISSING COMPLAINT

(Issued November 1, 2016)

1. On September 19, 2016, Vote Solar Initiative and Montana Environmental Information Center (collectively, Vote Solar), filed a complaint against the Montana Public Service Commission (Montana Commission) pursuant to Rule 206 of the Commission's Rules of Practice and Procedure (Complaint).¹ Vote Solar alleges that the Montana Commission violated section 210 of the Public Utilities Regulatory Policies Act of 1978 (PURPA),² by suspending NorthWestern Energy's (NorthWestern) obligation to adhere to the standard rate for solar qualifying facilities (QFs) with a nameplate capacity between 100 kW and 3 MW, extinguishing legally enforceable obligations to which these facilities were entitled under PURPA, and denying them opportunities to create future obligations. Vote Solar requests that the Commission exercise its authority pursuant to section 210(h)(2)(A) of PURPA³ to enforce PURPA against the Montana Commission.

2. As discussed below, Vote Solar may not file a complaint against the Montana Commission pursuant to Rule 206 because the Montana Commission is not an entity that, for purposes of enforcement, the Commission may, by order, require to take or not take

¹ 18 C.F.R. § 385.206 (2016).

² 16 U.S.C. § 824a-3 (2012).

³ 16 U.S.C. § 824a-3(h)(2)(A) (2012).

particular actions. Additionally, Vote Solar is neither a QF nor an electric utility, and as such is not authorized to file a petition for enforcement pursuant to section 210(h) of PURPA, and did not do so here.⁴ We will accordingly dismiss the Complaint.

I. Complaint

3. Vote Solar requests that the Commission exercise its authority under PURPA section 210(h)(2)(A) and enforce PURPA against the Montana Commission, claiming that the Montana Commission violated section 210 of PURPA by suspending NorthWestern's obligation to adhere to the standard rate for solar QFs with a nameplate capacity between 100 kW and 3 MW, extinguishing legally enforceable obligations to which these QFs were entitled under PURPA, and denying them opportunities to create future obligations.⁵ Vote Solar requests that the Commission: (a) invalidate the Montana Commission's June 16 notice⁶ and July 25 order⁷ suspending the standard rate as a violation of PURPA; (b) reinstate the standard rate originally approved by the Montana Commission in 2013 and reapproved in 2015; (c) rule that the Montana Commission's legally enforceable obligation standard violates PURPA; (d) recognize legally enforceable obligations existing at the time of the Montana Commission's June 16 decision, and the QFs' entitlement to the pre-existing standard rate; and (e) grant any other relief which this Commission deems appropriate.⁸

II. Notice of Filing and Responsive Pleadings

4. Notice of Vote Solar's Complaint was published in the *Federal Register*, 81 Fed. Reg. 66,960 (2016), with interventions and protests due on or before October 11, 2016. An extension of time was granted until November 1, 2016. Timely motions to intervene were filed by Public Citizen, Inc., Pacific Northwest Solar, LLC, Southern California

⁴ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

⁵ Vote Solar Complaint at 1, 16.

⁶ *In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Docket No. D2016.5.39 (Pub. Serv. Comm'n of Montana June 16, 2016) (issuing notice).

⁷ *In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Docket No. D2016.5.39 (Pub. Serv. Comm'n of Montana July 25, 2016) (order on motion).

⁸ Vote Solar Complaint at 33-34.

Edison Company, Montana Consumer Counsel, Sierra Club, Cypress Creek Renewables, LLC, and FLS Energy, Inc.

5. The Montana Commission filed a motion to dismiss on jurisdictional grounds, and asked that the Commission defer answers to the complaint until after its ruling on this motion. The Montana Commission argues that federal district courts enjoy exclusive jurisdiction over PURPA implementation claims, and the Commission cannot entertain the Complaint as a petition for enforcement because only QFs or electric utilities may bring a PURPA section 210(h) petition for enforcement against a state regulatory agency.⁹ The Montana Consumer Counsel filed an answer in support of the motion to dismiss, additionally arguing that the Montana Commission is not subject to the Commission's general complaint jurisdiction under section 306 of the Federal Power Act.¹⁰

6. Vote Solar filed a response to the Montana Commission's motion to dismiss. Vote Solar argues that Rule 206 offers an administrative procedure for members of the public to raise concerns about PURPA's implementation at the state level, and that the Commission is then entitled to take any action authorized by statute that it deems appropriate.¹¹ Vote Solar asserts that the Commission's authority to enforce PURPA pursuant to section 210(h)(2)(A) is not limited by the authorization under section 210(h)(2)(B). Vote Solar agrees that its Complaint asks the Commission to exercise its enforcement authority by initiating an action in federal district court.¹² Vote Solar adds that, even if the Commission lacks enforcement authority, the Commission nonetheless has jurisdiction to "grant any other relief which this Commission deems appropriate," including declaratory relief.¹³

7. Vote Solar filed an answer to the Montana Consumer Counsel's answer in support of the motion to dismiss, requesting that the Commission reject the answer, because, inter alia, the Commission's complaint authority under Rule 206 is not derived solely from section 306 of the Federal Power Act.¹⁴ In the alternative, Vote Solar states that

⁹ Montana Commission Motion at 1.

¹⁰ Montana Consumer Counsel Answer at 1.

¹¹ Vote Solar Response at 5.

¹² *Id.* at 2-3.

¹³ *Id.* at 4.

¹⁴ Vote Solar October 26 Answer (citing Montana Consumer Counsel Answer at 5-6).

the Commission may consider its Complaint under the separate proceeding initiated by FLS Energy, Inc., which raises substantially similar issues to those raised by Vote Solar's Complaint.¹⁵

III. Commission Determination

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.¹⁶

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Vote Solar's October 26 Answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

10. We dismiss the Complaint. While it is true that Rule 206(a) of the Commission's Rules of Practice and Procedures provides that "[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission or for any other alleged wrong over which the Commission may have jurisdiction,"¹⁷ section 306 of the Federal Power Act allows complaints only against "any licensee, transmitting utility, or public utility" and then only for "anything done or omitted to be done . . . in contravention of the provisions of [the Federal Power] Act."¹⁸ The Montana Commission is not one of these entities subject to Commission jurisdiction under section 306. Likewise, section 210(h) of PURPA provides that, for purposes of enforcement of PURPA, the rules adopted by the Commission pursuant to PURPA are treated as rules enforceable under the Federal Power Act, and enforcement of the Federal

¹⁵ *Id.* at 1.

¹⁶ The Montana Commission, by virtue of being the respondent, is a party to the proceeding as well. 18 C.F.R. § 385.102(c)(2) (2016).

¹⁷ 18 C.F.R. § 385.206(a) (2016).

¹⁸ 16 U.S.C. § 825(e) (2012).

Power Act is a matter within the jurisdiction of, as relevant here, United States district courts.¹⁹

11. Vote Solar asks the Commission to exercise its authority pursuant to PURPA section 210(h)(2)(A). However, Vote Solar is not authorized to file a petition for enforcement pursuant to PURPA section 210(h)(2)(B), because it is neither a QF nor an electric utility. Section 210(h)(2)(B) allows “any electric utility, qualifying cogenerator, or qualifying small power producer” to petition the Commission to enforce the requirements of PURPA.²⁰ Vote Solar is not a QF,²¹ and therefore Vote Solar is not authorized to file a petition for enforcement pursuant to section 210(h) of PURPA.²²

12. The Commission therefore dismisses Vote Solar’s Complaint.²³

¹⁹ Compare 16 U.S.C. § 824a-3(h) (2012) with 16 U.S.C. § 825m (2012).

²⁰ 16 U.S.C. § 24a-3(h)(2)(B) (2012).

²¹ Vote Solar has not filed Form 556 notices of self-certification or applications for Commission certification, as is required to obtain QF status pursuant section 292.203(a)(3) of the Commission’s regulations. 18 C.F.R. § 292.203(a)(3) (2016). Order No. 671 amended section 292.203 of the Commission’s regulations to expressly require that a facility claiming QF status must file either a notice of self-certification or an application for Commission certification. Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 82 (2006).

²² See *LoneStar Wind Power Co. v. S. Tex. Elec. Coop., Inc.*, 148 FERC ¶ 61,146, at P 9 (2014) (finding Petitioners were not QFs because they had not filed Form 556 notices of self-certification or applications for Commission certification, and were therefore not eligible to petition for enforcement action under PURPA section 210(h)(2)(ii)(B)).

²³ Although here we do not reach the substantive issues that Vote Solar raises in its filing, the Commission notes that in Docket No. EL17-5-000, *et al.*, FLS Energy, Inc. and its fourteen QFs raise similar issues as those raised in this proceeding.

The Commission orders:

Vote Solar's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.