

158 FERC ¶ 61,032
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. EL16-117-001

v.

Montana Public Service Commission

ORDER DENYING RECONSIDERATION

(Issued January 19, 2017)

1. In an order dated November 1, 2016,¹ the Commission dismissed a complaint filed by Vote Solar Initiative and Montana Environmental Information Center (collectively, Vote Solar) against the Montana Public Service Commission (Montana Commission) pursuant to Rule 206 of the Commission's Rules of Practice and Procedure (complaint).² In its complaint, Vote Solar alleged that the Montana Commission violated section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)³ by suspending NorthWestern Energy's (NorthWestern) obligation to adhere to the standard rate for solar qualifying facilities (QF) with a nameplate capacity between 100 kW and 3 MW, extinguishing legally enforceable obligations to which these facilities were entitled under PURPA, and denying solar QFs opportunities to create future obligations. Vote Solar requested that the Commission exercise its authority pursuant to section 210(h)(2)(A) of PURPA⁴ to enforce PURPA against the Montana Commission.

¹ *Vote Solar Initiative and Montana Env'tl. Info. Ctr. v. Mont. Pub. Serv. Comm'n*, 157 FERC ¶ 61,080 (2016) (November 1 Order).

² 18 C.F.R. § 385.206 (2016).

³ 16 U.S.C. § 824a-3 (2012).

⁴ *Id.* § 824a-3(h)(2)(A).

2. In dismissing the complaint, the Commission stated that 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 order to take or refrain from taking particular actions. The Commission also stated that Vote Solar was neither a QF nor an electric utility, and thus was not authorized to file a petition for enforcement pursuant to section 210(h) of PURPA.

3. On December 1, 2016, Vote Solar timely filed a request for rehearing. As discussed below, because rehearing does not lie on Vote Solar's request,⁵ we will treat that request as a request for reconsideration and we will deny the request for reconsideration.

Vote Solar's Reconsideration Request

4. Vote Solar argues that, contrary to the Commission's assertions, the Administrative Procedure Act (APA) and section 210 of PURPA grant the Commission authority to act on Vote Solar's complaint.⁶

5. Vote Solar states that it filed a complaint pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, and that the Commission erred by construing Vote Solar's complaint as a petition for enforcement pursuant to section 210(h) of PURPA. Vote Solar asserts that, beyond its PURPA enforcement authority, the Commission has broad remedial authority pursuant to section 309 of the Federal Power Act (FPA), and additionally may issue a declaratory order against the Montana Commission pursuant to section 554(e) of the APA.⁷

6. Vote Solar also argues that the Commission has authority to bring an enforcement action pursuant to section 210(h)(2)(A) of PURPA based on a complaint pursuant to Rule 206 of the Commission's Rules of Practice and Procedure.⁸ Vote Solar explains that the Commission erred in finding that a complaint brought pursuant to Rule 206 of the Commission's Rules of Practice and Procedure is coextensive with a complaint brought under section 306 of the FPA.⁹

⁵ See *infra* P 10 n.21.

⁶ Reconsideration Request at 3.

⁷ *Id.* at 3-6; see also *id.* at 8.

⁸ *Id.* at 6-7; see also *id.* at 8.

⁹ *Id.* at 7.

7. Vote Solar states that the Commission, in contravention of PURPA's goals of improving public participation, erred by unreasonably limiting the public's ability to raise important issues of PURPA implementation. Vote Solar argues that the November 1 Order creates a framework wherein the Commission can only take action against a state regulatory authority when asked to do so by a regulated party. Vote Solar posits that the November 1 Order leaves the public without a path to seek relief from the Commission when state regulatory authorities fail to implement PURPA properly and places the burden on electric utilities, qualifying cogenerators, and qualifying small power producers as the only entities that can seek enforcement action to ensure proper state implementation of PURPA. Vote Solar adds that petitioning the Commission for a declaratory order is cost-prohibitive.¹⁰

Commission Determination

8. We deny Vote Solar's request for reconsideration, as described below.¹¹

9. As stated in the November 1 Order,¹² we agree that Rule 206 of the Commission's Rules of Practice and Procedure permits "any person" to file a complaint against "any 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."¹³ In promulgating Rule 206, however, the Commission recognized that, although Rule 206 "govern[s] proceedings under statutes other than the Natural Gas Act and the Federal Power Act," "[t]he Commission's

¹⁰ *Id.* at 3, 8-10.

¹¹ Although we reject Vote Solar's procedural challenges to the November 1 Order, we note that, in *FLS Energy, Inc.*, 157 FERC ¶ 61,211 (2016), we addressed issues similar in substance to those in Vote Solar's complaint in this proceeding.

¹² November 1 Order, 157 FERC ¶ 61,080 at P 10.

¹³ 18 C.F.R. § 385.206(a) (2016).

authority is necessarily limited to that provided by statute.”¹⁴ Vote Solar nevertheless contends that the Commission’s enforcement authority in section 210(h) of PURPA and its “broad remedial authority” in section 309 of the FPA provide statutory support for its complaint under Rule 206.¹⁵

10. At the outset, we note that the Administrative Procedure Act excludes from judicial review actions “committed to agency discretion by law.”¹⁶ The Supreme Court has established the general rule that an agency’s decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion.¹⁷ We believe that the decision to initiate, or not to initiate, an enforcement action pursuant to section 210 falls within this general rule.¹⁸ Section 210 of PURPA expressly provides that the Commission, either upon its own motion or upon the petition of a private party, “may” bring an enforcement action and, if it chooses not to do so, such an action instead

¹⁴ *Revision of Rules of Practice and Procedure To Expedite Trial-Type Hearings*, Order No. 225, FERC Stats. & Regs. ¶ 30,358, at 30,174, *order on reh’g*, Order No. 225-A, FERC Stats. & Regs. ¶ 30,385, *order on petition for procedural rulings with respect to Order No. 225*, Order No. 225-B, 20 FERC ¶ 61,178, *order denying petition for a stay of final rule*, 20 FERC ¶ 61,200 (1982).

¹⁵ Reconsideration Request at 5, 7 (citing *inter alia* 16 U.S.C. §§ 824a-3(h)(2)(A), 825h; *Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 954 (D.C. Cir. 2016) (*Xcel Energy*); *Pub. Utils. Comm’n of State of Cal. v. FERC*, 462 F.3d 1027, 1047-48 (9th Cir. 2006) (*CPUC*)).

¹⁶ 5 U.S.C. § 701(a)(2) (2012).

¹⁷ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”); see also *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (“Congress has not given the courts the power to hear challenges to an agency’s exercise of the discretion with which Congress has entrusted it.”).

¹⁸ See, e.g., *Gregory and Beverly Swecker v. Midland Power Cooperative*, 149 FERC ¶ 61,236, at P 4 (2014) (“Under the statute, the Sweckers have the right to petition the Commission to enforce the requirements of section 210(f) of PURPA. However, as the Commission has long recognized, its enforcement authority is discretionary.”) (internal citations omitted); *Otter Creek Solar LLC*, 146 FERC ¶ 61,192, at P 6 (2014) (“Under the statute, Otter Creek, as a QF, has the right to petition the Commission to enforce the requirements of section 210(f) of PURPA. However, as the Commission has long recognized, its enforcement authority is discretionary.”).

may be brought by the petitioning party.¹⁹ And the courts have recognized that this language commits to the discretion of the Commission the decision to commence an enforcement action.²⁰ Because there is no legal requirement here to commence an enforcement action, there is thus no decision subject to legal error. Rather, we will treat Vote Solar's request for rehearing as a request for reconsideration of the Commission's decision,²¹ which, as we explain below, we deny.

11. With respect to Vote Solar's contention regarding the statutory basis for its complaint, while the Commission's remedial authority in section 309 of the FPA has

¹⁹ See 16 U.S.C. § 824a-3(h)(2)(A)-(B) (2012) (providing that the Commission "may" bring an enforcement action under subsection (A), and further providing for an electric utility or QF to bring an enforcement action under subsection (B) when the Commission opts not to bring an enforcement action under subsection (A)); *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 61,644-61,645 (1983) ("The Commission may undertake an enforcement action either on its own motion or upon petition The Commission is not required to undertake an enforcement action described above. If the Commission does not initiate an enforcement action by notice within 60 days after receipt of a petition . . . , the petitioner may bring an action in the appropriate United States district court. . . . The Commission is entitled to intervene as a matter of right in any private enforcement action under this section.").

²⁰ See, e.g., *Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000) ("The Commission's only obligations under [PURPA] § 210 are the promulgation and periodic revision of these regulations and of the exemption regulations required by [PURPA] § 210(e); therefore, the Commission's decision not to take any action in response to Claremont's apparent violation of § 3(17)(C)(ii) cannot be a violation of § 210 by the Commission."); *N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1476 (D.C. Cir. 1997) ("The Commission may bring an enforcement action in federal district court against any state authority that fails to do so . . . ; alternatively, a utility or cogenerator may petition the FERC to bring such an action and, if the agency declines, may itself sue the state regulatory authority in district court."); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995) ("The FERC *can* initiate an enforcement action either upon its own motion or upon the petition of a private party.") (emphasis added).

²¹ See, e.g., *N.Y. State Elec. & Gas Corp.*, 72 FERC ¶ 61,067, at 61,340 (1995) ("formal rehearings do not lie, either on a mandatory or a discretionary basis, in cases that involve solely section 210 issues"); *S. Cal. Edison Co.*, 71 FERC ¶ 61,090, at 61,305 (1995) (same).

been described as “broad,” it nevertheless is not open-ended and must be tailored to actions the Commission finds “necessary or appropriate to carry out the provisions of” the FPA²²—otherwise, the Commission would be acting *ultra vires*. Vote Solar relies on instances wherein U.S. Courts of Appeal have admonished the Commission for failing to exercise its remedial authority under section 309 of the FPA.²³ In those cases, however, the Commission had failed to use its remedial authority under section 309 of the FPA to correct legal mistakes made in earlier orders issued pursuant to its authority under the FPA when the Commission did not provide for refunds under section 205 of the FPA,²⁴ and to remedy tariff violations.²⁵

12. Here, by contrast, Vote Solar does not request that we invoke section 309 of the FPA to order refunds or to remedy tariff violations in furtherance of our FPA section 205 authority. Vote Solar instead urges the Commission to exercise its “broad remedial authority” under the FPA to “exercise its authority to enforce Section 210 of PURPA against the Montana Commission.”²⁶ That request, we reasonably conclude, is something we cannot do. Although Rule 206 of our Rules of Practice and Procedure permits “any person” to file a complaint with the Commission, our regulations cannot grant us more authority than the statute grants us. Vote Solar is not an entity authorized to file with this Commission pursuant to section 210(h) of PURPA a petition for enforcement against the Montana Commission,²⁷ nor, as relevant here, is the Montana Commission a Commission-jurisdictional public utility subject to the requirements of the FPA. Were

²² See 16 U.S.C. § 825h (2012).

²³ Reconsideration Request at 5, 7.

²⁴ *Xcel Energy*, 815 F.3d at 956 (“where the Commission acknowledges that it acted contrary to section 205’s mandate to protect consumers against unjust and unreasonable rates, its initial rate order is *ultra vires* and the Commission cannot rationally ignore the different contexts in which it has refused to suspend existing rate schedules or its remedial authority in section 309.”); see also *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,167, at P 23 (2016) (“At issue in *Xcel Energy* was the Commission’s remedial authority to direct refunds where, on rehearing, it admitted legal error in the underlying rate order . . .”).

²⁵ *CPUC*, 462 F.3d at 1048 (“We conclude that FERC’s decision not to consider a § 309 remedy for tariff violations was arbitrary and capricious, an abuse of discretion, and not in accordance with law.”).

²⁶ Reconsideration Request at 8.

²⁷ See November 1 Order, 157 FERC ¶ 61,080 at P 11.

we to permit Vote Solar to file a petition for enforcement, even though Vote Solar is not authorized to do so, we would be acting *ultra vires*. Similarly, were we to agree with Vote Solar and invoke section 309 of the FPA to issue directives to the Montana Commission under that authority, where the Montana Commission is not a Commission-jurisdictional public utility, we would equally be acting *ultra vires*. We therefore reject Vote Solar's argument that the Commission erred in both construing Vote Solar's complaint as a petition for enforcement filed pursuant to section 210(h) of PURPA and in declining to exercise authority under the FPA.

13. Even if we construed Vote Solar's complaint as a petition for declaratory order (for which Vote Solar did not pay the requisite fee²⁸), our decision to issue a declaratory order to terminate a controversy or to remove uncertainty is discretionary (and thus equally unreviewable), similar to our decision to initiate or not initiate an enforcement action pursuant to section 210(h) of PURPA.²⁹

14. In any event, certain QFs, who are authorized to file an enforcement petition under section 210(h) of PURPA, have raised similar substantive issues in another proceeding against the Montana Commission (a proceeding, we note, in which Vote Solar intervened³⁰), and our dismissal of Vote Solar's complaint here did not foreclose Vote Solar's public participation in our proceedings. We therefore reject Vote Solar's argument here that the November 1 Order unreasonably limited public participation in our proceedings.

²⁸ 18 C.F.R. § 385.207(c) (2016) ("Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).").

²⁹ See 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2016); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at P 29 (2013) ("The Commission also can and sometimes does issue a declaratory order in response to an enforcement petition. That declaratory order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's discretion to issue an order 'to remove uncertainty.'") (internal citations omitted).

³⁰ See *FLS Energy, Inc.*, 157 FERC ¶ 61,211 at PP 8, 16.

The Commission orders:

Vote Solar's request for reconsideration is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.