

MEMORANDUM

TO: Commissioners and Other Interested Parties

FROM: John J. Smith, Commission Counsel

RE: South Dakota Public Utilities Commission's authority to amend or repeal rules governing master metering set forth in ARSD Chapter 20:10:26

Following the Commission's consideration of the master metering exception determination in Docket EL13-034 at its regular meeting on November 22, 2013, Chairman Nelson directed me to research what authority the Commission could lawfully exercise under the Public Utility Regulatory Policies Act of 1978, as amended, and South Dakota state law to repeal or amend some or all of the rules governing master metering set forth in ARSD Chapter 20:10:26 and report my findings as a discussion item at the Commission's next regular meeting on December 3, 2013. Due to the short time period from the Commission's meeting until now, the information and analysis set forth in this memorandum is based on a fairly abbreviated review of applicable statutes and search for applicable case law and is accordingly brief. Additional supplementary analysis and information may be provided prior to the meeting or as the process proceeds if the decision is made to proceed further.

The Commission's actions to establish standards to govern public utility customers' installation, maintenance, and use of master metering came about beginning in 1978 as a result of certain provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA), as amended, 16 U.S.C. 2601 – 2645. See attached Decision and Order and Errata Notice in Docket F-3237. Provisions of these statutes applicable to the matter at hand include the following:

§2623. Adoption of certain standards

(a) Adoption of standards

Not later than two years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall provide public notice and conduct a hearing respecting the standards established by subsection (b) of this section and, on the basis of such hearing, shall—

(1) adopt the standards established by subsection (b) of this section (other than paragraph (4) thereof) if, and to the extent, such authority or nonregulated electric utility determines that such adoption is appropriate to carry out the purposes of this chapter, is otherwise appropriate, and is consistent with otherwise applicable State law, and

* * * *

For purposes of any determination under paragraphs (1) or (2) and any review of such determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to adopt any such standard, pursuant to its authority under otherwise applicable State law.

(b) Establishment

The following Federal standards are hereby established:

(1) Master metering

To the extent determined appropriate under section 2625(d) of this title, master metering of electric service in the case of new buildings shall be prohibited or restricted to the extent necessary to carry out the purposes of this chapter.

* * * *

(c) Procedural requirements

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility, within the two-year period specified in subsection (a) of this section, shall (1) adopt, pursuant to subsection (a) of this section, each of the standards established by subsection (b) of this section, or, (2) with respect to any such standard which is not adopted, such authority or nonregulated electric utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

§2625. Special rules for standards

* * * *

(d) Master metering

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if—

- (1) there is more than one unit in such building,
- (2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and
- (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

§2627. Relationship to State law

* * * *

(b) State authority

Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter.

South Dakota state statutes applicable to this matter include SDCL Chapter 1-26, particularly 1-26-1 through 1-26-13.1. Specific state statutes to be considered include SDCL 1-26-1(8), 1-26-6.7, and 49-34A-93, the pertinent portions of which are set forth below:

1-26-1. Definition of Terms

Terms used in this chapter mean:

* * * *

(8) "Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule

1-26-6.7. Procedure for amendment, suspension or repeal of rules. Once a rule has been adopted, it may not be amended, repealed, or suspended except by compliance with § 1-26-4 or 1-26-5, and with § 1-26-6, even if it has not taken effect.

49-34A-93. Implementation of and compliance with certain federal energy acts. The commission may implement and comply with the provisions of the Public Utility Regulatory Policies Act of 1978, as amended to January 1, 2009, the Energy Policy Act of 2005, and the Energy Independence and Security Act of 2007 and may promulgate rules pursuant to chapter 1-26 consistent with these acts.

Based on the foregoing statutes, it is my opinion that the Commission has the authority under state law, and therefore under PURPA pursuant to its state authority deference provisions, to amend or repeal rules promulgated by the Commission to implement the standards of PURPA. A quick search of the internet for PURPA-related rulemakings in other states revealed a plethora of policy changing amendments and repeals of rules in other states. SDCL 1-26-1(8) clearly indicates that standards of general applicability must be "rules" under our law and must be adopted by a rulemaking, not an adjudicatory proceeding. Furthermore, the term "rule" explicitly includes the amendment or repeal of a prior rule. Although the terminology employed in certain statutes does not always explicitly include the terms "amendment" or "repeal," it seems clear from our statutes that when the law gives rulemaking authority to an agency of this state, that authority also includes the power to amend or repeal rules previously adopted. The power to adopt would seem under our law to include the power to amend and repeal. SDCL 49-34A-93 and the Commission's other general rulemaking statutes, SDCL 49-1-11 and 49-34A-4, all use the term "may promulgate," not "shall promulgate." The realities of the utility industry evolve over time and the knowledge gained from experience grows and deepens over time. Regulation is an evolutionary process, and the ability to react to changing realities and experience is provided for the legislative rulemaking scheme enacted by the Legislature.

I would also point out that in the past few years in addressing the additions to the PURPA standards in the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, the Commission, in at least one case, engaged in a bifurcated decision-making process in order to perform the evidentiary fact-finding that certain of the PURPA standards require and comply with the "statement of reasons" for non-adoption requirement applicable to all of the standards consideration statutes. See Dockets EL06-018 and EL08-028. In EL06-018, the Commission engaged in an evidentiary proceeding to make findings regarding the new PURPA standards and whether to adopt them and then opened a rulemaking, Docket RM08-002, to perform the actual rule promulgation. The links to these dockets are:

<http://www.puc.sd.gov/Dockets/Electric/2006/EL06-018.aspx>

<http://www.puc.sd.gov/Dockets/Electric/2008/el08-028.aspx>

<http://www.puc.sd.gov/Dockets/Rulemaking/2008/rm08-002.aspx>