11-1738

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

CITY OF NEW MARTINSVILLE,

Petitioner,

vs. No.

PUBLIC SERVICE COMMMISSION OF WEST VIRGINIA,

Respondent.

Appeal from Public Service Commission Case No. 11-0249-E-P

PETITION FOR SUSPENSION AND REVIEW AND PETITIONER'S BRIEF

CITY OF NEW MARTINSVILLE

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2. The Public Service Commission of West Virginia erred in rejecting the applicability of the Court's decision in *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003) to the facts of this case in light of the 2004 Amendment to the Electric Energy Purchase Agreement.

3. The Public Service Commission of West Virginia erred in failing to adequately balance the interests of the City of New Martinsville as both a producer of electricity and a public utility subject to the requirements of the state's Alternative and Renewable Energy Portfolio Act with the interests of the Company.

4. The Public Service Commission of West Virginia erred in departing from its previous ruling that established that producers of electricity were eligible for the award of Renewable Energy Credits under the Alternative and Renewable Energy Portfolio Act.

II. STATEMENT OF THE CASE

This is an appeal by the City of New Martinsville ("City") pursuant to *West Virginia Code* §24-5-1 from a final order of the Public Service Commission ("PSC" or "Commission") entered on November 22, 2011, ruling on the Joint Petition for Declaratory Ruling filed by Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power in Case No. 11-0249-E-P ("Order").

The overarching issue before the PSC was as follows:

> The City owns and operates a hydropower generating facility, which, based on West Virginia's Alternative and Renewable Energy Portfolio Act, is entitled to two renewable energy credits for every megawatt hour of electric energy generated at the facility. In 1986, the City sold the energy produced from the facility to the Companies at the avoided cost rate as defined by the Public Utilities Regulatory Policy Act of 1978 ("PURPA"). Avoided costs have never included any environmental attributes, and the agreement between the City and Monongahela Power was silent towards the issue of the ownership of Renewable Energy Credits ("RECs") associated with the energy produced by the City's facility. Should the City, who took the financial risk to build, operate and maintain the green energy facility, or the Company, who purchased the energy, be entitled to the ownership of the RECs?

The PSC found that, as the purchaser of the energy, the RECs belong to the Company. The effect of this decision was a multimillion dollar windfall to Monongahela Power, who never contracted to purchase the RECs. The decision should be overturned.

A. Procedural History

On February 23, 2011, the Monongahela Power Company ("Mon Power" or "the Company") and The Potomac Edison Company ("P.E.", and together with Mon Power jointly referred to as "the Companies") filed a Petition for Declaratory Order and for Interim and Other Related Relief seeking a ruling, *inter alia*, that the Companies were entitled to all of the rights and benefits in, and to any and all, Alternative and Renewable Energy Resource Credits

("ARECs") applicable to Commission-approved Electric Energy Purchase Agreements ("EEPA") between the Companies and three nonutility electric generating facilities in West Virginia.

On March 4, 2011, the City filed a Petition to Intervene and Response in Opposition to the Petition for Declaratory and Interim Relief.

On March 14, 2011, the Companies filed their Response to the City's Petition to Intervene.

On March 21, 2011, the City filed its Reply to the Companies' Response to the City's Petition to Intervene.

On April 6, 2011, the Companies filed their Correction to the Companies' Response to the City's Petition to Intervene.

On April 19, 2011, after review of the initial Petitions, the Commission issued an Order naming Morgantown Energy Associates ("MEA") as Respondent in the case; granting the City's Petition to Intervene; and granting interim relief to the Companies, prohibiting MEA and the City from selling or transferring, or committing to sell or transfer any RECs that are generated from their qualifying facilities pursuant to *West Virginia Code* §24-2F-1 *et seq.* and the Portfolio Standard Rules.

On May 20, 2011, the City, MEA, the Companies, the Commission's Consumer Advocate Division ("CAD") and Staff filed Initial Briefs. Reply Briefs were filed by the City, the Companies, and MEA on May 27, 2011.

Through orders issued July 29, 2011, August 1, 2011, and August 17, 2011, the PSC set the case for an evidentiary hearing, which was held on August 25, 2011 and August 26, 2011.

On November 22, 2011, the Commission issued its Order on the Joint Petition for Declaratory Relief.

On December 14, 2011, MEA filed its Motion To Stay the November 22, 2011 Order. On December 15, 2011, the City filed its Response In Support of MEA's Motion To Stay. On December 20, 2011, the Commission issued an Order granting a stay pending appeal.

B. Statement of Facts

The City owns and operates the Hannibal Lock and Dam hydroelectric facility ("Hannibal Project"), located on the Ohio River in the City of New Martinsville, Wetzel County, West Virginia. The Hannibal Project is a "run-of-the-river" hydropower generating facility, which is a renewable energy resource generation facility.[1] As a result of the Commission's Order entered July 20, 2011 in Case No. 11-0291-E-P (Appendix), the energy generated at Hannibal is entitled to two RECs for every megawatt hour of electricity generated. *West Virginia Code* §§24-2F-3(13)(D); 24-2F-4(b)(2).[2]

On April 1, 1986, Mon Power and the City entered into to an Electric Energy Purchase Agreement ("EEPA") under PURPA. The EEPA requires Mon Power to purchase all of the capacity and energy generated at the Hannibal Project at rates based on Mon Power's avoided cost until the EEPA expires in 2034. The Hannibal Project began commercial operation in October 1988. The EEPA was amended July 1986 (the "July 1986 Amendment"), and in March 2004, a Termination and Amendment Agreement (the "2004 Amended Agreement") further amended the EEPA. The EEPA, the 1986 Amendment, and the 2004 Amended Agreement are

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1 See *West Virginia Code* §24-2F-3(13)(D).

2 The Commission's November 22, 2011 Order, at 19, mistakenly states that an electric utility is entitled to one credit per each megawatt hour of energy purchased from a renewable energy resource facility.

all governed by PURPA. The PSC approved the EEPA by Order dated May 9, 1986 in PSC Case No. 86-169-E-PC (Appendix). Thereafter, by Order entered August 8, 1986 (Appendix), the PSC approved the ratemaking treatment for the power purchased by Mon Power under the EEPA.

In 2009, the West Virginia Legislature enacted the Alternative and Renewable Energy Portfolio Act ("Portfolio Act" or "Act"), *West Virginia Code* §24-2F-1 *et seq.* The Act required the Commission to create a system of tradable RECs to create, verify, and monitor the generation and sale of electricity generated from alternative and renewable energy resource facilities. *West Virginia Code* § 24-2F-4. Electric utilities are required to own an amount of RECs equal to a certain percentage of electricity sold in the preceding calendar year. *West Virginia Code* § 24-2F-5.[3] Pursuant to 150 C.S.R. § 34-8.1, electric utilities are required to submit Portfolio Standard Compliance Plans to the PSC for its review and approval.

The EEPA, the July 1986 Amendment, and the 2004 Amendment were all executed prior to the enactment of the Act. The EEPA and the July 1986 Amendment were created prior to the concept of RECs. The EEPA and the Amendments thereto are silent on the issue of ownership of and entitlement to the RECs generated from the Hannibal Project.

On December 30, 2010, the Company, in PSC Case No. 10-1912-E-CP, filed an Alternative and Renewable Portfolio Standard Compliance Plan with the Commission for its approval. The Company's Compliance Plan claimed ownership to the RECs from the Hannibal Project to meet its obligations under the Act.

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[3] By Order entered July 30, 2010 and reiterated in an Order entered November 5, 2010, in General Order No. 184.25 (Appendix), the Commission ruled that the Portfolio Standards would apply to all electric utilities operating in the State, including rural electric cooperatives, municipally-owned electric utilities or utilities serving less than thirty thousand customers.

On January 3, 2011, the City, in PSC Case No. 11-0009-E-CP, filed its Alternative and Renewable Portfolio Standard Compliance Plan with the Commission for its approval. The City's Compliance Plan also claimed ownership to the RECs generated from the City-owned and operated Hannibal Project.

As a result of the Company and the City both claiming the RECs from Hannibal in their Compliance Plans, the Company sought the declaratory order from the PSC requesting that the PSC decide which entity owns the RECs.

C. PSC Order

The PSC issued its Order on November 22, 2011. In the Order, the Commission held that PURPA required electric utilities to purchase power from generating facilities known as qualifying facilities ("QFs").[4] Specifically, PURPA requires electric utilities, such as the Companies, to purchase power from QFs in long term EEPAs at the utilities' avoided cost.[5] Citing the applicable federal regulation, the Commission defined "avoided cost" as the incremental energy and capacity cost that the utility would have incurred from generating the electricity or purchasing the electricity from another source but for the purchase of the electricity from the QF.[6] The Commission then correctly stated that QFs are exempt from state law or regulation with respect to the rates of electric utilities.[7]

Because the Commission acknowledged that it is legally barred from changing an avoided cost rate under PURPA, the Commission side-stepped an overt finding that granting the RECs to the Companies will alter the avoided costs that the Companies pay the City for energy.

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4 November 22, 2011 Order at 11.

5 *Id.*

6 *Id.*

7 *Id.* at 12.

Instead, the Commission found that granting the RECs to the City would be unfair to the Company's West Virginia rate payers "when Mon Power was required to purchase the electricity from the QF facilities and when the QFs have received favorable treatment under the EEPAs because of PURPA . . . ."[8] However, even in the Commission's findings, the cost of the energy is so intertwined with the cost of the RECs that the Commission simply could not avoid coming to a conclusion that would fundamentally change the avoided cost of energy in the EEPA. This is because the West Virginia rate payers purchased energy from the Companies based on a rate that was determined by the avoided cost. Essentially, the Commission has improperly judged the policy of PURPA by concluding that the Company paid too much for energy because of "favorable treatment" that PURPA provided to the City, and is now giving the Company a refund on their PURPA contract. The Commission has used hindsight to change the avoided cost of the energy generated at the Hannibal Project. Accordingly, the PSC has overstepped its authority and has contravened clear federal law exempting the energy rates in the Hannibal EEPA from state regulation.

In the same vein, the Commission has dismissed the City's argument that the EEPA – that is silent towards RECs – cannot transfer RECs to the Companies because the plain face of the EEPA does not transfer the RECs to the Companies.[9] The Commission found that "[p]ursuant to the EEPAs, the utility owns the electricity. Because RECs are created at the time the electricity is generated, the purchaser and owner of the electricity at the time electricity is generated owns the [RECs] as well."[10] This logic is flawed for several reasons. First, the Commission previously found that the RECs were valued at thirty-six million dollars. To read

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8 *Id.* at 32.

9 *Id.* at 36.

10 *Id.*

into the EEPA a non-existent clause that transfers a thirty-six million dollar commodity is completely unfounded and unconscionable. Second, by finding that the purchaser of the energy also purchased the RECs, the Commission has explicitly found that the energy and RECs were a bundled purchase. This finding is in contravention of the plain language of PURPA's definition of avoided costs.[11]

In arriving at its decision to award the RECs to Mon Power, the Commission ignored an important precedent from this Court in failing to recognize that, at the time of the 2004 Amendment to the EEPA, Mon Power was aware of the fact that the Hannibal Project would produce valuable renewable energy credits and failed to address such in the 2004 Amendment.

Finally, in finding that the Hannibal Project credits were transferred to Mon Power at the time of its purchase of energy from the City in 1986, the Commission departed from its own Rules which establish that such credits are available to producers of energy, such as the City, and can be either bundled with or sold separately from energy produced by a qualifying resource. In the case of the Hannibal Project, the Commission's decision contravened such rule by asserting that, notwithstanding the fact that there was no contractual agreement to transfer such credits, the credits were owned by Mon Power as a result of the purchase of energy.

III. SUMMARY OF ARGUMENT

The Public Service Commission's decision to award Renewable Energy Credits ("RECs") associated with the energy produced by the City of New Martinsville's Hannibal Hydro Project improperly results in a reduction of the avoided cost rate approved for the sale of such energy under the provisions of the Public Utilities Regulatory Policy Act of 1978. Having approved the reasonableness of the avoided cost rate associated with the sale of such energy in

11 *Id.*

1986, the Commission is now, both under federal law and its own precedent, precluded from modifying such avoided cost determination. The reduction in the avoided cost rate results from the Commission's decision to award the Hannibal Project RECs valued at $36 million to Mon Power without providing any consideration to the City in return. This decision not only denies the City and its own utility customers of the value of the RECs, but causes the City to have to acquire RECs of its own to satisfy its obligations under the state's Portfolio Act while permitting Mon Power to meet its obligations under the Portfolio Act at no cost.

In arriving at its decision, the Commission improperly rejected the applicability of a decision of this Court in the case of *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003) that dealt with facts that are virtually on all fours with the facts of this case. In the *Energy Development Corporation* case, the Court determined that where a latent ambiguity existed in a natural gas lease, which, at the time that it was executed failed to address the right to coal bed methane, the agreement should be construed in favor of the lessor and the right to the coal bed methane, unless specifically stated to the contrary, remains with the lessor. In this case, the parties to the 1986 Hannibal Project energy purchase agreement did not address ownership of RECs because there was no knowledge of their existence at the time of the execution of such contract. However, the evidence before the Commission established that, at the time the Hannibal Project EEPA was amended in 2004, Mon Power was aware of the existence of RECs and the potential that RECs would be available as a result of the energy produced at the Hannibal Project, but chose not to make the City aware of the existence and potential value of such credits. The evidence also disclosed that the City was not aware of the existence and potential value of such credits at the time of the 2004 amendment to the agreement. Had the Commission properly applied the holding of the Court in the *Energy Development Corporation* case, the RECs should have been awarded to the City.

The Commission, rather than relying on its previously promulgated rules which established that producers of electric energy are entitled to the award of RECs under the Act, improperly conducted a balancing test to determine ownership and rejected the language of its own rules. In the conduct of an unnecessary balancing test, the Commission improperly skewed the balance in favor of Mon Power at the expense of the City and its customers. In departing from its own properly adopted rules, the Commission has abused its authority.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As an appeal of a decision of the Public Service Commission pursuant to the provisions of *West Virginia Code* §24-5-1, Rule 14 of the Rules of Appellate Procedure ("R. App. P.") is applicable to this Petition. Rule 14(d) of the R. App. P. states that the Petitioner's Brief should substantially follow the format provided in Rule 10. Rule 10(c)(6) states that the Party seeking oral argument must state whether the case should be set for a Rule 19 argument or a Rule 20 argument. This case is appropriate for a Rule 20 argument in that it involves a case of first impression both by the PSC and by this Court and it involves an issue of fundamental public importance regarding the rights of parties to a contract mandated by federal law.

V. ARGUMENT

A. Standard of Review.

In its recent decision in the case of *Jefferson Utilities, Inc. v. Public Service Commission et al.*, Docket No. 11-0505, (June 22, 2011), this Court reiterated the Standard of Review of decisions of the Public Service Commission as follows:

In Syllabus Point 1 of *Central West Virginia Refuse, Inc. v. Public Service Commission of West Virginia*, 190 W. Va. 416, 438 S.E.2d 596 (1993), this Court explained:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

This Court has also advised that

> "' [a]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.' *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, [99 S.E.2d 1 (1957).]" Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970).

Syllabus Point 1, Broadmoor/Timberline Apartments v. Public Service Commission of West Virginia, 180 W. Va. 387, 376 S.E.2d 593 (1988).

B. The PSC erred in awarding the Renewable Energy Credits associated with the City of New Martinsville's Hannibal Hydro Project to Monongahela Power Company on the basis of the fact that the Company was the purchaser of energy pursuant to a contract entered into in 1986 under the provisions of the Public Utilities Regulatory Policy Act of 1978.

The Commission is preempted from modifying the price paid by Mon Power for energy from the Hannibal Project

This case involves a question of whether the owner of electric energy generation facilities, the City, or the purchaser of the energy from such facilities, Mon Power, is entitled to claim ownership of the Renewable Energy Credits associated with such energy when the contract between the two parties entered into in 1986 is silent on the issue.

All of the parties before the Public Service Commission in the case that is being appealed from, as well as the Commission itself, recognized that this case is one of first impression.

RECs did not exist in West Virginia until the passage of the Portfolio Act, *West Virginia Code* §24-2F-1 *et seq.* in 2009. Further, the right of a party to claim such RECs as their own did not become an issue in West Virginia until the issuance of an Order by the Commission under the Act in November 2010.[12] And, finally, neither the Act, nor the Commission's General Order No. 184.25 through which it promulgated its Rules Governing Alternative and Renewable Energy Portfolio Standards, ("Portfolio Standard Rules"), 150 C.S.R. 34, addressed the issue of the ownership of credits under contracts entered into prior to the Act.

The Commission, in its General Order No. 184.25, made three rulings that are significant to the City's position in this case.

First, the Commission ruled, pursuant to §24-2F-10(a) of the Act, that "the portfolio standard requirements should be applied equally to the state electric utilities." [13] Through this ruling, the Commission established that, as a municipally owned electric utility that provides electric service to its citizens, the City would be required to meet the portfolio requirements of the Act.

Second, the Commission ruled, pursuant to §24-2F-10(b) of the Act, that RECs would be awarded to nonutility generators of electricity from alternative and renewable resources.[14] Thus, through the City' ownership of the Hannibal Hydro Project which produces power sold to Mon Power, as well as its status as an electric utility, the Commission recognized that the Hannibal Project would be eligible for certification under the Act and the award of credits.

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12 See, General Order No. 184.25 entered November 5, 2010 in Appendix.

13 *Id.* at 4 - 5.

14 *Id.* at 5 - 6

Third, the Commission established in its Order adopting the Portfolio Standard Rules that RECs "may be bundled with the purchase of power or may be unbundled and held or sold independently from the underlying power."[15]

Boiled down to its nub, the effect of the Act and the Commission's General Order No. 184.25 was to establish that the RECs associated with the production of energy at the City's Hannibal Project, a run of the river hydroelectric facility constructed by the City in 1988, were a valuable commodity that, under West Virginia's Portfolio Standards Act, or, under similar legislation in another state, could be sold, or acquired or retained for compliance purposes.

Because the contract between the City and Mon Power for the sale of the energy generated by the Hannibal Project predated the establishment of the concept of RECs, not only in West Virginia but in every other jurisdiction, there is no reference in the 1986 agreement to the ownership of the RECs.

It is within this context that the Commission was asked by Mon Power to enter an order declaring the ownership of the RECs associated with the energy generated by the City's Hannibal Project belonged to Mon Power as the purchaser of the energy produced by the plant. In its lengthy Order, the Commission has ranged far and wide in arriving at a decision in favor of the Company. However, in doing so, it has exceeded its authority and has violated a fundamental precept of the Public Utilities Regulatory Policy Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117, as codified and amended throughout sections of 16 U.S.C.

The issue of the ownership of RECs as between producers and purchasers of electric energy pursuant to PURPA contracts was first addressed by the Federal Energy Regulatory Commission ("FERC"). In 2003 FERC issued an order in *American Ref-Fuel Company*, 105

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15 *Id.* at 9 – 10.

FERC ¶ 61,004 (October 1, 2003)[16], and held that, in power purchase agreements that are silent as to the ownership of RECs, each state retains the authority to determine whether the buyer or seller owns the RECs. The petitioners in that case, owners of waste-to-energy power plants that were certified as QFs, sought interpretation of FERC's avoided cost rules under PURPA, specifically seeking an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any RECs or similar tradable certificates.[17]

The FERC granted the petition "to the extent that the petition asks that the Commission declare that the Commission's avoided cost regulations did not contemplate the existence of RECs and that **the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.**"[18] (emphasis added).

FERC, interpreting PURPA, deferred to the plain language of the contract and found that contracts for sale of QF capacity and energy, entered into pursuant to PURPA, do not control the ownership of the RECs. Moreover, FERC found that RECs were a creation of state law, and the transfer of ownership of state-created RECs must find its authority in state law.

The FERC's decision, however, does not allow the Commission to rule in such a way that adjusts the avoided cost that it previously approved between the seller and purchaser of energy. Pursuant to PURPA, electric utilities were required to purchase, at avoided cost, the energy and capacity generated from qualifying co-generation and small power production facilities that met the requirements set forth in FERC's regulations.

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16 See Appendix.

17 *American Ref-Fuel Company*, 105 FERC ¶ 61,004 (October 1, 2003) at ¶ 61,005.

18 Id. at ¶61,007

The term "avoided costs" is defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."[19] The factors to be considered in determining avoided costs include (1) the utility's system cost data; (2) the availability of capacity or energy from a Qualifying Facility ("QF") during the system daily and season peak periods; (3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and (4) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.[20]

While this is the first time the Commission has addressed the issue of RECs in the context of a PURPA contract, it is not the first time that the Commission has considered its jurisdiction and authority to modify the terms of such a contract to the benefit of one of the parties thereto. In the case of *American Bituminous Power Partners, L.P. v. Monongahela Power Company*, Case No. 87-669-E-C (Order entered March 29, 1996) the Commission stated:

> It seems clear to the Commission that PURPA works toward preserving the benefit of the bargain for both developers and utilities as is evident by the preamble to the FERC's PURPA regulations which states "[t]his provision can also work to preserve the bargain entered into by the electric utility." 45 Fed. Reg. 12224 (1980).[21]

In concluding that it was preempted from revisiting the contract to modify the avoided cost rate approved eight (8) years earlier, the Commission relied upon the decision in *Freehold*

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19 18 C.F.R. § 292.101(b)(6).

20 *Id.* at §292.304(e).

21 *American Bituminous Power Partners, L.P. v. Monongahela Power Company*, Case No. 87-669-E-C (Order entered March 29, 1996) at 4-5 (Appendix).

Cogeneration v. Bd. Of Regulatory Commissioners of N.J., 44 F.3d. 1178 (3rd Cir. 1995). In reference to the holding in the *Freehold* case, the Commission stated:

> Likewise our jurisdiction to implement the PURPA regulations ended in 1987 after our approval of the purchase power contract between the developers and MP became non-appealable. We are not free to reopen the case and modify the terms of the contract. As the Freehold Court explicitly stated "in this instance, there is specific federal statutory legislation, PURPA, that bars reconsideration of the prior approval of the PPA." [citation omitted] Although the Developers attempted to distinguish Freehold, we are persuaded that the clear unambiguous holding in Freehold controls.[22]

The 1986 Electric Energy Purchase Agreement ("EEPA") entered into on April 1, 1986 by the City and Mon Power, was approved by the Commission under its statutory authority and its Rules adopted to carry out the provisions of the Public Utilities Regulatory Policy Act of 1978 ("PURPA") by Order entered in *Monongahela Power Company and the City of New Martinsville*, Case No. 86-169-E-PC (May 9, 1986) (Appendix). That Order established that the terms and conditions of the EEPA were just and reasonable and the agreement was in the public interest. Thereafter, in a separate Order entered after public notice, the Commission granted Mon Power's request for ratemaking treatment to pass through all charges payable under the EEPA to the company's ratepayers through Mon Power's rates. In doing so, the Commission found that the contract charges for capacity and energy were just and reasonable.[23]

In its attempt to side-step obvious federal preemption issues in its November 22, 2011 Order, the Commission paid lip service to the holding of the *Freehold* Court by asserting that it was not modifying the existing PURPA Agreements but rather "determining the ownership of

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22 *Id. at 6.*

23 See, *Monongahela Power Company and the City of New Martinsville*, Case No. 86-169-E-PC (August 8, 1986)(Appendix).

the credits in light of state law."[24] In fact, other provisions of the Commission's Order belie that statement and make it quite clear that the Commission's decision was entirely related to the amount paid by Mon Power under the EEPA.

At page 28 of its Order, the Commission stated: "[t]he PURPA facilities received what they bargained for, and all that they were entitled to, when agreements were finalized setting forth the avoided cost rates and terms that would apply to the final EEPAs." Further, the Commission specifically addressed the reasonableness of rates associated with the EEPAs in expressing the scope of its analysis in the following terms:

> In the absence of specific statutory provisions in the Act governing the ownership of the credits under the EEPAs, the Commission must construe the Act [sic] provisions, together with the provisions of Chapter 24 requiring the Commission to prescribe rates, to determine just and reasonable rates, and to balance the interest of the current and future ratepayers, the utilities, and the state's economy.[25]

At page 31 of its Order, the Commission discussed the impact of the PURPA obligations upon Mon Power and the Commission as if the West Virginia ratepayers of Mon Power were somehow negatively impacted by the Company's obligation to purchase power from the City. In doing so, the Commission suggests that requiring the Company to have to acquire RECs from the City, or any other source, would be unreasonable, when the Company has already purchased energy that produces the RECs:

> . . . it would be unreasonable and contrary to State law to disregard the benefits of the fuel attributes of the PURPA facilities under recent state law creating the RECs and conclude that the RECs are not an integral and inseparable component of the energy that we have required be purchased on behalf of, and paid for by, West Virginia ratepayers.[26]

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24 See November 22, 2011 Order at 37.

25 *Id.* at 29.

26 *Id.* at 31.

The Commission's attempt to justify its decision by asserting that the ratepayers of Mon Power have some how borne a financial burden with the purchase of energy from the Hannibal Project is both misplaced and self-serving. It was the City, not Mon Power, that took the risk of developing a source of energy during the time that our country was in need of reasonably priced power. When the Commission asserts that the City received what it bargained for, the Commission fails to state that the Company and its customers also got what they bargained for, as previously recognized by the Commission in its 1996 *American Bituminous Power Partners* decision, *supra*. The Commission's approval of the EEPA and the avoided cost rate is clear evidence of that.

The Court should also understand that the Commission was not obligated to approve the EEPA with the City. In fact, in another case involving an EEPA for a proposed PURPA project, the Commission denied its approval. In the case of *Monongahela Power Company, The Potomac Edison Company, and Clairton Cogeneration Company*, Case No. 92-0158-E-PC, in an Order entered March 13, 1992 (Appendix), the Commission specifically disapproved an EEPA between the Clairton Cogeneration Company and the Companies where the Commission Staff asserted that the Mon Power had no need for additional capacity and, with the lack of need for capacity, Mon Power's avoided cost should be zero or very close to zero. The Commission's approval of the EEPA for the Hannibal Project stands in stark contrast to such situation. By its approval of the EEPA for Hannibal, the Commission determined that the project was needed and that the avoided cost rate was reasonable.

As tempting as it may be to settle for a solution that would enable the Company to avoid the cost of acquiring RECs from any of the PURPA projects, as the Commission clearly did, the Court must recognize that in order to do so, it must determine, contrary to the evidence, that these RECs have no value. Otherwise, the award of RECs to the Company must result in a repricing of, and diminution of, the cost of energy from the Hannibal Plant.

In reality, the Commission's decision to award the RECs to Mon Power without making any provision for consideration to the City, conveyed a benefit to Mon Power which it valued at $36 million for the period between 2011 and 2025; with an additional nine (9) years remaining in the EEPA where the Company can do with such RECs as it wishes. To suggest that this decision does not result in a prohibited repricing of the energy produced by the Hannibal Project under the EEPA strains credulity.

The Commission's November 22, 2011 Order is based
<u>entirely on the cost of energy purchased by Mon Power</u>

Mon Power, like the City, has a duty under the Act, to acquire sufficient RECs to satisfy its obligations. The credits to satisfy Mon Power's portfolio requirements, like those to satisfy the City's requirements, can be acquired from any certified alternative or renewable energy resource. They do not have to come from the City's Hannibal Project or any other PURPA project. In its wisdom, the Commission has determined that, when Mon Power contracted to acquire the energy from the Hannibal Project under the EEPA, it also acquired renewable credits valued at $36 million during the life of the Act, which it can use either to satisfy the portfolio requirements or, if it has more RECs than it needs, it can trade those credits to another utility; by way of example, as suggested by the Commission, the City. However, absent from any potential reading of the definition of "avoided cost" is any mention of environmental attributes. Indeed, FERC specifically held that RECs were not included in avoided costs.

The entire purpose of the Company's effort to obtain a ruling from the Commission on the ownership of the RECs was to determine whether the Company would have to acquire RECs from the City or another source in order to comply with the Act. Indeed, Mon Power asserted:

> If Mon Power's entitlement to the Hannibal Credits were not recognized and the Hannibal Credits were removed from their current place in the Companies' Compliance Plan, replacing that loss would cost the Companies' customers over **$36 million** during the 2011-2025 period. (Emphasis in the original)[27]

Recognizing this valuation of the RECs by Mon Power, and basically as a result of such valuation, the Commission entered a decision that has resulted in Mon Power receiving all of the RECs associated with the Hannibal Project without requiring that any consideration be given to the City in return. In fact, following a discussion of the City's suggestion that the Commission split the RECs between the City and Mon Power, the Commission, rather than recognize the value of the RECs to the City as the generator of the Hannibal energy and as an electric utility subject to the Act, gratuitously suggested that the City could purchase the RECs from Mon Power to satisfy its compliance needs.[28]

As a result, the Commission's entire analysis of the ownership of the RECs is tied to the cost to Mon Power and its customers associated with acquiring the RECs. If the RECS have no value, the Commission would not have needed to conduct its analysis of reasonableness which it uses to defend awarding the RECs to the Company. However, because the RECs do have value, but the Commission has failed to permit the City to receive any value for the production of the

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[27] Companies' Response To The City of New Martinsville's Petition To Intervene And Initial Joint Staff Memorandum at 8. See Corrected Version at Companies' Hearing Exhibit 3.

[28] The Commission stated at page 34 of the Final Order as follows:

> . . . [i]f Companies agreed to provide a sufficient number of credits to City to meet City's portfolio standard requirements at a cost that benefits City customers, the Commission would favorably consider such a proposed agreement.

RECs, the Commission has effectively repriced the energy produced at the Hannibal Project; something it has acknowledged that it cannot do under PURPA.

C. The PSC erred in rejecting the applicability of the Court's decision in *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003) to the facts of this case in light of the 2004 Amendment to the EEPA.

The Commission, in cobbling together its November 22, 2011 Order, asserted that it relied upon its interpretation of state law by referring to its general authority under Chapter 24 of the *Code* rather than seeking guidance from contract law and prior decisions of this Court. In deciding to conduct a balancing test under its general regulatory authority, the Commission rejected the City's assertion that a recent decision of this Court was on all fours with the facts of this case. The City had argued that because the EEPA, as amended in 2004, lacks any mention of RECs, it contains a latent ambiguity, and, as result, under the facts of this case and the holding of this Court in *Energy Development Corp. v. Moss, et al.*, 214 W. Va. 577; 591 S.E.2d 135 (2003) the RECs belong to the City.

In the *Energy Development Corp.* case, this Court addressed a directly analogous issue. There, the Court considered the question of whether a standard oil and gas lease executed in 1986 conveyed to the lessee the right to drill into the lessor's coal seams in order to produce coalbed methane, absent any specific language on the issue. In 1986 when the lease was signed, coalbed methane was a relatively new energy source that had not been commercially available in West Virginia.[29] The *West Virginia Code* did not contemplate coalbed methane development. The lease transferred all of the oil and gas and "all constituents of either in and under the land hereinafter described in all possible productive formations . . . ."[30]

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29 591 S.E.2d 141.

30 *Id.* at 139.

The Court determined that the lease, absent a clear conveyance of the coalbed methane, contained a latent ambiguity and, as a result, the lease was ambiguous.[31] Having determined that an ambiguity existed, the resolution turned on the parties' intent. *Id.* (citing *Fraternal Order of Police, Lodge Number 69 v. City of Fairmont*, 196 W. Va. 97, 101 n.7, 468 S.E.2d 712, 716). The Court stated that when an agreement is ambiguous, "a court is loath to adopt a construction that places a large and possibly never-considered burden on one of the parties; generally, a court will not find an implied right to conduct a given activity (not mentioned in the lease) unless that activity is clearly demonstrated to have been a common practice in the area, at the time of the lease's execution."[32]

Based on the intent of the parties, including the fact that the lessee may have been aware of the value of the coalbed methane when the lease was executed but the lessor was not, and that no coalbed methane wells had been drilled in the area, the Court held that, in absence of specific language to the contrary or other indicia of the parties' intent, the lease did not give the lessee the right to drill for coalbed methane gas.[33] The Court looked to what the language meant to the parties at the time of conveyance and "examined the terms used in light of the common

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31 *Id.* at 143-144. As the Court found in *Energy Development Corp.*, a latent ambiguity does not appear on the face of the document; rather it may be created by intrinsic facts or extraneous evidence. *Kopf v. Lacey*, 208 W. Va. 302, 307, 540 S.E. 2d 170, 175 (2000); see also *Snider v. Robinett*, 78 W. Va. 88, 93, 88 S.E. 599 (1916). The EEPA and the 2004 Amended Agreement do not reveal any ambiguities regarding the RECs on their face because the ownership of the RECs was not expressly provided for in the agreements. They were silent on this issue. The ambiguity surfaced years later as the RECs became relevant and the Companies claimed that the RECs were transferred with the electricity in the agreements.

32 *Id.* at 145.

33 *Id.* at 146.

understandings, along with other facts and circumstances during the time period" and found that "one making a grant of one interest need not specifically reserve every other possible interest."[34]

Like the lease for oil and gas in *Energy Development Corp.*, the 2004 Amendment to the EEPA resulted in an amendment to the terms of an agreement that transferred a specific asset, capacity and electric energy, to the Mon Power. Similar to an additional asset like coalbed methane, at the time the EEPA was executed, RECs were never contemplated because they did not exist and were not a part of the West Virginia marketplace and the EEPA, like the lease, had no provisions for the additional asset. However, at the time of the 2004 Amendment, the Company was clearly in possession of information regarding the potential that there were tradable credits associated with the energy produced by the Hannibal Project and even considered addressing the issue during the negotiations of the amendment. The City was totally unaware of the matter of tradable credits.

Specifically, Mon Power's response to the City's discovery request clearly reflects that, at the time the City and Mon Power were in negotiation of amendments to the EEPA, Mon Power was aware of the existence and potential value of RECs and the Company's Mr. Reeping discussed with outside counsel involved in the negotiation of the 2004 Amendment to the EEPA whether the matter of RECs should be discussed with the City during the negotiations.[35] The City has not been permitted to see the contents of a 2003 e-mail message between Mon Power and its outside counsel.[36] However, during his testimony before the Commission, Mr. Reeping admitted that he raised the issue of the RECs with outside counsel as an item of consideration for

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34 *Id.* at 150.

35 See, May 13, 2011 Response of Mon Power to City Discovery Request No. I-26 and the confidential e-mail attached in a sealed envelope as Exhibit A to the Company's May 24, 2011 Response to the City's Motion to Compel.

36 At pages 43 – 45 of the November 22, 2011, the Commission discussed its confidential treatment of the e-mail which the City attempted to obtain through discovery.

the negotiations.[37] For reasons known only to the Company, it was decided by Mon Power and its counsel that the matter of RECs would not be brought up during such negotiations.

The City established that it was not aware of the issue of RECs or their potential value at the time of the negotiation of the 2004 Amendment to the EEPA.[38] In fact, both the testimony of the City's witnesses and the Company's Mr. Reeping establish that the City did not become aware of the possibility of the tradability of RECs until after the 2004 Amendment to the EEPA. Further, a letter from the City's attorney to Mon Power dated February 6, 2007 clearly establishes that nearly three (3) years after the execution of the EEPA, the City remained unaware of the significance of the certification and ownership of RECs associated with the Hannibal Project.[39]

Had the City shared the same knowledge, the negotiation of the 2004 Amendment would have been the opportunity for both parties to address the ownership issue. In upholding the lower court's decision in *Energy Development Corp.*, this Court agreed with the Circuit Court's determination that the leases should be construed in favor of the lessors and against the lessee and observed that "the lessor may often be at an informational or technical disadvantage, and must often rely upon the advice of the lessee or his or her agent."[40]

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37 See pages 91 – 96 of the transcript of the August 25, 2011 hearing.

38 See, Affidavit of Bonnie Shannon, City Recorder for the City of New Martinsville attached as Exhibit 1 to the City's May 20, 2011 Initial Brief and testimony of Charles Stora at page 174 -76 pf of the hearing held on August 25, 2011.

39 See New Martinsville Exhibit 2 entered into the record of the August 26, 2011 hearing wherein counsel for the City requested an explanation of the significance of the certification of the Hannibal Project in Delaware and other states to both the City and Mon Power.

40 591 S.E.2d at 144.

While the Commission failed to see the 2004 Amendment as a significant change in the EEPA, the facts suggest otherwise and clearly show that the negotiation of such Amendment was the opportune time to discuss the ownership issue. The very first page of Post Hearing Commission Request Exhibit 2, filed by Mon Power on August 30, 2011, clearly shows that immediately following the 2004 Amendment to the EEPA, the price paid by Mon Power for energy from the Hannibal Project went from more than $60.00 per megawatt hour to less than $10.00 per megawatt hour. From 2004 to 2010, the price never exceeded $19.02. Thus, with the reduction in the price of energy arising out of the amendment to the EEPA, it would have been an opportune time for the parties to negotiate the possible transfer of RECs.

The Commission should have looked to what the language meant to the parties at the time of the 2004 Amendment to the EEPA and "examine[d] the terms used in light of the common understandings, along with other facts and circumstances during the time period" and found that the RECs could not "implicitly" pass to the Companies by virtue of the purchase for electricity.[41]

In 2004, the issue of tradable credits existed and was known to the Company. Mon Power, already having knowledge of the tradability of credits, would have known that RECs, under PURPA, were a separate asset that must be contracted for and sold pursuant to its own terms- separately from the capacity and energy under the EEPA. Because of the latent ambiguity in the 2004 Amendment, the Commission should have been "loath to adopt a construction that places a large and possibly never-considered burden on one of the parties."[42] Here, the City is burdened because it will be denied the value of what it has not sold; the RECs, a commodity that

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41 Energy Development Corp., 591 S.Ed.2d at 150.

42 *Id.* at 145

it also needs. Clearly an outcome never considered by the City when it signed the EEPA or the 2004 Amendment.

The Commission incorrectly rejected this argument. The Commission concluded that *Energy Development Corp.,* was not applicable because the parties to the natural gas leases in that case were aware of the existence of coal bed methane gas and failed to address its ownership specifically in the lease. Whereas here, the Commission found that neither the City nor the Company were aware of the existence of RECs at the time of the execution of the EEPA in 1986 because RECs did not exist. In so doing, the Commission erred in limiting its analysis to the issue of the latent ambiguity to the 1986 EEPA and failed to come to grips with the fact that the evidence disclosed that, when the EEPA was amended in 2004, Mon Power was specifically aware of the existence and significance of RECs, whereas the City was not. Like the natural gas leases in *Energy Development Corp.,* the EEPA as amended in 2004 has a latent ambiguity, absent the conveyance of RECs to the Company.

To the extent that the Commission rejected the significance of the Reeping e-mail on the basis of the fact that it predated the FERC decision in *American Ref Fuel, supra*, the Commission totally ignored the relevance of the fact that, at the time of the negotiation of the 2004 Amendment, Mon Power had knowledge of the significance of the Hannibal RECs and the City did not.

The Commission's Order simply ignores the significance of the 2004 Amendment and the decision of this Court in *Energy Development Corp.*, to the FERC decision in the *American Ref-Fuel Company* case. Mon Power's intent in the 2004 Amended Agreement was clearly not to address the transfer of RECs with the energy associated with the Hannibal Project electricity and the latent ambiguity in the 2004 Amended Agreement must be construed against Mon Power.

D. The PSC erred in failing to adequately balance the interests of the City of New Martinsville as both a producer of electricity and a public utility subject to the requirements of the state's Alternative and Renewable Energy Portfolio Act ("Portfolio Act" or "Act") with the interests of the Company.

In attempting to justify its decision to award the RECs to Mon Power, the Commission found it necessary to engage in a balancing of interests test which it asserted was a balancing of the interests of current and future ratepayers, the utilities and the State's economy under *West Virginia Code* §24-1-1(b). In doing so, the Commission stated that it referred to its general authority because there is nothing in the Act and Portfolio Standard Rules specifically addressing the transfer of RECs between parties to a PURPA agreement that predates the Act.[43] Notwithstanding the fact that the Commission did not need to engage in such an analysis, a fair evaluation of the Commission's decision reflects that, in engaging in such an analysis, the Commission unreasonably skewed its balance towards the interest of Mon Power and its ratepayers and against the City and its ratepayers.

First, the Commission asserted that "[o]n balance, the rate impact on City customers is significantly less than the rate impact on the customers of Mon Power and PE with the loss of the QF credits."[44] Even putting the fact that the Company will have to pay the same amount for energy under the EEPA regardless of the outcome of the decision on RECs aside,[45] the Commission's analysis fails to strike a proper balance. In arriving at its conclusion, the Commission relies upon the Companies' assertion that "it will cost at least $50 million through

43 See November 22, 2011 Order at 28-29.

44 November 22, 2011 Order at 31.

45 See the Companies' Response to the City's First Request for Information, I-18.

2025 to acquire the additional credits" if they are unable to rely upon the credits generated from the three PURPA facilities.[46] However, the record shows that the value of the Hannibal RECs for that period of time, based upon the Companies' own figures, would be in excess of $36 million. Thus, the City's generation would account for more than 70% of the Companies' entire need.

Second, the Commission ignored the fact that the Grant Town project has already given its credits to the Companies.[47] Based upon the Companies' own figures, the Grant Town credits for the life of the Act would be valued at more than $49 million.[48]

Third, the Commission failed to provide any support for its determination that the rate impact on City customers is significantly less than the rate impact on the customers of Mon Power with the loss of the credits beyond its calculation of the amount of credits required by both the Company and the City to comply with the Act. In its most simplistic terms, this type of analysis would always lead to a balance in favor of a large utility over a small utility. Obviously, the number of West Virginia customers of Mon Power is significantly greater than the number of electric utility customers of the City. Further, it is unreasonable for the Commission to have based its conclusion on the fact that the City will have enough credits to comply with the Act through 2025 without the Hannibal credits.[49] The only reason that the City will have enough credits to comply without the Hannibal credits is due to the fact that, unlike Mon Power, the City

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[46] November 22, 2011 Order at 31.

[47] See New Martinsville Cross Examination Exhibit No. 3 admitted into evidence at the hearing on August 25, 2011.

[48] During the hearing on August 25, 2011, the Companies introduced revised exhibits to their February 23, 2011 Petition. Revised Table 2, admitted into evidence as Company Exhibit 2, shows that the Grant Town Project will produce 638,000 annual credits. At the cost of $5.14 per credit as used by the Commission at footnote 13 on page 31 of its November 22, 2011 Order, over the 15 year period from 2011 to 2025, the value of the Grant Town credits would be $49,189,800.

[49] November 22, 2011 Order at 32.

has made arrangements for the purchase of energy from renewable energy resources through its power supply agreement with its power supplier. This energy is significantly more expensive than other power purchases available to the City, but the City will be entitled to the benefit of its pro rata portion of the renewable credits associated with the project's facilities, such as the Willow Island Hydroelectric Project now under construction in Pleasants County, West Virginia. Unlike the Company, the City has already specifically contracted for the cost of such energy and credits. If the Commission had properly balanced the interests of the City and its ratepayers together with the interests of the Company and its ratepayers, it would have found that the City's customers would be able to equally benefit from the award of credits through a credit to the cost of power purchased by the City for its customers. This is the same result that the Company's witness Reeping suggested was possible for its customers with some of the excess credits which the Company would have with the award of PURPA credits.[50]

A fourth area where the Commission failed to properly balance the interests of the customers of the City and the Company lies in the fact that, even though the Commission observed that the "Act is scheduled, by its own terms, to terminate after 2025",[51] and the Company has acknowledged that with the award of PURPA credits it will be in an excess credit position through 2025, the Commission has awarded the Hannibal RECs to Mon Power through the life of the EEPA; *i.e.* until 2034.[52] The Commission went to great lengths to denigrate the need of the City for the credits for compliance purposes by asserting that "[t]hese additional

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50 See transcript of hearing held on August 25, 2011 at page 91 where he stated that credits for production from the period of the end of 2004 through the current time could be sold in the market and the revenues credited to Mon Power's West Virginia customers through the expanded net energy charge (ENEC) process of the Commission.

51 November 22, 2011 Order at 32.

52 See Conclusion of Law number 29.

costs to the City are not due to a requirement for credits between now and 2025, but only to build up a bank of credits to carry it to at least 2039". [53] In fact, there is no greater justification for Mon Power to own the RECs after 2025 or for the Company to own the RECs for the period from 2004 to 2011 referred to in Mr. Reeping's testimony *supra*.

Finally, the Commission, at page 34 of the November 22, 2011 Order unreasonably rejected the City's suggestion at the hearing on August 26, 2011 that, with purchases from the Hannibal Project being entitled to 2 RECs for each megawatt hour of energy produced,[54] it could reasonably split the RECs between the City and the Company and the Company would have more than enough RECs for its needs. If the Commission is going to read into the Act an entitlement to the ownership of RECs by the Company that clearly does not exist, it defies reason to reject a compromise that was offered which would provide both the City and the Company with an equal share of the contested RECs. While the City believes that the Company is not entitled to any of the RECs, and that the Commission has had to manufacture a justification for awarding them to the Company that does not exist in law or reason, the City also recognizes that such a sharing of the RECs would be a reasonable means to resolve the conflict.

In short, the Commission has failed, on multiple grounds, to properly balance the interests of the City and its customers with the interests of the Company and its customers. In doing so, the Commission has exceeded its authority.

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53 November 22, 2011 Order at 33.

54 Under *West Virginia Code* §24-2F-4 (b), credits are awarded on the basis of the type of energy resource that produces the energy purchased by an electric utility. One credit is available for each megawatt hour of energy purchased from an alternative energy resource facility; two credits are available for energy purchased from renewable energy resource facilities; and three credits are available for energy purchased from a renewable energy resource facility sited upon a reclaimed surface mine.

E. The PSC erred in departing from its previous ruling that established that producers of electricity were eligible for the award of renewable energy credits under the Portfolio Act.

The Commission's own Rules require a finding that the City owns the RECs because Rule 5.6 grants ownership of RECs to utility generators.

The Act required the Commission to promulgate Rules governing the Act.[55] Once promulgated, the Commission must follow its own rules. *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 256, 539 S.E.2d 757, 763 (2000); *Consumer Advocate Div. of Pub. Serv. Comm'n*, 182 W. Va. 152, 157, 385 S.E.2d 650, 655 (1989). In the adoption of Portfolio Standard Rule 5.6, the Commission expressly addressed the issue of the ownership of RECs.

In its General Order No. 184.25 promulgating the Portfolio Standard Rules, the Commission stated:

> In the absence of a clear statutory directive specifying that the credits under W.Va. Code §24-2F-4 should be awarded to non-utility generators, the Commission has endeavored to construe the statutory provisions of W.Va. Code §24-2F-4 and to follow the intent of the Act in drafting final rules awarding credits to nonutility generators. . . .
>
> Consistent with our interpretation of the Act, the final rules extend the awarding of credits for the generation of electricity from alternative and renewable energy resources under W.Va. Code §24-2F-4 to nonutility generators.

While the Commission's Rules did not address the specific issue of RECs resulting from EEPAs that predate the act, the Commission was clear that RECs are tradable commodities that belong to the generator of electricity. Portfolio Standard Rule 5.6, adopted by the Commission in General Order No. 184.25, carries out the ruling of the Commission as to the ownership issue

55 See, *West Virginia Code* §24-2F-12.

and establishes that utilities can purchase RECs with electricity (bundled) or separate from electricity (unbundled), thus making it clear that, as the party selling RECs to the utilities, the electricity generators – not the utilities – own the RECs.

In its November 22, 2011 Order, the Commission carved out an exception to Rule 5.6 and asserts that Rule 5.6 does not apply to the Hannibal Project because the PURPA contracts existed prior to the Act and the Portfolio Standard Rules.[56] Its reasoning makes no sense. The Act and Portfolio Standard Rules have no provisions authorizing the automatic transfer of REC ownership from seller of energy to buyer of energy. The only provision of the Portfolio Standard Rules that addresses the transfer of ownership of RECs is found at Rule 5.6 which states that RECs can be sold to a utility either bundled with or unbundled from the sale of energy. Rather than recognize that energy sold today from a certified electric energy resource today is no different than energy sold pursuant to a PURPA contract entered into in 1986, the Commission has established two classes of energy contracts. A review of the Commission's Order reveals that the basis for the distinction rests solely on how much Mon Power paid for energy and capacity in the EEPA.

If, under Rule 5.6, a nonutility generator owns the RECs and can sell the RECs under the Act, why would the nonutility generator be stripped of this ownership if a PURPA agreement was executed prior to the Act? The Act does not make a temporal distinction between RECs created before or after the Act.

In the *Consumer Advocate Division* case, *supra*, this Court recounted the role of administrative agencies in the application of its rules as follows:

56 November 22, 2011 Order at 28.

> Interpretation of statutes or rules and regulations is proper only when an ambiguity exits. This Court has recently reiterated this point. Quoting syllabus point 3 of *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970) we stated, in syllabus point 1 of *Ooten v. Faerber*, 181 W.Va. 592, 383 S.E.2d 774 (1989), that even a long-standing "interpretation" by an administrative agency of its own rules should be disregarded when such "interpretation" conflicts with the clear language of the rules: " 'While long standing interpretation by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous.'" In addition, an administrative "interpretation" developed, as here, during or shortly before the involved litigation is entitled to less weight than a long-standing administrative interpretation of administrative rules. *Ooten v. Faerber*, 181 W.Va. 592, 596, 383 S.E.2d 774, 778 (1989). See, 182 W.Va. 152, 156, 386 S.E.2d 650, 654.

Rule 5.6 permits the seller of energy to sell RECs bundled with or unbundled from the sale of energy. Ownership of the RECs is vested in the seller of energy until it chooses to sell the RECs. In adopting the Portfolio Standard Rules, the Commission consciously recognized a separate and distinct asset in the REC that is not intrinsically intertwined and synonymous with the energy generated from the qualifying facility associated with the RECs and the language of the Rule is not related to the date of the execution of the contract for the sale of energy. Now, little more than a year after its adoption, the Commission has fashioned a reading of the Rule that does not comply with either the Act or the Order adopting the Rule.

The Commission's rejection of the applicability of Rule 5.6 to this case cannot be supported by any reference to the Act, or any other provision of law. There is no provision in the Act or in the Commission's Order No. 184.25 that suggests that its Rules would be applicable to energy produced pursuant to contracts executed after the passage of the Act and there is no reason that there should be. The Commission's decision to reject its own Rule is precisely the kind of action which the Court determined should be given little weight. The Rule is clear. Producers of energy, regardless of the date of when a contract for the sale of energy was executed, are entitled to the award of RECs.

In justifying its failure to comply with its Rule, the Commission concluded that the amount of money spent purchasing energy and capacity under the EEPA makes it unfair and inequitable for the City to retain ownership of the RECs. However, the record reveals that the Companies will pay the same sum for electricity through the expiration of the EEPA regardless of whether the Companies own the RECs or not.[57] The purchase of electricity is independent of the purchase of RECs. Equity should not be an issue in this case. Legal ownership of RECs is the narrow issue in this case and the Commission had previously ruled that generators of energy were entitled to the award of RECs. Any dollar amount, whether in the thousands, millions, or billions, distracts from the true question that was before the Commission.[58]

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57 The Companies' Response to the City's First Request for Information, I-18.

58 However, it is important to note that the Act considers costs of compliance with the Act. The purpose of the Act is to provide cleaner energy, reduce harmful emissions into the atmosphere, and generally promote a more eco-friendly business model in the energy utilities field. There are costs associated with such monumental policy changes, and the Act addresses this issue by providing the electric utility the right to recover the costs of complying with the Act. *W. Va. Code* § 24-2F-7.

VI. CONCLUSION

The City of New Martinsville respectfully requests that the Public Service Commission's November 22, 2011 decision in Case No. 11-0249-E-P be reversed and that the Commission be ordered to award the ownership of the Renewable Energy Credits associated with energy produced at the City's Hannibal Project to the City.

CITY OF NEW MARTINSVILLE

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December 22, 2011

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, do hereby certify that I have served the foregoing City of New Martinsville's "Petition For Suspension And Review And Petitioner's Brief", including a copy of the Appendix, upon the following parties on this 22nd day of December, 2011 in the manner so indicated:

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