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I. INTRODUCTION

On April 24, 2012, the Federal Energy Regulatory Commission (“FERC”) issued its “Notice of Intent Not to Act and Declaratory Order” (“FERC Order”)¹ in the combined cases involving the Petitions for Enforcement filed by Morgantown Energy Associates (“MEA”) and the City of New Martinsville (“City”) under FERC Docket Nos. EL12-36-000 and EL12-48-000, respectively. In an Order entered May 1, 2012, this Court ordered the parties to file supplemental briefs addressing “the impact of the FERC Order, including the extent to which additional proceedings before the Public Service Commission of West Virginia are necessary prior to this Court’s resolution of these appeals.”

II. FERC’S APRIL 24, 2012 DECISION SUPPORTS THE CITY’S POSITION THAT IT IS THE RIGHTFUL OWNER OF RENEWABLE ENERGY CREDITS FROM THE HANNIBAL HYDROELECTRIC PROJECT, AND ELIMINATES ANY NEED FOR ADDITIONAL PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION.

A. In the Proceedings Before FERC, the Public Service Commission Conceded That a Decision in the City’s Favor on the PURPA Issues Also Would Decide the REC Ownership Issue.

At paragraph 35 of the FERC Order, FERC recounted a key element of the Public Service Commission’s position in the following words:

According to the West Virginia Commission, in order to grant New Martinsville’s petition, the Commission would be required to agree with New Martinsville that the RECs belonged to New Martinsville “in the first instance.”²

¹ 139 FERC ¶ 61,066 (2012).

² *Id.* at paragraph 35.

FERC's recounting of the PSC's position is drawn directly from the *Notice of Intervention and Protest of the Public Service Commission of West Virginia*(hereinafter, *PSC Intervention Notice*) filed by the PSC on March 29, 2012, in which the PSC stated as follows:

In order for the [FERC] Commission to agree with the City contentions and grant the relief requested, **it is logically necessary for the Commission to agree that the City owns the credits in the first instance.**

PSC Intervention Notice at paragraph 10, Supplemental Brief Appendix Exhibit 1 (emphasis added). In light of the action subsequently taken by FERC in its April 24 Order, the PSC's concession effectively disposes of the matters now before the Court.

In its Petition for Enforcement to FERC, the City alleged that the Public Service Commission of West Virginia's November 22, 2011 Order in *Monongahela Power Company*, Case No. 11-0249-E-P violated the Public Utilities Regulatory Policies Act of 1978 ("PURPA"). On that basis, the City requested that FERC initiate an action against the Public Service Commission under the provisions of section 210(h) of PURPA, or, in the alternative, that FERC issue an order addressing whether the PSC's November 22, 2011 Order violated PURPA.³ FERC granted the alternative relief sought by the City. That is, after stating its intent not to initiate an enforcement action on its own,⁴ FERC specifically found that "the West Virginia Order is inconsistent with PURPA and [FERC's] regulations...."⁵ In explaining its ruling, FERC pointed out that:

³ At pages 11 – 14 of its Petition for Enforcement, the City specified that it was seeking the primary relief of an enforcement action by the FERC, or alternative relief in the form of a clear statement by FERC of its view as to the validity under PURPA of the rule adopted in the PSC Order.

⁴ 139 FERC ¶ 61,066 at ordering paragraph (A).

⁵ *Id.* at ordering paragraph (B).

[t]he West Virginia Order relies primarily on the avoided cost rate in the contracts between Morgantown Energy and Monongahela Power and New Martinsville and Monongahela Power as justification for finding that the RECs produced by the QFs are owned by the purchasing utility in the first instance. *See, e.g.,* West Virginia Order at 28-31.

FERC Order at note 68. FERC found that the PSC's reliance on payment of the avoided cost rate as adequate compensation was fatal under controlling federal law, stating that: "[t]o the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs, the West Virginia Order is inconsistent with PURPA." *Id.* at paragraph 47.

That the PSC ruled improperly in holding that Monongahela Power's payment of the avoided cost rate sufficiently compensated New Martinsville for the RECs was the City's principal claim for relief, not only to FERC but also to this Court in seeking review of the PSC's order.⁶ Because FERC agreed with the City in finding the PSC's action invalid under PURPA, the PSC concession quoted above becomes operative. That is, by "agree[ing] with the City contentions and grant[ing] the relief requested," FERC — by logical necessity — also "agree[d] that the City owns the credits in the first instance." That being the case, the fundamental premise of the PSC Order now on review — namely, that no "conveyance" of the RECs occurred because they were owned by Mon Power from the instant of their creation — has been upended by FERC's decision.

In light of the foregoing, the City anticipates that the PSC now may attempt to repudiate its prior position and argue that FERC's order has no effect on the question of which entity (the City or Mon Power) owns the RECs. This Court should reject any such attempt. It does the

⁶ *See* Argument at pages 11 – 19 of the City's December 22, 2011 Petition for Suspension and Review and Petitioner's Brief.

public a disservice to have one of the state's governmental agencies arguing wholly inconsistent positions before two different forums, simply to achieve the outcome it desires. The PSC should be held to its previous assertions regarding the effect of FERC's order and should be required to accept the results of its previous arguments.

B. There is No Need for Additional Proceedings before the PSC.

In its March 9, 2012 "Response of the Public Service Commission of West Virginia to the Motion to Continue Oral Argument", the PSC cited the case of Xcel Energy Services Inc. v. Federal Energy Regulatory Commission, 407 F.3d 1242 (D.C.Cir. 1995) in arguing that the issuance of a decision by FERC in favor of the City would not assist the Court in deciding the pending appeal "without a subsequent federal court action."⁷ Presumably, the PSC will continue to take that position.

The language quoted by the PSC from the Xcel decision must be viewed in context. The Xcel decision involved a petition for review, brought under the Federal Power Act before the U.S. Court of Appeals for the District of Columbia Circuit, of FERC's decision in American Ref-Fuel Co.; 105 FERC ¶61,004 (2003). The Court of Appeals determined that it lacked jurisdiction under the Federal Power Act and that it could not address the issues raised by Xcel

⁷ Without agreeing with the PSC's position regarding Xcel, the City advises the Court that it will file a timely complaint for enforcement of the FERC Order in federal District Court. This procedure is expressly provided for in Section 210(h)(2)(B) of PURPA where FERC has declined to initiate an enforcement action on its own, as is the case here. The fact that Monongahela Power Company and The Potomac Edison Company ("the Companies") filed a Motion For Clarification Of Order Issued April 24, 2012, Or, In The Alternative, Request For Rehearing Of Order on May 12, 2012 will not preclude the City from filing its complaint in federal court. Rule 713(e) of FERC's Rules of Practice and Procedure (18 C.F.R. § 385.713(e)), makes plain that "[u]nless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order" that is the subject of the rehearing request. Therefore, the Companies' filing does not affect the need for, or the appropriateness of, further actions by the City with respect to the FERC Order.

because the statutory scheme established in PURPA required a prior action in the federal district court. The Xcel court's statements regarding the impact of the FERC decision have little or no bearing on this Court's disposition of the pending case. At most, Xcel establishes that the position taken by FERC in its April 24, 2012 order is the position that FERC will take (should it elect to intervene) in the City's enforcement action in federal district court, and which is the same position that the City has taken before this Court.

On March 15, 2012, the City filed its Motion for Leave to File Reply to the Response of the Public Service Commission to the Motion to Continue Oral Argument. In paragraph 3 of that Motion, the City stated as follows:

On March 9, 2012, the Public Service Commission of West Virginia ("PSC") filed its Response to the Motion to Continue Oral Argument ("PSC Response").

At paragraph 5 of its Response, the PSC states: "regardless of the outcome of the FERC enforcement proceeding, this Court will have to decide whether the Commission was correct in determining that the utilities own the credits". That statement is incorrect. A finding by FERC that the PSC Order violates PURPA would furnish the basis for a federal District Court injunction prohibiting enforcement of the PSC Order, which would have the effect of rendering unnecessary a decision by this Court on pending state law issues. Indeed, state courts have no authority to consider a claim that the PSC has adopted a PURPA-implementation rule that conflicts with PURPA or FERC's regulations thereunder.

That statement remains applicable and valid today. FERC has now determined that the PSC Order violates PURPA. An action to enforce the FERC Order will be filed in federal District Court by the City. Under the holding of *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995), the federal court has exclusive jurisdiction to consider whether the PSC Order violated PURPA, as FERC has found. *See* 47 F.3d 1231, 1235-36 ("Congress created in § 210 a complete and independent scheme by which the purposes of the PURPA are to be realized. That

scheme involves the promulgation of regulations by the FERC, and their subsequent enforcement *exclusively in federal district court*, at the insistence of either a private party or of the FERC itself.”) (emphasis added).

The FERC Order properly found that the PSC Order was inconsistent with PURPA. In so doing, FERC specifically referred to the core reasoning of the PSC’s decision, as set forth at pages 28 through 31 of the PSC’s Order.⁸ FERC correctly observed in footnote 68 of its order that the PSC’s fundamental violation of PURPA involves the payment of consideration for the RECs. The example of offending language pointed out in FERC’s footnote 68 resides in the PSC’s assertion in its November 22, 2011 Order that: “[b]y the very nature of the PURPA EEPAs, **no additional consideration is contemplated or needed other than the substantial consideration that the projects received** and that is not usually available to merchant generators.”⁹ FERC’s determination that this linchpin element of the PSC Order violates PURPA makes clear that, before it can be found that the purchaser owns the RECs, some form of compensation must be provided for the RECs over and above the avoided cost charges the purchaser has agreed to pay. The remainder of the PSC’s discussion on pages 28 through 31 of its November 22, 2011 Order consists of the PSC’s attempted justification under state law for determining that the City is not entitled to any consideration for the RECs. The PSC’s reliance on state law for this purpose runs counter to FERC’s Order and, in any event, is unavailing and ineffective for the intended purpose.

⁸ See FERC Order at footnote 68.

⁹ November 22, 2011 Order at 28 (emphasis added).

With the FERC Order to be enforced in federal court, only state law issues remain pending before this Court. Additional proceedings before the Public Service Commission would not assist this Court in deciding whether the PSC's November 22, 2011 decision accords with state law. Neither would additional proceedings enable the PSC to repair its decision so as to bring its decision into compliance with PURPA and the FERC Order.

III. CONCLUSION

The City of New Martinsville respectfully requests that the Court enter an Order consistent with the FERC Order of April 24, 2012 reversing the Public Service Commission's November 22, 2011 decision in Case No. 11-0249-E-P and finding that the Commission erred in not awarding 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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May 16, 2012

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, do hereby certify that I have served the foregoing City of New Martinsville's Supplemental Brief, as well as a copy of the Supplemental Brief Appendix, upon the following parties on this 16th day of May, 2012 in the manner so indicated:

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