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**PUBLIC SERVICE COMMISSION**
**OF WEST VIRGINIA**
**CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 22nd day of November 2011.

CASE NO. 11-0249-E-P

MONONGAHELA POWER COMPANY AND THE POTOMAC EDISON COMPANY, both dba ALLEGHENY POWER

Joint Petition for declaratory order regarding ownership of Alternative and Renewable Energy Credits attributable to energy purchases by Monongahela Power Company from PURPA Qualifying Facilities and for interim and other related relief.

## COMMISSION ORDER

The Commission grants the Joint Petition for declaratory ruling and holds that the alternative and renewable energy resource credits attributable to energy purchases by Monongahela Power Company from certain PURPA Qualifying Facilities are owned by Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power, during the terms of the Electric Energy Purchase Agreements. Upon receipt of the necessary information as described in this Order, the Commission will consider certification of the MEA facility.

## I. BACKGROUND

On February 23, 2011, Monongahela Power Company (Mon Power) and the Potomac Edison Company (PE) (collectively Mon Power and PE, Allegheny Power or the Companies), filed a Joint Petition for declaratory order and for interim relief seeking a ruling that the Companies are entitled to the alternative and renewable energy resource credits (credits) generated from three "qualifying facilities" (QFs) under the Public Utility Regulatory Act of 1978 (PURPA) pursuant to Electric Energy Purchase Agreements (EEPAs or PURPA Agreements) with the QFs.[1] The EEPAs were between

[1] PURPA was enacted by Congress in 1978 to promote national energy independence and security. To encourage efficiency and use of domestic fuel, PURPA created a new class of electric generating facilities known as qualifying facilities or "QFs" that included cogeneration facilities and small power producers. A cogeneration facility produces both electricity and some other form of useful energy such as steam or heat. A small power production facility produces electric energy using biomass, waste, or renewable resources. A QF was assured of a guaranteed market and price certainty under PURPA. The electric utility within whose service territory the QF is located was required to purchase power from QFs at the utility's avoided cost. Once the avoided cost was agreed to or determined by a state utility regulatory commission, the QF was assured that it would receive compensation at the avoided cost rate

the QFs and Mon Power, but the Commission now regulates the combined West Virginia operations of Mon Power and PE as a single utility, including the determination of combined costs and rates. In this Order we refer to "Mon Power and PE," or the "Companies" when discussing the utility operation receiving the energy output from the QFs, paying for the QF power, and requesting a determination regarding ownership of credits associated with the energy output of the QFs. Depending on the context, we may refer to Mon Power when discussing previous EEPA negotiations and proceedings.

The three QFs include:

(i) the Hannibal project (Hannibal), a run-of-river hydropower facility located at the Hannibal Locks & Dam on the Ohio River in New Martinsville, West Virginia, that is owned by the City of New Martinsville (City);

(ii) the Grant Town project (Grant Town), a generation facility using coal and waste coal located in Grant Town, West Virginia, that is owned by American Bituminous Power Partners, L.P. (AmBit); and,

(iii) the Morgantown project (Morgantown), a cogeneration facility using coal and waste coal located in Morgantown, West Virginia, that is owned by Morgantown Energy Associates (MEA).

As discussed more in this Order, as a result of their fuel or energy output, Hannibal and Grant Town have been certified as qualified energy resources to generate credits under the Commission Rules Governing Alternative and Renewable Energy Portfolio Standard (Portfolio Standard Rules), 150 C.S.R. 34. Morgantown may qualify for certification as a qualified energy resource, although it is not currently certified to generate credits under the Portfolio Standard Rules. Morgantown is certified under Pennsylvania law based on its qualified generation. MEA indicated that it does not intend to seek certification of the Morgantown project under the Portfolio Standard Rules.

All of the EEPAs with the QFs were executed in the 1980's long before the creation of alternative and renewable energy resource credits in West Virginia by the enactment of the Alternative and Renewable Energy Portfolio Standard (Portfolio Act or Act), W.Va. Code § 24-2F-1, *et seq.*, effective July 1, 2009, the issuance of the Portfolio Standard Rules by Commission Order entered November 5, 2010, in General Order No. 184.25, and the widespread creation of renewable energy credits (RECs) in other state jurisdictions. Because the EEPAs were executed by Mon Power and the QFs before

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regardless of the cost of the alternative power supply for the electric utility. QFs also were exempted from State jurisdiction over rates or financial and organizational structures by PURPA.

credits existed, the Agreements do not contain provisions addressing the ownership of the credits.

The Commission approved the EEPAs and subsequent amendments to the EEPAs for the Hannibal, Grant Town and Morgantown projects in Case No. 86-169-E-PC (Hannibal), Case No. 87-669-E-C (Grant Town), and Case No. 89-200-E-PC (Morgantown), respectively. The Commission granted consent and approval for the parties to enter into the EEPAs with the PURPA facilities and approved the terms and conditions of the EEPAs under W.Va. Code § 24-2-12 and Rule 12.05 (1) of the Commission Rules and Regulations for the Government of Electric Utilities (Electric Rules), a rule that was promulgated to address Commission review and approval of PURPA Agreements. In the Commission Orders approving the EEPAs, the Commission approved rate recovery for the costs associated with the purchase of power under the EEPAs. Unlike the treatment of other power supply and transmission costs, including other purchased power contracts, that are allocated between states (if a utility serves retail customers in more than one state as Mon Power did at the time of the original EEPA filings) and wholesale customers (inasmuch as ratemaking for wholesale rates is within the jurisdiction of the FERC), the Commission approved a specific ratemaking treatment of costs of the EEPAs whereby Mon Power received all of the generation and all of the costs under the EEPAs were assigned to West Virginia operations of Mon Power and were entirely the responsibility of West Virginia ratepayers.

Pursuant to the EEPAs and applicable PURPA regulations, Mon Power is obligated to purchase all of the capacity and the energy available from the QFs. The terms and conditions of EEPAs for the Hannibal, Grant Town and Morgantown projects vary, and the EEPAs contain a different purchase price based on the parties' negotiations and determination of avoided cost at the time of the contract negotiations or Commission adjudication. The EEPAs contain contract terms that were acceptable to the PURPA project and were designed to fulfill the PURPA policies of encouraging the development of renewable energy resources, cogeneration and small power production facilities. The Hannibal and Morgantown EEPAs include purchase prices negotiated between the projects and Mon Power whereas the Grant Town EEPA includes purchase prices established by the Commission based on the Mon Power avoided cost rates.[2] All of the EEPAs include other contract terms designed to support financing, debt, and other project costs that are favorable to the QFs. The EEPAs were subsequently amended and the amendments were approved by the Commission, as necessary, to remove or reduce impediments to the continued financial viability and success of the PURPA projects.

[2] The Companies asserted that they paid approximately $1.25 billion through 2010 for the purchase of energy and capacity from the three PURPA facilities, pursuant to the terms of the EEPAs, at prices that, to date, have exceeded avoided costs of generating power or purchasing power at available market prices. Mon Power and PE Initial Brief at 11; Companies' Ex. 1 at 9 and Commission Request Ex. No. 3.

A. Hannibal EEPA

The Hannibal project began operating in October 1988, pursuant to the terms of the EEPA between Mon Power and City executed on April 1, 1986, as amended July 1, 1986. Companies' Ex. 7, 1; Mon Power and PE Initial Brief, Ex. B. The Commission approved the Hannibal EEPA in Monongahela Power Company and the City of New Martinsville, Case No. 86-169-E-PC (Commission Order May 9, 1986). Subsequently, the Commission approved a July 1, 1986 amendment that did not change the purchase price or material terms of the Agreement. Monongahela Power Company and the City of New Martinsville, Case No. 86-169-E-PC (Commission Order, dated August 8, 1986).

The Hannibal EEPA, as modified and extended, remains in effect until June 2034. According to the terms of the EEPA, Mon Power and its West Virginia customers pay more than the avoided cost rate in the first fifteen years and less than the avoided cost rate during the remaining years of the contract. This structure was designed to provide cash flow necessary to support the financing of the project. According to the May 9, 1986 Order approving the EEPA, under the terms of the EEPA, Mon Power agreed to purchase power from the Hannibal hydroelectric project at an avoided capacity rate of 3.7 cents per kilowatt hour and an initial energy rate of 3.9 cents per kilowatt hour. The approved energy rate varies during the term of the Agreement, with Mon Power likely paying more than the avoided cost of energy during the first fifteen years and less than the avoided cost after fifteen years. Commission Order, Case No. 86-169-E-PC, May 9, 1986, at 1-2.

In March 2004, the Hannibal EEPA was amended again to reflect the termination of the Recognition Agreement, dated September 1, 1985, as a result of the discharge of debts for project financing. Companies' Ex. 7, 2; Mon Power and PE Initial Brief, Ex. B. The 2004 Amendment was not submitted for Commission review and approval.

B. Grant Town EEPA

The Grant Town project began operating in May 1993 pursuant to the terms of the Grant Town EEPA, executed on September 15, 1988, as amended, that originally was to extend only to 2028, but was subsequently extended to 2036. Companies' Ex.7, 5; Mon Power and PE Initial Brief, Ex. B. The Commission approved the Grant Town EEPA in American Bituminous Power Partners and American Hydro Power Company v. Monongahela Power Company, Case No. 87-669-E-C (Commission Order, November 10, 1988).

The Grant Town EEPA has been before the Commission several times, including the original EEPA and subsequent amendments, resolving disputes between Mon Power and the project owners regarding, among other things, the avoided cost rate, length of the agreement, and project financing. The determination of avoided capacity costs, and the

Grant Town EEPA and subsequent amendments, were the subject of a number of Orders dated November 13, 1987; October 25, 1988; November 10, 1988; October 31, 1989; June 27, 1991; March 29, 1996; August 7, 2000; March 2, 2006; and, April 13, 2006, all issued in Case No. 87-669-E-C.[3]

Under the terms of the Grant Town EEPA, Mon Power initially was required to purchase electricity from Grant Town at an avoided capacity rate of 2.725 cents per kilowatt hour plus avoided energy costs, based on the average cost per kilowatt hour of generation at certain Monongahela Power Company coal-fired generation units, with a thirty-five year term.

Several years after the plant was in service, AmBit petitioned to reopen the case to modify the contract rate because of financial difficulties. By Order issued March 29, 1996, in American Bituminous Power Partners, L. P. v. Monongahela Power Company, Case No. 87-0669-EC (Reopened) (AmBit case), the Commission denied the Motion of the developer to reopen the case to increase the contract rate on grounds that the Commission lacked jurisdiction to require a modification to the avoided cost rate once approved by Commission Order. The Commission based its analysis on the ruling in Freehold Cogeneration v. Bd. of Regulatory Commissioners of N.J., 44 F.3d 1178 (3rd. Cir. 1995), in which the Federal Circuit Court of Appeals for the Third Circuit held that a state utility regulatory commission could not reconsider the avoided cost rate once approved because that would constitute "utility-type" regulation prohibited by PURPA.

In 2006, Mon Power and AmBit agreed to modify the Grant Town EEPA, and the EEPA was amended substantially to modify the purchase price and contract term. Mon Power and PE Initial Brief Ex. B; Companies' Ex. 7, 7. By Commission Order entered March 2, 2006, the Commission approved amendments to the Grant Town EEPA that had been jointly requested and agreed to by Mon Power and AmBit, increasing the capacity cost rate from 2.725 cents per kilowatt hour to 3.425 cents per kilowatt hour from the date of the Order authorizing the amendment until September 30, 2017. On October 1, 2017, the capacity cost rate will decrease to 2.7 cents per kilowatt hour for the remainder of the EEPA. The contract term was extended from 2028 until 2036. The purpose of the 2006 amendment was to increase revenues to AmBit during the debt repayment period in exchange for an extension of the term of the Agreement. Eight years were added to the contract at the reduced capacity rate of 2.7 cents and interest accrued during that period. March 2, 2006 Order, at 1-2. The amendment deferred the amortization of the tracking account until 2020. Id. American Bituminous Power Partner, L.P., Monongahela Power Company and The Potomac Edison Company, dba Allegheny Power, Case No. 87-0699-E-C (Reopened) (Commission Order, March 2, 2006).

[3] Beginning in 2005, the Commission docket numbering system was changed and the sequential identifying number was modified to four digits. Case No. 87-669-E-C would be referenced as Case No. 87-0669-E-C with any reopening filings beginning in 2005.

By Letter of Understanding dated August 20, 2007, filed as a closed entry in Case No. 87-0669-E-C, AmBit ceded ownership of the generation type and fuel attribute (environmental attribute) credits from the Grant Town project to Mon Power. Mon Power and PE Initial Brief, Ex. D. The Letter of Understanding was not approved by the Commission by a formal order. The document contains a provision that the Letter will be discharged and terminated if the Commission enters an order ruling that other QFs similar to the Grant Town project own the credits that are associated with their generation.

C. Morgantown EEPA

The Morgantown project began operating in April 1992 pursuant to the terms of the EEPA executed on March 1, 1989, that remains in effect until 2027. Mon Power and PE Initial Brief, Ex. B; Companies' Ex.7, 8. The Commission approved the Morgantown EEPA in Monongahela Power Company and Morgantown Energy Associates, Case No. 89-200-E-PC. (Commission Orders, April 7, 1989, and May 15, 1989).

Mon Power was required to purchase electricity from the project at a capacity rate of 4.0 cents per kilowatt hour plus an avoided energy cost rate. A conformed copy of the EEPA was filed as a closed entry in Case No. 89-200-E-PC on July 13, 1989.

Subsequently, MEA filed a formal complaint against Mon Power in Case No. 09-0985-E-C, requesting that the Commission order Mon Power to grant its consent to amend the Morgantown EEPA to modify the Recognition Agreement and other sales contract provisions to allow MEA to obtain debt refinancing. In Morgantown Energy Associates v. Monongahela Power Company, dba Allegheny Power, Case No. 09-0985-E-C (Order entered June 9, 2010) (MEA case), the Commission ordered Mon Power to consent to modifying the Morgantown EEPA in order to allow MEA to seek project debt refinancing and, thereby, to avoid financial failure of the project.

The Commission found that PURPA and PURPA regulations did not prohibit the Commission from requiring Allegheny Power to consent to modifying the Recognition Agreement and EEPA in order to allow MEA to seek debt refinancing. The Commission stated that if Mon Power did not grant its consent to refinance project debt, the Morgantown project would likely fall into actual or technical default and fail. The Commission found that it was in the public interest to require Mon Power to allow MEA to refinance debt and continue supplying electricity to Allegheny Power and steam to West Virginia University to support the PURPA policies underlying the Agreement. In so ruling, the Commission distinguished the ruling in the AmBit case on the grounds that the proposed modification of the Morgantown EEPA did not involve a modification of the contract price. June 9, 2010 Order at 9.

No agreement has been reached between MEA and Mon Power regarding consent to modifications to the Recognition Agreement and EEPA. No further amendment to the Morgantown EEPA has been filed for Commission approval, and the parties are continuing to discuss possible refinancing and consent by Mon Power for refinancing. Tr. 8/25/11 at 129.

D. Mon Power and PE Joint Petition

In the Joint Petition filed February 23, 2011, the Companies seek a declaratory Order from the Commission holding that (i) Mon Power owns the credits from the QFs, as well as any other environmental attributes from the facilities, during the terms of the EEPAs, and (ii) Mon Power's ownership of the credits is reflected in the compliance plan filed by Mon Power and PE in Case No. 10-1912-E-CP.

On February 23, 2011, the Companies also sought interim relief pursuant to Rule 6.4 of the Commission Rules of Practice and Procedure, 150 C.S.R. 1, requesting that the Commission issue an Order precluding the QFs from selling or transferring or committing to sell or transfer any future credits until the matter is adjudicated.

By Order issued April 19, 2011, the Commission granted the interim relief sought by the Companies, ordering City and MEA to refrain from selling, transferring or committing to sell or transfer credits from the QFs until the matter is fully adjudicated.

There are related proceedings filed with the Commission.[4] The Companies and City, which operates a municipally-owned electric utility, were required to file an

[4]In Case No. 10-1912-E-CP, on December 30, 2010, Mon Power and PE filed a portfolio standard compliance plan with the Commission for its review and approval. The evidentiary hearing was held June 13, 2011. On September 26 2011, the Commission issued an Order, conditionally approving the compliance plan, but noting that if it was later determined that the Companies could not claim the credits associated with the QF purchased power, their compliance plan would have to be modified and the modified plan would have to be filed for Commission approval.

In Case No. 11-0009-E-CP, on January 2, 2011, the City filed a portfolio standard compliance plan with the Commission for its review and approval. The evidentiary hearing was held July 22, 2011. On September 30, 2011, the Commission issued an Order, conditionally approving the compliance plan, but noting that if it was later determined that the City could not retain the credits associated with the Hannibal production, its compliance plan would have to be modified and the modified plan would have to be filed for Commission approval.

In Case No. 11-0019-E-P, by Commission Order dated June 7, 2011, the Commission granted certification of the Grant Town facilities owned by American Bituminous Power Partners, L.P. as a qualified energy resource pursuant to Rule 4 of the Commission Portfolio Standard Rules to generate credits under the Rules. Grant Town is certified based on qualified generation from waste coal, an alternative energy resource identified by statute and Rule 2.4g.

In Case No. 11-0291-E-P, by Commission Order issued July 20, 2011, the Commission granted certification of the Hannibal facilities owned by the City of New Martinsville as a qualified energy resource pursuant to Rule 4 of the Commission Portfolio Standard Rules to generate credits under the Rules. The Hannibal facilities are certified based on qualified generation as run of river hydropower, a renewable energy resource identified by statute and Rule 2.22.g.

alternative and renewable energy portfolio standard compliance plan (compliance plan) for Commission review and approval pursuant to W.Va. Code § 24-2F-6 and Rule 8 of the Commission Portfolio Standard Rules. Allegheny Power claimed the credits from the three QFs in the compliance plan filing in Case No. 10-1912-E-CP. The City claimed the credits from the Hannibal project in the compliance plan filing in Case No. 11-0009-E-CP. The Commission granted certification to the Grant Town and the Hannibal projects as qualified energy resources to generate credits pursuant to the Commission Portfolio Standard Rules, in Case Nos. 11-0019-E-P and 11-0291-E-P, respectively.

The Commission granted intervenor status to City and the Consumer Advocate Division of the Public Service Commission (CAD), and named MEA as a party to this proceeding pursuant to Commission Orders entered April 19, 2011, and April 29, 2011. The Commission invited AmBit to participate as a party in this proceeding by Commission Order entered May 1, 2011. AmBit elected not to participate as a party in this proceeding.

On March 4, 2011, City filed a Petition to Intervene and Response in Opposition to the Companies' Petition.

On March 14, 2011, Companies filed a Response to the City March 4, 2011 Response. On April 6, 2011, Companies filed a corrected Response.

On March 21, 2011, City filed a Reply to the Mon Power and PE March 14, 2011 Response.

On April 22, 2011, Mon Power and PE filed a Motion to include additional briefing issues and related request for relief. In the Motion, Companies requested leave to amend the Joint Petition. Based on the assertion that the Commission has the jurisdiction and authority to do so, the Companies requested that the Commission compel the QFs to seek certification to qualify for credits or, in the alternative, find that the Commission has inherent authority under the Act to certify the facilities as qualified to receive credits under the Commission Rules if the Commission determines that the Companies have ownership of the credits and if the QFs decline to obtain certification.

On April 29, 2011, the Commission issued an Order that, among other things, (i) granted the Mon Power and PE Motion to Compel, except to the extent the information sought was confidential or attorney-client privileged, (ii) granted the Companies' Motion to Include Additional Briefing Issues and Related Requests for Relief, and (iii) granted the City Motion to establish a discovery schedule and to revise the briefing schedule. The April 29, 2011 Order established a discovery schedule, requiring that discovery requests be filed by May 3, 2011, and responses by May 13, 2011. The Order also extended the briefing schedule, required Initial Briefs to be filed by May 20, 2011, and Reply Briefs to be filed by May 27, 2011, and required the Companies to file all of the relevant EEPAs, as amended, and related documentation for Commission review.

Initial Briefs were filed by Mon Power and PE, City, MEA, CAD and Staff on May 20, 2011. Reply Briefs were filed by Mon Power and PE, City and MEA on May 27, 2011.

There is a pending Motion for Protective Treatment, filed June 2, 2011, by Companies. The Motion is addressed in this Order.

Upon review of the briefs filed by the parties, the Commission found that there were questions of fact that needed to be further developed in the case. On July 29, 2011, and August 1, 2011, the Commission issued Orders scheduling this matter for evidentiary hearing. A further procedural Order was issued August 17, 2011, clarifying the July 29, 2011 and August 1, 2011 Orders that scheduled this matter for hearing.

The evidentiary hearing was held August 25, 2011, and August 26, 2011. On August 25, 2011, Robert B. Reeping, manager for Allegheny Energy Service Corporation, testified on behalf of Mon Power and PE. Bonnie Shannon, current City employee and former City Recorder, and Charles Stora, plant manager for the Hannibal hydroelectric facility, testified on behalf of City. Jesse R. Locklar, plant manager for the Morgantown facility, testified on behalf of MEA. On August 26, 2011, the parties presented oral argument in support of the evidence and the legal briefs filed in the proceeding.

On August 30, 2011, Mon Power and PE filed the following post-hearing exhibits: 1) Commission Request Exhibit No. 1, consisting of a letter dated May 30, 2006, from the Companies to MEA claiming ownership of the credits from the Morgantown project and a reply letter from MEA, dated July 26, 2006, and a letter dated May 26, 2006, from Companies to AmBit, claiming ownership of the credits from the Grant Town project; 2) Commission Request Exhibit No. 2, comprised of a Schedule A, dated September 23, 2005, in which City authorized the credits from the Hannibal project to be held in the Allegheny Power PJM GATS system account, and an e-mail from PJM, dated September 29, 2005, confirming the addition of the Hannibal credits to the Allegheny Power account; and 3) Commission Request Exhibit No. 3, comprised of three schedules comparing the average per unit payments made by Companies to City, MEA and AmBit with the corresponding PJM day-ahead Locational Marginal Prices (LMP) between 1999 and 2010.

On September 6, 2011, MEA filed a Response to the post-hearing exhibits, and asserted that the schedules in Companies' Commission Request Exhibit No. 3 represent an inappropriate comparison of payments under the PURPA Agreements to wholesale market rates and are not relevant to the proceeding. MEA states that the PJM day-ahead

LMP rate in the exhibit does not provide a complete comparison because it does not include a separate locational capacity component, and does not account for costs in other PJM ancillary service markets that would be incurred if Companies were to rely on the wholesale market.

## II. DISCUSSION

There are two issues presented for resolution in this case:

1. Whether, under EEPAs that predate the Portfolio Act and Commission Portfolio Standard Rules and that are silent on the issue of credit ownership, Mon Power and PE or the QFs own the credits associated with the QF generation; and,

2. If the utilities own and are entitled to credits from the facilities, whether the Commission has the jurisdiction and authority to order a QF to certify the facilities or to deem the facilities certified to generate credits under the Portfolio Standard Rules based on the statutory authority provided in the Portfolio Act and Chapter 24 of the West Virginia Code.

### A. Ownership of the Credits

As stated in prior Orders, the Commission is mindful of the significance of the legal issues presented in this proceeding. Although other states have addressed the issue of credit ownership under PURPA Agreements, this is a case of first impression for this Commission.

The case involves the interpretation of the recently enacted Portfolio Act and emerging legal issues involving the attributes of the generating facilities and fuel sources and the relationship between these attributes and the energy being purchased from the generation facilities. This case also has significant cost implications for the Companies and significant rate implications for ratepayers. As addressed in the compliance plan cases of Mon Power and PE and City in Case Nos. 10-1912-E-CP and 11-0009-E-CP and in the arguments and evidence presented by the parties in this case, the unavailability of QF credits will require the modification of the utility portfolio standard compliance plans. The costs of the additional compliance credits needed to replace the QF credits claimed by the utilities are a recoverable cost of service element that will be passed on to ratepayers pursuant to W.Va. Code § 24-2F-7. Mon Power and PE estimate that it will cost approximately $50 million through 2025 to acquire additional compliance credits to replace the QF credits. The Commission also must consider the underlying policies in the Portfolio Act, PURPA and state and federal laws that were enacted with the goals of encouraging the development of renewable and alternative energy resources and a diverse energy portfolio.

In resolving the question of credit ownership, the Commission finds that the issue must be addressed in the context of applicable state law. We find authority and direction from state law regarding the jurisdiction of this Commission over public utilities and public utility rates. We have reviewed the relationship between purchased power costs, renewable portfolio compliance costs and retail rates as critical considerations involving the jurisdiction of the Commission over this issue. We note that the credits at issue in this proceeding are created by state law related to renewable and alternative energy credits and the development of renewable portfolio standards.

1. Applicable Federal Law

In 1978, Congress enacted PURPA as part of a policy to promote national energy independence and security in response to the oil embargo of the Organization of the Petroleum Exporting Countries (OPEC) that led to a sharp increase in fuel costs. PURPA was passed to further the conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and the development of renewable energy, cogeneration and small power production facilities to promote national security. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, as codified and amended throughout Sections of 16 U.S.C.

Under Section 210 of PURPA, a new class of electric generating facilities was created to promote the goals of PURPA. The generating facilities are known as qualifying facilities or "QFs," and include two categories of facilities: (i) qualifying small power production facilities and (ii) qualifying cogeneration facilities. A cogeneration facility is a facility that produces both electric energy and steam or some other form of useful energy, such as heat, for industrial, commercial, heating or cooling purposes. 16 U.S.C. § 796 (18)(A). A small power production facility is a facility of 80 MW or less that produces electric energy solely by the use, as a primary source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof. 16 U.S.C. § 796 (17)(A).

Section 210 of PURPA provides qualifying facilities with benefits and exemptions to encourage their development, including certain exemptions from federal and state laws. One such benefit is that PURPA required electric utilities to purchase power from QFs at a long-term contract rate based on the utility's avoided cost that would not be subject to future state or federal reconsideration into the reasonableness of the rate. Avoided cost is defined 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. 18 C.F.R. § 292.101 (b)(6).

Under PURPA, QFs are exempt from certain state laws and regulations respecting the rates and financial and organizational aspects of utilities. The exemption provisions for QFs are found in 16 U.S.C. § 824a-3(e), which provides, in relevant part:

> [T]he [Federal Energy Regulatory] Commission shall . . . prescribe rules under which . . . qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 USC §§ 791a et seq.], from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production. [Emphasis added].

Federal regulations issued by the Federal Energy Regulatory Commission (FERC) pursuant to 18 CSR §§ 292.601 and 292.602 implement the exemption provisions under 16 USC § 824a-3(e). The relevant federal regulation governing state law exemptions is found at 18 C.S.R. § 292.602, and provides:

> (c) *Exemption from certain State laws and regulations.* (1) Any qualifying facility shall be exempted (except as provided in paragraph (b)(2)) of this section from State laws or regulations respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities.

As a general rule, pursuant to the Federal Power Act (FPA), FPA, § 210, FERC has exclusive jurisdiction over the sale of electric energy at wholesale. One exception to FERC's exclusive jurisdiction over wholesale power contracts is the reserve of limited authority granted to the states to review and approve proposed PURPA contracts and to set and approve the avoided cost rates for purchases of wholesale electricity under PURPA.

In American Bituminous Power Partners, L.P. v. Monongahela Power Company, Case No. 87-669-E-C, a case involving the Grant Town EEPA, the Commission discussed the limited scope of Commission jurisdiction over PURPA facilities and contracts:

> State utility commissions have traditionally been without power to regulate wholesale power contracts. The Federal Energy Regulatory Commission traditionally exercised exclusive jurisdiction in the realm of wholesale power contracts. See Federal Power Act 16 U.S.C. § 791a et seq. PURPA created a narrow exception to the general rule and allowed state commissions to implement PURPA by initially setting avoided cost rates

> for qualifying PURPA projects. However once state commissions approve power purchase agreements under PURPA, they are generally without jurisdiction to modify the terms of the agreement. See Freehold Cogeneration v. Bd. of Regulatory Commissioners of N.J., 44 F.3d. 1178 (3rd. Cir. 1995).

Order dated March 29, 1996, at 5.

After Congress enacted PURPA in 1978 and various state utility regulatory commissions approved purchase contracts between QFs and utilities (including the EEPAs for the Hannibal, Grant Town and Morgantown PURPA projects approved by this Commission in the 1980's), states across the nation began enacting various forms of mandatory portfolio standards laws. These state laws generally require, among other things, electric utilities to acquire or generate a certain percentage of electric supply from specified energy resources. In many states, renewable energy credits or "RECs" were created as part a system of tradable instruments that could be used to meet and to monitor compliance with the state portfolio standard laws.

The creation of these RECs was generally not contemplated or bargained for under the EEPAs, and as a result, litigation arose over the issue of REC ownership under EEPAs predating the state renewable portfolio standards (RPS) laws. As a result of that litigation, FERC recognized a second exception to its exclusive jurisdiction over the PURPA contracts in the 2003 FERC decision in American Ref-Fuel Co., Covanta Energy Group, Montenay Power Corp. and Wheelabrator Tech., Inc., 105 FERC ¶ 61,004 (October 1, 2003) (American Ref-Fuel), and declared that the issue of credit ownership under PURPA contracts was a matter to be decided by the states based on state law.

In American Ref-Fuel, a group of QF petitioners asked FERC to decide that the RECs from power produced by the QFs belonged to the QFs rather than the utility purchasing the power at the avoided cost rate under PURPA contracts that predated the existence of credits and that were silent on the issue of credit ownership. The petitioners sought an order declaring "that avoided cost rates entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradable certificates (RECs)." FERC granted the request to the extent that FERC held that the avoided cost rates for capacity and energy in the PURPA contracts do not convey the RECs, absent a contractual provision to the contrary. FERC declined to rule that the QFs owned the credits under the PURPA contracts, and, instead, declared that PURPA does not control REC ownership. Because the credits were created by state law, FERC declared that the question of REC ownership was a matter for the states to decide based on state law. American Ref-Fuel 105 FERC ¶ 61,004, 61007 (October 1, 2003).

On April 15, 2004, FERC issued an Order denying requests for rehearing. In its Order, FERC clarified that the language in the 2003 ruling regarding an "express contractual provision" should not be interpreted to require that an express contractual provision must exist in a PURPA contract in order to transfer the credits along with the electricity sold under the PURPA contract. FERC emphasized that state law, not PURPA, controlled the issue of credit ownership, by stating "[w]e did not mean to suggest that the parties to a PURPA contract, by contract, could undo the requirements of State law in this regard. All we intended by this language was to indicate that a PURPA contract did not inherently convey any RECs, and correspondingly that, assuming State law did not provide to the contrary, the QF by contract could separately convey the RECs." American Ref-Fuel, 107 FERC ¶ 61,016, at 61,042 n.1 (2004).

In interpreting the FERC ruling, the United States Court of Appeals for the Second Circuit stated, "[t]he FERC decision in *American Ref-Fuel* does not evince an intent to occupy the relevant field – namely, the regulation of renewable energy credits. Rather, it explicitly acknowledges that state law governs the conveyance of RECs." Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 531 F.3d 183, 190 (2d Cir. 2008).

2. Applicable State Law

The FERC ruling in American Ref-Fuel established that state law determines the question of credit ownership under the PURPA contracts. In deciding the issue based on state law, this Commission will consider not only the Portfolio Act, but also the other provisions of Chapter 24 of the West Virginia Code that require the Commission to investigate the rates, methods and practices of public utilities, to prescribe rates, and to determine fair and reasonable rates. W.Va. Code §§ 24-1-1(a), 24-2-2(a) and 24-2-3. In exercising its ratemaking authority, the Commission must determine that costs of the utility are reasonably and prudently incurred. In the exercise of its delegated duties and powers, in all its deliberations, the Commission must consider and balance the interests of the current and future ratepayers, the utilities, and the state's economy pursuant to W.Va. Code § 24-1-1(b).

Furthermore, the Commission has the authority and duty to ensure that rates and charges for utility services are just and reasonable. W.Va. Code § 24-1-1(a)(4). We cannot divorce the statutory responsibilities of the Commission regarding rates from the state law that guides our responsibilities regarding ownership of the PURPA credits. The Commission exercised its rate making jurisdiction when it determined that the cost of purchases under the PURPA EEPAs would be treated different from other power supply costs of a multi-jurisdictional utility and that one hundred percent of the costs of the PURPA power supply would be paid by only West Virginia customers. Most of our decisions that fostered the financial success of the PURPA facilities resulted in additional costs paid by West Virginia ratepayers or additional risks shouldered by ratepayers, including (i) the payments they would receive from Mon Power (which in turn were funded by West Virginia ratepayers through rates), (ii) the financing terms for the PURPA facilities that allowed them to finance the facilities at the most favorable terms available, and (iii) the approval of up-front payments to the projects in excess of avoided costs.

The up-front payments were handled differently in each case approving the three EEPAs. For Hannibal, the EEPA recognized that the energy cost rate and the capacity cost rate exceeded avoided costs in the early years of the contract and required reliability and availability of output from Hannibal in later years for the entire term of the EEPA. It was also recognized that the initial energy payments were set at a level that exceeded the avoided energy cost rate and a tracking account was established and maintained to record the excess amounts paid to Hannibal. After 15 years, the aggregate excess payments above avoided costs became a factor in determining a new energy cost rate to be paid over the remaining term of the EEPA. Companies' Initial Brief, Ex. B (Companies provided copies of the EEPAs on a CD-ROM attached to the Initial Brief as Exhibit B); Companies' Ex. 7, 1 (City EEPA).

For Grant Town, the EEPA recognized that the capacity cost rate exceeded avoided costs in the early years of the contract and required reliability and availability of the output from Grant Town in later years for the entire term of the EEPA. It was also recognized that the initial energy payments were set at a level that may exceed the avoided energy cost rate and a tracking account was established. There was a cap set on the amount that Grant Town could receive over the avoided energy cost rate and provisions to reduce the tracking account to zero by the end of the EEPA. Companies' Initial Brief, Ex. B; Companies' Ex. 7, 5 (AmBit EEPA).

For Morgantown, the EEPA recognized that the capacity cost rate exceeded avoided costs in the early years of the contract and required reliability and availability of the capacity from Morgantown in later years for the entire term of the EEPA. It was also recognized that in the event of cessation or prolonged reduction in deliveries of expected energy under the EEPA, to protect customers that had paid amounts in excess of the avoided costs, Morgantown would be required to make certain payments, and it would assign the steam contract related to the project to Mon Power. Companies' Initial Brief, Ex. B; Companies' Ex. 7, 8 (Morgantown EEPA).

<u>3. Portfolio Act</u>

In 2009, the West Virginia Legislature enacted the Portfolio Act, <u>W.Va. Code</u> § 24-2F-1 *et seq.*, as amended in 2010 and 2011, and established an alternative and renewable energy portfolio standard applicable to the electric utilities operating in West Virginia. The portfolio standard created a statutory obligation for the state electric utilities to own credits equal to a certain percentage of the electricity sold to retail customers in increasing percentage targets: ten percent by 2015, fifteen percent by 2020, and twenty-five percent by 2025.

Eligible renewable energy resources under the Act include solar photovoltaic or other solar electric energy; solar thermal energy; wind power; run of river hydropower; geothermal energy, biomass energy; biologically derived fuel including methane gas, ethanol or biodiesel fuel; fuel cell technology; and, recycled energy. W.Va. Code § 24-2F-3(13). Alternative energy resources include advanced coal technology; coal bed methane; natural gas, including any component of raw natural gas; fuel produced by a coal gasification or liquefaction facility; synthetic gas; integrated gasification combined cycle technologies; waste coal; tire-derived fuel; and, pumped storage hydroelectric projects. W.Va. Code § 24-2F-3(3).

The following legislative findings in the Act are set forth in W.Va. Code § 24-2F-2 and help to inform our decision in this order:

> (1) West Virginia has served the nation for many years as a reliable source of electrical power;
>
> (2) The nation is on a rapid course of action to produce electrical power with an ever decreasing amount of emissions;
>
> (3) To continue lowering the emissions associated with electrical production, and to expand the state's economic base, West Virginia should encourage the development of more efficient, lower-emitting and reasonably priced alternative and renewable energy resources;
>
> (4) The development of a robust and diverse portfolio of electric-generating capacity is needed for West Virginia to continue its success in attracting new businesses and jobs. This portfolio must include the use of alternative and renewable energy resources at new and existing facilities;
>
> (5) West Virginia has considerable natural resources that could support the development of alternative and renewable energy resource facilities at a reasonable price;
>
> (6) Alternative and renewable energy resources can be utilized now to meet state and federal environmental standards, including those reasonably anticipated to be mandated in the future; and
>
> (7) It is in the public interest for the state to encourage the construction of alternative and renewable energy resource facilities that increase the

capacity to provide for current and anticipated electric energy demand at a reasonable price.

The Portfolio Act vested the Commission with broad regulatory authority. The Act specifically authorized the Commission to establish a system of tradable credits. As defined in W.Va. Code § 24-2F-3(4), an alternative and renewable energy resource credit or "credit" is "a tradable instrument that is used to establish, verify and monitor the generation of electricity from alternative and renewable energy resource facilities, energy efficiency or demand-side energy initiative projects or greenhouse gas emissions reduction or offset projects." Credits were created by the Portfolio Act as the measure of utility compliance. Credits may be traded, sold or used to meet the portfolio standard requirements pursuant to W.Va. Code § 24-2F-4(a).

The electric utilities in the State were required to file an application on or before January 1, 2011, seeking Commission approval of an alternative and renewable energy portfolio standard compliance plan pursuant to W.Va. Code § 24-2F-6. In order to approve the compliance plan, the Commission must make the determination that the compliance plan has a reasonable expectation of achieving the portfolio standard requirements at a reasonable cost to electric customers in this state. W.Va. Code § 24-2F-6(e).

In seeking rate recovery for the compliance costs pursuant to W.Va. Code § 24-2F-7, the electric utility has the burden to demonstrate that the costs are reasonable and represent the least cost of compliance. W.Va. Code § 24-2F-7(a).

The Commission has the authority to impose penalties in the form of compliance assessments on utilities that fail to comply with the portfolio standard requirements pursuant to W.Va. Code § 24-2F-5(g).

The Act also required the Commission to consider extending, by rule, the awarding of credits "to electric distribution companies or electric distribution suppliers other than electric utilities" or to non-utility generators pursuant to W.Va. Code § 24-2F-10(b).

By its November 5, 2010 Order in General Order No. 184.25, issuing the final Portfolio Standard Rules, the Commission extended the awarding of credits representing the generation of electricity from alternative and renewable energy resources to non-utility generators, but limited the awarding of credits for greenhouse gas emission or reduction or offset projects and energy efficiency and demand-side energy initiative projects to the state electric utilities.

West Virginia is one of twenty-nine states and the District of Columbia that have enacted RPS programs. West Virginia and some of the states created a system of tradable credits and renewable energy credits to monitor compliance with the state RPS programs. In some states, the credits are bundled, meaning that the credits or environmental attributes of the energy are included with and purchased with the power. In some states, the credits are unbundled, or sold separately from the power. In West Virginia, the credits may be unbundled or bundled with the purchased power pursuant to Rule 5.6 of the Portfolio Standard Rules.

West Virginia, Ohio and Pennsylvania include alternative energy resources in the state RPS programs. Pennsylvania includes power generated from coal mine methane and waste coal in its Alternative Energy Portfolio Standard (AEPS), codified at 73 P.S. § 1648.1 *et seq.*, enacted November 30, 2004, as amended, effective February 28, 2005. Ohio includes power generated by clean coal technology and coal mine methane as part of its Alternative Energy Portfolio Standard, codified at ORC 4928.64 *et seq.*, effective January 1, 2009.

The credits in West Virginia, Ohio, and Pennsylvania are sometimes referred to as alternative energy credits (AECs). In West Virginia, the credits are defined as alternative and renewable energy resource credits in the Portfolio Act, and are sometimes referred to as "ARECs." For ease of reference, where discussed herein, the credits are referred to interchangeably as "credits" or "RECs," and is the term most commonly used in the case law and literature discussing the credits.

4. The Parties' Positions

As noted at the evidentiary hearing and in the briefs, there is general agreement on the basic facts, and this case involves primarily legal issues.

To summarize, Mon Power and PE assert that the utility purchaser should own the credits based on the same analysis, reasoning and conclusions adopted in other state jurisdictions assigning to the purchasing utilities the credits related to the attributes and fuel sources for PURPA facilities that had entered into EEPAs before the creation of State defined credits. Companies rely heavily on the reasoning in the Connecticut, New Jersey, and Pennsylvania cases that emphasize equity and policy considerations. City and MEA assert that the QFs should own the credits under the EEPAs, citing cases in other states that ruled in favor of the QFs which have new EEPAs executed after the FERC ruling or other state law determination. City and MEA further assert entitlement to the credits based on state and federal law and principles of contract law. CAD and Staff argue that the credits should be assigned to the utility to protect ratepayer interests.

5. Subject-Matter Jurisdiction

Initially, the Commission must determine whether it has subject-matter jurisdiction pertaining to the issue presented in the Joint Petition. The Commission concludes that it has jurisdiction to resolve the issue of ownership of credits related to generation that is purchased by a utility from the three specific QF EEPAs under consideration in this case. This is not an area that has been preempted by federal law. As previously indicated in its American Ref-Fuel decision, FERC declined to declare that credits should be retained by a QF and declined to assume jurisdiction to decide issues of credit ownership under similar EEPAs. The FERC found that PURPA did not speak to this issue and that any resolution must depend on state law.

We determine that the Legislature has vested the Commission with jurisdiction and authority over this matter. Not only does the Commission have subject-matter jurisdiction over this matter and the parties based on the Portfolio Act, the Commission also has jurisdiction over this matter pursuant to the provisions of Chapter 24 of the West Virginia Code related to the Commission's powers and duties to regulate public utilities, to establish just and reasonable rates pursuant to W.Va. Code §§ 24-1-1(a)(4), 24-2-2(a) and 24-2-3, and to review and approve the EEPAs. In creating the Commission, the West Virginia Legislature vested the Commission with broad regulatory authority regarding the costs, rates, acts and practices of public utilities. In enacting the Portfolio Act, the Legislature vested the Commission with the jurisdiction and regulatory authority to effectuate requirements and legislative purposes of the Act.

The primary statute governing this case, the Portfolio Act, confers subject-matter jurisdiction to the Commission. As the administrative agency charged with carrying out the requirements of the Act, the Commission has jurisdiction to resolve the issue of credit ownership. The Act authorized the Commission to establish a credit trading program "to establish, verify and monitor the generation and sale of electricity from alternative and renewable energy resource facilities" pursuant to W.Va. Code § 24-2F-4. Although there are other ways to obtain credits, an electric utility is to receive one credit per each megawatt hour of electricity purchased from an alternative or renewable energy resource facility. W.Va. Code § 24-2F-4 (b) (1). The Act authorizes the Commission to monitor and ensure utility compliance with portfolio standard requirements and to promulgate rules to effectuate the goals of the Act. The Act prohibits the double counting of credits. Consistent with the jurisdiction and authority vested to the Commission by the Act is the authority to determine ownership of the credits in order to carry out the Act mandates, to ensure utility compliance with the Act, to award credits and to prevent the double counting of credits.

State law creates the credits that are at issue in this proceeding, and authorizes the Commission to establish a program for identifying credits and trading credits "to establish, verify and monitor the generation and sale of electricity from alternative and renewable energy resource facilities." Commission rules, promulgated according to state law, establish methods for identifying and certifying qualified alternative energy facilities. State law also gives the Commission the authority and responsibility to ensure that the electric utilities comply with the requirements of the Portfolio Act. State law gives the Commission authority over the rates and practices of public utilities and that authority involves assuring that costs incurred by utilities are reasonable and prudent. Given this broad authority that state law gives the Commission over the West Virginia Portfolio Standards credits, we conclude that the Commission has jurisdiction under State law to determine entitlement to the credits.

In its Initial Brief, Staff suggests that this case may be one that should be resolved as a contractual matter in state court. Staff Initial Brief at 3. We disagree. As discussed above, the EEPAs were initially subject to Commission jurisdiction, the purchasing practices and rates of Mon Power and PE are subject to the jurisdiction of the Commission, compliance with the Portfolio Act is subject to the jurisdiction of the Commission, and determination of eligibility of generation for credits under the Act is subject to the jurisdiction of the Commission. We hold, as has been determined in other states that have similar regulatory processes as West Virginia, that the credits attached to the generation from the PURPA projects did not exist when the EEPAs were executed. As a creation of subsequent state law and regulation, the credits are not a normal intangible asset that could have been considered independent of state regulatory jurisdiction by arms length contract negotiation. For these reasons, the determination of ownership of the credits requires the unique expertise of the Commission, and the Commission has jurisdiction over this matter under state law.

Similar determinations regarding the jurisdiction of the state regulatory commission have been made in other states. Following the FERC ruling, this issue was addressed in other states that enacted RPS laws prior to West Virginia. In a Connecticut case, the Supreme Court of Connecticut addressed the argument that Connecticut Department of Public Utility Control (DPUC) lacked subject-matter jurisdiction to resolve the issue of ownership of the RECs under the PURPA Agreements because the issue involved a question of intent under a privately negotiated agreement and the DPUC lacked the statutory authority to decide such a matter. In Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control, 283 Conn. 672, 931 A.2d 159 (Conn. Sup. Ct. 2007) (Wheelabrator II),[5] the Court stated, "[w]e are unable to accept the plaintiff's

[5] The Connecticut case is part of a line of cases beginning with the Connecticut 2004 DPUC decision, In re Petition of the Riley Energy Corp. for Contract Approval and Declaratory Rulings Regarding Lisbon Res. Recovery Project-General Info. Sys. Certificates, Docket No. 91-01-12RE01, 2004 WL 3160409, 2004 Conn. PUC Lexis 148 (DPUC December 6, 2004) (2004 DPUC Decision), in which the DPUC held that the utilities should own the credits. The case was appealed to state and federal courts levels on separate grounds. For ease of reference, the Commission adopts the references to the decisions adopted in the Pennsylvania case in ARIPPA discussed infra and also adopted by the Petitioner in the legal briefs, as follows:

- In re Petition of the Riley Energy Corp. for Contract Approval and Declaratory Rulings Regarding Lisbon Res. Recovery Project-General Info. Sys. Certificates, Docket No. 91-01-12RE01, 2004 WL 3160409, 2004 Conn. PUC Lexis 148 (DPUC December 6, 2004) (2004 DPUC Decision)
- Wheelabrator Lisbon, Inc. v. Department of Public Utility Control, 283 Conn. 672, 931 A.2d 159 (Conn. Sup. Ct. 2007) (Wheelabrator II)

characterization of the issue before us as one of pure contractual intent . . . [it]is more a question of legislative intent and public intent than a question of the intent of the parties." 931 A. 2d 159, 169-170.

In upholding the decision of the Pennsylvania Public Utilities Commission (PaPUC), the Pennsylvania Commonwealth Court in ARIPPA v. Pennsylvania Pub. Util. Comm'n 966 A.2d 1204 (Pa. Commw. Ct. 2009) (ARIPPA) also addressed the argument that the PaPUC lacked subject-matter jurisdiction to decide the issue of credit ownership under the PURPA Agreements because the case involved a private contractual dispute. The Court stated:

> The nature of alternative energy credits is distinct from items normally bargained for in a private contract. The credits are a recent creation of the legislature . . . . Finally, although alternative and renewable energy credits may be bought and sold, their precise nature as a property right has not been developed and settled in the law. Considering the unique nature of the alternative energy credits and the provision in the AEPS for the Commission's extensive oversight of them, we believe, like the Court in *Wheelabrator II*, that resolving this dispute is not a matter of ordinary contract interpretation, but rather a process that implicates the expertise of the Commission. Accordingly, we hold that the Commission had jurisdiction over this matter.

Id. at 1212.

Consistent with the authority of this Commission under State law, the FERC ruling in American Ref-Fuel, and the reasoning applied to similar facts and circumstances in other states, the Commission concludes that the issue of credit ownership is properly decided by the Commission, not in the court system as a private contractual matter.

6. Rulings of Other Jurisdictions

Other states have ruled on the credit ownership issue similar to that presented in this proceeding. In reviewing the cases from the other state jurisdictions, we consider the decisions as instructive, not controlling authority in this case which we decide based on West Virginia law. In American Ref-Fuel, FERC held that state law determines the ownership of the credits under the EEPAs because the credits are a creation of state law. In reaching a decision in this case, therefore, we have been guided by West Virginia law, including the Portfolio Act, and have come to conclusions that are similar to those in

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- Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 526 F. Supp. 2d 295 (D. Conn.2006) (Dist. Ct. opinion)
- Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 531 F.3d 183 (2d Cir. 2008) (Wheelabrator I)

other states only to the extent that we agree with the underlying legal rationales and principles and to the extent the decisions are consistent with our State law.

Mon Power and PE argue that the Commission should rule that the purchasing utility is entitled to ownership of the credits based on the general rule of law adopted in the majority of the states addressing the issue presented in this case. The Companies cite the results of the study Who Owns Renewable Energy Certificates? An Exploration of Policy Options and Practice, E. Holt, R. Wiser and M. Bollinger, Ernest Orlando Lawrence Berkeley National Laboratory, Report No. LBNL-5996, April 2006 (Holt study), in which the authors reviewed the rulings of sixteen states addressing the issue of credit ownership under similar PURPA Agreements. The study found that the majority of the states ruled that the utility is entitled to the ownership of the credits related to power purchases under older EEPAs that were executed prior to the widespread existence of credits and that are silent on the issue of credit ownership.

The Holt study stated that "[s]tates have opted in most cases to establish that the utility purchaser will have title to the underlying RECs for existing QF contracts, while several states award RECs resulting from new contracts to the QF." The Holt study found that the determination of REC ownership in the state decisions depended on whether the QF contract predated a specific regulatory determination or whether the contract was a new QF contract. Id. at xiii.[6]

Companies rely primarily upon the decisions reached in Connecticut,[7] New Jersey,[8] and Pennsylvania[9] that followed the majority of the rulings on this issue and ruled in favor of the utilities based on equity and policy considerations.

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[6] According to the Holt study, states attributing credit ownership to the utility under the older contracts that predate current state laws establishing RECs include Connecticut, Colorado, Maine, Minnesota, North Dakota, New Jersey, New Mexico, Nevada, Texas and Wisconsin. States attributing credit ownership to the generator under new contracts include Colorado, Nevada, Oregon, Rhode Island, Texas and Utah. Some of these states clearly distinguish between contracts depending on their age in relationship to state laws establishing RECs. At the time of the Holt study in 2006, decisions were pending in Arizona, California, and Pennsylvania. See generally, Ed Holt, Ryan Wiser and Mark Bollinger, Who Owns Renewable Energy Certificates? An Exploration of Policy Options and Practice, Ernest Orlando Lawrence Berkeley National Laboratory, LBNL – 59965, April 2006, at xiv.

[7] See fn. 5 infra for the list of the Connecticut Wheelabrator cases.

[8] In re Ownership of Renewable Energy Certificates, 913 A.2d 825 (N.J. Super. Ct. App. Div. 2007) (affirming New Jersey Board of Public Utilities decision assigning RECs to utilities).

[9] ARIPPA v. Pennsylvania Pub. Util. Comm'n, 966 A.2d 1204 (Pa. Commw. Ct. 2009) (affirming PaPUC decision assigning RECs to utilities in Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No. P-00052149 (final Pa. Order, dated December 21, 2006, affirming ALJ Initial Decision, dated July 5, 2006)).

City argues that the general rule adopted by the majority of the states and the Connecticut, New Jersey and Pennsylvania cases do not apply to this case. City argues that in the states that interpreted EEPAs executed after the 2003 FERC ruling and that are silent on the issue of credit ownership, the majority of the states granted ownership of the credits to the power generator. City argues that the 2004 Amendment to the Hannibal EEPA constitutes a new Agreement executed after the 2003 FERC ruling. City argues that the state decisions related to new QF contracts identified in the Holt study apply to this case, citing the decisions reached in Colorado, Nevada, Oregon, Rhode Island, Texas, Utah, and Arizona included in the Holt study.[10] City Response filed March 4, 2011 at 2-3.

MEA maintains that the state rulings from Oregon, Texas, and Nevada apply to this case. In addition, MEA cites a recent Minnesota decision in which the Minnesota PUC ruled that the generator was entitled to the credits under older PURPA Agreements.[11] MEA Initial Brief at 16-18. MEA argues that the Pennsylvania, New Jersey and Connecticut cases cited by Mon Power and PE conflict with the 2003 FERC ruling concluding that the avoided cost rate includes only energy and capacity. MEA Initial Brief at 15; MEA Reply Brief at 5-6.

The Commission finds that the decisions cited by City and MEA do not apply to this case and are inapposite due to the differences between their facts and the facts in this case. Those decisions primarily involve new EEPAs executed after the 2003 FERC ruling or applicable state law determination, unlike the EEPAs under consideration in this case. The 2004 Amendment to the Hannibal EEPA did not amend the material terms of the Agreement, such that it constitutes a new Agreement. Although the EEPAs in question were amended over the years, as approved by the Commission in Case Nos. 86-169-E-PC, 87-669-E-C, and 89-200-E-PC, the EEPAs have not been amended such that the Agreements represent new EEPAs executed after the 2003 FERC ruling or after the July 1, 2009 effective date of the Portfolio Act and the January 4, 2011 effective date of the Commission Portfolio Standard Rules.

[10] Colorado Public Utilities Commission, Docket No. 05R-112E, In the Matter of the Proposed Rules Implementing Renewable Energy Standards 4 CCR 723-3, Decision No. C06-0091, Order Granting, In Part, And Denying, In Part, Rehearing, Reargument And Reconsideration, January 27, 2006; Nevada Public Utilities Commission, Docket No. R115-03, effective February 18, 2004; entered as Nevada Administrative Code 704.8925; Oregon Public Utility Commission, Docket No. AR 495, "Rulemaking to Adopt and Amend Rules Related to Ownership of the Non-energy Attributes of Renewable Energy (Green Tags), Energy Service Supplier Certification Requirements, and Use of the Terms 'Electric Utility' and 'Electric Company'." Order No. 05-1229, November 28, 2005; Rhode Island Public Utilities Commission, Docket 3659 – Negotiated Rulemaking to Promulgate Rules and Regulations to Implement a Renewable Energy Standard in compliance with R.I.G.L. Section 39-26-1. Rules and Regulations Governing the Implementation of a Renewable Energy Standard, adopted November 30, 2005; Texas Administrative Code, Title 16, Part II, Chapter 25.173(k)(1); Public Service Commission of Utah, Docket No. 03-035-14, Order on Reconsideration and Clarification, February 2, 2006; Arizona Corporation Commission Docket No. RE-00000C-05-0030, In the Matter of the Proposed Rulemaking for the Renewable Energy Standard and Tariff Rules, Decision No. 68566 issued March 14, 2006, Attachment A at Section R14-2-1803.

[11] In the Matter of Xcel Energy's Petition, Docket No. E-002/M-08-440 (Minn. Order, September 9, 2010).

The 2010 Minnesota case in In the Matter of Xcel Energy's Petition involves the Minnesota PUC's determination of credit ownership under older PURPA contracts. The Minnesota PUC found that the generator was entitled to the credits based on the PUC's interpretation of the 2003 FERC ruling that the avoided cost rates under the PURPA contracts conveyed only energy and capacity, absent a contractual provision to the contrary. We find that the Minnesota case is distinguishable, however, because it is based on an interpretation of the 2003 FERC ruling, which made the observation that nothing in PURPA would have conveyed the RECs. However, the essence of the FERC decision was that the question of REC ownership should be determined by applying state law, which Minnesota did not do. The Minnesota case is also contrary to the Second Circuit decision in Wheelabrator I, in which the Appellate Court upheld the District Court's interpretation of American Ref-Fuel that FERC did not decide that the PURPA contracts require an express contractual provision in order to transfer the credits, but instead decided that the issue of credit ownership under PURPA was a matter to be decided by state law. Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 531 F.3d 183, 189-190 (2d Cir. 2008).

Reviewing the rulings of other jurisdictions, the Commission finds the rationales in the New Jersey, Connecticut and Pennsylvania cases are more persuasive.

In the New Jersey, Connecticut and Pennsylvania decisions, the respective State Commissions and reviewing Courts held that based on state law the utility owns the credits related to PURPA facilities that have a power sale contract with the utility that predate the creation of RECs by state law and lack provisions addressing credit ownership. Those are the factual circumstances before us with regard to the three EEPAs at issue in this case. The Courts considered several factors. The New Jersey and Connecticut Courts found it significant that the long-term PURPA Agreements requiring the purchase of electricity by the utilities contained terms that were highly favorable to the generators, including terms that provided (i) front-loaded rates to support project financing and (ii) avoided cost rates at higher than the market rates. The Courts found that it was unfair for the utility customers to pay additional costs to purchase the credits to comply with the state RPS requirements when they had already paid for the electricity at higher than market rates to promote PURPA policies and the development of QFs. The Pennsylvania Court upheld the state regulatory commission decision that it was unfair for the utilities and customers to pay additional costs for compliance credits when they had purchased the qualifying electricity. The Pennsylvania Court found that the Pennsylvania Commission's decision was consistent with the public interest. The New Jersey, Connecticut, and Pennsylvania Courts uniformly held that a ruling in favor of the generators that required the utilities to pay additional costs for the purchase of the electricity contravened the state laws creating the credits and mandating utility compliance with the RPS requirements.

In Wheelabrator II, in affirming the decision of the Connecticut Department of Public Utility Control (DPUC), the Supreme Court of Connecticut found that ruling in favor of the generators would provide the generators with "an additional unbargained-for benefit . . . again at the expense of the utility and the ratepayers." Wheelabrator Lisbon, Inc. v. Department of Public Utility Control, 931 A.2d 159, 176 (Conn. Sup. Ct. 2007). In affirming a decision of the New Jersey Board of Public Utilities (BPU) that assigned credits to the utility, the Superior Court of New Jersey, Appellate Division, found that assigning the credits to the generator under the PURPA contracts "would have meant that the retail customer would have had to pay more for the electricity. This result would be unfair to the retail customers, who have already paid for appellants' electricity, and is entirely inconsistent with the governing state legislation." In re Ownership of Renewable Energy Certificates 913 A.2d 825, 830 (N.J. Super. Ct. App. Div. 2007).

In ARIPPA v. Pennsylvania Pub. Util. Comm'n, 966 A.2d 1204 (Pa. Commw. Ct. 2009) the Pennsylvania Commonwealth Court upheld a Pennsylvania Public Utilities Commission (PaPUC) decision affirming an ALJ Initial Decision issued on July 5, 2006, in which the ALJ held that the utilities owned the credits based on the purchase of the electricity generated by non-utility generators (NUGs). In Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No. P-00052149 (Order dated December 21, 2006) (PaPUC Decision), the PaPUC affirmed the Initial Decision in which the ALJ focused on the compliance requirements of the AEPS and the fact that the credits were created to measure compliance with the Pennsylvania law in ruling in favor of the utilities. The PaPUC affirmed the ALJ's conclusion in the Initial Decision at 21 that "[s]ince the EDCs [electric distribution companies] were purchasing qualifying alternative generation under the PPAs . . . the EDCs were also entitled to the AECs as a measurement of the power purchased." PaPUC Decision at 16. The PaPUC adopted the rationale in the Initial Decision at 22 that "[t]o hold otherwise would open the possibility that the EDCs continue to purchase power under their existing PPAs, at least partially complying with the Act's requirement that they use this power generated from alternative sources, while the NUGs are free to sell the AECs, which is the *measure of EDC compliance*, elsewhere. This would force the EDCs to purchase additional AECs from other sources, if they are available, or to be forced to pay a penalty for failure to comply with the Act when, in fact, they had purchased and were using the energy generated by the NUGs in actual compliance with the Act but unable to prove it." (italics in original) PaPUC Decision (citing ALJ Initial Decision).

In the Initial Decision in Pennsylvania Docket No. P-00052149, the ALJ held that the credits are not created until the electricity is generated, and that at the point of the credit's creation, the owners of the electricity own the credits. The ALJ concluded that because the purchasing utility owns the electricity pursuant to the EEPAs as soon as it is generated, the utility owns the credits as well. The underlying rationale in the ALJ decision is that ownership of the credits is based on ownership of the electricity. Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No.

P-00052149 (Initial Decision, dated July 5, 2006) at 53. The Court affirmed the PaPUC decision that affirmed the ALJ ruling that the credits produced by the non-utility generators were owned by the EDCs because the companies owned the electricity once it was generated. ARIPPA v. Pennsylvania Pub. Util. Comm'n, 966 A.2d 1204, 1207-1208, 1214 (Pa. Comm'n, Ct. 2009).

In ARIPPA, the Court affirmed that PaPUC's determination that "the public interest favored awarding ownership rights in the credits to the distribution company" because "if the credits attributable to that power belong to the generating company, the distribution company will have to purchase credits separately and pass that additional charge along to the consuming public." Id. at 1214. In the absence of a controlling statutory provision in the applicable version of the AEPS and language in the contract itself, the Court upheld the PaPUC's interpretation of statute that the utilities owned the credits under the PURPA contracts. Id.

Like the majority of the states that ruled in favor of the utilities, the Commission is faced with the situation of applying and interpreting a state law that created the credits, but does not specify whether the utility or the generator owns the credits when the PURPA EEPAs at issue predate the Act and those EEPAs are silent on the issue of credit ownership. For reasons more fully expressed in the next section of this Order on the application of state law, like a majority of the states and the New Jersey, Connecticut and Pennsylvania Courts that have addressed this issue presented in this case, we hold that the purchasing utility should own the credits under the EEPAs.

It is appropriate for the Commission to consider the rulings in New Jersey, Connecticut and Pennsylvania states that are located in the PJM region as persuasive authority in interpreting the Portfolio Act and its policies. The Pennsylvania and West Virginia laws are alike. The laws have a similar statutory scheme, definitions, and eligible resources. As part of its delegated responsibilities, the Portfolio Act required the Commission to consider the rules and regulations of other states within the PJM region in implementing the Act provisions under W.Va. Code § 24-2F-8. Although this Code section relates to Commission authorization to promulgate net metering rules, W.Va. Code § 24-2F-8 indicates that the Legislature intended for the Commission to consider the laws of other states in the PJM region in implementing the Act.

7. Application of State Law

MEA and City assert that state law resolves the issue of credit ownership in favor of the QFs. Although the parties' arguments differ slightly, in essence, the QFs maintain that in issuing the Rules, the Commission resolved the issue of credit ownership in this proceeding based on its decision to extend the awarding of credits for generation from alternative and renewable energy facilities to non-utility generators pursuant to W.Va.

Code § 24-2F-10 (b) in General Order No. 184.25 and based on Rules 5.2 and 5.6 of the Commission Portfolio Standard Rules.

Rule 5.2 provides, in relevant part:

> A qualified energy resource certified under Rule 4.2.a or 4.2.c shall be awarded certified alternative and renewable energy resource credits as summarized in Table 150-34A . . . .

Rule 5.6 provides:

> An electric utility purchasing power may meet the Portfolio Standard requirements set forth in this rule, provided that the credit awarded pursuant to Rule 5.2 is included in, or bundled with, the purchase of the power. Credits may also be purchased independently, or unbundled from, purchased power.

MEA and City argue that that the Commission cannot act contrary to its own Rules by ruling in favor of the utilities after issuing the Portfolio Standard Rules and deciding to award credits to the non-utility generators. MEA Initial Brief at 5-6; MEA Reply Brief at 3; City Initial Brief at 7.

In response, the Companies argue that the Commission did not make a final determination on the ownership of the credits from PURPA facilities in issuing the Commission Portfolio Standard Rules. The Companies argue that the Portfolio Act and the Commission Rules do not decide the case because the Rules do not contain specific provisions governing the issue of credit ownership under the factual circumstances presented in this case involving EEPAs that predate the Act and that are silent on the issue of credit ownership. The Companies argue that, in promulgating the Rules and extending the awarding of credits to non-utility generators, the Commission did not intend to address the issue of credit ownership associated with energy purchased under long-term PURPA contracts that predate the creation of credits and that do not address credit ownership. Mon Power and PE Initial Brief at 7; Mon Power and PE Reply Brief at 6-13. We agree with the Companies.

MEA and City are correct that a non-utility generator may be entitled to the credits for qualified generation from its generating facility based on the Commission Portfolio Standard Rules issued by the Commission in General Order No. 184.25. Under Rule 5.6 of the Commission Portfolio Standard Rules, the energy and credits associated with the generation of electricity from alternative and renewable energy resource facilities may be unbundled for facilities constructed or contracts entered into after the date of our Rules.

The Commission finds that the unbundling provision in Rule 5.6, however, does not govern this case. The Rules cannot reasonably be applied retroactively to these PURPA EEPAs and were intended to apply prospectively to agreements for the purchase of electricity entered into after January 4, 2011, the effective date of the Rules. The Rules and the determination under W.Va. Code § 24-2F-10(b) that the non-utility generator may be awarded credits, unbundled from the energy generated, for qualified generation does not apply to the factual circumstances of this case involving PURPA facilities and EEPAs predating the Rules. The rulemaking proceeding in General Order No. 184.25 did not address PURPA EEPAs executed prior to the Act, and the unbundling provision of the Rules was not intended to apply to these preexisting agreements.

The optional unbundling provision set forth in Rule 5.6 also does not apply to the PURPA EEPAs because these contracts that are based on the avoided cost rate do not include the unbundled aspect of the rule. PURPA requires that utilities purchase power generated from qualified PURPA facilities. Among other things, PURPA contracts were developed to enable an up or down decision on financing and construction of the projects based upon the financial expectation of receiving a guaranteed future revenue stream in the form of payments based on the utility avoided capacity and energy costs and allowable financing terms that would facilitate debt and equity financing. When the contracts were negotiated and approved by the Commission, the retention of the credits by the PURPA facility was not, and is obviously not now, necessary to encourage and facilitate the construction of these alternative energy facilities. The 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. This allowed the PURPA facilities to monetize the long-term future cash flows, which were protected by PURPA and our retail rate orders, to finance the PURPA facilities.

By 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 power generators. This substantial consideration included a guaranteed fixed avoided capacity cost rate, a guaranteed avoided energy cost rate that would increase as the variable alternative energy costs of the purchasing utility increased, a guarantee that captive ratepayers would be obligated to pay retail rates over the life of the EEPAs to cover the agreed-to EEPA rates, a guaranteed market for the power through the utility to which the projects were directly connected, and last, but not by any means least, the favorable contract terms that allowed extended long-term financing and to some extent, up-front cash flow in the early years of the EEPAs that was in excess of the utility's then current avoided costs.

Because we have decided that our Portfolio Standard Rules do not vest the PURPA QFs with the credits, we turn to an analysis of State law in order to resolve this dispute. The Portfolio Act does not contain a specific provision that the utility or a

PURPA generator owns the credits under EEPAs that predate the Act. 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 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 current and future ratepayers, the utilities, and the state's economy.

The rules of statutory construction require that meaning be given to all provisions in a statutory scheme; if at all possible, statutes must be interpreted so that no enactment is meaningless. The rules of statutory construction require that a construction of a statute that leads to inconsistent results or is in conflict with another statute be avoided. Belt v. Cole, 305 S.E. 2d.340, 305 S.E.2d 678 (W.Va. 1983); Mills v. VanKirk, 192 W.Va. 695, 453 S.E.2d 678 (1994).

Reading the provisions of Chapter 24 and the Portfolio Act provisions under W.Va. Code §§ 24-2F-4, 24-2F-5, 24-2F-6, and 24-2F-10(b) *in pari materia* and in a manner consistent with the intent and mandates of the Act, the Commission concludes that the credits are owned by Mon Power and PE, not the QFs, based on our interpretation of State law and the Commission Rules.

The primary mandate in the Portfolio Act is to require utility compliance with the alternative and renewable energy portfolio standard to fulfill the statutory goals set forth in W.Va. Code § 24-2F-2. In recognition that the electric utilities in this state are the primary producers and distributors of energy and that the legislative goals of W.Va. Code § 24-2F-2 will be effectively met through utility compliance with the portfolio standard requirements, the Act mandates are directed primarily to the electric utilities. The compliance obligations are imposed exclusively upon the utilities.

Under the Portfolio Act, utilities are required to own a certain amount of credits. The credits exist to show that the utility owns and uses a certain amount of qualifying generation from alternative and renewable energy resources. Companies have purchased and will continue to purchase qualified generation from the PURPA projects. Consistent with the intent of the Act, we conclude that the utilities should own the credits that exist to measure compliance with the Act related to power purchased under the EEPAs.

It would be contrary to the intent of the Portfolio Act to require the utility that has a continuing mandatory statutory obligation to purchase the qualifying generation at rates that are guaranteed pursuant to Commission Orders to separately purchase the credits from the PURPA generator, or to acquire additional credits at the expense of the utility and its customers. The credits are a measure of utility compliance with the Act by purchasing qualified generation. Because it is a given that the utility has purchased and will continue to purchase qualified generation from PURPA projects, it would be wrong to require the utility to now purchase credits to "verify" those purchases for the purpose of demonstrating compliance. To require that the utility and its customers pay additional money for credits to "verify" those purchases exposes the ratepayers to unreasonable additional expense and would constitute a windfall to the PURPA projects not contemplated in the Act or, for that matter, in the original PURPA EEPAs.

A further basis for our decision is that the purchase of generation under the PURPA EEPAs results in the utility owning the generation and the credits associated with the generation. The Companies own the electricity because under PURPA and the EEPAs, Mon Power is required to purchase all of the qualifying electricity generated from the PURPA facilities as that electricity is generated.[12] Because the credits are created by state law and exist only as the electricity is generated, it follows that Mon Power as the purchaser and owner of the qualifying generation at the time the electricity is generated owns the credits under the EEPAs.

Part of the "state law" that informs and assists us in reaching our decision must, of necessity, relate to the statutory obligations and duties imposed on this Commission in setting fair and reasonable rates for the utilities and their customers. W.Va. Code §§ 24-1-1(a)4, 24-2-2(a) and 24-2-3. We believe that the Legislature intended for the Commission to assure fair and reasonable rates in carrying out our duties under the Act. The legislative findings in W.Va. Code § 24-2F-2 contain many references that require a consideration of the reasonableness of the costs to the ratepayer. W.Va Code § 24-2F-6(e) requires that the Commission must determine that a portfolio standard plan "has a reasonable expectation of achieving the portfolio standard requirements at a reasonable cost to the electric customers" in order to approve a plan. The Act provides that before a utility can recover compliance costs, it must demonstrate that the costs are reasonable and represent the least cost of compliance. W.Va. Code § 24-2F-7 (a). As part of fulfilling its delegated duties and responsibilities in determining the fairness and reasonableness of rates, and in all its deliberations, the Commission must consider and balance the interests of current and future ratepayers, the utilities, and the State's economy pursuant to W.Va. Code § 24-1-1(b).

There are no statutory provisions or contractual provisions determining credit ownership in the EEPAs. Under these circumstances, like the New Jersey, Connecticut and Pennsylvania Courts, the Commission finds that it is appropriate to apply principles of equity and policy in resolving the issue of credit ownership under EEPAs by balancing the interests of the current and future ratepayers, the utilities and the State's economy as required by W.Va. Code § 24-1-1(b).

[12] Mon Power must purchase the maximum contract energy output specified in the three EEPAs, as, if and when delivered to Mon Power's System subject only to certain limited emergency and force majeure limitations, pursuant to Section 1.1 of the EEPAs, Sale and Purchase of Energy. Companies' Initial Brief Ex. B; Companies' Ex. 7, 1 (City EEPA), Companies' Ex. 7, 5 (AmBit EEPA), and Companies' Ex. 7, 8 (Morgantown EEPA).

Under PURPA and applicable PURPA regulations, Companies were required to purchase electricity from the QFs at prices that exceeded the incremental cost of power supply in the earlier years of the contracts. These payments to the QFs are consistent with the intent and goals of PURPA. We were required by PURPA to foster the type of generation that is provided by the PURPA facilities and approve the EEPAs which did that. We also made decisions to facilitate the continued financial well being of the PURPA facilities when faced with disputes between them and Mon Power. This was in the public interest at the time, and is still in the public interest, but 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 to be purchased on behalf of, and paid for by, West Virginia ratepayers. This is particularly true because the West Virginia ratepayers have shouldered the financial responsibility and risks of rates and terms that were designed to make the financing of the PURPA facilities possible and to foster, support and maintain, to the maximum extent within our authority to do so, the continuing financial health of the PURPA facilities.

We are charged with fixing cost based rates for the utilities and customers. In determining that Mon Power has ownership of the credits related to the generation from PURPA facilities that entered into EEPAs prior to the Act, the Commission has considered the interests of the PURPA facilities, the utilities and customers and has endeavored to balance the interests of the facilities, the utilities, Mon Power and PE and City, and the current and future ratepayers.

In applying W.Va. Code § 24-1-1(b) to this case, the Commission considered the evidence and arguments of Companies and City regarding the financial impact of the loss of the QF credits on the utilities and its ratepayers. On 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. The evidence introduced by Companies shows that it will cost at least $50 million through 2025 to acquire the additional credits required to meet the portfolio standard requirements without the credits generated from the three PURPA facilities.[13] Tr. 8/25/11 at 40; Companies' Ex. 1 at 9; Case No. 10-1912-E-CP, revised Direct Testimony of Robert B. Reeping.

The Commission concludes that it would be fundamentally unfair for the West Virginia ratepayers to pay an additional $50 million to comply with the mandates and policies of both PURPA and the Portfolio Act, when Mon Power was required to

[13] Companies' estimate of $50 million is based on the estimated cost of $5.14 per credit. Companies' estimated cost per credit of $5.14 is low compared to the estimates given in other utility compliance plan filings, including the City's compliance plan in Case No. 11-0009-E-CP. City estimated the cost to acquire additional credits to be $15 per credit, based on a range of credit pricing in adjacent markets of between $2 to $20 per credit. Case No. 11-0009-E-CP, Tr. 7/22/11 at 24. If the estimated cost of $15 per credit used by City were used to estimate the Companies' additional compliance costs, Companies' cost of compliance would be approximately $145 million.

purchase the electricity from the QF facilities and when the QFs have received favorable treatment under the EEPAs because of PURPA and our decisions implementing PURPA and responding to financial problems of the PURPA facilities. The Hannibal, Grant Town and Morgantown projects would likely not have been viable, or would have been much more difficult to finance, absent the obligation of Mon Power to purchase the electric energy output from the facilities and for West Virginia customers to compensate Mon Power at significant capacity and energy rates that initially exceeded the incremental cost of power supply to Mon Power. The projects continue to succeed only because of the favorable terms of the original EEPAs and in some cases because of amendments approved by the Commission.

Companies state that City will have 26,500 excess credits, without the Hannibal credits. Tr. 8/25/11 at 42; Companies' Ex. 3 at 6-7. Companies argue that City will have a windfall from the Hannibal credits, estimating that the potential value of excess credits from the Hannibal project to City to be over $35 million. Companies argue that it is inequitable for City to obtain a windfall from the potential sale of the credits given the advantageous position in which it has been placed as a result of the favorable terms of the Hannibal EEPA. Mon Power and PE Initial Brief at 23; Mon Power and PE Reply Brief at 20-24.

We cannot overlook the fact that the Portfolio Act is scheduled, by its own terms, to terminate after 2025. Whether the portfolio compliance requirement will be continued by the Legislature in its present (or some modified) form will not be known until sometime well into the future. Without the Hannibal credits, based on its present generation portfolio, City will have more than enough credits through 2025 to comply with the Act. The data shows that City will not become negative in credits until 2034. This is not true of Companies. Without the credits related to the PURPA facilities, Mon Power and PE will become deficit in 2020 and will be required to obtain over 9 million credits through 2025 at a conservative cost estimate of over $50 million.

Although City and its customers may have additional compliance costs to acquire additional credits to replace the Hannibal credits for compliance after 2025, the estimated costs are significantly less than costs to Companies and their customers. At the July 22, 2011 evidentiary hearing held in City's compliance plan in Case No. 11-0009-E-CP, David White, the General Manager of City's electric utility operation, testified that City will have sufficient credits through 2025 to meet the portfolio standard requirements without the Hannibal credits. Case No. 11-0009-E-CP, Tr. 7/22/11 at 16-20. The prefiled testimony of Mr. White shows that even without the Hannibal credits the City will not have a deficit of credits until 2034. Additional DLW-D at 3-4. Mr. White testified that City planned to acquire additional credits from its power supplier, American Municipal Power Inc. (AMP), from an AMP wind or solar project to replace the Hannibal credits in order to bank additional credits through 2039. Case No. 11-0009-E-CP, Tr. 7/22/11 at 16-20; City Additional DLW-D at 3-8. Mr. White testified that absent the availability of Hannibal credits, City will begin acquiring additional credits in the near term and bank credits to be used from 2034 through 2039 because there were limited open periods within which City is able to subscribe to the AMP projects. Id.

If City elects to purchase additional credits from the least cost option, an AMP wind project, the additional cost to City, over the cost of the current AMP power supply, is projected to be $8,868 per year in 2015 and $17,444 in 2025. Case No. 11-0009-E-CP, Additional DLW-D, Exhibit E. The Commission notes its concern that the $17,444 may be overstated because it is predicated on an annual inflation factor of 2.9 percent for the additional AMP wind project and only a 2 percent annual inflation factor for the current AMP purchased power. These additional 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.

In contrast to the position of City without the Hannibal credits, Companies presented evidence to show that without the credits relating to the purchases of QF generation Companies will begin to fall short of their credit compliance obligations in 2020. Tr. 8/25/11 at 33-37; Companies Ex. 1 at 8; Case No. 10-1912-E-CP, revised Direct Testimony of Robert B. Reeping. Based on the revised estimates, Companies estimate that the loss of the QF credits will convert Companies' projected net credit compliance position from a 14. 2 million credit surplus to a 1.1 million credit deficit in 2020 and from a 13.4 million credit surplus to a 9.6 million credit deficit in 2025. Id.

The evidence filed in the compliance plan proceedings in Case Nos. 10-1912-E-CP and 11-0009-E-CP and in this proceeding shows that the loss of the QF credits will have a significant negative impact on Mon Power and PE and their customers just to meet the requirements through the present termination date of the Act in 2025. This impact for just minimum compliance on the Companies' customers is greater than the impact on City customers for the over compliance that occurs under the City plan. Mon Power and PE estimate that it will cost approximately $50 million to acquire additional compliance credits to replace the QF credits through 2025. As discussed above, City estimates that it will cost an additional $17,444 annually in 2025 to generate additional credits to bank for future use with the wind power option available to City through purchases of additional capacity from AMP. Just looking at a single year, the additional cost to the retail customers of City in 2025 would be $0.00042 per kWh. Without the availability of the PURPA credits, Mon Power and PE would face a shortfall of 2,950,704 credits in meeting its compliance plan in 2025. Companies' Ex. 2, Table 5. At Mon Power and PE's estimated cost of $5.14 per credit, it would cost Company $15,166,619 to meet its compliance plan in 2025. The cost to Mon Power and PE's retail customers would be $0.00090 per kWh in 2025, a cost more than double the cost to City's customers, and this is a required compliance cost in 2025 for the Companies, not a cost to accumulate excess credits for future use which is the case for the City.

Based on the foregoing, the Commission concludes that assigning the credits to Mon Power and PE is an equitable solution that fulfills the purposes and intent of the Portfolio Act and ensures the fair and reasonable future rates for the utility customers. As required by W.Va. Code § 24-1-1(b), we balanced the interests of the utilities, its ratepayers, and the state economy and considered the justness and reasonableness of the rates, in determining that Mon Power and PE should be assigned the credits under the PURPA Agreements. This decision is also consistent with the provisions of the Portfolio Act that require reasonable cost of utility compliance. W.Va. Code §§24-2F-2, 24-2F-6(e) and 24-2F-7(a).

At the August 26, 2011 evidentiary hearing, City suggested that it would be willing to accept fifty percent of the credits generated annually from the Hannibal facilities as a reasonable compromise to this case. Mon Power and PE indicated that City's proposed fifty percent split of the Hannibal credits was not acceptable to Companies. Tr. 8/26/11 at 37-38, 56-57. The Commission has determined that the Companies own the credits from the Hannibal facilities, and we will not require a fifty percent split as proposed by City. The fifty percent of Hannibal credits greatly exceeds the credits required by City to comply with the Act. If 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. We believe that this type of agreement would be in the public interest and would fulfill the intent of the Act.

The Commission clarifies that Mon Power and PE is entitled to the credits for the duration of the term of the EEPAs. Credits are based on energy generated by qualified facilities and double counting of credits is prohibited. Because we are holding that Mon Power and PE own the credits related to the power they purchase from the PURPA facilities for the remaining term of the EEPAs, credits that are based on the energy output of the QFs and that could be obtained under other state laws are necessarily under the control of Mon Power and PE.

8. Contractual Interpretation of the EEPAs

MEA and City assert that this matter should be resolved on the basis of contract law. We have reviewed and do not agree with the MEA and City contractual interpretations of the EEPAs.

In its Initial Brief, City argues that principles of contract law govern the ownership of the credits under the EEPAs. City argues that Companies are not entitled to the credits under the EEPAs because (i) Companies could not have purchased the credits under the contract because they did not exist at the time the contract was executed, (ii) City never agreed to sell the credits, and (iii) no consideration was given under the contracts for the credits. City argues that the Hannibal EEPA, lacking any transfer of environmental attributes, should be deferred to and treated as the entire agreement between the parties. City argues that any other interpretation of the contract would confer a benefit upon Companies that was not part of the bargain under the contract. City argues that awarding the credits to the buyer at the originally contracted for price is tantamount to a reduction in the contract price. City Initial Brief at 10-11.

City also asserts that this case is analogous to a recent contract case by the Supreme Court of Appeals of West Virginia in Energy Development Corp. v. Moss et. al, 214 W.Va. 577, 591 S.E.2d 135 (2003) (Energy Development Corp.) in which the Court determined that a latent ambiguity existed in an oil and gas lease executed in 1986 regarding the right to drill for coalbed methane when coal bed methane was not commercially available at the time of the execution of the contract and did not contain a specific provision addressing coalbed methane. The Court held that in the absence of a specific provision, when a latent ambiguity exists, the Court must look to the parties' intent to resolve the dispute. Absent a specific provision in the contract or indicia of the parties' intent, the Court held that the lease did not give the lessee the right to drill for coalbed methane. Id. at 588.

City argues that based on the Court's decision in the Energy Development Corp. case, the Commission must look to the parties' intent because there is a similar latent ambiguity with the RECs in the EEPA. City Initial Brief at 13-16. The City argues that the parties' intent was not to include the credits with the purchase of electricity based on the discovery response regarding a 2003 e-mail from the Companies' employee Mr. Robert B. Reeping to outside legal counsel. The City argues that the contract should be construed against the Companies who had knowledge that a latent ambiguity existed in the contract and did not address the credits in the 2004 Amendment, referencing the 2003 e-mail from Robert B. Reeping to outside legal counsel referring to the credits. Id. at 17-19. City asserts that the evidence shows that the Companies intended to keep the credits out of the 2004 Amendment. Id. City also notes that an integration clause was added to the 2004 Amendment in Section 4.6 providing that the agreement and amendments contained all the terms and conditions of the Agreement, superseding all prior negotiations and writings. Based on the integration clause, City argues Companies are not entitled to the credits because the 2004 Amendment essentially constitutes a new Agreement, superseding the prior EEPA. Id. at 19.

In its initial filings and briefs, Companies responded to City arguments regarding the 2004 Amendment to the Hannibal EEPA. Companies assert that the 2004 Amendment did not change the material terms of the Agreement or supersede the prior Agreements. Companies' Response filed March 15, 2011; Mon Power and PE Initial Brief at 9, Fn. 10. Companies assert that any reliance of City on the 2003 e-mail from Robert E. Reeping is misplaced because the July 2003 e-mail predates the issuance of the 2003 FERC ruling on October 1, 2003, and Companies could not have had knowledge of the credit issue. Mon Power and PE Reply Brief at 14.

In its legal briefs, MEA acknowledges that the parties could not have contemplated the existence of credits and environmental attributes when the contract was first executed. MEA argues that because the EEPAs do not address credit ownership, they cannot be interpreted or modified to transfer the credits. MEA states that the EEPA is silent on the issue of credit ownership and cannot be interpreted or modified to transfer the credits. MEA Initial Brief at 8. MEA asserts that a provision cannot be read into the agreement that the parties did not contemplate, citing the principle that "when a written instrument is plain and unambiguous and is complete on its face it contains the entire agreement between the parties and is the final act of the parties." Id. MEA argues that the plain and unambiguous language of the contract shows that the credits should not be awarded to the utility. MEA argues that because the PURPA Agreement contains a merger clause providing that the Agreement constitutes the entire agreement between the parties, the contract cannot not be interpreted to include a provision that does not exist. MEA Initial Brief at 8-10.

As an initial matter, we believe that the Energy Development Corp. case is not as closely analogous or pertinent as City would like us to believe. While it is true that the contract in Energy Development Corp. failed to address coalbed methane, at a minimum the parties to that agreement knew of the existence of coalbed methane and other gases and that those gases might become commercially feasible. That cannot be said for the RECs at issue here. They simply did not exist either in fact or in law at the time of the EEPAs. It defies logic to say that one party or the other was somehow responsible for a latent ambiguity.

The Commission agrees with the analysis and interpretation of the PURPA EEPAs in the Pennsylvania decision cited previously. The reasonable interpretation of the EEPAs is that, essentially, the terms and conditions of the PURPA EEPAs provide that the utility must purchase all of the electricity from the PURPA facilities based on the utility's avoided cost or negotiated rate. Pursuant 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 the electricity is generated owns the credits as well. The Commission finds this interpretation of the PURPA EEPAs to be reasonable to the extent that we consider contract law in deciding the issue of credit ownership under the EEPAs. This determination is consistent with our initial determination that considers the underlying statute and its purposes and the laws governing the Commission, the agency charged with administering the Portfolio Act, as previously discussed.

9. Federal Law

MEA argues that a Commission ruling declaring ownership of the credits in favor of the utility would result in lowering the avoided cost rate to the QF under the EEPA and constitute an impermissible modification of the avoided cost rate and "utility-type" regulation prohibited by PURPA. MEA cites the holding in Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Commissioners of N.J., 44 F.3d 1178 (3rd. Cir. 1995) in which Court held that a state commission could not reconsider avoided cost rate once approved and that such action would constitute "utility-type" regulation prohibited by PURPA. MEA further asserts that such an action would violate PURPA and implementing regulations that exempt qualifying cogeneration facilities from state laws relating to (i) the rates of electric utilities and (ii) the financial and organizational regulation of electric utilities under 16 U.S.C. § 824a-3(e)(1). MEA Initial Brief at 11, MEA Reply Brief at 8. The Commission does not agree with this argument and believes that the argument is inapposite to the issue before us. The Commission rejects the MEA arguments that a Commission action to determine ownership of credits in this case violates PURPA by lowering the contract rates that the Companies are obligated to pay or is exercising utility-type regulation over MEA. In this case, the Commission is not modifying the existing PURPA Agreements or exercising utility-type jurisdiction over MEA; we are determining the ownership of the credits in light of state law. This conclusion is consistent with our prior Commission Order entered June 9, 2010, in the MEA case, in which we acknowledged the Wheelabrator I case in distinguishing the prior Commission ruling in the AmBit case and determining that we were not modifying the Morgantown PURPA EEPA. June 9, 2010 Order at 8-9.

MEA makes a different argument now than it did in Case No. 09-0985-E-C when it was asking for a Commission determination that Mon Power was acting in contravention to the EEPA or not acting reasonably. Indeed, MEA cited Wheelabrator I in Case No. 09-0985-E-C, including the decision of the Second Circuit that found that the Connecticut DPUC did not interfere with previously established rates when it determined that credits related to PURPA facilities belonged to the utility that purchased the power from the facilities. MEA's argument in this proceeding is inconsistent with the argument it made when it was seeking Commission intervention against Mon Power in interpreting the EEPA and ordering "reasonable actions" from Mon Power related to the same EEPA at issue in this case. In its brief in Case No. 09-0985-E-C, MEA argued that the Commission had continuing jurisdiction over certain aspects of the Morgantown EEPA, its decision should be based on the Commission jurisdiction over Mon Power under State law and should consider the public interest as required by State law. To support its argument that interpreting a contract and requiring a utility to take certain actions did not violate the limited preemption of State authority found in PURPA, MEA cited Wheelabrator I, and argued:

> [I]n *Wheelabrator*, the issue was whether a decision of the Connecticut Department of Public Utility Control ("DPUC") that, under state law, a PPA [Purchased Power Agreement] conveyed renewable energy certificates ("RECs") to the purchasing utility, "modified" the PPA in violation of the PURPA exemption of QFs from utility type regulation.

> The parties agreed that if the 2004 DPUC Decision "modified" the terms of the agreement, ***"<u>for example by changing the agreed-upon rate,</u>"*** then such a modification would constitute a "utility-type regulation" in violation of Section 210(e) of PURPA, 16 U.S.C. § 824a-3(e). *Wheelabrator Lisbon, Inc.*, 531 F.3d at 185-87 (emphasis added).
>
> The Second Circuit held that the "2004 DPUC decision in the instant case did not modify the terms of the contract. Unlike the New Jersey agency in *Freehold*, the DPUC has not ordered the [qualifying facility] to renegotiate the contract ***<u>purchase price or ordered lower rates</u>***. Rather, the DPUC considered the [energy purchase agreement] at issue and concluded that [it] transferred the renewable energy and the associated GIS Certificates to CL & P. We agree that the DPUC did not order the renegotiation of the terms of the Agreement but simply exercised its authority to ***<u>interpret</u>*** the Agreement's provisions -- as it happens, in a manner that was unfavorable to Wheelabrator. We hold, therefore, that the 2004 DPUC Decision does not modify the terms of the Agreement and, accordingly, does not violate Section 210(e) of PURPA." *Id.* 531 F.3d at 189 (emphasis added) (internal citations omitted) (insertion in original).

MEA Bench Brief filed April 1, 2010 at 12-13, Case No. 09-0985-E-C.

We agree with MEA's argument made in Case No. 09-0985-E-C that <u>Wheelabrator I</u> can be distinguished from <u>Freehold</u> because <u>Wheelabrator I</u> did not involve ratemaking. In upholding the decision of the Connecticut 2004 DUPC decision, the District Court in <u>Wheelabrator Lisbon, Inc. V. Connecticut Dept. Of Pub. Util. Control</u>, 526 F.Supp. 2d 295 (D. Conn. 2006) stated:

> "With respect to the generator's preemption claim based on section 210(e) and implementing regulations, the DPUC decisions are unlike the BRC order that was the subject of *Freehold*. Contrary to the BRC, the DPUC has not ordered the generators to renegotiate the contract purchase price or ordered lower rates. Rather, the DPUC considered the two EPAs at issue and concluded that those contracts transferred the renewable energy and the associated GIS Certificates to CL&P." <u>Id.</u> at 306

The Second Circuit upheld the District Court's decision in <u>Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control</u>, 531 F.3d 183 (2d Cir. 2008). The Court agreed with the District Court that the DPUC did not order the renegotiation of the Agreement, but exercised its authority to interpret the Agreement provisions. <u>Id.</u> at 187.

In In re Ownership of Renewable Energy Certificate upholding the decision of the New Jersey BPU assigning ownership of the credits to the utility, the New Jersey Superior Court, Appellate Division, addressed similar arguments regarding the impermissible modification of the avoided cost rate and discrimination in violation of PURPA. The New Jersey Court distinguished the ruling in the Freehold case by concluding that the New Jersey BPU did not modify the terms of the existing Agreement, but determined the ownership of assets under the existing Agreement. In re Ownership of Renewable Energy Certificates, 913 A.2d 825 at 830 (N.J. Super. Ct. App. Div. 2007).

The Pennsylvania Court in ARIPPA also distinguished Freehold in concluding that PURPA did not preempt the Commission authority to determine the ownership of the alternative energy credits. The Court stated:

> As did the courts in *Wheelabrator I* and *Ownership of Renewable Energy Credits*, we conclude that *Freehold* is completely distinguishable; the ownership of credits was not at issue in *Freehold*. Here, the Commission has not modified the terms of an existing contract, but rather has determined ownership of assets which were not contemplated let alone provided for in the contracts at issue. Accordingly, *Freehold* does not support ARIPPA's argument that the Commission lacks authority to determine ownership of the alternative energy credits in the present circumstances.

ARIPPA v. Pennsylvania Public Util. Comm'n 966 A.2d 1204, 1210. (Pa. Comm. Ct. 2009).

We conclude that our decision does not constitute an impermissible modification of the avoided cost rate or "utility-type" regulation.

10. Property Rights

MEA also asserts that because the Morgantown project has already certified its facility to generate credits under Pennsylvania law and sold the Pennsylvania credits (albeit to an affiliate), a determination that MEA does not own the credits constitutes a taking of private property in violation of the due process clause of the United States Constitution. The Commission rejects this argument, noting that other jurisdictions have also addressed and resolved this issue. In the District Court opinion in Wheelabrator, 526 F.Supp. 2d 295, (Dist. Ct. 2006), the Court considered the QF argument that the Connecticut DPUC's ruling in favor of the utility constituted a taking of private property for public use because the ruling took away the credits that were initially assigned to the QFs by NEPOOL without just compensation in violation of its constitutional rights. Addressing the generator's arguments that the credits are a form of a valuable and intangible, marketable private property and the DPUC's action constituted a taking of private property, the Court stated, "The RECs or GIS . . . are creations of state legislation and regulation . . . Accordingly, the generators have not been deprived a property interest because NEPOOL's initial assignment to them did not confer ownership of RECs or GIS Certificates. 526 F.Supp. 2d 295, 307. In Wheelabrator I, the Second Circuit upheld the District Court opinion. Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 531 F.3d 183 (2d Cir. 2008).

As noted in ARIPPA, the status of the credits as a property right has not been precisely defined in the law. As a statutorily conferred intangible property right, the credits do not exist apart from statute. The credits are awarded subject to the alternative and renewable energy portfolio standard requirements and the detailed statutory scheme under the regulatory authority of the Commission. W.Va Code § 24-2F-1 *et seq.* The credits are laden with legislative policy. The statutorily conferred property right to the credits includes statutory requirements and obligations, and the right to ownership of the credits must conform to the statute. To the extent it does not, the statute must prevail. As previously discussed in the section regarding the application of state law, we interpret the Portfolio Act to require the utilities to own the credits. We have determined that it would be inconsistent with the Act to assign the credits to the QFs. The Commission concludes that the assignment of ownership of the credits to Mon Power and PE does not constitute a taking of a property right because the QFs cannot be deprived of a property right that they are not entitled to under the Act.

In the instant case, moreover, there is no property right that has been "taken" from the QFs because the QFs never owned the credits. As we have determined, the QFs have sold the electricity and Mon Power has an obligation to take the electricity as it is generated, which is also when the credits are created. Therefore, the QFs do not own the electricity at the time the credits are created, and, therefore, do not possess a property right in the credits. The credits cannot be taken from the QFs when the credits do not rightfully belong to them when they are created.

**B. The Request that the Commission Assert Jurisdiction over the QFs for the Purpose of Certifying the Generation Facility**

In the amended Joint Petition, the Companies request that the Commission compel the QFs to seek certification to generate credits or, in the alternative, to deem the facilities certified to generate credits under the Commission Portfolio Standard Rules. Specifically, the Companies seek Commission certification of the Morgantown project to generate credits under the Rules. The Companies assert that the Commission has the authority to provide a way to convey the credits if the Commission determines that the utility has ownership of the credits under the PURPA Agreements. Mon Power and PE argue that the Commission has jurisdiction over the WVU EEPA and MEA as a result of the PURPA Agreements, to the extent it does not enter into "utility-type" regulation prohibited by PURPA. Mon Power and PE Initial Brief at 48.

Companies assert that the Commission's jurisdiction over the case and the WVU EEPA necessarily allows it to fashion a remedy that vindicates the public interest. In its brief, Companies cite the equitable principle: "[W]here a statute creates a new right which cannot be adequately enforced at law, equity will contrive remedies and order to enforce it unless the statutory remedy is exclusive." 30A C.J.S. Equity § 130 (2011). Mon Power and PE Initial Brief at 52. The Companies further assert that the Portfolio Act provides authority to the Commission to order certification of the QFs pursuant to the authority to establish a system of tradable credits under W.Va. Code § 24-2F-4(a) and based on the language in W.Va. Code § 24-2F-4(b), that provides that "an electric utility shall be awarded . . . [credits]" [emphasis added]. Mon Power and PE Initial Brief at 53.

MEA maintains that the Commission lacks the statutory authority under the Portfolio Act and Chapter 24 of the West Virginia Code to compel MEA to certify the Morgantown facility. MEA Initial Brief at 24-28. MEA asserts that W.Va. Code § 24-2-1(c)(3), specifically preempts a QF from Commission jurisdiction, unless it proposes a material modification to its facility, because the facilities are regulated by federal law. MEA Initial Brief at 25.

After the beginning of Mon Power and PE negotiations with MEA and throughout this case, MEA has refused to seek certification of the Morgantown project to generate credits under West Virginia law. MEA has made it clear that it does not intend to certify the Morgantown project to generate credits under the Commission Portfolio Standard Rules based on its assertion that it owns the credits and because MEA elected to certify Morgantown to generate credits under Pennsylvania law. MEA argues that the Commission cannot compel MEA to certify the Morgantown project as qualifying for West Virginia credits under state and federal law.

As noted previously, the Commission finds that the position taken by MEA is untenable and inconsistent with its position in the MEA case, in which MEA asserted that the Commission has jurisdiction to require modification to the EEPA and require Mon Power and PE to consent to debt refinancing in order to avoid financial ruin for the Morgantown project. Given the favorable regulatory treatment afforded MEA over the years and the actions taken by Companies and the Commission to support the viability and financial success of the facility coupled with the Commission's determination that the Companies own the credits, the Commission finds the refusal of MEA in this case to certify the facility to be unreasonable. The Commission believes that the MEA refusal to certify the facility is contrary to the public interest in this case and thwarts the purposes of the Portfolio Act.

Morgantown uses waste coal, an alternative energy resource under Rule 2.4.g of the Commission Portfolio Standard Rules, to generate electricity and has been certified under the Pennsylvania law that includes waste coal as an eligible alternative energy resource. It is likely that the MEA facility meets the requirements as an alternative energy resource facility to qualify for certification under the Portfolio Standard Rules. It is also possible that Morgantown generation would qualify as a renewable energy resource defined under W.Va. Code §24-2F-3(13)(I) and Rule 2.22.i as "electricity or equivalent mechanical energy extracted from a pressure drop in any gas, excluding any pressure drop to a condenser that subsequently vents the resulting heat." In the instant case, however, given the lack of data before the Commission about the MEA facility, the Commission is unable to make the determination that Morgantown qualifies for certification under the Rules as either an alternative energy resource facility or a renewable energy resource facility based on the evidence presented in the case. Accordingly, we decline, at this time, to grant the relief sought by Mon Power and PE that the Commission "deem" the facility certified or to order MEA to certify the facility.

We find, however, that allowing qualifying credits that are owned by the Companies to not be certified would work a hardship on ratepayers. It is obvious that there is unusual difficulty involved if the Companies would seek or expect cooperation from MEA in obtaining certification of the MEA. Under these unusual circumstances, it would be reasonable to allow the Companies to seek certification of the credits that we have determined they own as a result of the Morgantown EEPA. The evidence presented in the record by Mon Power and PE in the Joint Petition and related filings does not contain sufficient information about the attributes of the fuel type(s) used at the facility or the energy output from the Morgantown facility to show that the facility meets the requirements for certification under the Rules. If Mon Power and PE file the information needed to make this determination, the Commission will consider the filing and enter a ruling determining whether the facility meets the requirements for certification under the Rules. In the meantime, the Companies should take reasonable steps to secure the credits from the Morgantown facility that are currently in the MEA GATs account, including but not limited to advising PJM-EIS of the ruling in this case.

Assuming that the Commission will receive sufficient information concerning the MEA generation attributes, the Commission has jurisdiction and authority over the Morgantown project to deem the facility certified to generate credits under the Commission Portfolio Standard Rules based on the jurisdiction and authority provided in the Portfolio Act and in Chapter 24 of the West Virginia Code to resolve the issue of credit ownership and to enable Mon Power and PE to meet the compliance requirements of the Act based on our decision in this case. The Commission's assertion of jurisdiction to resolve the dispute over credit ownership does not conflict with federal jurisdiction over PURPA and the PURPA facilities. As FERC determined in American Ref-Fuel, the states have jurisdiction to resolve the issues of credit ownership arising under the PURPA contracts. Because federal law does not preempt this area, MEA's argument that W.Va. Code § 24-2-1(c)(3) applies to the case is not relevant. We believe that because our decision to certify the Morgantown facility is an extension of the Commission's jurisdiction over public utilities, the portfolio standard and credit trading system established by the Portfolio Act, our Order does not violate the PURPA's prohibition against "utility-type" state law regulation.

Conclusion

In summary, the Commission has concluded that Mon Power and PE own the credits associated with the generation of electricity from the PURPA facilities under the EEPAs because of three separate but interrelated bases: (i) consistent with the Act, the utility that is obligated to purchase PURPA generation (which also qualifies as eligible generation under the Portfolio Act) should own the credits that exist for the purpose of measuring utility compliance with the portfolio standard, (ii) Mon Power and PE's ownership of the credits is based on their ownership of the qualifying energy as it is generated, and (iii) under the circumstances of the case in which the Portfolio Act and the EEPAs do not contain provisions that specify credit ownership by the utility or the QF, it is appropriate to consider equity and fairness and the impact of our decision on utility rates in determining credit ownership under the EEPAs based on the provisions of W.Va. Code § 24-2F-1 *et seq.* that require that the costs associated with the Act are reasonable and the provisions of Chapter 24 of the West Virginia Code that require the Commission to ensure fair and reasonable rates and to balance the interests of the current and future utility customers, the utilities and the state economy.

For the foregoing reasons, we grant the Joint Petition for declaratory ruling by holding that Mon Power and PE own the credits from the energy which they purchase from the Hannibal, Grant Town and Morgantown projects for the term of the EEPAs. We will consider the relief requested in the Companies' amended Joint Petition and determine whether the Morgantown project may be certified as a qualified energy resource to generate credits provided that adequate information is provided to support certification of the facilities under the Commission Portfolio Standard Rules. We determine that allowing qualifying credits that are owned by the Companies to not be certified would work a hardship on ratepayers and that due to the unusual difficulty involved if the Companies would seek or expect cooperation from the MEA in obtaining certification of the MEA it is reasonable to allow the Companies to seek certification of the credits that they own as a result of their Morgantown EEPA.

Motion for Protective Treatment

On May 3, 2011, City filed its First Request for Information to Mon Power and PE.

On May 13, 2011, Mon Power and PE filed a Response to the City First Request for Information.

On May 20, 2011, City filed a Motion to compel and a Motion for suspension of the briefing schedule. City asserted that Companies failed to fully respond to Request No. 26 in the City first request for information by failing to provide a copy of an e-mail sent July 2003, from Robert B. Reeping, the General Manager of Energy Procurement for the Companies, to outside legal counsel that is referenced in its response.

On May 24, 2011, Mon Power and PE filed a Response. The Companies asserted that Mr. Reeping's e-mail of July 2003 is protected from discovery as attorney-client communication. On May 24, 2011, concurrent with its Response, Mon Power and PE filed a copy of the July 2003 e-mail under seal for an *in camera* review by the Commission to resolve the discovery dispute.

On May 26, 2011, the Commission issued an Order that, among other things, required a Motion for protective treatment to be filed and denied the City Motion to Compel. The Commission found that the July 2003 e-mail is protected from discovery under attorney-client privilege. In accordance with Rule 4.1.f of the Commission Rules of Practice and Procedure, 150 C.S.R. 1, the Commission directed Mon Power and PE to file a motion for protective treatment for permanent confidential treatment of the 2003 e-mail.

On June 2, 2011, Mon Power and PE filed a Motion for Protective Order, seeking permanent confidential treatment for the 2003 e-mail. Mon Power and PE asserts that the 2003 e-mail is a "trade secret," an exemption from the West Virginia Freedom of Information Act (FOIA) requirements pursuant to W.Va. Code § 29B-1-4(a)(1), consistent with the Supreme Court of Appeals in AT&T v. Public Service Commission, 423 S.E.2d 859, 188 W.Va. 250 (1992) and State ex rel. Johnson v. Tsapis, 187 W.Va. 337, 19 S.E. 2d (1992) (six-factor test to determine if "good cause" exists for granting protective order under Rule 26(c) (7) of the WV Rules of Civil Procedure.

On June 6, 2011, City filed an objection to the Companies' Motion. City objected on the grounds that Companies did not previously claim that the information was proprietary and confidential, as it claimed in the June 2, 2011 Motion.

The FOIA provides that the public has the right to inspect or to copy any documents or information held by a public body, unless the information falls within one of the categories of the FOIA exemptions listed in W.Va. Code §§ 29B-1-4 and 29B-1-3(1). In accordance with the standard established in AT&T v. Public Service Commission, et al. 188 W.Va. 250, 423 S.E. 2d 859 (1992) any documents and information held by the Commission is available for public inspection unless a specific exemption under FOIA applies.

One of the exemptions recognized under FOIA is information that constitutes a "trade secret" which is defined as follows:

> Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

In determining whether information is exempt from disclosures as a trade secret, the Commission is guided by a six-point test developed by the Supreme Court of Appeals of West Virginia in State ex rel. Johnson v. Tsapis, 187 W.Va. 337, 419 S.E. 2d 1 (1992). Mon Power and PE argue that the Companies satisfied each of the six Tsapis factors and the Motion for Protective Treatment should be granted.

The Commission concludes that it is not necessary to rule on the Companies' Motion for Protective Order at this time. The documents are currently under seal with the Executive Secretary's office. The Commission will continue to maintain the confidentiality of the documentation that is the subject of the Companies' Motion. Upon a filing, if any, of a FOIA request pursuant to W.Va. Code § 29B-1-1 *et seq.* for the information, the Commission will notify the Companies. At that time, the Commission will provide Companies with the opportunity to present arguments as to why protective treatment should be afforded the information and whether the information should be given permanent protective treatment.

## FINDINGS OF FACT

1. On February 23, 2011, Mon Power and PE, dba Allegheny Power, filed a Joint Petition for declaratory order and interim relief, seeking a ruling that the Companies are entitled to the credits generated from the three QFs, the Hannibal project, the Grant Town project and the Morgantown project, pursuant to PURPA Agreements with the facilities. Petition filed February 23, 2011.

2. On April 22, 2011, Mon Power and PE filed a Motion to include additional briefing issues and related request for relief, requesting leave to amend its Joint Petition to address additional briefing issues. Companies requested that the Commission compel the QFs to seek certification to generate credits or, in the alternative, to deem the facilities certified to generate credits under the Commission Portfolio Standard Rules. By Order issued April 29, 2011, the Commission granted the Motion.

3. The Commission granted intervenor status to City and CAD and named MEA as a party to the proceeding by Orders issued April 19, 2011, and April 29, 2011. The Commission invited AmBit to participate as a party in this proceeding. AmBit elected not to participate as a party in this proceeding. (Commission Orders dated April 19, 2011, April 29, 2011 and May 1, 2011).

4. The Hannibal project, a run-of-river hydropower facility owned by City, is a PURPA qualifying facility and a certified alternative and renewable energy resource facility entitled to generate credits under the Commission Portfolio Standard Rules.

5. By Order entered July 20, 2011, in Case No. 11-0291-E-P, the Commission granted certification of the facility as a qualified energy resource facility to generate credits under the Rules. Case No. 11-0291-E-P (Commission Order, dated July 20, 2011).

6. The Hannibal project is certified in West Virginia, Pennsylvania, Maryland, New Jersey and other states to generate credits and is registered in PJM GATS.

7. Currently the Hannibal credits are held in the GATS account of Mon Power and PE, pursuant to GATS Schedule A agreement between the Companies and City. Tr. 8/25/11 at 74-76; Commission Request Ex. No. 2.

8. The Grant Town project, a coal and coal waste-fired cogeneration facility owned by AmBit, is a PURPA qualifying facility and a certified alternative and renewable energy resource facility entitled to generate credits under the Commission Portfolio Standard Rules.

9. By Order entered June 7, 2011, in Case No. 11-0019-E-P, the Commission granted certification of Grant Town as a qualified energy resource facility to generate credits under the Rules. Petition filed February 23, 2011; Case No. 11-0019-E-P (Commission Order, dated June 7, 2011).

10. By Letter of Understanding dated August 20, 2007, filed as a closed entry in Case No. 87-669-E-C, AmBit ceded ownership of credits from the Grant Town project to Mon Power. Mon Power and PE Initial Brief, Ex. D.

11. The Morgantown project, a coal and coal waste-fired cogeneration facility that is located in Morgantown, West Virginia and owned by MEA, is a qualifying facility under PURPA. The facility uses waste coal, an alternative energy resource under Rule 2.4.g of the Commission Portfolio Standard Rules.

12. The Morgantown project is certified in Pennsylvania to generate credits and is registered in GATS.

13. MEA does not intend to certify the Morgantown project to generate credits under West Virginia law.

14. In 2009, MEA sold 75,000 vintage 2008 Pennsylvania Tier II alternative energy resource credits to its affiliate, Dominion Energy Marketing, Inc., at a price of 31 cents per credit. Tr. 8/25/11 at 190-196; MEA Ex. 1.

15. The EEPAs were executed prior to the enactment of W.Va. Code § 24-2F-1, *et seq.*, effective July 1, 2009, and the issuance of the Commission Portfolio Standard Rules, 150 C.S.R. 34, effective January 4, 2011, and the existence of credits.

16. The EEPAs do not contain provisions addressing ownership of the credits and the Agreements predate the enactment of the Portfolio Act, the issuance of the Commission Portfolio Standard Rules and the existence of the credits.

17. The EEPAs and PURPA obligate the Companies to purchase all of the generation from the PURPA projects. Section 1.1 of the EEPAs, Companies' Ex. 7, 1; Ex. 7, 5 and Ex. 7, 8.

18. The EEPAs and the subsequent amendments to the Agreements for the Hannibal, Grant Town and Morgantown project were approved by the Commission in Case No. 86-169-E-PC (Hannibal), Case No. 87-669-E-C (Grant Town), and Case No. 89-200-E-PC (Morgantown).

19. The Commission approved rate recovery for the costs associated with the EEPAs in the Commission Orders approving the Agreements in Case Nos. 86-169-E-PC, 87-669-E-C, and 89-200-E-PC.

20. The Commission ordered a special ratemaking treatment of the costs of purchased power under the EEPAs whereby all of the power is assigned to West Virginia retail customers and those customers are responsible for paying all of the cost. Commission Orders August 8, 1986, Case No. 86-169-E-PC; November 10, 1988, Case No. 87-669-E-C; and April 7, 1989, Case No. 89-200-E-PC.

21. To assure the continued financial viability and success of the PURPA projects, the EEPAs were subsequently amended by Mon Power and the project owners, and such amendments were approved by the Commission in Case Nos. 86-169-E-PC, 87-669-E-C, and 89-200-E-PC.

22. The Commission required Mon Power to consent to modifying the Recognition Agreement and EEPA in order to allow MEA to seek debt refinancing, to assure the continued viability and financial success of the Morgantown project and, to

support the PURPA policies underlying the Agreement in Morgantown Energy Associates v. Monongahela Power Company, dba Allegheny Power Case No. 09-0985-E-C (Commission Order, dated June 9, 2010).

23. The EEPAs contain contract terms that are favorable to the PURPA facilities and that were designed to fulfill the PURPA policy to encourage the development of renewable energy resources, cogeneration and small power production facilities. Companies' Ex. 7; Mon Power and PE Initial Brief, Ex. B.

24. The PURPA EEPAs contain contract rates based on Mon Power's avoided cost rate, and other favorable contract terms designed to support financing, debt, and other project costs; the Hannibal Agreement has front-loaded rates to support project financing. Companies' Ex. 7; Mon Power and PE Initial Brief, Ex. B.

25. On April 1, 1986, Mon Power and City entered into the Hannibal EEPA. Pursuant to the terms of the thirty-year contract, expiring in June 2034, Mon Power purchases all of the energy and capacity from the Hannibal facility at a capacity rate of 3.7 cents per kilowatt hour and energy rate of 3.9 cents per hour. The Hannibal EEPA has front loaded rates to pay for project financing. Companies' Ex. 7, 1; Mon Power and PE Initial Brief, Ex. B

26. In March 2004, the Hannibal Agreement was amended to reflect the termination of the Recognition Agreement, dated September 1, 1985, as a result of the discharge of the debts for project financing. As amended, the Agreement was not submitted for Commission approval. Companies' Ex. 7, 2; Mon Power and PE Initial Brief, Ex. B.

27. On September 15, 1988, Mon Power and American Bituminous Power Partners and American Hydro Power Company entered into the Grant Town EEPA. Under the terms of thirty-five year contract expiring in 2036, Mon Power purchases all of the energy and capacity from the Grant Town facility at a minimum of a fixed capacity cost rate of 2.725 cents per kWh and an energy cost rate that changes over time depending on the cost of Mon Power generation. The EEPA, as amended on January 10, 2006, increased the capacity rate from 2.725 cents per kilowatt hour to 3.425 cents per kilowatt hour and extended the term of the agreement, adding eight years at a reduced capacity rate of 2.7 cents per kilowatt hour. Companies' Ex. 7, 5 and 7; Mon Power and PE Initial Brief, Ex. B; American Bituminous Power Partners L.P., Monongahela Power Company and The Potomac Edison Company, dba Allegheny Power, Case No. 87-699-E-C (Reopened) (Commission Order, dated March 2, 2006).

28. On March 1, 1989, Mon Power and MEA entered into the EEPA. Under the terms of the EEPA that remains in effect until 2027, Mon Power purchases all the capacity and energy from Morgantown at a capacity rate of 4.0 cents per kilowatt hour,

plus an avoided energy cost rate that varies over time depending on the cost of Mon Power generation. Companies' Ex.7, 8; Mon Power and PE Initial Brief, Ex. B. The Commission approved the Morgantown EEPA in Case No. 89-200-E-PC by Commission Orders dated April 7, 1989, and May 15, 1989.

29. In Case No. 10-1912-E-CP, on December 30, 2010, Mon Power and PE filed a portfolio standard compliance plan with the Commission for its review and approval. Mon Power and PE claim the credits generated from the three QFs in their compliance plan filing. An evidentiary hearing was held June 13, 2011. By Order entered September 26 2011, the Commission conditionally approved the compliance plan, but noted that if it was later determined that the Companies could not claim the credits associated with the QF purchased power, their compliance plan would have to be modified and the modified plan would have to be filed for Commission approval.

30. In Case No. 11-0009-E-CP, on January 2, 2011, City filed a portfolio standard compliance plan with the Commission for its review and approval. City claims the credits generated from the Hannibal facility in the compliance plan. An evidentiary hearing was held July 22, 2011. By Order entered September 30, 2011, the Commission conditionally approved the compliance plan, but noted that if it was later determined that City could not retain the credits associated with the Hannibal production, its compliance plan would have to be modified and the modified plan would have to be filed for Commission approval.

31. Administrative notice is taken of the evidence filed in the Companies' compliance plan filing in Case No. 10-1912-E-CP and City's compliance plan filing in Case No. 11-0009-E-CP.

32. Based on revised estimates of its compliance credits in the compliance filing in Case No. 10-1912-E-CP to include estimated credits from the certification of its supercritical units, the Companies have a projected net credit deficit of 9.6 million credits by 2025 if they cannot claim the credits from PURPA projects that make up sixty-two percent of the credits in the compliance plan. Tr. 8/25/11 at 28, 33-36, 38; Companies' Ex. 1 at 9; Case No. 10-1912-E-CP, Tr. 6/13/11 at 41.

33. Based on the Companies' revised estimates of its compliance credits, it will cost, at least, an aggregate of $50 million through 2025 to acquire the credits necessary to meet the portfolio standard requirements if it cannot use the credits related to purchases from the Hannibal, Grant Town and Morgantown projects. Tr. 8/25/11 at 40; Companies' Ex. 1 at 9; Case No. 10-1912-E-CP, revised Direct Testimony of Robert B. Reeping.

34. The Companies' estimated cost of an additional $50 million is based on the Companies' estimated cost of $5.14 per credit used in their compliance plan filing. If the

estimated cost of $15.00 per credit used by City in the compliance plan filing in Case No. 11-0009-E-CP were used to estimate the Companies' additional compliance costs to obtain credits if the PURPA credits were not available, would be approximately $145 million.

35. The City will have 26,500 excess credits by 2025 if the Hannibal credits are not included in City's compliance plan in Case No. 11-0009-E-CP, based on the testimony of City witness, David White, at the hearing held July 22, 2011, in Case No. 11-0009-E-CP. Tr. 8/25/11 at 42; Companies' Ex. 3 at 6-7.

36. Without the Hannibal credits, City will not have a deficit of credits until 2034. However, City plans to acquire additional credits from an AMP wind or solar project in order to bank additional credits through 2039 to accumulate credits for perceived compliance needs after 2025, the end of the statutory compliance period. Case No. 11-0009-E-CP, Tr. 7/22/11 at 16-20; City additional DLW-D at 3-8.

37. If City purchases from an AMP wind project to obtain additional credits in lieu of the Hannibal credits, the additional cost to City, over the cost of other AMP power supply, is projected to be $8,868 per year in 2015 and $17,444 in 2025. Case No. 11-0009-E-CP, Tr. 7/22/11 at 16-20; Additional DLW-D at 3-8, Exhibit E.

38. In contrast to the position of City without the Hannibal credits, the Companies presented evidence to show that without the credits relating to the purchases of QF generation Companies will begin to fall short of their credit compliance obligations in 2020. Based on the revised estimates, Companies estimate that the loss of the QF credits will convert Companies' projected net credit compliance position from a 14. 2 million credit surplus to a 1.1 million credit deficit in 2020 and from a 13.4 million credit surplus to a 9.6 million credit deficit in 2025. Tr. 8/25/11 at 33; Companies' Ex. 1 at 8-9.

39. At Mon Power and PE's estimated cost of $5.14 per credit, it would cost ratepayers $15,166,619 to meet the compliance plan in 2025. The estimated cost to Mon Power and PE's retail customers would be $0.00090 per kWh in 2025, which is more than double the cost to City's customers.

40. With the exception of MEA, pending the outcome of this case, the parties agreed to bank the credits generated from the PURPA facilities in the PJM GATS account of Allegheny Power and to hold those credits in the Allegheny Power account. Tr. 8/25/11 at 75-76; Commission Request Ex. 2.

41. W.Va Code § 24-2F-4(b)(1)(2) and (3) provides that the electric utility shall be awarded credits for each megawatt hour of electricity generated from qualified facilities or purchased from qualified facilities. W.Va. Code § 24-2F-5(a) provides that

the electric utility shall own an amount of credits equal to the applicable percentage of electricity sold to retail customers in a given year that the portfolio standard is in effect.

42. The credits are issued based on generation after certification of the electric generating facility as a qualified energy resource pursuant to Rule 4 of the Commission Portfolio Standard Rules, and the issuance of a certification number for registry in GATS.

43. On May 20, 2011, City filed a Motion to compel, in which City asserted that the Companies failed to fully respond to Request No. 26 in City first request for information by failing to provide a copy of an e-mail sent July 2003, from Robert B. Reeping, the General Manager of Energy Procurement for the Companies, to outside legal counsel, referenced in the Companies' response.

44. On May 24, 2011, Mon Power and PE filed a Response. The Companies asserted that Mr. Reeping's e-mail of July 2003 is protected from discovery as attorney-client communication.

45. On May 24, 2011, concurrent with its Response, Mon Power and PE filed a copy of the July 2003 e-mail under seal for an *in camera* review by the Commission to resolve the discovery dispute.

46. On May 26, 2011, the Commission issued an Order, denying City Motion to compel. The July 2003 e-mail is protected from discovery as subject to attorney-client privilege. In accordance with Rule 4.1.f of the Commission Rules of Practice and Procedure, 150 C.S.R. 1, the Commission directed Mon Power and PE to file a Motion for protective treatment for permanent confidential treatment of the 2003 e-mail.

47. On June 2, 2011, Mon Power and PE filed a Motion for Protective Order, seeking permanent confidential treatment for the 2003 e-mail that is currently filed under seal with the Executive Secretary's Office. Mon Power and PE asserts that the 2003 e-mail is a "trade secret," an exemption from the West Virginia Freedom of Information Act (FOIA) requirements pursuant to W.Va. Code § 29B-1-4(a)(1). No entity has requested copies of the information for which protective treatment is sought.

## CONCLUSIONS OF LAW

1. The Commission has subject-matter jurisdiction over the parties and the matter presented in this proceeding pursuant to W.Va. Code § 24-2F-1 *et seq.* and Chapter 24 of the West Virginia Code.

2. The Commission has the authority to determine ownership of the credits under the PURPA Agreements pursuant to W.Va. Code § 24-2F-1 *et seq.* and Chapter 24 of the West Virginia Code which is consistent with the 2003 FERC ruling in American

Ref-Fuel Co., Covanta Energy Group, Montenay Power Corp. and Wheelabrator Tech. Inc., 105 FERC ¶ 61,004, 61007 (October 1, 2003).

3. The Morgantown project generates electricity from waste coal, an alternative energy resource identified in Rule 2.4.g of the Commission Portfolio Standard Rules, and is located in West Virginia, and, thus, may meet the requirements for certification as a qualified energy resource to qualify to generate credits under Rule 4 of the Commission Portfolio Standard Rules. Morgantown may also qualify as a renewable energy resource facility under the Rules based on the thermal output from steam as recycled energy, a renewable energy resource defined under Rule 2.22.i. There is, however, insufficient data in the record at this time to support certification of the facility as a qualified energy resource under the Portfolio Standard Rules.

4. Pursuant to Rule 4.1 of the Commission Portfolio Standard Rules, a facility must be certified to generate credits. According to the procedure outlined in Rule 4.2, the facility applies for certification of the facility and provides the Commission with the information required under Rule 4.4.a for the Commission to make a determination that the facility meets the requirements of Rule 4.2.a to be certified as a qualified energy resource. Based on the evidence presented in the case and because MEA has not sought certification pursuant to Rule 4 of the Commission Portfolio Standard Rules to generate credits under the rules, the Commission is unable to make that determination at this time.

5. Congress enacted PURPA in 1978 to promote national energy independence and security and to the promote conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and the development of renewable energy, cogeneration and small power production facilities to promote national security. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, as codified and amended throughout Sections of 16 U.S.C.

6. Under PURPA, utilities are required to purchase electricity from QFs at avoided cost, defined as the incremental cost to the electric utility of electric energy or capacity or both which, but for the purchase of energy from the QF, that utility would have to generate itself or purchase from another source in 18 C.F.R. § 292.101 (b)(6).

7. The Portfolio Act, effective July 1, 2009, created a statutory obligation for the state electric utilities to derive a certain percentage of the electricity sold to retail customers from alternative and renewable energy resources by percentage targets: ten percent by 2015, fifteen percent by 2020, and twenty-five percent by 2025 pursuant to W.Va. Code § 24-2F-5.

8. The Commission has the authority to impose compliance assessments on utilities for failure to comply with the portfolio standard requirements pursuant to W.Va. Code § 24-2F-5(g).

9. The Act prohibits the double counting of credits. A credit may not be used more than once to meet the portfolio standard requirements. Pursuant to W.Va. Code §§ 24-2F-4(d)(3) and 24-2F-5(b) and (e), credits that are used to meet the portfolio standard requirements of other states cannot be used to meet the compliance requirements of the West Virginia portfolio standard.

10. The Act also required the Commission to consider extending, by rule, the awarding of credits "to electric distribution companies or electric distribution suppliers other than electric utilities" or to non-utility generators pursuant to W.Va. Code § 24-2F-10(b).

11. By Commission Order issued November 5, 2010, in General Order No. 184.25, issuing the final Portfolio Standard Rules, the Commission extended the awarding of credits representing the generation of electricity from alternative and renewable energy resources to non-utility generators, but limited the awarding of credits for greenhouse gas emission or reduction or offset projects and energy efficiency and demand-side energy initiative projects to projects funded by state electric utilities.

12. Rule 5.2 of the Commission Portfolio Standard Rules provides that a qualified energy resource certified under the Rules shall be awarded credits as summarized in a table to the Rules.

13. Rule 5.6 of the Commission Portfolio Standard Rules provides that an electric utility purchasing power may meet the Portfolio Standard requirements provided the credit awarded pursuant to Rule 5.2 is included in, or bundled with, the purchase of the power. Credits may also be purchased independently, or unbundled from, purchased power.

14. The rulemaking proceeding in General Order No. 184.25 did not address PURPA EEPAs executed prior to the Act, and the Rules were not intended to apply to these preexisting agreements.

15. The unbundling provision in Rule 5.6 of the Commission Portfolio Standard Rules cannot reasonable be applied retroactively; it was intended to apply prospectively to agreements for the purchase of electricity entered after January 4, 2011, the effective date of the Rules.

16. The optional unbundling provision set forth in Rule 5.6 does not apply to the PURPA EEPAs because these contracts that are based on the avoided cost rate do not include the unbundled aspect of the rule.

17. When the three EEPAs in question were negotiated and approved by the Commission, the statutory created credits did not exist and the retention of the credits was not a part of the contract and agreement between the parties. The 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.

18. By 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 power generators.

19. The purchase of generation under the PURPA EEPAs results in the utility owning the generation and the credits associated with the generation.

20. Rule 8 of the Portfolio Standard Rules and W.Va Code § 24-2F-6 require electric utilities to file an alternative and renewable energy portfolio standard compliance plan for Commission review and approval.

21. The primary mandate of the Act is to require utility compliance with the alternative and renewable energy portfolio standard to fulfill the statutory goals set forth in W.Va. Code 24-2F-2.

22. The Portfolio Act does not contain a specific provision that the utility or a PURPA generator owns the credits under EEPAs that predate the Act and does not contain a specific provision that addresses the ownership of the credits for non-utility generators, except for customer-generators as provided in W.Va. Code §§ 24-2F-4 and 24-2F-10(b).

23. A customer-generator is awarded credits pursuant to W.Va. Code § 24-2F-4(b)(4). This statutory provision and the applicable Rules do not apply to this case because a customer-generator (or a behind-the-meter generator), as defined in the Rules, include customer-sited generating facilities no greater than 2 megawatts.

24. The rules of statutory construction require that meaning be given to all provisions in a statutory scheme; if at all possible, statutes must be interpreted so that no enactment is meaningless. The rules of statutory construction require that a construction of a statute that leads to inconsistent results or is in conflict with another statute be avoided. Belt v. Cole, 305 S.E. 2d.340, 305 S.E.2d 678 (W.Va. 1983); Mills v. VanKirk, 192 W.Va. 695, 453 S.E.2d 678 (1994).

25. The Commission has the authority to determine the fairness and reasonableness of utility rates pursuant to W.Va. Code §§ 24-1-1(a), 24-2-2(a) and 24-2-3.

26. In all of its deliberations, the Commission is charged with appraising and balancing the interests of current and future utility service customers, the general interests of the State's economy and the interests of the utilities subject to its jurisdiction pursuant to W.Va. Code § 24-1-1(b).

27. It would be unreasonable to require the utility to purchase, and ratepayers to pay the additional cost of credits, to verify the purchases of PURPA generation that the utility has purchased and will continue to purchase which qualifies as eligible generation under the Portfolio Act.

28. In the absence of an express statutory provision governing the issue of credit ownership under PURPA EEPAs that predate the Portfolio Act and that are silent on the issue of credits ownership, the credits under the PURPA EEPAs are owned by the electric utility, Mon Power and PE, not the QFs, consistent with the intent and mandates of the Act and principles of equity and fairness.

29. Mon Power and PE own the credits from the electricity generated from the QFs and purchased by the Companies under the EEPAs for the term of each Agreement, based on their ownership of the qualified generation under the EEPAs.

30. The credits are created when electric energy is generated from a qualified energy resource facility. W.Va. Code §24-2F-4.

31. Allowing qualifying energy and related credits that are owned by the Companies to not be certified would work a hardship on ratepayers.

32. Given the asserted MEA position that it does not intend to seek certification of its generating facility in West Virginia, there would be unusual difficulty involved for the Companies to obtain certification of the MEA facility.

33. It would be reasonable to allow the Companies to seek certification of the credits which they own as a result of their Morgantown EEPA.

34. If the Commission receives adequate information about the MEA facility, the Commission has the jurisdiction and authority to deem the facility certified to generate credits under the Commission Portfolio Standard Rules based on the inherent jurisdiction and authority provided in the Portfolio Act and in Chapter 24 of the West Virginia Code to resolve the issue of credit ownership and to enable Mon Power and PE to meet the portfolio standard requirements.

35. The Commission will continue to maintain the confidentiality of the documents for which protective treatment is sought, that are segregated and under seal in

the Executive Secretary's office, until such future time, if any, that the Commission receives a Freedom of Information Act request for the documents. At such time, the Commission will notify Companies.

## ORDER

IT IS THEREFORE ORDERED that the Joint Petition for declaratory order filed by Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power on February 23, 2011 is granted, as provided herein.

IT IS FURTHER ORDERED that credits related to the electricity generated from the PURPA facilities: the Hannibal project owned by City of New Martinsville; the Grant Town project owned by American Bituminous Power Partners, L.P.; and the Morgantown project owned by Morgantown Energy Associates; and sold pursuant to the electric energy purchase agreements discussed herein belong to the purchaser, Monongahela Power Company.

IT IS FURTHER ORDERED that Companies take reasonable steps to secure the credits from the Morgantown facility that are currently in the MEA GATs account, including, but not limited to, contacting PJM-EIS to advise it of the ruling in this case.

IT IS FURTHER ORDERED that Mon Power and PE must use the credits which it owns in a manner that provides the most benefit to West Virginia retail customers.

IT IS FURTHER ORDERED that the documents for which protective treatment is sought will remain segregated and under seal in the Executive Secretary's office, until such future time, if any, that the Commission receives a Freedom of Information Act request for the documents. At such time, the Commission will notify the Companies.

IT IS FURTHER ORDERED that on entry of this Order this case shall be removed from the Commission docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste: Sandra Squire

Sandra Squire
Executive Secretary

ASH/rt/ldd
110249cj

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 20th day of December 2011.

CASE NO. 11-0249-E-P

MONONGAHELA POWER COMPANY AND THE POTOMAC EDISON COMPANY, both dba ALLEGHENY POWER

Joint Petition for declaratory order regarding ownership of Alternative and Renewable Energy Credits attributable to energy purchases by Monongahela Power Company from PURPA Qualifying Facilities and for interim and other related relief.

## COMMISSION ORDER

The Commission grants a stay of its November 22, 2011 Order pending review by the West Virginia Supreme Court.

## BACKGROUND

On December 15, 2011, Morgantown Energy Associates (MEA) filed a motion to stay the Commission Order of November 22, 2011. In its motion, MEA indicated that it intended to appeal the Commission Order to the West Virginia Supreme Court of Appeals. On the same date, the City of New Martinsville (City) filed a response in support of the motion to stay. The City also indicated its intention to file a petition for review by the West Virginia Supreme Court.

Along with American Bituminous Power Partners, L.P. (AmBit), MEA and the City are owners of "qualifying facilities" (QFs) under the Public Utility Regulatory Act of 1978 (PURPA). The ownership of the alternative and renewable energy resource credits (credits) generated from the QFs is the subject of dispute in this proceeding. MEA and the City are parties to this proceeding, while AmBit is not as AmBit ceded ownership of the credits in another Commission proceeding.

On December 19, 2011, Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power Company (Allegheny Power or the Companies), filed a response, stating that they are not opposed to the relief by MEA and the City; provided that, the relief is limited in scope to the relief requested in the motion for stay and does not extend to other aspects of the November 22, 2011 Order. Specifically, the Companies request that the Order granting the stay specify that the Mon Power can proceed to certify the QF owned by MEA to generate credits from the QF under West Virginia law.

## DISCUSSION

Given that the credits will continue to accumulate and are not immediately needed by the utilities, it appears reasonable to grant the motion to stay pending review by the West Virginia Supreme Court. Furthermore, MEA indicates that while the stay is in effect, it will abide by the Commission Order entered April 19, 2011 requiring it to refrain from selling or transferring, or committing to sell or transfer any credits that are generated by the QFs. Accordingly, effective with the stay, the parties to the proceeding and owners of the QFs shall refrain from selling or transferring, or committing to sell or transfer any credits attributable to the QF generation.

In its motion, MEA has expressed that it is likely to succeed on appeal. Obviously the Commission disagrees with that statement. Moreover, that allegation is completely unnecessary given that the issue is the Commission stay of a Commission Order and unlike a stay that is directed at a party in a Commission proceeding, the present request for stay lies completely within the discretion of the Commission.

The Commission declines to grant the Allegheny Power request in its response as the legal issues underlying the certification of the QFs are matters that will likely be the subject of appeal.

## FINDINGS OF FACT

1. Both MEA and the City have expressed their intent to appeal the Order of November 22, 2011 to the West Virginia Supreme Court.

2. The credits will continue to accumulate and are not immediately needed by the utilities.

## CONCLUSION OF LAW

It is reasonable to grant the motion to stay pending review by the West Virginia Supreme Court.

## ORDER

IT IS THEREFORE ORDERED that the Motion for a Stay of the Commission Order of November 22, 2011 is granted pending review by the West Virginia Supreme Court.

IT IS FURTHER ORDERED that while the stay is effective, all parties and the owners of the QFs shall refrain from selling or transferring, or committing to sell or transfer any credits attributable to the QF generation.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

IT IS FURTHER ORDERED that on entry of this Order this case shall be removed from the Commission docket of open cases.

A True Copy, Teste: Sandra Squire

Sandra Squire
Executive Secretary

ASH/rt
110249ck