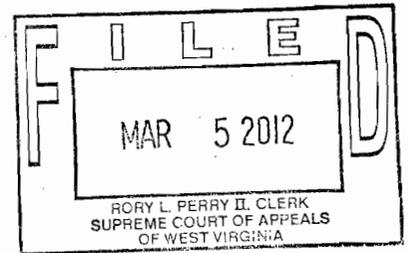


ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



CITY OF NEW MARTINSVILLE,

Petitioner,

vs.

No. 11-1738

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

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

PETITIONER'S REPLY BRIEF

CITY OF NEW MARTINSVILLE

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**I. REPLY TO STATEMENT OF REASONS OF THE
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA**

A. Summary Of Argument

At the time of filing this Reply Brief, both the City of New Martinsville (“City”) and Morgantown Energy Associates (“MEA”), the petitioner in the companion appeal from the Public Service Commission’s November 22, 2011 decision that is the subject of this appeal,¹ have filed Motions to continue the oral argument in both cases pending the outcome of MEA’s Petition for Enforcement of PURPA filed with the Federal Energy Regulatory Commission (“FERC”).² Because a FERC decision on the Petition for Enforcement could be dispositive of this appeal, and the City will address the PURPA related issues before FERC, the content of this Reply Brief will address matters of state law. To the extent the FERC does not address the City’s PURPA-related arguments, the City will continue to stand on the arguments contained on those matters in its Petition for Suspension and Review and Petitioner’s Brief.

This Reply Brief will show that through its Statement of Reasons, the Public Service Commission (“PSC” or “Commission”) has established that its November 22, 2011 decision is not entitled to the deference that would normally attach to an administrative agency’s decision and such Statement of Reasons supports a determination that the PSC abused its discretion in awarding the Renewable Energy Credits (“RECs”) associated with the City’s Hannibal Project to

¹ See, *Morgantown Energy Associates v. Public Service Commission of West Virginia, Monongahela Power Company, and Potomac Edison Company*, Case No. 11-1739.

² On February 24, 2012, MEA filed its Petition for Enforcement Pursuant to Section 210(h) of the Public Utilities Regulatory Policy Act of 1978 with the FERC; on February 27, 2012, MEA filed its Motion to Continue Oral Argument in Case NO 11-1739; on February 28, 2012, the City filed a Motion to Hold Case in Abeyance in this matter.

Monongahela Power Company (“MPC” or “Mon Power” and, together with Potomac Edison Company, the “Companies”).

II. ARGUMENT

A. **The Statement of Reasons Shows That The PSC Abused Its Discretion In Failing To Consider The Evidence.**

It is well settled that:

. . . an order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles. *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, 99 S.E.2d 1 (1957). Syllabus Point 5, in part, *Boggs v. Public Service Commission*, 154 W.Va. 146, 174 S.E.2d 331 (1970), Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission*, 180 W.Va. 387, 376 S.E.2d 593 (1988)). Syl. Pt. 1. *Sexton v. Public Service Commission*, 188 W.Va. 305, 423 S.E.2d 914 (1992). Cited at Syllabus Point 1, *Affiliated Construction Trades Foundation v. Public Service Commission*, 211 W.Va. 315, 565 S.E.2d 778 (2002).

It is not often that one is presented with a stark example that the agency responsible for arriving at a fair and reasoned decision either did not understand, or totally ignored, the evidence that was presented in a case. This is one of those times.

In one paragraph on page 31 of its Statement of Reasons, the Commission revealed that it had either failed to read the City’s exhibits or did not understand the evidence presented and, as a result, failed to apply the clear language in the exhibits and testimony to the facts of this case. As a result, the Commission’s decision is contrary to the evidence and arbitrary. In that paragraph, the Commission stated as follows:

New Martinsville’s further argument, that its letter in 2007 to Mon Power supports its position that it was unaware of RECs is not credible. Petition at 24. That letter asked Mon Power to explain the significance of the

certification of the Hannibal project (**a sister project**) in Delaware and other states to both the City and Monongahela Power. **If New Martinsville really wanted the answer to that question, why would it not have directed its inquiry directly to the Hannibal project in Delaware?** The most logical explanation is that New Martinsville already knew the answer to its question and was fully aware of the potential value of RECs. (Emphasis added)

As will be seen by a review of the record, it is not the City's argument to which that statement refers that is not credible, it is the Commission's Order that is not credible.

The evidence reveals that the Commission is plainly wrong as to the City's knowledge about RECs at the time of the letter, and the Commission would have been aware of such if it had actually read the letter and the testimony of the hearing. Simply stated, there is no Hannibal project in Delaware of which the City is aware. If there is one, it is not a "sister project" to the City's Hannibal Project in New Martinsville, West Virginia. Consequently, there is no one in Delaware to whom the City could direct its inquiry about certification. Contrary to the Commission's Statement of Reasons, the representative of Mon Power who was trying to obtain the certification in Delaware was the one person that would have been in a position to address the City's concerns. In short, this passage establishes that the Commission either manufactured a totally unfounded basis for rejecting the City's argument; totally misunderstood the facts that were presented at the hearing; or ignored the evidence presented by the City. Regardless of the reason for the Commission's misunderstanding, this passage proves that the PSC completely failed to give due consideration to relevant evidence.

As the Court will observe from a review of the letter at issue,³ the letter was sent by the City's attorney to the employee of Mon Power who was in the process of certifying the City's Hannibal Project (located in West Virginia) for inclusion of the Hannibal Project's credits in other jurisdictions.⁴ The letter refers to the fact that the City was requested by Mon Power to complete an application for the certification in Delaware of the City's Hannibal Project in West Virginia⁵ in order to make it an Eligible Energy Resource under the Delaware Renewable Energy Portfolio Standard, and references the fact that the City had apparently executed other Applications for Maryland and the District of Columbia.⁶ The City's attorney made it clear in the letter that she did not understand the implications of the certification of the Hannibal Project

³ New Martinsville Exhibit 2, attached hereto as Reply Brief Appendix, Exhibit 1 at Appendix Page 1, is a letter dated February 6, 2007 addressed to Thomas A. Rhone [sic], Engineer for Load Management with Monongahela Power Company.

⁴ At page 114 of the transcript of the hearing held on August 25, 2011, Monongahela Power Company's witness Robert Reeping testified that Mr. Rone was the person within the Company that worked to get the City's Hannibal Project certified in Pennsylvania, the District of Columbia and other jurisdictions. New Martinsville Cross Examination Exhibit 2, attached hereto as Reply Brief Appendix, Exhibit 2 at Appendix Page 4, is a copy of an Order entered June 15, 2006 by the Public Service Commission of the District of Columbia certifying the City of New Martinsville's Hannibal Hydroelectric Plant as an Eligible District of Columbia Renewable Energy Standards Generating Facility together with an Application for Retroactive Renewable Energy Credits Maryland Renewable Energy Portfolio Standard Program and a Streamlined Application for Certification as an Eligible District of Columbia Renewable Energy Standards Generating Facility. In the Maryland Application and the District of Columbia Application, Mr. Rone is listed as the contact person for the Hannibal Hydroelectric Plant. In both applications, the address of the plant is shown as One Howard Jeffers Drive, New Martinsville, WV 26155.

⁵ As opposed to the certification in Delaware of a Hannibal Project in Delaware presumed by the Commission to be owned by the City.

⁶ As reflected by the record referred to at footnote 4 *Infra*, and at footnote 9 *supra*, there would have been no reason for the Commission to be confused about the location of the Hannibal Project and the fact that the Hannibal Project would be certified in other jurisdictions. The record fully reflects that this was one of a series of certifications of the Hannibal Project undertaken by Mon Power in other jurisdictions.

in other jurisdictions and requested Monongahela Power Company to provide her with an explanation of the benefits to the Company associated with the certification of the Hannibal Project.

The letter was specifically entered into evidence to support the testimony of the City's witness on cross examination.⁷ During his testimony, Mr. Stora, plant manager of the Hannibal Project, testified that Mr. Rone had prepared applications for the City to sign for certification in other jurisdictions.⁸ He also stated that it was not until the Delaware application came up that the City became aware of the fact that the RECs might have value to the City.⁹ That was in 2007. Thus, contrary to the PSC's Statement of Reasons. The record clearly reflects that the City had no knowledge of the value of ownership of the RECs until 2007, and the only Hannibal Project that was ever discussed in this case was the City's Hannibal Project in West Virginia.

⁷ See pages 6 and 7 of the transcript of the hearing held on August 26, 2011.

⁸ See pages 175 – 76 of the transcript of the hearing held on August 25, 2011 where Mr. Stora stated:

Mr. Thomas Rone, he actually --- he filled in all the blanks. He just sent the application to me, and I forwarded it to the mayor to get a signature on.

⁹ See pages 179 – 80 of the transcript of the hearing held on August 25, 2011:

Q. (by Mr. Callas) Okay. Is it your testimony, then, that there [sic] a number of times in which Mon Power and the City cooperated on getting the facility certified before the question of the ownership of credits really kind of occurred to the City?

A. (Mr. Stora) Yes, I would agree with that.

Q. And you did a couple of certifications. And then when it came time to try to do Delaware, this question appeared, perhaps to Ms. Flannery or to someone else?

A. Yeah. I [sic] came up. That's when the topic of who owned--- or should be--- or should have ownership of the RECs came up, and that's when I'm saying that everybody just kind of screeched to a halt there. And that was the end of the RECs for a long time after that.

*

*

*

Q. Did the screeching halt come to pass because it occurred to the City that it had an ownership interest in the credits and that Mon Power thought it had one to [sic]?

A. Yes, I do believe.

By failing to understand the evidence, the Commission's dismissal of the City's reliance on the case of *Energy Development Corp. v. Moss, et al.*, 214 W.Va. 577, 591 S.E.2d 135 (2003) must be rejected. However, the Commission's failure to consider the evidence is not the only reason for rejecting the Commission's refusal to apply the *Energy Development Corp.* to this case. The Statement of Reasons reveals that the Commission did not understand the Court's ruling in that case either.

The Commission concluded that the *Energy Development Corp.* case was inapplicable to the facts of this case. The PSC argued that no latent ambiguity existed with regard to the EEPA between the City and MPC and its 2004 amendment, because the environmental attributes now known as RECs did not exist at the time of the negotiation of the 1986 EEPA, and because the state's Portfolio Act did not create RECs in the state of West Virginia until 2009.¹⁰ Further, the PSC reasoned, both in its November 22, 2011 Order¹¹ and in its Statement of Reasons, that, unlike the situation in the *Energy Development Corp.* case where "[a]t the time the lease was entered into, the presence of coal methane gas was known, but not considered commercially developable", no latent ambiguity existed in this case because RECs did not exist and neither party would have been aware of their value.¹²

¹⁰ See Statement of Reasons at page 29.

¹¹ November 22, 2011 Order at 36 where the Commission stated:

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.

¹² See Statement of Reasons at page 29.

In fact, the situation in this case is almost identical to the situation that existed in *Energy Development Corp., supra*. In *Energy Development Corp.*, the question before the Court was whether a standard oil and gas lease conveyed to the lessee the right to drill into the lessor's coal seams in order to produce the coalbed methane.¹³ The leases at issue were prepared by the lessee and were entered into on September 15, 1986.¹⁴ The president of the lessee, Energy Development, testified that:

He first became aware of the economic potential of coalbed methane when Congress addressed the topic in the 1978 Tax Reform Act. He stated that his familiarity with a 1983 Pennsylvania case on the subject, his contacts with one of the parties in that case, and his reading of trade journals, all contributed to make him aware of the potential economic value of coalbed methane at the time he signed the leases with the appellees.¹⁵

Thus, at the time of the execution of the leases, the lessee did have knowledge of the economic potential of coalbed methane. The lessors, on the other hand, did not share the same knowledge.

The Court stated:

Dale Harman, a named lessor and a witness for the appellees testified that he had not heard of the economic potential of coalbed methane until 1990, and, to his (Dale Harman's) knowledge, Mr. C. Henry Harman [an original lessor, since deceased] had never met with anyone regarding the leases without having either himself (Dale Harman) or counsel for Hall Mining present.¹⁶

¹³ *Energy Development Corp. v. Moss, et al.*, 591 S.E.2d 135, at 138.

¹⁴ *Id.* at 139.

¹⁵ *Id.* at 140.

¹⁶ *Id.*

The Court found that, ‘in the absence of specific language to the contrary or other indicia of the parties’ intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas.’¹⁷

At page 30 of its Statement of Reasons, in discussing the 2004 amendment to the EEPA, the Commission stated:

. . . the RECs are not like the coal methane gas that existed in Energy Development Corp.. At the time EEPAs were entered into, RECs did not exist, but, at the time the gas lease was entered into in Energy Development Corp., both parties were aware that coal methane existed.

The Commission mischaracterized the factual setting and was simply wrong in its reading of the facts of the *Energy Development Corp.*, case. It is not known whether the parties in *Energy Development Corp.* were aware of the existence of coalbed methane gas, but it is clear that only one of the parties was aware of the potential economic value of coalbed methane gas at the time of entering into the leases; the lessee.

In this case, the question before the Court is whether the owner of the Hannibal Project, or the purchaser of the electricity from that project should own the RECs when the 1986 EEPA and the 2004 Amendment to the EEPA are silent on the ownership issue.

The evidence in this case shows that in 2003, much like the situation in the *Energy Development Corp.*, case, the power purchaser’s representative, Mr. Reeping, knew of the existence of the issue of RECs and even discussed with MPC’s counsel whether RECs should be included in negotiations regarding the amendment of the EEPA, prior to the time of entering into discussions for the 2004 amendment to the EEPA. Mr. Reeping testified that, in addressing the

¹⁷ *Id.* at 146.

items to be considered in the negotiations with the City, he raised the issue of RECs with the Company's counsel who was "assisting us on the issues associated with Hannibal, in the end of the 15 year term."¹⁸ While MPC and the Commission try to minimize the significance of the 2004 Amendment to the EEPA, Mr. Reeping testified that the issue of RECs occurred to him as an issue that might come up in negotiations that ultimately led to the City becoming the new operator of the Hannibal Project.¹⁹ Also, while the other issues he considered that could come up in negotiations involved other parties, the issue of the RECs only related to the matters between the City and MPC and not between MPC and any other party.²⁰ Thus, not only was the Commission wrong in its understanding of the facts in the *Energy Development Corp.*, case, it was clearly wrong in its conclusion that the Company did not have knowledge of the existence and potential value of RECs at the time of the negotiation of the 2004 Amendment to the EEPA. Not only did MPC have knowledge of the existence and potential value of RECs at that time, the evidence shows that consideration was given to whether the matter should be included in the negotiations. Obviously, for reasons known only to MPC, it was ultimately decided by MPC's counsel that such item would not be included in the negotiations.

As was the case with the lessor in the *Energy Development Corp.* case, the facts in this case show that the City, the owner of the Hannibal Project, did not have knowledge of the

¹⁸ *Id.* at 92.

¹⁹ See Transcript of hearing held August 25, 2011 at page 97.

²⁰ *Id.* at 96.

existence and value of RECs until three (3) years after the signing of the 2004 Amendment to the EEPA.²¹

The Commission's assertion that it did not find the City's claim of ignorance of the existence and value of RECs to be credible must be disregarded as being utterly unfounded based on the revelation of its failure to read or understand the evidence. Further, the Commission's failure to consider the evidence of record regarding both MPC's knowledge of the existence and value of the RECs leads to the conclusion that the Commission's Statement of Reasons for its decision must be disregarded as unreasonable. Finally, the Commission's determination that the facts in *Energy Development Corp.*, are distinguishable from the facts in this case, and the Commission's determination that the *Energy Development Corp.*, case has no applicability to this case must be seen as clearly erroneous.²²

²¹ See discussion regarding New Martinsville Exhibit 2 *Infra*.

²² Given the degree to which the record shows that the Commission disregarded pertinent evidence related to the City's claims, the City must also question whether the 2003 e-mail between Mr. Reeping and his outside counsel which addressed the issue of the Hannibal RECs which was reviewed by the Commission *in camera*, may also bear on the argument concerning MPC's knowledge of the RECs at the time of the negotiation of the 2004 Amendment. As stated in footnote 35 at page 23 of the City's December 22, 2011 Petition in this case, that e-mail is contained in a sealed envelope as Exhibit A to the Company's May 24, 2011 Response to the City's Motion to Compel. Counsel for the City has never seen the contents of the e-mail.

The Commission was clearly wrong in its assertion that there is no ambiguity in the EEPA.²³ And, contrary to the Commission's reasoning,²⁴ the lessors in *Energy Development Corp.* had not reserved any interest in coalbed methane. The Court in *Energy Development Corp.*, found that the leases were silent on the matter, but a latent ambiguity existed not because the leases were silent about a commodity that was known to exist, but because the leases were silent about that commodity and later events gave rise to conflicting claims about whether one party or the other was entitled to the ownership of that commodity.²⁵ As recited in *Energy Development Corp.*, "[a] latent ambiguity is one that is not apparent upon the face of the instrument alone and that is discovered when it is sought to identify the property, the beneficiaries, etc." *Collins v. Treat*, 108 W.Va. 443, 446, 152 S.E. 205, 206 (1930). In such a situation, the Court determined that it was appropriate to look to the parties' intent at the time of the contract in order to determine the ownership of coalbed methane.

That is the same situation here. The EEPA and the 2004 Amendment to the EEPA are silent on the matter of RECs. However, the record is clear that at the time of the negotiation of the 2004 Amendment, MPC knew about the potential value of RECs at the Hannibal Project. Indeed, Mr. Reeping went so far as to e-mail counsel as to whether MPC would discuss the

²³ See Statement of Reasons at page 29.

²⁴ The Commission appears to believe that the Court found the lessor in *Energy Development Corp.* was entitled to the coalbed methane because it retained a mineral interest not contained in the lease. The Commission stated:

Unlike the situation in *Energy Development Corp.* **where the surface owner retained a mineral interest not included in the lease**, the EEPA results in an unqualified sale of electricity where New Martinsville has not reserved any residual interest in electricity or any attribute of the electricity. The credits come into existence after the electricity has been generated and sold to the utility. Statement of Reasons at page 29 - 30. (Emphasis added)

²⁵ See discussion at *Energy Development Corp. v. Moss, et al.*, 591 S.E.2d 135, at 143 - 44.

treatment of RECs when the Companies and the City addressed the amendment. And, notwithstanding the Commission's refusal to consider the relevance of the evidence, the City knew nothing about the existence and potential value of RECs. MPC may not have had an obligation to bring the issue to the City, and, like the lessee in *Energy Development Corp.*, MPC did not share its knowledge with the City that RECs were a commodity with economic value. However, when confronted with the facts of the matter, the Commission should have found, as the Court did in *Energy Development Corp.*, *supra*, that the EEPA and the 2004 Amendment is clear on its face and does not transfer RECs to MPC with the energy and capacity that was purchased and, that the 2004 Amendment to the EEPA contains a latent ambiguity. Further, the Court should, unlike the Commission, determine that the only way to resolve it is to look to MPC's clear intent to decide not to add RECs into the EEPA.

B. The Commission Abused Its Discretion By Selectively Reading The Statutory Scheme Of The Portfolio Act And Rule Making Process In Its Effort To Justify The Award Of RECs To The Companies.

At pages 13 and 14 of their brief, the Companies correctly state that an agency such as the Commission is typically entitled to substantial deference with regard to the implementation of a regulatory scheme that is within the expertise of the agency. However, in this case, the Commission's November 22, 2011 decision and its Statement of Reasons reveal that the Commission has viewed both the Portfolio Act and the Portfolio Standard Rules in a way that was unintended by the Legislature and which is inconsistent with the Portfolio Standard Rules.

In its Statement of the Case, the Commission asserts that:

The Portfolio Act has as one of its stated goals the stimulation of the construction of new alternative generation facilities, which would not include these particular PURPA projects – they are already constructed.²⁶

And, at page 36 of its Statement of Reasons, the Commission states:

Because PURPA projects have already been constructed and have been operating for years before the Portfolio Act was passed, it does not further the Legislature’s desire to encourage the development of new alternative energy generation.

The Commission is correct that one of the goals of the Portfolio Act is the stimulation of the construction of new alternative generation facilities.²⁷ And, it is true that the PURPA projects were constructed prior to the passage of the Portfolio Act. However, the construction of new facilities is not the only goal of the Portfolio Act and the Act specifically contemplated the use of existing alternative and renewable facilities; including the PURPA projects.

At *West Virginia Code* §24-2F-2(4), the Legislature stated:

The Legislature finds that:

* * *

(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;**

* * *

(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; (Emphasis added)

²⁶ See Statement of Reasons at page 2.

²⁷ See, *West Virginia Code* §24-2F-2(7).

The Commission also attempts to back away from its decision in the adoption of the Portfolio Rules by suggesting that the Rules were not intended to address PURPA projects. This is especially curious given the statement at page 34 of its Statement of Reasons where the Commission states that it “contemplated that the parties to purchase contracts would address the ownership of credits and whether they are bundled or unbundled from purchased power.” It is also curious that the PSC suggests that the ownership of RECs was not addressed in the comments to the rules by the parties to the purchase contracts. The PSC’s Statement of Reasons asserts that “the comments that were submitted in the Commission rulemaking, which led to the formulation of the rule, did not mention PURPA projects that existed prior to the Portfolio Act.”²⁸ The Commission then provides a citation to Comments of American Municipal Power, Inc. (“AMP”), the City of New Martinsville and City of Philippi (“Philippi”) that were filed in the rule making proceeding.

As the Court can see from the Joint Comments that were filed by the City, AMP and Philippi,²⁹ the City did address the ownership of RECs and whether they are bundled or unbundled from purchased power. The Commission’s representation that these issues were not addressed is absolutely incorrect. The implications of the Commission’s Rule Making on the

²⁸ See Statement of Reasons at page 35 and “These credits were never intended to provide financial incentive to existing projects which had already struck its [sic] deal with the utility under the PURPA policies” at page 36. MPC also argues that “nothing in the Act or the Portfolio Standard Rules remotely suggests that the Legislature or the Commission had even thought about, much less addressed, the PURPA Credit Ownership Question.” See Brief of Respondents Monongahela Power Company And The Potomac Edison Company at page 14.

²⁹ Because the comments that were cited by the Commission are not a part of the record of this case, copies of such comments are attached hereto as Reply Brief Appendix, Exhibits 3 and 4 at Appendix Pages 17 and 26, respectively.

City's PURPA project was clearly presented to the Commission and the final rule that was adopted by the Commission was revised specifically to address the comments of the City.

In the Joint Comments filed on August 30, 2010, the City was identified as follows:

The City of New Martinsville is located on the western edge of West Virginia in Wetzel County and has a population of approximately 6,000 people. **The City of New Martinsville also owns and operates the hydroelectric facility located at Hannibal Locks and Dam.**³⁰ (Emphasis added)

And, in their comments to proposed Rule 3.1, the City, AMP and Philippi specifically addressed the issue of the ownership of credits that is now before this Court as follows:

Sec. 150-34-3. Electric Utility Obligations.

Rule 3.1. This Rule states that “an electric utility each year *shall own* an amount of certified credits...” [emphasis added]. AMP and the Municipal Systems request that the Commission provide clarification as to whether credits initially are awarded to – and thus owned by – the entity that **generates** the electricity or the entity that **purchases** the electricity.

In W.Va. Code §24-2F-4(b)(2) (awarding of credits), the statutory language reads that “an electric utility shall be awarded two credits for each megawatt hour of electricity generated or purchased from a renewable energy resource facility...”. **It should be noted that it is possible to generate renewable energy, and sell the renewable energy credits to one buyer, but sell the actual energy generated from the facility to another buyer. The current language in both the statute and the Proposed Rules leaves open the possibility of more than one interpretation as to whether the generator or purchaser of the electricity is initially awarded the associated credits. Clarification on this point is needed to eliminate possible disputes where more than one party could claim credits for the same megawatt hour of generation. The potential for conflict also is enhanced by the fact that the Proposed Rules now provide for the award of credits to non-electric utility distributors and generators. See Proposed Rule 4.**³¹ (Emphasis added)

³⁰ See Exhibit 3 attached hereto, Joint Comments of American Municipal Power, Inc., The City of New Martinsville, and the City of Philippi on the Proposed Rules Governing Alternative and Renewable Energy Portfolio Standard, 150 C.S.R. 34 (“Joint Comments”), at 2.

³¹ See Joint Comments at 3-4.

The comments above were not lost on the Commission at the time. In its Order entered November 5, 2010 in General Order No. 184.25 which adopted the Portfolio Rules, the Commission specifically referenced the Joint Comments of AMP, the City and Philippi as follows:

Rule 3.1 AMP and the Municipal Systems requested that the Commission amend the rule to clarify whether the credits are initially awarded to, and thus owned by, the entity that generates the electricity or the entity that purchases the electricity. AMP and the Municipal Systems suggest that there is ambiguity in the rules because it is possible to generate renewable energy and sell the credits to one buyer and sell the actual energy generated from the facility to another buyer. The Commission agrees with the comments and has amended Rule 5.6 to add language clarifying that the credit awarded under Rule 5.6 may be bundled with the purchase of power or may be unbundled and sold independently from the underlying power.³²

Thus, it is simply a revisionist view of the Act and the rulemaking process involved in the adoption of the Portfolio Standard Rules to suggest that the PURPA projects and the ownership of RECs were not part of the consideration of the Legislature and the Commission. In adopting the Portfolio Rules, the Commission specifically referred to the City's concern for the ownership of RECs and the City had identified itself as the owner of the Hannibal Project. It is simply not credible for the Commission to say that it did not consider the PURPA projects at the time of the adoption of the Rules. Its representations in its Statement of Reasons provide a further example of the Commission's selective reading and application of the Act and the Rules.

C. The Statement Of Reasons Discloses That In Balancing The Interests Contemplated By The Portfolio Act, The Commission Continues To Distort The Impact Of Its Decision.

By reading the November 22, 2011 decision and the Commission's Statement of Reasons, one cannot avoid the overt emphasis the Commission places on its concern for the cost of

³² See City's Appendix at pages 86-87.

compliance with the terms of the Portfolio Act on the ratepayers of MPC. In so doing, the Commission has totally distorted the impact of its decision on the citizens of the City of New Martinsville and again selectively applies the Legislative intent of the Act.

The Commission states in relevant part as follows:

New Martinsville would [sic] this Court ignore [sic] plain instruction of the Legislature in the Portfolio Act that the Commission is to ensure that the utility and its ratepayers incur reasonable compliance costs; its statutory obligation and authority to ensure that consumers pay reasonable utility rates; and its duty to consider in its deliberations and decisions the balancing of interest between utilities, ratepayers, and the state's economy. W.Va. Code §§24-2F-6(e), 24-2F-7(a) and 24-1-1.³³

Quite the contrary to the Commission's statement, the City merely expects the Commission to fairly balance the interests of the utilities, ratepayers, and the state's economy. The Commission did not do that. It does not encourage the development of reasonably priced alternative and renewable resources when the Commission's action in this case fails to compensate the developers of PURPA resources. And its decision fails to strike a fair balance between the interests involved.

There is no more obvious example of the Commission's distorted approach to its balancing process than can be seen in the City's situation.

The City is the owner of the Hannibal Project; a renewable energy resource under the Portfolio Act. All of the energy produced by the Hannibal Project is sold to MPC. The City is also the owner of a municipal electric utility. Under the Commission's orders, the City, as a public utility, must also comply with the Portfolio Act by owning or acquiring RECs of its own to satisfy its Portfolio requirements.

³³ See Statement of Reasons at page 37.

Under the Commission's November 22, 2011 decision, the City is not entitled to the ownership of any of the RECs associated with the production of energy from its Hannibal Project unless it would buy the RECs from MPC. The Commission justifies this situation by suggesting that "there is no additional financial impact on New Martinsville through 2025 because of its existing purchased power agreements."³⁴ Further, the Commission suggests that it would be unwise to award the credits to the City because "the credits would belong to the City, not the utility operations of the City. The City might decide to use the proceeds from hypothetical credit sales for other municipal purposes" whereas, by awarding the credits to MPC, "[t]he value of the credits . . . will be flowed through dollar for dollar, to the benefit of West Virginia ratepayers."³⁵

For some reason the Commission fails to recognize that the only reason that the City has enough credits to meet its requirements under the Portfolio Act through 2025 is that it has contracted to purchase those credits. That is a cost that could be offset by the amount that it could claim for the Hannibal Credits, just as MPC plans to do for any credits that MPC chooses to sell.³⁶ Further, the Commission apparently considers MPC's "West Virginia ratepayers" as somehow different than, and superior to, the citizens of the City of New Martinsville.

The City of New Martinsville is a city in the state of West Virginia. All of its citizens are West Virginia residents and electrical customers of either the City or, believe it or not, MPC. Awarding the credits to the City would keep the value of 100% of the RECs in the state of West Virginia. Awarding the credits to the City would also send a message to developers of alternative

³⁴ *Id.* at 31.

³⁵ *Id.* at 32-33.

³⁶ See Reeping testimony at page 91 of August 25, 2011 hearing transcript.

and renewable resources that their investments will not be ignored by the state in the future when the interest of the resource developer might be considered less valuable than the interest of the purchaser of energy.

Awarding the credits to MPC provides MPC's West Virginia customers with a free commodity (remember the Commission already determined that the price of energy from the Hannibal Project was reasonable and such energy does not include a value for the RECs), while requiring the City to purchase RECs on its own and the City of New Martinsville's residents are denied the value of such RECs that could be used to meet its Portfolio requirements and improve the quality of life in New Martinsville and offset the cost that the City's utility customers have to pay for RECs from another source.

In its Statement of Reasons, the Commission coyly suggests that the Court may be tempted by the City's "offer" to share the credits with MPC.³⁷ It is clear that the Commission has disdain for such a resolution. While the City firmly believes that the City owns and is entitled to the RECs, if the Commission actually wanted to strike a balance of the competing interests, a 50/50 split of the RECs could resolve this matter. Rather than the Commission's one-sided balance of interests to benefit the "West Virginia ratepayers" of MPC, which is also not provided for in the Portfolio Act or the Commission's Portfolio Standard Rules, sharing the credits between the City and MPC would achieve a much more fair balance of the interests with which the Commission purports to be concerned.

³⁷ *Id.* at 33.

III. CONCLUSION

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

CITY OF NEW MARTINSVILLE

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March 5, 2012

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, do hereby certify that I have served the foregoing City of New Martinsville's "Reply Brief", as well as a copy of the "Reply Appendix", upon the following parties on this 5th day of March, 2012 in the manner so indicated:

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