

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

City of New Martinsville, Petitioner

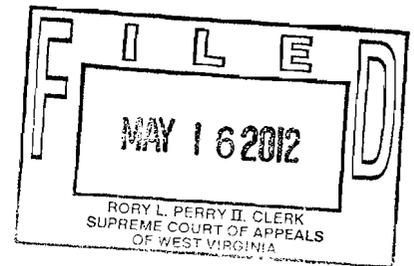
vs.) No. 11-1738

The Public Service Commission of West Virginia;
and Monongahela Power Company and The Potomac
Edison Company, both doing business as Allegheny
Power, Respondents

Morgantown Energy Associates, Petitioner

vs.) No. 11-1739

The Public Service Commission of West Virginia;
and Monongahela Power Company and The Potomac
Edison Company, both doing business as Allegheny
Power, Respondents



SUPPLEMENTAL BRIEF OF RESPONDENTS
MONONGAHELA POWER COMPANY AND
THE POTOMAC EDISON COMPANY

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May 16, 2011

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I. STATEMENT OF THE CASE

A. Introduction and Basis for Supplemental Brief

In its May 1, 2012 order, the Court directed the parties to file supplemental briefs to address the impact of a recent Federal Energy Regulatory Commission (“FERC”) order, and the extent to which it may necessitate additional proceedings before the Public Service Commission of West Virginia (“Commission”) before the Court resolves the pending appeals. Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“PE,” and with Mon Power, the “Companies”) assert that the FERC order has no impact whatsoever on the pending appeals, and that no additional Commission proceedings are necessary before the Court renders its decision.

Moreover, the Companies have petitioned the FERC for clarification or rehearing of the FERC’s inaccurate finding that certain statements in the Commission’s November 22, 2011 order (“PSC Order”) would be “inconsistent” with the requirements of PURPA “[t]o the extent that the [PSC Order] finds that avoided-cost rates under PURPA also compensate for RECs.” Because the Commission manifestly did not base its Credit ownership determination on these grounds, there is no inconsistency between the PSC Order and federal law. The Companies have asked the FERC to clarify the FERC order to recognize this fact.

B. Prior Proceedings before the Commission and this Court

The City of New Martinsville, West Virginia (“City”) and Morgantown Energy Associates (“MEA”) filed separate petitions seeking review of the PSC Order, in which the Commission determined that Mon Power owns the alternative and renewable energy credits (“Credits”) associated with the energy generated by the Petitioners’ “qualifying facilities” (“QFs”), as defined under the Public Utility Regulatory Policies Act of 1978 (“PURPA”), and sold to Mon Power pursuant to Commission-approved electric energy purchase agreements (“EEPAs”).¹

¹ The QFs and EEPAs are described in greater detail on pages 2-9 of the Companies’ Brief.

The Commission's holding that Mon Power owns the Credits attributable to energy purchased by Mon Power from Petitioners' QFs relied upon three separate but interrelated bases:

- (i) it is consistent with the intent of the Portfolio Act for a utility to own the Credits associated with qualifying energy it already purchases and use them toward the utility's Credit obligation under the Portfolio Act (*see* PSC Order at 29-30, 43);
- (ii) because Credits are created by state law and exist only as the electricity is generated, Mon Power's purchase of all of the qualifying electricity generated from Petitioners QFs as that electricity is generated results in Mon Power's ownership of the Credits associated to that energy as well (*see id.* at 30, 43); and
- (iii) because neither the Portfolio Act nor the Portfolio Standard Rules addresses Credit ownership in this situation, it is appropriate for the Commission to resolve the ownership question under both the Portfolio Act and the Commission's statutory obligations under W. Va. Code § 24-1-1(b) to ensure fair and reasonable rates and to balance the interests of utility customers, utilities, and the State's economy (*see id.* at 30-34, 43).

Petitioners challenged the PSC Order in their respective appeals, arguing that the Commission erred in its application of both West Virginia and federal law. The Commission and the Companies responded that the Commission's ownership determination was legally correct and should be upheld. The parties have fully presented their respective legal arguments in briefs and during oral argument held on April 10, 2012.

C. Petitioners' Unsuccessful Requests to the FERC

During the pendency of these appeals, the City and MEA filed petitions with the FERC, alleging that the PSC Order violates PURPA and asking the FERC to bring an enforcement action against the Commission pursuant to Section 210(h) of PURPA. On April 24, 2012, the FERC issued a Notice of Intent Not to Act and Declaratory Order ("FERC Order"), in which it refused to initiate the enforcement action Petitioners had sought. In its discussion, however, the FERC made the perplexing finding that "[t]o the extent that the [PSC] Order finds that avoided-cost rates under

PURPA also compensate for [Credits],” then certain statements in that order were “inconsistent with the requirements of PURPA.” FERC Order at ¶ 47

However, in determining Mon Power’s ownership of the Credits, the Commission *did not conclude* that avoided-cost rates under PURPA compensate Petitioners for RECs, and its decision did not rely on such a finding. Indeed, the FERC did not identify any portion of the PSC Order in which such a finding appears. The Companies do not know whether this erroneous aspect of the FERC’s decision was inadvertent or intentional. Nevertheless, the Companies filed a Motion for Clarification or, in the Alternative, Request for Rehearing of Order (“Motion,” attached as Exhibit A) on May 16, 2012 asking that the FERC clarify, or alternatively, grant rehearing of this aspect of the FERC Order.²

II. SUMMARY OF ARGUMENT

The Commission appropriately applied State law and determined that Mon Power is entitled to the Credits associated with generation it purchases from the Petitioners. In doing so, the Commission itself recognized that PURPA does not address the ownership of renewable energy credits (“RECs”), and that states have the authority to determine ownership of RECs in the initial instance, as well as how they are transferred from one entity to another. *See* PSC Order at 14, 19-20, 21, 34, 37; *see also* FERC Order at ¶ 46. Instead, the Commission’s Credit ownership determination relied solely upon application of West Virginia law and, contrary to the FERC’s hypothetical suggestion, did not rely upon a finding that avoided-cost rates paid pursuant to the EEPAs compensate Petitioners for the Credits. The Commission’s decision also turned on equitable

² Consequently, the FERC Order, although currently effective, is not final at this point, and will not be final until the FERC adjudicates the Motion or the request for rehearing is denied by operation of law.

considerations premised in State law, much as similar state regulatory and judicial decisions on this very issue have done.³

Despite the FERC's incorrect characterization of the Commission's decisional rationale, the FERC Order does not challenge or even address the State-law bases for the PSC Order, which clearly are for this Court to resolve. This Court has heard all legal arguments relevant to its consideration of these appeals, and no additional Commission proceedings are necessary for the Court to resolve them. The Court should issue an opinion without delay upholding the PSC Order.

III. ARGUMENT

Under FERC precedent, while “contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any [RECs],” it is for the states to decide the question of REC ownership under state law. *See* Companies' Brief at 23 and Companies' Response to Motion to Continue Oral Argument filed March 9, 2012 at 3 (each citing American Ref-Fuel Co., 105 FERC ¶ 61,004, 61,007 (2003) (“American Ref-Fuel”). The FERC itself explained its previous holding that

PURPA does not address the ownership of RECs and that states have the authority to determine ownership of RECs in the initial instance, as well as how they are transferred from one entity to another. In American Ref-Fuel, the [FERC] stated that “[C]ontracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers the ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

FERC Order at ¶ 46 (citing American Ref-Fuel, 105 FERC at ¶ 61,004). Although a Commission decision to award Mon Power ownership of the Credits, if premised on PURPA, would clearly have

³ See Companies' Brief at 22-26 for discussion of regulatory and judicial decisions in Pennsylvania, Connecticut, and New Jersey in which utility purchasers of QF energy were determined to own RECs generated in those states.

been inconsistent with American Ref-Fuel, the FERC expressly rejected Petitioners' request that the FERC file an enforcement action against the Commission. *Id.* at ¶¶ 44-45.

In an ancillary finding that is difficult to understand, the FERC nonetheless found that “certain statements in the West Virginia Order are inconsistent with PURPA.” FERC Order at ¶¶ 1, 45. Even more puzzling was the FERC’s qualification of this finding, in which it explained that this inconsistency would be present only “[t]o the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for [Credits].” *Id.* at ¶ 47 (emphasis added). In effect, the FERC presented a hypothetical situation: *if* the Commission had found that avoided-cost rates paid by Mon Power under the EEPAs compensate Petitioners for Credits, *then* that finding would be inconsistent with PURPA.

Yet the Commission could not have more clearly expressed that its determination of Credit ownership relied *solely* upon West Virginia law, and not PURPA. The PSC Order is replete with language expressly recognizing the constraints on states set forth in American Ref-Fuel, and differentiating the Commission’s decisional bases as arising not under PURPA, but under *State law* alone:

- “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.” PSC Order at 14 (emphasis added).
- “*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.” *Id.* at 19-20 (emphasis added).

- “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.” *Id.* at 21 (emphasis added).
- “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 para 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.” *Id.* at 29 (emphasis added).
- “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 interests of current and future ratepayers, the utilities and the state’s economy.” *Id.* at 29.

Furthermore, there is absolutely no finding in the PSC Order that avoided-cost rates compensate the Petitioners for Credits.

In a footnote near the end of the FERC Order, the FERC suggested that pages 28-31 of the PSC Order support the proposition that the Commission “relie[d] primarily on the avoided cost rate in the [EEPAs] as justification for finding that the [Credits] produced by the QFs” are owned by Mon Power. This observation is clearly misplaced. There is absolutely no support for this interpretation in the PSC Order; in fact, the Commission clearly did not base its decision on a finding that would have so patently contravened the FERC’s ruling in American Ref-Fuel.

The FERC misinterprets page 28 of the PSC Order to find “that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the [Credits] produced by the QFs.” FERC Order at fn 68. However, the third paragraph on page 28 merely (1) explains that the

“substantial consideration” provided for in the EEPAs constitutes all of the consideration contemplated by the parties and (2) notes that the EEPAs contain favorable terms for capacity and energy in the Commission’s view. Contrary to the FERC’s assertion, the Commission does *not* say that this consideration is “sufficient to compensate” the Petitioners for Credits.

At page 28 of the PSC Order, the Commission concluded that its rules permitting the optional “unbundling” of Credits from energy cannot reasonably be applied retroactively to the EEPAs because the EEPAs did not contemplate the existence of Credits or, for that matter, any potential need for additional consideration in the future whatsoever beyond the avoided-cost rates for capacity and energy incorporated in those agreements. At no point on page 28, or anywhere else in the PSC Order, did the Commission hold that the avoided-cost rates in the EEPAs compensate the Petitioners for Credits. Instead, the Commission explained that it sought to determine the ownership of the Credits on the basis of state law: “[b]ecause 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.” PSC Order at 28 (emphasis added). Moreover, on pages 29-31 of the PSC Order, also cited generally in FERC Order footnote 68, the Commission analyzed *state law*, not PURPA, to determine which party owns the Credits. The Commission considered the legislative goals of the Portfolio Act as well as its statutory obligations to enforce reasonable rates and balance the interests of current and future ratepayers, utilities, and the state’s economy in its decisions. Although the Commission declined to disregard the fuel attributes of the QFs under the Portfolio Act, or the inseparability of Credits from the energy Mon Power is required to purchase from those facilities (PSC Order at 31), these observations do not equate to a holding that the avoided-cost rates paid under the EEPAs compensate MEA and New Martinsville for those Credits.

In summary, the Commission properly considered state law, and only state law, in determining that Mon Power owns the Credits, and the PSC Order does not reflect a Commission

finding that avoided cost rates under the EEPAs compensate Petitioners for Credits. Consequently, the FERC's hypothetical situation is not present, and the Commission did not violate PURPA in its award of Credit ownership to Mon Power.

Nor is there any significance to the FERC's identification of Petitioners' statutory right to bring an enforcement action in federal district court, even though the FERC itself declined to file an enforcement action on its own. FERC Order at ¶¶ 44-45. Under 16 U.S.C. § 824a-3(h)(2)(B), electric utilities whose petitions for enforcement are denied have this right as a matter of law, without regard to the likelihood that their case would succeed on the merits:

If the [FERC] does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The [FERC] may intervene as a matter of right in any such action.

16 U.S.C.A. § 824a-3(h)(2)(B). The potential that Petitioners may bring such an action, which could take months or even years to resolve, does not impair the Court's resolution of these appeals, and should not delay that resolution.

The pending appeals present a controversy of state law interpretation, and are properly before this Court. All relevant issues have been fully briefed and argued, including arguments addressing whether the PSC Order violates PURPA. *See, e.g.*, City Brief at 11-21; City Reply Brief at 7-9; New Martinsville Brief at 36-40; Companies' Brief at 23-26; Companies' Reply Brief at 23-25; Commission's Statement of Reasons at 18-21, 26-29; Commission's Response to Motion to Continue Oral Argument at 3-5. No additional proceedings before the Commission or this Court are necessary or warranted for the Court to decide the appeals.

IV. CONCLUSION

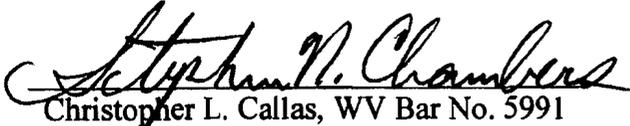
The Commission's Credit ownership determination was correct and should be upheld on appeal. The Commission correctly considered state law, including its responsibilities under the Portfolio Act and its general statutory obligations to establish reasonable utility rates and equitably balance the interests of current and future ratepayers, utilities, and the State's economy in its decisions. The FERC's hypothetical suggestion that the Commission may have impermissibly relied upon a finding that avoided-cost rates compensate Petitioners for their Credits simply has no basis in the PSC Order.

This Court has now received all relevant legal arguments, including those addressing the FERC's holding in American Ref-Fuel and whether or not the PSC Order violates PURPA. No further proceedings before the Commission or this Court are necessary, and this Court should issue an opinion affirming the PSC Order without delay.

Respectfully submitted this 16th day of May, 2012.

MONONGAHELA POWER COMPANY
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CERTIFICATE OF SERVICE

I, Stephen N. Chambers, do hereby certify that I have served the foregoing "Supplemental Brief of Respondents Monongahela Power Company and The Potomac Edison Company" on May 16, 2012, upon:

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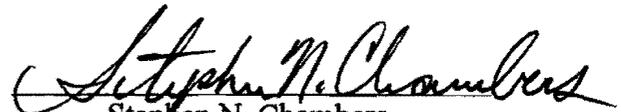
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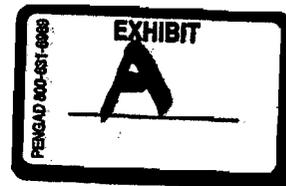
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Morgantown Energy Associates) Docket Nos. EL12-36-000
QF89-25-008
City of New Martinsville, West Virginia) Docket Nos. EL12-48-000
QF85-541-001

MOTION OF MONONGAHELA POWER COMPANY
AND THE POTOMAC EDISON COMPANY
FOR CLARIFICATION OF ORDER ISSUED APRIL 24, 2012,
OR, IN THE ALTERNATIVE, REQUEST FOR REHEARING OF ORDER

Pursuant to Rules 212 and 713 of the Federal Energy Regulatory Commission (the “FERC”), 18 CFR §§ 385.212; 385.713, Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“PE,” and with Mon Power, the “Companies”) respectfully request that the FERC clarify the Notice of Intent Not to Act and Declaratory Order issued in these proceedings on April 24, 2012 (the “April 24 Order”)¹ to ensure that it accurately reflects certain findings of the Public Service Commission of West Virginia (“WV PSC”). In the alternative, the Companies also respectfully request that the FERC grant rehearing and modify the April 24 Order to correct certain errors in that order.

INTRODUCTION

The Companies are electric utility subsidiaries of FirstEnergy Corp. that provide retail electric service, *inter alia*, in the State of West Virginia. Morgantown Energy Associates (“MEA”) and the City of New Martinsville, West Virginia (“New Martinsville”) each own and operate electric generating facilities in West Virginia that have been designated as Qualifying Facilities (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Mon Power purchases all of the capacity and energy available from MEA and New Martinsville

¹ *Morgantown Energy Associates, et al.*, 139 FERC ¶ 61,066 (2012).

pursuant to Electric Energy Purchase Agreements (“EEPAs”) negotiated in the 1980s. In accordance with the requirements adopted in PURPA and the FERC’s regulations thereunder,² the rates paid by Mon Power for such capacity and energy are based on Mon Power’s avoided cost of production of electricity as determined at the time each of those contracts was negotiated.

In 2009, the West Virginia Legislature enacted the Alternative and Renewable Energy Portfolio Act, W. Va. Code §§ 24-2F-1, *et seq.*, (the “Portfolio Act”), which provides for the creation of alternative and renewable energy resource credits under West Virginia law when electricity is produced by generators having specified characteristics.³ The electric generating facilities of MEA and New Martinsville meet the criteria adopted in the Portfolio Act for the creation of such RECs. On November 22, 2011, the WV PSC issued an Order on Joint Petition for Declaratory Ruling in *Monongahela Power Company and The Potomac Edison Company, both dba as Allegheny Power*, WV PSC Case No. 11-0249-E-P (the “WV PSC Order”), in which it ruled that under West Virginia state law, the Companies own the RECs attributable to electricity Mon Power purchases from MEA and New Martinsville at the time such electricity is generated.⁴

MEA and New Martinsville have alleged that the WV PSC’s conclusion under the Portfolio Act that Mon Power owns the RECs attributable to the electricity that it purchases from them violates PURPA. Therefore, each of them asked the FERC to initiate an enforcement action against the WV PSC pursuant to Section 210(h) of PURPA. In the April 24 Order, the

² See, 18 CFR § 292.304.

³ The term “renewable energy credits,” or “RECs,” is frequently used to refer to tradable instruments used to meet and monitor compliance with state renewable portfolio standards. The acronym “RECs” is used herein to refer to the alternative and renewable energy resource credits that have been created under West Virginia law for this purpose.

⁴ WV PSC Order at 55 (conclusions of law 29-30); WV PSC Order at 56. Although only Mon Power purchases electricity from MEA and New Martinsville, PE was a party to proceedings before the WV PSC and is considered to own some of the RECs at issue because the WV PSC “now regulates the combined West Virginia operations of Mon Power and PE as a single utility, including the determination of combined costs and rates” (WV PSC Order at 1-2).

FERC declined to initiate any such enforcement action, but noted that MEA and New Martinsville may bring their own enforcement actions against the WV PSC in the appropriate United States district court under 16 U.S.C. § 824a-3(h)(2)(B) if they desire to do so (April 24 Order at PP 44-45). However, the FERC further found *sua sponte* that “certain statements in the West Virginia Order are inconsistent with PURPA” (April 24 Order at P 45). The Companies seek clarification, or alternatively, rehearing of this finding.

MOTION FOR CLARIFICATION OF APRIL 24 ORDER

Although the April 24 Order found that “certain statements in the West Virginia Order are inconsistent with PURPA,” it does not clearly identify any specific statements in the WV PSC Order that the FERC believes to be “inconsistent with PURPA.” Instead, the FERC simply explained hypothetically that if the WV PSC had found that Mon Power owns the RECs because the payments it makes under the EEPAs compensate MEA and New Martinsville for those RECs, then such a finding would have been deemed to be inconsistent with PURPA.

Specifically, the FERC asserted in the April 24 Order at P 47:

To the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs,⁶⁸ the West Virginia Order is inconsistent with PURPA.

⁶⁸ The West Virginia Order relies primarily on the avoided cost rate in the contracts between Morgantown Energy and Monongahela Power and between the City of New Martinsville and Monongahela Power as justification for finding that the RECs produced by the QFs are owned by the purchasing utility in the first instance. *See, e.g.*, West Virginia Order at 28-31. For example, the West Virginia Order states that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs. *See* West Virginia Order at 28.

The suggestion that the WV PSC Order may be inconsistent with PURPA is based on the unfounded assumption that the WV PSC Order did, in fact, find that the rates paid by Mon

Power for capacity and energy being purchased from MEA and New Martinsville also compensate them for RECs. However, the Companies have carefully scrutinized the WV PSC Order and have not found any language to this effect, and no such language was identified in the April 24 Order.

The FERC claimed at footnote 68 of the April 24 Order that the WV PSC relied primarily on the avoided cost rate in the EEPAs as its justification that the RECs are owned by the Companies. However, as discussed further herein, the WV PSC's decision was focused on the fact that the Companies are purchasing the capacity and energy available from MEA and New Martinsville at rates that happen to be avoided-cost rates established in accordance with PURPA (*see, e.g.*, WV PSC Order at 36). The WV PSC finding regarding ownership of the RECs would not have been different even if the rate at which Mon Power purchases capacity and energy from MEA and New Martinsville had been established in a different manner (such as a market-based rate or a purely negotiated rate).

Also at footnote 68 of the April 24 Order, the FERC characterized page 28 of the WV PSC Order as stating that "avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs" (emphasis added). Contrary to the FERC's assertion, the WV PSC simply noted at page 28 of the WV PSC Order that the EEPAs contain what it believed to be favorable terms for capacity and energy supplied by MEA and New Martinsville. The WV PSC made no such finding about inclusion in the avoided-cost rates contained in the EEPAs of compensation for RECs attributable to electricity supplied by MEA and New Martinsville.

At page 28 of the WV PSC Order, the WV PSC concluded that its rules permitting the optional “unbundling” of RECs from energy cannot reasonably be applied retroactively to the EEPAs because the EEPAs do not contemplate the existence of RECs or, for that matter, any potential need for additional compensation in the future whatsoever beyond the avoided-cost rates for capacity and energy incorporated in those agreements. At no point on page 28, or anywhere else in the WV PSC Order, did the WV PSC opine that the avoided-cost rates in the EEPAs compensate the QFs for RECs. Instead, the WV PSC explained that it sought to determine the ownership of the RECs on the basis of state law: “[b]ecause 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” (WV PSC Order at 28; emphasis added).

On pages 29-31 of the WV PSC Order, also cited generally in footnote 68 of the April 24 Order, the WV PSC analyzed State law, not PURPA, to determine which party owns the RECs. This analysis considered the legislative goals of the Portfolio Act as well as the WV PSC’s statutory obligations to enforce reasonable rates and balance the interests of current and future ratepayers, utilities, and the State’s economy in its decisions. Although the WV PSC concluded that “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” (WV PSC Order at 31; emphasis added), the WV PSC never held that the avoided-cost rates for capacity and energy supplied under the EEPAs are sufficient to compensate MEA and New Martinsville for RECs.

After carefully considering all relevant factors, the WV PSC concluded that Mon Power owns the RECs associated with the generation of electricity from the PURPA facilities under the EEPAs because of three separate but inter-related bases under State law:⁵

(i) consistent with the [Portfolio] 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 interest of the current and future utility customers, the utilities and the state economy.

Insofar as the Companies can discern, there is no finding in the WV PSC order "that avoided-cost rates under PURPA also compensate for RECs." To the contrary, the WV PSC found that (WV PSC Order at 36):

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.

Moreover, the WV PSC explicitly rejected MEA's claim that the allocation of the RECs to the Companies in the first instance without additional compensation effectively lowered the rates paid for capacity and energy being supplied under the EEPAs, thereby violating PURPA. In so doing, the WV PSC affirmed that it was "not modifying the existing PURPA Agreements

⁵ WV PSC Order at 43; compare with April 24 Order at P 9 (summarizing eight bases that the FERC believed the WV PSC relied on for its decision. Significantly, none of the reasons cited by the FERC involves a belief on the part of the WV PSC that MEA and New Martinsville are being compensated for RECs through payments for capacity and energy under the EEPAs).

or exercising utility-type jurisdiction over MEA; we are determining the ownership of the credits in light of state law” (WV PSC Order at 37, 39). Therefore, the FERC’s suggestion that the WV PSC believed that MEA and New Martinsville are being compensated for RECs through payments for capacity and energy being supplied from their generating facilities, and its finding that the WV PSC Order is therefore inconsistent with PURPA, are incorrect.

The Companies do not know whether MEA and/or New Martinsville will initiate PURPA enforcement actions against the WV PSC in an appropriate United States district court. In the event that they do so, however, it is reasonable to expect that they will rely on the April 24 Order’s erroneous finding that the WV PSC Order may be inconsistent with PURPA. In order to avoid unnecessary litigation about the intent of the April 24 Order, the Companies respectfully request that the FERC clarify that its statement was not intended to suggest that there actually is language in the WV PSC Order stating that MEA and New Martinsville are being compensated for RECs through avoided cost payments for capacity and energy. In the alternative, the FERC should (i) identify with specificity all portions of the WV PSC Order it considers to be inconsistent with PURPA, and (ii) explain in detail how each such statement is inconsistent with PURPA. If the FERC does not provide such clarification, a United States district court judge may be burdened with the task of discerning the FERC’s intended meaning of the April 24 Order, perhaps ultimately leading to an erroneous result.

ALTERNATIVE REQUEST FOR REHEARING OF APRIL 24 ORDER

If the FERC chooses not to clarify the April 24 Order as requested above, the Companies alternatively request that the FERC grant rehearing and modify the April 24 Order to address the issues described below.

A. Statement of Issues and Specification of Errors

1. Whether the FERC's conclusion that there may be findings in the WV PSC Order that the avoided cost rates established pursuant to PURPA for capacity and energy purchased by Mon Power from MEA and New Martinsville also compensate MEA and New Martinsville for RECs is reasonable and supported by the record.
2. Whether the FERC's conclusion that any reliance by the WV PSC on the avoided cost rate in the EEPAs as justification for finding that the RECs produced by MEA and New Martinsville are owned by the Companies in the first instance might be inconsistent with PURPA is correct and consistent with its prior orders. See, *American Ref-Fuel Company*, 105 FERC ¶ 61,004 at PP 23-24 (2003) (*American Ref-Fuel I*), order on rehearing, 107 FERC 61,016 (2004) (*American Ref-Fuel II*).

B. Basis for Rehearing

1. The WV PSC Order does not support a finding that the avoided-cost rates being paid by Mon Power to MEA and New Martinsville for capacity and energy being purchased pursuant to contracts negotiated in the 1980s also compensate MEA and New Martinsville for RECs.

As noted above, the FERC ruled in the April 24 Order that "certain statements in the West Virginia Order are inconsistent with the requirements of PURPA" (April 24 Order at P 1), and, specifically, that "[t]o the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs, the West Virginia Order is inconsistent with PURPA" (April 24 Order at P 47). Implicit in this ruling is the assumption that the WV PSC may have found that avoided cost rates established in the 1980s pursuant to PURPA for capacity and energy supplied by QFs also compensate MEA and New Martinsville for the RECs attributable to their generation that were created in accordance with the Portfolio Act.

There is nothing in the WV PSC Order to support such an assumption. To the contrary, the WV PSC properly found that the EEPAs predated RECs and do not address the ownership of RECs (WV PSC Order at 2):

All of the EEPAs with the QFs were executed in the 1980s long before the creation of alternative and renewable energy resource credits in West Virginia by the enactment of the [Portfolio Act and WV PSC regulations thereunder], 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 credits existed, the Agreements do not contain provisions addressing the ownership of the credits.

For this reason, there was no basis for the WV PSC to find, as FERC has implied, that payments for capacity and energy at avoided-cost rates incorporated in the EEPAs also compensate New Martinsville and MEA for the RECs attributable to electricity that they generate.

The WV PSC explained at length that its determination that the RECs associated with electricity generated by MEA and New Martinsville are owned at their inception by Mon Power was based on the fact that Mon Power owns the electricity as it is generated (WV PSC Order at 28-36):

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. 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. (WV PSC Order at 30; emphasis added.)

* * *

The [WV PSC] clarifies that Mon Power and PE is (*sic*) 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. (WV PSC Order at 34; emphasis added.)

* * *

...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. (WV PSC Order at 36; emphasis added)

Contrary to the FERC's assumption, the WV PSC did not find that MEA and New Martinsville are being compensated for such RECs. Instead, the WV PSC concluded that the Companies own the RECs attributable to electricity generated by MEA and New Martinsville in the first instance.

As recently discussed in *Braintree Electric Light Department v. FERC*, CADC No. 09-1231 (Feb. 7, 2012), slip opinion at 7, it is incumbent on the FERC to establish a rational connection between the facts of a particular case and its conclusion. There is no evidence in the WV PSC Order or elsewhere in the record of this proceeding to show that the WV PSC believed that MEA and New Martinsville were being compensated for RECs through payments pursuant to the EEPAs. Indeed, because the Companies own the RECs in the first instance as they are created, there is no obligation for the Companies to compensate MEA and New Martinsville for them. Under such circumstances, it is evident that the FERC's suggestion that certain language in the WV PSC Order may be inconsistent with PURPA is arbitrary and capricious. The FERC should therefore grant rehearing and modify the April 24 Order to affirm that (a) there is no finding in the WV PSC Order that the avoided cost rates being paid by Mon Power to MEA and New Martinsville for capacity and energy purchased pursuant to contracts negotiated in the 1980s also compensate MEA and New Martinsville for RECs, and (b) there is no other statement in the WV PSC Order that might be inconsistent with PURPA.

2. There is nothing in PURPA which affects the right of a state regulatory agency, acting in accordance with state law, to determine who owns RECs at the time they are created.

The April 24 Order concludes that if and to the extent that the WV PSC determined that Mon Power owns the RECs associated with capacity and energy it purchases from MEA and New Martinsville because its payments under the EEPAs compensate MEA and New

Martinsville for those RECs, the WV PSC Order is inconsistent with PURPA (April 24 Order at P 47, and fn. 68).

The FERC has previously ruled that RECs are creations of state law, and that states have full discretion to determine the initial ownership of RECs in any manner they choose, so long as the basis for that determination rests in state law, not PURPA. As the FERC explained in *American Ref-Fuel I* at PP 23-24:

...RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs....States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.

... While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

The WV PSC Order was clearly based on the WV PSC's interpretation of West Virginia state law, and did not rest on any provision in PURPA or the FERC's regulations thereunder. Indeed, the WV PSC explicitly recognized that the ownership of the RECs in question was to be determined solely in accordance with West Virginia state law, and that PURPA was not applicable to such determination (WV PSC Order at 11-14). Because the WV PSC Order is based solely on West Virginia state law, the WV PSC Order is fully consistent with PURPA, as interpreted by the FERC in *American Ref-Fuel*.

The issues addressed by PURPA and the subject matter of the WV PSC Order are separate and distinct. Although (insofar as relevant) PURPA imposes an obligation for utilities to purchase capacity and energy from QFs at avoided-cost rates, the ownership of RECs is "not an issue controlled by PURPA." The WV PSC Order determined REC ownership under state law, but did not affect the EEPAs under which Mon Power purchases electricity from MEA and New Martinsville. For that reason, there is no basis for the FERC's assertion that there may be

language in the WV PSC Order that is inconsistent with PURPA. The FERC should therefore grant rehearing and modify the April 24 Order to affirm, in accordance with *American Ref-Fuel*, that states have unfettered discretion to determine ownership of RECs pursuant to state law where the obligation of utilities to purchase electricity from QFs is not affected.

WHEREFORE, for the reasons discussed herein, the Companies respectfully request that the FERC clarify that the April 24 Order was not intended to suggest that the WV PSC Order contains any finding that avoided-cost rates being paid to MEA and New Martinsville for capacity and energy under contracts negotiated in the 1980s are also intended to compensate them for RECs created pursuant to the Portfolio Act. Further, the FERC should either clarify that there are no statements within the WV PSC Order that are inconsistent with PURPA, or identify any such statements within the full context in which they are presented, and specify whether any such statements affect the REC ownership determination made by the WV PSC. In the alternative, the Companies request that the FERC grant rehearing and modify the April 24 Order (a) to affirm that nothing in the WV PSC Order supports a finding that avoided-cost rates being paid to MEA and New Martinsville for capacity and energy being purchased by Mon Power compensates, or is intended to compensate, MEA and New Martinsville for RECs, and (b) to affirm that PURPA does not inhibit in any way the authority of the WV PSC to determine the ownership of such RECs in accordance with West Virginia state law.

Respectfully submitted,
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May 16, 2012.

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that a copy of the foregoing document has been served upon the parties of record indicated on the official service list compiled by the Secretary in this proceeding this 16th day of May, 2012.

James K. Mitchell
James K. Mitchell