

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

City of New Martinsville, Petitioner

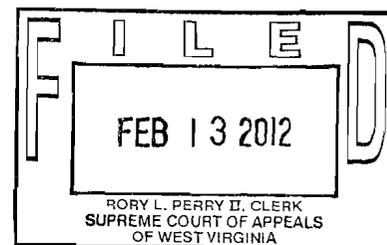
vs.) No. 11-1738

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



BRIEF OF RESPONDENTS
MONONGAHELA POWER COMPANY AND
THE POTOMAC EDISON COMPANY

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
A.	Procedural History	1
B.	Statement of Facts Relevant to Petitioners' Assignments of Error.....	2
1.	The Act and Portfolio Standard Rules	2
2.	Compliance Filings Under the Act	3
3.	The PURPA Facilities.....	3
4.	The PURPA Agreements	4
5.	Mon Power Payments under the PURPA Agreements	6
6.	Estimates of PURPA Credits and Market Value of Credits	7
7.	The Companies' Reliance on Ownership of PURPA Credits.....	8
8.	Other Parties' Reliance on Ownership of PURPA Credits	9
II.	SUMMARY OF ARGUMENT	9
III.	ARGUMENT	13
A.	The Commission Properly Held that Petitioners Never Owned the Credits, and That the Commission Did Not Intend to Determine the Ownership of PURPA Credits When It Promulgated the Portfolio Standard Rules.	14
1.	The City's Argument – Portfolio Standard Rule 5.6	15
2.	MEA's Argument – Portfolio Standard Rule 5.2.....	18
B.	The Order Did Not “Transfer” or “Convey” Ownership of PURPA Credits from Petitioners to Mon Power.....	21
1.	The American Ref-Fuel Decision	22
2.	State Contract Law Principles.....	26
3.	No Modification of Price Terms – PURPA, Ambit, and Freehold.....	28
4.	PURPA Anti-Discrimination and Anti-Regulation Principles	30
C.	The Commission Properly Considered Policy Concerns and Ratepayer Interests in the Order.....	31

D.	There Is No “Latent Ambiguity” in the 2004 Amendment Between Mon Power and the City, and Thus There Was Nothing for the Commission to Interpret to the City’s Benefit	33
E.	The Commission Order Did Not Effect an Unconstitutional “Taking” of Private Property, Nor Did it Violate the “Dormant” Commerce Clause.	35
1.	MEA’s “Takings” Arguments.....	36
2.	MEA’s Commerce Clause Claim.....	38
F.	The Commission Properly Exercised Jurisdiction over MEA and Developed a Reasonable Mechanism to Deem the WVU Project Certified as a Qualified Resource in West Virginia.....	39
IV.	CONCLUSION.....	43

TABLE OF AUTHORITIES

Federal and State Statutes

<u>West Virginia Alternative and Renewable Energy Portfolio Act</u> ,.....	passim
W. Va. Code §24-2F-1, <i>et seq.</i> (2009).	
<u>Pennsylvania Alternative Energy Portfolio Standards Act</u> ,	37
Act of November 30, 2004, P.L. 1672, <i>as amended</i> , 73 P.S. §§ 1648.1-1648.8 (“AEPS”).	

Federal and State Judicial Decisions (Other than West Virginia)

<u>W. Lynn Creamery, Inc. v. Healy</u> ,.....	39
512 U.S.186, 192-93 (1994)	
<u>Penn Central Transp. Co. v. City of New York</u> ,.....	38
438 U.S. 104, 124 (1978)	
<u>Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control</u> ,.....	36, 38
531 F.3d 183 (2d Cir. 2008) (“ <u>Wheelabrator I</u> ”)	
<u>Freehold Cogeneration v. Bd. of Regulatory Comm’s of N.J.</u> ,	29
44 F.3d 1178 (3 rd Cir. 1995) (“ <u>Freehold</u> ”)	
<u>ARIPPA v. Pennsylvania Pub. Util. Comm’n</u> , 966 A.2d 1204.....	24, 34
(Pa. Commw. Ct. 2009) (“ <u>ARIPPA</u> ”)	
<u>Consumers Lobby Against Monopolies v. Public Utils. Comm’n</u> ,	42
25 Cal.3d 891, 907 (1979)	
<u>In re Ownership of Renewable Energy Certificates</u> , 389 N.J. Super. 481,.....	24
913 A.2d 825 (N.J. Super. Ct. App. Div. 2007) (“ <u>In re Ownership of RECs</u> ”)	
<u>Mountain States Telephone and Telegraphic Co. v. Public Utils. Comm’n</u> ,.....	42
576 P.2d 544, 547 (Colo. 1978)	
<u>Northern Indiana Public Serv. Co. v. Citizens Action Coalition of Ind., Inc.</u> ,	41
548 N.E.2d 153 (Ind. 1989)	
<u>Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control</u> ,.....	24, 35, 36, 38
Conn. 672, 931 A.2d 159 (2007) (“ <u>Wheelabrator II</u> ”)	

Federal and State Regulatory Decisions (Other than West Virginia)

American Ref-Fuel Co., Covanta Energy Group, Montenay Power Corp., and Wheelabrator Tech., Inc., 105 FERC ¶ 61,004, 61007 (2003) (“American Ref-Fuel”); *rehearing denied*, 107 FERC ¶ 61,016, at 61,042 n.1 (2004)20, 21, 22, 24, 27

Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No. P-00052149 (Opinion and Order dated December 21, 2006) (“PaPUC Decision”)24

West Virginia Judicial Decisions

Affiliated Constr. Trades Found. v. Public Serv. Comm’n,13
Syl. Pt. 1, 211 W. Va. 315, 565 S.E.2d 778 (2002)

Berkley County Pub. Serv. Dist. v. Vitro Corp.,34
152 W. Va. 252, 162 S.E.2d 189 (1968)

Casey v. Public Serv. Comm’n,41
193 W. Va. 606, 457 S.E.2d 543 (1995)

Central West Virginia Refuse, Inc. v. Pub. Serv. Comm’n,13
190 W.Va. 416, 438 S.E.2d 596 (1993)

Energy Development Corp. v. Moss,33, 34, 35
214 W.Va. 577, 591 S.E.2d 135 (2003)

State ex rel. Public Service Comm'n v. Town of Fayetteville, Mun. Water Works,13
Syl. Pts. 4-6, 212 W.Va. 427, 573 S.E.2d 338 (2002)

Commission Orders

American Bituminous Power Partners and American Hydro Power Co. v. Monongahela Power Co., Case No. 87-669-E-C:

Commission Order dated March 29, 199627

General Order No. 184.25 (Commission Order dated November 5, 2010)2, 15

Monongahela Power Co. and the City of New Martinsville, Case No. 86-169-E-PC:

Commission Order dated August 8, 19864

Commission Order dated May 9, 19864

Monongahela Power Co. and Morgantown Energy Assocs.,
Case No. 89-200-E-PC:

Commission Order dated May 15, 19894, 5
Commission Order dated April 7, 19894, 5

Morgantown Energy Assocs. v. Monongahela Power Co.,5
Case No. 09-0985-E-C (Commission Order dated June 9, 2010)

West Virginia Administrative Rules

Rules Governing Alternative and Renewable Portfolio Standard, passim
150 W.V.C.S.R. Series 34 (2010) (“Portfolio Standard Rules”)

Secondary Materials

Bordeau, John, J.D., et. al, “Judicial Construction and.....13
Interpretation of Rules- Deference to Administrative
Construction or Interpretation,
ED HOLT AND LORI BIRD, NATIONAL RENEWABLE ENERGY4
LABORATORY, EMERGING MARKETS FOR RENEWABLE ENERGY
CERTIFICATES: OPPORTUNITIES AND CHALLENGES at 7 (January 2005).
30A C.J.S. Equity § 130 (2011)37
73 C.J.S. Public Administrative Law and Procedure § 212 (updated Dec. 2011).....12

I. STATEMENT OF THE CASE

The City of New Martinsville, West Virginia (“City”), and Morgantown Energy Associates (“MEA”) have filed separate petitions seeking review of the Public Service Commission’s November 22, 2011 order in Case No. 11-0249-E-P (“Order”). In the Order, the Commission determined that Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“PE,” and with Mon Power, the “Companies”) own the alternative and renewable energy credits (“Credits”) associated with the energy generated by certain “qualifying facilities” (“QFs”) under federal law pursuant to Commission-approved electric energy purchase agreements (“EEPAs”). Mon Power and Petitioners entered into the EEPAs in the late 1980s, long before the West Virginia Legislature enacted the Alternative and Renewable Energy Portfolio Act, W. Va. Code §§ 24-2F-1, *et seq.*, in 2009 (“Portfolio Act”), and before the concept of renewable energy credits (“RECs”) became prevalent. The City and MEA own and operate pre-Portfolio Act QFs under EEPAs that require Mon Power to purchase all the energy and capacity from the QFs. The EEPAs do not address the subject of RECs or specifically provide for their ownership.

The Commission’s Credit ownership determination was correct and should be upheld on appeal. The Commission correctly considered state law, its responsibilities under the Portfolio Act, its general obligations under Chapter 24 of the Code, and principles of equity and fairness.

A. Procedural History

The Companies adopt the Procedural History as set forth in Section II.A (pages 2-4) of the City’s Petition for Appeal (“City Petition”).

B. Statement of Facts Relevant to Petitioners' Assignments of Error

1. The Act and Portfolio Standard Rules

The Portfolio Act established alternative and renewable energy portfolio standards (“Portfolio Standards”) under which electric utilities must own each year an amount of Credits equal to specified minimum percentages of electricity sold to West Virginia retail customers in the preceding calendar year. Portfolio Act at § 5. Section 4 of the Portfolio Act requires the Commission to create a system of tradable Credits to verify and monitor the generation and sale of electricity from alternative and renewable energy resource facilities. *Id.* at § 4. Credits may be traded, sold, banked or used to meet the Portfolio Standards. Section 4 also provides that specified Credits shall be awarded to electric utilities for each megawatt hour of electricity generated or purchased from Commission-certified facilities. *Id.*

Section 10(b) of the Portfolio Act directs the Commission to “consider extending, by rule, the awarding of alternative and renewable energy resource credits ... to electric distribution companies or electric generation suppliers other than electric utilities.” *Id.* at § 10(b). The Commission promulgated the Portfolio Standard Rules (as codified at 150 W.V.C.S.R. Series 34, the “Portfolio Standard Rules” or “Rules”) by General Order No. 184.25 entered on November 5, 2010 (“General Order”).¹ Each of the QFs – the City, MEA, and American Bituminous Power Partners, L.P. (“Ambit”) – is a “non-utility generator” (“NUG”) covered by the Portfolio Standard Rules, and in the General Order the Commission determined that Credits could be awarded to NUGs, upon certification pursuant to the Portfolio Act and Portfolio Standard Rules, for the generation of electricity from alternative and renewable energy resources. *See* General Order at 5-6.

¹ A copy of the General Order is provided at page 78 of the City’s Appendix.

2. Compliance Filings Under the Act

Under Section 6 of the Portfolio Act, electric utilities must prepare an alternative and renewable energy portfolio standard compliance plan and submit it for Commission approval. Portfolio Act at § 6. On December 30, 2010, the Companies filed their Compliance Plan in Case No. 10-1912-E-CP. The City filed a Compliance Plan for its municipal electric department on January 3, 2011 in Case No. 11-0009-E-CP. In Orders dated September 26, 2011 and September 30, 2011, respectively, the Commission conditionally approved the plans, subject to a final determination of the ownership of Credits associated with generation from PURPA facilities and sold to Mon Power under the EEPAs (in this Response, the “PURPA Credit Ownership Question”). Order at 7, n. 4.

3. The PURPA Facilities

Mon Power is contractually obligated to purchase all of the facility output (net of station service) from the WVU Project, owned by MEA, and the Hannibal Project, owned by the City.²

The WVU Project is a coal and coal waste-fired cogeneration facility. The WVU Project began commercial operation in April 1992 under the terms of an Electric Energy Purchase Agreement between MEA and Mon Power dated as of March 1, 1989 (as amended, the “WVU EEPA”) that remains in effect until 2027. Mon Power is required to purchase all electric energy generated by, and capacity associated with, the WVU Project (net of station service) pursuant to the WVU EEPA. The WVU Project would be entitled to one Credit for each MWh of electricity generated; however, MEA has declined to seek certification of the WVU Project.

² Ambit owns a QF known as the Grant Town Project and has a PURPA EEPA with Mon Power as well. Order at 2-3. Ambit has ceded its right to the PURPA Credits associated with the generation from the Grant Town Project; however, the parties’ “Letter of Understanding” on this issue provides that if the Commission determines that QFs are entitled to own the PURPA Credits, the Letter of Understanding will be terminated. Consequently, the Court’s decision on the PURPA Credit Ownership Question also affects the PURPA Credits generated by the Grant Town Project. *Id.* at 6.

The Hannibal Project is a “run of river hydropower” facility, as defined in the Portfolio Standard Rules. Order at 2. The Hannibal Project began commercial operation in October 1988 under the terms of an EEPA between Mon Power and the City dated as of April 1, 1986 (as amended, the “Hannibal EEPA”) that remains in effect until June 2034. Because the Hannibal Project utilizes a Renewable Energy Resource, the Commission certified the Hannibal Project to create two Credits for each MWh of electricity generated. *Id.* at 7, n. 4. The Companies estimate that the Hannibal Project will produce 477,000 Credits per year.³

4. The PURPA Agreements

Each of the PURPA Agreements was entered into in the late 1980s (Hannibal in 1986, Grant Town in 1988, and WVU in 1989). Order at 3-7. Thus, each agreement antedated the appearance of RECs on the regulatory landscape, or the general recognition that environmental attributes might correspond to the generation of energy from certain types of generating facilities or fuels. *Id.* at 2.⁴ Not surprisingly, none of the PURPA Agreements mentions the concept of RECs in any context, let alone REC ownership or the markets for trading RECs that ultimately would arise.

In Commission Orders entered the late 1980s (the “Approval Orders”), the Commission approved each of the PURPA Agreements. Order at 3.⁵ None of the Approval Orders

³ See Document 77 in Commission’s case record (“Rec. at Doc. ____”), the hearing transcript and exhibits from the August 25, 2011 evidentiary hearing (“Tr. at ____”) at Companies’ Ex. 2, p. 8, n. 10.

⁴ The first mention of tradable attributes associated with the generation of electricity appears to have arisen in the context of electricity restructuring proceedings before the California Public Utilities Commission in 1995 or 1996. See ED HOLT AND LORI BIRD, NATIONAL RENEWABLE ENERGY LABORATORY, EMERGING MARKETS FOR RENEWABLE ENERGY CERTIFICATES: OPPORTUNITIES AND CHALLENGES at 7-8 (January 2005) available at <https://apps3.eere.energy.gov/greenpower/resources/pdfs/37388.pdf>.

⁵ The Hannibal EEPA was approved by Commission Orders dated May 9, 1986 and August 8, 1986 in Case No. 86-169-E-PC. The Grant Town EEPA was approved by Commission Order dated November 10, 1988 in Case No. 87-0669-E-C, and has been amended by several subsequent

contemplated the existence of RECs. The Commission's approval of the PURPA Agreements reflected its determination that the agreements were in the public interest and should be approved under the applicable PURPA regulations and Section 12 of the Commission's Electric Rules, which were specifically designed for Commission approval of PURPA contracts. *Id.* The Approval Orders stressed Mon Power's legal obligation, found in PURPA and administered by the Commission, to purchase QF energy at "avoided cost rates."⁶ *Id.*

In the Commission Order approving the Hannibal EEPA, for example, the Commission recognized that Mon Power would be purchasing all energy and capacity produced by the Hannibal Project, and approved the direct pass-through of these costs to West Virginia customers, even though Mon Power's payments under the agreement were front-loaded – that is, were initially priced at a rate higher than Mon Power's avoided cost of energy. *Id.* at 4 (citations omitted). The Commission Orders approving the WVU EEPA likewise mentioned these considerations.⁷

The Commission has also entertained disputes between Mon Power and the QFs relating to the terms of the EEPAs, and granted a QF request to exercise continuing jurisdiction over its EEPA with Mon Power. One recent and particularly relevant case was Morgantown Energy Assocs. v. Monongahela Power Co., Case No. 09-0985-E-C (Commission Order dated June 9,

Commission-approved amendments in that docket. The WVU EEPA was approved by Commission Orders dated April 7, 1989 and May 15, 1989 in Case No. 89-200-E-PC. *See* Order at 4-7.

⁶ The Commission pointed out that under PURPA, "[a]voided 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." Order at 11, *citing* 18 C.F.R. § 292.101(b)(6).

⁷ *Id.* at 6. *See also* Monongahela Power Co. and Morgantown Energy Assocs., Case No. 89-200-E-PC (Commission Orders dated April 7, 1989 and May 15, 1989) (WVU EEPA's terms and conditions were reasonable, Mon Power's purchase of capacity and energy from MEA was "in the public interest," and Mon Power's pass-through to customers of amounts paid to MEA was approved).

2010) (“MEA v. Mon Power”). In this complaint case, MEA urged the Commission to compel Mon Power to consent to a prolonged position of subordination to project lenders, and to execute EEPA and other amendments to permit MEA’s extended debt refinancing. MEA argued that unless the project debt were refinanced, the WVU Project could go bankrupt, and that the “public interest” in the continued operation of that facility, and its continued provision of steam to WVU, outweighed Mon Power’s interest in maintaining its bargained-for first lien position in the WVU Project at the scheduled maturity of the project debt. Although the Commission acknowledged that Mon Power’s position was not unreasonable (*id.* at 9), the Commission compelled Mon Power to grant its consent to advance the public interest. *Id.* at 14 (Conclusion of Law 3.) Giving the WVU Project the opportunity to remain viable was, the Commission concluded, also in the public interest because doing so would preserve the policy benefits of a PURPA facility. *Id.* at 9; *see also* Order at 6.

5. Mon Power Payments under the PURPA Agreements

Mon Power, and through Mon Power, the Companies’ customers, have provided the funds through which the QFs financed the construction of the PURPA Facilities and paid for their operations under EEPAs, with contract terms “designed to support the QFs financing efforts, and otherwise favorable to the QFs.” Order at 3. Mon Power has been the only source of revenue to the QFs associated with the sale of energy or capacity from the PURPA Facilities.⁸

Mon Power has paid a significant amount for the energy and capacity from the PURPA Facilities – over \$1.25 billion through 2010. *Id.* at 3, n. 2. This entire amount has been passed through to, and paid for by, the Companies’ customers. Under the PURPA Agreements, Mon

⁸ Mon Power was the incumbent electric utility in the area where each of the QFs was constructed, and is the purchasing utility under the EEPAs. Nevertheless, customers of both Companies provide the compensation paid to the QFs under the EEPAs.

Power and the Companies' West Virginia customers have paid significantly more to the QFs over time than Mon Power would have paid to purchase the same amount of energy in the wholesale market. All in all, the Companies estimate that their West Virginia customers have paid well over \$300 million more than wholesale market rates for the privilege of purchasing energy from the QFs.⁹ As a result, by virtue of the "avoided cost" pricing and the Federal mandate for utilities like Mon Power to purchase QF power, the QFs were assured revenue streams under the EEPAs, and the public policy goals Congress established in PURPA were advanced.

6. Estimates of PURPA Credits and Market Value of Credits

The Companies estimated the Credits to be generated by the PURPA Facilities in their Compliance Plan. The Companies projected that Mon Power will be entitled to approximately 2,313,000 Credits per year, with over 62% of those Credits being associated with generation from the Hannibal, WVU, and Grant Town Projects (at 477,000, 419,000, and 638,000 annual Credits, respectively). Tr. at 32-33, 38-39, and Companies' Ex. 1 at 5-8.

Although no market for the sale of Credits yet exists, market value estimates were relevant to the Commission's decision on Credit ownership. The compliance plans filed by the State's electric utilities are required to project the costs of compliance (Portfolio Act at § 6(b)(6)); where a utility does not expect to have sufficient Credits from existing sources to meet its obligations, it either must purchase them on the open market or develop new renewable or

⁹ This \$300 million estimate is the sum of the \$204 million estimated shortfall for the Grant Town and MEA Projects between 1999 and 2010 and the \$109 million estimated shortfall for the Hannibal Project between 1988 and 2010 (the sum is actually \$313 million). This calculation does not include any projected over-compensation provided to the Grant Town and MEA Projects from their respective in-service dates through 1998, which would make the overall revenue shortfall estimate even higher. Tr. at Companies' Ex. 1, pp. 17-18.

alternative resources that will generate Credits (*id.* at §§ 4, 5). The Companies' estimate of \$5.14 per Credit is based on data from an adjacent existing market for comparable RECs.¹⁰

7. The Companies' Reliance on Ownership of PURPA Credits

As noted above, the Companies' compliance plan relies heavily on the Companies' ownership of the PURPA Credits. Fully 62% of the Companies' compliance position is associated with the availability of Credits associated with the output of the PURPA Facilities that Mon Power is obligated to purchase under the EEPAs. If Mon Power's ownership of the PURPA Credits is not upheld, then the Companies would be required to buy millions of Credits to satisfy their Portfolio Standard obligations. Without the PURPA Credits, the Companies will begin to fall short of their projected Credit requirements in 2019, and this position will progressively and significantly worsen through 2025, when the Companies would have a projected shortfall of approximately 9.6 million Credits. Tr. at 39, Companies' Ex. 2 at Table 5. Assuming a Credit market price of \$5.14, purchasing the Credits necessary to cover the Companies' Credit shortfall would cost the Companies' customers at least \$50 million. Order at 31; Tr. at 40 and Companies' Ex. 1 at 9. (At the City's estimated market value of \$15.00 per Credit, the Companies' cost of meeting the shortfall without the PURPA Credits would increase to approximately \$145 million. Order at 31, n. 13.)

It is difficult to predict where the Companies would otherwise cost-effectively purchase these Credits. It is not unreasonable to assume, however, that the Companies would be forced to purchase the Credits from the QFs, which in the aggregate are expected to generate over 1.5 million Credits each year. The Companies would provide a large, ready market for the Credits;

¹⁰ West Penn Power Company, an affiliate of the Companies, recently completed a Request for Proposals for the purchase of Pennsylvania Tier I non-solar credits for the January 1, 2011 through May 31, 2021 term. Based on West Penn's results, the weighted average cost was \$5.14 per Pennsylvania Tier I non-solar credit. Order at 31, n. 13.

the QFs would be large sources of Credits looking for a steady market. In this situation, Mon Power would be making two different payments to the QFs: payments owed under the PURPA Agreements for the energy they generate (estimated to be \$1.2 billion between 2011 and 2025),¹¹ and an additional \$50 million for the Credits arising from the same output of the PURPA Facilities.

8. Other Parties' Reliance on Ownership of PURPA Credits

Of the three QFs, only the City also operates a municipal electric utility that has obligations under the Act. MEA and Grant Town are private, non-utility generators, owned by investors. Whatever compliance position the City may find itself in, it is clear that the Hannibal Project will generate far more Credits than the City would ever need to comply with the Act. At a conservative Credit value of \$5.14 per Credit, the City would have approximately \$2.4 million in excess Credits to sell each and every year, and still meet its compliance obligations. Tr. at Companies' Ex. 8, pp. 1-2. Even if the City were to have no PURPA Credits at all, it still will not have a Credit deficit until 2034. Order at 32-33. In comparison, the Commission found that the loss of PURPA Credits would have a much more significant impact on the Companies. *Id.* at 33.

II. SUMMARY OF ARGUMENT

The Commission's ownership determination was legally correct and should be upheld. The Commission summarized three bases for its decision on the PURPA Credit Ownership Question:

- (i) that the utility legally obligated under PURPA to purchase generation from a QF at its "avoided cost" should own the Credits that exist for the purpose of measuring the utility's compliance with the Portfolio Act's requirements;

¹¹ See Tr. at Companies' Ex. 1, Ex. 1 (Reeping Compliance Plan Testimony) at 14-15 and Table 4.

- (ii) that Mon Power's ownership of the Credits under the Portfolio Act is based on its contractual ownership of the qualifying energy *as it is generated*; and
- (iii) when neither the Portfolio Act or the Rules specify 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, to ensure fair and reasonable rates and to balance the interests of utility customers, utilities, and the State's economy.

Order at 43. The Commission not only made correct holdings in each of these areas, but also reached a decision that was consistent with those of regulators and appellate courts in Pennsylvania, Connecticut, and New Jersey, where the exact same issue has been litigated. Those state decisions show that the legislative initiatives that created this situation – PURPA's mandate to incentivize renewable energy and small power production through "avoided cost" contracts, and the various states' efforts to develop markets in tradable RECs – put the cost burdens of advancing state and federal alternative energy goals on the backs of utility customers. Because this is true, the Commission and these tribunals found that it would be unfair from a public policy perspective to assign initial ownership of RECs to any party other than the utilities themselves.

Although the City and MEA Petitions overlap to a significant extent, each presents individual issues. The Companies will address the following aspects of their arguments in Section III of this Response, which roughly correspond to Petitioners' respective assignments of error.

Section III.A. Ownership of Credits. The Commission correctly held that in promulgating the Portfolio Standard Rules, it did not intend to address the PURPA Credit Ownership Question or to vest ownership of the Credits associated with QF energy in the QFs. Consequently, Petitioners' contention that they own the Credits associated with energy generated

by their facilities under the Portfolio Standard Rules, and that the Commission then improperly transferred those credits to Mon Power, is invalid. (City Assignment of Error 4; MEA Assignment of Error 3.)

Section III.B. “Transfer” or “Conveyance” of Credits. Having jumped to the conclusion that they own the PURPA Credits by operation of the Portfolio Standard Rules, Petitioners then assert that the Order improperly “transferred” or “conveyed” the PURPA Credits from Petitioners to Mon Power. Yet the Commission determined that Petitioners *never* had any ownership interest in the PURPA Credits; consequently, the Commission did not hold (and could not have held) that the PURPA Credits had been transferred or conveyed from Petitioners to Mon Power. (City Assignment of Error 1; MEA Assignment of Error 4.) When these two false premises – Petitioners’ initial ownership of the PURPA Credits, and a subsequent Commission conveyance of them to Mon Power – are proved to be incorrect, all of Petitioners’ other arguments are undermined.

Section III.C. Rejection of Policy Basis for Commission Decision. Petitioners contend that this case presents pure legal issues, and that the Commission erred in evaluating policy issues, including customer rate impacts and equitable considerations, in reaching its decision. The City also contends that the Commission failed to balance correctly those policy interests, and that the Commission’s decision was “entirely related” to its assessment that Mon Power had paid too much for energy under the EEPA for the City’s Hannibal Project. (MEA Petition at 37; City Assignment of Error 3.) The Commission properly considered both legal and factual issues in its decision, just as other tribunals have done in considering the same issues.

Section III.D. City’s “Latent Ambiguity” Argument. The City also argues that a 2004 amendment to the City’s EEPA with Mon Power created a “latent ambiguity” as to the

ownership of RECs that the Commission erroneously failed to resolve in the City's favor. (City Assignment of Error 2.) The Commission's factual and legal determinations here were proper as well; it correctly found that the 2004 amendment did not materially amend the EEPA, and that under this Court's precedent, no latent ambiguity existed for the Commission to interpret.

Section III.E. MEA's "Property Rights" Arguments. The Commission correctly disposed of MEA's arguments that the Commission's ownership determination constituted an unconstitutional "taking." (MEA Assignment of Error 5.) Simply put, if MEA never had an ownership interest in the PURPA Credits (or the RECs in other states associated with the kilowatt-hours generated by the WVU Project), then it never owned anything that could be taken.

Section III.F. MEA's Opposition to "Deemed Certification" of the WVU Project. MEA has steadfastly refused to seek certification of the WVU Project under the Portfolio Act, preventing it from being available to generate Credits for Mon Power's use in complying with its Portfolio Act obligations. Order at 47, Finding of Fact 13. (MEA Assignment of Error 2.) The Commission correctly found that MEA's refusal is "contrary to the public interest" and "thwarts the purposes of the Portfolio Act." Order at 41. Moreover, MEA's position contrasts starkly with its reliance on public policy and "reasonableness" issues in an earlier dispute with Mon Power over the WVU EEPA in the MEA v. Mon Power case, where MEA invoked the Commission's jurisdiction over the WVU EEPA and asked that it rule against the interest of the Companies' customers.

III. ARGUMENT

The standard of review that this Court applies to a challenged Commission order is well known, but bears repeating. The Court has held that the Commission must act within its statutory authority and must base its decisions upon the evidence, but has otherwise deferred to the Commission's judgment within the sphere of its regulatory expertise. This Court summarized the detailed standard of review as a three-part test: "(1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper." Syl. Pt. 1, Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n., 190 W.Va. 416, 438 S.E.2d 596 (1993). Moreover, a Commission Order based upon the Commission's finding of facts "will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." State ex rel. Public Service Comm'n v. Town of Fayetteville, Mun. Water Works, Syl. Pts. 4-6, 212 W.Va. 427, 573 S.E.2d 338 (2002) (citations omitted). The Court's responsibility is "not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." Affiliated Constr. Trades Found. v. Public Serv. Comm'n, Syl. Pt. 1, 211 W. Va. 315, 565 S.E.2d 778 (2002).

Generally speaking, as long as a regulatory agency's interpretation of its own rule or regulation does not violate the constitution or a statute, "it is generally entitled to substantial or 'great' deference by the courts, especially when the implementation of the regulatory scheme requires particular administrative or scientific expertise, or the meaning of a provision is within the expertise of the agency." Bordeau, John, J.D., et. al, "Judicial Construction and

Interpretation of Rules- Deference to Administrative Construction or Interpretation,” 73 C.J.S. Public Administrative Law and Procedure § 212 (updated Dec. 2011).

- A. The Commission Properly Held that Petitioners Never Owned the Credits, and That the Commission Did Not Intend to Determine the Ownership of PURPA Credits When It Promulgated the Portfolio Standard Rules.

Petitioners strenuously assert that the Commission, in promulgating the Portfolio Standard Rules, made a knowing determination that QFs like Petitioners would own the PURPA Credits, and that the Commission is conclusively, irrevocably bound to follow its own rules and abide by this ownership determination.¹² But 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. The Commission demonstrated in the Order that it had no intention of addressing this issue in the Portfolio Standard Rules, and that the two rules Petitioners identify, Rules 5.2 and 5.6, do not determine PURPA Credit ownership. Order at 26-29.

For all their emphasis on this argument, the City and MEA reach the same untenable conclusions in different ways. The City primarily contends that Portfolio Standard Rule 5.6, which specifies that Credits can be sold either bundled or unbundled with energy, necessarily means that the generator owns the Credits associated with the energy it produces, no matter what

¹² In its Assignment of Error 4, the City contends that the Commission erred “in departing from its previous ruling that established that producers of electricity were eligible for the award” of Credits under the Portfolio Act. City Petition at 1. MEA’s Assignment of Error 3 sounds the same theme, but adds a few points of related argument. MEA contends that the Commission erred in

Holding that MEA’s RECs initially belonged to the Utilities notwithstanding the fact that the PSC’s own Rules 5.2 and 5.6 expressly require the opposite result, even though (a) the execution date of a contract has nothing to do with application of West Virginia’s rules, (b) the PSC’s exception to those rules does not exist, and (c) PURPA’s anti-discrimination provision requires otherwise.

MEA Petition at 1.

the situation. City Petition at 30-33. MEA’s principal interpretation of the Portfolio Standard Rules is different and even more doctrinaire – it contends that Portfolio Standard Rule 5.2, which *permits* NUGs to be certified to generate Credits, constituted an affirmative, knowing determination on the Commission’s part that NUGs are to be awarded Credits, automatically and in every instance. In promulgating Rule 5.2, MEA asserts that the Commission “squarely addressed who initially owns any such RECs created when a QF generates electricity.” MEA Petition at 20. In both instances, Petitioners’ conclusions contradict the Commission’s explanation of its own rules in the Order, and do not benefit from even a shred of evidence that the Commission contemplated the PURPA Credit Ownership Question when it promulgated the Rules.

1. The City’s Argument – Portfolio Standard Rule 5.6

The City argues that Portfolio Standard Rule 5.6, and the Commission’s recognition in that rule that Credits can be either bundled or unbundled from energy, explicitly address Credit ownership by NUGs and affirmatively awards all NUGs (including the three QFs) ownership of the Credits associated with their energy production. The City argues that the Commission therefore “abused its authority” (City Petition at 10) by assigning ownership of the PURPA Credits in the first instance to Petitioners (*id.* at 31). Although the City concedes that the Portfolio Standard Rules *do not* specifically address the PURPA Credit Ownership Question (*id.*), it nevertheless contends that Rule 5.6 is “clear” that PURPA Credits are tradable commodities “that belong to the generator of the electricity” (*id.*). To the City, the import of Rule 5.6 is so clear that the Commission’s decision in this case necessarily was “a decision to reject its own Rule” (*id.* at 33) and to carve out an “exception” to Rule 5.6 for PURPA EEPAs (*id.* at 32).

Nevertheless, in the General Order, there is no basis to conclude that the Commission believed it was resolving the PURPA Credit Ownership Question. Instead, Rule 5.6 only addressed the possibility that Credits may be either “bundled” or “unbundled” from the underlying energy – presumably per the contracting parties’ agreement on the subject:

AMP and the Municipal Systems [parties to the rulemaking, including the City] 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 held or sold independently from the underlying power.*

General Order at 9 (emphasis added).

Accordingly, the Commission’s final version of Portfolio Standard Rule 5.6 served only to recognize that Credits may be bundled with the energy from facilities, or “unbundled” and sold separate from the energy – nothing more.¹³ The Commission manifestly did not address the question of ownership of Credits associated with energy under long-term, PURPA-mandated purchase contracts that antedated the advent of RECs and did not speak to REC ownership – this issue was not on anyone’s radar during the rulemaking, least of all the Commission’s.¹⁴ If the

¹³ As promulgated, the relevant portion of Portfolio Standard Rule 5.6 reads as follows:

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.

¹⁴ If any party appreciated the PURPA Credit Ownership question during the rulemaking proceeding culminating in the General Order, it was the City and American Municipal Power (as used in

Commission had appreciated that, by adopting Rule 5.6, it was making a final adjudication of an issue as significant as the PURPA Credit Ownership Question, it certainly would have discussed that decision, and set forth its supporting rationale, in the General Order.

Consequently, there is no basis to conclude that Portfolio Standard Rule 5.6 governs or even informs the questions presented in this Petition. Portfolio Standard Rule 5.6 recognizes only that parties may enter into contracts in which they either bundle Credits with the energy, or sell the energy without the Credits. There is nothing remarkable about this proposition, and certainly nothing in it that is determinative of the PURPA Credit Ownership Question. In fact, the Commission conclusively held that neither of these Rules was intended to address this issue.

The Companies argue that, in promulgating the Rules and extending the awarding of credits to non-utility generators [in Rule 5.2, discussed below], 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. *We agree with the Companies.*

Order at 27 (emphasis added; citations to briefing omitted).

In addition to this general finding, the Commission specifically found that the unbundling provision of Rule 5.6 “does not govern the case,” because the Portfolio Standard Rules “cannot reasonably be applied retroactively” to pre-existing agreements like the EEPAs. *Id.* at 28.

that order, “AMP”). In the Companies’ Reply Brief, they showed how the City’s rather opaque advocacy in that proceeding skirted, but did not directly raise, the PURPA Credit Ownership Question:

It now seems that the City and AMP anticipated the Credit ownership dispute with Mon Power, and were trying by stealth to engineer a rule change on which the City could later rely in claiming ownership of the Credits – all the while obscuring the fact that resolving the PURPA Credit ownership question was their true aim.

Rec. at Doc. 41 (hereinafter, “Companies’ Reply Brief”) at 8, *citing* “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,” filed on August 30, 2010 in General Order No. 184.25, at 3-4. In the Order, the Commission noted its agreement with the Companies’ arguments on the Rule 5.6 issue. Order at 27.

Moreover, the Commission recognized that EEPAs, which are based on the purchasing utility's avoided cost rates, did not include (or even envision) the unbundling of Credits from energy purchased under them.

When the [EEPA]s 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.

Id. (citing the policy and financial considerations behind PURPA).

2. MEA's Argument – Portfolio Standard Rule 5.2

MEA's interpretation of Portfolio Standard Rules 5.2 and 5.6 is even more self-serving. MEA argues that the Commission's promulgation of Rules 5.2 and 5.6 constituted an affirmative, knowing determination that NUGs are to be awarded Credits, without qualification. MEA Brief at 4-5. MEA points primarily to Portfolio Standard Rule 5.2, in which the Commission prescribes how Credits can be awarded to qualified energy resources:

5.2 A qualified energy resource certified under Rule 4.2.a or 4.2.c shall be awarded certified alternative energy and renewable energy credits as summarized in Table 150-34A at the end of this rule and as described below . . .

MEA zeroes in on the "shall be awarded" language of this rule, and not the obvious fact that in order to be "awarded" anything, the facility *must first be certified* by the Commission.

This omission is legally significant. First, under the Portfolio Standard Rules, Credits do not exist, and certainly are not awarded to an NUG, until the Commission has certified the facility. In promulgating Portfolio Standard Rule 5.2, the Commission cannot be said to have made an affirmative, irrevocable award of Credits to MEA or any other NUG, or to have determined how subsequently awarded Credits might be allocated – yet this is exactly what MEA argues. In fact, MEA's Assignment of Error 2, which questions the Commission's willingness to deem as certified the WVU Project "against MEA's business judgment," depends entirely on the

argument that no Credits can exist *until* a qualifying resource facility is “certified” under the Portfolio Standard Rules. MEA Petition at 1 (Assignment of Error 2), 15-16.

Second, MEA contends that Portfolio Standard Rule 5.2 vested legal ownership and entitlement to the Credits in MEA by operation of law – even though it opposes any effort to certify the WVU Project to generate Credits without its consent. MEA Petition at 17-18. These two positions are logically inconsistent. If MEA’s interpretation of Rule 5.2 is correct (it is not), it would never have to seek certification of the WVU Project for the Credits to exist, because the Commission has *already* determined that MEA owns them. *Id.* at 20-21. This reading is logically inconsistent with its position (this one correct) that no Credits come into existence until a facility is certified under the Rules. *Id.* at 17. MEA advances these conflicting arguments because its other arguments depend on its pre-determined ownership of the Credits. For example, MEA’s arguments that an award of PURPA Credits to Mon Power would be constitute a “taking” under federal and West Virginia law (MEA Petition at 33-35), or would violate the dormant Commerce Clause (*id.* at 35, n.106), are entirely dependent on the MEA’s presumed existing ownership of Credits associated with electricity generated at the WVU Project. *See* Section III.E below.

MEA’s insistence that Portfolio Standard Rule 5.2 was intended to award Credits to NUGs, and by extension, to resolve the PURPA Credit Ownership Question, has absolutely no factual basis. If the Commission had thought it was adjudicating these issues, the word “PURPA” certainly would have appeared in the General Order (it did not). The more sensible reading of the Commission’s intent in promulgating Portfolio Standard Rules 5.2 and 5.6 is that the Commission:

- was establishing processes by which NUGs could seek certification of facilities to generate Credits;

- believed that it was appropriate to allow generators to sell Credits either separately from power or bundled with it, and promulgated Portfolio Standard Rule 5.6 to account for this situation;
- had not been effectively alerted, by the City or any other party, that any legal and equitable issues surrounding the appropriate ownership of PURPA Credits would arise; and thus
- had no intention, explicitly or implicitly, of deciding the PURPA Credit Ownership Question, one way or another.

This is the explanation the Companies offered in their Reply Brief below, and was among the arguments the Commission referenced with approval in the Order. Order at 27, Companies' Reply Brief at 11-12. If the PURPA Credit Ownership Question had been properly presented in the rulemaking, then the General Order would have squarely addressed the issue, and the Portfolio Standard Rules would have reflected the Commission's Credit ownership determination.

If the Commission never intended to address the PURPA Credit Ownership Question in the General Order – and indeed, was not even aware of the issue – then the Portfolio Standard Rules cannot be read to require or preclude any particular determination of that question. It simply was a matter not covered in the Rules, and consequently was neither included nor excluded from them. For this reason, Petitioners' contentions that the Commission effectively created an "exception" from the operation of Rule 5.2 for PURPA EEPAs, either for agreements that pre-dated the Rules (MEA Petition at 23) or for agreements where the Commission believes Mon Power paid too much for energy and capacity (City Petition at 32), are illogical and incorrect. In explaining its analysis of this issue, MEA turns the idea of an "exception" to a rule on its head:

Rules set out exceptions by *stating* them, not by being silent. If Rule 5.2 meant to exclude PURPA contracts like the MEA/Mon Power EEPA, it would have *said* that. The PSC erroneously read an exception into the rule based on what the rule does *not* say.

MEA Petition at 23 (emphasis in original). If the Commission was not even aware of the PURPA Credit Ownership Question, then the fact that it did not set out an “exception” for PURPA EEPAs cannot prove that Rule 5.2 does or does not govern those contracts. Nor could the Commission have created an “exception” based on what Rule 5.2 does *not* say. The only sensible conclusion is that the Commission did not intend for the Rules to cover PURPA EEPAs in any way.

B. The Order Did Not “Transfer” or “Convey” Ownership of PURPA Credits from Petitioners to Mon Power.

The Companies have shown that the Portfolio Standard Rules do not vest initial ownership of the PURPA Credits in Petitioners. Instead, the Commission consistently held that Credits, which constitute a “measure of utility compliance” with the Portfolio Act (Order at 25, 29), are generated only as the electricity is generated (*id.* at 30), and are owned by the utility, not the QFs. The Commission expressed this holding clearly in rejecting MEA’s “takings” arguments:

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.***

Id. at 40 (emphasis added).

If Petitioners never owned the PURPA Credits in the first place, then the Commission could not have caused a “transfer” or “conveyance” of the PURPA Credits from Petitioners to

Mon Power. Yet the idea that a conveyance has occurred is central to each Petitioner's assignments of error,¹⁵ and the concept is referenced in both Petitions as evidence that such a transfer would violate state and federal law.¹⁶ But the Order makes clear that no transfer or conveyance is necessary to vest ownership of the PURPA Credits with Mon Power, and thus the purported violations of law Petitioners have identified are entirely irrelevant.

1. The American Ref-Fuel Decision

Both Petitioners argue strenuously that the Federal Energy Regulatory Commission's 2003 decision in American Ref-Fuel Co. controls the PURPA Credit Ownership Question, establishing legal impediments that the Commission's award of the PURPA Credits to Mon Power cannot overcome. American Ref-Fuel Co., Covanta Energy Group, Montenay Power Corp., and Wheelabrator Tech., Inc., 105 FERC ¶ 61,004, 61007 (2003) ("American Ref-Fuel").¹⁷ Petitioners' readings of American Ref-Fuel, however, improperly constrain the Commission's ability to decide the PURPA Credit Ownership Question on state law principles, an outcome specifically permitted in the FERC's decision in that case.

¹⁵ In the City's Assignment of Error 1, the City contends that the Commission erred in finding Mon Power's ownership of the Hannibal Credits "on the basis of the fact that the Company was the purchaser of energy pursuant to [the Hannibal EEPA] entered into in 1986 . . ." City Petition at 1. The City's analysis under this assignment of error focuses on (i) an effective repricing of energy under the Hannibal EEPA, violating PURPA's "avoided cost" provisions and the American Ref-Fuel decision (*id.* at 14-19) and (ii) the observation that Credits have value, the City received no additional consideration for them (*id.* at 20-21). MEA, in its Assignment of Error 5, asserts that the Commission held that the MEA EEPA "conveys RECs without consideration" in violation of state contract law and PURPA's rate requirements and anti-regulation and anti-discrimination proscriptions." MEA Petition at 1.

¹⁶ The MEA Petition is rife with the "conveyance" concept, using it in many aspects of its argument, and each time characterizing a "conveyance" as an explicit or implicit determination of the Commission. *See, e.g.*, MEA Petition at 25 (Commission's contract analysis "says nothing about the conveyance of and payment for" PURPA Credits); 27 (Commission "unlawfully conveyed" the PURPA Credits for no consideration); 28 (Commission "read a conveyance" in the EEPAs); 30 (Commission concluded that "EEPAs convey RECs"); 32 (Commission expressly found that "QFs' RECs convey to utilities *because* they are QFs, or *because* they have a PURPA agreement with a utility" (emphasis in original)); and 35 (PURPA Credits "conveyed by PSC Order").

¹⁷ A copy of the 2003 American Ref-Fuel order is provided at page 41 of the City's Appendix.

In American Ref-Fuel, QF owners petitioned for an order declaring “that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradable certificates (RECs).” In its order, the Federal Energy Regulatory Commission (“FERC”) granted the QFs’ request insofar as it related to whether the avoided cost regulations under PURPA were intended to compensate QFs for more than capacity and energy. American Ref-Fuel Co., 105 FERC ¶ 61,004, 61007 (2003). The FERC then held that the REC ownership is for the states to decide:

As noted above, RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). *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.

American Ref-Fuel, 105 FERC at ¶ 61,007 (emphasis added). The only limitation on a state determination of ownership is that the decision must find its basis in state law, not PURPA itself (which, as the FERC held, does not control). *Id.*

The City correctly recites the FERC’s holding in American Ref-Fuel (City Petition at 13-14), but draws incorrect conclusions from it. The City contends that American Ref-Fuel “does not allow the Commission to rule in such a way that adjusts the avoided cost that it previously approved between the seller and purchaser of energy.” City Petition at 14. The City also insists that a determination of utility ownership of PURPA Credits violates PURPA because it diminishes the Commission-approved avoided cost rate by “repricing” the energy sold under it.

This repricing purportedly violates PURPA's avoided cost regulations as well as prohibitions against post-approval amendments to EEPAs that modify the price terms. City Petition at 14-19.

MEA took a different approach on this issue, but one that led to the same result. It contended that American Ref-Fuel controls this issue only to the extent that it and similar decisions specify that avoided cost rates are not intended to compensate the QF for more than capacity and energy. MEA Petition at 25 (citations omitted). MEA asks this Court to ignore the rest of American Ref-Fuel, and to jump directly to its assumed Commission determination that Mon Power purchased the PURPA Credits along with the energy and capacity from the WVU Project:

Thus, as a matter of controlling federal law, the consideration in an EEPA does not purchase RECs. The PSC ignores this controlling federal law. . . . PURPA requires that the PSC *cannot* conclude that once West Virginia created West Virginia RECs, utilities paid for them along with energy and capacity under EEPAs.

Id. at 26 (emphasis in original).

In each of these approaches, Petitioners utterly ignore the Commission's repeated statements that it determined the PURPA Credit Ownership Question under state law, just as the second prong of American Ref-Fuel permits. The Commission could not have been more explicit on this point:

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 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.

Order at 21-22. More specifically in the context of Petitioners' contention that the Commission had improperly modified the EEPAs, the Commission held that it was "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.” *Id.* at 37. Both Petitioners attacked this statement with vehemence. MEA called it “gibberish,” contending that “State law includes contract law” (MEA Petition at 26), while the City derided the Commission as having paid “lip service” to decisions prohibiting the modification of EEPA price terms, and contending the Commission’s explanation on this point was “belied” by its dissatisfaction with the terms of the EEPA from Mon Power’s perspective (City Petition at 16, 17).

American Ref-Fuel’s authorization to states to determine PURPA Credit ownership under state law was the motivating principle in the New Jersey, Connecticut, and Pennsylvania decisions considered at length in the Order – decisions that the Commission found “persuasive” in their rationales. Order at 24. In these decisions, regulators and appellate courts in these states considered state law, including policy rationales, issues of fairness, and the purposes of the renewable portfolio standard (“RPS”) statutes in their respective states to inform their decisions. Before the Commission began its analysis of West Virginia law in the Order, it first reviewed the rationales these tribunals relied upon to conclude that utility purchasers, not QFs, own the RECs under PURPA contracts that pre-dated the concept of RECs and did not address REC ownership. Order at 24-26.¹⁸ The Commission summarized these rationales at page 24 of the Order, and enumerated several considerations it would later adopt in its own analysis. In virtually identical factual situations, tribunals in these three states cited the following concepts as bases for their decisions:

¹⁸ In this discussion, the Commission discussed with approval the following decisions: Wheelabrator Lisbon, Inc. v. Dept. of Pub. Util. Control, 931 A.2d 159 (Conn. Sup. Ct. 2007) (“Wheelabrator II”); In re Ownership of Renewable Energy Certificates, 913 A.2d 825 (N.J. Super. Ct. App. Div. 2007) (“In re Ownership of RECs”); and ARIPPA v. Pennsylvania Pub. Util. Comm’n, 966 A.2d 1204 (Pa. Commw. Ct. 2009) (“ARIPPA”), affirming Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No. P-00052149 (Pa. P.U.C., Order dated December 21, 2006) (“PaPUC Decision”). See Order at 24-26.

- the fact that under long-term EEPAs, utilities were required to purchase electricity from QFs under terms that were “highly favorable” to the QFs, including (i) “front-loaded rates” to support project financings; and (ii) avoided cost rates that were higher than market rates;
- the unfairness inherent in requiring utility customers to pay additional costs so that their utilities could purchase RECs for to meet 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”; and
- the fact that requiring utility customers to pay more would contravene “state laws creating the credits and mandating utility compliance with the RPS requirements.”

Order at 24. These state law and policy considerations are permissible grounds for a determination of PURPA Credit ownership, and nothing in the American Ref-Fuel decision precluded the New Jersey, Connecticut, or Pennsylvania tribunals from applying them. In the Order, the Commission used the exact same approach, and did not contravene American Ref-Fuel in doing so.

2. State Contract Law Principles

MEA strongly argues that the Commission has no expertise in “to interpret contracts,” and ignored “basic principles of West Virginia contract law based on an incorrect assumption of expertise” in that area. MEA Petition at 24. MEA then devotes six pages to assailing the Commission’s purported violations of West Virginia contract law. *Id.* at 24-29. This entire discussion is based on the same false premise explained above – a required “conveyance” to Mon Power of PURPA Credits that, according to MEA, it initially owned by operation of Rule 5.2.

MEA then added two twists to facilitate its arguments. First, MEA contended that the Commission had determined PURPA Credit ownership not under state law and policy principles, but instead “under the EEPAs”; to MEA, this necessarily means that the Commission “intends to

convey” the PURPA Credits by interpreting the terms of the EEPAs themselves. *Id.* at 24-25. Second, MEA insisted that there must be a “conveyance of and payment for” the PURPA Credits under the EEPAs (*id.* at 25), and therefore the Commission must have “read a conveyance into the EEPAs” when they contain none (*id.* at 28). Neither of these contentions has merit.

MEA indulges in wordplay in mischaracterizing the Commission’s decision-making as an interpretation of the EEPAs. Appearances in the Order of the phrases “under the PURPA contracts” or “under the EEPAs,” as listed in MEA’s footnote 73 (page 24), simply do not support the conclusion that the Commission sought to “interpret” the EEPAs in order to reach its decision. Rather, the Commission only “interpreted” the EEPAs to evaluate Mon Power’s obligations under them, and its ownership of the electricity at the time it is generated. *See, e.g.,* Order at 36. The Commission also explicitly said that it did “not agree with the MEA and City contractual interpretations of the EEPAs.” *Id.* at 34. Thus, any suggestion that the Commission made its decision based on an interpretation of the EEPAs is misleading and utterly misrepresents the Order. Next, the Commission just as clearly did not “read a conveyance” into the EEPAs; instead, the Commission acknowledged, as do Petitioners and the Companies, that the EEPAs do not mention, let alone control, PURPA Credit ownership. *Id.* at 2-3. Again, this is an intentional misstatement of the Commission’s decisional rationale in the Order.

Once these false premises are discarded, MEA’s state law arguments fall apart. The Commission did not err in finding a conveyance of PURPA Credits without Mon Power’s payment of consideration, because the Commission did not hold that the EEPAs conveyed the PURPA Credits “as a separate, independently valuable commodity,” as MEA contends. MEA Petition at 26. Nor did the Commission violate black-letter contract law by making the EEPAs, which are silent on the issue of Credits, speak to the conveyance of PURPA Credits through

contract “interpretation.” *Id.* at 27-28. Finally, the Commission assuredly did not “find that the EEPA conveyed the RECs from MEA to the Utilities.” *Id.* at 28. None of these purported contract law violations respects the decisional bases the Commission clearly expressed in the Order. As a consequence, MEA’s brusque contention that the Pennsylvania, Connecticut, and New Jersey decisions are inapposite because they would violate “West Virginia contract law” principles (*id.* at 28, n.85) is entirely false.

The City’s arguments in this area were more muted, and less explicitly asked this Court to find and rely on unsupportable interpretations of the Order. Still, some of the same themes are present in the City Petition. The City contended that the Commission determined that “when Mon Power contracted to acquire the energy from the Hannibal Project under the EEPA, it also acquired renewable credits valued at \$36 million during the life of the Act.” City Petition at 19. Moreover, the City asserted that the Commission’s concern about the value of the Hannibal Credits led it to enter a decision resulting in “Mon Power receiving all of the RECs associated with the Hannibal Project *without requiring that any consideration be given* to the City in return.” *Id.* at 20. These contentions are no more faithful than MEA’s to the Commission’s actual holdings in the Order.

3. No Modification of Price Terms – PURPA, Ambit, and Freehold

Petitioners both argue that the Commission impermissibly modified the price terms of the EEPAs, violating both the PURPA avoided cost regulations and prior Commission decisions prohibiting material modifications to EEPA contract terms once the Commission has initially approved the EEPAs. Again, the Commission clearly ruled that the QFs never owned the PURPA Credits in the first place, and the Order assuredly did not “transfer” or “convey” the PURPA Credits from Petitioners to Mon Power, through interpretation of the EEPAs or

otherwise. Consequently, the Commission could not have modified the price terms of the EEPAs.

No one disputes the significance of PURPA's avoided cost regulations to this dispute, or the Commission's inability to make material modifications to those price terms:

- "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." Order at 11, *citing* Section 210 of PURPA and implementing regulations at 18 C.F.R. § 292.101(b)(6).
- In Freehold Cogeneration v. Bd. of Regulatory Comm'rs of N.J., 44 F.3d 1178 (3rd Cir. 1995) ("Freehold"), the United States Court of Appeals for the Third Circuit held that once state commissions approve power purchase agreements under PURPA, they are generally without jurisdiction to modify the terms of those agreements. Order at 12-13.
- The Commission's decision in American Bituminous Power Partners, L.P. v. Monongahela Power Co., Case No. 87-669-E-C (Commission Order dated March 29, 1996) ("Ambit"), recognized the limitations imposed by the Freehold court on its ability to modify the terms of Commission-approved EEPAs. Order at 12-13.¹⁹

No one disputes, then, what the law provides in this area. The only difference is, yet again, the Petitioners' stubborn position that the Commission "conveyed" the PURPA Credits to Mon Power:

[T]he PSC's conclusion that EEPAs convey RECs for the same avoided cost that before purchased only energy effectively reduces the compensation to QFs under the EEPAs. As a result of the PSC Order, the previously approved avoided cost rate now pays for energy, capacity, and RECs. The avoided cost rate to QFs is lowered by the value of the RECs, so that QFs' compensation for energy and capacity is less than the full avoided cost rate they received before.

MEA Petition at 30. This purported conveyance, MEA contended, is "an impermissible modification of the EEPAs' price terms." *Id.* The City expresses the same idea, contending that

¹⁹ A copy of the Ambit order is provided at page 33 of the City's Appendix.

American Ref-Fuel “does not allow the Commission to rule in such a way that adjusts the avoided cost that it previously approved between the seller and purchaser of energy.” City Petition at 14.

Logically speaking, however, the absence of Petitioners’ initial ownership of the PURPA Credits, and the non-existence of any “transfer” or “conveyance” in the Order, preclude any finding that the Commission’s decision violated PURPA avoided cost rules, Freehold, or Ambit. The Court need not rely on this logic alone, however; the Commission explicitly addressed these alleged violations, and soundly rejected them. *See* Order at 36-37 (Commission determined ownership of PURPA Credits under State law, not under PURPA or through modification of the EEPAs); 38-39 (citing New Jersey and Pennsylvania decisions, Commission rejected argument that Freehold prohibits ownership determination as a modification to existing PURPA contracts).

4. PURPA Anti-Discrimination and Anti-Regulation Principles

MEA incorrectly contends that the Commission expressly found that PURPA Credits convey from Petitioners to Mon Power because Petitioners have PURPA EEPAs with Mon Power. MEA Petition at 32. Not only does this argument suffer from the same weaknesses outlined above (no initial Credit ownership; absence of conveyance to Mon Power), MEA’s contention that the Commission discriminated against Petitioners in violation of PURPA is wrong as a matter of law.

Section 2.10(b) of PURPA provides that purchases from QFs must be at rates that are “not discriminatory against QFs.” But the discrimination analysis relates to the Commission’s initial establishment of avoided cost rates, in the Approval Orders setting those rates before the Hannibal and WVU Projects were built – not to a Credit ownership determination that, under American Ref-Fuel, is not controlled by PURPA in any event, and is to be decided under state law. The fact that RECs have subsequently appeared on a regulatory landscape, and the West

Virginia Legislature has enacted the Portfolio Act to establish Credits as a “measure of utility compliance” with that legislation (Order at 29), does not discriminate against Petitioners in comparison with non-QF NUGs, whose rates are not subject to avoided costs rules in the first place.

C. The Commission Properly Considered Policy Concerns and Ratepayer Interests in the Order.

Petitioners contend that this case presents purely legal issues, and that equity, fairness, and customer rate impact concerns should not have figured into the Commission’s decision.²⁰ MEA argues that customer impact concerns are irrelevant, and if there were a place to consider equity and fairness, the Commission’s development of the Portfolio Standard Rules was the place to do it. MEA Petition at 37-39. In addition to the City’s suggested impact of Portfolio Standard Rule 5.6 on the PURPA Credit Ownership question, the City argued that the Commission’s view of PURPA policy, and particularly its purported dissatisfaction with the amounts Mon Power had been required to pay under the Hannibal EEPA, clouded the Commission’s judgment.²¹ The City even suggested that the Commission “manufacture[d] a justification” for awarding the PURPA Credits to Mon Power “that does not exist in law or reason ...”. City Petition at 30. Petitioners urge the Court to decide this case solely as a legal

²⁰ In its Assignment of Error 3, the City contended that the Commission erred in failing to adequately balance the interests of the City as both a producer of electricity and a public utility. MEA had no assignment of error directly related to policy concerns and ratepayer interests, but addressed the issues at pages 37-39 of its Petition.

²¹ See, e.g., City Petition at 7 (Commission improperly judged the PURPA Policy by concluding that Mon Power paid too much for PURPA energy from Hannibal Project, and now should get a “refund” on the Hannibal EEPA through ownership of the Hannibal Credits); 16-17 (Commission decision was “entirely related” to amount paid by Mon Power under the Hannibal EEPA); and 34 (to justify its “failure” to comply with the Portfolio Standard Rules, Commission concluded that the amount of money Mon Power spent purchasing energy and capacity under the Hannibal EEPA made retention by the City of the Hannibal Credits unfair and inequitable). *But see id.* at 20 (City contends that “entire analysis” of PURPA Credit ownership is tied to the Companies’ cost to acquire Credits to meet their Portfolio Act compliance obligations).

issue – a strategy arising from their claimed entitlement to initial ownership of the PURPA Credits under the Portfolio Standard Rules. MEA’s criticism of the Commission’s consideration of policy issues focused more closely on its flawed contention that the applicable law, in the form of Rules 5.2 and 5.6, controls the Credit ownership issue, as well as the fact that avoided cost payments do not compensate the QF for RECs. MEA Petition at 36.

The City and MEA positions are incorrect for the same reasons many of their other arguments are: their repeated mischaracterizations of the Commission’s rulings in the Order. As MEA put it, the Commission’s policy determinations, while perhaps “laudable,” do not allow the Commission “to ignore the rules of law.” MEA Petition at 38. MEA points to its view that Portfolio Standard Rule 5.2 controls the PURPA Credit Ownership Question (*id.*), the Commission’s subsequent “conveyance” of the PURPA Credits from Petitioners to Mon Power, the asserted violations of state contract law associated with such a conveyance (*id.* at 37), and its observation that the PURPA avoided cost rate cannot include compensation for PURPA Credits in addition to energy and capacity under the EEPAs (*id.* at 38). As has been conclusively demonstrated above, Petitioners are incorrect on these points; therefore, their concern about policy considerations trumping legal ones is a non-issue. Likewise, MEA’s asserts that if fairness and equity were to be considered, the Commission should have done so in the rulemaking proceeding. *Id.* at 39. But there is no evidence that in the General Order proceeding, the Commission was advised of the policy concerns associated with the PURPA Credit Ownership Question. *See* Section III.B above.

All these arguments aside, within the sphere of public utility regulation, including electric utilities relationships with PURPA QFs, considering policy is exactly what the Commission should be expected to do. Petitioners have failed to show that the Commission should be

precluded from considering the purposes of its governing statutes and the Portfolio Act, or the ratemaking impact on the Companies and their customers, just as other regulators and appellate courts have done.

D. There Is No “Latent Ambiguity” in the 2004 Amendment Between Mon Power and the City, and Thus There Was Nothing for the Commission to Interpret to the City’s Benefit

The City asserts that because the 2004 Amendment does not mention RECs, it contains a “latent ambiguity,” and under this Court’s decision in Energy Development Corp. v. Moss, 214 W.Va. 577, 591 S.E.2d 135 (2003), the Hannibal Credits belong to the City. City Petition at 21.²² The Commission had no trouble distinguishing the Energy Development Corp. case, both on legal and factual grounds. Although the Commission’s legal analysis is subject to *de novo* review, its factual findings on the import of the 2004 Amendment are entitled to substantial deference.

First, the Court should note that neither the Hannibal EEPA, executed in 1986, nor the 2004 Amendment, addressed the concept of RECs or either party’s ownership of them – to say nothing of Credits under the Act, which obviously had not yet been enacted. The City finds a “latent ambiguity” because Mon Power “was clearly in possession of information regarding the potential” that there may be tradable RECs associated with Hannibal Project’s energy and, that Mon Power “even considered addressing the issue during the negotiations” of the 2004 Amendment. At the same time, “[t]he City was totally unaware of the matter of tradable Credits.” MEA Petition at 23. Moreover, the City asserts that neither of the parties discussed this REC issue when the 2004 Amendment was being prepared. *Id.* at 23-24. The elements of the City’s position on this point can be summarized as follows:

²² City Assignment of Error 2 asserts that the Commission erred in rejecting the applicability of this decision “to the facts of this case in light of the 2004 Amendment to the [Hannibal EEPA].”

- The City didn't know about RECs in either 1986 or 2004, and could not have intended to transfer RECs to Mon Power. (This much can be agreed upon.) City Petition at 24.
- The Hannibal EEPA's silence on the REC ownership issue requires the Commission to interpret the contract to search for extrinsic evidence to determine the parties' intent – to resolve a “latent ambiguity.” *Id.* at 25, 26.
- Despite the purported “latent ambiguity,” the 2004 Amendment provided an “opportunity” for Mon Power to claim ownership of RECs – an opportunity Mon Power somehow was legally obligated to pursue. *Id.* at 25.
- The fact that Mon Power may have known about the possibility of RECs at the time of the 2004 Amendment, while the City did not, must necessarily mean that (i) Mon Power intended not to address REC ownership (*id.* at 26-27); and (ii) the resultant latent ambiguity must be construed against Mon Power (*id.*).

The problems with the City's contract interpretation arguments are almost too numerous to list. First, it makes absolutely no sense to say that the Hannibal EEPA was silent on REC ownership, and then to ask the Commission to interpret the EEPA to ascertain the parties' intent on the very same question. If the agreement does not control the question of REC ownership, then it doesn't control. Second, in an agreement that is silent on the issue of REC ownership, and in an environment in which Credits did not exist, there is no “latent ambiguity” that the Commission needs to resolve – in fact, there is no specific contract provision on which the Commission could be asked to interpret the parties' intent. For this reason, the City's “latent ambiguity” analysis in Energy Development Corp. v. Moss, 214 W. Va. 577, 591 S.E.2d 135 (2003) is inapposite. Here there was no clause susceptible to two different meanings, and no single term that created any ambiguity. As noted in Moss, “[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous.” *Id.* at 586, 591 S.E.2d at 143 (quoting Berkley County Pub. Serv. Dist. v. Vitro Corp., 152 W. Va. 252, 162 S.E.2d 189 (1968)).

Moreover, the fact that RECs existed in other jurisdictions in early 2004 does not mean that Mon Power had any duty to address REC ownership in an amendment that was clearly negotiated to meet other purposes – the exit of a project developer and certain financing parties on the retirement of the initial project financing. Indeed, the Commission found that the 2004 Amendment amended the Hannibal EEPA “to reflect the termination of the ‘Recognition Agreement’” (a project financing document among a number of parties, executed in 1985) as a result of the discharge of debts in the initial Project financing. Order at 48, Finding of Fact 26. It did not, the Commission also found, “amend the material terms of the [Hannibal EEPA], such that it constituted a new Agreement.” *Id.* at 23. For this reason, the Commission found the Energy Development Corp. case to be distinguishable.

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 latent ambiguity.

Id. at 36. The City’s “latent ambiguity” arguments have no merit and should be rejected.

E. The Commission Order Did Not Effect an Unconstitutional “Taking” of Private Property, Nor Did it Violate the “Dormant” Commerce Clause.

MEA strongly contends that “taking” any of the credits (from West Virginia and elsewhere) to which MEA believes it is entitled would violate (i) the “takings” clause in the United States and West Virginia Constitutions and (ii) the dormant Commerce Clause of the United States Constitution, which aims to prohibit economic protectionism by burdening out-of-

state competitors. MEA Petition at 32–35.²³ The Commission properly rejected these arguments.

1. MEA’s “Takings” Arguments

Citing its determination that Petitioners have no property rights in PURPA Credits under West Virginia law, and noting that other jurisdictions have rejected similar arguments by QFs, the Commission rejected MEA’s argument that the Order resulted in a “taking” of private property without compensation in violation of the U.S. and West Virginia Constitutions. Order at 39-40. The Commission correctly noted that the Credits do not exist apart from statute, and are “laden with legislative policy.” *Id.* at 40. Because the Commission applied state law to require that utilities own the Credits in the first instance, Petitioners never owned them, and the Order cannot be construed to deprive them of a property right they never had. *Id.* The Commission also noted that the Wheelabrator decisions rejected a similar takings argument by QFs in that proceeding. *Id.* at 39-40, *citing* Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 526 F.Supp.2d 295 (D. Conn. 2006), *affirmed in* Wheelabrator I, *supra*, 531 F.3d 183 (2nd Cir. 2008).

Even if one were to assume that MEA had some legal ownership of the Pennsylvania RECs, the Companies demonstrated that no violation of the takings clause would exist. See Companies’ Reply Brief at 28-36. MEA argues that it has registered the WVU Project as eligible to generate RECs in Pennsylvania, has already made a sale of those RECs, and any determination that Mon Power is entitled to the WVU Credits would interfere with its right to sell Pa-RECs, effecting an unconstitutional taking. Central to MEA’s argument, however, is the

²³ MEA Assignment of Error 5 contended that the Commission’s directive to Mon Power to “secure” MEA’s Pennsylvania RECs violated the U.S. and West Virginia Constitutions. MEA Petition at 1. MEA also addressed the “takings” arguments at pages 34-39 of the MEA Petition.

implicit assertion that the Pennsylvania Legislature determined that the Pa-RECs are MEA's property. MEA Petition at 34-35. This is a mischaracterization for a number of reasons.

First, MEA fails to note that the Pennsylvania law awarding Pennsylvania credits to NUGs was an *amendment* to the AEPS, enacted in response to the PaPUC Decision. Second, and just as importantly, in enacting this amendment, the Pennsylvania Legislature *let stand* the outcome of the PaPUC Decision.²⁴ Accordingly, the rationale of the PaPUC Decision and the ARIPPA case is still the law of the case, and the effect of those decisions as to the QFs and utilities still stands. Third, MEA wants this Commission to rule that its one-time sale of *Pa-RECs* prohibits the Commission from determining that Mon Power owns the WVU Credits.²⁵ This argument shows quite a bit of nerve on MEA's part, when one considers MEA's range of contacts with West Virginia: its location in West Virginia, its sale of energy and capacity to a West Virginia utility under a Commission-approved EEPA, and its invocation of Commission jurisdiction in MEA v. Mon Power case to force Mon Power to take steps that, the Commission recognized, were not necessarily its customers' best interests. MEA has no apparent relationship with Pennsylvania, apart from the fact that it has registered under Pennsylvania's REC system.

²⁴ The Pennsylvania General Assembly initially enacted the AEPS (Act 213 of 2004, 73 P.S. §§ 1648.1-1648.8) on November 30, 2004; the AEPS became effective on February 28, 2005. Two years later, on May 24, 2007, Pa. H.B. 1203 (the "2007 Amendment") was introduced in the Pennsylvania House of Representatives, and referred to the Environmental Resources and Energy Committee. The 2007 Amendment included a provision specifying that "the owner of the alternative energy system or a customer-generator owns any and all" AECs. The 2007 Amendment was adopted and became effective on July 17, 2007. Act of July 17, 2007, P.L. 114, 73 P.S. §§ 1648.2 and 1648.3(e)(12). The 2007 Amendment also provided, however, that notwithstanding its addition of the language cited above, nothing in the amendment was intended "to reverse or modify the Pennsylvania Public Utility Commission's Order Docket Number P-00052149," which is the PaPUC Decision. Two years after the effective date of the 2007 Amendment, the Commonwealth Court of Pennsylvania, in ARIPPA, upheld the PaPUC Decision and specifically stated that the "[2007] Amendment is not applicable to the instant petition for review." ARIPPA, 966 A.2d at 1207.

²⁵ In March 2004, MEA sold 75,000 Tier II Pa-RECs for \$0.31 each, netting \$23,250 from the buyer, Dominion Energy Marketing, Inc. (an affiliate of one of MEA's partners at the time). Tr. at 189-192 and MEA Ex. 1, Attachment to Response 1.24.

Moreover, MEA's takings argument depends entirely on its present ownership of the WVU Credits. MEA has itself argued that under the Portfolio Standard Rules, the WVU Credits do not exist until the WVU Project is certified. Consequently, MEA has no property interest in West Virginia that the Commission decision could effectively "take." The fact that MEA sold Pa-RECs before this Commission had an opportunity to decide this case prejudices nothing; it shows only that, in hindsight, MEA sold something it was never legally entitled to sell.

Finally, nothing in the MEA Petition makes out even a colorable claim to the existence of a taking. The Takings Clause provides that no "private property shall be taken for public use, without just compensation." U.S. Const. amend. V; W. Va. Const., art. III, § 9. In this factual inquiry, the reviewing court must evaluate (i) the economic impact of the state action; (ii) its interference with distinct investment-backed expectations, and (iii) the character of the state action. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). MEA has neglected to discuss or even identify *any* of the Penn Central factors, either in its advocacy to the Commission or in the MEA Petition. Nor has it conceded the fact that the court in Wheelabrator II also claimed unsuccessfully that a taking had occurred under the exact same circumstances. Wheelabrator II, 931 A.2d at 177 (holding that the transfer of RECs to the utility was not an unconstitutional taking).²⁶

2. MEA's Commerce Clause Claim

Footnote 106 of the MEA Petition advances the unlikely claim that a Commission decision recognizing Mon Power's ownership of the WVU Credits would impair MEA's "disposition of its Pa-RECs," in violation of the "dormant Commerce Clause." See MEA Petition at 35, n.106. The essence of such a claim is that the regulation "discriminates against

²⁶ For a more extended refutation of MEA's takings claims, see the Companies' Reply Brief at 28-34.

interstate commerce” by “favor[ing] in-state economic interests over out-of-state economic interests.” W. Lynn Creamery, Inc. v. Healy, 512 U.S.186, 192-93 (1994). However, any cognizable claim of “economic protectionism” pursuant to the dormant Commerce Clause must prove: (i) the existence of an in-state economic interest that is benefited, and (ii) the existence of an out-of-state economic interest that is burdened. *Id.* Because those key elements are utterly lacking in this case, the dormant Commerce Clause has no legitimate application. MEA has not shown any in-state economic interest that is benefited from the Order, nor any out-of-state interest that is burdened by it (MEA is, in fact, an in-state interest). These unanswered questions compel the conclusion that no “economic protectionism” would be triggered by the Order, and that the Order would neither impair the free flow of Credits or of RECs in other jurisdictions nor insulate any industry, product, or service against the “rigors of interstate commerce.” *See Companies’ Reply Brief at 34-36.*

F. The Commission Properly Exercised Jurisdiction over MEA and Developed a Reasonable Mechanism to Deem the WVU Project Certified as a Qualified Resource in West Virginia

MEA’s Assignment of Error 2 (MEA Petition at 2) opposes the Commission’s determination to deem the WVU Project as certified under the Portfolio Act, in a manner that conflict with MEA’s “business judgment” and, MEA contends, the Portfolio Act Rules themselves and PURPA’s anti-discrimination provisions. In effect, MEA intends to thumb its nose at the Commission and deprive Mon Power of the benefit of the Credits from the WVU Project. The Commission, obviously frustrated by MEA’s steadfast refusal to make the simple filing necessary to certify the WVU Project, determined that it needed to take action to enable the Companies to begin banking Credits from that facility. MEA’s position on the Commission’s authority in this area is completely unreasonable, especially given its resort to the

Commission for resolution of its complaint against Mon Power under the WVU EEPA just two years ago in MEA v. Mon Power.

MEA's argument on this subject has two prongs: (i) its assertion that the only way a facility can be certified under the Act is through a certification process initiated by the facility owner (MEA Petition at 17-18); and (ii) its position that any effort to certify the WVU Project against MEA's wishes would violate PURPA as an exertion of "financial" or "organizational" regulation over a QF or "discrimination" against it (*id.* at 18-19). The first of these arguments was squarely raised in MEA's briefing below, which was more focused on the Commission's statutory jurisdiction and authority over MEA for this purpose; this argument is not prominent in the MEA Petition. To this extent, the Commission did not have an opportunity to rule upon it, and this Court should not consider it as an appropriate assignment of error from which an appeal is possible. Nevertheless, the Order addresses both elements of MEA's Assignment of Error 2.

First, the Commission held that it has statutory authority under the Portfolio Act and its general jurisdiction, set forth in Chapter 24 of the Code, to deem certified the WVU Project. Order at 42. The Commission also acknowledged that where a statute creates a new right that cannot be adequately enforced at law, "equity will contrive remedies and [sic] order to enforce it unless the statutory remedy is exclusive." *Id.* at 41, *citing* 30A C.J.S. Equity § 130 (2011). Moreover, the Commission clearly has authority under the Portfolio Act "to establish a system of tradable credits" and to award credits to electric utilities (who are, of course, the only entities with actual compliance obligations under the Portfolio Act). Most importantly, the Commission was unable to accept that MEA could unilaterally refuse to have its facility certified, even with virtually no efforts on MEA's part, and in doing so frustrate the Companies' ability to meet their compliance obligations. This would create a "hardship on ratepayers" (Order at 42), be

unreasonable under the circumstances, be contrary to the public interest, and “thwart the purposes of the Portfolio Act” (*id.* at 41).

The Commission’s determination on this point is absolutely correct; any other outcome would absolutely frustrate legislative intent and fail to effectuate the purposes of the Portfolio Act. This Court has found that the Commission’s authority extends not only to the “express” aspects of delegated legislative authority, but also to powers that arise “by necessary implication therefrom.” Syl. Pt. 2, Casey v. Public Serv. Comm’n, 193 W. Va. 606, 457 S.E.2d 543 (1995). If the Legislature authorized the Commission to promulgate legislative rules to “effectuate the purpose” of the Portfolio Act, then the Commission must have authority to establish and modify the mechanisms and processes to be used to implement the Act’s provisions and achieve the legislative objectives identified in the Act. Where the Commission is to devise an entirely new regulatory construct to govern the creation, sale, and trading of Credits, it must have considerable latitude, not only in the Commission’s initial promulgation of rules to implement the Act, but also its ongoing oversight of the Act compliance process, including the revision of existing rules where necessary. This broad scope of implied jurisdiction, both in carrying out the Act’s mandates and in the Commission’s general role of serving the public interest, is consonant with the Casey Court’s determination that the only limitation upon such power and authority is that the Commission’s actions shall not be contrary to law, but must be just, reasonable, fair and proper. Casey, 457 S.E.2d at 549-50 (citations omitted). Other jurisdictions with similarly broad statutory grants of authority to public utility commissions have held that those commissions have, by necessary implication, something akin to equitable jurisdiction to enforce their rules and regulations.²⁷

²⁷ See, e.g., Northern Indiana Public Serv. Co. v. Citizens Action Coalition of Ind., Inc., 548 N.E.2d 153 (Ind. 1989) (although the commission lacks full equitable powers of a court at law, its task is

The Commission should have the authority to ensure, through an order compelling MEA to certify its facility, a rulemaking change to permit an alternative certification mechanism, or some other effective method, that the outcome of an order recognizing Mon Power's ownership of PURPA Credits is not undermined by MEA's obstruction. Any other result would reward a party that would invoke and rely upon the Commission's authority when it achieves a favorable result (as in MEA v. Mon Power), but flout that same authority when the result is unfavorable.

The second aspect of MEA's Assignment of Error 2 is also lacking. A Commission decision respecting Mon Power's ownership of PURPA Credits does not constitute impermissible QF regulation in violation of PURPA, as MEA suggests (MEA Petition at 18), because the Commission decision does not encroach upon the areas in which Congress prohibited states to act: regulation of QF rates or utility-type financial or organizational regulation. Certifying the WVU Project under Portfolio Standard Rule 4.4 thus would not amount to "management" action over MEA, or otherwise exert "too much regulation over MEA." Likewise, such an order would not result in discrimination against MEA as a QF. PURPA's anti-discrimination provisions, plainly relate to *rates*; compelling certification of the WVU Project would have nothing at all to do with the rates Mon Power pays under the WVU

essentially an equitable one in balancing the relationship between utilities and its consumers); In re SoCal Edison Co., Decision No. 93724, 1981 WL 165291 (Cal. P.U.C. Nov. 13, 1981) (noting it is a general principle of administrative law that "the Commission's judicial powers include 'equitable jurisdiction as an incident to its express duties and authority.')" (*quoting Consumers Lobby Against Monopolies v. Public Utils. Comm'n*, 25 Cal.3d 891, 907 (1979) (citing cases)); Mountain States Telephone and Telegraphic Co. v. Public Utils. Comm'n, 576 P.2d 544, 547 (Colo. 1978) (noting that where the statutory enactment does not restrict the public utility commission, but grants "broad based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it," it may exercise its equitable powers to grant, in that case, attorneys' fees to an intervenor).

EEPA. *Id.* The Commission's objective should be to provide for a result that is consistent with the public interest, and to ensure that the result can be achieved.

IV. CONCLUSION

The Commission properly found that the legal precedents supporting Mon Power's ownership of PURPA Credits align fully with equitable considerations, and both the law and the facts support an outcome that puts customer interests first. The Companies ask this Court to uphold the Order and dismiss the Petitions for Appeal.

Respectfully submitted this 13th day of February, 2012.

MONONGAHELA POWER COMPANY
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