IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

Morgantown Energy Associates,
Petitioner

vs.) No. 11-1739

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

And

City of New Martinsville, Petitioner

vs.) No. 11-1738

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

STATEMENT OF REASONS OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT DECISIONS

ADMINISTRATIVE DECISIONS

STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

STATEMENT OF THE CASE

On February 23, 2011, Monongahela Power Company (Mon Power) and the Potomac Edison Company (PE) (collectively the Utilities), filed a Joint Petition for declaratory order and for interim relief seeking a ruling that the Utilities are entitled to the alternative and renewable energy resource credits (credits) generated from three "qualifying facilities" (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA) pursuant to Electric Energy Purchase Agreements (EEPAs or PURPA Agreements) with the QFs. The EEPAs are between the QFs and Mon Power. The three QFs include: (i) the Hannibal project (Hannibal), a 34 megawatt run-of-river hydropower facility located at the Hannibal Locks & Dam on the Ohio River in New Martinsville, West Virginia, that is owned by the City of New Martinsville (City or New Martinsville) (EEPA approved in 1986 and extends until 2034); (ii) the Grant Town project (Grant Town), a 80 megawatt generation facility using coal and waste coal, located in Grant Town, West Virginia, that is owned by American Bituminous Power Partners, L.P. (AmBit) (EEPA approved in 1988 and extends until 2036); and, (iii) the Morgantown project (Morgantown), a 69 megawatt cogeneration facility using coal and waste coal located in Morgantown, West Virginia, that is owned by Morgantown Energy Associates (Morgantown) (EEPA approved in 1989 and extends until 2027).

The Commission order contains three foundations that support its determination that the utilities own the PURPA credits. First, the determination is consistent with the legislative intent and instruction to the Commission contained within the Portfolio Act. The Utilities have purchased and will continue to purchase electricity from these PURPA projects that represent qualified generation as defined in the Portfolio Act. Those contracts make an unqualified sale of the electricity to the Utilities. The contracts contain no provisions that relate to RECs because the contracts were executed and the projects were operating well before the concept of RECs was created by state legislation. The Portfolio Act has as one of its stated goals the stimulation of the construction of new alternative generation facilities, which would not include these particular PURPA projects - they are already constructed. Moreover, the Portfolio Act instructs the Commission to ensure that the utility's costs of compliance, and resulting impact to ratepayers, are reasonable and represent the least cost. Second, the determination is consistent with provisions of W. Va. Code §24-1-1 that require the Commission to assure that costs to consumers are reasonable and instruct the Commission to balance the interest of utilities, ratepayers, and the state's economy in arriving at its decision. If the utilities do not own the PURPA credits, although they are obligated to purchase the eligible generation, their West Virginia ratepayers will incur an additional $50-150 million in additional compliance costs. Finally, the Commission's determination is consistent with the express terms of the EEPAs, under which, without reservation, the utilities are the owners of the electricity when it is generated by the PURPA facilities.

By necessity, an analysis of this case must begin with the federal legislation that fostered the development of these three projects – The Public Utility Regulatory Policies Act of 1978, Pub.L.No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.A.) (1978) (PURPA). PURPA was enacted by Congress in 1978 to promote national energy independence and security. To encourage efficiency and use of domestic fuel, PURPA created a new class of electric generating facilities known as qualifying facilities or "QFs" that included cogeneration facilities and small power producers. A cogeneration facility produces both electricity and some other form of useful energy such as steam or heat. A small power production facility produces electric energy using biomass, waste, or renewable resources. A QF was assured of a guaranteed market and price certainty under PURPA. The electric utility within whose service territory the QF is located was required to purchase power from the QF at the utility's avoided cost. Once the avoided cost was agreed to or determined by a state utility regulatory commission, the QF was assured that it would receive compensation at the avoided cost rate regardless of the cost of the alternative power supply for the electric utility. QFs also were exempted from State jurisdiction over rates or financial and organizational structures by PURPA. Wheelabrator Lisbon, Inc. v. Department of Public Utility Control, et al., 283 Conn. 672, 931 A.2d 159, 163-164 (2007).

By Orders entered in 1986, 1988 and 1989, the Commission approved the EEPAs and subsequent amendments to the EEPAs for the Hannibal, Grant Town and Morgantown projects in Case No. 86-169-E-PC (Hannibal), Case No. 87-669-E-C (Grant Town), and Case No. 89-200-E-PC (Morgantown), respectively. The Commission granted consent and approval for the parties to enter into the EEPAs with the PURPA facilities and approved the terms and conditions of the EEPAs under W.Va. Code §24-2-12 and Rule 12.05 (1) of the Commission Rules and Regulations for the Government of Electric Utilities (Electric Rules), a rule that was promulgated to address Commission review and approval of PURPA Agreements. In the Commission Orders approving the EEPAs, the Commission approved rate recovery for the costs associated with the purchase of power under the EEPAs. Unlike the treatment of other power supply and transmission costs, including other purchased power contracts, that are allocated between states (if a utility serves retail customers in more than one state as Mon Power did at the time of the original EEPA filings) and wholesale customers (inasmuch as ratemaking for wholesale rates is within the jurisdiction of the FERC), the Commission approved a specific ratemaking treatment of costs of the EEPAs whereby Mon Power received all of the generation and all of the costs under the EEPAs were assigned to West Virginia operations of Mon Power and were entirely the responsibility of West Virginia ratepayers.

Pursuant to the EEPAs and applicable PURPA regulations, Mon Power is obligated to purchase all of the capacity and the energy available from the QFs. The terms and conditions of EEPAs for the Hannibal, Grant Town and Morgantown projects vary, and the EEPAs contain a different purchase price based on the parties' negotiations and determination of avoided cost at the time of the contract negotiations or Commission adjudication. The EEPAs contain contract terms that were acceptable to the PURPA project and were designed to fulfill the PURPA policies of encouraging the development of renewable energy resources, cogeneration and small power production facilities. The Hannibal and Morgantown EEPAs include purchase prices negotiated between the projects and Mon Power and the Grant Town EEPA includes purchase prices established by the Commission all based on the Mon Power avoided cost rates.[1] All of the EEPAs include other contract terms designed to support financing, debt, and other project costs that are favorable to the QFs. The EEPAs were subsequently amended and the amendments were approved by the Commission, as necessary, to remove or reduce impediments to the continued financial viability and success of the PURPA projects.

As explained in the Commission Order, the up-front payments were handled differently in the three EEPAs; however, in the early years of each contract, the payments to the PURPA projects exceeded avoided costs. Mon Power and PE, Case No. 11-0249-E-P, Commission Final Order, November 22, 2011 at p. 15.

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

The present dispute followed the West Virginia enactment of the Alternative and Renewable Energy Portfolio Act (Portfolio Act), W.Va. Code § 24-2F-1 *et seq.* in 2009, as amended in 2010 and 2011. The Portfolio Act established an alternative and renewable energy portfolio standard applicable to the electric utilities operating in West Virginia. The portfolio standard created a statutory obligation whereby West Virginia electric utilities must own credits associated with alternative generation equal to a certain percentage of the electricity sold to retail customers in increasing percentage targets: ten percent by 2015, fifteen percent by 2020, and twenty-five percent by 2025. W. Va. Code §24-2F-5(a), (c) and (d).

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

As a result of their fuel attributes, the Hannibal and Grant Town generation facilities have been certified as qualified energy resources to generate credits under the Commission Rules Governing Alternative and Renewable Energy Portfolio Standard (Portfolio Standard Rules), 150 C.S.R. 34. To the extent that it generates electricity from waste coal, Morgantown would qualify as an alternative energy resource, although it is not currently certified to generate credits under the Portfolio Standard Rules. Morgantown is certified under Pennsylvania law, which is very similar to West Virginia law, based on its qualified generation. MEA indicated that it does not intend to seek West Virginia certification of the Morgantown project under the Portfolio Standard Rules.

Included in the Portfolio Act are findings by the Legislature that:

> (4) The development of a robust and diverse portfolio of electric-generating capacity is needed for West Virginia to continue its success in attracting new businesses and jobs. This portfolio must include the use of alternative and renewable energy resources at new and existing facilities;
>
> (7) It is in the public interest for the state to encourage the construction of alternative and renewable energy resource facilities that increase the capacity to provide for current and anticipated electric energy demand at a reasonable price.

W. Va. Code §24-2F-2

The Portfolio Act vests the Commission with broad regulatory authority. The Act specifically authorized the Commission to establish a system of tradable credits. As defined in W.Va. Code §24-2F-3(4), an alternative and renewable energy resource credit or "credit" is "a tradable instrument that is used to establish, verify and monitor the generation of electricity from alternative and renewable energy resource facilities, energy efficiency or demand-side energy initiative projects or greenhouse gas emissions reduction or offset projects." Credits, which must be owned by the utility, were created by the Portfolio Act as the measure of utility compliance with the requirements to meet the statutory percentage targets. Credits can be obtained by the public utilities in three different ways: through its own qualified generation, by purchasing power from qualified generation, or by purchasing credits attributable to qualified generation.

The electric utilities in the State were required to file applications on or before January 1, 2011, seeking Commission approval of an alternative and renewable energy portfolio standard compliance plans pursuant to W.Va. Code § 24-2F-6 specifying how they would meet the mandated targets. In order to approve the compliance plans, the Commission had to make the determination that the compliance plans have a reasonable expectation of achieving the portfolio standard requirements at a reasonable cost and ensure that the plan represents the least cost to the utilities and their ratepayers. W.Va. Code § 24-2F-6(e) and 7(a).

West Virginia is one of twenty-nine states and the District of Columbia that have enacted renewable and/or alternative energy portfolio standards (RPS) programs. West Virginia and other states created a system of tradable credits and renewable energy credits to monitor compliance with the state RPS programs. In some states, the credits are bundled, meaning that the credits or environmental attributes of the energy are included with and purchased with the power. In some states, the credits are unbundled, or sold separately from the power. In West Virginia, the credits may be unbundled or bundled with the purchased power pursuant to Rule 5.6 of the Portfolio Standard Rules 150 C.S.R. 34, Order entered November 5, 2010, in General Order No. 184.25. Within the PJM footprint[2], both West Virginia and Pennsylvania include waste coal as an alternative energy resource in the state RPS statutory programs.

All of the EEPAs in this case were executed in the 1980's long before the creation of alternative and renewable energy resource credits in West Virginia by the enactment of the Portfolio Act and the widespread creation of renewable energy credits (RECs) in other state jurisdictions. The Agreements do not contain provisions addressing the ownership of the credits, and they reserve no future interest in the electricity sold to Mon Power.

The Petitioners, New Martinsville and Morgantown, maintain that they own the credits, and the Utilities claim they own the credits.

[2] In West Virginia, credits related to eligible generation can come from any generation located within the PJM service territory. PJM is the federally created and regulated regional transmission operator that covers West Virginia, Pennsylvania, Ohio, Maryland, New Jersey, Delaware, Illinois, Kentucky, Michigan, North Carolina, Tennessee, Virginia and the District of Columbia.

Following a public hearing, the receipt of oral argument and written briefs, the Commission issued its order, which is the subject of this appeal, declaring that the Utilities owned the credits.

SUMMARY OF THE ARGUMENT

The Commission is required by law to issue final orders that explain the rationale of its decisions and contain findings of fact and conclusions of law. The Commission Order contains a complete and full analysis of the issues and explains the rationale of the Commission including the facts and law that support that decision. For the most part, the arguments being made to the Court in the Petitions were made to the Commission and are fully addressed by the Commission Order. However, since neither Petitioner filed a petition for reconsideration with the Commission, the petitions for appeal contain nuances of arguments which may not have been specifically made to the Commission and addressed in the Commission Order. In at least one instance, additional arguments not made to the Commission have been presented to support the Petitioners' contentions.

Although the Federal Energy Regulatory (FERC) decision in American Ref-Fuel Company, 105 FERC ¶ 61,004 (2003) has been cited by both Petitioners for various reasons, a careful reading of that decision reflects that there has been no federal preemption of the issue and that the question of ownership of credits associated with PURPA generation is a matter to be decided under state law. Wheelabrator Lisbon, Inc. et al v. State of Connecticut Department of Public Utilities Control, et al, 531 F.3d 183, 189-190 (2nd Cir. 2008).

This is not a case of first impression in the United States. Other states have ruled on the same issue and the Commission analyzed the various other state decisions in its Final Order.

Order at 21-26. The Holt Study[3], cited in the order, reviewed the rulings of sixteen other states addressing the issue of credit ownership associated with generation from PURPA projects. Order at 22. The study found the majority of the states ruled that the utility is entitled to the ownership of the credits related to power purchases under older PURPA contracts that were executed prior to the existence of credits and that are silent on the issue of credit ownership.

The subject has been not only considered by other state regulatory commissions, but has also been considered in state appellate courts and in various federal courts. These court opinions have upheld the decisions of every state that has held the utilities are entitled to the ownership of the credits related to the PURPA generation.

As indicated by the Commission in its order, these decisions in other states were considered instructive but not controlling authority. Instead, the Commission recognized that it must apply applicable state law to resolve the issue of credit ownership. The Commission considered the instruction and intent of the legislature as expressed in the Portfolio Act, W. Va. Code §24-2F-1 *et seq*; the authority and duties of the Commission contained in Chapter 24 of the West Virginia Code; and the express terms of the PURPA EEPAs. Order at 26-34.

Contrary to the assertions of the Petitioners, there is no latent ambiguity with respect to these PURPA EEPAs. The parties concede that the EEPAs contain no language with respect to credits. In fact, all parties agree that the EEPAs were entered into well before any state established the concept of credits as are now established pursuant to various state renewable portfolio standards (RPS) programs. Because of PURPA, Mon Power is obligated to purchase that power. The PURPA projects have received the consideration for which they originally bargained. They built their projects and they have received the utility avoided cost rate from the

[3] Who owns Renewable Energy Certificate? An Explanation of Policy Options and Practice, E. Holt, R. Wiser and M. Gollinger, Ernest Orland Lawrence Berkeley National Laboratory, Report No. LBNL-5996, April 2006.

utility and its rate payers to fund the projects and provide a return to their investors. Furthermore, it is evident from the express terms of the EEPAs that the commodity being sold by the PURPA generator to the utility is electricity without any reservation of interest in that electricity. Because the electricity is not stored, as the electricity is generated, it is sold to the utility, which is obligated to purchase the power.

Credits under the Portfolio Act exist only after a certain quantity of electricity has been generated. Under West Virginia law, "an electric utility shall be awarded one credit for each megawatt hour of electricity generated or purchased from an alternative energy resource facility" located in West Virginia or within the PJM footprint. W. Va. Code §24-2F-4(b)(1). Both the MEA and New Martinsville facilities generate electricity that is eligible generation under the Portfolio Act.

Beginning in 2015, the Portfolio Act requires that the electric utilities own credits equal to a certain percentage of the sales to their retail customers in West Virginia. Credits can be obtained several ways. First, the law recognizes that credits can be associated with the utility's own generation. Second, credits can be obtained by purchasing eligible generation. Finally, credits can be obtained through the purchase of a credit which has been disaggregated or separated from eligible generation. In this case, the Commission has considered the second means of obtaining credits; specifically, whether the utilities are entitled to credits associated with the purchase of eligible electricity under the EEPAs where the obligation to purchase was created well before the creation of any state credits, the contracts are silent as to credits and the PURPA projects reserved no interest in the electricity sold. It would be unreasonable to require ratepayers to pay an additional \$50 – 150 million simply to verify the eligible generation that the utility will continue to purchase. Imposing unreasonable costs upon ratepayers would be contrary to express provisions of the Portfolio Act as well as other provisions of Chapter 24 of the West Virginia Code. W. Va. Code §§24-2F-6(e), 24-2F-7(a) and 24-1-1(a)(4).

ORAL ARGUMENT

The Court has already issued a scheduling order setting this matter for Rule 19 argument.

ARGUMENT

A. Standard of Review

In Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Public Service Commission of West Virginia, 190 W. Va. 416, 438 S.E.2d 596 (1993), this Court explained:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (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.

This Court has also advised that:

> "[a]n order of the public service commission based upon its 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." United Fuel Gas Company v. The Public Service Commission, 143 W.Va. 33, 99 S.E.2d 1 (1957). Syllabus Point 5, in part, Boggs v. Public Service Comm'n, 154 W.Va. 146, 174 S.E.2d 331 (1970).

Syllabus Point 1, Broadmoor/Timberline Apartments v. Public Service Commission of West Virginia, 180 W. Va. 387, 376 S.E.2d 593 (1988).

B. Preliminary comments concerning the Morgantown Petition

Much of the Morgantown argument centers on its contention that the Commission has impermissibly amended a PURPA contract and that there has been no transfer by contract of the credits from the project to the utility. The argument is fundamentally flawed because it is based on faulty premises. The Commission has not amended a PURPA agreement. The Commission has not altered the avoided cost rate. Instead, it has only decided which party is entitled to the credits associated with the generation. Moreover, there are no credits to transfer. The Commission determined that the projects never owned the credits, instead the Utilities own the credits by virtue of their purchase of the electricity.

In its statement of the case, Morgantown deliberately confuses the terminology. A QF is generally recognized to be a qualified facility under the provisions of PURPA. Morgantown uses the term QF to refer to generation that qualifies as an alternative energy resources under the Portfolio Act. This confusion of terminology seems designed to tie the Morgantown PURPA facility to the Portfolio Act and the Commission Rules. For example, Morgantown asserts that the Commission "rules require that RECs created when a QF generates electricity 'shall be awarded' to the QF, not the utility to whom the QF sold the electricity." Petition at 7. An examination of the rule cited by Morgantown discloses that the rule says no such thing. The rule uses the term "non-utility generator" and makes no mention of PURPA projects and purchase agreements that were entered into prior to the Portfolio Act or the concept of RECs. Furthermore, the rule does not assign credit ownership to either party. The rule assumes that the parties will address credit ownership in their contract. In fact, in its petition, New Martinsville (City) acknowledges that the rule fails to reference PURPA generation and contracts that predate the Act. Petition at 12.

In its statement of the case, Morgantown has inadvertently highlighted the inherent flaw and inequity of its argument that it is entitled to the credits from its generation. Morgantown states:

> For utilities that are unable to generate <u>or purchase</u> enough qualifying energy, the RPS acts also created systems under which the generation of a megawatt-hour of qualifying electricity gave rise to one more "renewable energy credits" or "alternative energy credits" ("RECs"). RECs certified by a state can

> be traded and eventually redeemed to meet a utility's portfolio requirement in that state. So utilities that are unable to comply with an RPS by generating or buying compliant electricity can nonetheless buy their way into compliance by purchasing RECs from generators like MEA, who create and own RECs through their use of alternative sources, but who, as unregulated non-utility generators, are not saddled with RPS compliance requirements of their own. (Footnotes omitted) (emphasis added).

Petition at 6.

Mon Power and its ratepayers have been, and will continue to be, obligated to purchase all of the Morgantown power for years because of this PURPA project. That power is qualified generation under the Portfolio Act. So, to use Morgantown's terminology, the utility has purchased "compliant electricity;" however, Morgantown would deprive Mon Power and its ratepayers of "credit" for those purchases and require the utility and its ratepayers to spend additional dollars to obtain credits to meet the Portfolio Act requirements. The Commission and the majority of states that have considered this issue have rejected the argument advanced by Morgantown.

Morgantown states that because its facility was registered in Pennsylvania, it had no incentive to register in West Virginia. Petition, at fn 38. If Morgantown truly believed that it owned the credits, it should expand its market potential registered in West Virginia because both states recognize generation from waste coal as alternative generation. Morgantown as a business entity could expand its opportunity to sell those credits, but Morgantown was well aware of the Pennsylvania PUC decision that Pennsylvania utilities own credits associated with PURPA power sold to those utilities pursuant to contracts that existed prior to the Pennsylvania Portfolio Act. In fact, in light of the Pennsylvania PUC decision, if Morgantown were selling its power to a Pennsylvania utility under the same PURPA avoided cost contract it has with Mon Power, it would not own the credits it now claims it owns. Furthermore, Morgantown was aware of the

West Virginia legislation, the Portfolio Act. In its efforts to avoid a West Virginia Commission decision similar to the Pennsylvania PUC decision, it has refused to register its facilities in West Virginia and now argues that the Commission improperly determined that the utility owned the credits because its project is not registered in West Virginia.

Of course, Morgantown's argument assumes that it owns the credits in the first instance. The Commission determined that the utility owns the credits which is consistent with the purchased power contract, the Portfolio Act, and provisions of Chapter 24 of the West Virginia Code.

Finally, Morgantown's Petition consists of forty pages, the limit established by Appellate Rule 38. The Petition contains over one hundred single spaced footnotes, consisting of approximately four hundred lines and containing argument that in certain instances is unrelated to the text and assignment of error. The net effect of this extensive use of footnotes is to add the equivalent of over 20 pages of double spaced text to the Petition. This effort to circumvent the rules of this Court should not be sanctioned. The Court should ignore the footnote arguments.

C. Morgantown assigns the following error in the Commission decision:

1. No generation of electricity before January 4, 2011, (the effective date of the Commission rulemaking) could possibly have given rise to RECs recognized by West Virginia law because before that date there was no West Virginia law recognizing RECs.

This argument might make sense if the proceeding before the Commission was initiated and decided prior to the West Virginia Portfolio Act. It was not. This proceeding was initiated after January 4, 2011, which is the effective date of the Commission rules implementing the Portfolio Act, 150 C.S.R. 34. Morgantown has not challenged the jurisdiction of the Commission over the subject matter of the controversy. Furthermore, Morgantown generation qualifies, in part through the use of waste coal, as an alternative generation facility under West

Virginia law. The Commission has determined that the utility, which is obligated to purchase that power, and becomes the owner of the electricity, is the owner of any and all credits associated with that power, where the contract is silent as to RECs, reserves no future interest in the electricity and was entered into pursuant to the goals and policies of PURPA.

2. *At no time could Morgantown's generation of electricity ever possibly give and rise to RECs recognized by West Virginia law, because at no time has Morgantown been certified to create RECs recognized by West Virginia law.*

This argument misleads and, in opinion of the Commission, is contrary to the intention of the Portfolio Act. The Portfolio Act requires public utilities to generate or purchase a certain percentage of power required to meet retail demand from statutorily defined qualified generation facilities. W. Va. Code §§24-2F-4(1) and 24-2F-5. To the extent Morgantown generates electricity from waste coal, Morgantown is an eligible generator under the Portfolio Act and sells all of its electrical output to the Utilities. W. Va. Code §24-2F-3(3)(G). Thus, by purchasing the eligible Morgantown power, Mon Power is complying with the intention of the Portfolio Act. However, the legislation uses credits as a means of measuring compliance and requires the electric utilities to "own" credits equal to a certain percentage of electricity sold in a preceding year. W. Va. Code §24-2F-5(a).

Importantly, under the West Virginia Portfolio Act, and all other similar state laws that the Commission is aware of, a credit cannot be used more than once for compliance. W. Va. Code §24-2F-5(e). In other words, Morgantown could not sell a credit for Pennsylvania compliance and Mon Power use the same credit for compliance under the West Virginia Portfolio Act. As previously emphasized, as a PURPA project, Mon Power and its ratepayers, are obligated to purchase and to continue to purchase the electricity generated by Morgantown. Morgantown attempts to negate the fact that Monongahela Power and its ratepayers have purchased eligible power by refusing to "certify" its facility and of course by arguing that it should be deemed the owner of the credits.

Morgantown further argues that the Commission conclusion that it could deem the generation facility as certified to create RECs contradicts its own rules that the facility must file for certification. Morgantown is not an entity or generator that is unknown to the Commission. It is a PURPA project, and its very existence is dependent upon a purchase power contract with Mon Power and payments by Mon Power West Virginia ratepayers which were approved by the Commission. Recently, Morgantown requested that the Commission require Mon Power to agree to a modification of their contract and underlying recognition agreement that is favorable to Morgantown. The Commission granted the relief requested by Morgantown. Morgantown v. Mon Power, PSC Case No. 09-0985-E-C, Order entered June 9, 2010. When it worked to its advantage, Morgantown argued, in that case, that it was permissible for the Commission to amend its contract. Now when it would work to its advantage, Morgantown argues that the Commission Order impermissibly amends the contract.

The Portfolio Rules allow the Commission to waive the rules upon a showing of hardship or unusual difficulty in complying with the rules. Rules Governing Alternative and Renewable Energy Portfolio Standard, 150 C.S.R. 34, Rule 1.5.a. Again, the purpose of the certification process in Rule 4.1 is to verify that Mon Power has purchased eligible generation as required by W. Va. Code §24-2F-4. By purchasing Morgantown power, the Commission knows that Mon Power has purchased eligible power by reason of the waste coal used by Morgantown. Because Morgantown states that it refuses to request West Virginia certification of its qualified generation facility, the Commission made the decision regarding an alternative path to certification as a means of avoiding the imposition of a hardship upon Mon Power and its customers and to ensure that proper "credit" is given for the purchases.

Morgantown also asserts that "deeming" the Morgantown facility as certified would contradict a federally created exemption from regulation. The Commission is not regulating Morgantown in any respect; rather, the Commission is determining only that the utility should own the credits associated with the generation from the Morgantown facility and providing the owner of the energy, Mon Power, a mechanism for receiving a certification that the energy qualifies for the purpose of the Portfolio Act. Other than reciting some fundamental tenants of PURPA law, which are not applicable to this issue, MEA has not factually shown how a Commission determination of credit ownership is regulation of any sort. Furthermore, MEA provided no case precedent to support its contention because there is none.

3. If it could be said the Morgantown generation of electricity has created RECs recognized by West Virginia law, then federal and West Virginia law both require they belong to Morgantown, not Monongahela Power.

Although Morgantown expends a fair amount of effort arguing the legal significance that its facility is not presently certified under Commission rules, it nonetheless bases this argument on a rule that applies to generation that has been certified under Commission rules. This is the same argument advanced by New Martinsville and the Commission response is the same. See New Martinsville Assignment of Error No. 4, discussed *infra*.

Like the EEPA in New Martinsville, the Morgantown EEPA is a contract for the PURPA projects to sell all of its electrical output to the public utility, Mon Power. The contract is silent as to the issue of RECs; and neither New Martinsville or Morgantown reserved any residual interest in the electricity that was sold or that it will sell to Mon Power.

Morgantown also argues that any decision by the Commission to determine RECs ownership under the PURPA contract necessarily requires contract interpretation. Petition at 24. Morgantown ignores that the undisputed effect of the PURPA contract is to convey all of the electricity from the PURPA facilities to the utility at an avoided cost rate. Furthermore, credits are a state created right, which relate to state legislation that requires a utility to diversify its generation resources, that were created well after these PURPA contracts. As stated by the Supreme Court of Connecticut, the determination of ownership of credits associated with older PURPA contracts "is more a question of legislative intent and public policy than a question of intent of the parties." Wheelabrator Lisbon, Inc., *supra*, 931 A.2d at 169-170.

Morgantown attempts to use FERC decisions that discuss the capacity and energy produced by QFs and that this is all that is conveyed in a PURPA contract. Through these legal gymnastics Morgantown attempts to avoid the undisputed fact that as electricity is generated from its plant it flows to Mon Power. The electrical generation is not stored, and Morgantown has reserved no ownership interest regarding the electricity. Because the utility owns the generated electricity and because the credit is created under West Virginia law (Pennsylvania law provides the same) after a megawatt hour of generation occurs, it is irrelevant that the EEPA has no consideration for the payment of credits because the credits were created after the generation was purchased and are owned by the utility. This was precisely the determination made in Pennsylvania. Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits, Docket No. P-00052149 (ALJ decision, July 5, 2006), (Commission Order, December 21, 2006); affirmed, ARIPPA v. Pennsylvania Pub. Util. Comm'n, 966 A.2d 1204 (PA. Commw. Ct. 2009)

Morgantown argues that RECs were not sold to the utility because no consideration was given for the RECs. Morgantown argues that under West Virginia law a contract that is silent as to whether a party has sold an asset to another party does not result in the sale of the asset. This is just more of the same sophistry. To state the obvious, a REC does not exist without generation. Once eligible generation occurs in a sufficient amount, one megawatt hour, a REC is created. Furthermore, the argument assumes that Morgantown owned the credits in the first instance which the Commission has determined that it did not.

Morgantown equates the steam byproduct of its generation to the RECs. However, the steam was recognized, at the time the EEPA was executed, as a tangible by-product of the generation with commercial value that is, in fact, separately captured and sold by Morgantown to West Virginia University. The fact that Morgantown is recognized as a cogeneration facility under PURPA means that in addition to the generation of electricity, it has a useful energy byproduct - in this instance the heat value of steam. Again, the REC credits are an intangible creation of state law that only exist because of the electric generation from a statutorily recognized plant.

Courts have held that awarding credits to the utilities does not lower the avoided cost rate in violation of PURPA. The PURPA projects sold their electricity to the utilities and received as consideration all that was contemplated under PURPA. <u>Wheelabrator Lisbon Inc. v. Connecticut PUC</u>, 526 F.Supp.2d 295, 306 (2006) affirmed in <u>Wheelabrator Lisbon Inc. v. Connecticut PUC</u>, 531 F.3d. 183, 188-189 (2nd Cir. 2008); accord, <u>Wheelabrator</u> *supra*, 931 A.2d at 177 (the award of PURPA RECs to the utilities did not diminish value to the PURPA project because the RECs were never the property of the PURPA projects). Furthermore, "there is legal and factual support for the conclusion that the avoided cost rate itself was intended to develop renewable energy sources." Wheelabrator, *supra*, 931 A.2d at 175, citing American Paper Institute, Inc. v. American Electric Power Service Corporation, 461 U.S. 402, 406, 103 S.Ct. 1921, 76 L.Ed.2d 22 (1983).

Morgantown cites the Minnesota decision as authority for its position. Petition at fn 88. In addition to constituting a minority position, the Minnesota PUC misconstrued the FERC ruling and failed to apply state law and related policies. As stated by the Commission:

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

Order at 24.

Morgantown concludes by stating that "the entire rationale of the Commission Order is that because the contracts at issue are PURPA contracts with QFs, QFs' RECs – an independently valuable commodity – are to be treated differently, i.e., automatically conveyed to the purchasing utility. A non-QF NUG with a post-January 4, 2011 contract gets to keep its RECs. Thus the Commission Order explicitly discriminates against QFs with respect to rates." Petition at 32. The Commission decision was limited to the consideration of three specific PURPA contracts, all of which were entered into long before any state created the statutory concept of RECs and which were executed in furtherance of the goals of PURPA. Each of these contracts unequivocally transferred the electricity to the purchasing utility. The PURPA QF did not reserve any future interest in the attribution of the electricity; moreover, the generation constitutes eligible generation, which the utility is obligated to purchase, that will assist the utility in meeting its requirements under the Portfolio Act. Requiring the utility to purchase additional credits to "verify" that it purchased eligible generation would cost West Virginia ratepayers anywhere from $50-150 million. For these reasons, and others given in the Commission order, the Commission found that the utility owned the credits created. The Commission did not have before it the question of a post-January 4, 2011 PURPA contract.

4. *Taking any of the Morgantown RECs violates the United States and West Virginia constitutions.*

At the outset of this particular argument, MEA misleads with its incomplete statement of Pennsylvania law. As previously indicated, following the Pennsylvania PUC decision that the purchasing utility owns the credits associated with PURPA contracts that predated the Pennsylvania equivalent of the West Virginia Portfolio Act, the Pennsylvania legislature amended the Act to provide that

> Unless a contractual provision explicitly assigns alternative energy credits in a different manner, the owner of the alternative energy system or a customer-generator owns any and all alternative energy credits associated with or created by the production of electric energy by such facility or customer, and the owner or customer shall be entitled to sell, transfer or take any other action to which a legal owner of property is entitled to take with respect to the credits.

73 P.S. §1648.3 (e)(12).

Quoting a part of this language Morgantown goes on to argue that "PA-RECs are indisputably Morgantown's property according the Pennsylvania legislature." What Morgantown fails to divulge to the Court is that the Pennsylvania legislation specifically provided that nothing in the legislation is intended to overturn the Pennsylvania PUC's decision that PURPA projects like Morgantown that sell generation to Pennsylvania utilities do not own the credits, the Pennsylvania utilities do. The Pennsylvania Legislature provided that

> [n]otwithstanding the addition of section 3(e)(12) of the act, nothing in this act is intended to reverse or modify the Pennsylvania Public Utility Commission's order Docket Number P-00052149.

2007 Pa. ALS 35, Section 3.1.

Thus, by statute, the Pennsylvania Legislature has treated PURPA facilities (like Morgantown) different than other owners of generation facilities regarding credit ownership – the PURPA facilities do not own the credits.

In advancing its taking arguments under the United States and West Virginia Constitutions, Morgantown argues that it has registered its facility in Pennsylvania as a qualified energy source under Pennsylvania law. Pennsylvania, like West Virginia, has a statute that recognizes that the generation of electricity from waste coal constitutes eligible generation. In that regard, Pennsylvania and West Virginia are in the minority of the states recognizing waste coal as an eligible generation resource. Pennsylvania, like West Virginia, also uses the PJM GATS system[4] to record and track credits. An eligible generator can register its facility in every state that would recognize its generation as eligible to produce credits, but that credit can only be used once. Once sold in one state and used to meet a portfolio requirement, the credit is retired on the PJM GATS system and cannot be used again in another state. Furthermore, the registering of a facility in the state and on the PJM GATS system does not legally deem the registrant as the owner of the credits.

Morgantown also states that it has sold credits. The sale in question was a one-time nominal sale four years ago to an affiliated company, Dominion. Order, finding of fact 14. This

[4] The PJM GATS system was developed by PJM to track and verify generation that qualifies for credits under the various States RPS statutes.

transaction does not establish ownership. The Connecticut PUC, whose decision was upheld in both state and federal court, directed the QF to make a refund of the credits that the QF sold when the Connecticut Commission later determined that the credits were in fact owned by the utility. Wheelabrator, *supra*, 931 A.2d at 163. As with most of its argument concerning contract law, the so-called "taking" argument is based on the premise that Morgantown owned the credits in the first instance. Again, the Commission held that the QF never owned the credits, the utility does. For the same reason given by the Commission, that the PURPA project never owned the credit in the first instance, this same takings argument has been considered and rejected in Connecticut, Wheelabrator, *supra*, 931 A.2d at 177; Wheelabrator, *supra*, 526 F.Supp. 2d at 307; and summarily rejected in Pennsylvania for lack of authority. ARRIPA, *supra*, 966 A2d at 1208.

In a footnote, Morgantown makes an entire argument concerning the Commerce Clause. Petition at fn 106. The error assigned and related text is a "takings argument" not a Commerce Clause argument. For this reason, the entire footnote, and other arguments contained in numerous and extensive footnotes to its petition, in an obvious effort to avoid the Court's rule limiting the Petition to 40 pages and an effort to slip in its Commerce Clause argument before the Court, should be ignored by the Court. Further, the argument is inappropriate and erroneous because MEA never owned the credits. The Commission decision is that the credit belonged to the purchasing utility for the benefit of West Virginia ratepayers regardless of where the nonowner registers them or intends to trade them. It is instructive that the New Martinsville facility, a renewable energy source that is recognized as eligible generation in all states that have a RPS, is registered in multiple states, but it has not advanced this particular argument.

Morgantown concludes this assignment of error by repeating argument concerning the Commission rulemaking. This matter is discussed in response to the New Martinsville Petition. See, New Martinsville Assignment of Error No. 4, discussed *infra.*

5. *The Commission's idea of policy is no substitute for clear rules of federal and state laws.*

The concluding assignment of error of Morgantown begins with the assertion that the Commission's decision was based "entirely on the agency's notion of policy and its general charge to keep rates down. But the Commission is not the legislature, nor is it a court." Petition at 36. Morgantown creates confusion. The Legislature, not the Commission, has stated as one of its intentions in enacting the Portfolio Act that it desired to stimulate the development of alternative generation facilities. W. Va. Code §24-2F-2(7). Obviously, MEA facilities were constructed, pursuant to the goals of PURPA, prior to the enactment of the Portfolio Act so the MEA facility does not accomplish this particular goal. Under the Act, however, its generation does count as eligible generation, the purchase of which would assist the utility in meeting its portfolio requirements and incidentally benefit the West Virginia ratepayers. The Legislature has instructed the Commission to ensure that the costs of compliance are reasonable and represent the least cost to the utility and its ratepayers. W. Va. Code §§24-2F-6(e) and 7. The Legislature has specifically charged the Commission to balance the interest of utilities, current and future customers, and the state's economy in its deliberations and decisions and to ensure that rates are reasonable. W. Va. Code §§24-1-1(b) and 24-1-1(a)(4). To suggest that the Commission has gone outside of this statutory framework established by the Legislature is silly. Clearly, there are policies and directives established by the Legislature, not the Commission. Considering the statutory charges placed on the Commission by the Legislature, and the responsibility for administering the Portfolio Act placed upon the Commission, the Commission concluded that it was manifestly unreasonable for the utility and its ratepayers to pay millions of dollars in additional costs to acquire credits to validate the qualified generation for which it has already paid and will continue to pay. In this argument, as has been previously discussed, Morgantown again misstates Pennsylvania law.

Curiously, Morgantown cites various provisions of PURPA that indicate the purposes of PURPA were satisfied with the approval of the EEPA, establishing the obligation of the utility to buy Morgantown's power at an avoided cost.

Morgantown champions the purposes of PURPA and emphasized "the practical effect of PURPA is to divert potential profits from regulated electric companies, whose earnings are largely based on the value of their own facilities, to the owners of QFs" quoting a Pennsylvania Supreme Court decision. Petition at 39. Morgantown has already received its end of the bargain and has satisfied the intent of PURPA. It had the benefit of a customer, Mon Power, that was required to purchase its power and to assist Morgantown in financing the project and it had the benefit of a rate based on Mon Power's avoided costs that could not be subsequently reduced. With the certainty gained from those two guarantees, it has built its project and received considerable payment from the utility and its ratepayers, all is contemplated by PURPA. To be clear, in this case, the diversion of potential profits, as quoted by Morgantown, constitutes payments from West Virginia ratepayers to the three PURPA projects in excess of $1.25 billion. Order at fn 2. What Morgantown wants now is for the Court to determine that Morgantown also owns the credits associated with the power produced by the project, sold to Mon Power and paid for by Mon Power customers. That result would unreasonably impose additional and significant expense on ratepayers, $50-150 million, in order to obtain credits when they have already paid for generation that would otherwise satisfy the Act's requirements.

D. New Martinsville assigns the following error in the Commission's decision:

1. The Commission erred in awarding RECs on the basis that the utility was the purchaser of "energy" pursuant to a contract entered into 1986 under PURPA.

First, New Martinsville maintains that the Commission rulemaking awarded credits to New Martinsville. However, on the same page of its petition, New Martinsville acknowledges that neither the Portfolio Act nor the Commission rules "addressed the issue of the ownership of credits under contracts entered into prior to the Act." Petition p. 12. New Martinsville acknowledges that the 1986 agreement predated the concept of RECs not only in West Virginia, but in every other state. This concession is particularly noteworthy when considering the argument New Martinsville advances later in its Petition that there exists a latent ambiguity in the contract.

Similar to Morgantown, New Martinsville points to the FERC decision in American Ref-Fuel as providing essentially that the PURPA EEPA could not have conveyed RECs. However, that is an irrelevant point. The EEPA conveyed the electricity to the utility without qualification. The FERC decision states clearly that FERC did not intend to preempt the states in determining the ownership of PURPA credits. As observed by the Second Circuit the intent to preempt is negated by the fact that FERC acknowledged that the issue of REC ownership would be determined by states considering state law. Wheelabrator, *supra*, 531 F.3d at 188-189. Other Courts have considered and dismissed the argument advanced by New Martinsville that the ruling of the Commission has essentially reduced its contracted avoided cost rate that it is entitled to under PURPA. Wheelabrator, *supra*, 531 F.3d at pp. 188-189; ARIPPA, *supra*, 966 A.2d at 1210-1211. The Commission has taken no action to affect or alter the avoided cost rate that the PURPA project receives.

In an effort to persuade the Court of the equity of its position, New Martinsville makes the curious, if not misleading, statement that the City, not the utility, "took the risk of developing a source of energy during a time that our country was in need of reasonable priced power." Petition at 18. In fact, any risk that existed has been underwritten by West Virginia ratepayers. New Martinsville now argues, in effect, that those same West Virginia ratepayers should shoulder an additional $50-150 million to purchase credits for generation the utility is not only entitled to receive, but is required to purchase. The ratepayers shouldered the risk by providing rates to New Martinsville that exceeded avoided cost rates in the early year of the project's life to help underwrite the development of the project. In addition, New Martinsville risk was virtually non-existent because of the utility's obligation to purchase all of the output from the project as well as the obligation of the West Virginia ratepayers to pay for those purchases at a rate that could not be changed. Only after it received a firm buyer and a firm price did the City go forward with the project. PURPA intended to take the risk out of developing qualified PURPA facilities. As a PURPA project, New Martinsville has received the full benefits intended by Congress when the legislation was enacted in 1978. In determining avoided cost rules, the FERC assumed that the cost to PURPA generators would be lower than the avoided utility cost that they would be paid for the energy. Wheelabrator, *supra*, 931 A.2d at 164 citing American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402, 406-407, 103 S.Ct. 1921, 762. Ed.2d 22 (1983). The FERC explained that it had "set the rate [for purchasing electric energy] at the full avoided cost rather that at a level that would result in direct rate saving for utility customers" in order "to provide incentives for the development of cogeneration and small power production . . . ." The federal commission also had determined that the rate was "just and reasonable to the electric consumers of the electric utility," even though it was not the "lowest possible reasonable rate consistent with the maintenance of adequate service . . . ." Wheelabrator, *supra*, 931 A.2d at 164.

The Commission's decision in the Clariton case cited by New Martinsville is simply a non-factor. That case involved a negotiated contract between the project and the utility which was submitted to the Commission. Unlike the filing in New Martinsville, Staff opposed the terms of the agreement and the Commission disapproved the agreement for the reasons advanced by Staff. The case has absolutely no applicability to New Martinsville's circumstance.

New Martinsville continues to assert that "the award of RECs to the Company must result in the repricing of, and diminution of, the cost of energy from the Hannibal plant." Petition at 19. That argument has been consistently rejected by the Courts for a simple reason – the PURPA project was built pursuant to the goals of Congress in enacting PURPA. The financial incentives were provided to the project developers to build the project and they have been compensated for their power since the inception of the project and will be compensated until the expiration of the contract. The projects have received as compensation what was intended under PURPA – the avoided cost rate paid by a captive utility customer. The determination of credit ownership has no effect upon PURPA obligations and entitlements. Wheelabrator, *supra*, 526 F.Supp.2d at 306, affirmed, in Wheelabrator, *supra* 531 F.3d at 188-189, Wheelabrator, *supra*, 931 A.2d at 177.

New Martinsville also contends that the Commission order is based entirely on the cost of energy purchased by the utility. The argument misstates the order. As previously argued, the bases of the Commission order are the plain terms of the EEPA, the express terms of the EEPA and what terms are not in the EEPA, the legislative intent in enacting the Portfolio Act, and the general instruction to the Commission in what it must assess in making its determination and deliberations *i.e.*, the balancing of the utility's interest with the public interest and the state's economy. Order at 26-34.

2. In light of the 2004 amendments to EEPA, it was an error for the Commission to reject the Court's decision in Energy Development Corporation.

New Martinsville argues that "because the EEPA, as amended in 2004, lacks any mention of RECs, it contains a latent ambiguity, and, as a result, under the facts of this case and the holding of this Court in Energy Development Corp. v. Moss, et al., 214 W.Va. 577, 591 S.E. 2d 135 (2003) the RECs belong to the City." Petition at 21.

New Martinsville is correct that the EEPA does not mention RECs. At the time the EEPA was negotiated and executed by the parties, RECs did not exist. However, New Martinsville is wrong that the failure to include RECs within the term of the EEPA contract or the later creation of RECs create a latent ambiguity in the contract as confronted by the Court in Energy Development Corp. In Energy Development Corp., the Court considered a natural gas lease that allowed Energy Development Corp. to develop gas formations. At the time the lease was entered into, the presence of coal methane gas was known, but not considered commercially developable. During the term of the lease, drilling techniques developed that could extract the coal methane gas for commercial purposes. The latent ambiguity was created by the use of the word "gas" in the lease and whether that conferred upon Energy Development Corporation the right to extract the coal methane gas.

There is no ambiguity in the New Martinsville EEPA. Under the plain terms of the agreement, when electricity is produced, Mon Power, is obligated to purchase and owns the electricity. Unlike the situation in Energy Development Corp. where the surface owner retained a mineral interest not included in the lease, the EEPA results in an unqualified sale of electricity where New Martinsville has not reserved any residual interest in electricity or any attribute of the electricity. The credits come into existence after the electricity has been generated and sold to the utility. Specifically, a credit exists under West Virginia law after a megawatt hour of electricity has been generated by an eligible facility. W. Va. Code §24-2F-4(b)(1).

New Martinsville argues that at the time of the 2004 amendment to the EEPA, Mon Power knew about RECs and New Martinsville did not, therefore, a latent ambiguity exists with respect to the EEPA and that that latent ambiguity should be construed against the utility. That argument fails in several respects. First, the RECs are not like the coal methane gas that existed in Energy Development Corp.. At the time EEPAs were entered into, RECs did not exist, but, at the time the gas lease was entered into in Energy Development Corp., both parties were aware that coal methane existed. New Martinsville has pointed to no provision within the EEPA that creates the latent ambiguity. The EEPA is clear that Monongahela Power is the owner of the electricity produced by New Martinsville. The credits are created after a sufficient amount of electricity has been generated from an eligible facility, and the EEPA does not contain a reservation of interest in that electricity by New Martinsville.

The 2004 amendment had nothing to do with the fundamental provision of the contract, *i.e.*, Monongahela Power obligation to purchase the New Martinsville electrical output and pay for it at avoided cost over the life of the contract. The 2004 amendment was initiated by New Martinsville and its financing partners to amend that the financing provisions that were referenced in the EEPA. The insignificance of the amendment to the underlying purchase obligation is underscored by the fact that the amendment contract was not even submitted to the Commission for approval. Contrary to its contention, New Martinsville did not establish that it was unaware at the time of the 2004 amendments of the issue of RECs or their potential value. To the contrary, New Martinsville solicited the testimony of the City Clerk, Ms. Shannon, who testified that she was unaware of the issue, was not involved in the negotiations and could not speak for others. Hearing transcript, August 25, 2011 at 168-169.

New Martinsville's further argument, that its letter in 2007 to Mon Power supports it position that it was unaware of RECs is not credible. Petition at 24. That letter asked Mon Power to explain the significance of the certification of the Hannibal project (a sister project) in Delaware and other states to both the City and Monongahela Power. If New Martinsville really wanted the answer to that question, why would it not have directed its inquiry directly to the Hannibal project in Delaware? The most logical explanation is that New Martinsville already knew the answer to its own question and was fully aware of the potential value of RECs. There is no basis upon which to determine that if a latent ambiguity existed, it should be construed against a "more knowledgeable" utility, but this Court does not need to make that decision because the EEPA simply has no latent ambiguity.

3. The Commission failed to balance the interest of New Martinsville as a producer and utility subject to the requirements of the Portfolio Act with the interest of Monongahela Power.

This argument is fallacious. The order contains considerable analysis of this issue. New Martinsville both generates electricity from Hannibal that is sold to Monongahela Power and purchases electricity for its utility customers from sources that can qualify for credits to satisfy New Martinsville portfolio requirements. There is no additional financial impact on New Martinsville through 2025 because of its existing purchased power agreements. In fact, the Order finds that New Martinsville will have sufficient credits until 2034. Order, finding of fact 36. On the other hand, in the absence of PURPA credits from New Martinsville, Grant Town and Morgantown, the impact on Mon Power ratepayers of replacing credits would be a minimum of $50 million based on a conservative estimate of credit values of $5.14 or as much as $144.6 million if credits are valued at $15.00. Order at 32-34.

New Martinsville attempts to compare the $50 million to Mon Power's customers that would, in the absence of the PURPA RECs, be required to purchase from 2020 to 2025 (a 6 year period) to the cumulative value of the RECs generated by the Hannibal facility from 2011 to 2025 (a 15 year period). Petition at 27-28. New Martinsville uses this comparison to assert that its generation "accounts for more than 70% of the Companies' entire need." This is simply an improper and unbalanced comparison that signifies nothing and overstates what New Martinsville is representing as its contribution to Mon Power's needs.

New Martinsville also argues that the Commission erred by ignoring the fact that "the Grant Town project has already given its credits to the Companies" and that the value of those credits exceed $49 million. There is a critical error in this argument. The Grant Town credits were "given" to Mon Power, subject to the qualification that if the Commission determined that a PURPA project similar to Grant Town owned the credits attributable to its generation, Grant Town would own the credits, not Mon Power. In other words, if New Martinsville prevails in its appeal, then the Grant Town credits are likely lost and may have to be replaced.

New Martinsville asserts that it was unreasonable for the Commission to base its decision on the established fact that without the credits, New Martinsville will have enough credits to comply with the Act through 2025. New Martinsville in essence argues that the Commission should disregard the record. The City states that if the Commission awarded the credits to New Martinsville, New Martinsville's customers would "equally benefit from the award of credits through a credit to the cost of power purchased by the City for its customers." This is not necessarily correct at all. As a municipal electric utility, the Commission has limited jurisdiction of the rates of New Martinsville. W. Va. Code §24-2-4b. Furthermore, the credits would belong to the City, not the utility operations of the City. The City might decide to use the proceeds from hypothetical credit sales for other municipal purposes. In contrast, the Commission has complete and continuing jurisdiction over the rates and charges of Monongahela Power. The value of the credits, whether retired for purposes of complying with the Act or otherwise sold, will be flowed through dollar for dollar, to the benefit of West Virginia ratepayers.

The City concludes this assignment of error with the suggestion that it would be reasonable to share the credits 50/50 between the City and the Utilities. The Commission rejected this offer in the Order because it determined that Utilities owned the credits for the benefit of their West Virginia customers. Having made that determination, the Commission determined that it could not turn around and divert half of those credits to New Martinsville. Nevertheless, if the Court is tempted by the "offer," the Commission urges the Court to consider that if gets there by declaring that New Martinsville is the owner of the credits, as previously mentioned, the Grant Town credits are likely unavailable to the Utilities.

4. Commission erred by departing from its ruling that producers of electricity were eligible for the award of RECs.

The City, like Morgantown, argues that the Commission rulemaking and its adoption of Rule 5.6 has already determined that PURPA generators are entitled to the credits. The City cites this Court's decision in Consumer Advocate Div. v. Public Service Commission, 182 W.Va. 152, 385 S.E.2d 650 (1989) for the proposition that the Commission cannot interpret its rules. In the Consumer Advocate case, the rule in question was a specific method of calculating the percentage of unaccounted for gas that could be allowed in the calculation of the purchased gas costs of Hope Gas, Inc. This Court found the rule to be clear and unambiguous and remanded the case to the Commission when it allowed Hope an alternative method of calculating unaccounted for gas, by including transportation gas, than that prescribed by the rule. Because the Commission rules contained a waiver provision upon a showing of hardship, similar to Rule

1.5.a. promulgated under the Portfolio Act, the Court remanded the case to the Commission to determine whether Hope would experience a hardship in the absence of a waiver of the percentage of unaccounted gas. Consumer Advocate, *supra*, 385 S.E.2d at 655.

The City, however, admits in its Petition that the Commission's rules do not address the issue of the ownership of credits under contracts entered into prior to the Act, or EEPAs that predate the Act. Petition at 12 and 31. Moreover, the legislative rule has been raised in a contested administrative proceeding in the context of specific factual matters that were not present in the rulemaking. The Rule provides as follows:

> An electric utility may meet the alternative and renewable energy Portfolio Standard requirements set forth in this rule by purchasing additional credits awarded pursuant to Rule 5.2. 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 include in, or bundled with, the purchase of power. Credits may also be purchased independently, or unbundled from, purchased power.

150 C.S.R. 34, Rule 5.6.

The rule does not mention PURPA facilities involving EEPAs that predate the Act. The rule does not attempt to establish ownership of the credits with either the project or the utility, or, for that matter, does not dictate whether credits in a particular transaction are bundled or unbundled. The Commission contemplated that the parties to purchase contracts would address the ownership of credits and whether they are bundled or unbundled from purchased power. In the present case, the PURPA EEPAs were executed at a time, 1980s, which were intended to comply with the intentions and policies of Congress when it enacted PURPA. There is no mention of credits because the concept of credits did not exist. Moreover, the PURPA projects retain no future interest in the environmental attributes of the electricity sold to Mon Power.

The legislative rule was promulgated pursuant to specific provisions in the Portfolio Act which allowed the Commission to consider including, by rule, non-utility generators in a credit trading program. W. Va. Code §§24-2F-10(b) and 24-2F-12. The Act does not reference PURPA projects that predate the Portfolio Act. Furthermore, the comments that were submitted in the Commission rulemaking, which led to the formulation of the rule, did not mention PURPA projects that existed prior to the Portfolio Act. See, Comments of American Municipal Power, Inc., the City of New Martinsville and City of Philippi, August 30, 2012 and September 15, 2010, PSC General Order No. 184.25.

The Commission explained that the rule did not apply to the PURPA EPPAs for several reasons.

> The Commission finds that the unbundling provision in Rule 5.6, however, does not govern this case. The Rules cannot reasonably be applied retroactively to these PURPA EEPAs and were intended to apply prospectively to agreements for the purchase of electricity entered into after January 4, 2011, the effective date of the Rules. The Rules and the determination under W.Va. Code § 24-2F-10(b) that the non-utility generator may be awarded credits, unbundled from the energy generated, for qualified generation does not apply to the factual circumstances of this case involving PURPA facilities and EEPAs predating the Rules. The rulemaking proceeding in General Order No. 184.25 did not address PURPA EEPAs executed prior to the Act, and the unbundling provision of the Rules was not intended to apply to these preexisting agreements.
>
> The optional unbundling provision set forth in Rule 5.6 also does not apply to the PURPA EEPAs because these contracts that are based on the avoided cost rate do not include the unbundled aspect of the rule. PURPA requires that utilities purchase power generated from qualified PURPA facilities. Among other things, PURPA contracts were developed to enable an up or down decision on financing and construction of the projects based upon the financial expectation of receiving a guaranteed future revenue stream in the form of payments based on the utility avoided capacity and energy costs and allowable financing terms that would facilitate debt and equity financing. When the contracts were negotiated and approved by the Commission, the retention of the credits by the PURPA facility was not, and is obviously not now, necessary to encourage and facilitate the construction of these alternative energy facilities. The PURPA facilities received what they bargained for, and all that they were entitled to, when agreements were finalized setting forth the avoided cost rates and terms that

> would apply to the final EEPAs. This allowed the PURPA facilities to monetize the long-term future cash flows, which were protected by PURPA and our retail rate orders, to finance the PURPA facilities.
>
> By the very nature of the PURPA EEPAs, no additional consideration is contemplated or needed other than the substantial consideration that the projects received and that is not usually available to merchant power generators. This substantial consideration included a guaranteed fixed avoided capacity cost rate, a guaranteed avoided energy cost rate that would increase as the variable alternative energy costs of the purchasing utility increased, a guarantee that captive ratepayers would be obligated to pay retail rates over the life of the EEPAs to cover the agreed-to EEPA rates, a guaranteed market for the power through the utility to which the projects were directly connected, and last, but not by any means least, the favorable contract terms that allowed extended long-term financing and to some extent, up-front cash flow in the early years of the EEPAs that was in excess of the utility's then current avoided costs.

Order at 28.

As stated in the order, the rule did not intend to apply to PURPA contracts. The Act does not speak to ownership of PURPA credits associated with projects constructed before the Act. It would be contrary to the Act for the rule to apply to PURPA projects for several reasons. The construction of PURPA projects was encouraged by Congress though the passage of PURPA which guaranteed, as previously discussed, a buyer, in this case Mon Power, and the payment of the utility's avoided cost rate, which could not be altered. RECs were created much later by state legislation in conjunction with RPS statutes. These credits were never intended to provide financial incentive to existing projects which had already struck its deal with the utility under the PURPA policies. Because the PURPA projects have already been constructed and have been operating for years before the Portfolio Act was passed, it does not further the Legislature's desire to encourage the development of new alternative energy generation. The application of the rule to PURPA projects would also impose unreasonable costs upon Mon Power ratepayers to be forced to pay for additional credits when they have already paid and will continue to pay for generation that qualifies under the Act.

The Commission made a reasoned and rational determination that Rule 5.6 does not apply to the PURPA EEPAs.

In its concluding arguments, New Martinsville complains that "equity should not be an issue in this case." Petition at page 34. This statement is ironic given that New Martinsville advances numerous equitable arguments while erroneously alleging that the Commission did not rely upon state law in making its decision. New Martinsville would this Court ignore plain instruction of the Legislature in the Portfolio Act that the Commission is to ensure that the utility and its ratepayers incur reasonable compliance costs; its statutory obligation and authority to ensure that consumers pay reasonable utility rates; and its duty to consider in its deliberations and decisions the balancing of interest between utilities, ratepayers, and the state's economy. W. Va. Code §§24-2F-6(e), 24-2F-7(a) and 24-1-1.

CONCLUSION

In conclusion, the Commission would invite the Court's attention to the concluding statement of the Commonwealth Court of Pennsylvania in upholding the Pennsylvania PUC decision that credits associated with PURPA contracts belonged to the purchasing Pennsylvania utility. The Court stated:

> As the Commission points out, the purposed of AEPS is to encourage the creation and use of energy from alternative sources, and the fact that the credits are a tradable commodity is a secondary effect of the statutory scheme to effectuate that goal. Where, as here, the distribution company has already purchased energy from an alternative energy supplier (albeit under a pre-2005 agreement that made no provision for alternative energy credits), the underlying purpose of AEPS has been satisfied. Nonetheless, if the credits attributable to that power belong to the generating company, the distribution company will have to purchase credits separately and pass that additional charge along to the consuming public. Thus the Commission concluded that the public interest favored awarding ownership rights in the credits to the distribution company. Moreover, the contracts themselves are entirely silent on the issue of these rights, and any attempt to determine the parties' intent or how they might have structured the contract if they had anticipated the future creation of saleable credits is

> speculative at best. Thus, as there is no controlling statutory language in the applicable version of AEPS, no controlling precedent, and not guiding language in the contracts themselves, this court accepts the Commission's persuasive interpretation and reasoning in concluding that electric distribution companies own the credits under the circumstances presented here.

ARRIPA, *supra*, 966A.2d at 1214.

For the reasons stated in this statement of reasons as well as the Commission's final order, the Commission respectfully requests that the Court either reject this appeal or affirm the Commission Order.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

I, Richard E. Hitt, General Counsel for the Public Service Commission of West Virginia, do hereby certify that copies of the foregoing Statement of Reasons has been served upon the following counsel of record via First Class United States Mail Postage Prepaid on this 13th day of February, 2012:

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