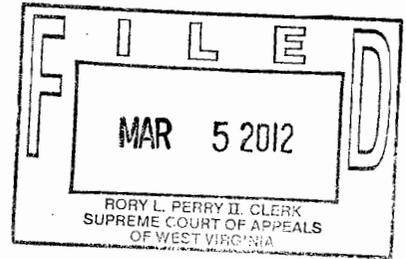


# ARGUMENT DOCKET



**In the Supreme Court of Appeals of West Virginia**

**Docket No. 11-1739**

**MORGANTOWN ENERGY ASSOCIATES,**

*Petitioner,*

v.

**THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA,**

*Respondent.*

Appeal from a final order of the  
Public Service Commission  
of West Virginia,

Case No. 11-0249-E-P (Nov. 22, 2011)

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**PETITIONER'S REPLY BRIEF**

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## STATEMENT OF THE CASE

This is the reply brief in an appeal from an order of the West Virginia Public Service Commission (the “PSC”) that purports to take Morgantown Energy Associates’ (“MEA’s”) “renewable energy credits” or “alternative energy credits” (“RECs”) and give them to Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (collectively, the “Utilities”) in violation of federal and state law. In its Petition, MEA made and supported five assignments of legal error that are summarized as follows:

1. The PSC has no legal basis to conclude that MEA’s facility ever generated a REC that is recognized by West Virginia law (a West Virginia REC or “WV-REC”). WV-RECs could not have existed before January 4, 2011, because January 4, 2011 is the effective date of the PSC’s Portfolio Standard Rules<sup>1</sup> implementing the West Virginia Alternative and Renewable Energy Portfolio Act (the “WV-AREPA”). The PSC also has no authority over any REC related to MEA’s generation of electricity after January 4, 2011, because MEA has not applied under West Virginia law to become qualified to generate WV-RECs.
2. The PSC has no legal authority to force MEA to certify its facility under West Virginia law or to otherwise “deem” MEA’s facility as certified.
3. The PSC has no legal basis to ignore its own Portfolio Standard Rules and conclude that a non-utility generator (“NUG”) selling its electricity via a PURPA contract cannot own RECs created by the generation of that electricity, and, instead, that the utility under a PURPA contract automatically owns the RECs.
4. The PSC violates controlling federal law and state contract law to find that PURPA contracts convey RECs without additional compensation to the QFs/NUGs.
5. The PSC effected an unconstitutional taking of MEA’s property without just compensation when it ordered the Utilities to “secure” MEA’s Pennsylvania RECs (and, to the extent there are any, WV-RECs).

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<sup>1</sup> Unless defined again for clarity, terms have the same meaning as defined in MEA’s Petition.

As discussed further below, nothing in the PSC's Statement of Reasons or in the Utilities' Respondents' Brief shows that MEA's arguments are incorrect or provides any legally supportable basis to uphold the PSC's Order.

## **ARGUMENT**

The questions presented in this appeal are purely legal ones and are subject to *de novo* review. Any deference due to the PSC in other cases where its order was based on findings of fact is inapplicable here. (*See* MEA Pet'n at 13-14.) In this case, the PSC and all parties agree on the pertinent facts (namely, that the EEPAs are silent as to RECs and that PURPA qualifying facilities ("QFs") are non-utility generators with PURPA contracts). Neither the PSC nor the Utilities identify any pertinent disputed fact that required PSC expertise to resolve, so there is no reason to afford the PSC any deference.<sup>2</sup>

### **I. Nothing Excepts PURPA Qualifying Facilities from the PSC's Rules Awarding RECs to All Non-Utility Generators.**

#### **A. The PSC's Portfolio Standards Rules apply to *all* non-utility generators, including PURPA qualifying facilities.**

Exercising its statutory grant of authority, the PSC determined in its Portfolio Standards Rulemaking (*i.e.*, the rulemaking that resulted in the Portfolio Standards Rules) that "the final rules extend the awarding of credits for the generation of electricity from alternative and renewable energy resources under [W. VA. CODE § 24-2F-4] to nonutility generators." (MEA Pet'n at 21 (citation omitted).) The PSC's Portfolio Standards Rules apply to *all* non-

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<sup>2</sup> Furthermore, the Utilities' citation to a secondary source for the proposition that, absent a legal error, a regulatory agency's interpretation of its own rules is entitled to great deference (Utils.' Br. at 13-14), is inapposite. First, the PSC's Order contains multiple legal errors. Second, West Virginia law states that the PSC has no authority to "interpret" its rules that are unambiguous, as are the rules at issue in this case. *See Consumer Advocate Div. v. Pub. Serv. Comm'n*, 182 W. Va. 152, 156, 385 S.E.2d 650, 654 (1989).

utility generators or NUGs.<sup>3</sup> The three West Virginia PURPA QFs, including MEA, indisputably are NUGs. QFs are simply NUGs that have qualified their facilities under the separate federal law of PURPA.<sup>4</sup> Nothing about QFs being a type of NUG makes the Portfolio Standards Rules ambiguous or justifies the PSC “interpreting” them.<sup>5</sup>

The PSC Order recognizes that *all* NUGs, upon certification, can generate and own WV-RECs:

By its November 5, 2010 Order in General Order No. 184.25, issuing the final Portfolio Standard Rules, the Commission extended the awarding of credits representing the generation of electricity from alternative and renewable energy resources to nonutility generators . . . .<sup>6</sup>

(PSC Order at 17.) The Utilities, too, are clear on the consequences of the Portfolio Order early in their brief (before then making arguments that contradict their earlier clarity):

Each of the QFs—the City, MEA, and [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.

(Utils.’ Br. at 2 (citation omitted).<sup>7</sup>)

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<sup>3</sup> A NUG is an electricity generator that does not meet the definition of “utility,” principally because it does not sell electricity to retail customers but, rather, sells its electricity wholesale.

<sup>4</sup> While the fact that MEA is a co-generation facility allowed it to be qualified under PURPA and would allow it to be certified under the West Virginia Portfolio Standards Rules—if MEA voluntarily applied for certification in West Virginia—being a PURPA QF is legally distinct from being a certified facility under West Virginia law.

<sup>5</sup> Syl. pt. 1, *Consumer Advocate Div., supra*, (“A statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”).

<sup>6</sup> This is precisely the type of state determination of REC ownership “in the initial instance” that FERC stated in its *American Ref-Fuel* decision should occur. See *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, 22-23 (2003); *Am. Ref-Fuel Co.*, 107 FERC ¶ 61,016, 15 (2004).

<sup>7</sup> After making this clear statement on page 2, the Utilities then spend the next 41 pages of their brief trying to explain why the statement is inaccurate.

The following syllogism succinctly illustrates that the PSC's Portfolio Standards

Rules apply to QFs, including MEA, because a QF is one type of NUG:

All NUGs, once certified under West Virginia law, shall be awarded WV-RECs.

All QFs at issue (MEA, the City, and AmBit) are NUGs.

Therefore, all QFs, once certified, shall be awarded WV-RECs.<sup>8</sup>

The PSC, then, has no legal basis to state that its Portfolio Standards Rules, applicable to all NUGs, do not now apply to a certain type of NUG—that is, QFs.<sup>9</sup>

The PSC's Portfolio Standards Rules cannot apply variously to different NUGs depending on the contractual arrangement between any particular NUG and a utility. Nothing in those Rules carves out any exception for NUGs with PURPA contracts or NUGs with contracts entered before January 4, 2011.<sup>10</sup> (See MEA Pet'n at 23.) And nothing that the PSC says about

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<sup>8</sup> Because of the irrefutable logic of this syllogism, MEA was correct to substitute "QF" for "NUG" in the interest of clarity in its Petition. (See MEA Pet'n at 7 n.33.)

<sup>9</sup> (But see PSC Order at 28 ("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."); PSC Statement at 12 (asserting, incorrectly, that its rules applicable to NUGs do not apply to the sub-group of NUGs that are QFs because the rules do not also mention PURPA or QFs).)

<sup>10</sup> "Statutes [and, necessarily, legislative rules] are presumed to have only prospective application." *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 649, 434 S.E.2d 7, 10 (1993) (citation omitted); see also syl. pt. 1, *id.* ("A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute.") (citations omitted). So, WV-RECs never existed before January 4, 2011. (See MEA Pet'n at 14.) But, the generation of WV-RECs by any particular facility—whether a NUG's facility or a utility's facility—has absolutely nothing to do with whether the generating facility has a contract that was entered before January 4, 2011.

Furthermore, absent from any briefing in support of the PSC Order is an explanation of how the Portfolio Standard Rules are to apply to a non-QF NUG that has a pre-January 4, 2011 contract with a utility. The PSC's rationale in the PSC Order is entirely dependent upon a NUG having a PURPA contract with a utility. The PSC's rationale falls apart if the NUG-utility contract is not a PURPA contract. If such a non-PURPA contract were entered by a non-QF NUG before January 4, 2011, however, the PSC, to remain consistent, would have to find that its Portfolio Standards Rules do not apply to that contract, either. How this gap can legally exist, though, is unexplained by the PSC.

its or the Rules' "intent" (*see* PSC Statement at 12, 34-37) changes the unambiguous directive of the Rules that *all* NUGs, once certified, "shall be awarded" RECs.<sup>11</sup>

**B. The PSC's Portfolio Standards Rulemaking was the forum to address the consequences of awarding WV-RECs to *all* NUGs.**

Both the PSC and the Utilities argue that the particular factual circumstance of NUGs with PURPA contracts was not considered in the Portfolio Standards Rulemaking. (*See* PSC Statement at 34; Utils.' Br. at 14-21.) Their argument, however, is unavailing. The Portfolio Standards Rulemaking specifically considered whether any and all NUGs could be awarded WV-RECs.<sup>12</sup> The PSC necessarily applied its expertise in the Rulemaking and necessarily understood that existing NUGs would have contracts that were entered before the WV-AREPA and the Portfolio Standards Rulemaking. The PSC, having approved the PURPA contracts for all three West Virginia QFs, certainly was aware of those particular contracts entered by NUGs. Furthermore, the issue of ownership of RECs generated by NUGs that have PURPA contracts had been joined in other states at the time of the Portfolio Standards Rulemaking in 2010.<sup>13</sup> Thus, the PSC must be deemed to have been aware of the issue. If it was not, that is not the fault of any interested party.<sup>14</sup>

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<sup>11</sup> W. VA. CODE ST. R. § 150-34-5.2.

<sup>12</sup> In the Portfolio Standards Rulemaking, the PSC clearly understood the significance of awarding WV-RECs to NUGs in the initial instance when it determined that it would *not* award other types of credits (*i.e.*, credits for greenhouse gas emission reduction or offset projects and energy efficiency and demand side energy initiative projects) to NUGs, but rather only to utilities. *See* Portfolio Order at 5.

<sup>13</sup> The material distinction between how the issue was joined in West Virginia compared to other states such as Pennsylvania, New Jersey, and Connecticut is that in West Virginia, the PSC determined by rulemaking whether NUGs could be awarded RECs in the initial instance. In the other three states, the legislatures had not conclusively determined whether NUGs could be awarded RECs, and the state agencies had not made the determination by rulemaking. In other words, none of the states had, at the time, any statute or rule that specified REC ownership. Indeed, the RECs at issue in Connecticut were the creation not of a state legislature or agency, but the New England Power Pool. Thus, the states' statutory and regulatory laws on RECs were, at best, ambiguous. In West Virginia, however, the PSC promulgated an unambiguous rule that all NUGs, once certified, shall be awarded WV-RECs, and the PSC specified by

The PSC and the Utilities have no basis to say that the PSC can be blind to the effects of its determination of REC ownership by all (certified) NUGs in the initial instance. The PSC cannot promulgate an unambiguous rule and then seek to introduce ambiguity by claiming that it failed to consider the consequences of its rulemaking decision. Post-rulemaking hypotheses about what was or was not considered in promulgating unambiguous rules are no basis for allowing the PSC to depart from those rules. (See MEA Pet'n at 22 & n.70 (citing case law holding that an agency must follow all parts of its own rules).)

Once the Portfolio Standards Rulemaking was complete, the issue of WV-REC ownership by all NUGs had been decided. There remained no "PURPA Credit Ownership Question" in West Virginia, as the Utilities incorrectly contend. (Utils.' Br. *passim*.) A WV-REC is a creature of West Virginia statute. No West Virginia law, however, recognizes such a thing as a "PURPA Credit." Thus, the PSC has no authority to determine the ownership of a "PURPA Credit."<sup>15</sup> Again, the PSC determined the ownership of a WV-REC by rulemaking pursuant to statutory authority, but neither the PSC nor the Utilities has identified any statutory or other legal authority for the PSC to determine the ownership of a "PURPA Credit."<sup>16</sup>

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rule that WV-RECs could be unbundled from the associated electricity (*i.e.*, that WV-RECs were *not* inseparable from electricity).

<sup>14</sup> The Utilities are off-base to accuse NUGs that participated in the rulemaking as somehow being less than completely forthright with the PSC. (See Utils.' Br. at 16-17 n.14.) Because there is no such thing as a "PURPA Credit," no one could be faulted for not raising the non-existent "PURPA Credit Ownership Question."

<sup>15</sup> Because no such thing as a "PURPA Credit" legally exists and the PSC, thus, could have no authority over them, the Utilities' entire Respondents' Brief—rife with references to "PURPA Credits" and the "PURPA Credit Ownership Question"—fails to have any logical or legal coherence.

<sup>16</sup> While the PSC is correct that MEA has not challenged its overall subject matter jurisdiction (PSC Statement at 14), MEA consistently has stated that the PSC, having promulgated its Portfolio Standards Rules, is without *legal authority* to separately award ownership of WV-RECs to utilities purchasing electricity from NUGs that are PURPA QFs. MEA never has contended the PSC's Portfolio Standards Rulemaking could not have gone the other way—that is, resulted in a determination that NUGs are not awarded WV-RECs. That, however, is not what the PSC concluded. Thus, the Portfolio Standards Rulemaking already answered the question posed by the Utilities—in its simplest form: Is a NUG, once

## II. The PSC's Order Impermissibly Contravenes Controlling Federal Law by Transferring WV-RECs without Consideration to NUGs.

The PSC attempts to explain that it did not transfer RECs in contravention of controlling federal law by stating that “[t]he Commission determined that the [QFs] never owned the credits[;] instead the Utilities own the credits by virtue of their purchase of the electricity.”<sup>17</sup> That explanation of ownership “by virtue of their purchase of electricity” actually confirms that the PSC Order effectuates a transfer of RECs. The statement is yet another example of the PSC’s conclusion that the Utilities own RECs *because* of their PURPA contracts with the QFs.<sup>18, 19</sup> The PSC cannot award RECs “*by virtue of*” PURPA contracts without *transferring*

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certified, entitled to WV-RECs? As such, the PSC had no legal authority in the underlying proceeding, initiated by the Utilities, to change its Rules.

<sup>17</sup> (PSC Statement at 11-12; *see also* Utils.’ Br. at 27 (erroneously asserting that the PSC’s consideration of the EEPAs was not contract interpretation because “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”).)

<sup>18</sup> (*See also, e.g.*, PSC Statement at 9 (“Because of PURPA, Mon Power is obligated to purchase [the QFs’] power.”); *id.* at 13 (“Mon Power and its ratepayers have been, and will continue to be obligated to purchase all of [MEA’s] power for years because of this PURPA project”); *see also* MEA Pet’n at 20 n.68 (providing multiple citations to language in the PSC Order illustrating the PSC’s theory that it necessarily assumed MEA owned the RECs at their inception but that the EEPA conveyed those RECs to the Utilities).)

Even the contract analysis that the PSC attempts—claiming that the QFs have received the full benefit of their PURPA contract bargain—is misguided. (*See, e.g.*, PSC Statement at 9 (“The PURPA projects have received the consideration for which they originally bargained.”).) The PSC’s focus on only one party to a bilateral contract is incorrect. As the PSC recognizes, Mon Power’s purchase price for MEA’s electricity—and only MEA’s electricity—was “negotiated.” (*Id.* at 4.) Mon Power, then, has also received the full benefit of the bargain it negotiated by obtaining only MEA’s electricity. That both parties to a bilateral contract continue to receive the benefits of their bargains says nothing about REC ownership.

Equally misguided is the PSC’s rationale that the Utilities should get RECs because the QFs’ facilities are already constructed, when one of the Portfolio Act’s purposes is to stimulate construction of new facilities. (*See, e.g.*, PSC Statement at 2.) Regardless of the mechanism by which a utility obtains RECs from a QF, the RECs are generated by a constructed facility. The rationale could be said to argue *against* the Utilities getting the QFs’ RECs if the primary goal is to build new facilities. Needing additional RECs for compliance provides the Utilities with an incentive to build new alternative or renewable fuel facilities.

those RECs pursuant to those contracts, which necessarily means that the PSC interpreted and altered the contracts.

The PSC incorrectly bases Mon Power's ownership of MEA's RECs on Mon Power's purchase of all of MEA's electricity.<sup>20</sup> That reasoning is faulty, because RECs are property interests that are separate from the generation of electricity by which they are measured.<sup>21</sup> The actual energy and capacity purchased under an EEPA—the sole commodities transferred by the contract—are indistinguishable from energy and capacity created by a coal-fired power plant, which clearly cannot generate RECs.<sup>22</sup> Thus, the PSC is incorrect to focus on a REC being created at the moment of electricity generation.<sup>23</sup> The time of creation is immaterial. If something additional is created along with electricity—however intangible—it

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<sup>19</sup> As MEA observed in its Petition, even though MEA's EEPA is with Mon Power only, the PSC gave MEA's RECs to both Mon Power and its sister utility, The Potomac Edison Company ("PE"), without attempting to distinguish Mon Power from PE. Thus, the PSC erroneously and unlawfully gave MEA's RECs to PE as well, even though PE has no contract with MEA. (MEA Pet'n at 5 n.19.)

<sup>20</sup> (See, e.g., PSC Statement at 2 ("[T]he 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."); *id.* at 9 ("The PURPA projects have received the consideration for which they originally bargained."); *id.* at 15 ("The Commission has determined that the utility, which is obligated to purchase [the QFs'] 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."))

<sup>21</sup> (See, e.g., PSC Statement at 6 (recognizing that W. VA. CODE § 24-2f-3(4) defines a WV-REC as a "tradable instrument"); *id.* at 7 (recognizing that "West Virginia and other states created a system of tradable credits"); *id.* at 25 (recognizing that RECs are an independently valuable commodity "associated with the power produced by [QFs]"); Utils.' Br. at 9 (recognizing that to acquire a QFs' RECs Mon Power would pay for electricity under its PURPA contract and separately for the RECs); MEA Pet'n at 24 n.72.)

<sup>22</sup> The energy and capacity purchased from PURPA QFs also is indistinguishable from the energy and capacity created by a non-QF NUG. The PSC, however, fails to explain how its Portfolio Standards Rules would apply to a non-QF NUG selling electricity to a West Virginia utility. For the PSC's reasoning that RECs are created at the moment of generation to be valid, the reasoning must apply to a non-QF NUG's generation, too. But then, a non-QF NUG's RECs would be automatically owned by the purchasing utility in contravention of the PSC's Portfolio Standards Rules that award RECs to NUGs and provide that RECs may be unbundled from electricity. In short, the PSC has failed to show how the reasoning of the PSC Order would apply to non-QF NUGs, as the PSC's reasoning must in order to be valid.

<sup>23</sup> (See PSC Order at 36; PSC Statement at 18.)

remains separate from the electricity regardless of the timing of its creation. The PSC is not free to ignore the separateness of RECs.

Federal law is clear that avoided cost PURPA rates convey no consideration for RECs.<sup>24</sup> Controlling federal law requires that the consideration in an EEPA—regardless of how favorable to QFs the PSC wants to characterize that consideration—is not consideration for RECs. Accordingly, the PSC unlawfully conveyed RECs for no consideration.<sup>25</sup> The PSC adds nothing by asserting that it “is not modifying the existing PURPA Agreements or exercising utility type jurisdiction over MEA; [it is] determining the ownership of credits in light of state law.”<sup>26</sup> The PSC cannot escape that its application of state law necessarily requires it to apply controlling federal law.

### **III. The PSC Cannot Force MEA to be a Certified Facility in West Virginia.**

The PSC has no legitimate response to MEA’s observation that “deeming” MEA to be certified directly contradicts the PSC’s own Portfolio Standards Rules, which establish certification as a voluntary process initiated at the option of a NUG. (*See* MEA Pet’n at 17-18.)

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<sup>24</sup> (*See* MEA Pet’n at 25-26.) MEA has filed a petition with FERC for an order enforcing the FERC’s regulations under PURPA. MEA provided its FERC petition to the Court as an attachment to its Motion to Continue Oral Argument.

<sup>25</sup> Contrary to the PSC’s mischaracterization, *American Ref-Fuel* did not create an “exception” to FERC’s exclusive jurisdiction. *See* PSC Order at 13 (“FERC recognized a second exception to its exclusive jurisdiction over the PURPA contracts in [*American Ref-Fuel*] and declared that the issue of credit ownership under PURPA contracts was a matter to be decided by the states based on state law.”); PSC Statement at 8, 26 (same). Rather, in *American Ref-Fuel*, FERC stated that *as a matter of federal law* a utility’s “avoided costs” (the amount that the utility is paying the QF for electricity) do *not* include any of the environmental attributes of the generation of power, including RECs. Thus, said FERC, a state may apply its own contract law about whether EEPAs that are silent as to RECs (*e.g.*, pre-RPS EEPAs or “PURPA contracts” as the PSC refers to them) convey RECs, but in doing so the state *must* recognize this federally required legal rule, and it must do so *in accordance* with the rest of PURPA. Accordingly, it is not entirely correct for the PSC to state that PURPA does not govern who owns RECs and that only state law does. MEA never has contended that PURPA *completely* pre-empts state authority to determine ownership of RECs. Rather, a state cannot legally ignore controlling federal law in applying state law.

<sup>26</sup> (PSC Order at 37.)

Rule 4.1 refers to application for certification by “an electricity generator or project *seeking entitlement to credits*,” and Rule 4.2 specifies the “types of facilities [that] *may apply* to be a qualified energy resource.”<sup>27</sup> Thus, the PSC has no basis to assert that “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.”<sup>28</sup> That statement is so divorced from the language of Rule 4.1 and is so circular and conclusory that it is inscrutable.<sup>29</sup> The fact remains that the *only* route to certification under the PSC’s Portfolio Standards Rules is discretionary application by a NUG (or by a utility, as the Utilities are aware<sup>30</sup>). The PSC has identified no rule that provides an alternate route to certification, as there is none.

It bears repeating that under § 210(e) of PURPA, QFs are exempt from state laws and regulations with respect to the rates or the financial or organizational regulation of electric utilities.<sup>31</sup> PURPA does not allow the PSC, directly or indirectly, to make management decisions for a QF, like MEA, on whether to file with the PSC under the Portfolio Standards Rules to certify MEA’s facility to be a “qualifying energy resource.” For the PSC to “deem” MEA so

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<sup>27</sup> W. VA. CODE ST. R. § 150-34-4.1 to -4.2.c (emphasis added).

<sup>28</sup> (PSC Statement at 16.)

<sup>29</sup> Equally inscrutable is the Utilities’ argument that MEA’s current decision to not seek certification in West Virginia somehow determines the REC ownership issue. (*See* Utils.’ Br. at 18 (contending that because Rule 5.2 is conditional on certification under Rule 4.2, “the Commission cannot be said to have made an affirmative, irrevocable award of Credits to MEA or any other NUG”).) Rule 5.2 states plainly that *once* a facility is certified pursuant to Rule 4.2a or 4.2.c, *then* it “shall be awarded [WV-RECs].” The PSC, then, *did say* in Rule 5.2 that once a NUG becomes certified, it automatically is entitled to the WV-RECs it generates.

<sup>30</sup> The Utilities argue in this matter that they are entitled to not only the WV-RECs MEA generates after its facility is deemed certified, they are entitled to *all* MEA’s RECs, necessarily including WV-RECs, generated by MEA’s facility before certification in West Virginia and even before enactment of the Portfolio Standards Rules. (*See, e.g.*, Utils.’ Br. at 36-38.) The Utilities, however, have applied for certification of their own facilities (*e.g.*, the Bath County, Virginia, pumped storage hydropower facility), and nowhere in those applications or the Utilities’ compliance plan do the Utilities contend that they are entitled to pre-certification WV-RECs from their own facilities. The Utilities, then, at least understand the incorrectness of the PSC Order.

<sup>31</sup> 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c). (*See* PSC Order at 12.)

certified violates not only its own rules, as described immediately above, but also the PURPA exemptions by exercising prohibited utility-type regulation over MEA. Furthermore, the PSC cannot do indirectly what it cannot do directly—that is, it cannot direct one of its regulated utilities, Mon Power, to file on MEA’s behalf to certify the MEA facility.<sup>32</sup> If the PURPA exemption prohibits the PSC from exercising utility-type regulation over MEA, the PSC cannot ask one of its regulated utilities to do it instead.

#### **IV. The PSC Has Absolutely No Authority Respecting MEA’s Pennsylvania RECs And So Effected an Unconstitutional Taking.**

Under *Pennsylvania* law, Pa-RECs are the generator’s intangible personal property.<sup>33</sup> Even the PSC recognizes that MEA’s facility “is certified under Pennsylvania law.”<sup>34</sup> Thus, the PSC has identified absolutely no legal basis for it to divest MEA of MEA’s Pa-RECs. It is irrelevant that Pennsylvania law “is very similar to West Virginia law.”<sup>35</sup> Pennsylvania’s law is the law of another state, and the West Virginia PSC has no legal authority over Pennsylvania’s system of RECs. The PSC has authority to “establish a system of tradable credits” only in *West Virginia*.<sup>36</sup> It also is irrelevant that under the Pennsylvania *ARIPPA* decision, “if [MEA] were selling its power to a Pennsylvania utility . . . it would not own the credits it now claims it owns.”<sup>37</sup> MEA does not sell electricity to a Pennsylvania utility, so there

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<sup>32</sup> Again, it is irrelevant that MEA has sought relief from the PSC with respect to a regulated utility. (See PSC Statement at 16 (“[MEA] is not an entity or generator unknown to the [PSC].”)) MEA is entitled to ask the PSC to regulate an entity over which it has authority without MEA, itself, becoming such a regulated entity. (MEA Pet’n at 9 n.45.)

<sup>33</sup> (See MEA Pet’n at 32-33.)

<sup>34</sup> (PSC Statement at 5.)

<sup>35</sup> (*Id.*; see also *id.* at 22.)

<sup>36</sup> W. VA. CODE § 24-2F-4(a).

<sup>37</sup> (PSC Statement at 13; see also *id.* at 21-22.) Furthermore, the PSC provides no support for the misleading statement that MEA’s sale of Pa-RECs “does not establish ownership.” (*Id.* at 22-23.) A sale of anything may not “establish” ownership by the seller, but it is a very good indication of ownership.

is no impediment to the application of the Pennsylvania statute conclusively awarding Pa-RECs to generators that are not subject to the *ARIPPA* decision.<sup>38</sup>

Because MEA owns Pa-RECs over which the PSC has no authority to determine ownership, the PSC has, indeed, effected an unconstitutional taking by ordering the Utilities to take control of those Pa-RECs. (MEA Pet'n at 33-35.) The *Wheelabrator* cases are inapposite. In those cases, the Connecticut PUC had determined that Connecticut RECs never were owned by generators. Regardless of the actual validity of that determination,<sup>39</sup> once it was made, it necessarily meant that the Connecticut generators had no property that could be taken. MEA's case is different. MEA owns Pa-RECs. The PSC's taking them from MEA without any compensation is, thus, unconstitutional.<sup>40</sup>

#### **V. The PSC's Waiver Authority Should Be Used to Modify the Utilities' Compliance Requirements.**

The PSC incorrectly suggests that it can use its self-granted waiver authority to "deem" MEA's facility certified in West Virginia.<sup>41</sup> The PSC's waiver authority is not available for such a use. MEA has not applied to the PSC for a waiver of any Portfolio Standards Rule because of hardship. The contortions that the PSC has to undergo in attempting to apply its rule-based waiver authority illustrate just how bereft of legal support the PSC's reasoning is.

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<sup>38</sup> See 73 P.S. § 1648.3(e)(12); see also 52 Pa. Code § 75.63(h) ("The alternative energy credit shall remain the property of the alternative energy system until voluntarily transferred."). Moreover, it is unclear how 73 P.S. § 1648.3(e)(12) and 52 Pa. Code § 75.63(h) are to be reconciled with the *ARIPPA* decision even for Pennsylvania generators selling to Pennsylvania utilities. Fortunately, neither the PSC nor this Court need (or has a legal basis to) attempt such reconciliation.

<sup>39</sup> (See MEA Pet'n at 28 n.85 (explaining why the Connecticut *Wheelabrator* decision is inconsistent with West Virginia contract law and federal PURPA law).)

<sup>40</sup> Because under the PSC's Rules, MEA would own WV-RECs if it were to voluntarily certify its facility in West Virginia, the PSC's determination that the Utilities get those WV-RECs also effects an unconstitutional taking. (See MEA Pet'n at 35.) Again, the PSC cannot legally ignore its own rules to "[hold] that the QF never owned the credits, the utility does." (PSC Statement at 23.)

<sup>41</sup> (PSC Statement at 16-17 (citing W. VA. CODE ST. R. § 150-34-1.5.a).)

The PSC's contortions to take RECs from QFs appear even more unnecessary considering that the PSC has statutory authority to effect the policy rationales put forth in its Order and Statement of Reasons (generally summarized as preventing the WV-AREPA from increasing ratepayers' costs) by granting the Utilities a compliance waiver. The WV-AREPA specifically gives the PSC the power, "[u]pon its own initiative," to "modify the portfolio standard requirements of an electric utility in a given year or years . . . if the commission determines that alternative or renewable energy resources are not reasonably available in the marketplace in sufficient quantities for the electric utility to meet the requirements of this article."<sup>42</sup> Because MEA currently is certified to generate only Pa-RECs, it has sold Pa-RECs, and it has no current plans to certify its facility under the WV-AREPA, the West Virginia RECs that MEA theoretically could generate "are not reasonably available in the marketplace." Thus, the PSC has a basis to reduce the Utilities' portfolio standards requirements.<sup>43</sup> Such a resolution would be consistent with both state and federal law.

### CONCLUSION

For the reasons stated in Morgantown Energy Associates' Petition and above, Petitioner respectfully requests that the Court **GRANT** this petition, **VACATE** the order of the PSC, and **REMAND** this case with instructions that the PSC deny the Utilities' petition *en toto*. Once the West Virginia Public Service Commission determined by rulemaking that all non-utility generators, if voluntarily certified under the Commission's rules, "shall be awarded" West Virginia alternative and renewable energy credits associated with generation of electricity, the

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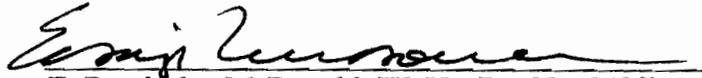
<sup>42</sup> W. VA. CODE § 24-2F-5(h)(1).

<sup>43</sup> For this reason, the Utilities' claim that they are entitled to the QFs' WV-RECs because the Utilities included those WV-RECs in their compliance plan (Utils.' Br. at 8-9) is baseless. The claim first is baseless because it is circular. The Utilities are stating that they should be awarded WV-RECs because they already have claimed entitlement to them. The claim is even more baseless, because if the Utilities had correctly understood the Portfolio Standards Rules, they would have realized that they are not entitled to the QFs' RECs and so already could have sought a statutory compliance waiver.

Commission was without legal authority to determine in response to a petition from utilities that certain non-utility generators—namely, qualifying facilities under the separate federal law of the Public Utility Regulatory Policies Act of 1978—do not own the credits associated with their generation of electricity.

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## CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, true and accurate copies of the foregoing *Petitioner's Reply Brief* were hand delivered or deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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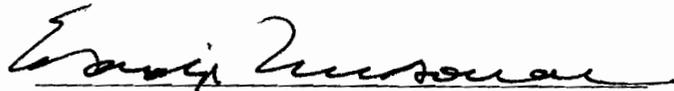
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