



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)

**PETITIONER'S SUPPLEMENTAL BRIEF REGARDING FERC ORDER
AS REQUESTED BY MAY 1, 2012 ORDER**

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INTRODUCTION

By April 24, 2012 Declaratory Order (the “FERC Order”), the Federal Energy Regulatory Commission (the “FERC”) ruled that

[t]o the extent that the West Virginia [PSC] Order finds that avoided-cost rates under PURPA also compensate for RECs,⁶⁸ **the West Virginia Order is inconsistent with PURPA.**

⁶⁸ The West Virginia Order relies primarily on the avoided cost rate in the contracts between [MEA] and [Mon Power] and the City of New Martinsville and [Mon Power] as justification for finding that the RECs produced by the QFs are owned by the purchasing utility in the first instance. *See, e.g.*, West Virginia Order at 28-31. For example, the West Virginia Order states that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs. *See* West Virginia Order at 28.¹

The FERC Order then concluded that

[t]he [FERC] finds that the West Virginia Order is inconsistent with PURPA and the [FERC]’s regulations as discussed in the body of the order.²

¹ (*Morgantown Energy Associates et al.*, 139 FERC ¶ 61,066 at ¶ 47 & n.68 (2012) (emphasis added).) Nearly simultaneous with filing their appeals to this Court, MEA and the City of New Martinsville petitioned the FERC, under Section 210(h) of PURPA, to enforce PURPA and find the PSC Order unlawful. In ruling on the petitions, the FERC declined to enforce PURPA by taking the PSC to court, which is unsurprising since, under the currently effective FERC regulations, the FERC has never itself instituted court proceedings to enforce PURPA § 210(h) and has, instead, authorized the harmed petitioner to do so. Consistent with its prior practice, the FERC declared that the PSC Order unlawfully contravenes PURPA and invited petitioners to initiate their own federal court proceeding. (*See id.* at ¶¶ 44-45.) Furthermore, any request for rehearing or clarification of the FERC Order is not a stay of that order pursuant to 18 C.F.R. 385.713(e).

² (*Id.* at 19, Ordering Para. B.) This conclusion by the FERC confirms the correctness of the 2010 Minnesota Public Utilities Commission (“MPUC”) decision—which resolved the precise issue before the PSC *in favor of QFs*. In Minnesota, the utility argued—as did the Utilities to the PSC in this case—that because it paid “premium pricing” for the power, it should obtain the inseparable “environmental attributes associated with the renewable energy.” *In the Matter of Xcel Energy’s Pet.*, Docket No. E-002/M-08-440, at 9 (Minn. PUC Dec’n, Sept. 9, 2010). The MPUC, however, rejected that argument and concluded that avoided cost pricing in PURPA agreements “does not include any additional value for the severable environmental attributes of power.” *Id.* at 10. Similar to the MPUC, the PSC cannot escape the effect of this controlling federal law.

Thus, the FERC effectively declared the PSC Order to be unlawful through the controlling effect of federal law. “Under the Supremacy Clause of the United States Constitution, a federal agency acting within the scope of its congressionally delegated authority has the power to preempt state regulation and render unenforceable state or local laws which are otherwise not inconsistent with federal law. *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986).”³

The FERC Order thus invalidates the PSC Order. All of the PSC’s reasoning that the Utilities own RECs generated by MEA and other QFs ultimately relies on the confirmedly unlawful conclusion that the Utilities and their customers already have paid enough through avoided cost rates.⁴ Furthermore, because the PSC Order relies entirely on this unlawful conclusion, additional proceedings before the PSC would be futile. The FERC Order confirms that the Court should vacate the PSC Order and remand this case with instructions that the PSC deny the Utilities’ petition *en toto*.

³ *Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm’rs of N.J.*, 44 F.3d 1178, 1190 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995). That the federal PURPA invalidates any state agency’s attempt to reconsider or alter an avoided cost rate, once initially approved, has been established. (*See* MEA Pet’r’s Br. at 30-31 & n.87 (quoting *Freehold* and citing additional cases holding that PURPA invalidates state agency attempts to alter avoided cost rates); *see also id.* at 2-3, 12, 38; MEA Reply Br. at 9.)

⁴ (*See, e.g.*, PSC Order at 54 (“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.”).)

ARGUMENT

I. The FERC Order Invalidates the PSC Order, which Pervasively Relies on the Unlawful Conclusion that Avoided Cost Rates Pay for RECs.

The PSC and the Utilities agree with MEA that the PSC's Portfolio Standards Rules award RECs⁵ to NUGs.⁶ In order for the PSC to avoid the operation of its Rules and to award the Utilities the RECs generated by PURPA QFs (indisputably NUGs), then, the PSC had to distinguish QFs from other NUGs.⁷ The PSC's basis to distinguish QFs from other NUGs is that PURPA requires the Utilities to purchase power (through PURPA contracts or EEPAs) from QFs at avoided cost rates. As the PSC Order states in an effort to distinguish QFs,

[b]y the very nature of the PURPA EEPAs, no additional consideration is contemplated other than the substantial consideration [*i.e.*, avoided cost rates] that the projects [*i.e.*, QFs]

⁵ For the sake of clarity, this brief refers to RECs generically, but the West Virginia PSC has authority regarding only RECs generated pursuant to West Virginia law—*i.e.*, WV-RECs. The West Virginia PSC has no authority over RECs generated pursuant to the law of another state, such as Pennsylvania. MEA chose to certify its facility under Pennsylvania's laws years before the effective date of the PSC's Portfolio Standards Rules (and MEA has not certified its facility under West Virginia's Portfolio Standards Rules). The PSC thus has absolutely no legal authority over MEA's PA-RECs. (*See* MEA Reply Br. at 11-12; *see also* MEA Pet'r's Br. at 32-35.)

⁶ (PSC Order at 17 (“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”); *id.* at 27 (“MEA and City are correct that a non-utility generator may be entitled to the credits for qualified generation from its generating facility based on the Commission Portfolio Standard Rules issued by the Commission in General Order No. 184.25.”); Utils.’ Br. at 2 (“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”).

⁷ In order for the PSC to avoid the operation of its Portfolio Standards Rules to QFs, it was necessary for the PSC to distinguish QFs from all other NUGs, not just NUGs with contracts entered after January 4, 2011 (the effective date of those Rules). (*See* MEA Pet'r's Br. at 23 (basing the PSC's decision on the PURPA contracts' “execution date[s] was purely arbitrary”).) Otherwise, the PSC Order would apply to non-QF NUGs with contracts entered before January 4, 2011. But, that cannot be the case, because the PSC Order rests entirely on the consequences of MEA, the City of New Martinsville, and American Bituminous being PURPA QFs.

received [via PURPA] and that is not usually available to merchant power generators.⁸

The FERC Order eliminates this rationale supporting the entire PSC Order.⁹

Absent the PURPA requirement that Mon Power purchase QFs' power at an avoided cost rate, the PSC Order contains no basis for failing to apply the PSC's Portfolio Standards Rules to QFs, including MEA.

⁸ (PSC Order at 28; *id.* at 54 ¶ 18 (same); *see also id.* at 28 (concluding that Rules 5.2 and 5.6 “cannot reasonably be applied retroactively to these PURPA EEPAs,” by which Mon Power pays the QFs avoided cost rates); *id.* (“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.”) (emphasis added); PSC Resp. Br. at 20-21 (stating that “[t]he Commission decision was limited to the consideration of three specific PURPA contracts” in response to MEA’s assertion that the PSC Order discriminates against QFs versus non-QF NUGs).) In distinguishing PURPA QFs from other NUGs for the purposes of applying its Portfolio Standards Rules, the PSC adopts the Utilities’ fallacious assertion that there is such thing as a “PURPA Credit” that is different from a WV-REC. (*See* MEA Reply Br. at 6.)

⁹ PURPA contracts (EEPAs) for power purchases at avoided cost rates are central to each of the PSC’s “three separate but interrelated bases” for its Order:

(i) consistent with the Act, the utility that is obligated to purchase PURPA generation (which also qualifies as eligible generation under the Portfolio Act) should own the credits that exist for the purpose of measuring utility compliance with the portfolio standard, (ii) Mon Power and PE’s ownership of the credits is based on their ownership [via PURPA contracts] of the qualifying energy as it is generated, and (iii) under the circumstances of the case in which the Portfolio Act and the EEPAs do not contain provisions that specify credit ownership by the utility or the QF, it is appropriate to consider equity and fairness and the impact of our decision on utility rates in determining credit ownership under the EEPAs [which require payment of avoided cost rates] based on the provisions of W.Va. Code § 24-2F-1 *et seq.* that require that the costs associated with the Act are reasonable and the provisions of Chapter 24 of the West Virginia Code that require the Commission to ensure fair and reasonable rates and to balance the interests of the current and future utility customers, the utilities and the state economy.

(PSC Order at 43.) The FERC Order further breaks down the PSC’s reasoning to eight bases. (*See* FERC Order ¶ 9.) At bottom, every rationale in the PSC Order is founded on the PSC’s contention that the Utilities and their customers already have paid enough to the QFs through PURPA-mandated avoided cost rates, so that the Utilities and their customers should not now have to pay additional consideration for RECs.

II. No Independent State Law Basis Could Support the PSC Order.

As *Freehold* makes clear, if a state's attempt to regulate contravenes PURPA, then it is irrelevant whether additional bases for the state action are otherwise consistent with federal law.¹⁰ Thus, even if the PSC were to articulate an independent state law basis for its decision, the PSC's still cannot give MEA's RECs to the Utilities. The FERC's conclusion in *American Ref-Fuel* that state law governs the ownership of RECs *in the initial instance* is not applicable here. In this case, the PSC relied on PURPA to distinguish QFs and *avoid* the application of state law—*i.e.*, the PSC's Portfolio Standards Rules, awarding RECs to NUGs in the initial instance. In sum, the controlling effect of PURPA invalidates the PSC Order regardless of any purported alternative state law bases. In any event, as the following discussion shows, no independent state law basis exists to distinguish QFs from other NUGs, which, again, own the RECs they generate under the Portfolio Standards Rules.

No one disputes that state law—the WV-AREPA—establishes the requirement that utilities generate or obtain RECs. That state law compliance requirement, however, does not provide a rationale for taking QFs' RECs—and only QFs' but not other NUGs' RECs—and giving them to utilities without compensating the QFs.¹¹ If the WV-AREPA's requirement that utilities obtain RECs forms a rationale for awarding RECs to utilities, then that rationale must apply in all cases. In other words, the rationale must apply to award *any* NUG's RECs to the purchasing utility because only the purchasing utility needs RECs under the WV-AREPA. The PSC's Portfolio Standards Rules, however, do not award RECs to all purchasing utilities.¹²

¹⁰ See 44 F.3d at 1190.

¹¹ (See PSC Order at 29 (purporting that a basis for the PSC's awarding QFs' RECs to NUGs is that the WV-AREPA's "compliance obligations are imposed exclusively on the utilities").)

¹² See W. VA. CODE ST. R. § 150-34-5.2.

Thus, the mere fact that the WV-AREPA requires utilities to comply with the Act by generating or obtaining RECs cannot be a state law basis for the PSC Order.

The PSC's attempt to describe RECs as springing into being at the moment of generation and after the point in time when the utility owns the power purchased from a QF¹³ also is not a state law basis for the PSC Order. Nothing in West Virginia law provides a basis for the PSC to conclude that RECs are created only after the point at which the utility owns the power purchased from a QF generator.¹⁴ QFs generate electricity in the same manner as non-QF NUGs. Under the PSC's Portfolio Standards Rules, non-QF NUGs generate RECs that are not automatically owned by the purchasing utility.¹⁵ So, again, absent a basis to distinguish between QF NUGs and non-QF NUGs, which the FERC Order eliminates, the PSC has no basis to avoid the operation of its Portfolio Standards Rules.

Finally, the silence of PURPA contracts as to RECs provides no state law basis for awarding QFs' RECs to Mon Power. The FERC Order confirms that PURPA contracts do not silently convey RECs.¹⁶ Thus, as MEA has stated and contrary to the PSC's assertion, applying West Virginia contract law to PURPA contracts, silent as to RECs, would result in QFs retaining their RECs.¹⁷

¹³ (See PSC Order at 36 (purporting that a basis for the PSC's awarding QFs' RECs to NUGs is that "[b]ecause RECs are created at the time the electricity is generated, the purchaser and owner of the electricity at the time the electricity is generated owns the credits as well.").)

¹⁴ (MEA Pet'r's Br. at 29; MEA Reply Br. at 8 n.22.)

¹⁵ See W. VA. CODE ST. R. § 150-34-5.6.

¹⁶ (See FERC Order ¶¶ 46-47 (emphasizing the FERC's pronouncement in *American Ref-Fuel* that "[C]ontracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary)").)

¹⁷ (See MEA Pet'r's Br. at 23-29.)

CONCLUSION

The FERC Order confirms that the PSC cannot base its decision to award QFs' RECs to the Utilities on the fact that PURPA requires the Utilities to purchase QFs' power at avoided costs rates. Absent that rationale (*i.e.*, that avoided cost rates compensate QFs for power *and* RECs so that "no additional consideration is contemplated"), the PSC Order is bereft of any basis for avoiding the operation of the Portfolio Standards Rules to QFs. Accordingly, the FERC Order confirms that the Court should vacate the PSC Order and remand this case with instructions that the PSC deny the Utilities' petition *en toto*.¹⁸ The PSC's Portfolio Standards Rules should then apply to MEA and other QFs to allow them to generate and own RECs recognized by West Virginia law if they choose to complete the West Virginia certification process.¹⁹

¹⁸ It would be improper to remand the case to the PSC for further proceedings when the PSC incorrectly predicated its ruling upon a misguided interpretation of controlling law. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (the importance of agency explanations do not "require that we convert judicial review of agency action into a ping-pong game;" "remand would be an idle and useless formality" when the "substance of the [agency's] command is not seriously contestable"); *Kureghyan v. Holder*, 338 Fed. Appx. 622 at *2 (9th Cir. 2009) ("In these circumstances, remand to the agency would serve little purpose other than providing the DHS with an unfair second bite at the apple."); *Watson v. Geren*, 569 F.3d 115, 134-35 (2nd Cir. 2009) ("[R]emand would be futile, and is therefore not required, where there is no basis in fact to support the DACORB's denial on any valid ground."); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992) (remand to the agency for further statement of reasons would be futile where "only one disposition is possible as a matter of law" because "[n]o matter how massaged, such a result would necessarily trench upon [the] dictates [of controlling law]."); *Wilkett v. ICC*, 710 F.2d 861, 865 (D.C. Cir. 1983) ("As the finding of unfitness is clearly in error, the Commission is directed to issue the authority requested.").

If, nonetheless, the Court were to remand the case to the PSC for further proceedings, then MEA suggests that such remand should include instructions for the PSC to take new evidence and broadly consider all factors. The PSC Order accepts the Utilities' contention that absent a determination they own the QFs' RECs, ratepayers could be required to pay an additional \$50 million or more. Developments since the PSC proceeding, however, have affected the number of RECs the Utilities would need to acquire in order to comply with the WV-AREPA. Any remand proceeding should re-examine such matters as the Utilities' purported need for the QFs' RECs.

¹⁹ As MEA has explained, 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. (*See* MEA Reply Br. at 12-13.)

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