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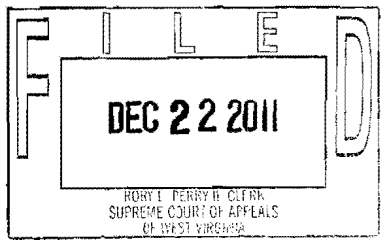


# In the Supreme Court of Appeals of West Virginia

**Docket No. 11-_____**

**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 BRIEF**

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## ASSIGNMENTS OF ERROR

The Public Service Commission of West Virginia (the "PSC") committed the following errors in its November 22, 2011 Order:

(1) holding that MEA's generation of electricity could possibly have created any RECs recognized by West Virginia law given that January 4, 2011 was the first date that West Virginia law recognized any RECs, and given that MEA's facility is not certified to create RECs under West Virginia law;

(2) holding that the PSC can "deem" MEA's West Virginia facility as certified against MEA's business judgment to not seek certification in West Virginia, even though the PSC's own Portfolio Standards Rules specifically predicate such certification on the facility applying therefor, and PURPA's anti-regulation and anti-discrimination provisions proscribe such a result;

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

(4) holding that the parties' pre-WV-AREPA agreement conveys RECs without consideration (as governed by federal law) even though West Virginia contract law on absence of consideration and on the silence of an agreement as to a term provides otherwise, and in violation of PURPA's rate requirements and anti-regulation and anti-discrimination proscriptions; and

(5) ordering the Utilities to "secure" MEA's Pennsylvania RECs (and, to the extent there are any, West Virginia RECs) in violation of both the United States and West Virginia Constitutions.

## STATEMENT OF THE CASE

### I. Factual Background.

#### A. The Public Utility Regulatory Policies Act of 1978.

The Federal Power Act (the "FPA")[1] gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction and authority to regulate the wholesale sale of electric power in interstate commerce. In response to the 1970s energy crisis, Congress amended the FPA by enacting the Public Utility Regulatory Policies Act of 1978 ("PURPA").[2] The nation needed its electric utilities to rely on more efficient, environmentally sound nontraditional generating facilities. But Congress discovered "that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development."[3]

The purpose of PURPA, then, was to reduce the nation's electric utilities' dependence on foreign fossil fuels, in part by promoting the development and use of alternative sources of energy, including cogeneration facilities like the Morgantown plant of Morgantown Energy Associates ("MEA").[4] Section 210 of PURPA spawned the creation of non-utility generators ("NUGs"), including cogeneration facilities[5] and small electric power production

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1 16 U.S.C. § 791, *et seq.*.

2 Pub. L. No. 95-617, 92 Stat. 3117 (1978), *as amended, codified in relevant part at* 16 U.S.C. §§ 796(17) to (18) and 824a-3. (*See* PSC Order at 11-14.)

3 *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). *See also Greenwood ex rel. Estate of Greenwood v. N.H. Pub. Util. Comm'n*, 527 F.3d 8, 10 (1st Cir. 2008).

4 *See FERC v. Mississippi*, 456 U.S. at 745-46; *Power Res. Grp. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 233 (5th Cir. 2005), *cert. denied*, 547 U.S. 1020 (2006); *N. Am. Natural Res., Inc. v. Strand*, 252 F.3d 808, 809 (6th Cir. 2001).

5 *See* 16 U.S.C. § 796(18)(A) ("a facility which produces [] electric energy[] and [] steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes").

facilities.[6] PURPA denominated such facilities as "qualifying facilities" ("QFs").[7] PURPA then required FERC to promulgate rules requiring electric utilities to purchase electricity from QFs.[8] FERC, in turn, promulgated rules requiring the states' regulatory agencies to adopt rules mandating utilities to "purchase, in accordance with [18 C.F.R.] § 292.304, . . . any energy and capacity which is made available from a qualifying facility."[9]

Relevant to this case, PURPA specifically requires utilities to pay QFs at a rate that is "just and reasonable to the electric consumers of the electric utility and in the public interest."[10] Congress set this "just and reasonable" rate at the "cost to the electric utility of the electric energy which, but for the purchase from such [QF], such utility would generate or purchase from another source."[11] Hence, that rate is called the utility's "avoided cost."[12]

PURPA also required FERC to prescribe rules exempting QFs from certain state and federal regulation.[13] FERC's regulation implementing this provision requires that "[a]ny qualifying facility shall be exempted . . . from State laws or regulations respecting . . . (i) [t]he rates of electric utilities; and (ii) [t]he financial and organizational regulation of electric utilities."[14] Consequently, under PURPA, once a state's utility regulatory agency establishes the

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6 *See* 16 U.S.C. § 824a-3(a); 16 U.S.C. § 796(17)(A) (defining "small power production facility"). 456 U.S. at 750.

7 *See* 18 C.F.R. § 292.101(b)(1) (defining "qualifying facility").

8 16 U.S.C. § 824a-3.

9 18 C.F.R. § 292.303(a); *cf.* 16 U.S.C. § 824a-3(f)(1). *See* W. VA. CODE ST. R. § 150-3-12 (West Virginia's implementation of PURPA).

10 16 U.S.C. § 824a-3(b)(1).

11 16 U.S.C. § 824a-3(d); *cf.* 18 C.F.R. § 292.304(b).

12 *See* W. VA. CODE ST. R. § 150-3-12.1.1(f).

13 *See* 16 U.S.C. § 824a-3(e); *FERC v. Mississippi*, 456 U.S. at 751.

14 18 C.F.R. § 292.602(c).

rate at which a QF is to be reimbursed (the utility's "avoided costs"), PURPA preempts any subsequent attempt by that agency to modify—openly or surreptitiously—the QF's rates:

> PURPA created a narrow exception to the general rule and allowed state commissions to implement PURPA by *initially setting avoided cost rates* for qualifying PURPA projects. However *once state commissions approve power purchase agreements under PURPA, they are generally without jurisdiction to modify the terms of the agreement.*

(PSC Order at 13 (emphasis added) (quoting *Am. Bituminous Power Partners v. Monongahela Power Co.*, Case No. 87-669-E-C, at 5 (Pub. Serv. Comm'n of W. Va., Mar. 29, 1996)).[15]

PURPA also preempts a state agency from subjecting a QF to financial regulation—that is, a state agency is preempted from requiring a QF to file financial information, to obtain permission before issuing stock, to make certain entries on financial statements, or to adopt certain depreciation rates. Similarly, a QF is not subject to such state organizational regulation as a requirement to obtain permission before engaging in agreements with affiliates, or before engaging in a merger, acquisition, or divesture. In sum, once an avoided cost rate is approved, the state agency has next to no jurisdiction over the QF.

### B. The Electric Energy Purchase Agreement between MEA and Mon Power.

The typical agreement arising out of PURPA was a long-term electric energy purchase agreement.[16] On March 1, 1989, MEA, a PURPA-qualified facility, and Monongahela Power Company ("Mon Power"), a regulated electric utility,[17] entered into just such an agreement (the "EEPA"), effective until 2027, pursuant to which MEA agreed to sell all of its

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[15] *See also Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs*, 44 F.3d 1178, 1192 (3d Cir. 1995) ("The present attempt to either modify the [power purchase agreement between the utility and the QF] or revoke [state regulatory] approval is 'utility-type' regulation—exactly the type of regulation from which [the QF] is immune under [16 U.S.C. § 824a-3(e)].").

[16] (*Cf.* PSC Order at 11.)

[17] *See* W. VA. CODE § 24-2F-3(8) (defining "electric utility").

generated electrical power and capacity to Mon Power, and Mon Power agreed to pay MEA Mon Power's avoided costs under PURPA.[18] The PSC approved the EEPA pursuant to PURPA,[19] and MEA began to generate electricity in April 1992.[20] MEA separately contracted to sell the steam output of its plant to West Virginia University.[21]

### C. Pennsylvania's and West Virginia's renewable portfolio standards acts.

Several years later, states began to pass laws *requiring* utilities to generate a certain percentage of their electricity by environmentally sound methods. These laws, known as "renewable portfolio standards" ("RPS"), "generally require, among other things, electric utilities to acquire or generate a certain percentage of electric supply from specified energy resources."[22] Pennsylvania's renewable portfolio standard is the Alternative Energy Portfolio Standards Act (the "PA-AEPSA"), effective since 2005.[23] West Virginia's is the Alternative and Renewable Energy Portfolio Act (the "WV-AREPA"),[24] effective since 2009. The WV-AREPA "created a statutory obligation for the state electric utilities to own credits equal to a certain

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18 (PSC Order at 6.) Other QFs also entered into agreements with Mon Power. These other QF's agreements were also the subject of the PSC's order but are not the subject of MEA's appeal.

19 (*See* PSC Order at 3 ("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.").)

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") (with Mon Power, collectively herein the "Utilities" (throughout its Order, PSC refers to the Utilities as "the Companies")), 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.

20 (PSC Order at 6.)

21 (*Id.*)

22 (PSC Order at 13.)

23 73 P.S. §§ 1648.1–1648.8.

24 W. VA. CODE § 24-2F-1 to -12.

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."[25]

For utilities that are unable to generate or purchase 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.[26] 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.

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[25] (PSC Order at 15-16.) *See* W. VA. CODE § 24-2F-3(3) (defining "alternative energy resources"); W. VA. CODE § 24-2F-3(2) (defining "alternative and renewable energy portfolio standard" or "portfolio standard" as "a requirement in any given year that requires an electric utility to own credits in an amount equal to a certain percentage of electric energy sold in the preceding calendar year by the electric utility to retail customers in this state"); W. VA. CODE § 24-2F-3(5) (defining "alternative energy resource facility" as "a facility or equipment that generates electricity from alternative energy resources"); W. VA. CODE § 24-2F-5(a) (setting out requirements on utilities) & -5(b) (setting out redemption); W. VA. CODE ST. R. § 150-34-3.1 (requiring that "an electric utility each year shall own an amount of certified credits equal to a certain percentage of electricity . . . sold by the electric utility in the preceding year to retail customers in West Virginia").

[26] *See, e.g.,* W. VA. CODE § 24-2F-3(4) (defining an "alternative and renewable energy resource credit" or "credit" as "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 emission reduction or offset projects"); W. VA. CODE § 24-2F-4(a) ("The Public Service Commission shall establish a system of tradable credits to establish, verify and monitor the generation and sale of electricity generated from alternative and renewable energy resource facilities. The credits may be traded, sold or used to meet the portfolio standards established in section five of this article."); W. VA. CODE § 24-2F-4(c) (governing sale of credits).

Because a QF can be certified under more than one state's RPS act, the generation of a given megawatt-hour of electricity can give rise to one REC that is qualified for redemption in more than one state. Although it is tempting to view each state's credits as "separate" RECs, that is not how the system works in reality. To avoid double-counting, PJM GATS, for example, credits a REC's owner with just one REC per credit, regardless of how many states that REC is redeemable in. (Complicating this slightly but irrelevantly, the generation of electricity from some fuels or resources gives rise to more than one REC per megawatt-hour due to a 2x or 3x "credit multiplier," but this same observation is true of all of those resulting RECs.)

Various regional entities serve as REC "banks" where owners keep their RECs in accounts.[27] The entity that services West Virginia and Pennsylvania (and several other states) is the area's regional transmission organization, PJM-Environmental Information Services, Inc. ("PJM").[28] The system that PJM uses to account for RECs is the Generation Attribute Tracking System ("PJM GATS").[29]

Importantly, the states' RPS acts that create RECs all contain "no double counting" provisions requiring that once a REC created by the generation of a particular megawatt-hour of electricity is redeemed in a state, no REC that arose from the generation of that same megawatt-hour can be redeemed to meet that or any other state's RPS requirement.[30]

Pursuant to the authority granted to it by the Legislature,[31] the PSC promulgated its Portfolio Standards Rules on January 4, 2011.[32] Those rules require that RECs created when a QF generates electricity "shall be awarded" to the QF, not the utility to whom the QF sold that electricity.[33] The rules also provide that after such RECs are initially awarded to the QF, they

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27 http://apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=3.

28 *See* W. VA. CODE ST. R. § 150-34-2.19; *see also* http://www.pjm.com/about-pjm.aspx; etnna.org/images/ETNNA-Tracking-System-Map.gif; epa.gov/greenpower/gpmarket/tracking.htm.

29 *See* W. VA. CODE ST. R. § 150-34-2.16; W. VA. CODE ST. R. § 150-34-5.1 ("Awarded credits shall be created and tracked through the registry system referenced in Rule 6.1."); W. VA. CODE ST. R. § 150-34-6 (PJM GATS). *See also* http://www.epa.gov/greenpower/gpmarket/tracking.htm; http://www.pjm.com/faqs/renewables/general/how-does-gats.aspx.

30 *See* W. VA. CODE § 24-2F-5(e); W. VA. CODE ST. R. § 150-34-7.1 & 7.6.

31 *See* W. VA. CODE § 24-2F-4(b); W. VA. CODE § 24-2F-10(b) ("The commission shall consider extending, by rule, the awarding of alternative and renewable energy resource credits in accordance with the provisions of section four of this article to electric distribution companies *or electric generation suppliers other than electric utilities*. . . .") (emphasis added); W. VA. CODE § 24-2F-12.

32 *See* W. VA. CODE ST. R. ser. 150-34.

33 W. VA. CODE ST. R. § 150-34-5.2 ("Rule 5.2"). As noted, "qualifying facility" or "QF" is a PURPA term of art, since it is PURPA that recognizes some NUGs as QFs. A NUG need not, however, be a QF under PURPA in order to apply for certification to generate RECs under the WV-AREPA. Since MEA is a QF, though, and since this case concerns PURPA contracts, in the interest of clarity, MEA refers to NUGs that are certified under the WV-AREPA as QFs, also.

may then be "included in, or bundled with, the purchase of the power" by a utility, or instead they "may also be purchased independently, or unbundled from, purchased power."[34]

MEA has been certified to generate RECs under Pennsylvania's law since January 1, 2006.[35] MEA has previously sold some of those RECs, which are redeemable only in Pennsylvania,[36] and a sizeable balance of those RECs remains in MEA's PJM GATS account.[37] MEA has not, however, applied to generate West Virginia-certified RECs, so MEA has never created any RECs recognized by West Virginia law.[38]

## II. Procedural Background.

As a result of the requirements imposed on them by the Legislature in the WV-AREPA, the Utilities need RECs redeemable in West Virginia.[39] They could simply buy RECs to make up any shortfall between what they generate and what they need.[40] Instead, they are trying to force MEA to (retroactively) become a West Virginia-certified QF (so that MEA's generation of electricity gives rise to RECs that are redeemable in West Virginia) and then simply to take the RECs that were and will be created from MEA's generation of electricity.[41]

On February 23, 2011, that is exactly what the Utilities attempted. On that day, they petitioned the PSC "for declaratory order and for interim relief seeking a ruling that [they]

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34 W. VA. CODE ST. R. § 150-34-5.6 ("Rule 5.6").

35 (PSC Order at 2 (recognizing that MEA's facility is "certified under Pennsylvania law"); (Hr'g Tr. 624, MEA Ex. 1, Aug. 25, 2011.)

36 (*Id.* 625; *see also id.* 189-90, 193-96.)

37 (Hr'g Tr. 626.)

38 MEA witness Jesse Locklar testified that because MEA's facility is registered in Pennsylvania, the company has no incentive to register in West Virginia. (Hr'g Tr. 198.)

39 (*See, e.g.*, PSC Order at 10 ("the unavailability of QF credits will require the modification of the utility portfolio standard compliance plans").) *But see* discussion, *infra* at n.46 (Mon Power likely does not need the RECs that the PSC felt it did).

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

41 Although the Utilities' petition did not ask for them, the PSC Order even awarded to the Utilities MEA's *existing* RECs, which were created *only* under Pennsylvania law.

are entitled to the alternative and renewable energy resource credits (credits) [RECs] generated [by MEA] under the [PURPA]."[42,43] A series of procedural steps and related proceedings took place thereafter, the details of which are not pertinent to this appeal.[44] The one pertinent procedural step occurred when the PSC ordered MEA to become a party to the case.[45]

On November 22, 2011, the PSC entered its order (the "PSC Order") granting the Utilities' petition, holding:

> that the alternative and renewable energy resource credits [RECs] attributable to energy purchases by Monongahela Power Company from certain PURPA Qualifying Facilities [including MEA] are owned by Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power, during the terms of the Electric Energy Purchase Agreements. Upon receipt of the necessary information as described in this Order, the Commission will consider certification of the MEA facility.

(PSC Order at 1.)

The PSC based its decision on "three separate but interrelated bases":

> (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

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42 (PSC Order at 1 (footnote omitted).)

43 One other QF, the City of New Martinsville, was part of the case before the PSC.

44 (*See* PSC Order at 7-10.)

45 At the outset, MEA notes that it is not subject to the PSC's jurisdiction. "The Public Service Commission of West Virginia has no jurisdiction and no power or authority except as conferred on it by statute and necessary implications therefrom, and its power is confined to the regulation of public utilities. It has no inherent power or authority." Syl. pt. 2, *Casey v. Pub. Serv. Comm'n*, 193 W. Va. 606, 457 S.E.2d 543 (1995) (quoting syl. pt. 2, *Wilhite v. Pub. Serv. Comm'n*, 150 W. Va. 747, 149 S.E.2d 273 (1966)). The PSC's organic statute, W. VA. CODE §§ 24-1-1, *et seq.*, gives the agency extensive power over public utilities like Mon Power. MEA, however, is specifically exempt from the PSC's jurisdiction. Pursuant to W. VA. CODE § 24-2-1(c)(3), MEA is not subject to the PSC's jurisdiction unless MEA proposes a material modification to its facility, which is not the case here. Thus, it is immaterial that MEA in the past asked the PSC to take actions with respect to a utility over which the agency *does* have jurisdiction. Non-regulated entities and individuals frequently ask that the PSC use its regulatory authority to direct the action of regulated utilities. Making such a request of a regulatory agency and even receiving "favorable treatment," however, does not transform a non-regulated entity into a regulated one.

> based on their ownership of the qualifying energy as it is generated, and (iii) under the circumstances of the case in which the Portfolio Act and the EEPAs do not contain provisions that specify credit ownership by the utility or the QF, it is appropriate to consider equity and fairness and the impact of our decision on utility rates in determining credit ownership under the EEPAs based on the provisions of W.Va. Code § 24-2F-1 *et seq.* that require that the costs associated with the Act are reasonable and the provisions of Chapter 24 of the West Virginia Code that require the Commission to ensure fair and reasonable rates and to balance the interests of the current and future utility customers, the utilities and the state economy.

(PSC Order at 43.)

In other words, the PSC based its decision to give MEA's RECs to the Utilities not on the law, but on what the agency simply believed was the best outcome, *i.e.*, that since the Utilities (allegedly) need MEA's RECs, and since they are already paying for the electricity, they "should own" the environmental attributes of the generation of that electricity, too, because "equity and fairness and the impact of our decision on utility rates" trump clear, well-settled governing legal rules.[46]

As to MEA's RECs (which are undisputedly certified under Pennsylvania law), the PSC ordered Mon Power to contact PJM GATS and "secure" them:

> IT IS FURTHER ORDERED that credits related to the electricity generated from the PURPA facilities [including] the Morgantown project owned by Morgantown Energy Associates;

[46] Because policy, based on alleged need or otherwise, cannot trump controlling legal principles, MEA did not fully contest the Utilities' assertions about the number of RECs they need for compliance, and MEA is not in a position to contest the Utilities' assertions about how many RECs are available to them. But it is important to note that the need of Mon Power (the only entity with whom MEA has a contract) is less than the combined Utilities' need, and it should have been analyzed independently. Furthermore, the PSC failed to consider other sources of RECs that are or will be available to Mon Power, like RECs awarded for (1) generating electricity from Albright Unit #2 (a biomass/sawdust facility) and Willow Island Unit 3 (tires), which were certified in PSC Case No. 11-0072-E-P; (2) Mon Power's Energy Efficiency and Conservation Plan, Phase I of which they seek to have approved in PSC Case No. 11-0452-E-PC (energy efficiency and demand-side energy initiative projects qualify for RECs under W. VA. CODE § 24-2F-3(4); and (3) generating electricity from supercritical power plants, including the Harrison Power Station (20.54% MPC) and Pleasants Power Station (7.69% MPC), which all utilize supercritical technology, *see* PSC Case No. 11-1184-E-P.

> and sold pursuant to the electric energy purchase agreements discussed herein belong to the purchaser, Monongahela Power Company.
>
> IT IS FURTHER ORDERED that [Utilities] take reasonable steps to secure the credits from the Morgantown facility that are currently in the MEA GATS account, including, but not limited to, contacting PJM-EIS to advise it of the ruling in this case.

(PSC Order at 56.)

The PSC sidestepped the very inconvenient fact that MEA's generating facility never has been, is not, and has no present intention of becoming certified to create any RECs recognized by West Virginia law, by ordering that if the *Utilities* present the PSC with proof that MEA meets the standards to receive such certification, it will "deem" MEA as certified:

> We will consider the relief requested in the [Utilities]' amended Joint Petition and determine whether [MEA's] Morgantown project may be certified as a qualified energy resource to generate credits provided that adequate information is provided to support certification of the facilities under the Commission Portfolio Standard Rules. We determine that allowing qualifying credits that are owned by the [Utilities] to not be certified would work a hardship on ratepayers and that due to the unusual difficulty involved if the [Utilities] would seek or expect cooperation from the MEA in obtaining certification of the MEA it is reasonable to allow the [Utilities] to seek certification of the credits that they own as a result of their Morgantown EEPA.

(PSC Order at 43.) Apparently, the PSC considers itself able to not only "deem" MEA's facility as certified, but also to do so retroactive to January 1, 2006—the date that MEA began generating RECs under Pennsylvania law and a date more than five years before the effective date of the PSC's Portfolio Standards Rules.[47]

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[47] On December 20, 2011, the PSC stayed its order pending review by this Court.

## SUMMARY OF ARGUMENT

The PSC's decision to take MEA's RECs and give them to the Utilities was erroneous as a matter of both federal and state law.

First, MEA's (in fact, anyone's) generation of electricity before January 4, 2011 (the effective date of the Portfolio Standards Rules that first defined and recognized RECs) could not possibly have given rise to RECs recognized by West Virginia law, because before that date there *was no* West Virginia law recognizing RECs.

Second, West Virginia law recognizes only RECs created by West Virginia-certified facilities, and MEA is not a West Virginia-certified facility. So MEA's generation of electricity (regardless of when) did not and will not create RECs recognized by West Virginia. Instead MEA's generation of electricity created and (will continue to create) only RECs recognized by Pennsylvania (the only state where MEA is certified).

Next, as a matter of federal law, PURPA contracts like the EEPA convey to the QF only the utility's "avoided cost" (plus a certain fixed component for capacity as part of the total PSC-approved rate) in exchange only for electricity generation and capacity. RECs, however, are environmental attributes of generation that, as a matter of federal law decided by FERC, are *not* included within such consideration. Third, then, West Virginia contract law precludes holding that the MEA/Mon Power EEPA conveyed MEA's RECs to Mon Power because Mon Power has, as a matter of federal law, not given any consideration for them, and separately because the EEPA was (necessarily) silent as to any conveyance of RECs. Fourth, and relatedly, PURPA forbids giving Mon Power MEA's RECs without additional consideration, because doing so would effectively reduce MEA's rate below the EEPA's rate (the "avoided cost" rate) in violation of PURPA, would constitute a federally proscribed financial regulation of MEA, and would violate PURPA's anti-discrimination provision.

Fifth, because MEA owned all of the RECs arising from its generation of electricity from the first day thereof and did not convey them to the Utilities under the EEPA (which was executed before *any* RECs recognized by *any* state ever came into existence), it necessarily follows that the PSC's decision to order Mon Power to contact PJM GATS and "secure" all of MEA's RECs for the Utilities' benefit constitutes a taking without compensation, forbidden by both the United States and West Virginia Constitutions.

And sixth, in order to get around the clear West Virginia law providing that only electricity generated by West Virginia-certified facilities gives rise to new West Virginia RECs, the PSC determined that it can "deem" MEA a certified West Virginia facility even though the facility has no present desire to do so and has not applied to do so. This determination, however, violates West Virginia law limiting certification to facilities that have applied therefor, and also violates PURPA's anti-regulation and anti-discrimination provisions.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appeals from final orders of the PSC are automatically set for oral argument.

## ARGUMENT

The standard for this Court's review of an order of the PSC is well-settled, asking "(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."[48] Any deference due to the PSC in other cases where its order was "based upon its finding of facts"[49] is inapplicable here, as "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."[50]

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48 Syl. pt. 1, *Ctl. W. Va. Refuse, Inc. v. Pub. Serv. Comm'n*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

49 Syl. pt. 5, in part, *Boggs v. Pub. Serv. Comm'n*, 154 W. Va. 146, 174 S.E.2d 331 (1970).

50 Syl. pt. 1, *App. Power Co. v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

The questions presented here (the interpretation of federal and state statutes and regulations, the applicability and meaning of West Virginia's contract law, and the scope of constitutional protections) are purely legal ones, and the PSC's answers were "arbitrary [and] result[ed] from a misapplication of legal principles."[51] As demonstrated below, the PSC abused and exceeded its statutory jurisdiction and powers, and the agency failed to employ the methods of regulation that it has itself selected.[52]

## I. No generation of electricity before January 4, 2011 could possibly ever have given rise to RECs recognized by West Virginia law, because before that date there was no West Virginia law recognizing RECs.

In the WV-AREPA, the Legislature required the PSC to promulgate rules implementing West Virginia's REC program.[53] On January 4, 2011, the PSC did so.[54] On that day, the PSC's Portfolio Standards Rules[55] first became effective. Relevant to this issue, the Portfolio Standards Rules were the first law to give birth to RECs recognized by ***West Virginia*** law. Before the effective date of the Portfolio Standards Rules, there simply could not possibly have been any such thing as RECs recognized by West Virginia law, because before that date there was no West Virginia law to recognize them.

Application of this somewhat obvious fact to this case necessarily requires that there are ***no*** RECs recognized by West Virginia law for the Utilities to take from MEA arising from MEA's (or anyone else's, for that matter) generation of electricity before January 4, 2011 (and as explained below, also after). The PSC says it best: Because the law creating the concept

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51 Syl. pt. 1, *Broadmoor/Timberline Apartments v. Pub. Serv. Comm'n of W. Va.*, 180 W. Va. 387, 376 S.E.2d 593 (1988) (quoting *Boggs*).

52 *See* syl. pt. 2, *Monongahela Power Co.*

53 *See* W. VA. CODE § 24-2F-10(b) (authorizing PSC to determine "by rule, [whether to award] [RECs] . . . to electric generation suppliers other than electric utilities").

54 W. VA. CODE ST. R. § 150-34-1.4.

55 W. VA. CODE ST. R. ser. 150-34.

of RECs did not exist at the time—something that would not happen until January 4, 2011—RECs "simply did not exist either in fact or in law at the time of the EEPAs."[56] MEA's generation of electricity before that day created only RECs recognized by Pennsylvania law—the RECs currently in MEA's PJM GATS account. And since West Virginia law cannot and does not even purport to govern those RECs, they were and remain the sole property of MEA alone.[57]

The PSC stated in its Order that it will allow the Utilities to "apply" for West Virginia certification on MEA's behalf. Not only would that be unlawful (as shown below), it would also not change the outcome as to RECs purportedly recognized by West Virginia law created by the generation of electricity before January 4, 2011, which cannot possibly exist regardless of the certification status of the generator.

## II. At no time could MEA's generation of electricity ever possibly have given or give rise to RECs recognized by West Virginia law, because at no time has MEA been certified to create RECs recognized by West Virginia law.

Regardless of when electricity was generated, West Virginia law recognizes only RECs that are created when a certified facility generates electricity: "Only electricity generated after the alternative or renewable energy resource is certified under Rule 4.2.a or 4.2.c is eligible for a credit . . . ." W. VA. CODE ST. R. § 150-34-5.2.a.1. It is undisputed that MEA is not "certified under Rule 4.2.a or 4.2.c," has never been certified under Rule 4.2.a or Rule 4.2.c, and has no present plan to obtain such certification. Therefore, the clear and unambiguous language of Rule 5.2.a.1 requires that MEA's generation of electricity could and can never create RECs recognized by West Virginia law.

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[56] (PSC Order at 36.)

[57] It is important to bear in mind the dual effect of the PSC Order. The PSC Order not only erroneously creates West Virginia RECs back to before the existence of the Portfolio Standards Rules and awards those "new" West Virginia RECs to the Utilities; it also purports to award the Utilities with MEA's Pennsylvania RECs, also *nunc pro tunc* the date MEA first created them.

The PSC dealt with this inconvenient fact by holding that if the Utilities present the PSC with proof that MEA meets the standards to receive such certification, the PSC will "deem" MEA as so certified, apparently *nunc pro tunc* all the way back to the first day MEA started generating electricity (even before the WV-AREPA was enacted and before the Portfolio Standards Rules became effective):

> If Mon Power and PE file the information needed to make this determination, the Commission will consider the filing and enter a ruling determining whether the facility meets the requirements for certification under the Rules. In the meantime, the Companies should take reasonable steps to secure the credits from the Morgantown facility that are currently in the MEA GATS account, including but not limited to advising PJM-EIS of the ruling in this case.
>
> Assuming that the Commission will receive sufficient information concerning the MEA generation attributes, the Commission has jurisdiction and authority over the Morgantown project to deem the facility certified to generate credits under the Commission Portfolio Standard Rules based on the jurisdiction and authority provided in the Portfolio Act and in Chapter 24 of the West Virginia Code to resolve the issue of credit ownership and to enable Mon Power and PE to meet the compliance requirements of the Act based on our decision in this case.
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> * * * *
>
> We will consider the relief requested in the [Utilities]' amended Joint Petition and determine whether [MEA's] Morgantown project may be certified as a qualified energy resource to generate credits provided that adequate information is provided to support certification of the facilities under the Commission Portfolio Standard Rules. We determine that allowing qualifying credits that are owned by the [Utilities] to not be certified would work a hardship on ratepayers and that due to the unusual difficulty involved if the [Utilities] would seek or expect cooperation from the MEA in obtaining certification of the MEA it is reasonable to allow the [Utilities] to seek certification of the credits that they own as a result of their Morgantown EEPA.

(PSC Order at 42-43.)

### A. The PSC's conclusion that it can "deem" MEA as certified to create RECs recognized by West Virginia law squarely contradicts its own clear and unambiguous regulation on the subject.

The conclusion that the PSC can "deem" MEA as certified directly contradicts the PSC's own Portfolio Standards Rules, something that the agency is not free to do:

> 4.1. In order to be a qualified energy resource, an electricity generator or project ***seeking entitlement to credits*** must be certified as such by the Commission. If the Commission determines an energy resource qualifies to generate credits under W. Va. Code § 24-2F-4, the Commission will issue a certification number for the qualified energy resource to be recorded in the registry system referenced in Rule 6.1.
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> 4.2. The following types of ***facilities may apply*** to be a qualified energy resource:
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> * * * *

W. VA. CODE ST. R. § 150-34-4.1 to -4.2.c (emphasis added).[58]

Ultimately, the PSC offers only its idea of good policy as the basis for its authority to "deem" MEA to be certified to create RECs recognized by West Virginia law: "Given the favorable regulatory treatment afforded MEA over the years and the actions taken by Companies and the Commission to support the viability and financial success of the facility coupled with the Commission's determination that the Companies own the credits, the Commission finds the refusal of MEA in this case to certify the facility to be unreasonable."[59] The question before the PSC, however, was not whether it feels a QF's actions are "unreasonable." This is not a negligence case. It is a statutory and regulatory interpretation case. Nothing in any law gave the PSC any authority to overrule what it believes is a QF's "unreasonable" decision to be certified in one state but not others.

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[58] *Cf.* W. VA. CODE ST. R. § 150-34-4.4 ("Any *electricity generator seeking certification of facilities* . . . shall submit to the Commission a verified application stating, at a minimum [around a dozen of pieces of information about the facility].") (emphasis added).

[59] (PSC Order at 41.)

Instead, as the clear and unambiguous language of Rules 4.1 and 4.2 requires, the only basis for the PSC to certify a QF as eligible to create RECs recognized by West Virginia law is after that QF "applies" for such certification. There is nothing in the WV-AREPA, in the Portfolio Standards Rules, or in any other law that would allow the PSC to wave its wand and "deem" MEA as certified under West Virginia law.[60] As discussed earlier, an administrative agency is not free to disregard its own rules so cavalierly.[61]

### B. The PSC's conclusion that it can "deem" MEA as certified to create RECs recognized by West Virginia law contradicts MEA's federally-created exemption from regulation.

Under § 210(e) of PURPA, QFs are exempted from state laws relating to the rates of electric utilities and the financial and organizational regulation of electric utilities.[62] While Congress specifically left room for states to review and approve power purchase contracts as part of state regulation of electric utilities, they may not regulate QFs inconsistently with PURPA.

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[60] Further demonstrating the error of the PSC's conclusion, West Virginia-certified status requires that the QF allow the PSC to "verify information submitted as part of the application process for certification as a qualified energy resource by performing a review or site visit to the qualified energy resource," W. VA. CODE ST. R. § 150-34-4.5, including providing the PSC with "access to the qualified energy resource" and "furnish[ing] documentation to substantiate information submitted as part of the qualification application process," even as far as requiring the QF to allow the PSC to have "physical access to the qualified energy resource," *id.* *See also* W. VA. CODE ST. R. § 150-34-5.9 ("The Commission may verify information submitted for certification of credits by performing a review or site visit to the electric utility or generating facility. The qualified facility shall provide the Commission access to the facility or furnish documentation to substantiate information submitted as part of the certification process. . . ."). Presumably, the PSC would require MEA to submit itself involuntarily to such "verification" and "physical access" as part of the "deeming" process. The Portfolio Standards Rules also require West Virginia-certified QFs to apprise the PSC of changes to the QF's "operating characteristics," including such details as "changes in fuel type, fuel mix, generator type or the rate of net carbon dioxide emissions." W. VA. CODE ST. R. § 150-34-4.6. Again, one assumes that the PSC will require MEA to file such reports. The PSC's legal authority for such requirements remains unidentified.

[61] (*See also* discussion at 38 (discussing PSC's use of "hardship" and "difficulty" as bases to refuse to apply the law).)

[62] 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c). The Commission recognized in *MEA v. Mon Power*, Case No. 09-0985-E-C (June 9, 2010) that "[t]he PURPA statute and rule exempt a qualifying cogeneration facility, such as the MEA Project, from utility-type regulation by a state commission relating to rates or financial or organizational matters."

FERC, when promulgating its rules, did not establish specific guidelines as to what it meant by "financial and organization" regulation.[63] But FERC did state that it intended "to provide a broad exemption from State laws and regulations which would conflict with the State's implementation of the [FERC's] rules under section 210 [of PURPA]."[64] According to FERC, a broad exemption was necessary in order to encourage projects similar to MEA's.[65]

Were the PSC to compel MEA to make a filing under the WV-AREPA and its implementing regulations to certify MEA's facility as a "qualified energy resource"[66] (whether directly or through the artifice of "deeming" MEA as having applied by virtue of the Utilities doing so), the PSC would violate PURPA and its implementing regulations. The PSC's action would be a state directive that exerts impermissible "financial" and "organization" regulation of MEA. Simply stated, the PSC cannot make management decisions for MEA (as a QF) that affect MEA's financial affairs, its rates, or its managerial discretion in the same way the PSC may be able to regulate a utility.

Furthermore, requiring MEA to file to certify its facility *because* it is QF, or *because* it has a PURPA agreement with a utility, as the PSC is doing, is discriminatory against a QF in violation of the PURPA, which prohibits not only most state regulation of QFs but also discrimination against QFs. Section 210(b) of PURPA provides that purchases from QFs must be at rates that are "not discriminatory against QFs."[67]

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63 45 Fed. Reg. 12,214, 12,233 (Feb. 25, 1980).

64 *Id.*

65 *Id.*

66 Or worse, ignore that MEA has not certified its facility under the WV-AREPA and unlawfully declare the facility certified so that it must generate RECs for Mon Power.

67 Similarly, 18 C.F.R. § 292.304(a)(1) requires that the rates for such purchases shall: "(1) be just and reasonable to the electric consumer of the electric utility and in the public interest; and (2) ***not discriminate against qualifying cogeneration and small power production facilities***" (emphasis added).

## III. Even if MEA's generation of electricity could be said to have ever created any RECs recognized by West Virginia law, then federal and West Virginia state law both require that they belong to MEA, not the Utilities.

It is unclear from the PSC Order whether the PSC's decision that the Utilities now own all of MEA's past and future RECs was based on the premise that the RECs *initially* belonged to the Utilities, or that the RECs initially belonged to MEA but that MEA *conveyed* them to the Utilities in the EEPA—the only two possible ways that the Utilities could now own those RECs.[68] It does not matter which premise the PSC relied on, because both are wrong.

### A. Any RECs recognized by West Virginia law that were ever created by MEA's generation of electricity were awarded to MEA.

When the PSC responded to the West Virginia Legislature's charge in the WV-AREPA to promulgate rules implementing West Virginia's REC program, the agency created the very concept of RECs recognized by West Virginia law. The PSC also squarely addressed who initially owns any such RECs created when a QF generates electricity:

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

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[68] Suggesting the former, the PSC spends time, for example, (incorrectly) concluding that Rule 5.2, governing to whom RECs are initially awarded, does not apply (*see, e.g.*, PSC Order at 28 ("Because we have decided that our Portfolio Standard Rules do not *vest* the PURPA QFs with the credits, we turn to an analysis of State law in order to resolve this dispute.") (emphasis added)), and it concludes that "the QFs do not own the electricity at the time the credits are created . . . . The credits cannot be taken from the QFs when the credits do not rightfully belong to them when they are created." (*Id.* at 40.)

There is, though, just as much language in the PSC Order that all but requires reading it as based on the theory that the PSC necessarily assumed MEA owned the RECs at their inception but that the EEPA somehow conveyed those RECs to the Utilities. (*See, e.g.*, *id.* at 28-29 (stating in the very next sentence: "The Portfolio Act does not contain a specific provision that the utility or a PURPA generator owns the credits *under EEPAs* that predate the Act. In the absence of specific statutory provisions in the Act governing the ownership of the credits *under the EEPAs*, . . . .") (emphasis added); *id.* at 34 (titled "Contractual Interpretation of the EEPAs"); *id.* at 42 (saying the Utilities own MEA's RECs "as a result of the Morgantown EEPA").) Since no "contract analysis" would be needed unless MEA owned the RECs in the first instance, this analysis suggests the PSC is not sure about initial ownership.

W. VA. CODE ST. R. § 150-34-5.2 ("Rule 5.2"). The PSC further provided that such RECs may be "included in, or bundled with, the purchase of the power," W. VA. CODE ST. R. § 150-34-5.6, or they may be "purchased independently, or unbundled from, purchased power," *id.*

As the PSC explained in its order promulgating the Portfolio Standards Rules:

> After considering the comments filed, the Commission has extended the awarding of [RECs] to nonutility generators [which would include QFs]. . . .
>
> * * * *
>
> In the absence of a clear statutory directive specifying that the credits under W. Va. Code §24-2F-4 should be awarded to non-utility generators, the Commission has endeavored to construe the statutory provisions of W. Va. Code §24-2F-4 and to follow the intent of the Act in drafting final rules awarding credits to nonutility generators. . . .
>
> * * * *
>
> Consistent with our interpretation of the Act, **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 . . . .***

*Final Rules Governing Alternative & Renewable Energy Portfolio Standard*, G.O. No. 184.25, at 5-6 (Pub. Serv. Comm'n of W. Va. Nov. 5, 2010) (the "Portfolio Order") (emphasis added); *see also id.* at 9-10 (agreeing that "credits are initially awarded to, and thus *owned by*, the entity that generates the electricity") (emphasis added); *id.* at 12 (reiterating that the PSC modified Rule 5.6 to reflect that a QF may sell RECs "independently of the purchased power").

The PSC apparently does not dispute that if Rule 5.2 applied, it would dispose of the question of who owns RECs recognized by West Virginia law at the moment of their creation in favor of QFs. Instead, the PSC held that Rule 5.2 *does not apply* to RECs created pursuant to a *contract executed* before January 4, 2011 (the Rule's effective date), *i.e.*, that all RECs that MEA has ever created and will ever create have been "grandfathered out" of Rule 5.2. The PSC's rejection of Rule 5.2 is based on a number of conclusions that are plainly wrong.

Even if one assumes *arguendo* that the PSC can somehow retroactively create RECs recognized by West Virginia law based on pre-January 4, 2011 generation of electricity (an incorrect assumption), then the PSC can only do so by saying that West Virginia law—*i.e.*, the Portfolio Standards Rules, the very rules that brought all West Virginia RECs to life—apply, because without the Portfolio Standards Rules, there are *no West Virginia-recognized RECs at all*. And if the Portfolio Standards Rules apply, then they must *all* apply, which means that Rule 5.2 applies, which in turn means that QFs unambiguously own any "pre-January 4, 2011 West Virginia RECs" that would exist (again, indulging in the fiction that there can possibly be any pre-January 4, 2011 RECs recognized by West Virginia law).[69]

The PSC's next mistake, then, was in believing that it was free to pick and choose the parts of its rules that it believes support its desired outcome (the part creating RECs) while openly ignoring the parts that do not (the part vesting them in QFs). "[A]dministrative agencies must abide by their properly promulgated rules until they are lawfully changed,"[70] and the PSC's rejection of Rule 5.2 was clearly erroneous.

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[69] In their reply brief, the Utilities contended that Rule 5.2 does not result in MEA being awarded any West Virginia RECs that arise out of MEA's generation of electricity because "the facility ***must first be certified*** by the Commission" (Utilities' Reply Br. at 10.) And since MEA certainly is not a West Virginia-certified non-utility generator, say the Utilities, then Rule 5.2 does not apply, and any argument to the contrary, they asserted, is "baseless and self-serving." (*Id.*) How the Utilities can make this argument with a straight face is truly baffling, given that these are the very same Utilities that argued out of the other side of their mouths that MEA should be "deemed" to have been certified under the then-non-existent Portfolio Standards Rules all the way back to before those rules were even rules. Picking to apply (indeed, over-apply) a rule when it benefits you to do so but pretending like it does not exist when it eviscerates your case is canonically "baseless and self-serving."

[70] *Consumer Advocate Div. of Pub. Serv. Comm'n v. Pub. Serv. Comm'n*, 182 W. Va. 152, 157, 386 S.E.2d 650, 655 (1989); *see also In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 256, 539 S.E.2d 757, 763 (2000) ("An administrative agency is, of course, obligated to follow and apply its rules and regulations in existence at the time of agency action.") (internal quotation marks and citations omitted). "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to *every section, clause, word or part of the statute*." Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) (emphasis added).

Also mistaken was the PSC's decision to compare the Rule's effective date with the day on which MEA and Mon Power *executed the EEPA*, resulting in the PSC holding that Rule 5.2 does not apply to *any* RECs created by MEA's generation of electricity pursuant to its pre-January 4, 2011 EEPA. The language of the rule says nothing about the date of the contract that gave rise to the demand for the electricity whose generation created the RECs. Rules set out exceptions by *stating* them, not by being silent. If Rule 5.2 meant to exclude PURPA contracts like the MEA/Mon Power EEPA, it would have *said* that. The PSC erroneously read an exception into the rule based on what the rule does *not* say. Accepting such a theory would, for example, allow reading another exception into Rule 5.2 for companies incorporated before January 4, 2011, or even companies starting with the letter M, who are, after all, also not mentioned in the rule. Using the EEPA's execution date was purely arbitrary. The PSC's conclusion further conflates *initial* ownership, which is governed exclusively by Rule 5.2, and any *subsequent conveyance*, which alone is governed by any applicable agreement.[71]

### B. MEA did not convey to the Utilities, under the EEPA or otherwise, any RECs recognized by West Virginia law that were ever created by MEA's generation of electricity.

The PSC's answer to MEA's black letter contract law arguments is to contend that RECs recognized by West Virginia law are somehow unique and cannot be dealt with by applying West Virginia contract law:

> As a creation of subsequent state law and regulation, the credits are not a normal intangible asset that could have been considered independent of state regulatory jurisdiction by arms[’] length

[71] The PSC Order also has the effect of cancelling Rule 5.6 for PURPA contracts like the EEPA. (*Compare* W. VA. CODE ST. R. § 150-34-5.6 (providing that RECs may be "purchased independently, or unbundled from, purchased power") *with* PSC Order at 31 (finding that "it would be unreasonable and contrary to State law to disregard the benefits of the fuel attributes of the PURPA facilities under recent state law creating the RECs and conclude that the RECs are not *an integral and inseparable component of the energy*") (emphasis added).)

> contract negotiation. For these reasons, the determination of ownership of the credits requires the unique expertise of the Commission . . . .

(PSC Order at 20.) The PSC is incorrect. Of course RECs recognized by West Virginia law are a creation of state law. But that does not mean that they are any different than any other intangible asset created by a legislative act (like a tax credit, for example).[72] The PSC applied its expertise to the determination of REC ownership in its rulemaking to effectuate the WV-AREPA. But nothing about the PSC's rulemaking authority under the WV-AREPA imbued the agency with any expertise to interpret contracts. Contrary to the PSC's analysis, this is not a jurisdictional argument. The issue is not whether the WV-AREPA granted PSC "jurisdiction" to create and manage the system of tradable RECs under West Virginia law. No party challenges that jurisdiction. Rather, the mistake that the PSC makes is to ignore basic principles of West Virginia contract law based on an incorrect assertion of expertise.

### 1. The PSC Order violates West Virginia contract law.

*Any* decision by the PSC to determine REC ownership "under the PURPA contracts" or "under the EEPAs"[73] necessarily requires contract interpretation. And such contract interpretation must axiomatically comport with West Virginia contract law. The PSC indulges in a *non sequitur* when it says that its Order determines REC ownership "under the EEPAs." A contract does not determine ownership; it conveys something already owned

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[72] It is indisputable that RECs are independently valuable commodities separate and apart from electricity. "With the creation of the system of tradeable RECs, a new property right has essentially been established; the tradability of the RECs makes them akin to stand-alone personal property, separate and distinct from the generation to which they are attached." *Order Determining Ownership of Renewable Energy Credits*, No. E-002/M-08-440, at 8 (Minn. Pub. Utils. Comm'n Sept. 9, 2010) ("Minn. PUC Decision"). Nothing about the legislative creation of RECs makes them any different from any other intangible asset.

[73] (*See, e.g.*, PSC Order at 14, 24, 25, 26, 42 & 43.)

according to its terms.[74] Thus, the PSC's decision regarding ownership "under the EEPAs" necessarily means that the PSC intends to convey RECs from QFs to utilities. If QFs did not own West Virginia RECs in the first instance, they would have nothing to convey, and resort to the EEPAs would not be necessary. The PSC Order, however, does not convey RECs "under the EEPAs" consistent with West Virginia contract law.

The PSC's contract analysis begins and ends with its undisputed assertion that "the terms and conditions of the PURPA EEPAs provide that the utility must purchase all of the electricity from the PURPA facilities based on the utility's avoided cost or negotiated rate." (PSC Order at 36.) That statement, however, says nothing about the conveyance of and payment for the separate commodity that is a REC.

FERC's decision in *American Ref-Fuel* is clear that "**avoided cost rates are not intended to compensate the QF for more than capacity and energy.**"[75] FERC recently confirmed this federal rule, born of FERC's unique expertise and authority to interpret PURPA:

> Compensation for such environmental externalities through ***RECs*** is ***outside of PURPA***, and is ***not part of the avoided cost calculation; RECs are separate commodities*** from the capacity and energy produced by QFs. If a state chooses to create these separate commodities, they are not compensation for capacity and energy.

*Calif. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010), *order granting clarification and dismissing rehearing*, 133 FERC ¶ 61,059, at 16 n.62 (2010), *order denying rehearing*, 134 FERC ¶ 61,044 (2011) (footnotes omitted; emphasis added); *see also* W. VA. CODE ST. R. § 150-3-12.1.1.f (defining "avoided costs" without reference to environmental or other

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[74] The PSC is further incorrect to state that "it is a given that the utility has purchased and will continue to purchase *qualified generation* from PURPA projects." (PSC Order at 29 (emphasis added).) A utility purchases generic energy and capacity under an EEPA, not electrical generation qualified in West Virginia to generate WV RECs.

[75] *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003), *order denying rehearing*, 107 FERC ¶ 61,016, at 15 (2004) (footnote omitted; emphasis added).

attributes).[76] Thus, as a matter of controlling federal law, the consideration in an EEPA does not purchase RECs. The PSC wholly ignores this controlling federal law.

PURPA requires that the PSC ***cannot*** conclude that once West Virginia created West Virginia RECs, utilities paid for them along with energy and capacity under EEPAs.[77] 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."[78] That is gibberish: State law includes state contract law.

#### a. As a matter of West Virginia state contract law, MEA did not sell any RECs to the Utilities pursuant to the EEPA, because as a matter of federal law, the Utilities gave no consideration for any RECs.

Federal law is clear that EEPAs convey no consideration for RECs. Thus, when the PSC concludes that EEPAs convey as a separate, independently valuable commodity—*e.g.*, RECs—for no additional consideration, the PSC contravenes West Virginia contract law. For an EEPA to convey RECs in West Virginia, consideration must be paid.[79] Without consideration,

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[76] Accordingly, a PURPA agreement does not subsidize or unfairly enrich QF generators, as the PSC contends. (*See* PSC Order at 3 ("All of the EEPAs include other contract terms . . . that are favorable to the QFs.").) "If purchase rates are set at the utility's avoided cost, consumers are not forced to subsidize QFs because they are paying the same amount they would have paid if the utility had generated energy itself or purchased energy elsewhere." *Indep. Energy Producers Ass'n v. Calif. Pub. Util. Comm'n,* 36 F.3d 848, 858 (9th Cir. 1994) (rejecting state PUC plan to have utilities pay lesser avoided cost rates when a generator operated out of compliance with federal QF efficiency requirements). Any additional terms beyond cost were negotiated and acceptable to *both* parties.

[77] (*See* PSC Order at 36.) The actual energy and capacity purchased under an EEPA—the very commodities transferred by the contract—are indistinguishable from energy and capacity created by a coal-fired power plant. Thus, the PSC is incorrect to focus on a REC being created at the moment of electricity generation. (*See* PSC Order at 36.) The time of creation is immaterial. If something additional is created along with electricity—however intangible—it remains separate from the electricity regardless of the timing of its creation. The PSC simply is not free to ignore the separateness of RECs.

[78] (PSC Order at 37.)

[79] *See* syl. pt. 5, *Va. Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926).

there can be no conveyance.[80] But, again, controlling federal law states 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.[81]

**b. As a matter of West Virginia state contract law, a contract that is silent as to whether one party has sold an asset to another party does not effect the sale of that asset.**

Undisputedly, the EEPAs at issue are silent as to RECs. So for the PSC to read a conveyance of RECs into the EEPAs further contravenes West Virginia contract law:

> [W]hen a written instrument is plain and unambiguous and is complete upon its face it contains the entire agreement between and is the final act of the parties.

*Edmiston v. Wilson*, 146 W. Va. 511, 527, 120 S.E.2d 491, 500 (1961) (citations omitted).[82]

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80 *Id.*

81 Contrary to the PSC's mischaracterization, *Am. 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 [*Am. 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.").) Rather, in *Am. Ref-Fuel*, FERC stated that *as a matter of federal law—i.e.*, PURPA—a utility's "avoid 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.*, post-PURPA, 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. Thus it is not entirely correct to state that PURPA does not govern who owns RECs and that only state law does. PURPA governs the issue of whether there has been consideration, so a state (like West Virginia) whose law requires consideration would violate federal law by finding that there was consideration, or its own state's law by finding that none was needed.

82 *See also, e.g.*, syl. pt. 1, *State ex rel. Coral Pools, Inc. v. Knapp*, 147 W. Va. 704, 131 S.E.2d 81 (1963) ("An unambiguous written agreement entered into as the result of verbal negotiations will, in the absence of a showing of fraud or mistake, be conclusively presumed to represent the final agreement of the parties thereto, and parol evidence may not be admitted to prove that the agreement of the parties was different from that expressed in such writing."); syl. pt. 1, in part, *Jones v. Kessler*, 98 W. Va. 1, 126 S.E. 344 (1925) ("When a written contract upon its face is couched in such terms as to import a legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent of the undertaking were reduced to writing.").

No amount of contract "interpretation" by the PSC can find an agreement in a pre-WV-AREPA contract to convey RECs. "[T]he intention of the parties is controlling, and must be ascertained from the ***language*** of the instrument."[83] "[A] court [or the PSC] should take great care not to make the contract speak where it was intentionally silent."[84,85] Nothing in West Virginia contract law permits the PSC to read a conveyance of RECs into the EEPAs when the EEPAs contain no such conveyance.

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[83] *Berry v. Humphreys*, 76 W. Va. 668, 670, 86 S.E. 568 (1915) (emphasis added).

[84] *Id.* Without any ability to contemplate the creation of RECs in the distant future, the parties to pre-WV-AREPA agreements were undoubtedly "intentionally silent" as to RECs. This circumstance also ensures that no oral agreement was contemporaneously reached that could be shown by parol evidence to modify the written agreements.

[85] *See also, e.g.*, *Stewart v. Blackwood Electric Steel Corp.*, 100 W. Va. 331, 130 S.E. 447, 449 (1925) (concluding it is reversible error to establish a term as to which both parties were silent). When considered in terms of West Virginia contract law, the Pennsylvania ALJ's decision that a purchasing utility automatically purchases RECs when the contract is silent, is clearly incorrect as a matter of governing West Virginia law. Thus, the Pennsylvania court decision ultimately upholding that ALJ's decision, *ARIPPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204, 1210 (Pa. Commw. Ct. 2009), also contradicts West Virginia's contract law. Under West Virginia law, a contract cannot be "interpreted" to transfer something that neither party intended to be transferred.

Other state decisions cited in the PSC Order are equally incorrect under West Virginia contract law. The court in *Wheelabrator Lisbon, Inc. v. Ct. Dept. of Pub. Util. Control*, 931 A.2d 159 (Conn. 2007), affirmed the Connecticut DPUC's conclusion that the word "electricity" in its own regulations included renewable attributes. Thus, the *Wheelabrator* court relied on statutory interpretation principles (including deference to an agency interpreting its own regulations), rather than contract interpretation principles. Nonetheless, the *Wheelabrator* court ultimately was unable to escape recognizing that its ruling meant that avoided cost must actually include compensation for renewable attributes in contravention of FERC's ruling in *Am. Ref-Fuel*. *Id.* at 697 n.25. To the extent that the federal appeals court reviewing the Connecticut DPUC's decision concluded that the DPUC "simply exercised its authority to interpret the Agreement's provisions," *Wheelabrator Lisbon, Inc. v. Ct. Dept. of Pub. Util. Control*, 531 F.3d 183, 189 (2d Cir. 2008), that court, too, allowed the DPUC to do something that would be inconsistent with West Virginia contract law.

The New Jersey decision also interprets a silent contract in a way that would be incorrect under West Virginia law. The New Jersey court concluded that RECs were purchased under PURPA agreements, "[e]ven though the appellants may have believed their contracts were only about providing electricity." *In re Ownership of Renewable Energy Certificates*, 913 A.2d 825, 830 (N.J. Super. Ct. 2007). Regardless of the validity of that conclusion under New Jersey law, that is an incorrect conclusion as a matter of *West Virginia* contract law.

The PSC based its decision to find that the EEPA conveyed the RECs from MEA to the Utilities on the fact that RECs are created at the same time as the electrical energy that the Utilities bought in the EEPA, so surely the Utilities must have bought the RECs, too:

> Because the credits are created by state law and exist only as the electricity is generated, it follows that Mon Power as the purchaser and owner of the qualifying generation at the time the electricity is generated owns the credits under the EEPAs.

(PSC Order at 30; *see also id.* at 36 ("Because RECs are created at the time the electricity is generated, the purchaser and owner of the electricity at the time the electricity is generated owns the credits as well.").)

This argument has absolutely no merit, as one example easily shows: MEA also generates steam at the same time it generates electricity and RECs. Surely Mon Power does not feel that it is entitled to MEA's steam, too. Like steam, RECs are a valuable byproduct of MEA's generation of electrical energy. And they are not conveyed by a contract that is silent as to that asset any more than the steam is:

> In this regard, we note that cogeneration facilities, to receive QF status, are required to produce both electricity and useful thermal output. The thermal output that is a pre-requisite to a cogeneration facility's achieving QF status is saleable separately from the capacity and energy of the cogeneration facility.
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> **If the thermal output of a cogeneration QF is separately saleable, the renewable attributes of a small power production QF are similarly separate.**

107 FERC ¶ 61,016, 61,044 n.9 (citations omitted; emphasis added).

### 2. Giving any of MEA's RECs, a valuable asset, to the Utilities purportedly as a result of the EEPA necessarily lowers the rate that the Utilities are paying MEA to below Mon Power's avoided cost, in violation of PURPA.

Because the avoided cost paid under EEPAs does not compensate QFs for any environmental attribute as a matter of federal law (*see supra*), the PSC's conclusion that it does violates that controlling federal law. The MEA/Mon Power EEPA conveys only "Project Energy" to Mon Power in exchange for the utility's avoided cost, which is measured by Mon Power's calculated cost to produce electricity.[86] Accordingly, the PSC's conclusion that EEPAs convey RECs for the same avoided cost that before purchased only energy effectively reduces the compensation to QFs under the EEPAs. As a result of the PSC Order, the previously approved avoided cost rate now pays for energy, capacity, ***and*** RECs. The avoided cost rate to QFs is lowered by the value of the RECs, so that QFs' compensation for energy and capacity is less than the full avoided cost rate they received before.

That is an impermissible modification of the EEPAs' price terms.

> [O]nce [a state agency] approve[s] [a] power purchase agreement between [a QF and a utility] on the ground that the rates were consistent with avoided cost, an action or order by the [agency] to reconsider its approval or to deny the passage of those rates to [the utility's] consumers under purported state authority [is] preempted by federal law.

[86] (*See* MEA/Mon Power EEPA, Art. I and related definitions in Art. IX, attached to the Utilities' May 20, 2011 Initial Br. at Ex. B; *see also* W. VA. CODE ST. R. § 150-3-12.1.1.f ("'Avoided costs' means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, ***such utility would generate itself or purchase from another source***.") (emphasis added).) Thus, even the PSC's own definition of "avoided costs" excludes consideration of any environmental or other attribute of how the energy is generated. *See also* 18 C.F.R. § 292.101(b)(6) (defining "avoided costs" identically).

*Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs of N.J.*, 44 F.3d 1178, 1194 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995).[87]

When the PSC interprets the EEPAs to convey RECs—as discussed above, if the EEPAs are not conveying RECs, then would be no need to refer to the EEPAs—it necessarily affects the price term. The PSC's "conclu[sion] that [its] decision does not constitute an impermissible modification of the avoided cost rate 'utility-type' regulation" (PSC Order at 39) has no basis or support. At best, the PSC relies on a policy argument to overcome irrefutable contract law and mathematical principles.[88]

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[87] *See also Smith Cogeneration Management, Inc. v. The Corp. Comm'n of Okla.*, 863 P.2d 1227, 1241 (Okla. 1993) ("Once avoided costs are set, the [state agency] cannot later review the contract to reconsider the avoided costs."); *W. Penn Power Co. v. PaPUC*, 659 A.2d 1055, 1066 (Pa. Commw. Ct. 1995) (concluding "that Section 210 of PURPA preempts the PUC from reconsidering its prior approval of the EEPAs between [the utility] and the QFs or to change the rates established for the avoided costs at the time of the agreements").

MEA's citation to the Second Circuit's *Wheelabrator* decision in a prior proceeding's bench brief was not a specific endorsement of the decision's reasoning. (*But see* PSC Order at 37-38.) Rather, MEA simply provided a citation to a decision, along with multiple other decisions, that superficially purported not to effect a modification of a PURPA agreement. The bench brief citation in a case unrelated to RECs cannot be viewed as MEA once-and-for-all adopting the underlying reasoning of the decision.

[88] The PSC's attempt to distinguish the 2010 Minnesota Public Utilities Commission ("MPUC") decision—which resolved the precise issue before the PSC *in favor of QFs*—makes no logical sense. (*See* PSC Order at 24 (asserting that MPUC did not apply state law in its decision).) In Minnesota, a utility argued that the power that it purchased at avoided cost rates under PURPA agreements (silent as to RECs) also included RECs. The utility argued—as did the Utilities to the PSC here—that because it paid "premium pricing" for the power, it should obtain the inseparable "environmental attributes associated with the renewable energy." Minn. PUC Dec'n at 9. The MPUC, however, rejected that argument and agreed with the FERC that avoided cost pricing in PURPA agreements "does not include any additional value for the severable environmental attributes of power." *Id.* at 10. "[P]ower purchased by utilities pursuant to PURPA power purchase agreements was purchased to meet statutory demands entirely different from that purchased pursuant to [Minnesota's] Renewable Energy Mandates." *Id.* Thus, the MPUC specifically rejected reasoning identical to that in the PSC Order and concluded that "for the power purchase agreements entered into under PURPA, the generators own the RECs absent contractual provisions to the contrary." *Id.* at 11. The MPUC necessarily applied state contract law. But the MPUC also correctly recognized that state contract law must account for controlling federal law, that avoided costs simply do not pay for RECs—something the PSC refused to acknowledge here. The MPUC did not ignore, as does the PSC, the actual holding of *Am. Ref-Fuel*: avoided costs do not include compensation for RECs. Simply because *initial* REC ownership may be determined by a state does not mean that a state agency applying state contract law regarding *conveyance* of a REC may ignore controlling federal law about the nature of the consideration in the contract.

Furthermore, finding that QFs' RECs convey to utilities *because* they are QFs, or *because* they have a PURPA agreement with a utility, as the PSC has expressly done, is discriminatory against QFs vis-à-vis other independent non-utility generators in direct violation of PURPA, which prohibits not only most state regulation of QFs but also discrimination against QFs. Section 210(b) of PURPA provides that purchases from QFs must be at rates that are "not discriminatory against QFs." The entire rationale of the PSC 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 PSC Order explicitly discriminates against QFs with respect to their rates.

## IV. Taking any of MEA's RECs violates the United States and West Virginia Constitutions.

### A. Pennsylvania RECs

As noted, Pennsylvania has enacted its PA-AEPSA.[89] Under the PA-AEPSA, generators located in the PJM region[90] using qualifying fuels are eligible to apply for and be awarded Alternative Energy Credits ("Pa-RECs"). A Pa-REC is a "tradable instrument that is used to establish, verify and monitor compliance with the act."[91]

Under Pennsylvania law, unless a contractual provision assigns alternative energy credits in a different manner, "the owner of the alternative energy system . . . owns any and all

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[89] 73 P.S. §§ 1648.1, *et seq.*

[90] The regulations require a facility seeking qualification as an alternative energy system to be physically located in either Pennsylvania or the control area of a regional transmission organization ("RTO") that manages a portion of the electric transmission system in Pennsylvania. 52 PA. CODE § 75.62(c). "For purposes of compliance with the act, alternative energy sources located in the control area of the PJM Interconnection, LLC RTO or its successor shall be eligible to fulfill compliance obligations of all Pennsylvania EDC's and EGSs." 52 PA. CODE § 75.62(d).

[91] 73 P.S. § 1648.2.

alternative energy credits associated with or created by the production of electric energy by such facility."[92] Thus, Pa-RECs are the generator's intangible personal property.

MEA's facility, which burns waste coal, qualifies as a Tier II Alternative Energy Source under the PA-AEPSA.[93] In Pennsylvania, as in West Virginia, RECs may not be used more than once to satisfy renewable portfolio standards compliance requirements.[94] MEA has registered its Pa-RECs under the PA-AEPSA.[95] MEA has engaged in transactions in interstate commerce in which it has sold its Pa-RECs to others.[96] Any PSC decision holding that the Utilities own MEA's RECs places the PSC in the middle of MEA's contracts with third parties.

Both the federal and state Constitutions forbid the taking of private property without just compensation to the owner.[97] A taking will always be found if there is an actual appropriation or destruction of private property.[98] If the government action denies an owner of all economic use of his property, such regulation is a taking.[99] The principle that depriving an owner of all economic use of his property constitutes a taking applies to government action that denies an owner of all economic use of an intangible.[100]

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92 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.").

93 *See* 73 P.S. § 1648.2.

94 *See* 73 P.S. § 1648.3(e)(6)(iii); W. VA. CODE § 24-2F-5(d)(3).

95 *See* PA-50011-WC-II; Morgantown Energy Facility; Waste Coal/Other Coal; 68.9 Mw; 01/10/2006; PJM, *available at* http://paaeps.com/credit/showQualified.do?todo=qualified.

96 (MEA Ex. 1, Resp. to Questions 1.23 and 1.24.)

97 U.S. CONST., amend. V; W. VA. CONST., article III § 9. The Fifth Amendment's prohibition against such a taking is applicable to the states and their political subdivisions through the Fourteenth Amendment. *Chicago Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897).

98 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (ordinance requiring landlords to allow installation of cable television in their rental units but limiting the fee to $1 was a taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1980) (requirement that public be given free access to a privately developed waterway was a taking).

99 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

100 *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

The protection against governmental taking "is not restricted to physical invasions, occupations, or removals of property; in some cases, overly assiduous government regulation can create an unconstitutional taking."[101] "A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property."[102] It may occur as a result of "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land," even if the government does not physically intrude upon, or acquire a legal interest in, the property.[103] A regulatory action becomes a compensable taking under the Fifth Amendment if the government interference has gone "too far,"[104] which it does when "some people alone" are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[105]

> In identifying a property interest protected from a taking, courts must look to existing rules or understandings that stem from an independent source such as state law. Even though fundamental principles of state property law may define property rights, the Takings Clause nevertheless limits a state's authority to redefine preexisting property rights. Thus, a state, by *ipse dixit*, may not transform private property into public property without compensation, nor can it sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.

*Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000) (internal quotation marks and citations omitted), *cert. denied*, 532 U.S. 983 (2001).

Because Pa-RECs are indisputably MEA's property according to the Pennsylvania Legislature, under these principles of constitutional law, a declaration, *ipse dixit,*

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101 *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 185 (1st Cir. 1999).

102 *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

103 *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

104 *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

105 *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

by the PSC that Allegheny somehow owns MEA's RECs, so that they also could not be redeemed in Pennsylvania, constitutes a prohibited taking.[106]

### B. West Virginia RECs

As demonstrated, *supra*, West Virginia state law (via PSC rulemaking) also awarded RECs like those at issue here to generators, not utilities.[107] As also discussed above, the MEA/Mon Power EEPA does not compensate MEA for RECs. Thus, to now say that property (RECs) that a generator owns (or will own on certification of its resource facility) is conveyed by PSC order to a utility for no additional compensation also constitutes an unconstitutional taking, regardless of whether the generator sells RECs in another state.

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[106] Awarding a generator's RECs to the purchasing utility would also violate the Commerce Clause of the U.S. Constitution. Because for each MWh of electricity generated by MEA, one REC may be used to satisfy only one state's renewable portfolio standards requirements, the Commission cannot award MEA's (non-existent) West Virginia RECs to Mon Power and ignore the impact of that ruling on MEA's disposition of its Pa-RECs. Even in the absence of Congressional action, "[t]he dormant Commerce Clause . . . limits the power of the States to erect barriers against interstate trade." *Yamaha Motor Corp., U.S.A., v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 568 (4th Cir.) (citations omitted), *cert. denied*, 546 U.S. 936 (2005). The dormant Commerce Clause aims to prohibit "economic protectionism," defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994).

Analysis of a dormant Commerce Clause challenge to state action proceeds on two tiers, a discrimination tier and (if necessary) an undue burden tier. *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996), *cert. denied sub nom.*, *South Carolina v. Env'l Tech. Council*, 521 U.S. 1103 (1997). "Under the discrimination tier, 'when a state statute clearly discriminates against interstate commerce, it will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" *Yamaha*, 401 F.3d at 567 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992). "In the jurisprudence of the dormant commerce clause, a finding of facial discrimination is almost always fatal." *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 185 (1st Cir. 1999). "Indeed, when the state statute amounts to simple economic protectionism, a virtually per se rule of invalidity has applied." *Wyoming*, 502 U.S. at 454-55.

In this case, the PSC's decision fails the discrimination tier because it facially discriminates against interstate commerce by removing from interstate commerce entirely a commodity now traded and in the future to be traded in interstate commerce. Such a regulation must be denied unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. The PSC has offered *no* rationale for its regulation *other than* economic protectionism.

[107] Because West Virginia state law has clearly awarded ownership of RECs to non-utility generators, state action determining ownership of RECs is complete. Thus, decisions in other states finding that it was not a taking for a state agency to award RECs to utilities *in the first instance* are inapposite.

## V. The PSC's idea of policy is no substitute for clear rules of federal and state law.

It is apparent from the face of the PSC Order that the PSC based its decision to take MEA's RECs and give them to the Utilities entirely on the agency's notions of policy and its general charge to keep utility rates down. But the PSC is not the Legislature, nor is it a court. And an administrative agency's idea of the best policy and its general rate charges are no substitutes for the clear legal rules that those two branches of government have already set out in black-letter legislation (and even worse, the agency's own clear rules promulgated pursuant to those acts) and judicial opinions.

The PSC believes that the Utilities are already paying enough to compensate MEA for the energy and capacity, which they did bargain for under the EEPA, *and* for MEA's RECs, which they did not bargain for.[108] The PSC also suggests that it thinks MEA got a too good deal. (*See, e.g.*, *id.* at 28 ("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.").)

But PURPA and the FERC have already made very clear that this is false: *i.e.*, that the Utilities are *not* paying for RECs when they pay a QF their "avoided costs." Instead, as a matter of federal law, they are paying only for the generation and capacity. Congress long ago determined a "just and reasonable" rate that was "in the public interest,"[109] and that is by definition the rate MEA is receiving—only for electricity and capacity. FERC understood and undertook this charge,[110] ultimately "set[ting] the rates for purchases at a level which it

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108 (*See, e.g.*, PSC Order at 29-30.)

109 16 U.S.C. § 824a-3(b).

110 FERC Order No. 69, *Small Power Production & Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214,

believe[d] appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA."[111] The West Virginia Legislature required that "[a]n electric utility shall have the right to recover the costs of complying with the alternative and renewable energy portfolio standards set forth in this article in a manner prescribed by the Commission."[112] Obviously, the West Virginia Legislature recognized that a utility's cost to comply with WV-AREPA would ultimately fall on ratepayers. Regardless of what the PSC thinks of the fairness of the WV-AREPA, the PSC went outside the framework established by the Legislature by thinking it better to allocate the costs of compliance to QFs.

The PSC based its decision in part on its belief that when a party makes X and Y at the same time, surely anyone who purchases X ought to own Y, too (*see, e.g.*, PSC Order at 36 ("Because RECs are created at the time the electricity is generated, the purchaser and owner of the electricity at the time the electricity is generated owns the credits as well.")), even when their agreement says absolutely nothing about Y (*see, e.g.*, *id.* at 43 ("the EEPAs do not contain provisions that specify credit ownership by the utility or the QF")). While the PSC's policy might have school-yard appeal, it is not the law of contracts in West Virginia, which clearly requires otherwise, and it violates constitutional proscriptions against taking private property.

The PSC also considers itself free to openly ignore Pennsylvania law on who owns MEA's RECs. (*See, e.g.*, PSC Order at 34 ("Because we are holding that Mon Power and PE own the credits related to the power they purchase from the PURPA facilities for the remaining term of the EEPAs, credits that are based on the energy output of the QFs and that

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12,221-22 (Feb. 25, 1980) ("The [FERC] must ensure that the rates for purchase [of electric energy] be just and reasonable to the electric consumers of the purchasing utility, [and] in the public interest . . . .").

111 *Id.* at 12,221.

112 W. VA. CODE § 24-2F-7(a). Similar to the WV-AREPA, the Portfolio Standards Rules provide that a utility may recover its compliance costs. W. VA. CODE ST. R. § 150-34-11.1.

could be obtained under other state laws are necessarily under the control of Mon Power and PE.").) But this gives neither full faith nor credit to Pennsylvania's determination that MEA owns the RECs in its PJM GATS account.

The PSC agency justified its decision to allow the Utilities to effectively force MEA to apply for certification in West Virginia, notwithstanding the agency's own clear rules to the contrary, by believing that doing otherwise "would work a hardship on ratepayers" (PSC Order at 42) and that it will save the Utilities from "unusual difficulty" (*id.* at 43). (*See also id.* (calling its "deeming" MEA "reasonable").) Saving ratepayers from a perceived "hardship" or the Utilities from "unusual difficulty," while perhaps laudable public policy, are not *carte blanche* to ignore the rules of law. As a non-regulated entity, the PSC lacks the jurisdiction to evaluate MEA's conduct for "reasonableness."

Finally, the PSC believes that since the QFs will "receive[] what they bargained for," (PSC Order at 28), implying that as long as the QF receives a check for the "avoided cost" rate stated in the contract with the utility, it would constitute a windfall to also let QFs keep their RECs. That argument is factually false, irrelevant, and lopsided, and it contradicts clear *legislatively* determined public policy. It is false, because it forgets that RECs have value; taking them from the QFs will reduce the QFs' rate below avoided costs. It is irrelevant because redistribution of wealth is not within the PSC's power. It is lopsided because it fails to recognize that the *exact same thing* can be said about the utilities, who will still receive the electricity and capacity they bargained for *at the same rate* at the same rate as if RECs never existed. And it contradicts legislative findings that utilities should bear the initial costs of PURPA and the RPS acts, which they will largely pass on to ratepayers, who ultimately reap the environmental benefits of the acts—apparently without, according to the PSC, expecting to pay for them:

> The [FERC] emphasized the need to provide incentives for the development of cogeneration and small power production:
>
> > "[I]n most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual consumer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies."
>
> The Commission noted that "ratepayers and the nation as a whole will benefit from the decreased reliance on scarce fossil fuels, such as oil and gas, and the more efficient use of energy."

*Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 406 (1983) (citations omitted). "The practical effect of PURPA is to divert potential profits from regulated electric companies, whose earnings are largely based on the value of their owned facilities, to the owners of QFs." *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 677 A.2d 831, 832-33 (Pa. 1996).[113]

The PSC perceives its mission as being "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 (emphasis added).) Notably missing from this "balancing" are the interests of the QFs who serve PURPA's and the WV-AREPA's goals of expanding the nation's use of alternative sources of energy. Nonetheless, the proper place for the PSC to have considered its "fairness" and "equity" arguments was in the promulgation of the Portfolio Standards Rules. Within the limits of PURPA and WV-AREPA, the agency was free to make

[113] The PSC Order purports to be based primarily if not entirely on the fact that this case involves a pre-WV-AREPA PURPA contract between a utility and a non-utility generator. But the rule that the PSC Order purports to set out is not so limited, and must and would apply equally to non-utility generators selling electricity to utilities under a pre-WV-AREPA-but-*non*-PURPA contract. In that case, the PSC's "policies" would not even exist, demonstrating another reason not to allow an administrative agency to ignore the law under the guise of furthering its idea of good policy.

rules governing REC ownership.[114] It is now bound by those rules. The PSC is not now free to simply substitute its judgment for that of Congress, of the Legislature, or of this Court in the name of the agency's ethereal notion of the best public policy:

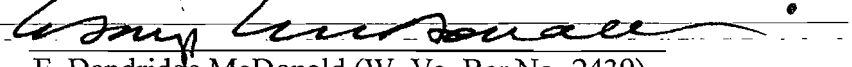
> Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Syl. pt. 2, *M & J Garage & Towing, Inc. v. W. Va. State Police*, 227 W. Va. 344, 709 S.E.2d 194 (2010).

## CONCLUSION

Accordingly, 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*.

**MORGANTOWN ENERGY ASSOCIATES,**
By Counsel



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[114] The PSC cannot seriously contend that at the time it promulgated its Portfolio Standards Rules (in which it award RECs to NUGs (like QFs)), it did not know all of the same factual circumstances that it considered in this case as a reason for ignoring those very rules—namely, that some NUGs (*i.e.*, QFs) have pre-WV-AREPA contracts.

## CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2011, true and accurate copies of the foregoing *Petitioner's 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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