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IDAHO PUBLIC
UTILITIES COMMISSION

May 29, 2012

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: IPC-E-11-15 – Grand View Solar PV Two, LLC v. Idaho Power – Augmentation of Record to Consider New Legal Authority

Dear Ms. Jewell:

I write on behalf of Grand View PV Solar Two, LLC in the above captioned docket and respectfully request the Commission augment and consider on the record a recent order issued by the Federal Energy Regulatory Commission ("FERC") that specifically address a state commission's legal ability to issue a ruling on REC ownership. There is currently pending a Motion for Summary Judgment in this docket with legal briefing. The very relevant FERC issuance was made just weeks ago and would have been referenced by Grand View in its briefing had it been available at the time.

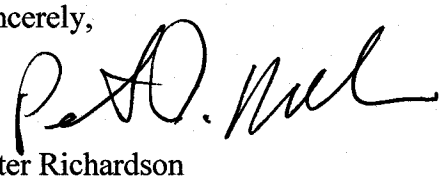
In Morgantown Energy Associates, Docket Nos. EL12-36-000 and QF89-25-008 and *City of New Martinsville, West Virginia*, Docket Nos. EL12-48-000 and QF85-541-00, issued on April 24, 2012, FERC made the following finding:

> In making this statement, the Commission reasoned that, under PURPA and the Commission's regulations, electric utilities must purchase energy and capacity made available by QFs, and that rates for these purchases must be just and reasonable to the electric customer of the electric utility and in the public interest, and not discriminate against QFs. Additionally, an electric utility is not required to pay the QF more than the avoided costs of generating the power itself or of purchasing from another source. The Commission stated that these avoided cost rates, "<u>in short, are not intended to compensate the QF for more that capacity and energy." To the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs, the West Virginia Order is inconsistent with PURPA</u>.

At p. 18 citations omitted, emphasis provided. A complete copy of the FERC decision is attached.

Grand View respectfully requests that the Idaho Public Utilities Commission augment its record and rule on this matter with the attached FERC order aiding to inform its decision.

Sincerely,



Peter Richardson
Richardson & O'Leary PLLC
Attorney for Grand View Solar PV, Two

Cc: parties of record

139 FERC ¶ 61,066
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Morgantown Energy Associates	Docket Nos. EL12-36-000 QF89-25-008
City of New Martinsville, West Virginia	Docket Nos. EL12-48-000 QF85-541-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued April 24, 2012)

1. In a November 22, 2011 decision,[1] the Public Service Commission of West Virginia (West Virginia Commission) held that an electric utility that purchases electric energy and capacity under an electric energy purchase agreement[2] with a qualifying facility (QF) formed in accordance with the Public Utility Regulatory Policies Act of 1978 (PURPA)[3]—and not the owner of the QF—owns the renewable energy credits (REC) associated with that purchase.[4] In response to subsequent petitions filed with this Commission, we hereby give notice that we decline to initiate an enforcement action pursuant to section 210(h) of PURPA.[5] However, as discussed below, we conclude that certain statements in the West Virginia Order are inconsistent with the requirements of PURPA.

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[1] *Monongahela Power Company*, Case No. 11-0249-E-P, (Pub. Serv. Comm'n of W. Va. Nov. 22, 2011) (West Virginia Order).

[2] In this order, the Commission refers to such agreements by the term they are more usually known as—power purchase agreements (PPA).

[3] 16 U.S.C. § 824a-3 (2006).

[4] West Virginia Order at 56.

[5] 16 U.S.C. § 824a-3(h) (2006).

I. Background

2. Morgantown Energy Associates (Morgantown Energy) owns and operates a 50 MW waste-coal cogeneration facility, which has been self-certified by Morgantown Energy as a qualifying cogeneration facility.[6] Morgantown Energy and Monongahela Power Company (Monongahela Power) are parties to a PPA (Morgantown PPA), entered into on March 1, 1989, whereby Morgantown Energy sells its capacity and energy to Monongahela Power in return for an avoided cost rate in accordance with PURPA. The Morgantown PPA was approved by the West Virginia Commission, with Morgantown Energy generating electric energy under the Morgantown PPA since April 1992. The Morgantown PPA is silent with respect to RECs.[7] Morgantown Energy, however, is certified to produce RECs under Pennsylvania state law.[8]

3. The City of New Martinsville, West Virginia (New Martinsville) owns and operates a municipal electric system serving approximately 1,800 customers. It also owns and operates a hydroelectric generation facility with an approximate capacity of 37.4 MW that began commercial operation in 1988. New Martinsville's facility was certified as a QF by the Commission in Docket No. QF85-541-000.[9] New Martinsville and Monongahela Power are parties to an electric energy purchase agreement (New Martinsville PPA), entered into on April 1, 1986, and approved by the West Virginia Commission, whereby New Martinsville sells its capacity and energy to Monongahela Power in return for an avoided cost rate in accordance with PURPA. The New Martinsville PPA is silent with respect to RECs.[10] New Martinsville, however, voluntarily filed a petition with the West Virginia Commission to certify itself as a qualified energy resource, allowing it to produce RECs under West Virginia state law.[11]

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[6] Morgantown Energy Petition at 1 n.2; Morgantown Energy, FERC Form 556, Docket No. QF89-25-007 (filed Aug. 17, 2011).

[7] Morgantown Energy Petition at 8; West Virginia Order at 47.

[8] Morgantown Energy Petition at 9.

[9] New Martinsville Petition at 2; *City of New Martinsville, West Virginia*, 35 FERC ¶ 61,322 (1986).

[10] New Martinsville Petition at 3.

[11] *Id.* at 9. New Martinsville states that, although the West Virginia Commission approved its petition for certification as a qualified energy resource, the ownership of the RECs associated with electric energy generated by New Martinsville was determined by the West Virginia Order at issue here to belong to Monongahela Power. *Id.*

New Martinsville adds that it needs to own RECs itself to comply with West Virginia renewable energy portfolio standards.[12]

A. Renewable Energy Credits

4. A number of states have enacted statutes creating renewable portfolio standards that, in general, require utilities to procure a percentage of their generation from sources that meet certain renewable energy criteria.[13] To demonstrate compliance with renewable portfolio standards, a utility subject to these standards is required to own RECs to demonstrate its participation.[14]

5. West Virginia enacted its renewable portfolio standards statute, the Alternative and Renewable Energy Portfolio Act (West Virginia Act), in 2009.[15] The West Virginia Act requires electric utilities to own alternative and renewable energy resource credits[16] (i.e., RECs) proportional to the electric energy sold by the electric utility to its retail customers.[17] The West Virginia Act awards RECs to electric utilities[18] that generate electricity from specified alternative or renewable energy resource facilities.[19] If an electric utility does not itself generate enough electric energy from its own alternative or renewable energy resource facilities to meet its REC requirement, it may purchase RECs.[20]

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[12] New Martinsville Petition at 9.

[13] Morgantown Energy Petition at 8.

[14] *See id.* at 9

[15] W. VA. CODE ANN. § 24-2F-1 (2011); Morgantown Energy Petition at 10.

[16] W. VA. CODE ANN. § 24-2F-3(4). The statute defines an alternative and renewable energy resource 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."

[17] W. VA. CODE ANN. § 24-2F-3(2).

[18] W. VA. CODE ANN. § 24-2F-4(b).

[19] W. VA. CODE ANN. § 24-2F-3(3), -3(13).

[20] W. VA. CODE ANN. § 24-2F-4(c).

6. The West Virginia Commission has issued a series of rules and orders addressing the provisions of the West Virginia Act.[21] The West Virginia rules provide detail with respect to the awarding of RECs to a qualified energy resource.[22] These rules provide that these credits may be "included in, or bundled with," the purchase of energy, or may be "purchased independently, or unbundled from," energy purchased from a qualified energy resource.[23] Additionally, the rules set forth the procedure by which a qualified energy resource may apply for certification from the West Virginia Commission allowing it to produce RECs.[24] The rules also make available to electric utilities cost recovery and rate incentive mechanisms to help recover compliance costs associated with the alternative and renewable energy portfolio standards and costs associated with electric utility investments in new alternative and renewable energy resource facilities.[25] In an order issued on November 5, 2010, the West Virginia Commission addressed the issue of nonutility generators and found that a nonutility generator shall be considered a qualified energy resource and thus awarded alternative and renewable energy resource credits under sections 24-2F-4(b)(1)-(3) of the West Virginia Act.[26]

B. West Virginia Order

7. On February 23, 2011, Monongahela Power and Potomac Edison Company, together doing business as Allegheny Power (Allegheny Power), filed a joint petition for declaratory order and interim relief with the West Virginia Commission seeking a ruling declaring, essentially, that Allegheny Power is entitled to own the RECs produced by

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[21] *See* Morgantown Energy Petition at 12.

[22] W. VA. CODE R. § 150-34-5.5.2 (2012).

[23] W. VA. CODE R. § 150-34-5.5.6.

[24] W. VA. CODE R. § 150-34-4. Rule 150-34-4.4.2 provides that certain "types of facilities may apply to be a qualified energy resource."

[25] W. VA. CODE ANN. § 24-2F-7.

[26] *In the matter of a proceeding to seek preliminary comments from interested parties regarding the scope of a proposed rulemaking to establish a credit trading program pursuant to West Virginia House Bill 103, effective July 1, 2009: Alternative and Renewable Energy Portfolio Act, codified as W.Va. Code § 24-2F-1* et seq., General Order No. 184.25, at 11-15 (W. Va. Pub. Serv. Comm'n Nov. 5, 2010).

three facilities certified with the Commission as QFs under PURPA.[27] Allegheny Power sought interim relief in the form of a moratorium on the selling or transferring of any RECs, or any commitment to do the same, by the QFs until the matter is adjudicated.[28] On April 19, 2011, the West Virginia Commission granted the interim relief.[29] Along with granting interim relief, the West Virginia Commission named Morgantown Energy as a party to the proceeding.[30]

8. On November 22, 2011, the West Virginia Commission issued the West Virginia Order at issue here, addressing two questions raised by Allegheny Power. The first question asked whether the electric utilities own the RECs generated by the QFs under PURPA avoided cost rate contracts between the QFs and their respective electric utility counterparties when these contracts are silent on RECs. The second question assumed the electric utilities indeed own the RECs, and asked whether the West Virginia Commission has the authority to order the QFs to certify themselves as qualified energy resources or to deem the QFs certified. With respect to these two questions, the West Virginia Commission held first that the electric utilities own the RECs, and second that the West Virginia Commission has the authority to deem the QFs to be qualified energy resources under the West Virginia Act.

9. The West Virginia Commission provided the following reasons why it determined the RECs are owned by the electric utility rather than the QF: (1) avoided cost rate contracts under PURPA provide a substantial consideration to the QF, an amount of consideration that generally is not available to merchant power generators, and "no additional consideration is contemplated or needed" for the generation of RECs;[31] (2) given that RECs are used to show that an electric utility is using qualifying generation, coupled with the fact that the electric utility is required to and does purchase

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[27] West Virginia Order at 1; *see* Morgantown Energy Petition at 14. The three QFs at issue in the West Virginia Order proceeding are: the Hannibal project, a run-of-river hydropower facility located at the Hannibal Locks and Dam on the Ohio River in New Martinsville, West Virginia; the Grant Town project, a waste-coal generation facility located in Grant Town, West Virginia; and the previously described Morgantown Energy QF.

[28] West Virginia Order at 7.

[29] *Id.* at 7. Morgantown Energy had been selling RECs into Pennsylvania prior to the grant of interim relief.

[30] *Id.* at 8; *see* Morgantown Energy Petition at 14.

[31] West Virginia Order at 28.

the energy from a QF under a PPA, it is consistent with the West Virginia Act to award ownership of the RECs to the electric utility rather than the QF; (3) "[t]o require the [electric] utility and its customers to pay additional money for [renewable energy] credits to 'verify' those purchases exposes the ratepayers to unreasonable additional expense and would constitute a windfall" for the QFs;[32] (4) an electric utility purchasing electric energy from a QF under a PPA owns both the generation and the RECs associated with that generation because the PPA requires the electric utility to purchase all the energy generated by the QF; (5) it would be unreasonable and contrary to West Virginia law not to consider RECs an integral and inseparable component of the electric energy purchased under an avoided cost rate contract due to the West Virginia Commission's decision to support the financial health of QFs; (6) based on proffered evidence showing that the RECs associated with the QFs are worth approximately $50 million, it is unfair to shoulder West Virginia ratepayers with the additional cost that would be incurred if the RECs are not owned by the electric utilities; (7) assigning ownership of the RECs to the electric utilities constitutes "an equitable solution that fulfills the purposes and intent of the [West Virginia Act] and ensures the fair and reasonable future rates for the utility customers;"[33] and (8) given that under the PPA the electric utility owns the electric energy generated by the QF, and that RECs are created simultaneously with electric energy, the West Virginia Commission properly concluded that the "purchaser and owner of the electricity at the time the electricity is generated owns the credits as well."[34]

10. The West Virginia Commission also found that it is within its authority to deem Morgantown Energy to be a qualified energy resource under the West Virginia Act.[35] The West Virginia Commission first reasoned that:

> Given the favorable regulatory treatment afforded [Morgantown Energy] and the actions taken by Companies and the [West Virginia Commission] to support the viability and financial success of the facility coupled with the [West Virginia Commission's] determination that the Companies own the [RECs], the [West Virginia Commission] finds the refusal of [Morgantown Energy] in this case to

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[32] *Id.* at 30.

[33] *Id.* at 34.

[34] *Id.* at 36.

[35] *Id.* at 42.

> certify the facility [as a qualified energy resource] to be unreasonable.[36]

11. The West Virginia Commission then explained:

> Assuming that the [West Virginia] Commission will receive sufficient information [from the electric utilities] concerning the [Morgantown Energy] generation attributes, the [West Virginia] Commission has jurisdiction and authority over the Morgantown project to deem the facility certified to generate credits under the [West Virginia] 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 [the Companies] to meet the compliance requirements of the Act based on our decision in this case.[37]

12. On December 22, 2011, Morgantown Energy filed an appeal of the West Virginia Order with the Supreme Court of Appeals of West Virginia. Also on December 22, 2011, New Martinsville filed an appeal of the West Virginia Order with the Supreme Court of Appeals of West Virginia.[38]

C. Morgantown Energy's Petition for Enforcement

13. Concurrent with Morgantown Energy's appeal to the Supreme Court of Appeals of West Virginia, Morgantown Energy filed a petition for enforcement with the Commission on February 24, 2012 pursuant to section 210(h) of PURPA and the Commission's regulations implementing PURPA. Morgantown Energy alleges that the West Virginia Order violated PURPA in three ways: (1) the West Virginia Order incorrectly held that the avoided cost rate paid by Allegheny Power to Morgantown Energy is sufficient to transfer RECs, together with energy and capacity, generated by Morgantown Energy to Allegheny Power; (2) the West Virginia Order incorrectly held that the West Virginia Commission has the authority to find Morgantown Energy certified, or deem

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[36] West Virginia Order at 41.

[37] *Id.* at 42.

[38] *See Morgantown Energy Associates v. Public Service Commission*, Docket No. 11-1739; *City of New Martinsville v. Public Service Commission*, Docket No. 11-1738.

Morgantown Energy certified, as a qualified energy resource able to produce RECs; and (3) the West Virginia Order discriminates against Morgantown Energy with respect to its QF status.

14. Morgantown Energy argues that prior Commission orders support its position that considering an avoided cost rate to be compensation for energy, capacity, and RECs is a violation of PURPA. Morgantown Energy cites the Commission's finding in *American Ref-Fuel Company*,[39] where, Morgantown Energy states, the Commission declared that avoided cost rates paid by electric utilities to QFs pursuant to PURPA contracts do not convey the RECs produced by the QFs. In support of its argument, Morgantown Energy further cites to a more recent Commission order, *California Public Utilities Commission* (*CPUC*),[40] which it states reaffirms the Commission's finding in *American Ref-Fuel Company*. In *CPUC*, Morgantown Energy states, the Commission held that the avoided cost rate must represent the actual energy and capacity costs avoided, nevertheless, PURPA does not prohibit the payment of other compensation not affiliated with the avoided cost rate as compensation for RECs.[41] Morgantown Energy argues that, if a PURPA avoided cost rate is the just and reasonable level of compensation paid to a QF, then by including RECs along with energy and capacity the same avoided cost rate is effectively reduced.

15. Morgantown Energy asserts that the West Virginia Order is littered with conclusory statements, the most egregious being the West Virginia Commission's finding that, because electric energy and RECs are created simultaneously, whoever owns the electric energy also owns the RECs. Morgantown Energy argues that using that same logic leads to the conclusion that Allegheny Power would also own the steam generated by Morgantown Energy, an unrealistic result.[42]

16. Morgantown Energy also states that the West Virginia Commission in the West Virginia Order mischaracterized the holding of *Wheelabrator Lisbon, Inc. v. Connecticut Department of Public Utility Control* (*Wheelabrator*).[43] Morgantown

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[39] 105 FERC ¶ 61,004, at P 18 (2003), *reh'g denied*, 107 FERC ¶ 61,016, at P 16 (2004), *appeal dismissed sub nom. Xcel Energy Serv. Inc.*, 407 F.3d 1242 (D.C. Cir. 2005) (*American Ref-Fuel*).

[40] 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011).

[41] *CPUC*, 133 FERC ¶ 61,059 at P 31.

[42] Morgantown Energy Petition at 24.

[43] 531 F.3d 183 (2d Cir. 2008).

Energy argues that *Wheelabrator* is distinguishable and unsupportive of the West Virginia Order because the PPA in *Wheelabrator* differs from the Morgantown PPA with respect to the following: the *Wheelabrator* PPA expressly transferred all of Wheelabrator's net electrical output to the purchasing utility, which differs from the Morgantown PPA in which Morgantown Energy agreed to transfer energy and capacity; Connecticut's RECs are contractually linked to Wheelabrator's electrical output; and Wheelabrator's electrical output was within Connecticut's definition of renewable energy. Another difference, Morgantown Energy explains, resides in the fact that Wheelabrator's PPA contained a dispute resolution clause assigning adjudicatory authority to the relevant state commission, whereas the Morgantown PPA is silent.

17. Morgantown Energy claims that the West Virginia Commission violated PURPA by transferring the RECs along with the energy and capacity generated to the electric utility because such a change effectively lowers the avoided cost rate received by the QF thus constituting a modification to the Morgantown PPA. Morgantown Energy cites to *Freehold*[44] for the proposition that a state agency cannot reconsider or modify a PPA after it has approved the agreement.

18. Morgantown Energy also argues that the West Virginia Commission's transfer of RECs without any compensation other than the avoided cost rate was inconsistent with the West Virginia Commission's rules providing for a cost recovery and rate incentive mechanism to account for costs incurred by electric utilities complying with the West Virginia Act.

19. Morgantown Energy further asserts that the West Virginia Commission violated the PURPA exemption provisions applicable to QFs when, in the West Virginia Order, it found that it has the authority to compel Morgantown Energy to certify itself as a qualified energy resource, including the authority to deem Morgantown Energy as such a resource, for the purpose of generating RECs. Morgantown Energy notes that section 210(e) of PURPA exempts QFs from state laws and regulations affecting rates, financial regulation, and organizational regulation, therefore arguing that the West Virginia Commission lacks the authority necessary to issue such an order. Moreover, Morgantown Energy states that the West Virginia Commission's determination that not requiring Morgantown Energy to certify itself as a qualifying energy facility would harm ratepayers and impose unusual difficulty on the electric utility, rendering Morgantown Energy's refusal unreasonable, is a rejection of applicable laws and regulations because the West Virginia Commission lacks jurisdiction over Morgantown Energy's wholesale rates under PURPA.

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[44] *Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs of the State of N.J.*, 44 F.3d 1178 (3d Cir. 1995) (*Freehold*).

20. Finally, Morgantown Energy alleges that the West Virginia Commission has discriminated against Morgantown Energy with respect to other generators that may be capable of generating RECs due to its status as a QF, or because of Morgantown's PPA with Monongahela Power. Morgantown Energy argues that the West Virginia Order's finding that a QF's RECs are automatically conveyed to the electric utility violates section 210(b) of PURPA, which prohibits discrimination against QFs, because a generator that may be capable of certifying itself as a qualified energy resource, but is not a QF, is not subject to the same automatic conveyance of its RECs.

D. New Martinsville's Comments and Petition for Enforcement

21. On March 14, 2012, New Martinsville filed a motion to intervene and comments in support of Morgantown Energy's petition, stating that it agrees with Morgantown Energy that the West Virginia Order is inconsistent with PURPA, and urging the Commission to grant the petition.

22. In addition to its comments, New Martinsville filed its own petition for enforcement with the Commission on March 15, 2012, pursuant to section 210(h) of PURPA and the Commission's regulations implementing PURPA.[45] New Martinsville states that the facts and events relevant to its petition were summarized in Morgantown Energy's petition.[46] New Martinsville states that, like Morgantown Energy, it disagrees with the West Virginia Order's outcome and asserts that QFs should own the RECs associated with the electric energy they generate. New Martinsville explains that its status is different than Morgantown Energy because, as a municipal electric utility, it sought certification as a qualified energy resource to generate RECs to satisfy its own renewable energy portfolio standards obligation under the West Virginia Act. New Martinsville further explains that it filed its petition out of concern that, if the Commission takes action based on only Morgantown Energy's circumstances, New Martinsville may be left without relief and remain compelled to transfer RECs to the electric utility purchasing energy and capacity pursuant to its avoided cost rate contract.

23. New Martinsville also requests that the Commission consider its petition together with Morgantown Energy's petition due to the commonality of the relevant facts and issues.

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[45] New Martinsville Petition at 1-2. The Commission docketed New Martinsville's petition under EL12-48-000 and QF85-541-001.

[46] *Id.* at 2.

II. Notice of Filings and Responsive Pleadings

A. Notice of Morgantown Energy's Petition

24. Notice of Morgantown Energy's filing was published in the *Federal Register*, 77 Fed. Reg. 13,120 (2012), with interventions and protests due on or before March 16, 2012. Exelon Corporation, Electric Power Supply Association, and the North Carolina Electric Membership Corporation filed timely motions to intervene. New Martinsville filed a timely motion to intervene and comments supporting Morgantown Energy's petition. The West Virginia Commission filed a notice of intervention and a protest. Allegheny Power filed a motion to intervene and a protest. Allegheny Power filed a motion to consolidate the proceedings under Docket Nos. EL12-36-000 and EL12-48-000. On March 30, 2012, Morgantown Energy filed a motion for leave to answer and answer in response to the protests.

B. Notice of New Martinsville's Petition

25. Notice of New Martinsville's filing was published in the *Federal Register*, 77 Fed. Reg. 16,544 (2012), with interventions and protests due on or before March 29, 2012. Morgantown Energy filed a timely motion to intervene and comments supporting New Martinsville's petition. Allegheny Power filed a timely motion to intervene, a protest, and a motion to consolidate the proceedings under Docket Nos. EL12-36-000 and EL12-48-000. The West Virginia Commission filed a notice of intervention and a protest.

C. Responsive Pleadings – Morgantown Energy's Petition

1. West Virginia Commission's Protest

26. The West Virginia Commission argues that Morgantown Energy should not have brought this proceeding to the Commission. The West Virginia Commission argues that Morgantown Energy is alleging that the West Virginia Order violates provisions of PURPA and the West Virginia Commission's implementation of PURPA "as applied" to Morgantown. The West Virginia Commission argues that an "as applied" dispute is reserved to state courts pursuant to section 210(g) of PURPA.[47] The West Virginia Commission argues that only an "implementation" of PURPA may be challenged by the filing of an enforcement petition pursuant to section 210(h) of PURPA.

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[47] West Virginia Protest to Morgantown Energy at P 24-25.

27. The West Virginia Commission denies the three PURPA violations alleged by Morgantown Energy, and argues that Morgantown Energy incorrectly frames its arguments in terms of prior Commission orders, rather than West Virginia Commission rules implementing PURPA. The West Virginia Commission asserts that Morgantown Energy's argument erroneously assumes that a QF owns RECs in the first instance.

28. The West Virginia Commission also disputes Morgantown Energy's claim that the determination in the West Virginia Order that it has the authority to make a finding as to whether Morgantown Energy may be certified as a qualified energy resource is a violation of PURPA is insignificant and "involves nothing more than state verification that particular generation qualifies for credits under the [West Virginia] Portfolio Act." Further, it disagrees that the West Virginia Order treats QFs differently and argues that the West Virginia Order is limited to the underlying factual circumstances presented in the petition, therefore issues involving contracts with other types of generation facilities were not affected.

2. Allegheny Power's Protest

29. Allegheny Power claims the West Virginia Order findings do not violate PURPA and are consistent with *American Ref-Fuel* because the West Virginia Order relies on West Virginia state law for its findings concerning the transfer and ownership of RECs. Allegheny Power argues that Morgantown Energy's reliance on *American Ref-Fuel* is

> irrelevant because the [West Virginia Order's] determination that the Companies own the RECs attributable to generation of electricity by the Facility was based on Mon Power's ownership of such electricity at the time it is produced—not on the premise that Mon Power must pay, or has already paid, [Morgantown Energy] to acquire the RECs.[48]

30. Allegheny Power also argues that Morgantown Energy's allegation that *Wheelabrator* is distinguishable and does not support the West Virginia Order is unsupported by Morgantown Energy because it did not cite to any provision of PURPA or the Commission's regulations that would prevent the West Virginia Commission's reliance on that case. Allegheny Power further argues that Morgantown Energy's petition improperly asks the Commission to review various state law determinations unrelated to PURPA.[49] Allegheny Power also argues that the West Virginia Commission properly exercised its authority when it determined that it may issue a finding certifying

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[48] Allegheny Power Protest to Morgantown Energy at 15.

[49] *Id.* at 19.

Morgantown Energy as a qualified energy resource based on the West Virginia Commission's "unquestioned authority under the Portfolio Act to award credits based on electricity generated or purchased from an alternative energy resource facility."[50] Last, Allegheny Power contends that Morgantown Energy's claim that the West Virginia Order discriminates against QFs is unfounded because the prohibition on discrimination found in section 210(b) of PURPA applies to rates for energy and capacity, not to ownership of RECs. Allegheny Power also asserts that a discrimination analysis is required only at the initial establishment of an avoided cost rate, and does not apply here to a determination regarding ownership of RECs.

3. Morgantown Energy's Answer

31. Morgantown Energy disputes protesters' assertions that Morgantown Energy wrongly assumes that it owns RECs prior to their transfer to an electric utility and argues that, even though protesters' arguments are founded in state law, the Commission retains the authority to review it. Morgantown Energy asserts that protesters' characterizations of avoided cost rates as sufficient compensation are inconsistent with the plain language of PURPA and therefore have no merit.

32. Morgantown Energy explains that Monongahela Power, in a brief to the West Virginia Commission, acknowledged that RECs need to be formally conveyed and transferred from the QF to the purchasing electric utility, which is contrary to the West Virginia Order finding that the RECs are owned at the outset by the purchasing utility. Morgantown Energy in this regard points out that a directive of the West Virginia Order requiring Allegheny Power to secure Morgantown Energy's RECs contained in its PJM Generation Attribute Tracking System account demonstrates that the West Virginia Commission has acknowledged that RECs must be formally transferred from the QF to the purchasing utility. Morgantown Energy also asserts that the requirement that facilities must be certified as qualified energy resources before they can generate RECs indicates that such qualified facilities are awarded the RECs in the first instance, implying that a formal transfer must occur to allow entities that have an obligation to purchase RECs to actually obtain them.

D. Responsive Pleadings – New Martinsville's Petition

1. West Virginia Commission's Protest

33. According to the West Virginia Commission, New Martinsville's petition alleges the West Virginia Order violates PURPA in two ways: first, it effectively reduces the avoided cost established for the PPA by determining Monongahela Power owns RECs

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[50] *Id.* at 22-23.

associated with the New Martinsville QF without additional compensation; and second, the West Virginia Order discriminates against New Martinsville as the owner of a QF. The West Virginia Commission contends both assertions lack merit.

34. The West Virginia Commission denies that it discriminated against QFs "*vis-a-vis* other independent non-utility generators" arguing that it based its decision solely on the facts before it in accordance with West Virginia law.[51] The West Virginia Commission states that it did not address non-QF generators, or contracts originating after the West Virginia Act. The West Virginia Commission further cites to its past rulings favoring New Martinsville and Morgantown Energy in matters involving their PPAs with Monongahela Power.

35. Additionally, the West Virginia Commission rejects New Martinsville's allegation that the West Virginia Commission conveyed RECs as part of the avoided cost rate from New Martinsville's QF to the purchasing utility.[52] According to the West Virginia Commission, in order to grant New Martinsville's petition, the Commission would be required to agree with New Martinsville that the RECs belonged to New Martinsville "in the first instance."[53] The West Virginia Commission argues, however, that the RECs are created only as the electric energy is generated and thereby belong to the utility purchasing the electric energy. The West Virginia Commission also argues that the Commission has previously found that REC ownership is outside the scope of PURPA and is a matter of state law. The West Virginia Commission states that it acted in accordance with Commission precedent and made its determinations in accordance with West Virginia state law.

36. The West Virginia Commission also asserts that New Martinsville's petition is an "as applied" challenge of the West Virginia Order's findings. The West Virginia Commission argues that such a challenge differs from a challenge of a state's implementation of PURPA. The West Virginia Commission explains that as-applied challenges are reserved for consideration by state courts only, therefore New Martinsville improperly brought its challenge with the Commission and it should be denied.

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[51] West Virginia Protest to New Martinsville at P 15.

[52] *Id.* P 13.

[53] *Id.* PP 10, 13.

2. Allegheny Power's Protest

37. Allegheny Power claims that the New Martinsville petition is similar to that filed by Morgantown Energy and presents the same issue, namely, ownership of RECs in the context of an avoided cost rate contract. Allegheny Power also claims that both petitions demonstrate a misunderstanding of the Commission's precedent stating that REC ownership is a matter of state law, not PURPA. While Allegheny Power states that there is no basis to New Martinsville's petition, Allegheny Power requests that the Commission provide a statement regarding the validity of the West Virginia Order to eliminate any confusion with respect to the findings in *American Ref-Fuel.*

38. Allegheny Power asserts that it interprets the West Virginia Order to suggest that New Martinsville never owned RECs, and thus there is no reason to provide compensation. Allegheny Power also asserts that, because the West Virginia Order does not change the avoided cost rate for capacity and energy in the New Martinsville PPA, no price adjustment occurred that would contravene PURPA.

39. Allegheny Power argues that the West Virginia Order is consistent with the Commission's findings in *American Ref-Fuel*, because, according to Allegheny Power, "as a matter of state law, RECs are owned at inception by the utility that purchases the electricity."[54] Allegheny Power explains that the West Virginia Order unambiguously states that REC ownership is a matter of state law, deriving authority from the West Virginia Act. Allegheny Power claims that New Martinsville's reading of *American Ref-Fuel* is mistaken, and that "because the RECs are owned by [Allegheny Power] as they are created, the [West Virginia Order] did not result in a transfer of RECs from New Martinsville to [Allegheny Power]."[55] Allegheny Power also argues that New Martinsville failed to explain how the Commission has jurisdiction to determine ownership of RECs created under state law.

40. Allegheny Power further asserts that New Martinsville mischaracterizes PURPA and the West Virginia Order when it claims that it is owed compensation for RECs because New Martinsville failed to explain why it is entitled to compensation for RECs in the first instance. Allegheny Power explains that the mischaracterization originates from New Martinsville's failure to recognize that RECs are owned by Allegheny Power, not the QF, as they are created.

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[54] Allegheny Power Protest to New Martinsville at 12.

[55] *Id.* at 14.

41. Allegheny Power argues that New Martinsville's claim that the West Virginia Order results in undue discrimination against QFs is unsupported for two reasons. First, Allegheny Power explains that PURPA relates only to the rates paid by electric utilities for capacity and energy, and does not contemplate the existence of RECs. Second, Allegheny Power states that the discrimination analysis required under PURPA pertains only to the initial calculation of the avoided cost rate and does not encompass REC ownership.[56]

III. Discussion

A. Procedural Matters

42. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they sought to intervene. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Morgantown Energy's answer to the West Virginia and Allegheny Power protests because they provided information that assisted us in our decision-making process.

B. Commission Determination

43. Morgantown Energy alleges that the West Virginia Commission, through the West Virginia Order, violated PURPA in holding that: (1) the avoided cost rate paid by Monongahela Power to Morgantown Energy is sufficient to transfer RECs, together with energy and capacity, generated by Morgantown Energy to Monongahela Power; and (2) the West Virginia Commission has the authority to find Morgantown Energy certified, or to deem Morgantown Energy certified, as a qualified energy resource thus able to produce RECs. Morgantown Energy also argues the West Virginia Order discriminates against Morgantown Energy given its QF status. New Martinsville's petition for enforcement closely follows the relief requested by Morgantown Energy.

44. Section 210(h)(2)(B) of PURPA[57] permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA[58] to enforce the requirement that a state commission

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[56] *Id.* at 21-22.

[57] 16 U.S.C. § 824a-3(h)(2)(B) (2006).

[58] 16 U.S.C. § 824a-3(h)(2)(A) (2006).

implement the Commission's regulations. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."[59] If the Commission does not undertake an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(A) of PURPA, the petitioner then may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.[60]

45. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of Morgantown Energy or New Martinsville;[61] either petitioner thus may bring its own enforcement action against the West Virginia Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of the petitioners, we find that certain statements in the West Virginia Order are inconsistent with PURPA.

46. The Commission has recognized that PURPA does not address the ownership of RECs and that states have the authority to determine ownership of RECs in the initial instance, as well as how they are transferred from one entity to another.[62] In *American Ref-Fuel,* the Commission stated that "[C]ontracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers the ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA."[63]

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[59] *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utilities Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

[60] 16 U.S.C. § 824a-3(h)(2)(B) (2006). The Commission may intervene in such a district court proceeding as a matter of right. *Id.*

[61] Our decision not to go to court effectively moots the West Virginia Commission's claim that the petition for enforcement was not appropriately before us in the first instance.

[62] *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 23.

[63] *Id.* P 3; *accord id.* P 18.

47. In making this statement, the Commission reasoned that, under PURPA and the Commission's regulations, electric utilities must purchase energy and capacity made available by QFs,[64] and that rates for these purchases must be just and reasonable to the electric customer of the electric utility and in the public interest, and not discriminate against QFs.[65] Additionally, an electric utility is not required to pay the QF more than the avoided costs of generating the power itself or of purchasing from another source.[66] The Commission stated that these avoided cost rates, "in short, are not intended to compensate the QF for more than capacity and energy."[67] To the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs,[68] the West Virginia Order is inconsistent with PURPA.

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

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[64] *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 20; *see also* 18 C.F.R. § 292.303(a) (2011).

[65] *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 20; *see also* 18 C.F.R. § 292.304(a)(1) (2011).

[66] *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 20; *see also* 18 C.F.R. §§ 292.304(a)(2), .101(b)(6) (2001).

[67] *Id.* P 22.

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

(B) The Commission finds that the West Virginia Order is inconsistent with PURPA and the Commission's regulations as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.