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IDAHO PUBLIC
UTILITIES COMMISSION

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Lead Counsel
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January 10, 2014

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-11-15
Grand View PV Solar Two, LLC, vs. Idaho Power Company – Idaho
Power Company's Augmentation of Record to Consider New Legal
Authority

Dear Ms. Jewell:

On May 29, 2012, counsel for Grand View Solar PV Two, LLC ("Grand View") filed with the Idaho Public Utilities Commission ("Commission") a request to augment the record to consider new legal authority with the Federal Energy Regulatory Commission's ("FERC") Notice of Intent Not to Act and Declaratory Order 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. Counsel for Grand View filed a copy of FERC's Declaratory Order, 139 FERC ¶ 61,066.

Subsequent to FERC's April 24, 2012, Declaratory Order provided by counsel for Grand View, the same matter was brought before the United States District Court for the Southern District of West Virginia as an enforcement action against the Public Service Commission of West Virginia. Civil Action No. 2:12-cv-6327. On September 30, 2013, the Federal District Court entered a Memorandum Opinion and Order dismissing the case. A copy of the Federal District Court's Memorandum Opinion and Order is attached hereto and provided for the Commission's consideration.

Counsel for Grand View quoted a passage from FERC's non-binding, non-appealable Declaratory Order stating in part, "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." The Federal District Court's Opinion and Order disagrees stating, "The [West Virginia] Commission Order is consistent with PURPA" See Memorandum Opinion and Order, 2013 WL 5462386, pp. 22-26.

The West Virginia Commission's Order was also appealed to the West Virginia Supreme Court of Appeals, which affirmed the West Virginia Commission's Order in full, despite FERC's Declaratory Order, as provided to this Commission by counsel for Grand View, purporting to find the West Virginia Commission in violation of the PURPA. *City of Martinsville v. Public Service Com'n of West Virginia*, 229 W.Va. 353, 729 S.E.2d 188 (2012). The Court disagreed with FERC and "concluded that the Commission's decision is not inconsistent with PURPA but, rather, is a well-reasoned decision based upon our state law." Memorandum Opinion and Order, p. 9 (Federal Court quoting West Virginia Supreme Court of Appeals). The Federal District Court stated and explained its agreement with the decision of the West Virginia Supreme Court of Appeals in this Memorandum Opinion and Order. See Memorandum Opinion and Order, p. 22.

Grand View filed the FERC Declaratory Order with this Commission stating that the FERC Order "specifically address [sic] a state commission's legal ability to issue a ruling on REC ownership" and "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."

Because both the West Virginia Supreme Court of Appeals and the Federal District Court for the Southern District of West Virginia both reached contrary decisions to the FERC Declaratory Order provided by counsel for Grand View, Idaho Power hereby respectfully requests that the record reflect those subsequent decisions as well.

West Virginia Supreme Court of Appeals Opinion:

- *City of Martinsville v. Public Service Com'n of West Virginia*, 229 W.Va. 353, 729 S.E.2d 188 (2012).

Federal District Court for the Southern District of West Virginia Opinion:

- *Morgantown Energy Associates v. Public Service Com'n of West Virginia*, Case No. 2:12-cv-6327, Document No. 36, Memorandum Opinion and Order – Slip Copy, 2013 WL 5462386 (S.D.W.Va.), Util. L. Rep. P 14,868 (2013).

Copies of both decisions are submitted herewith.

Very truly yours,



Donovan E. Walker

DEW:csb

Enclosures

cc: Donald L. Howell, II (via e-mail)
Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January 2014 I served a true and correct copy of the LETTER DATED JANUARY 10, 2014, TO JEAN D. JEWELL upon the following named parties by the method indicated below, and addressed to the following:

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Supreme Court of Appeals of
 West Virginia.

CITY OF NEW MARTINSVILLE, Petitioner

v.

The PUBLIC SERVICE COMMISSION OF WEST
 VIRGINIA; and Monongahela Power Company and
 The Potomac Edison Company, Both Doing
 Business as Allegheny Power, Respondents
 and
 Morgantown Energy Associates, Petitioner

v.

The Public Service Commission of West Virginia;
 and Monongahela Power Company and the
 Potomac Edison Company, Both Doing Business as
 Allegheny Power, Respondents.

Nos. 11-1738, 11-1739.
 Submitted April 10, 2012.
 Decided June 11, 2012.

Background: Electric generators appealed Public Service Commission decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from the generators were owned by the utilities during the terms of the electric energy purchase agreements (EEPA) between the entities.

Holdings: The Supreme Court of Appeals held that:
 (1) PSC portfolio standard rules did not apply retroactively to Public Utility Regulatory Policies Act (PURPA) EEPAs between utility and generators;
 (2) PSC decision was not preempted by PURPA;
 (3) PSC could consider its statutory charge to keep utility rates fair and reasonable; and
 (4) PSC had jurisdiction and authority to deem generator's cogeneration facility certified to generate alternative and renewable energy resource credits.

Affirmed.

West Headnotes

[1] Public Utilities 317A 194

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of
 Commission

317Ak194 k. Review and
 determination in general. **Most Cited Cases**

Standard for review of an order of the Public Service Commission may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers, (2) whether there is adequate evidence to support the Commission's findings, and, (3) whether the substantive result of the Commission's order is proper.

[2] Public Utilities 317A 194

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of
 Commission

317Ak194 k. Review and
 determination in general. **Most Cited Cases**

An order of the Public Service Commission (PSC) based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.

[3] Electricity 145 11(4)

145 Electricity

145k11 Supply of Electricity in General

145k11(4) k. Regulation of supply and use.
Most Cited Cases

Public Service Commission's (PSC) portfolio

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standard rules did not apply retroactively to Public Utility Regulatory Policies Act (PURPA) electric energy purchase agreements (EEPA) between utility and electric generators that were executed long before the creation of credits in West Virginia and before the widespread creation of credits in other jurisdictions; there was no indication, either expressly or impliedly, that the portfolio standard rules were meant to be applied retroactively. Public Utility Regulatory Policies Act of 1978, § 2 et seq., 16 U.S.C.A. § 2601 et seq.

[4] Electricity 145 ↪1

145 Electricity

145k1 k. Regulation in general; statutes and ordinances. **Most Cited Cases**

States 360 ↪18.73

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.73 k. Public utilities. **Most Cited Cases**

Public Utility Regulatory Policies Act (PURPA) did not preempt Public Service Commission (PSC) decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from electric generators through electric energy purchase agreements (EEPA) were owned by the utilities during the terms of the electric energy purchase agreements between the generators; PSC only interpreted the EEPAs to evaluate the utilities' obligations under them and their ownership of the electricity at the time it is generated but did not interfere with the generators' federally-granted right to be exempt from certain utility-type state regulation. Public Utility Regulatory Policies Act of 1978, § 2 et seq., 16 U.S.C.A. § 2601 et seq.

[5] Electricity 145 ↪11(3)

145 Electricity

145k11 Supply of Electricity in General

145k11(3) k. Contracts for supply in general. **Most Cited Cases**

Public Service Commission (PSC) decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from electric generators through electric energy purchase agreements (EEPA) were owned by the utilities during the terms of the electric energy purchase agreements between the generators did not result in violation of general contract law principles through failure of generators to receive consideration for the credits, where credits were created after the generation of electricity and, therefore, were owned by the utilities.

[6] Constitutional Law 92 ↪4371

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)17 Carriers and Public Utilities

92k4371 k. Gas and electricity. **Most Cited Cases**

Electricity 145 ↪11(4)

145 Electricity

145k11 Supply of Electricity in General

145k11(4) k. Regulation of supply and use. **Most Cited Cases**

Public Service Commission (PSC) decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from electric generators through electric energy purchase agreements (EEPA) were owned by the utilities did not result in the taking of generators' property without due process of law; PSC determined that the credits were owned by the utilities in the first instance, and, thus, no property owned by the generators was taken. U.S.C.A. Const.Amend. 14.

[7] Electricity 145 ↪11(4)

145 Electricity

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145k11 Supply of Electricity in General

145k11(4) k. Regulation of supply and use.

Most Cited Cases

Order by Federal Energy Regulatory Commission (FERC) that, while certain statements in Public Service Commission's (PSC) decision were inconsistent with the requirements of Public Utility Regulatory Policies Act (PURPA), it would not initiate an enforcement action had no bearing upon appeal by electric generators from PSC decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from the generators were owned by the utilities during the terms of the electric energy purchase agreements (EEPA) between the entities; FERC order announcing its interpretation of PURPA or implementing regulations was of no legal moment unless and until judicial adoption and PSC decision was well-reasoned and based upon state law.

[8] Electricity 145 11.3(1)

145 Electricity

145k11.3 Regulation of Charges

145k11.3(1) k. In general. **Most Cited Cases**

Public Service Commission (PSC) could consider its statutory charge to keep utility rates fair and reasonable in reaching its decision that alternative and renewable energy resource credits attributable to energy purchases by utilities from electric generators through electric energy purchase agreements (EEPA) were owned by the utilities during the terms of the electric energy purchase agreements between the generators did not result in violation of general contract law principles through failure of generators to receive consideration for the credits. *West's Ann.W.Va.Code, 24-2F-2(7)*.

[9] Electricity 145 8.4

145 Electricity

145k8.4 k. Generating facilities in general. **Most Cited Cases**

Public Service Commission (PSC) had jurisdiction and authority to deem the electric

generator's cogeneration facility certified to generate alternative and renewable energy resource credits, which were purchased by utilities, under the portfolio standard rules; credits were owned by the utilities, deeming the project certified was the only mechanism by which the utilities could receive certification that the energy they were purchasing satisfied the requirements of the Alternative and Renewable Energy Portfolio Act (AREPA), portfolio standard rules provided for waiver thereof upon a showing of hardship or unusual difficulty in complying with any one rule, and a hardship on ratepayers would have occurred if the qualifying credits owned by the utilities were not certified. *West's Ann.W.Va.Code, 24-2F-1 et seq.; W.Va. Code St. R., § 150-34-1.5a.*

****190 *355 Syllabus by the Court**

1. "The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper." Syllabus Point 1, *Central West Virginia Refuse, Inc. v. Public Service Commission of West Virginia*, 190 W.Va. 416, 438 S.E.2d 596 (1993).

2. " "[A]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, [99 S.E.2d 1 (1957)].' Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970)." Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission of West Virginia*, 180 W.Va. 387, 376 S.E.2d 593 (1988).

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 Edison Company.

PER CURIAM:

This case is before this Court upon appeal of a final order of the Public Service Commission of West Virginia (hereinafter "Commission")^{FN1} entered on November 22, 2011, ruling upon a Joint Petition for Declaratory Order filed by the respondents herein, Monongahela Power Company and the Potomac Edison Company, both doing business as Allegheny Power (hereinafter referred to separately as "Mon Power" and "PE" or collectively as "the Utilities"). In its final order, the Commission held that the alternative and renewable energy resource credits attributable to energy purchases by the Utilities from the petitioners herein, the City of New Martinsville and Morgantown Energy Associates (hereinafter referred to separately as "the City" and "MEA" or collectively as "the Generators") are owned by the Utilities during the terms of the Electric Energy Purchase Agreements between the entities.

^{FN1}. Pursuant to W. Va.Code § 24-5-1 (1979) (Repl.Vol.2008), "Any party feeling aggrieved by the entry of a final order by the [C]ommission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying

for the suspension of such final order."

In this appeal, the Generators contend that the Commission erred in its ruling and that the energy resource credits are owned by them.^{FN2} MEA also argues that the Commission*356 **191 erred by holding that it would deem MEA's Morgantown project as a certified facility under the Alternative and Renewable Energy Portfolio Act, W. Va.Code §§ 24-2F-1 to - 12, for the purpose of generating energy resource credits upon the submission of sufficient evidence by the Utilities.

^{FN2}. The Generators filed separate petitions for appeal, and this Court assigned separate case numbers thereto. Because the Generators are appealing the same order, the appeals have been considered together for purposes of oral argument and decision.

This Court has before it the petitions for appeal, the responses thereto including the Statement of Reasons filed by the Commission, and the appendices filed by the parties. For the reasons set forth below, the final order of the Commission is affirmed.

I. FACTS

In response to the energy crisis of the 1970s, Congress amended the Federal Power Act, 16 U.S.C. § 791 *et seq.*, and enacted the Public Utility Regulatory Policies Act of 1978, Pub.L. No. 95-617, 92 Stat. 3117 (1978) (hereinafter "PURPA"). The purpose of PURPA was to reduce the nation's electric utilities' dependence on foreign fossil fuels by promoting the development and use of alternative sources of energy. *Id.* To that end, PURPA created a new class of electric generating facilities known as qualifying facilities or "QFs" that include cogeneration facilities and small power producers. A cogeneration facility produces both electricity and some other form of useful energy such as steam or heat, whereas a small power production facility produces electric energy using biomass, waste or renewable resources. 16

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U.S.C. § 796(18)(A) & (17)(A).

Pursuant to PURPA, an electric utility whose service territory includes a QF is required to purchase power from the QF at the utility's avoided cost—the incremental energy and capacity costs that the utility would have incurred from generating the electricity or purchasing the electricity from another source but for the purchase of the electricity from the QF. 18 C.F.R. § 292.101(b)(6). The contracts between electric utilities and QFs setting forth, *inter alia*, the avoided cost, are known as Electric Energy Purchase Agreements (hereinafter “EEPAs”).

In 2009, the West Virginia Legislature enacted the Alternative and Renewable Energy Portfolio Act (hereinafter “Portfolio Act”), W. Va.Code §§ 24–2F–1 to – 12. The Portfolio Act requires that electric utilities acquire or generate a certain percentage of their electric supply from specified energy sources. In order to establish, verify and monitor the generation of electricity from alternative and renewable energy resource facilities, the Portfolio Act created a system of tradable instruments known as alternative and renewable energy resource credits (hereinafter “credits”). W. Va.Code 24–2F–3(4) (Repl.Vol.2008 & Supp.2011). Depending upon the type of facility, one, two or three credits are created by each megawatt hour of electricity generated. 150 C.S.R. § 34A. Pursuant to W. Va.Code § 24–2F–5(d) (Repl.Vol.2008 & Supp.2011):

(1) For the period beginning January 1, 2015, and ending December 31, 2019, an electric utility shall each year own credits in an amount equal to at least ten percent of the electric energy sold by the electric utility to retail customers in this state in the preceding calendar year; and

(2) For the period beginning January 1, 2020, and ending December 31, 2024, an electric utility shall each year own credits in an amount equal to at least fifteen percent of the electric energy sold by the electric utility to retail customers in this

state in the preceding calendar year.

Subsequently, “[o]n and after January 1, 2025, an electric utility shall each year own credits in an amount equal to at least twenty-five percent of the electric energy sold by the electric utility to retail customers in this state in the preceding calendar year.” W. Va.Code § 24–2F–5(c).

The parties in this case executed EEPAs in the 1980s, long before the creation of credits in West Virginia and before the widespread creation of credits in other jurisdictions. Thus, the EEPAs are silent on the issue of ownership of and entitlement to credits generated from QFs. The three QFs involved in this case are: (1) the Hannibal project, a run-of-river hydropower facility located on the Ohio River in New Martinsville, West Virginia, and owned by the City; (2) the Grant Town project, a generation facility using coal and waste coal located in Grant Town, West Virginia, and owned by American*357 **192 Bituminous Power Partners, L.P. (hereinafter “AmBit”);^{FN3} and (3) the Morgantown project, a cogeneration facility using coal and waste coal located in Morgantown, West Virginia, and owned by MEA. Hannibal and Grant Town have been certified as qualified energy resources to generate credits under the Commission's Rules Governing Alternative and Renewable Energy Portfolio Standard (hereinafter referred to as “Portfolio Standard Rules”), 150 C.S.R. § 34 (2011).^{FN4} While MEA's Morgantown project may qualify for certification as a qualified energy resource under the Portfolio Standard Rules, it has not sought such certification and indicates that it does not intend to do so.^{FN5} The Morgantown project is certified to generate credits under Pennsylvania law. The terms and conditions of the EEPAs between the Utilities and the QFs vary.^{FN6} Each EEPA contains a different purchase price based on the parties' negotiations and determination of avoided costs at the time of the contract negotiations or Commission adjudication.^{FN7}

FN3. The Commission invited AmBit to

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participate as a party in this proceeding by order entered on May 1, 2011. AmBit elected to not participate and is not a party herein. According to the Utilities, AmBit has ceded its right to the PURPA credits associated with the generation from the Grant Town project; however, the parties' "Letter of Understanding" on this issue provides that if the Commission determines that QFs are entitled to own the PURPA credits, the "Letter of Understanding" will be terminated. Consequently, the Utilities acknowledge that this Court's decision also affects the PURPA credits generated by the Grant Town project.

FN4. The Legislature directed the Commission to promulgate rules to effectuate the purposes of the Portfolio Act. See W. Va.Code § 24-2F-12 (Repl.Vol.2008 & Supp.2011).

FN5. By Commission order dated July 20, 2011, the Hannibal project was certified as a qualified energy resource to generate credits pursuant to the Portfolio Standard Rules. As a renewable energy resource facility, the Hannibal project creates two credits for every megawatt hour of electricity generated. See 150 C.S.R. § 34A. According to the Utilities, the Morgantown project would be entitled to one credit for each megawatt of electricity generated if it were certified.

FN6. The EEPAs were executed by the QFs and Mon Power, but the Commission now regulates the combined West Virginia operations of Mon Power and PE as a single entity, including the combined costs and rates.

FN7. The purchase prices for the Hannibal and Morgantown projects were arrived out of negotiations between the parties; the

Grant Town purchase price was established by the Commission.

On February 23, 2011, the Utilities sought a declaratory order from the Commission requesting that the Commission hold that the Utilities own the credits from the QFs as well as any other environmental attributes from the QFs during the terms of the EEPAs.^{FN8} On March 4, 2011, the City filed a Petition to Intervene and Response in Opposition to the Utilities' petition for a declaratory order. On April 19, 2011, the Commission granted the City's motion to intervene and also named MEA as a respondent in the case. The Commission also entered an order prohibiting MEA and the City from selling or transferring or committing to sell or transfer any credits generated from their QFs pending the Commission's ruling.^{FN9} On April 22, 2011, the Utilities requested leave to amend their Joint Petition, asking that the Commission compel MEA to seek certification of the Morgantown project so that it is qualified to generate credits under the Portfolio Act. Alternatively, the Utilities asked that the Commission use its inherent authority under the Portfolio Act to certify the Morgantown project as qualified to generate credits if the Commission concluded that the credits were owned by the Utilities and the QF declined to obtain certification. Evidentiary hearings were then scheduled and held *358 **193 on August 25, and 26, 2011. On November 22, 2011, the Commission entered its order ruling in favor of the Utilities.

FN8. The EEPA for the Hannibal project was approved in 1986 and extends until 2034. The EEPA for the Grant Town project was approved in 1988 and extends to 2036. The EEPA for the Morgantown project was approved in 1989 and extends until 2027.

FN9. Various regional entities serve as "banks" that keep track of the credits. The entity that services West Virginia and Pennsylvania, as well as some other states, is PJM-Environmental Information

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Services, Inc. (hereinafter "PJM"). The system that PJM uses to account for the credits is the Generation Attribute Tracking System. Once a credit created by the generation of a particular megawatt-hour of electricity is redeemed in a state, it cannot be used to meet another's state's alternative energy, advanced energy, renewable energy or similar energy portfolio standard. *W. Va.Code* § 24-2F-5(e). In other words, double-counting of credits is prohibited.

In its November 22, 2011, order, the Commission concluded that the Utilities own the credits associated with the generation of electricity from the QFs because of three separate but interrelated bases. The Commission's order states:

(i) consistent with the Act, the utility that is obligated to purchase PURPA generation (which also qualifies as eligible generation under the Portfolio Act) should own the credits that exist for the purpose of measuring utility compliance with the portfolio standard, (ii) Mon Power and PE's ownership of the credits is based on their ownership 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.

With respect to the Utilities' request that the Morgantown project be certified under the Portfolio Act to generate credits, the order states that the

Commission

will consider the relief requested in the [Utilities'] amended Joint Petition and determine whether the 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 [Morgantown project] it is reasonable to allow the [Utilities] to seek certification of the credits they own as a result of the Morgantown EEPA.

On December 15, 2011, MEA filed a Motion to Stay the November 22, 2011, order with the Commission. The following day, the City filed its response supporting MEA's motion to stay. By order entered on December 20, 2011, the Commission granted the Motion to Stay. MEA and the City filed their separate petitions for appeal with this Court on December 22, 2011.

II. STANDARD OF REVIEW

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

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

This Court has also stated that

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“ ‘an order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.’ *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, [99 S.E.2d 1 (1957)].” Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970).

Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission of West Virginia*, 180 W.Va. 387, 376 S.E.2d 593 (1988). With these standards in mind, the issues presented in these appeals will be considered.

****194 *359 III. DISCUSSION**

As noted, the City and MEA filed separate petitions for appeal with this Court. Both of them, however, challenge the Commission's decision declaring that the credits at issue are owned by the Utilities. While some of the arguments presented on this issue overlap to a significant extent, each party has also made distinct arguments specific to its particular circumstances. In the analysis that follows, the party or parties making each argument will be identified. Also, as previously noted, the second assignment of error only relates to MEA and concerns whether the Commission has jurisdiction and authority to deem MEA's Morgantown project certified under the Portfolio Standard Rules. Each assignment of error will be considered in turn below.

A. Ownership of the Credits

Traditionally, state utility commissions had no authority with regard to wholesale power contracts. Rather, exclusive jurisdiction over such contracts belonged to the Federal Energy Regulatory Commission (hereinafter “FERC”) under the Federal Power Act, 16 U.S.C. 791 *et seq.* With the enactment of PURPA, however, state utility commissions have been authorized to initially set the avoided cost rates for qualifying PURPA projects. Once the state commission approves the

EEPA though, it is generally without jurisdiction to modify the terms of the agreement. 16 U.S.C. § 824a-3. Pursuant to regulations promulgated by FERC, any QF is “exempted ... from State law or regulations respecting: (i) the rates of electric utilities; and (ii) the financial and organizational regulation of electric utilities.” 18 C.F.R. § 292.602(c).

With the enactment of portfolio standard laws in several states, which generally require electric utilities to acquire or generate a certain percentage of their electric supply from specified energy resources, and the creation of credits as a means of monitoring compliance therewith, the question of credit ownership under PURPA contracts arose. In 2003, FERC issued a decision in *American Ref-Fuel Co., Covanta Energy Group, Monteny Power Corp. and Wheelabrator Tech., Inc.*, 105 FERC ¶ 61004 (October 1, 2003), declaring that the issue of credit ownership under PURPA contracts is a matter to be decided by the states based on state law.

In *American Ref-Fuel*, FERC granted a petition for declaratory judgment filed by the owners of several QFs across the United States “to the extent that they ask [FERC] to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey [credits] to the purchasing utility (absent express provision in a contract to the contrary).” 105 FERC at 61005. In so holding, FERC explained:

What is relevant here is that the [credits] are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of [credits]. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the [credits] (absent an express provision in the contract). States, in creating [credits] have the power to determine who owns the [credits] in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.

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105 FERC at 61007. Thus, FERC concluded that “[w]hile a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created [credits], that requirement must find its authority in state law, not PURPA.” *Id.*

In this case, the City and MEA argue that our state law resolves the issue of credit ownership in favor of the QFs and that the Commission’s decision to the contrary must be reversed.

1. Applicability of the Commission’s Portfolio Standard Rules. First, both the City and MEA contend that the Commission erred by not applying the Portfolio Standard Rules which it promulgated and which provide that the credits are owned by the Generators. The City primarily argues that Rule 5.6 of the Portfolio Standard Rules ^{FN10} specifying*360 **195 that credits can be sold bundled or unbundled with the energy necessarily means that the generator owns the credits associated with the energy it produces. MEA maintains that Portfolio Standard Rule 5.2 ^{FN11} which permits non-utility generators to be certified to generate credits constitutes an affirmative, knowing determination on the part of the Commission that non-utility generators are to be awarded credits automatically and in every instance. In support of their arguments, the Generators note that this Court has stated that “[a]n administrative agency is, of course, obligated to ‘follow and apply its rules and regulations in existence at the time of agency action.’” *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 256, 539 S.E.2d 757, 763 (2000) (quoting *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W.Va. 573, 583 n. 8, 466 S.E.2d 424, 434 n. 8 (1995)).

FN10. 150 C.S.R. § 34–5.6 states as follows:

An electric utility may meet the alternative and renewable energy Portfolio Standard requirements set forth in this rule by purchasing additional

credits awarded pursuant to Rule 5.2. An electric utility purchasing power may meet the Portfolio Standard requirements set forth in this rule, provided that the credit awarded pursuant to Rule 5.2 is included in, or bundled with, the purchase of the power. Credits may also be purchased independently, or unbundled from, purchased power.

FN11. 150 C.S.R. § 34–5.2 provides: “A qualified energy resource certified under Rule 4.2.a or 4.2.c shall be awarded certified alternative and renewable energy resource credits as summarized in Table 150–34A at the end of this rule and as described below[.]”

Conversely, the Utilities assert that ownership of credits associated with the EEPAs was not contemplated during the rulemaking process and that the Commission correctly concluded that the Portfolio Standard Rules do not apply to PURPA contracts that existed prior to the enactment of the Portfolio Act and promulgation of the Portfolio Standard Rules. In its order, the Commission acknowledges that “MEA and [the] City are correct that a non-utility generator may be entitled to the credits for qualified generation from its generating facility based on the Commission *Portfolio Standard Rules* issued by the Commission in General Order No. 184.25.” ^{FN12} The Commission explained, however, that the rulemaking proceeding “did not address PURPA EEPAs executed prior to the Act, and the unbundling provision of the Rules was not intended to apply to these pre-existing agreements.” The Commission concluded that “[t]he Rules cannot reasonably be applied retroactively to these PURPA EEPAs and were intended to apply prospectively to agreements for the purchase of electricity entered into after January 4, 2011, the effective date of the Rules.”

FN12. The Portfolio Act required the Commission to consider extending, by rule, the awarding of credits to “electric

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distribution companies or electric generation suppliers other than electric utilities” or to non-utility generators. W. Va.Code § 24-2F-10(b). Thus, by its November 10, 2010, order issuing the Portfolio Standard Rules, the Commission extended the award of credits representing the generation of electricity from alternative and renewable energy resources to non-utility generators, but limited the award of credits for greenhouse gas emissions or reduction or offset projects and energy efficient and demand-side energy initiative projects to the state electric utilities.

[3] Upon review, it is clear that the Commission did not err by refusing to apply the Portfolio Standard Rules to the PURPA EEPAs at issue in this case. This Court has long held that, “[a] statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute.” Syllabus Point 3, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980). Moreover, this Court has further explained that “[b]ecause legislative rules have the force and effect of statutes, the presumption of prospective application applies equally to such rules.” *Summers v. West Virginia Consolidated Public Retirement Bd.*, 217 W.Va. 399, 405, 618 S.E.2d 408, 414 (2005); see also *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 222 W.Va. 252, 664 S.E.2d 137 (2008) (finding that amendments to a zoning ordinance could not be applied retroactively to a permit application). Here, there is no indication, either expressly or impliedly, that the Portfolio Standard Rules were meant to be applied retroactively. Accordingly, there is no merit to the Generators' argument that Portfolio Standard Rules are applicable.

****196 *361 2. Alleged Contractual Modification.** Both the City and MEA argue that

the Commission's decision to award the credits to the Utilities modifies the EEPAs between the entities contrary to both PURPA and West Virginia contract law.

a. Preemption. The Generators contend that the Commission's decision modifies the avoided cost rate in the EEPAs which is expressly prohibited by PURPA. In other words, MEA and the City argue that the avoided cost rate in the EEPAs now pays for energy, capacity and the credits. Therefore, they conclude that the avoided cost rate received by the QFs is lowered by the value of the credits such that the QFs' compensation for energy and capacity is less than the full avoided cost rate it received before. The Generators maintain that this modification of the EEPAs' price terms constitutes a “utility-type regulation” in violation of PURPA, 16 U.S.C. § 824a-3(e). In support of their argument, the parties rely upon *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey*, 44 F.3d 1178 (3rd Cir.1995).

In *Freehold*, a state regulatory agency ordered a QF to renegotiate the terms of its energy purchase agreement with the utility in response to decreases in the cost of obtaining electrical power. The QF then filed a declaratory judgment action seeking a declaration that the state agency was preempted by PURPA from modifying the terms of the previously approved power purchase agreement. In granting relief to the QF, the United States Court of Appeals for the Third Circuit observed that under PURPA, it is FERC and not state agencies that is responsible for regulating the rates charged by QFs in power purchase agreements. 44 F.3d at 1191. The Third Circuit recognized that state regulatory agencies have the authority to implement PURPA by initially reviewing and approving contracts for the sale of electricity. *Id.* Once the state agency has approved the agreement, however, any attempt to modify the agreement would subject the QF to “utility-type” regulation barred by Section 210(e) of PURPA. *Id.* at 1192.

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[4] Upon review, we find that *Freehold* has no application in this instance. Contrary to the assertions of the Generators, the Commission has not modified the terms of the existing EEPAs but, instead, has only determined ownership of assets—the credits—which were not contemplated and, thus, not provided for in the EEPAs. Other jurisdictions that have considered this same issue agree that an interpretation of a power purchase agreement which is silent on the issue of credit ownership does not violate PURPA. See *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183 (2nd Cir.2008) (finding that Department of Public Utility Control did not order the renegotiation of the terms of the electric energy purchase agreement in violation of PURPA but simply exercised its authority to interpret the agreement's provisions when it concluded that electric utility was entitled to the renewable energy credits); *ARIPPA v. Pennsylvania Public Utility Comm'n*, 966 A.2d 1204, 1211 (Pa.Cmwlt.2009) (concluding that “PURPA did not preempt the Commission's authority to determine the ownership of alternative energy credits at issue”). Here, the Commission considered the EEPAs and concluded that because the Utilities own the electricity as it is generated, they also own the credits which only come into existence after the electricity is generated. The Commission explained in its order that

the purchase of generation under the PURPA EEPAs results in the utility owning the generation and the credits associated with the generation. The [Utilities] own the electricity because under PURPA and the EEPAs, Mon Power is required to purchase all of the qualifying electricity generated from the PURPA facilities as that electricity is generated. 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.

Thus, in reaching its decision, the Commission has only interpreted the EEPAs to evaluate the Utilities' obligations under them and their ownership of the electricity at the time it is generated. The Commission has not interfered with the Generators' federally-*362 **197 granted right to be exempt from certain utility-type state regulation. Accordingly, we find no merit to the Generators' argument.

b. Application of West Virginia contract law. MEA argues the Commission's conveyance of the credits under the EEPAs to the Utilities contravenes West Virginia contract law. In that regard, MEA says that nothing in West Virginia contract law permits the Commission to read a conveyance of credits into the EEPA when the EEPA contains no such conveyance and makes no mention of credits because they did not exist at the time the EEPA was executed. MEA notes that this Court long ago stated that “the intention of the parties is controlling, and must be ascertained from the language of the instrument.” *Berry v. Humphreys*, 76 W.Va. 668, 670, 86 S.E. 568, 568 (1915). MEA further argues that the Commission's conclusion that the Utilities own the credits because they purchase the electricity and the credits only come into existence after the electricity is generated is not logical considering the fact that steam is also generated along with the electricity yet it is not conveyed under the EEPA.

[5][6] With regard to MEA's argument which attempts to equate the steam by-product of its generation with the credits, the record shows that steam was recognized at the time the EEPA was created as a tangible by-product of the generation with a separate commercial value. In fact, the steam is separately captured and sold to West Virginia University. By contrast, the credits are an intangible creation of state law that only exist because of the electric generation from a statutorily-recognized plant. Because the Commission concluded that the Utilities own the credits in the first instance since they own the

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electricity as it is generated, there is simply no merit to MEA's claim that the credits were conveyed to the Utilities without consideration. In other words, it is irrelevant that the EEPA provides no consideration for the credits because the credits are created after the generation of electricity and are, therefore, owned by the Utilities.^{FN13}

FN13. MEA also argues that Commission's decision to award the credits to the Utilities results in the taking of private property without just compensation to the owners, i.e., the Generators, in violation of the federal and state constitutions. Again, we find no merit to this argument because the Commission determined that the credits were owned by the Utilities in the first instance. The Commission's decision could not constitute an unconstitutional taking because no property owned by the Generators was taken.

c. Applicability of *Energy Dev. Corp. v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003). The City also contends that the Commission erred by refusing to find that its EEPA contains a latent ambiguity based upon this Court's holding in *Energy Development Corporation v. Moss*, 214 W.Va. 577, 591 S.E.2d 135 (2003). In that case, this Court considered whether a standard oil and gas lease executed in 1986 conveyed to the lessee the right to drill into the lessor's coal seams in order to produce coalbed methane, absent any specific language in the lease addressing the issue. When the lease was signed, coalbed methane was a relatively new source of energy that had not been commercially available in West Virginia. This Court determined that the lease, absent a clear conveyance of the coalbed methane, contained a latent ambiguity. Therefore, the lease was deemed ambiguous. Based on the intent of the parties, including the fact that the lessee may have been aware of the value of the coalbed methane when the lease was executed, but the lessor was not, and that no coalbed methane wells had been drilled in the

area, this Court held that the lease did not give the lessee the right to drill for coalbed methane gas.

The City argues that *Energy Development Corporation* is directly on point. Here, the EEPA between the City and Mon Power was executed in 1986 and amended in 2004. At the time the EEPA was initially signed, credits did not exist. According to the City, when the EEPA was amended in 2004, Mon Power was in possession of information regarding the possibility that there were tradeable credits associated with the energy produced by the Hannibal project. The City argues that there is a latent ambiguity in the EEPA because it does not address the credits and, therefore, pursuant to this Court's decision in *363**198 *Energy Development Corporation*, the Commission should have ruled that the credits belong to the City.

The Commission found that *Energy Development Corporation* was not applicable in this instance for two reasons. First, the Commission concluded that the 2004 amendment to the Hannibal EEPA did not amend the material terms thereof in such a manner that it constituted a new agreement. Secondly, and consequently, unlike the parties in *Energy Development Corporation* who knew of the existence of coalbed methane, the parties here were not aware of the credits because they did not exist in fact or in law at the time the EEPAs were executed. The Commission concluded that "[i]t defies logic to say that one party or the other was responsible for a latent ambiguity." Upon review, we agree with the Commission's findings because the Portfolio Act that created the credits did not exist at the time the EEPAs were executed. Therefore, neither party can be found to have created a latent ambiguity. Accordingly, there is no merit to the City's argument.

3. Public Policy Considerations. Finally, the Generators say that it is apparent the Commission based its decision to award the credits to the Utilities on its notions of policy and its general charge to keep utility rates down. The Generators

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assert that the Commission's idea of the best policy and its general rate charges is no substitute for clear legal rules already established by the Legislature and judicial opinions. The Generators assert that while the Commission may believe that the QFs will receive what they bargained for in the EEPAs, this conclusion ignores the fact that the credits have value. The Generators note that the Commission has indicated that its mission is "to ensure fair and reasonable rates and to balance the interest of the current and future utility customers, the utilities, and the state economy." The Generators assert that missing from this "balancing of interests" are the QFs who serve PURPA and the Portfolio Act's goals of expanding the nation's use of alternative energy resources.

The Commission acknowledges that its decision was based, in part, upon the legislative intent in enacting the Portfolio Act and the Commission's statutory charge to balance the interests of utilities, the public, and the state's economy in making its assessments. In this regard, the Commission explained:

The Portfolio Act does not contain a specific provision that the utility or a PURPA generator owns the credits under the EEPAs that predate the Act. In the absence of specific statutory provisions in the Act governing the ownership of the credits under the EEPAs, the Commission must construe the [Portfolio] Act provisions, together with the provisions of Chapter 24 requiring the Commission to prescribe rates, to determine just and reasonable rates, and to balance the interest of current and future ratepayers, the utilities, and that state's economy.

The Commission further reasoned that [i]t would be contrary to the intent of the Portfolio Act to require the utility that has a continuing mandatory statutory obligation to purchase the qualifying generation at rates that are guaranteed pursuant to Commission Orders to separately purchase the credits from the PURPA generator, or to acquire additional credits at the

expense of the utility and its customers. The credits are a measure of utility compliance with the [Portfolio] Act by purchasing qualified generation. Because it is a given that the utility has purchased and will continue to purchase qualified generation from PURPA projects, it would be wrong to require the utility to now purchase credits to "verify" those purchases for the purpose of demonstrating compliance.

In summary, the Commission concluded that the public interest favored awarding ownership of the credits to the Utilities. A decision to the contrary would result in the imposition of additional and significant expenses to ratepayers of approximately \$50 to \$100 million.

[7][8] As previously discussed and contrary to the assertions of the Generators, the Commission did not ignore or violate state law in reaching its decision that the credits at issue are owned by the Utilities. Likewise, the Commission did not err in considering its statutory charge to keep utility rates fair and reasonable in reaching its decision. The purpose of the Portfolio Act is to encourage the *364 **199 creation and use of energy from alternative sources of energy. *West Virginia Code § 24-2F-2(7)* (Repl.Vol.2008 & Supp.2011) states: "It is in the public interest for the state to encourage the construction of alternative and renewable energy resources facilities that increase the capacity to provide for current and anticipated electric energy demand at a reasonable price." The credits at issue here are the means of effectuating the goals of the Portfolio Act. Because the Utilities have already agreed to purchase energy from an alternative energy facility, admittedly by a contract that is silent on the issue of credit ownership, the purpose of Portfolio Act has nonetheless been achieved. Given that the EEPAs are silent on the issue of credit ownership and there is no controlling statutory language in the Portfolio Act with regard to ownership of credits under these particular circumstances, we find that the Commission's decision is well-reasoned and supported by the

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evidence.^{FN14} In summary, we find no merit to the arguments asserted by the Generators and, therefore, the decision of the Commission finding that the credits at issue are owned by the Utilities is affirmed.^{FN15}

FN14. Like MEA, the City has also challenged the Commission's determination that its decision should be based in part upon its statutory obligation and duties in setting fair and reasonable rates for utility companies and their customers. Specifically, the City has asserted that the Commission failed to adequately balance its interests as both a producer of electricity and a public utility subject to the requirements of the Portfolio Act. We find no merit to the City's argument, however, as the evidence showed that without the Hannibal credits, the City will have more than enough credits through 2025 to comply with the Portfolio Act. By contrast, absent the credits related to the PURPA facilities, the Utilities would have a deficit by 2020 and be required to obtain over 9 million credits through 2025 at a conservative cost estimate of over \$50 million.

FN15. Concurrent with the filing of this appeal, MEA also filed a petition for enforcement with FERC alleging that Commission's order violated PURPA in three ways: (1) that the order incorrectly held that the avoided cost rate paid by the Utilities to MEA is sufficient to transfer credits, together with energy and capacity; (2) that the order incorrectly held that the Commission has the authority to find MEA certified, or deem MEA certified, as a qualified energy resource able to produce credits; and (3) that the order discriminates against MEA with respect to its QF status. The City filed a motion to intervene and comments in support of MEA's petition for

enforcement on March 14, 2012. On April 24, 2012, FERC ruled upon the petition for enforcement by issuing a "Notice of Intent Not to Act and Declaratory Order" in which it concluded that "certain statements in [the Commission's order] are inconsistent with the requirements of PURPA" but also advised that it "decline[d] to initiate an enforcement action pursuant to section 210(h) of PURPA." Thereafter, by order entered on May 1, 2012, this Court ordered the parties to file supplemental briefs pursuant to Rule 10(f) of the Revised Rules of Appellate Procedure addressing the impact of the FERC order, including the extent to which additional proceedings before the Commission were necessary prior to the Court's resolution of these appeals. The Generators responded by stating that the FERC order supported their position and confirmed that this Court should vacate the Commission's order. In contrast, the Utilities and the Commission took the position that the FERC order has no impact upon this appeal. All parties agreed, however, that no additional proceedings were necessary and that this Court should proceed with resolution of the pending appeals.

Upon review, this Court finds that FERC's decision has no bearing upon this appeal. " 'An order that does no more than announce the [Federal Energy Regulatory] Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.' " *Xcel Energy Services, Inc. v. Federal Energy Regulatory Comm'n*, 407 F.3d 1242, 1244 (D.C.Cir.2005) (quoting *Niagara Mohawk Power Corp. v. FERC*, 117

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F.3d 1485, 1488 (D.C.Cir.1997)). Moreover, as explained in the analysis above, this Court has concluded that the Commission's decision is not inconsistent with PURPA but, rather, is a well-reasoned decision based upon our state law.

B. Certification of the Morgantown Project

MEA also assigns as error the Commission's conclusion that it has jurisdiction and authority to deem the Morgantown project certified to generate credits under the Portfolio Standard Rules upon the submission of sufficient information by the Utilities regarding the generation attributes of the Morgantown project. MEA argues that the Commission's conclusion that it can "deem" the Morgantown project certified to create credits recognized by West Virginia law contradicts MEA's federally-created exemption from "utility-type" state law regulation. As noted previously, QFs are exempted from *365 **200 state laws relating to rates of electric utilities and the financial and organizational regulation of electric utilities. While the states are granted authority to approve PURPA contracts, they may not regulate QFs inconsistently with PURPA. MEA contends that requiring it to certify its facility because it is a QF constitutes impermissible "financial" and "organizational" regulation. In other words, MEA contends that the Commission cannot make management decisions for MEA in its capacity as a QF that affect its financial affairs, its rates, or its managerial discretion in the same way that the Commission can regulate a utility.

MEA further asserts that the Commission's conclusion that it can "deem" the Morgantown project as certified to create credits recognized by West Virginia law squarely contradicts its own clear and unambiguous regulation on the subject. The Commission's own regulations state that a QF must be certified as such to create credits pursuant to the Portfolio Act and the Portfolio Standard Rules. MEA says that while the Commission may

believe that its refusal to request certification of the Morgantown project is "unreasonable," there is simply no authority for the Commission to deem the Morgantown project certified to create credits in West Virginia.

[9] Upon review, we find no merit to MEA's argument. As discussed above, the Commission has determined that the credits are owned by the Utilities in the first instance. Given MEA's refusal to seek certification of its Morgantown project under the Portfolio Standard Rules, the Commission's decision to deem the project certified is the only mechanism by which the Utilities can receive certification that the energy they are purchasing satisfies the requirements of the Portfolio Act. The Portfolio Standard Rules provide for waiver thereof upon a showing of hardship or unusual difficulty in complying with any one rule. 150 C.S.R. § 34-1.5a. Certainly, a hardship on ratepayers would occur in this instance if the qualifying credits owned by the Utilities were not certified.

Contrary to the assertions of MEA, the Commission's decision that it will certify the Morgantown project to create credits under the Portfolio Act, upon the submission of sufficient information establishing that the Morgantown project satisfies the qualifications for such certification, does not constitute impermissible "utility-type" regulation prohibited by PURPA. The Commission's decision is simply an extension of its jurisdiction over public utilities and the authority conferred upon it by the Portfolio Act. By deeming the Morgantown project certified, the Commission is not regulating the Morgantown project in any respect; instead, it is only providing a mechanism for the owner of the energy, the Utilities, to receive certification that the energy they are purchasing qualifies for the purpose of satisfying the requirements of the Portfolio Act. Accordingly, the Commission's decision providing for certification of the Morgantown project under the Portfolio Standard Rules upon the submission of sufficient

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evidence by the Utilities is affirmed.

IV. CONCLUSION

For the reasons set forth above, the final order of the Commission entered on November 22, 2011, is affirmed.

Affirmed.

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United States District Court, S.D. West Virginia.
MORGANTOWN ENERGY ASSOCIATES,
Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and Michael A. Albert, in his official capacity as Chairman of the Public Service Commission, and Jon W. McKinney, in his official capacity as Commissioner of the Public Service Commission, and Ryan B. Palmer, in his official capacity as Commissioner of the Public Service Commission, and Monongahela Power Company and The Potomac Edison Company, Defendants.

Civil Action No. 2:12-cv-6327.
Sept. 30, 2013.

Pamela C. Deem, Rebecca A. Betts, Kay Casto & Chaney, Charleston, WV, for Plaintiff.

Benjamin L. Bailey, Jonathan S. Deem, Bailey & Glasser, Charleston, WV, for Defendants.

MEMORANDUM OPINION AND ORDER

JOHN T. COPENHAVER, JR., District Judge.

*1 Pending is the motion to dismiss by defendants Public Service Commission of West Virginia, and Commissioners Michael A. Albert, Chairman, Jon W. McKinney, and Ryan B. Palmer (collectively, “the Commission”), filed December 7, 2012. Also pending is the motion for judgment on the pleadings by defendants Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“Potomac Edison” and together with Mon Power, “the Utilities”), filed January 25, 2013.

The plaintiff, Morgantown Energy Associates (“MEA”), is a general partnership with a principal place of business in Morgantown, West Virginia. Compl. ¶ 7. MEA is engaged in generating electric power from alternative energy resources which it

sells to electric utilities. Compl. ¶¶ 19, 41. The Public Service Commission is an administrative agency of the State of West Virginia, having the “authority and duty to enforce and regulate the practices, services and rates of public utilities.” W. Va.Code § 24-1-1(a). Mon Power is an electric utility in West Virginia and Potomac Edison is its sister company. *Id.* ¶ 12.

I. Background

This case arises from a dispute over ownership of alternative and renewable energy credits (commonly called “RECs,” or “credits”) that are a relatively recent creature of state law. Here, the credits relate to electric energy provided by MEA to the Utilities under a pre-existing 1989 contract that runs until 2027, pursuant to federal law.

Congress enacted the Public Utility Regulatory Policies Act (“PURPA”) in 1978, in the wake of the energy crisis of the 1970s, to promote greater use of domestic alternative and renewable energy and to decrease the nation's dependence on foreign oil. Pub.L. No. 95-617, 92 Stat. 3117; *FERC v. Mississippi*, 456 U.S. 742, 746 (1982). Under PURPA, certain facilities that produce electricity in nontraditional ways are designated as “qualified facilities” (“QFs”). 16 U.S.C. § 824a-3. Rulemaking power to encourage proliferation of QFs is generally held by the Federal Energy Regulatory Commission (“FERC”), while state regulatory commissions are charged with implementing ^{FN1} those rules. 16 U.S.C. 824a-3(a, f). Under PURPA, utilities must purchase any electricity made available to them by a QF at a special price called the “avoided cost” rate. *Id.*; 18 C.F.R. §§ 292.303 – 304. The avoided cost rate is a rate equal to the costs that the utility would have incurred from generating the electricity or purchasing the electricity from another source. 16 U.S.C. § 824a-3(d); 18 C.F.R. §§ 292.101(b)(6), 292.303. The contracts by which utilities purchase electricity supplied by a facility, whether or not it is a QF, are commonly called electric energy purchase

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agreements (“EEP Agreements” or “EEPAs”) or power purchase agreements (“PPAs”).

FN1. The contours of the state commission's power to “implement” the regulations are discussed *infra*, Part III.B, pp. 36–43.

West Virginia is among that states that, independent of PURPA, have enacted their own laws to “encourage the development of more efficient, lower-emitting and reasonably priced alternative and renewable energy resources.” *W. Va.Code §§ 24–2F–1, 24–2F2(3)*. West Virginia's Alternative and Renewable Energy Portfolio Act (“the W.Va. Portfolio Act” or “the Portfolio Act”) was enacted in 2009, and tasks the Public Service Commission with rulemaking to “establish a system of tradable credits to establish, verify and monitor the generation and sale of electricity generated from alternative and renewable energy resources facilities.” *Id.* § 24–2F–4(a). A “qualified facility” under PURPA is not necessarily an “alternative and renewable energy resource” facility under the Portfolio Act, and vice versa. The two classification schemes operate independently of one another and do not have the same requirements.

*2 The Portfolio Act awards one REC to electric utilities for each megawatt hour of electricity purchased or generated from specified alternative energy resource facilities. *Id.* § 24–2F4(b)(1–2). Utilities earn two RECs for each megawatt hour from specified renewable energy resource facilities. *Id.* § 24–2F4(b)(2). The specified facilities include those located within West Virginia, such as MEA's Morgantown facility. These statecreated credits can be accumulated for use in years to come. Beginning in 2015, the Portfolio Act requires electric utilities to own RECs in amounts equal to at least 10 percent of the energy they sold to West Virginia retail customers in the preceding calendar year. *Id.* § 24–2F–5(d)(1). The requirement increases to 15 percent in 2020, and settles at 25 percent in 2025. *Id.* § 24–2F5(c), (d)(1–2). If a utility cannot meet its requirement for

a given year, the Commission will assess a per-credit penalty of at least the lesser of 200 percent of the average market value of a credit or 50 dollars. *Id.* § 24–2F–5(g). In meeting the Portfolio Act requirements, RECs may not be used more than once, but excess RECs may be carried over for use in future years. *Id.* § 24–2F–5(b, f).

On November 5, 2010, the Commission issued General Order No. 184.25, setting forth final rules for the Portfolio Act. The final rules provide that RECs may be obtained from non-utility generators of electricity from alternative and renewable resources, such as the plaintiff, MEA, either by purchasing the credits and the energy bundled together or by purchasing the credits independently, unbundled from the energy. *W. Va.Code R. § 150–34–5.6*.

This dispute concerns a circumstance that the final rules do not directly address: who should own the credits when a nonutility QF sells electricity to utilities through an EEPA that predates the Portfolio Act and consequently does not specify who owns the credits? On November 22, 2011, the Commission issued an order (“the Commission Order”) that assigned the credits to the purchasing utilities. In this case, the court is asked to consider whether the Commission violated PURPA or otherwise erred in making that determination.

A. Federal Statutory Framework

As noted, PURPA created a class of electricity generating facilities known as “qualified facilities,” or “QFs”. QFs include cogeneration,^{FN2} biomass, waste, and renewable resource facilities. *See 16 U.S.C. § 824a–3*. In addition to meeting any regulatory requirements for energy output or the manner in which energy is generated, a facility must also be certified to be a QF.^{FN3} If a facility does not seek certification, even if it would meet all of the other requirements necessary to be a qualified facility, it is not a “qualified facility” under the regulations. A facility may either file a notice of self-certification with FERC or apply directly to FERC for certification. 18 C.F.R. §

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292.203. Whether to seek QF certification is up to the facility, as no part of PURPA or the FERC regulations requires an otherwise qualified facility to do so. *See generally* 16 U.S.C. §§ 824 – 824a-3; 18 C.F.R. §§ 292.101 – 292.602. The plaintiff, MEA, is a qualified facility.

FN2. A “cogeneration” facility is one that produces both electric energy and steam or some other form of energy useful for “industrial, commercial, heating, or cooling purposes.” 16 U.S.C. § 796.

FN3. There is an exception: “Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements.” 18 C.F.R. § 292.203(d).

*3 To encourage the development of QFs, PURPA obligates electric utilities to buy any electricity made available by a QF at the avoided cost rate. The QF may sell power on an “as available” basis, in which case the purchasing utility will buy at the avoided cost rate at the time of purchase. 18 C.F.R. § 292.304(d)(1). Alternatively, the QF can enter into a contract with a utility (known as EEPAs or PPAs), where the price may be either the avoided cost at the time of contracting or the avoided cost at the time of delivery. 18 C.F.R. § 292.304(d)(2).

PURPA directs the Federal Energy Regulatory Commission (“FERC”) to prescribe “such rules as it determines necessary to encourage cogeneration and small power production.” PURPA § 210(a), 16 U.S.C. § 824a-3(a). Section 210(f), headed “Implementation of rules for qualifying cogeneration and qualifying small power production facilities,” then directs “each State regulatory authority” to “implement such [FERC] rule (or revised rule) for each electric utility for which it has ratemaking authority.” *Id.* § 210(f), 16 U.S.C. § 824a-3(f).

PURPA § 210(e) instructs FERC to prescribe rules exempting qualifying facilities from certain

federal and state utility regulation, including “State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities.” 16 U.S.C. § 824a-3(e); *see also Wheelabrator Lisbon, Inc. v. Conn. Dept. of Pub. Util. Ctr.*, 531 F.3d 183, 185 n. 7 (2d Cir.2008). FERC regulations accordingly provide, that any QF is “exempted ... from State laws or regulations respecting: (i) The rates of electric utilities; and (ii) The financial and organizational regulation of electric utilities.” 18 C.F.R. § 292.602(c). The exemption “is referred to as the ‘exempt[ion] from ... utility-type ... regulation.’” *Wheelabrator*, 531 F.3d at 185 n. 7 (quoting *Freehold Cogeneration Assocs., L.P. v. Bd. of Reg. Comm'rs of N.J.*, 44 F.3d 1178, 1185 (3d Cir.1995)).

In *Freehold*, the Third Circuit concluded that a state regulatory agency had impermissibly modified an EEPA by ordering the QF and utility to renegotiate the agreement's purchase rate terms. 44 F.3d at 1190. The court observed that PURPA reserves for FERC, not state regulators, the responsibility of regulating the rates at which electricity is purchased under EEPAs. *Id.* at 1191. PURPA gives state regulatory agencies the authority to review and approve EEPAs with a QF as a party, but once an EEPA is approved, modification of the EEPA or revocation of the approval of an EEPA constitutes “utility-type” regulation of the QF, in violation of § 210(e). *Id.* at 1191-92.

B. Ownership of RECs for Electricity Sold Under Preexisting EEPAs

Previous disputes have arisen regarding whether the generator or the electric utility should own the RECs associated with EEPAs that predate the relevant state portfolio act. In 2003, FERC issued a decision declaring that REC ownership in the context of preexisting PURPA EEPAs is a matter to be decided by the states under state law. *American Ref-Fuel Co.*, 105 F.E.R.C. ¶ 61,004 (2003). In *American Ref-Fuel*, FERC considered a

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petition from owners of several QFs seeking a declaratory judgment that PURPA EEPAs compensate QFs only for energy and capacity, not for any “environmental attributes,” and therefore should not “inherently convey to the purchasing utility any renewable energy credits.” 105 F.E.R.C. ¶ 61,005, at ¶ 2. FERC granted the petition to the extent that it sought a declaration that FERC’s “avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.” *Id.* ¶ 61,006, at ¶ 18. FERC concluded that “[w]hile a state may decide that a sale of power at wholesale automatically transfers ownership of the statecreated RECs, that requirement must find its authority in state law, not PURPA.” *Id.* ¶ 61,007, at ¶ 24.

*4 The Second Circuit considered the issue in *Wheelabrator Lisbon*. 531 F.3d at 190. There, the plaintiff, a QF, had challenged a ruling by the Connecticut Department of Public Utility Control (“DPUC”) that the parties’ EEPA “conveyed to [the utility, Connecticut Light and Power,] any RECs arising from” the production of its subject electricity. *Id.* at 187. The plaintiff argued that DPUC’s ruling “modified the terms of the [EEPA] and thereby imposed utility-type regulation in conflict with Section 210(e) of [PURPA].” *Id.* at 185.

The Second Circuit agreed with the district court that DPUC’s interpretation of the EEPA with respect to ownership of RECs did not constitute a modification of the EEPA:

As the District Court explained, “the DPUC decisions are unlike the [state agency] order that was the subject of *Freehold*.” Unlike the New Jersey agency in *Freehold*, “the DPUC has not ordered the [qualifying facility] to renegotiate the contract purchase price or ordered lower rates. Rather, the DPUC considered the [energy purchase agreement] at issue and concluded that

[it] transferred the renewable energy and the associated GIS Certificates to CL & P.” We agree that the DPUC did not order the renegotiation of the terms of the Agreement but simply exercised its authority to interpret the Agreement’s provisions—as it happens, in a manner that was unfavorable to Wheelabrator. We hold, therefore, that the 2004 DPUC Decision does not modify the terms of the Agreement and, accordingly, does not violate Section 210(e) of PURPA.

Id. at 188–89.

The Second Circuit also found that FERC’s decision in *American Ref-Fuel* did not preempt DPUC’s decision. The plaintiff had argued that *American Ref-Fuel* required “RECs to be sold through express contractual provisions and that, in the absence of such a provision, an electricity purchase agreement cannot convey RECs.” *Id.* at 189. The court disagreed, again adopting the lower court’s reasoning:

We agree with the District Court, and with FERC, that *American Ref-Fuel* did not impose such a rule. As the District Court correctly observed:

[In *American Ref-Fuel*,] [t]he FERC concluded that RECs are created by the State and controlled by state law, not PURPA, and that they may be decoupled from the renewable energy.... Taken as a whole, however, *American Ref-Fuel* does not stand for the proposition that PURPA requires an express contractual provision in order for RECs ... to be transferred to a public utility pursuant to a PURPA contract.... In its order denying rehearing, the FERC noted that the reference to an “express contractual provision” seems to have been misunderstood. The FERC elaborated: “We did not mean to suggest that the parties to a PURPA contract, by contract, could undo the requirements of State law in this regard. All we intended by this language was to indicate that a PURPA contract did not

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inherently convey any RECs, and correspondingly that, assuming State law did not provide to the contrary, the [qualifying facility] by contract could separately convey the RECs.”

*5 In sum, the FERC decision in *American Ref-Fuel* does not evince an intent to occupy the relevant field—namely, the regulation of renewable energy credits. Rather, it explicitly acknowledges that state law governs the conveyance of RECs. We conclude, therefore, that the *American Ref-Fuel* does not preempt the 2004 DPUC Decision.

Id. at 189–90 (internal citations omitted).

New Jersey and Pennsylvania state courts have also considered the issue and concluded that state regulatory authorities did not run afoul of PURPA by decreeing ownership of RECs to utilities absent a contrary contractual provision. See *ARIPPA v. Pa Pub. Util. Comm'n*, 966 A.2d 1204, 1209 (Pa.Comm.w.Ct.2009); *In re Ownership of Renewable Energy Certificates (“Ownership of RECs”)*, 913 A.2d 825, 828, 830 (N.J.Super.Ct.App.Div.2007). In *Ownership of RECs*, a New Jersey state court found that certain language in *American Ref-Fuel* “might be construed as helpful to appellants,” who were QFs, but that “the balance” of that opinion supported the regulator’s decision that the RECs belonged to the utility. 913 A.2d at 831. It concluded that “according to FERC, states decide who owns the REC in the initial instance.” *Id.* In *ARIPPA*, a Pennsylvania state court similarly found that the Pennsylvania Public Utility Commission “has not modified the terms of an existing and approved contract, but rather has determined ownership of assets which were not contemplated, let alone provided for in the contracts at issue.” 966 A.2d at 1209.

C. Factual and Procedural Background

Plaintiff MEA owns and operates a 60.8 MW cogeneration facility in Morgantown, West Virginia

(the “Morgantown facility”) that utilizes circulated fluidized bed combustion technology to burn bituminous coal refuse as its primary energy source. Compl. ¶ 7. As earlier noted, it is a qualified facility under PURPA. *Id.* ¶ 15. On March 1, 1989, MEA and Mon Power entered into a longterm EEPA, whereby Mon Power has purchased the energy and capacity generated by MEA. *Id.* ¶ 19.^{FN4} The EEPA is in effect until 2027. Comm’n Order 48.

FN4. While Mon Power executed the EEPA, “the Commission now regulates the combined West Virginia operations of Mon Power and [Potomac Edison] as a single entity, including the combined costs and rates.” *City of New Martinsville v. Pub. Serv. Comm’n of W. Va.*, 729 S.E.2d 188 n. 6 (W.Va.2012), consolidated on appeal with *Morgantown Energy Associates v. Pub. Serv. Comm’n of W. Va.*, No. 11–1739, [hereinafter *New Martinsville/MEA*].

In 2006, MEA registered its Morgantown facility as an alternative energy resource under the Pennsylvania Portfolio Act (“the Pa. Portfolio Act”). Compl. ¶ 32; 73 P.S. §§ 1648.1–1648.8. The Pa. Portfolio Act was enacted in 2005, and like the later W.Va. Portfolio Act, it requires electric utilities to create or purchase alternative ^{FNS} energy credits (“Pa.-RECs”) if they sell energy to retail customers in Pennsylvania. 73 P.S. § 1648.3(a)(1). Any energy generated from alternative sources within the service territory of PJM Interconnection, LLC (“PJM”), a FERC-regulated, interstate regional transmission organization, or its successor, is eligible to meet the requirements of the Pa. Portfolio Act. 73 P.S. § 1648.4. The Morgantown facility is within the PJM service territory and began generating Pa.-RECs in 2006. Compl. 25, 28. Under the Pa. Portfolio Act, MEA asserts that it owns the Pa.-RECs. See 73 P.S. § 1648.3(e)(12) (providing that unless a contract for electricity “explicitly assigns alternative energy

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credits in a different manner, the owner of the alternative energy system ... owns any and all alternative energy credits associated with or created by the production of the electric energy by such facility”) .^{FN6} MEA has “banked” the Pa.-RECS with PJM’s subsidiary, PJM–Environmental Information Services, Inc. (“PJM–EIS”) and has also “engaged in transactions ... in which it has sold its PaRECs to electric utilities.” Compl. ¶¶ 25, 32–33. MEA has not alleged whether it sells any electric energy or RECs to entities located in Pennsylvania.

FN5. Though an energy source under the West Virginia law may be “renewable,” “alternative,” or neither, under the Pennsylvania law a source may only be “alternative” or not. 73 P.S. § 1648.3. The “alternative” category does not include the same types of energy sources in each state. For instance, some sources considered “renewable” under the West Virginia law, like solar plants, are “alternative” under the Pennsylvania law. W. Va.Code § 24–2F–3 (13)(A); 73 P.S. § 1648.3(b). For simplicity and uniformity, the court refers to credits under the Pennsylvania law as Pa.-RECs.

FN6. The Pennsylvania legislature amended the Pa. Portfolio Act in 2007 to include this provision, which did not apply in *ARIPPA*. *ARIPPA*, 966 A.2d at 1207.

*6 MEA’s Morgantown facility also qualifies as an alternative energy resource under the W.Va. Portfolio Act. *Id.* ¶ 41. MEA, however, has not filed and currently has not made a determination to file an application to become certified under the W.Va. Portfolio Act to generate West Virginia credits. *Id.* ¶ 41. It asserts that it has no legal obligation to pursue certification, and it points out that although a facility may be capable of generating credits recognized by two different states, the credits can be transferred only once to a utility. *Id.* ¶¶ 27, 41. As stated above, MEA alleges

that it has “engaged in transactions” involving such transfers. *Id.* ¶ 33.

The EEPA between Mon Power and MEA, predating both states’ portfolio acts, is silent regarding ownership of any potential RECs generated by the Morgantown facility. *Id.* ¶ 42.

1. The Commission Order

On February 23, 2011, the Utilities filed a petition for declaratory relief with the Commission, requesting a ruling that the Utilities were entitled to W.Va. Portfolio Act RECs attributable to three non-utility QFs: (1) MEA’s Morgantown facility, (2) a facility of the City of New Martinsville, (3) and the Grant Town Project.^{FN7} *Id.* ¶ 44 & n. 2. On April 19, the Commission named MEA as a respondent in the case.

FN7. The second of these facilities is the subject of concurrent litigation pending before this court as *City of New Martinsville v. Public Service Commission of West Virginia*, No. 2:12–cv–1809. The owner of the other project, the Grant Town Project, was not a party to the proceedings before the Commission. Compl. ¶ 39 n. 9.

On November 22, 2011, the Commission issued an order (the “Commission Order”) resolving the following two issues in the affirmative:

1. Whether, under EEPAs that predate the Portfolio Act and Commission *Portfolio Standard Rules* and that are silent on the issue of credit ownership, [the Utilities] or the QFs own the credits associated with QF generation; and,
2. If the utilities own and are entitled to credits from the facilities, whether the Commission has the jurisdiction and authority to order a QF to certify the facilities or to deem the facilities certified to generate credits under the *Portfolio Standard Rules*

Comm’n Order 10.

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At the outset, the Commission noted that the Utilities estimate the cost of “acquir[ing] additional compliance credits to replace” the credits generated by MEA and the other two facilities to be “approximately \$50 million through 2025.” *Id.* The Commission later refers to this as a “conservative cost estimate.” *Id.* at 32.

The Commission determined that the Utilities own the credits based on “three separate but interrelated bases”:

(i) consistent with the [Portfolio] 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) [the Utilities’] ownership of the credits is 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 [Portfolio] 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.

*7 *Id.* at 43.

The Commission concluded that:

It would be unreasonable to require the utility to purchase, and ratepayers to pay the additional cost of credits, to verify the purchases of PURPA generation that the utility has purchased and will continue to purchase which qualifies as eligible

generation under the Portfolio Act.

[] In the absence of an express statutory provision governing the issue of credit ownership under PURPA EEPAs that predate the Portfolio Act and that are silent on the issue of credit[] ownership, the credits under the PURPA EEPAs are owned by the electric utility, Mon Power and PE, not the QFs, consistent with the intent and mandates of the Act and principles of equity and fairness.

Id. at 55.

The Commission expressly disavowed any reliance on federal law: “The Commission is not modifying the existing PURPA Agreements or exercising utility-type jurisdiction over MEA; we are determining the ownership of the credits in light of state law.” *Id.* at 37. It made the following conclusions respecting the EEPAs:

17. When the three EEPAs in question were negotiated and approved by the Commission, the statutory created credits did not exist and the retention of the credits was not a part of the contract and agreement between the parties. The PURPA facilities received what they bargained for, and all that they were entitled to, when agreements were finalized setting forth the avoided cost rates and terms that would apply to the final EEPAs.

18. 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.

Id. at 54.

Respecting certification of the Morgantown facility, the Commission observed that “allowing qualifying credits that are owned by the [Utilities] to not be certified would work a hardship on ratepayers.” *Id.* at 42. It took note of the “unusual difficulty” the Utilities would encounter should

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they “seek or expect cooperation from MEA in obtaining certification” of the Morgantown facility. *Id.* Consequently, the Commission concluded that, “it would be reasonable to allow the [Utilities] to seek certification of the credits we have determined they own.” *Id.*

The Commission again found its authority for the decision in state law:

[T]he 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 issues of credit ownership and to enable [the Utilities] to meet the compliance requirements of the [Portfolio] Act based on our decision in this case. The Commission's assertion of jurisdiction to resolve the dispute over credit ownership does not conflict with federal jurisdiction over PURPA and the PURPA facilities. As FERC determined in *American Ref-Fuel*, the states have jurisdiction to resolve the issues of credit ownership arising under the PURPA contracts. ... We believe that because our decision to certify the Morgantown facility is an extension of the Commission's jurisdiction over public utilities, the portfolio standard and credit trading system established by the Portfolio Act, our Order does not violate the PURPA's prohibition against “utility-type” state law regulation.

*8 *Id.* at 42–43.

Generally, the Commission, in its order, discusses “the credits,” without limitation on when the credits were generated and without distinction between RECs created under West Virginia law or RECs created under Pennsylvania law. However, the Commission did offer the following:

The Commission clarifies that [the Utilities are] entitled to the credits for the duration of the term

of the EEPAs. Credits are based on energy generated by qualified facilities and double counting of credits is prohibited. Because we are holding that [the Utilities] 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 could be obtained under other state laws are necessarily under the control of [the Utilities].

Id. at 34. In addition, the Commission ordered “that credits related to the electricity generated from ... the Morgantown project owned by Morgantown Energy Associates; and sold pursuant to the electric energy purchase agreements discussed herein belong to the purchaser,” and also ordered that the “[Utilities] take reasonable steps to secure the credits from the Morgantown facility that are currently in the MEA [] account, including, but not limited to, contacting PJM–EIS to advise it of the ruling in this case.” *Id.* at 56.

In December 2011, MEA and the City of New Martinsville filed appeals of the Commission Order with the West Virginia Supreme Court of Appeals, which the high court subsequently consolidated. Compl. ¶ 53.

2. The April FERC Order

On February 24, 2012, while the state appeal was pending, MEA petitioned FERC to bring an enforcement action against the Commission to require compliance with PURPA. Compl. ¶ 54. The petition asserted that the Commission's order violates PURPA in three respects: (1) by concluding that Mon Power's payments under the EEPA warranted giving Mon Power the credits, (2) by concluding that the Commission has the authority to deem MEA's facility certified under the W.Va. Portfolio Act, and (3) by discriminating against MEA based on its QF status under PURPA in setting electricity rates, in violation of 16 U.S.C. § 824a–3(b)(2) and 18 C.F.R. § 292.304(a)(1), because the Commission purportedly does not also deem RECs generated by a facility that is not

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qualified under PURPA to be owned by the utility to which the facility sells power. *Id.* ¶ 55.

On April 24, 2012, FERC issued a Notice of Intent Not to Act and Declaratory Order. FERC declined to exercise its discretionary enforcement authority under § 210(h) of PURPA. *Morgantown Energy Associates* (Morgantown I), 139 F.E.R.C. ¶ 61,066, at ¶ 44–45 (2012). It quoted from and reiterated its holding in *American Ref-Fuel*:

[FERC] 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.

*9 *Id.* ¶ 46. It further explained the rationale behind *American Ref-Fuel*, stating that the rates at which the utilities must purchase power from QFs “must be just and reasonable to the electric customer of the public utility and in the public interest,” but an electric utility is not required to pay the QF more than the avoided cost. *Id.* ¶ 47.

Nonetheless, FERC found that “certain statements in the [Commission] Order are inconsistent with PURPA.” *Id.* ¶ 45. FERC concluded that “[t]o the extent that the [Commission] Order finds that avoided-cost rates under PURPA also compensate for RECs, the [Commission] Order is inconsistent with PURPA.” *Id.* ¶ 47. In a footnote, FERC further explains the perceived inconsistency:

The West Virginia Order relies primarily on the avoided cost rate in the contract[] between Morgantown Energy 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 the contracts, but also for the RECs produced by the QFs. *See* West Virginia Order at 28.

Id. ¶ 47 n. 68.

3. The Appeal to the West Virginia Supreme Court

On June 11, 2012, in *New Martinsville/MEA*, 729 S.E.2d 188 (W.Va.2012), the West Virginia Supreme Court of Appeals affirmed the Commission Order in full. The court held,

[T]he Commission has not modified the terms of the existing EEPAs but, instead, has only determined ownership of assets—the credits—which were not contemplated and, thus, not provided for in the EEPAs.

Id. at 196. It further explained, [T]he Commission considered the EEPAs and concluded that because the Utilities own the electricity as it is generated, they also own the credits which only come into existence after the electricity is generated.

* * *

Thus, in reaching its decision, the Commission has only interpreted the EEPAs to evaluate the Utilities' obligations under them and their ownership of the electricity at the time it is generated. The Commission has not interfered with the Generators' federally granted right to be exempt from certain utility-type state regulation.

Id. 196–97.

The court found that the April FERC order “ha[d] no bearing upon” the appeal before it. *Id.* at 199 n. 15. Consequently, the court disagreed with FERC's concerns and “concluded that the Commission's decision is not inconsistent with PURPA but, rather, is a well-reasoned decision based upon our state law.” *Id.*

The court next addressed MEA's contention

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that the Commission violated MEA's federal exemption from "utility-type" state law regulation by deeming MEA certified to create West Virginia RECs. The court found that the Commission has an appropriate state law basis for its determination:

*10 Given MEA's refusal to seek certification of its Morgantown project under the Portfolio Standard Rules, the Commission's decision to deem the project certified is the only mechanism by which the Utilities can receive certification that the energy they are purchasing satisfies the requirements of the Portfolio Act. The Portfolio Standard Rules provide for waiver thereof upon a showing of hardship or unusual difficulty in complying with any one rule. 150 C.S.R. § 34-1.5a. Certainly, a hardship on ratepayers would occur in this instance if the qualifying credits owned by the Utilities were not certified.

Id. at 200.

Given this state-law justification for certifying MEA to generate RECs, the high court then explained why it did not consider the certification to be "utility-type" regulation:

Contrary to the assertions of MEA, the Commission's decision that it will certify the Morgantown project to create credits under the Portfolio Act ... does not constitute impermissible "utility-type" regulation prohibited by PURPA. The Commission's decision is simply an extension of its jurisdiction over public utilities and the authority conferred upon it by the Portfolio Act. By deeming the Morgantown project certified, the Commission is not regulating the Morgantown project in any respect; instead, it is only providing a mechanism for the owner of the energy, the Utilities, to receive certification that the energy they are purchasing qualifies for the purpose of satisfying the requirements of the Portfolio Act.

Id.

4. The September FERC Order

On May 6, 2012, the Utilities filed with FERC a request for clarification or, alternatively, a motion for rehearing of FERC's April Order. *Morgantown Energy Associates* (Morgantown II), 140 F .E.R.C. ¶ 61,223, at ¶ 3 (2012). The Utilities claimed that the order did not identify which statements in the Commission order were inconsistent with PURPA, and that FERC erred in determining that the Commission Order found that avoided cost rates compensate the QF for both RECs and energy. *Id.* On September 20, 2012, FERC issued an order denying a request by the Utilities for reconsideration of its April order. *Id.* ¶ 1. FERC acknowledged the Supreme Court of Appeals affirmance, but did not comment on its substance, instead focusing on the Commission Order. *Id.* ¶ 14 & n. 34. In the September order FERC explained its concerns regarding one of the perceived rationales for the Commission's decision:

While the [Commission] Order may also identify other bases for its decision to find that RECs produced by QFs belong to the purchasing utility, we cannot ignore those portions of the [Commission] Order that clearly refer to the avoided cost rate under PURPA as justification for its finding that RECs produced by QFs belong to the purchasing utility in the first instance. It is likewise significant, we find, that the West Virginia Commission implied that RECs produced by non-QFs could be considered to be owned by the non-QF generator in the first instance rather than the first purchaser of the output of the non-QF generator. The only reasonable reading of the [Commission] Order is that the West Virginia Commission's finding that the RECs produced by QFs, as opposed to RECs produced by non-QFs, are owned by the purchasing utilities in the first instance is based on the West Virginia Commission's belief that the PURPA avoided cost rates are overly generous and therefore must include RECs.

*11 *Id.* ¶ 21. It continued,

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We note ... that the West Virginia Commission did not find the sale of power at wholesale automatically transfers RECs. Instead, the West Virginia Commission found that RECs produced by QFs are owned by the purchasing utility (while RECs produced by non-QFs are not); and the West Virginia Commission clearly based this finding on its expressly stated belief that avoided cost rates were overly generous to utilities and unfair to consumers. Under these circumstances it is clear that to this extent, at least, the West Virginia Order is inconsistent with the Commission's ruling in *American Ref-Fuel* that avoided cost rates "in short, are not intended to compensate the QF for more than capacity and energy."

Id. (quoting *Am. Ref-Fuel*, 105 F.E.R.C. ¶ 61,004, at ¶ 22).

The order then makes clear that FERC's criticism is limited to the rationale perceived by it in the Commission Order, not the Commission's actual decision to assign credits to the utilities:

Because the ownership of the RECs is a matter of West Virginia law, we are not dictating to West Virginia whether a generator or the electric utility purchasing capacity and energy from the generator should own RECs at their creation. Rather, we merely find that the West Virginia Commission cannot, consistent with PURPA, assign ownership of the RECs to the Utilities on the grounds that the avoided cost rates in their PURPA [agreements] compensate the QFs for RECs in addition to energy and capacity.

Id. ¶ 24. In addition, FERC acknowledged that the Commission Order rested on other justifications as well: (1) that "it is unreasonable to retroactively apply [the unbundling provision, *Portfolio Standard Rule* 5.6] to PURPA [EPPAs] entered into prior to the rule's effective date," and (2) that "because RECs are a tool for ensuring that electric utilities purchase energy that satisfies their renewable portfolio standard obligations, RECs are

not necessary in the presence of PURPA [EPPAs] because PURPA [EPPAs] perform the same function as RECs." *Id.* ¶ 21 n. 45. Ultimately, FERC denied the request, rejecting the Utilities' arguments for reconsideration. *Id.* ¶ 26.

5. Federal District Court

Under PURPA, when FERC declines to bring an enforcement action within 60 days of the filing of a petition, the petitioner may bring its own enforcement action against the state regulatory authority in the appropriate U.S. district court. 16 U.S.C. § 824a-3(h)(2)(B). Pursuant to that provision, MEA filed the present action on October 8, 2012.

The complaint names as defendants the Commission and its individual commissioners. It asserts six counts. Count I seeks a declaratory judgment that the Commission Order violates PURPA and its implementing regulations. Count II claims that the Commission Order is preempted because it has the effect of modifying the avoided cost in the EEP agreement, a power reserved solely to FERC under PURPA. Count III seeks a declaration that the Commission Order violates PURPA's exemption of QFs from state utility-type regulation. Count IV seeks a declaration that the Commission Order violates PURPA § 210(b) by discriminating against QFs. Count V seeks an order enjoining the Commission from enforcing the Commission Order. Lastly, Count VI alleges that the individual commissioners violated the Takings Clause of the Fifth Amendment by granting ownership of MEA's Pa.-RECs to the Utilities without just compensation.

*12 The original defendants, consisting of the Commission and its commissioners, filed their pending motion to dismiss under *Federal Rules of Civil Procedure* 12(b)(1) and 12(b)(6) on December 7, 2012. On January 10, 2013, the court granted the Utilities' motion to intervene as party defendants, and on January 25, 2013 the Utilities filed their pending motion for judgment on the pleadings under *Federal Rule of Civil Procedure* 12(c).

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In their motions, the defendants assert that federal jurisdiction is barred by the *Rooker-Feldman* doctrine. They also contend that this action is not properly before this court because it is not a challenge to the Commission's "implementation" of PURPA, but rather an "as applied" challenge. The Utilities additionally argue that the court should abstain from adjudicating the controversy under various abstention doctrines.

Should the court recognize jurisdiction and decline to abstain, the defendants maintain that preclusion principles require it to honor the state decisions granting credit ownership to the electric utilities. The Utilities also argue that each Counts I–V of the complaint should be dismissed for failure to state a claim, and the Commission argues that Count VI should be dismissed for failure to state a claim.

II. Governing Standard

Under Federal Rule of Civil Procedure 8(a)(1), a complaint must contain "a short and plain statement of the grounds for the court's jurisdiction." Rule 12(b)(1) correspondingly permits a defendant to assert, by motion, that the plaintiff's claim for relief fails for "lack of subject-matter jurisdiction." Fed.R.Civ.P. 12(b)(1). The plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins, Co.*, 166 F.3d 642, 647 (4th Cir.1999). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.' " *Id.* (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991)). The court "should grant the Rule 12(b)(1) motion to dismiss 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.' " *Id.* (quoting *Richmond*, 945 F.2d at 768).

Under Rule 8(a)(2), the complaint must contain

"a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) correspondingly permits a defendant to challenge a complaint when it "fail[s] to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6).

The required "short and plain statement" must provide "fair notice of what the ... claim is and the grounds upon which it rests." " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir.2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); see also *Monroe v. City of Charlottesville*, 579 F.3d 380, 386 (4th Cir.2009). Facial plausibility exists when the court is able "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). The plausibility standard "is not akin to a 'probability requirement,' " but it requires more than a "sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

*13 In assessing plausibility, the court must accept as true the factual allegations contained in the complaint, but not the legal conclusions. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The determination is "context-specific" and requires "the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). A Rule 12(c) motion "is assessed under the same standard that applies to a Rule 12(b)(6) motion." *Walker v. Kelley*, 589 F.3d 127, 139 (4th Cir.2009); *Independence News, Inc. v. City of Charlotte*, 568

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F.3d 148, 154 (4th Cir.2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999)).

III. Discussion

A. The *Rooker–Feldman* Doctrine

The defendants argue that the *Rooker–Feldman* doctrine bars this court's jurisdiction. The United States Supreme Court holds that the doctrine "recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n. 3 (2002). It is named for the only two Supreme Court cases in which it has been applied: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005).

In *Exxon Mobil*, the Supreme Court warned that lower courts had at times applied the doctrine "far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738." 544 U.S. at 283. The Court clarified that the doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284.

It added that the *Rooker–Feldman* doctrine does not become applicable "simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Id.* at 293. The federal district court still has jurisdiction if the case before it "present[s] some independent claim" "even if that claim "denies a legal conclusion that a state court has reached in a case to which [the plaintiff] was a party." *Id.* (quoting *GASH Assocs.*

v. Rosemont, 995 F.2d 726, 728 (7th Cir.1993)). Thus, in *Exxon Mobil*, the Court declined to apply *Rooker–Feldman* where the plaintiff did not "repair [] to federal court to undo the [state court] judgment in its favor" but rather "filed suit in Federal District Court ... to protect itself in the event it lost in state court on grounds (such as the state statute of limitations) that might not preclude relief in the federal venue." *Id.* at 293–94.

*14 Discussing the impact of *Exxon Mobil*, our court of appeals explained,

Whereas [before *Exxon*] we examined whether the statecourt loser who files suit in federal court is attempting to litigate claims he either litigated or could have litigated before the state court, *Exxon* requires us to examine whether the state-court loser who files suit in federal district court seeks redress for an injury caused by the state-court decision itself. If he is not challenging the state-court decision, the *Rooker–Feldman* doctrine does not Dapply.

Davani v. Virginia Department of Transportation, 434 F.3d 712, 718 (4th Cir.2006) (footnote omitted) (permitting a federal employment discrimination and retaliation action following the state court's refusal to overturn the plaintiff's grievance with the employer). It borrowed this example from the Second Circuit:

Suppose a plaintiff sues his employer in state court for violating ... anti-discrimination law and ... loses. If the plaintiff then brings the same suit in federal court, he will be seeking a decision from the federal court that denies the state court's conclusion that the employer is not liable, but he will not be alleging injury from the state judgment. Instead, he will be alleging injury based on the employer's discrimination. The fact that the state court chose not to remedy the injury does not transform the subsequent federal suit on the same matter into an appeal, forbidden by *Rooker–Feldman*, of the state-court judgment.

Id. at 719.

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The Supreme Court further emphasized the doctrine's limits in *Lance v. Dennis*, decided the term following *Exxon Mobil*:

Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker–Feldman* rule. See *Exxon Mobil*, 544 U.S., at 292, 125 S.Ct. 1517 (*Rooker–Feldman* does not apply to parallel state and federal litigation); *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644, n. 3, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (*Rooker–Feldman* “has no application to judicial review of executive action, including determinations made by a state administrative agency”); *Johnson v. De Grandy*, 512 U.S. 997, 1005–1006, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (*Rooker–Feldman* does not bar actions by a nonparty to the earlier state suit). Indeed, during that period, “this Court has never applied *Rooker–Feldman* to dismiss an action for want of jurisdiction.” *Exxon Mobil*, *supra*, at 287, 125 S.Ct. 1517.

546 U.S. 459, 464 (2006). Particularly relevant to this case is the admonition that “[t]he doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency.” *Verizon Md.*, 535 U.S. at 644 n. 3.

The facts in *Verizon Maryland* were somewhat analogous to those here. Pursuant to the Telecommunications Act of 1996, the Maryland Public Service Commission had approved an “interconnection agreement” and “reciprocal compensation arrangement” through which Verizon would share its network with WorldCom and other competitors. *Id.* at 638–39. Sometime thereafter, Verizon informed WorldCom that it would no longer pay for certain calls which it contended were not subject to the interconnection agreement. *Id.* WorldCom filed a complaint with the commission challenging Verizon's claim, and the commission

found in favor of WorldCom. *Id.* On appeal, a Maryland state court affirmed the order. *Id.*

*15 Verizon then filed an action in federal district court, alleging that the commission's ruling violated the 1996 Act and a later FCC determination. *Id.* at 640. The district court dismissed the action, and the Fourth Circuit affirmed on immunity grounds. *Id.* On appeal to the Supreme Court, the commission suggested that *Rooker–Feldman* should have precluded federal jurisdiction. The Court dismissed the argument in a footnote, stating that *Rooker–Feldman* limits jurisdiction “over state-court judgments” and therefore does not apply “to judicial review of executive action, including determinations made by a state administrative agency.” *Id.* at 644 n. 3.

This court finds the *Rooker–Feldman* doctrine likewise inapplicable to MEA's claims. MEA has not brought a direct challenge to the West Virginia Supreme Court's judgment. MEA is challenging the Commission's ruling regarding credit ownership, a determination by a state administrative agency, just as in *Verizon Maryland*. While the federal challenge may “deny” the West Virginia Supreme Court's legal conclusion that the Commission Order is consistent with PURPA, that denial does not make this action a challenge to a state court judgment. See *Exxon Mobil Corp.*, 544 U.S. at 293. The Commission's further argument that the state high court created the injury by making the Commission order the “law of the land in West Virginia” is unpersuasive. Comm'n's Mem. Supp. Mot. Dismiss 18. Such a rationale would apply to any state high court decision and considerably broaden a doctrine whose application the Supreme Court has expressly left rather narrow.

Having found that this case is not a direct challenge to a state court judgment, the court need not address MEA's two alternative arguments against the application of *Rooker–Feldman*: 1) that this action began with the FERC petition and therefore preceded the state court judgment and 2) that the doctrine is inapplicable because this court

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has exclusive jurisdiction over PURPA implementation challenges.

B. Statutory Jurisdiction Under PURPA

The defendants also assert that this case does not challenge the Commission's "implementation" of FERC rules for electric utilities, and consequently fails to qualify for PURPA's statutory grant of jurisdiction to federal district courts. See PURPA § 210(f, h), 16 U.S.C. § 824a-3(f, h).

Section 210 of PURPA provides the mechanism through which qualifying facilities can bring an action in federal district court. As discussed above, § 210(f) concerns the "[i]mplementation of rules for qualifying cogeneration and qualifying small power production facilities" and requires "each State regulatory authority"—in this case, the Commission—to "implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." *Id.* The implementation must occur "on or before the date one year after" FERC prescribed the rule. *Id.* If the regulatory authority fails to implement the FERC rules, § 210(h) provides that "[a]ny electric utility, qualifying cogenerator, or qualifying small power producer may petition [FERC] to enforce the requirements of subsection (f)." *Id.* § 824a3(h)(2)(B). If FERC declines to bring an enforcement action, § 210(h) then authorizes the electric utility, qualifying cogenerator, or qualifying small power producer to bring an action against the state regulatory authority in "the appropriate United States district court." *Id.*

*16 MEA's complaint expressly provides § 210(h) as the basis for this court's jurisdiction for claims against the Commission arising under PURPA. Compl. ¶ 5. The defendants, however, contend that this lawsuit does not relate to the Commission's "implementation" of FERC rules because the initial assignment of RECs is controlled by state law, not by PURPA. They consequently assert that this court lacks jurisdiction under § 210(h) to review the Commission Order.

The court believes its exercise of jurisdiction is proper in this instance. While *Wheelabrator* and *American Ref-Fuel* conclude that state regulatory agencies' assignment of RECs is a matter of state law, these opinions do not stand for the further position that the assignment of state credits can never result in a violation of PURPA. Consistent with those opinions, a state commission would violate PURPA by assigning credits in a way that directly modifies EEPAs, that is, by ruling that the EEPAs "inherently convey" the credits. *Am. Ref-Fuel*, 105 F.E.R.C. ¶ 61,005. That is what MEA alleges has happened in this case.

FERC, in somewhat qualified language, appears to agree with MEA, and though it declined to initiate an enforcement action, FERC expressly stated that MEA "may bring its own enforcement action ... in the appropriate United States district court." 139 F.E.R.C. ¶ 61,066 at ¶ 45. The defendants argue that the court is not obligated to follow a FERC order. See *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242, 1244 (D.D.C.2005) ("An order that does no more than announce [FERC's] interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA."). While that may be, close scrutiny of FERC's conclusions is inappropriate in the context of a jurisdictional inquiry, and the court, accordingly, takes FERC's conclusions at face value as support for jurisdiction. See *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir.1999) ("[A] jurisdictional inquiry is not the appropriate stage of litigation to resolve these various uncertain questions of law and fact. ... To permit extensive litigation of the merits of a case while determining jurisdiction thwarts the purpose of jurisdictional rules.").

Section 210 gives this court jurisdiction over challenges to PURPA implementation, and this is such a challenge. Whether it is also a fruitful challenge should not be determined within the

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threshold jurisdictional inquiry. The court concludes that jurisdiction is proper and leaves consideration of *American Ref-Fuel* for the discussion of MEA's specific claims.

The court rejects the defendants' argument that the assignment of Portfolio Act credits is not a matter of PURPA implementation because, it says, "implementation" occurred in 1981, when it implemented West Virginia's PURPA program. Comm'n's Mem. Supp. Mot. Dismiss 25. See also Mem. Supp. Utilities' Mot. J. Pleadings 13, 20. A 1983 FERC policy statement clarifies that implementation enforcement under § 210 extends to state regulatory authorities that "completed the implementation process, but have promulgated regulations which are inconsistent with or contrary to [FERC's] regulations." *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the PURPA* ("Policy Statement"), 23 F.E.R.C. ¶ 61,304, at ¶ 61,644 (1983). The policy statement continues: "Thus, for example, an allegation that a State regulatory authority had promulgated regulations which include a purchase rate standard contrary to [FERC] regulations would properly lie before [FERC] or before a judicial forum of proper jurisdiction." *Id.*; see also *Occidental Chem. Corp. v. La. Pub. Serv. Comm'n*, 494 F.Supp.2d 401, 409 (M.D.La.2007) ("Federal jurisdiction under § 210(h) exists whenever a state regulatory authority has adopted requirements that 'include a purchase rate standard contrary to existing [FERC] regulations.'" (quoting *Policy Statement*, 23 F.E.R.C. at ¶ 61,644)). Section 210 "implementation" actions are not limited to the review of a regulatory authority's initial implementation. If the Commission Order modified the EEPA purchase rates contrary to FERC regulations, as MEA alleges, then the Commission has failed to implement PURPA.

*17 The court likewise disagrees with the defendants' related contention that jurisdiction is improper because the complaint can "[a]t best" be construed as an "as applied" challenge. Comm'n's

Mem. Supp. Mot. Dismiss 24–25; see also Utilities' Mem. Supp. Mot. J. Pleadings 11. As one court explained,

An implementation claim ... involves a contention that the state agency has failed to implement a lawful implementation plan under § 210(f) of PURPA. An as-applied claim, in contrast, involves a contention that the agency's implementation plan is unlawful, as it applies to or affects an individual petitioner.

Mass. Inst. of Tech. v. Mass. Dep't of Pub. Util. ("MIT"), 941 F.Supp. 233, 237 (D.Mass.1996). "Because the jurisdictional grant in § 210(h) of PURPA extends only to cases in which a federal court is asked to require a state agency ... to implement, federal courts have refused to hear as-applied claims." *Id.* (citing *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F.Supp. 1345, 1374 (N.D.Ga.1986), *aff'd* 844 F.2d 1538, 1542 (11th Cir.1988) ("The district court held that it lacked subject matter jurisdiction over Greensboro's 'as applied' claim, and we find its reasoning persuasive.")).

In arguing that the pending action is an "as applied" challenge, the defendants rely on *Greensboro Lumber* and *MIT*. The court observes that the instant case differs from those "as applied" cases in that the complaint alleges an impermissible modification of preexisting EEPAs that would broadly affect all West Virginia QFs. In *Occidental Chemical Corp.*, the district court distinguished *Greensboro Lumber* and *MIT* on grounds that are equally apt in this case. See 494 F.Supp.2d at 410 ("Inasmuch as the *Greensboro Lumber Co.* court relied upon the allegation that the non-regulated utility violated PURPA as-applied to the plaintiff alone, the case is distinguishable. In the case *sub judice*, neither Carville nor Occidental allege that the [state regulatory] order violates PURPA as-applied to either plaintiff alone."); *id.* ("Like *Greensboro Lumber Co.*, *Mass. Inst. of Tech.* is distinguishable because neither Carville nor Occidental allege that either is the only QF

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subjected to the new methodology for calculating avoided cost. To the contrary, Occidental alleges that ‘the [state regulator’s] failure to implement PURPA is demonstrated by the broad scope of entities to whom the [state regulator’s] Order applies....’ ”).^{FN8} The Commission Order sets forth a rule that broadly applies to PURPA QFs and that is allegedly “inconsistent with or contrary to [FERC’s] regulations.” *Policy Statement*, 23 F.E.R.C. at ¶ 61644. The Commission Order does not relate to a “particular qualifying facility,” ^{FN9} *Greensboro Lumber*, 643 F.Supp. at 1374, and the court is satisfied that this action is not an “as applied” challenge.

FN8. The Commission argues that *Occidental Chemical* is itself distinguishable because in that case the state regulator expressly authorized modification of the QF’s avoided cost rates, whereas this case “indirectly reduces the QFs avoided cost rate previously implemented.” Comm’n Reply 19. But MEA claims precisely the contrary: that, inasmuch as the Commission relied on the avoided cost rates as grounds for its decision, it directly modified the rates. Moreover, even if such a distinction is tenable, it is of no consequence to the grounds on which *Occidental Chemical* distinguished *Greensboro Lumber* and *MIT*.

FN9. The Commission acknowledged the breadth of the Commission Order’s impact when, in arguing for the application of *Rooker–Feldman*, it stated that the Commission Order had become the “law of the land in West Virginia.” Comm’n’s Mem. Supp. Mot. Dismiss 18.

C. Abstention

The Utilities argue that this court should abstain from adjudicating MEA’s claims under the *Younger*, *Burford*, *Pullman*, *Princess Lida*, and *Colorado River* abstention doctrines because the

“exact claims” have already been adjudicated in state proceedings before the Commission and the West Virginia Supreme Court of Appeals. Utilities’ Mem. Supp. Mot. J. Pleadings 3, 24–25. The Utilities’ opening brief dedicates a mere three sentences of argument to these several complex doctrines. The reply brief simply gives a short discussion of *Burford* followed by a series of sentences, each one of which describes why a different abstention doctrine applies to this case. The court concludes that the abstention arguments have not been seriously raised by the Utilities. In any event, the court declines to abstain under the aforementioned doctrines. The case has been fully resolved in the West Virginia Supreme Court of Appeals and there is no ongoing, parallel state proceeding, so abstention is not warranted under *Younger*, *Colorado River*, or *Pullman*. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 n. 7 (1964) (*Pullman*); *United States v. South Carolina*, 720 F.3d 518, 527 (4th Cir.2013) (*Younger*); *Ackerman v. ExxonMobil Corp.*, — F.3d —, 2013 WL 4008699, at *3 (4th Cir.2013) (*Colorado River*). There are no unresolved questions of state law, so abstention is not warranted under *Burford*. See *Town of Nags Head v. Toloczko*, 728 F.3d 391, 2013 WL 4517074 at *3 (4th Cir.2013). Finally, MEA does not request that the court take control of property over which a state court has obtained jurisdiction. Rather than asking the court to control the RECs, MEA asks for an injunction against the Commission, damages, and declaratory relief. Therefore, abstention is not warranted under *Princess Lida*. See *Gannett Co., Inc. v. Clark Const. Group, Inc.*, 286 F.3d 737, 747 n.9 (4th Cir.2002).^{FN10}

FN10. The court also declines to abstain pursuant to the discussion in the order dismissing the companion case before it, *City of New Martinsville v. Public Service Comm’n of West Virginia*, 2:12–cv–1809.

D. Res Judicata and Collateral Estoppel

*18 The defendants assert that res judicata and

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collateral estoppel bar MEA's complaint because the issues have been fully litigated within the Commission's proceeding and the state court appeal.

The Full Faith and Credit Act, 28 U.S.C. § 1738 requires the federal court to "give the same preclusive effect to a statecourt judgment as another court of that State would give." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986). The application of preclusion principles is subject to a two-part inquiry:

First, a federal court must look to state law to determine the preclusive effect of the state court judgment. If state law would not bar relitigation of an issue or claim decided in the earlier proceeding, then the inquiry ends—a federal court will not give the state court judgment preclusive effect either. If state law would afford the judgment preclusive effect, however, then a federal court must engage in a second step—it must determine if Congress created an exception to § 1738. Only if "some exception to § 1738 applie [s]" can a federal court refuse to give a judgment the preclusive effect to which it is entitled under state law. An exception "will not be recognized unless a later statute contains an express or implied partial repeal" of § 1738.

In re Genesys Data Techs., Inc., 204 F.3d 124, 128 (4th Cir.2000) (citations omitted); see also *Jaffe v. Accredited Sur. and Cas. Co.*, 294 F.3d 584, 590 (4th Cir.2002).

Under the relevant state law, res judicata prevents relitigation when three elements are satisfied:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to

the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Blake v. Charleston Area Med. Ctr., Inc., 498 S.E.2d 41, 49 (W. Va.1997) (quoting *Hannah v. Beasley*, 53 S.E.2d 729, 732 (W.Va.1949)). The West Virginia Supreme Court of Appeals has further expounded on what constitutes the same cause of action in the res judicata context:

"[F]or purposes of res judicata, 'a cause of action' is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief.... The test to determine if the ... cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues.... If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata."

Id. at 48 (quoting *White v. SWCC*, 262 S.E.2d 752, 756 (W.Va.1980)). For res judicata to be applicable, a prior adjudication need not have formally and directly addressed a matter:

*19 "[A]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits."

Id. (quoting Syl. Pt. 1, *Conley v. Spillers*, 301 S.E.2d 216, 217 (W.Va.1983)).

For administrative agency decisions, the preclusion rule is derived from *Page v. Columbia Natural Resources, Inc.* and provides as follows:

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An assessment of three factors is ordinarily made in determining whether res judicata and collateral estoppel may be applied to a hearing body: (1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body.

480 S.E.2d 817, 831 (W.Va.) (quoting Syl. Pt. 3, *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 126 (W.Va.1987)).

One need not pause to consider whether the proceedings that culminated in the Commission Order met this test. According preclusive effect to the Commission Order would be inconsistent with the framework through which the court conducts its review, inasmuch as Section 210(h) gives the court jurisdiction to review regulatory authority decisions for compliance with PURPA implementation rules. Barring review due to the Commission's own proceedings would significantly impair the court's ability to carry out that congressionally granted function.

The court, however, concludes that the Supreme Court of Appeals' decision in *New Martinsville/MEA* bars relitigation of MEA's claims. First, *New Martinsville/MEA* was a final adjudication on the merits by a court having jurisdiction of the proceedings. *Blake*, 498 S.E.2d at 49. The high court affirmed the Commission's order as consistent with both PURPA and state law. *New Martinsville/MEA*, 729 S.E.2d at 196-97, 199 (“[W]e find no merit to the arguments asserted by the Generators and, therefore, the decision of the Commission finding that the credits at issue are owned by the Utilities is affirmed.”). As expressly recognized by FERC, the high court had jurisdiction to consider PURPA implementation claims:

[T]he Commission [(FERC)] believes that its jurisdiction to review and enforce the section

210(f) implementation requirement (i.e., the requirement that State regulatory authorities ... promulgate rules consistent with the requirements established by this Commission under section 210(a) of PURPA) is not exclusive. In fact, we would anticipate that generally proceedings would be initiated at the State level.

*20 *Policy Statement*, 23 F.E.R.C. ¶ 61,304, at ¶ 61,664.

MEA's position to the contrary—that this court has exclusive jurisdiction over PURPA enforcement claims—is based on the following statement from a federal court of appeals:

Congress created in § 210 a complete and independent scheme by which the purposes of PURPA are to be realized. That scheme involves the promulgation of regulations by the FERC, and their subsequent enforcement exclusively in federal district court, at the insistence of either a private party or the FERC itself.

Industrial Cogenerators v. FERC, 47 F.3d 1231, 1235-36 (D.C.Cir.1995). MEA overlooks that the appeals court made the statement in the context of the plaintiff's direct challenge to a FERC order. Under PURPA, a plaintiff may opt to pursue judicial enforcement of a state's PURPA implementation in one of two ways: directly, at the state level under § 210(g); or in federal district court after petitioning FERC under § 210(h). See *Rainbow Ranch Wind, LLC & Rainbow West Wind, LLC*, 139 F.E.R.C. ¶ 61,304 (“Section 210(g) and section 210(h) of PURPA provide for separate state and federal rights to challenge a state's implementation of PURPA. A state's implementation of PURPA and the Commission's rules implementing PURPA may be challenged either through the state courts under section 210(g) of PURPA, or separately at the Commission under section 210(h) of PURPA, or both.”). *Industrial Cogenerators'* discussion of exclusivity stands only for the proposition that a direct challenge to a FERC order must occur under § 210(h), at the

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federal district court. Here, MEA is challenging a state implementation enforcement action, not a FERC order.

The second element required for applying preclusion is satisfied since, in both this case and *New Martinsville/MEA*, MEA is challenging the Commission Order and the Commission and the Utilities are defending. See *Blake*, 498 S.E.2d at 49. While the individual Commissioners were not parties to *New Martinsville/MEA*, MEA does not assert that the Commissioners were not in privity with the Public Service Commission. Indeed, the Commissioners, sued here in their official capacity, are in privity with the Public Service Commission. While the West Virginia cases are relatively silent on the matter, there exists other persuasive authority on the issue. See, e.g., *Tait v. Western Maryland R. Co.*, 289 U.S. 620 (1933) (tax collector in privity with Commissioner of Internal Revenue); *Mears v. Town of Oxford, Md.*, 762 F.2d 368, 371 n. 3 (4th Cir.1985) (applying Maryland law).

Finally, the causes of action identified for resolution in this action are identical to the causes of action determined in *New Martinsville/MEA*, or such that they could have been resolved, had they been presented. See *id.* The West Virginia Supreme Court of Appeals addressed and rejected MEA's Count I argument that the Commission improperly modified the EEPAs: "the Commission has not modified the terms of the existing EEPAs but, instead, has only determined ownership of assets—the credits—which were not contemplated and, thus, not provided for in the EEPAs." *New Martinsville/MEA*, 729 S.E.2d at 196.

*21 The same discussion also addresses MEA's Count II preemption claim, which arises from the allegedly improper modification. Count II alleges "[s]pecifically" that the Commission was prohibited from "holding that the payment of avoided cost rates included compensation for RECs." Compl. ¶ 72. Notably, the high court addressed this issue. It recognized that modifying the EEPA is something

the Commission cannot do under § 210(e) of PURPA, citing *Freehold*, 44 F.3d at 1192; and it concluded that the Commission's actions were not preempted because the Commission did not modify the terms of the EEPA. *New Martinsville/MEA*, 729 S.E.2d at 196.

New Martinsville/MEA directly and thoroughly resolved MEA's Count III claim that the decision to certify the Morgantown facility constituted utility-type regulation, concluding that it did not. *Id.* at 196–97, 200. There the court noted that "MEA argues that the Commission's conclusion that it can 'deem' the Morgantown project certified to create credits recognized by West Virginia law contradicts MEA's federally-created exemption from 'utility-type' state law regulation." *Id.* at 199. Here, MEA makes the same claim in Count III: "The [Commission's] decision that it 'has the jurisdiction and authority to deem' MEA's facility certified as a qualified energy resource to generate WV-RECs exerts impermissible 'financial' and 'organizational' regulation of MEA." Compl. ¶ 79.

In Count IV, MEA asserts that "[t]he [Commission] Order violates PURPA's anti-discrimination provision by determining that the avoided cost rates paid to MEA ... include MEA's WV-RECs." Compl. ¶ 86. PURPA mandates that rates for the purchase of energy by a utility must not discriminate against QFs (as compared to facilities that are not qualified). 16 U.S.C. § 824a-3(b)(2). MEA claims that under West Virginia law, a non-QF will retain any RECs associated with the energy it generates. As a result, MEA argues, the Commission Order discriminates because QFs do not get to keep their RECs—instead they go to the utility with which the QF has a contract.

For the moment, the court sets aside whether MEA is correct about the state of the law in West Virginia and its discriminatory effect. The viability of MEA's cause of action is not at issue in an analysis of *res judicata*. All the court need determine is whether MEA asserts the same cause

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of action as in *New Martinsville/MEA*.^{FN11}

FN11. Nevertheless, the court does ultimately examine the merits of MEA's discrimination claim and concludes that MEA makes an incorrect statement of the law and that the Commission Order is not discriminatory. See *infra* Part III.E.4, pp. 61–63.

As to whether MEA asserts the same cause of action as in *New Martinsville/MEA*, the discrimination argument in Count IV appears directly in MEA's brief presented before the West Virginia Supreme Court of Appeals. Utilities' Mot. Dismiss, Exh. A 32. Therefore, even if the discrimination claim did not constitute the same cause of action as in the instant case—which it did because there is no additional evidence required to pursue it—it clearly could have been made in *New Martinsville/MEA*, inasmuch as the argument was, in fact, presented there. That is enough for res judicata.

*22 Count V merely requests injunctive relief, and is not a stand-alone claim. Finally, respecting Count VI, the West Virginia Supreme Court of Appeals directly considered and rejected MEA's argument that the Commission Order “results in the taking of private property without just compensation.” *New Martinsville/MEA*, 729 S.E.2d at 197 n. 13 (“[W]e find no merit to this argument because the Commission determined that the credits were owned by the Utilities in the first instance. The Commission's decision could not constitute an unconstitutional taking because no property owned by [MEA] was taken.”).

Despite the overlap between this case and *New Martinsville/MEA*, MEA insists that the two cases are entirely distinct claims: “The object of this case—enforcement of a PURPA implementation claim—is separate and distinct from the issue of REC ownership presented in the *New Martinsville* case.”^{FN12} Opp'n to Comm'n's Mot. Dismiss 23. As stated above, however, state law interprets a

“cause of action” for purposes of res judicata as “the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief.” See *Blake*, 498 S.E.2d at 48. In both *New Martinsville/MEA* and this case, MEA attempts to overturn the Commission Order, and it is the circumstances of the PURPA implementation claims and takings claim that give rise to the right of action in each case. Therefore, the causes of action are identical.

FN12. Even if this were the case, it appears that *New Martinsville/MEA*'s underlying conclusions would merit preclusive effect on collateral estoppel grounds. See *Bland v. State*, 737 S.E.2d 291, 297 (W.Va.2012) (“Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” (quoting Syl. Pt. 1, *State v. Miller*, 459 S.E.2d 114 (W.Va.1995))).

MEA suggests that even if the requirements for res judicata are satisfied, the court may nonetheless decline to enforce the doctrine. MEA is right that the court is not obligated to apply the doctrine: “[E]ven though the requirements of *res judicata* may be satisfied, we do ‘not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice.’” *Blake*, 498 S.E.2d at 50 (quoting *Gentry v. Farruggia*, 53 S.E.2d 741, 742 (W.Va.1949)). However, it is unclear how MEA believes the West Virginia Supreme Court of Appeals' decision in *New Martinsville/MEA* would “plainly defeat the ends of justice,” apart from the mere fact that MEA disagrees with its outcome.

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Moreover, as discussed below, this court substantially agrees with *New Martinsville/MEA*—although it need not agree to apply res judicata. See *Blake*, 498 S.E.2d at 49 (“An erroneous ruling of the court will not prevent the matter from being res judicata.” (quoting Syl. Pt. 1, *Conley*, 301 S.E.2d at 217)).

Accordingly, res judicata applies to each and every count brought by MEA in its complaint, and bars them all from relitigation in this court.

E. Sufficiency of the Claims^{FN13}

FN13. MEA asserts that “these issues are inappropriate for a motion to dismiss and are contrary to the agreement of the parties to present the issues to the Court in two steps.” Opp’n to Utilities’ Mot. J. Pleadings 17. The court’s January 10, 2013 bifurcation order, however, did not limit the motions to procedural issues, and the Utilities’ arguments are appropriate at this juncture. Moreover, the arguments overlap considerably with what the parties have elsewhere deemed “procedural” arguments, and, in any case, MEA has had an opportunity to respond.

Apart from the application of res judicata, the court agrees with the Utilities’ assertion that MEA’s PURPA claims in Counts I through V fail as a matter of law.^{FN14}

FN14. The parties do not address the merits of Count VI, the takings claim, which is only asserted against the Commission. That is, they do not address whether the Commission Order effected an unconstitutional taking. The Commission and MEA do argue over how sovereign immunity might bar relief under Count VI, but they both agree that even after applying sovereign immunity, prospective injunctive relief would still be available against the individual Commissioners.

Inasmuch as resolving the sovereign immunity arguments would not eliminate Count VI outright, and because the court dismisses Count VI on res judicata grounds, there is little utility to addressing the sovereign immunity claims, and the court declines to do so.

1. Count I: Violation of PURPA

Count I alleges the Commission Order violates PURPA and FERC’s regulations implementing PURPA by “granting ownership of WVRECs to Mon Power without requiring the payment of compensation to MEA beyond the avoided cost rate in the parties’ PURPA EEP[A].” Compl. ¶ 67.

*23 The Utilities seek dismissal on the ground that the Commission Order was purely a matter of state law and did not violate PURPA.^{FN15} They argue that the Commission Order assigns credits based exclusively on state law authority, consistent with *American Ref-Fuel*, and that MEA has no grounds for challenging that decision. The basis for the decision, the Commission states, was the assessment of the Portfolio Act’s policy goals and the determination that granting credits to the generators would be an “un-bargained for windfall” for the generator and would be “unfair to the utilities and rate-paying public.” Comm’n Reply 6.

FN15. The Commission raised these arguments in the jurisdictional context, but the court, for reasons discussed above, finds it more appropriate to consider the arguments with respect to the merits.

MEA relies on “FERC’s view” that the Commission Order violated PURPA by “impermissibly discriminat[ing]” against West Virginia QFs with PURPA-approved EEPAs. Opp’n to Comm’n 12. MEA quotes the FERC’s conclusion that “[t]he only reasonable reading” of the [Commission] Order is that the West Virginia Commission’s finding ... is based on the West Virginia Commission’s belief that the PURPA avoided cost rates are overly generous and therefore

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must include RECs.” 140 F.E.R.C. ¶ 61,223 at ¶ 21. MEA further points to statements that the Commission Order was “inconsistent with PURPA,” 139 F.E.R.C. ¶ 61,066 at ¶ 47, and was “inconsistent with [FERC’s] ruling in *American Ref-Fuel* that avoided cost rates ‘in short, are not intended to compensate the QF for more than capacity and energy,’ ” 140 F.E.R.C. ¶ 61,223 at ¶ 21.

The court agrees with the Supreme Court of Appeals’ reasoning in *New Martinsville/MEA*. There, the high court found that the Commission, in accordance with the legislative intent of the Portfolio Act and its statutory charge to balance the interests of the utilities, the public, and the state’s economy in making its assessment, “concluded that the public interest favored awarding ownership of the credits to the Utilities.” *New Martinsville/MEA*, 729 S.E.2d at 198. Thus, the Commission’s determination is consistent with FERC’s guidance in *American Ref-Fuel* that a state regulator should “find its authority [for assigning RECs] in state law, not PURPA.” 105 F.E.R.C. ¶ 61,007, at ¶ 24. Other courts have noted and approved similar public policy grounds for assigning RECs. See *Ownership of RECs*, 913 A.2d 825, 830 (N.J.Super.Ct.App.Div.2007) (“[A]s the [state regulator] concluded, assignment of the Renewable Energy Certificates to appellants necessarily would have meant that retail consumers would have had to pay more for electricity. This result would be unfair to retail consumers, who have already paid for appellants’ electricity, and is entirely inconsistent with the governing state legislation.”); *ARIPPA v. Pa Pub. Util. Comm’n*, 966 A.2d 1204, 1214 (Pa.Comm’n.Ct.2009) (accepting the state regulator’s “conclu[sion] that the public interest favored awarding ownership rights in the credits to the distribution company” where there was “no controlling statutory language in the applicable version of [the state portfolio standards act], no controlling precedent, and no guiding language in the contracts themselves”).

*24 The Commission Order does not conclude, as proscribed by *American Ref-Fuel*, that the avoided cost rate inherently compensates for more than capacity and energy. As the Supreme Court of Appeals observed, the Commission “only interpreted the EEPAs to evaluate the Utilities’ obligations under them and their ownership of the electricity at the time it is generated.” *New Martinsville*, 729 S.E.2d at 196. It did not “interfere[] with the Generators’ federally-granted right to be exempt from certain utility-type state regulation.” *Id.* at 196–97.

In implementing the Portfolio Act, the Commission necessarily had to consider the circumstances surrounding the PURPA EEPAs—agreements that are directly relevant to the Portfolio Act’s policy goals of providing renewable energy at reasonable prices. *Id.* 198–99 (“The purpose of the Portfolio Act is to encourage the creation and use of energy from alternative sources of energy. West Virginia Code § 24–2F–2(7) (Repl.Vol.2008 & Supp.2011) states: ‘It is in the public interest for the state to encourage the construction of alternative and renewable energy resources facilities that increase the capacity to provide for current and anticipated electric energy demand at a reasonable price.’ ”). The Commission’s finding that PURPA EEPAs are generous and require no additional consideration is merely an assessment of policy concerns. It does not signify a belief that the EEPAs “inherently” convey RECs. See 105 F.E.R.C. ¶ 61,005, at ¶ 2. The Commission Order is not based on PURPA and does not modify the EEPA’s avoided cost rates.

FERC’s April and September orders do not require the court to reach a different outcome. As the defendants emphasize, FERC’s conclusions are not binding upon this court, though the court does consider FERC’s studied and informed pronouncements respectfully. FERC’s opinion that the Commission Order in one respect is inconsistent with PURPA does not diminish the determination of the Commission and the West Virginia Supreme

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Court that the Commission's conclusion, that the RECs at issue belong to the Utilities, is based on state law. Having determined that Count I does not assert a cognizable violation of PURPA, the court concludes that MEA is not entitled to declaratory relief.

2. Count II: Federal Preemption

Count II asserts that the Commission Order is preempted by federal law in that it is contrary to and inconsistent with the Commission's PURPA § 210(f) implementation requirement.

As stated by the Second Circuit in *Wheelabrator*, “The FERC decision in *American Ref-Fuel* does not evince an intent to occupy the relevant field—namely, the regulation of renewable energy credits. Rather, it explicitly acknowledges that state law governs the conveyance of RECs.” 531 F.3d at 190. This court has concluded that West Virginia state law—particularly the W.Va. Portfolio Act—appropriately governed the Commission's conveyance of RECs. The Commission Order is consistent with PURPA, and MEA has failed to state grounds for its preemption claim.

3. Count III: Exemption of QFs from State Regulation

*25 In Count III, MEA seeks a declaration that the Commission Order violates PURPA's exemption of QFs from state laws relating to utility-type regulation. MEA asserts that the Commission's “decision that it ‘has the jurisdiction and authority to deem’ MEA's facility certified ... to generate WV-RECs exerts impermissible ‘financial’ and ‘organizational’ regulation of MEA.” Compl. ¶ 79. The Utilities contend that this count fails because certifying the MEA facility would not amount to the “management” of MEA.

The court does not agree that the Commission's certification of the Morgantown facility constitutes utility-type regulation. *New Martinsville/MEA* is again persuasive. That court aptly found that since the Utilities owned the credits “in the first instance,” unilateral certification by the

Commission was the “only mechanism by which the [Utilities] can receive certification that the energy they are purchasing satisfies the requirements of the Portfolio Act.” *New Martinsville/MEA*, 729 S.E.2d at 200.

Given this state-law justification, the court agrees with the state supreme court's further conclusion that the decision was “simply an extension of [the Commission's] jurisdiction over public utilities and the authority conferred upon it by the Portfolio Act.” *New Martinsville/MEA*, 729 S.E.2d at 200. It “provid[ed] a mechanism for the owner of the energy, the Utilities, to receive certification that the energy they are purchasing qualifies for the purpose of satisfying the requirements of the Portfolio Act.” *Id.*; see also Comm'n Order 42 (recognizing the need “to allow the [Utilities] to seek certification of the credits we have determined they own” given the “unusual difficulty”). Rather than regulating the organizational or financial aspects of the Morgantown facility, its certification merely recognizes the Utilities' compliance with the Portfolio Act. Count III fails to state a claim of utility-type regulation.

4. Count IV: PURPA's Anti-Discrimination Provision

As noted, Count IV asserts that the Commission Order violates PURPA § 210(b) and 18 C.F.R. § 292.304(a)(1) by creating a rate for the purchase of energy that discriminates against QFs. PURPA regulation 18 C.F.R. § 292.304(a) provides that “[r]ates for purchases shall: (i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) Not discriminate against qualifying cogeneration and small power production facilities.” MEA contends that the Commission Order is discriminatory against QFs because it concludes that the PURPA EEPAs convey the credits whereas, under state law, non-QF generators are able to sell their electricity while retaining the credits associated with the energy they generate. *Id.* ¶ 86.

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MEA's characterization of state law as discriminatory appears to arise from a statement in the Commission Order that “[t]he unbundling provision in Rule 5.6 of the Commission *Portfolio Standard Rules* cannot reasonab[ly] be applied retroactively; it was intended to apply prospectively to agreements for the purchase of electricity entered [into] after January 4, 2011, the effective date of the Rules.” *Comm’n Order* 53. According to MEA, this statement means that a non-utility generator that is not a QF under PURPA with a post January 4, 2011 contract gets to keep its RECs, because under the rules it can unbundle the RECs from the power it sells to a utility and sell those RECs separately. Pl.’s Resp. Utilities’ Mot. J. Pleadings 23. While that may be true, MEA fails to show how such a rule is discriminatory against QFs. If the Commission Order were to discriminate against MEA, it must do so with respect to a similarly situated non-QF, that is, a facility not qualified under PURPA that had a long-term contract to sell power that it entered into before the effective date of the rules. The Commission Order says nothing about a non-utility non-QF that had a long-term contract to sell power that it entered into before January 4, 2011, nor does the Commission order address REC ownership for QFs that have *not* entered into a contract before January 4, 2011. Indeed, parties fitting those descriptions were not before the Commission. The Commission Order merely states that its unbundling rules were not meant to apply to preexisting contracts, a ruling that depends not upon QF status, but upon whether a non-utility generator entered into an energy sale contract before the effective date of the rules.

*26 In addition, the Utilities make a different argument for dismissing Count IV. They argue that the anti-discrimination provision prohibits discrimination in the setting of cost rates, not in the determination of REC ownership. REC ownership, they argue, is not controlled by PURPA and is a matter of state law according to *American Ref-Fuel*. They contend that because the Commission Order determined REC ownership and

did not set cost rates, it cannot violate the anti-discrimination provision. The court agrees. Having already concluded that the Commission Order assigned credits as a matter of state law and not as a modification of EEPA avoided cost rates required under PURPA, there is no change in any EEPA rate that could be deemed discriminatory. Count IV fails to state a claim.

5. Count V: Injunctive Relief

Count V merely asserts that “[b]ecause the [Commission] Order violates PURPA, MEA is entitled to an Order enjoining the Commission from enforcing the [Commission] Order.” Compl. ¶ 89. Since the court finds the Commission Order to be consistent with PURPA, injunctive relief is unwarranted.

IV.

It is, accordingly, ORDERED as follows:

1. The motion to dismiss, filed by the Commission and the Commissioners on December 7, 2012, be, and it hereby is, granted;
2. The Utilities' motion for judgment on the pleadings, filed January 25, 2013, be, and it hereby is, granted; and
3. This action be, and it hereby is, dismissed and stricken from the docket.

The Clerk is directed to transmit copies of this order to all counsel of record and any unrepresented parties.

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