

140 FERC ¶ 61,223  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Morgantown Energy Associates

Docket Nos. EL12-36-001  
QF89-25-009

City of New Martinsville, West Virginia

EL12-48-001  
QF85-541-003

ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued September 20, 2012)

1. In this order, the Commission denies Monongahela Power Company (Monongahela Power) and Potomac Edison Company's (jointly, Utilities) request for reconsideration of the order issued on April 24, 2012<sup>1</sup> declining to initiate an enforcement action pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>2</sup>

**I. Background**

2. On April 24, 2012, the Commission issued an order responding to petitions for enforcement under section 210(h) of PURPA filed by Morgantown Energy Associates (Morgantown Energy) and the City of New Martinsville, West Virginia (New Martinsville). In the April 24 Order, the Commission gave notice that it declined to initiate an enforcement action pursuant to section 210(h) of PURPA. In response to Morgantown Energy's and New Martinsville's petitions, the Commission also declared that certain statements contained in a November 22, 2011 decision by the Public Service Commission of West Virginia (West Virginia Commission)<sup>3</sup>—which held that an electric

---

<sup>1</sup> *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012) (April 24 Order).

<sup>2</sup> 16 U.S.C. § 824a-3(h) (2006).

<sup>3</sup> *Monongahela Power Company*, Case No. 11-0249-E-P, (Pub. Serv. Comm'n of W. Va. Nov. 22, 2011) (West Virginia Order).

utility that purchases electric energy and capacity under an electric energy purchase agreement<sup>4</sup> with a qualifying facility (QF) formed in accordance with PURPA, rather than the owner of the QF, owns the renewable energy credits (RECs) associated with that purchase—are inconsistent with the requirements of PURPA and our regulations implementing PURPA.<sup>5</sup>

3. On May 6, 2012, Utilities filed a pleading styled as a motion for clarification or, in the alternative, request for rehearing of the April 24 Order.<sup>6</sup> Utilities claim that the April 24 Order failed to identify which particular statements in the West Virginia Order are inconsistent with PURPA, and that the Commission erred by determining that the West Virginia Order contained findings stating that the avoided cost rate contracts between QFs and electric utilities compensate the QF for not only the electric energy and capacity associated with a QF, but also the RECs produced by a QF.

**A. West Virginia Order**

4. Utilities are electric utilities that provide retail electric service to customers in West Virginia and purchase energy and capacity from QFs owned by Morgantown Energy and New Martinsville. Utilities, Morgantown Energy, and New Martinsville are parties to PPAs that govern the sale of energy and capacity by Morgantown Energy and New Martinsville to Utilities; however, the PPAs are silent with respect to RECs.

5. In the underlying state proceeding, Utilities filed a joint petition for declaratory order and interim relief with the West Virginia Commission seeking a declaration that the Utilities are entitled to own, in the first instance, the RECs produced by three QFs. On November 22, 2011, the West Virginia Commission issued the order at issue here, addressing two questions raised by Utilities. First, the West Virginia Commission asked whether the electric utilities own the RECs produced by the QFs operating under PURPA avoided cost rate contracts between the QFs and their respective electric utility counterparties when these contracts are silent on RECs.<sup>7</sup> Second, the West Virginia Commission, assuming that the electric utilities own the RECs, asked whether it has the

---

<sup>4</sup> In this order, the Commission refers to such agreements by the term they are more usually known as—power purchase agreements (PPAs).

<sup>5</sup> See 16 U.S.C. § 824a-3 (2006); 18 C.F.R. Part 292 (2012).

<sup>6</sup> In this order, the Commission refers to Utilities' Filing as a request for reconsideration.

<sup>7</sup> West Virginia Order at 10.

authority to deem the QFs to be qualified energy resources under West Virginia state law, thus allowing the QFs to produce RECs.<sup>8</sup>

6. Addressing the first question, the West Virginia Commission held that “the [RECs] attributable to energy purchases by Monongahela Power Company from certain PURPA Qualifying Facilities are owned by Monongahela Power Company and The Potomac Edison Company . . . during the terms of the Electric Energy Purchase Agreements [(PPAs)].”<sup>9</sup> In response to the second question, the West Virginia Commission held that “[a]ssuming that the [West Virginia] Commission will receive sufficient information concerning the [Morgantown Energy] generation attributes, the [West Virginia] Commission has jurisdiction and authority over the Morgantown project to deem the facility certified to generate credits under [West Virginia Rules].”<sup>10</sup> The West Virginia Commission stated that if the Utilities filed information detailing the attributes of Morgantown Energy’s QF—rather than Morgantown Energy voluntarily filing the information itself—it would issue a ruling on whether the QF “meets the requirements for certification under the Rules.”<sup>11</sup>

#### **B. April 24 Order**

7. The Commission exercised its discretion and issued a Notice of Intent Not to Act, declining to go to court to enforce PURPA on behalf of Morgantown Energy and New Martinsville.<sup>12</sup> The Commission, however, declared that certain statements in the West Virginia Order are inconsistent with the requirements of PURPA and the Commission’s regulations implementing PURPA. The Commission noted its precedent in *American Ref-Fuel*,<sup>13</sup> where the Commission stated that “contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 42.

<sup>11</sup> *Id.* The West Virginia Order states that the Utilities “request that the [West Virginia] Commission compel the QFs to seek certification to generate [RECs] or, in the alternative, to deem the [QFs] certified to generate [RECs] under the [West Virginia Rules].” West Virginia Order at 40.

<sup>12</sup> April 24 Order, 139 FERC ¶ 61,066 at P 45.

<sup>13</sup> *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003) (*American Ref-Fuel*).

sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.”<sup>14</sup>

8. The Commission explained that PURPA, and the Commission’s regulations implementing PURPA, require electric utilities to purchase energy and capacity made available by QFs. The Commission further explained “that rates for these purchases must be just and reasonable to the electric customer of the electric utility and in the public interest, and not discriminate against QFs.”<sup>15</sup> The Commission then noted that the electric utility is not required to pay a rate that exceeds the avoided costs of generating the energy itself or of purchasing from another source, and that avoided cost rates, “in short, are not intended to compensate the QF for more than capacity and energy.”<sup>16</sup>

9. The Commission concluded that “[t]o 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.”<sup>17</sup> The Commission explained, in this regard, that the West Virginia Order points to the avoided cost rate contracts between the electric utility and the QF as justification for the West Virginia Commission’s holding that RECs produced by QFs are owned by the purchasing electric utility in the first instance. For example, the Commission noted that “the West Virginia Order states that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs.”<sup>18</sup>

### **C. Request for Reconsideration**

10. In their pleading, Utilities assert that the April 24 Order fails to identify any specific statements in the West Virginia Order that are inconsistent with PURPA. Utilities state that the April 24 Order “simply explained hypothetically that if the [West Virginia Commission] had found that [Monongahela] Power owns the RECs because the payments it makes under the [PPAs] compensate [Morgantown Energy] and New Martinsville for those RECs, then such a finding would have been deemed to be

---

<sup>14</sup> *Id.* P 3; *accord id.* P 18.

<sup>15</sup> April 24 Order, 139 FERC ¶ 61,066 at P 47 (citing *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 20; 18 C.F.R. § 292.304(a)(1) (2012)).

<sup>16</sup> *Id.* (citing *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 20); *see also* 18 C.F.R. §§ 292.304(a)(2), 292.101(b)(6) (2012).

<sup>17</sup> April 24 Order, 139 FERC ¶ 61,066 at P 47 (footnote omitted).

<sup>18</sup> *Id.* P 47 n.68 (citing West Virginia Order at 28-31).

inconsistent with PURPA.”<sup>19</sup> Utilities further assert that the April 24 Order rests its conclusion on the unfounded assumption that the West Virginia Order found that the rates paid by the Utilities to the QFs compensate the QFs for capacity, energy, and RECs.<sup>20</sup>

11. Utilities argue that footnote 68 in the April 24 Order does not support the Commission’s finding because the portions of the West Virginia Order cited in footnote 68, specifically pages 28-31, do not contain a finding by the West Virginia Commission that PPAs compensate QFs for RECs.<sup>21</sup> Utilities acknowledge that the West Virginia Order discussed the rates paid by the Utilities and that these rates only “happen” to be PURPA avoided cost rates.<sup>22</sup> Utilities argue that the West Virginia Commission’s findings “regarding ownership of the RECs would not have been different even if the rate at which [Monongahela Power] purchases capacity and energy from [Morgantown Energy] and New Martinsville had been established in a different manner (such as a market-based rate or a purely negotiated rate).”<sup>23</sup> Utilities argue that the West Virginia Commission simply had noted its belief that the terms of a PPA under PURPA are favorable to QFs.<sup>24</sup>

12. Utilities acknowledge that pages 28-31 of the West Virginia Order reach a number of conclusions; however, they claim that none finds that PURPA PPAs compensate QFs for RECs. Utilities state that page 28 concludes that, although the West Virginia Rules governing RECs permit the unbundling, or separating of RECs from the generation of energy, the West Virginia Order finds that unbundling cannot reasonably be applied in the context of PURPA PPAs entered into prior to the effective date of the West Virginia Rules.<sup>25</sup> Likewise for pages 29-31, Utilities state that the West Virginia Commission analyzed state law and concluded that state law, not PURPA, determines ownership of RECs, and that the West Virginia Order provides three bases under state law for this conclusion.<sup>26</sup> Additionally, Utilities note that the West Virginia Order rejects

---

<sup>19</sup> Request for Reconsideration at 3.

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 5-6.

Morgantown Energy's assertion that assigning ownership of RECs to an electric utility absent additional compensation for the corresponding QF effectively lowers the avoided cost rate established in the applicable PPA for capacity and energy.<sup>27</sup> Utilities state that this finding by the West Virginia Commission demonstrates that the West Virginia Order did not lower the avoided cost rate established by a PURPA PPA, but rather determines the assignment of ownership under state law.<sup>28</sup>

13. Utilities also state that the Commission improperly assumed that the West Virginia Order found that QF PPAs compensate QFs for energy, capacity, *and* RECs.<sup>29</sup> Utilities assert that the West Virginia Order does not support the Commission's assumption, and, to the contrary, the West Virginia Commission correctly found that the QF PPAs relevant to this proceeding predate the West Virginia state law creating RECs; thus the QF PPAs do not address REC ownership.<sup>30</sup> Utilities argue that the West Virginia Order explained that the electric utility owns RECs produced by QFs in the first instance because the electric utility owns the electricity purchased from QFs as it is generated.<sup>31</sup> Lastly, Utilities contend that the West Virginia Order was correctly founded in West Virginia state law, consistent with *American Ref-Fuel* and PURPA.<sup>32</sup> Utilities conclude that the Commission's finding that certain statements in the West Virginia Order are inconsistent with PURPA is arbitrary and capricious.<sup>33</sup>

14. Morgantown Energy and New Martinsville each filed an answer stating its support for the April 24 Order and further stating that the Utilities' pleading offers nothing to cause the Commission to grant Utilities' requests. On June 14, 2012, Morgantown Energy and New Martinsville filed a request to lodge a West Virginia Supreme Court of Appeals opinion, filed June 11, 2012, affirming the West Virginia Order.<sup>34</sup>

---

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.* at 6-7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> Morgantown Energy and New Martinsville June 14, 2012 Request to Lodge. *See also City of New Martinsville v. Public Service Commission of W. Va.*, No. 11-1738, *Morgantown Energy Associates v. Public Service Commission of W. Va.*, No. 11-1739, 2012 W. Va. LEXIS 308 (W. Va. June 11, 2012).

## II. Discussion

### A. Procedural Matters

15. Because this proceeding arises under section 210(h) of PURPA, formal rehearing does not lie, either on a mandatory or a discretionary basis.<sup>35</sup> We will, however, treat Utilities' Filing as a request for reconsideration, and we will deny reconsideration as discussed below.

16. The Commission's Rules of Practice and Procedure, although silent with respect to requests for reconsideration and answers to requests for reconsideration, do not normally permit answers to requests for rehearing.<sup>36</sup> We have previously indicated that the concerns that militate against answers to requests for rehearing similarly should apply to answers to requests for reconsideration.<sup>37</sup> Accordingly, we will reject Morgantown Energy's and New Martinsville's answers.

### B. Commission Determination

17. We deny Utilities' request for reconsideration. Nothing raised in the request warrants a change to our April 24 Order. Utilities argue that the Commission's finding that certain statements in the West Virginia Order are inconsistent with PURPA and the Commission's regulations implementing PURPA, specifically the statements in the West Virginia Order indicating that avoided cost rates under PURPA compensate for energy, capacity, *and* RECs is without merit.

18. The April 24 Order specifically noted, in this regard, the West Virginia Order's discussion, at pages 28-31, providing the reasons given by the West Virginia Commission why PURPA avoided cost rate contracts cause electric utilities to own RECs in the first instance. The April 24 Order also provided an example, noting that the West Virginia Order stated "that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs."<sup>38</sup>

---

<sup>35</sup> See *Southern California Edison Co.*, 71 FERC ¶ 61,090, at 61,305 (1995); *New York State Electric & Gas Corp.*, 72 FERC ¶ 61,067, at 61,340 (1995).

<sup>36</sup> 18 C.F.R. § 385.713(d) (2012).

<sup>37</sup> See *JD Wind 1, LLC*, 130 FERC ¶ 61,127, at P 13 (2010); *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Connecticut Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995).

<sup>38</sup> April 24 Order, 139 FERC ¶ 61,066 at P 47, n.68. The Commission cited to page 28 of the West Virginia Order, which states: "By the very nature of the PURPA

19. Utilities respond that pages 28-31 of the West Virginia Order do not contain the finding that the Commission discussed in the April 24 Order, i.e., do not contain a finding that the avoided cost rate received by QFs under PURPA justifies a finding that RECs produced by QFs belong to the purchasing utility in the first instance. Utilities argue that the West Virginia Commission found instead that the avoided cost rate is a matter of happenstance or coincidence, and that the West Virginia Order expresses a mere belief by the West Virginia Commission that avoided cost rate contracts favor QFs. Utilities' argument is unpersuasive because the West Virginia Order, in fact, makes a number of express statements concerning the favorable nature of PURPA avoided cost rate contracts and how those favorable PURPA avoided cost rates support its finding that electric utilities should own RECs produced by QFs in the first instance.<sup>39</sup> In the portion of the

---

[PPAs], 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.” West Virginia Order at 28.

<sup>39</sup> Pages 28-31 are not the only relevant pages, we note. Thus, on page 11, the West Virginia Order states: “We have reviewed the relationship between purchased power costs, renewable portfolio compliance costs and retail rates as *critical considerations* involving the jurisdiction of the [West Virginia] Commission over this issue.” West Virginia Order at 11 (emphasis added).

Similarly the West Virginia Order found the “rationale” used in other states – New Jersey, Connecticut, and Pennsylvania – “persuasive,” noting that the New Jersey and Connecticut decisions “found it significant” that the utility purchases were on terms “highly favorable to the generators, including terms that provided (i) front-loaded rates to support project financing and (ii) avoided-cost rates at higher than market rates.” *Id.* at p. 24. The West Virginia Order went on to note that the other states “found that it was unfair for the utility customer to pay additional costs to purchase the credits . . . when they had already paid for the electricity at higher market rates to promote PURPA policies and the development of QFs,” particularly highlighting Pennsylvania’s decision that it was “unfair” for utilities and their customers “to pay *additional* costs for compliance.” *Id.* (emphasis added); *accord id.* at 25 (describing New Jersey’s decision that found that the credits should not be assigned to generators because retail customers had “already paid for [the generators’] electricity”). The West Virginia order found the rulings in other states in the PJM region to be “persuasive authority” in interpreting the West Virginia’s statutes and policies. *Id.* at 26.

And the West Virginia Order’s “Conclusion of Law” expressly finds that “[b]y the very nature of the PURPA [PPAs], no additional consideration is contemplated or needed other than the substantial consideration that the [QFs] received.” *Id.* at 54.

(continued...)

West Virginia Order in and around pages 28-31, the West Virginia Commission explains why it finds West Virginia Rule 5.6,<sup>40</sup> the rule permitting the bundling and unbundling of RECs, only partially applies to PURPA PPAs formed prior to the effective date of the West Virginia Rules. The West Virginia Order explains that only the bundled provision, not the unbundled provision, of West Virginia Rule 5.6 applies to PURPA PPAs formed prior to the effective date because to apply both would be an unreasonable retroactive application of that rule.<sup>41</sup> The West Virginia Order further explains in this regard:

The optional unbundling provision set forth in [West Virginia] Rule 5.6 also does not apply to the PURPA [PPAs] because these contracts that are based on the avoided cost rate do not include the unbundled aspect of the rule. . . . 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 [PPAs].<sup>[42]</sup>

The West Virginia Order concludes emphatically that “[b]y the very nature of the PURPA [PPAs], 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.”<sup>43</sup>

20. In another example of what the West Virginia Commission anticipates occurring if unbundling would be permitted, the West Virginia Commission argues that the RECs produced by the QFs are valued at approximately \$50 million, leading it to conclude, expressly, that:

[I]t would be fundamentally unfair for the West Virginia ratepayers to pay an additional \$50 million to comply with the mandates and policies of both PURPA and the [West Virginia] Portfolio Act, when [Monongahela Power]

---

These additional references, noted above, further demonstrate that the avoided cost rate paid by the purchasing utility was indeed a justification for the West Virginia Order’s finding that the RECs belong to the purchasing utility.

<sup>40</sup> W. VA. CODE R. § 150-34-5.6 (2012).

<sup>41</sup> West Virginia Order at 28.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* To a like effect, the West Virginia Order later notes, as contrary to West Virginia policy embodied in the state statute creating RECs, a utility’s obligation both to purchase electricity from QFs “at rates that are guaranteed . . . [and] to separately purchase the credits from the [QF] generator.” *Id.* at 29.

was required to purchase the electricity from the QF facilities and when the QFs have received favorable treatment under the [PPAs] because of PURPA and our decisions implementing PURPA . . . .<sup>[44]</sup>

21. We understand the West Virginia Order to mean that the unbundling provision of West Virginia Rule 5.6 does not apply to QFs with PURPA PPAs entered into prior to the effective date of the rules because of the favorable and substantial consideration that QFs receive; the West Virginia Commission found, in essence, that the unbundling provisions of West Virginia law do not apply to QFs under these circumstances because QFs already receive substantial consideration (i.e., the PURPA avoided cost rate) for energy, capacity, and RECs. While the West Virginia Order may also identify other bases for its decision to find that RECs produced by QFs belong to the purchasing utility,<sup>45</sup> we cannot ignore those portions of the West Virginia 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 West Virginia Order is that the West Virginia Commission's finding that 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. In *American Ref-Fuel*, the Commission stated, “[w]hile a state may decide that a sale of power at wholesale automatically transfers the ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.”<sup>46</sup> We note, in this regard, that the West Virginia Commission did not find the sale of power at wholesale automatically transfers

---

<sup>44</sup> *Id.* at 31-32; *accord id.* at 31 (emphasizing that, under PURPA, utilities “were required to purchase electricity from the QFs at prices that exceeded the incremental cost of power supply in the earlier years of the contracts”); *id.* at 32 (emphasizing Monongahela Power’s obligation to purchase at rates that exceeded the incremental cost of power).

<sup>45</sup> In addition to the West Virginia Commission’s argument that it is unreasonable to retroactively apply the rules to PURPA PPAs entered into prior to the rule’s effective date, the West Virginia Commission also states 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 PPAs because PURPA PPAs perform the same function as RECs—ensuring that electric utilities make certain purchases of energy and capacity. *See* West Virginia Order at 29-30.

<sup>46</sup> *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 3; *accord id.* P 18.

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."<sup>47</sup>

22. Utilities hypothesize that the West Virginia Order's findings would stay the same even if the rates paid by a purchasing electric utility to a QF were something other (presumably lower) than avoided cost rates, for example, market-based rates or a negotiated rate. The West Virginia Commission did not, however, discuss what would happen if the rates paid to the QFs were other than PURPA avoided cost rates. Because the West Virginia Order did not discuss a rate other than an avoided cost rate, we find that Utilities' speculation does not support a finding that the West Virginia Order is fully and entirely consistent with PURPA.

23. Utilities also assert that the West Virginia Order correctly found that the PURPA PPAs between Utilities and Morgantown Energy and New Martinsville do not expressly address RECs. In the April 24 Order, however, the Commission did not find otherwise.<sup>48</sup> The only relevance of this fact is that, under Commission precedent, a state commission may not base a finding that, under PURPA, such a contract automatically and necessarily transfers RECs to a purchasing utility.

24. Utilities assert that the West Virginia Order correctly found that the electric utility that is a party to a PURPA PPA owns the RECs produced by QFs in the first instance because the electric utility owns the electricity generated by QFs as it is generated. As discussed in the April 24 Order, the Commission has recognized that PURPA does not address the ownership of RECs and that states have the authority to determine ownership of RECs in the initial instance, as well as how they are transferred from one entity to another.<sup>49</sup> As we stated in the April 24 Order, while a state may decide that a sale of

---

<sup>47</sup> April 24 Order, 139 FERC ¶ 61,066 at P 47 (citing *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 22); *see also* 18 C.F.R. §§ 292.304(a)(2), 292.101(b)(6) (2012).

<sup>48</sup> April 24 Order, 139 FERC ¶ 61,046 at PP 2-3. We note that a QF is not obligated to sell its electric energy to the directly interconnected electric utility and the QF may instead choose which particular electric utility to sell its electric energy to. *Public Service Company of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC ¶ 61,224, at 61,998-99, *reh'g denied*, 85 FERC ¶ 61,044, at 61,133 (1998).

<sup>49</sup> April 24 Order, 139 FERC ¶ 61,066 at P 44, (citing *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 23).

power at wholesale automatically transfers the ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.”<sup>50</sup> 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 PPAs compensate the QFs for RECs in addition to energy and capacity.

25. Lastly, Utilities argue that the findings in the West Virginia Order were based on state law, and therefore are consistent with *American Ref-Fuel* and PURPA. As explained above, the West Virginia Order relies in significant part on the PURPA PPA as a reason that electric utilities that purchase energy and capacity from QFs also own the associated RECs in the first instance. The West Virginia Order states as much: “A further basis for our decision is that the purchase of generation under the PURPA [PPA] results in the utility owning the generation and the [RECs] associated with the generation.”<sup>51</sup> Thus, we cannot agree that the West Virginia Order relied exclusively on West Virginia law.

26. We conclude that nothing raised by Utilities on reconsideration convinces us to change our finding that certain statements in the West Virginia Order are inconsistent with PURPA.

The Commission orders:

Utilities’ request for reconsideration is hereby denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>50</sup> *Id.*, (citing *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 3; *accord id.* P 18).

<sup>51</sup> West Virginia Order at 30.