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June 26, 2015

11:57 AM JUN 26 2015 PSC EXEC SEC DIV

Ms. Ingrid Ferrell
Executive Secretary
Public Service Commission
of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

RE: CASE NO. 87-0669-E-C (REOPENED)
AMERICAN BITUMINOUS POWER PARTNERS, L.P.
and MONONGAHELA POWER COMPANY

Dear Ms. Ferrell:

Enclosed herein please find the original and twelve (12) copies of the Response of Joint Petitioners In Opposition To Staff Motion To Dismiss For Lack of Jurisdiction. Gary A. Jack, counsel for Monongahela Power Company, authorized me to affix his signature to the document.

As evidenced by the Certificate of Service attached thereto, a copy of the Response has been served upon all counsel of record.

Sincerely,

John R. McGhee, Jr.
WV State Bar No. 5205

/bg
Enclosures
cc: counsel of record

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 87-0669-E-C (REOPENED)

AMERICAN BITUMINOUS POWER PARTNERS, L.P.
and MONONGAHELA POWER COMPANY
Joint Petition to re-open and request for approval of an amendment to the Electric Energy Purchase Agreement of Monongahela Power Company and American Bituminous Power Partners, L.P., and associated ratemaking treatment

RESPONSE OF JOINT PETITIONERS IN OPPOSITION TO STAFF MOTION TO DISMISS FOR LACK OF JURISDICTION

Now come American Bituminous Power Partners, L.P. ("AmBit")[1] and Monongahela Power Company ("Mon Power", and collectively "Joint Petitioners")[2], in response in opposition to the Motion to Dismiss For Lack of Jurisdiction ("Motion to Dismiss") filed by Staff of the Commission ("Staff").

This is not the first time that the Commission has been faced with the issue of whether it has jurisdiction to consider modifications of the terms of contracts entered into by public utilities and qualifying facilities ("QF's") pursuant to the provisions of the Public Utilities Regulatory Policy Act of 1978, 16, U.S.C. Section 2601 *et seq.* ("PURPA"). Nor is this the first time that the Commission has been asked to address

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[1] AmBit is the owner and operator of the Grant Town waste coal electric generation project located in Grant Town, West Virginia.

[2] Mon Power is the purchaser of energy and capacity from the Grant Town project. Both AMBIT and Mon Power are parties to the Electric Energy Purchase Agreement ("EEPA") approved by the Commission by Order entered November 10, 1988 in Case No. 87-669-E-C.

the issue of its jurisdiction to consider modifications to the Electric Energy Purchase Agreement ("EEPA") between AmBit and Mon Power originally approved on November 10, 1988, in Case No. 87-669-E-C. Finally, this is not the first time that the Staff has argued that the Commission lacks jurisdiction to consider modifications to a PURPA contract based on similar arguments to those presented in its June 16, 2015 Motion to Dismiss. A review of the prior decisions of this Commission and the cases relied upon by the Staff in its Motion to Dismiss, reveals that the Commission has been consistent in its handling of cases where parties to a PURPA contract have mutually agreed to modify the terms of the agreement, and none of the cases relied upon by Staff to argue that the Commission lacks jurisdiction involved instances where the parties to the PURPA contract have mutually agreed to modify the terms of the agreement.

Based upon direct precedent involving the Joint Petitioners, and previously considered jurisdictional arguments presented by Staff, the Commission has jurisdiction to determine whether it is in the public interest to permit the Grant Town project to continue in operation and to permit Mon Power to pass through to its customers the modest change in rates resulting from the modifications.

Prior Commission Decisions on the review of modifications to a PURPA contract.

AmBit cases.

What is clear from a review of the Commission's prior Orders is that the Commission has concluded that, where one party to a PURPA contract has sought Commission approval for a modification of the contract, based on the holding in the Freehold case, the Commission lacks jurisdiction to require a modification of the

contract. However, where the parties to the contract have presented the Commission with an amendment to the contract that is mutually agreed to, the Commission has uniformly exercised jurisdiction and accepted such modifications.

The initial effort to modify the terms of AmBit's EEPA occurred in 1989. By Order entered October 31, 1989, the Commission granted a petition filed by the project developers and approved amendments to the EEPA dealing with certain financing issues and provisions relating to dispatch of the project. Included in the amendments to the EEPA was a $20 million increase in senior debt to cover the increased cost of construction. In its Order approving the 1989 amendments to the EEPA, the Commission stated that mutually agreed upon modifications are to be filed with the Commission.

The Commission decision Staff primarily relies on to argue that the Commission lacks jurisdiction in this case is the Order entered in this docket in 1996. In an Order entered March 29, 1996 ("1996 AmBit Order") the Commission ruled on an emergency petition filed by AmBit. AmBit had requested that the Commission raise the contract rate for avoided energy from its then current level. MPC opposed the changes to the EEPA and argued that the Commission lacked jurisdiction to modify the contract due to federal preemption. In considering the issues of a modification to the EEPA, the Commission discussed the decision of the Court of Appeals for the Third Circuit in Freehold Cogeneration v. Bd. of Regulatory Commissioners of N.J., 44 F.3d. 1178 (3rd. Cir. 1995) in some length as follows:

> State utility commissions have traditionally been without power to regulate wholesale power contracts. The Federal Energy Regulatory Commission traditionally exercised exclusive jurisdiction in the realm of wholesale power contracts. See Federal Power Act 16 U.S.C. §791a et seq. PURPA created a narrow exception to the general rule and allowed state commissions to implement PURPA by initially setting avoided cost rates for qualifying PURPA projects. However **once state commissions approve power purchase agreements under PURPA, they are generally without jurisdiction to modify the terms of the agreement**. See Freehold Cogeneration v. Bd. of Regulatory Commissioners of N.J., 44 F.3d. 1178 (3rd. Cir. 1995). In Freehold, the New Jersey Commission was "attempting to alter the terms of the PPA (power purchase agreement) after having fully approved it in a final and non-appealable order." 44 F.3d. at 1190 n.10. The factual situation at bar is identical. The Developers are seeking the Commission to modify the contract by raising the current avoided energy rate by a modification of the tracking account found in the PPA which we approved almost eight years ago in a final nonappealable order. See Case No. 87-669-E-C Order of November 13, 1987. The Freehold Court found that PURPA "gives State regulatory authorities power to implement the requirements of 210(a) and the relevant regulations." 44 F.3d. at 1191-92. (Emphasis in original). The Court found that the New Jersey Commission's efforts at implementing the PURPA regulations "ended with the BRC's (Commission's) July 8, 1992 approval of the PPA."

Thus, the Commission clearly found that where one party to the EEPA sought a revision to the terms of the contract, the Commission is without jurisdiction to modify the contract on the basis of the Freehold decision.

The next time the Commission was asked to modify the terms of the EEPA, the Commission explained why it was not limited by the 1996 AmBit Order and the Freehold decision in exercising jurisdiction to modify the EEPA. In an Order entered August 7, 2000 ("2000 AmBit Order") following a petition filed by MPC to approve the terms of a Settlement Agreement and Release between the company and AmBit arising out of arbitration, the Commission stated:

> The Commission has reviewed the petition and finds that, unlike the Commission Order of March 29, 1996, in the same case, **the Commission is not being asked to modify the terms of an agreement or contract when the parties disagree but to merely approve the parties' mutual agreement and release. Therefore, the Commission finds no jurisdictional matter at issue** and that the Petition filed by Mon Power, on March 3, 2000 seeking approval of the Settlement Agreement and Release should be approved. (Emphasis added)

Thus, the Commission specifically stated that where the changes to the terms of the EEPA are not unilateral, but are mutually agreed to between the parties, the Commission found no jurisdictional impediment.

The next time the Commission was asked to modify the terms of the EEPA between MPC and AmBit was in 2006. On January 11, 2006, MPC and AmBit filed a joint petition to reopen the case and approve amendments to the EEPA between the parties and for approval of associated rate making treatment. That petition, like the one currently pending before the Commission, stated that AmBit's financial condition was dire and sought expedited treatment. In an Order entered April 13, 2006 ("2006 AmBit Order") approving the Joint Petition, the Commission stated that **"[t]he proposed amendments to the EEPA have been mutually agreed to by all parties and are reasonable."** (Emphasis added) No hearing was held and no argument was presented to suggest that there was any limitation on the scope of the Commission's authority to accept a mutually agreed revision to the terms of the EEPA.

The Orders cited above are the only Orders addressing revisions to the AmBit EEPA. There is nothing in those Orders that suggests that the Commission is without jurisdiction to review and approve revisions to the EEPA mutually agreed to by the

parties. In fact, the opposite is true. As early as 1989, the Commission made clear that the parties to the EEPA could mutually agree to revisions to the agreement. In the 2000 AmBit Order, the Commission clearly distinguished the situation where there is mutual agreement between the parties from the Freehold decision and a case where only one party to the EEPA is seeking a change in terms. And, in 2006, in a case virtually identical to the current matter, the Commission reviewed the petition and granted the requested relief. In these cases, the action taken by the Commission has not been the implementation of rate making authority on the QF that is prohibited by PURPA, but rather the necessary review of the impact of the modifications upon the retail rates of Mon Power's customers as will be discussed below.

Other Commission cases.

In a case involving another PURPA contract, the Commission considered a complaint by Morgantown Energy Associates ("MEA") wherein MEA alleged that MPC was acting unreasonably in failing to agree to permit MEA to explore refinancing of its debt. See, Morgantown Energy Associates v. Monongahela Power Company, dba Allegheny Power, Case No. 09-0985-E-C. In its consideration of the Complaint, the Commission instructed the parties to address the relevance, if any, of the Commission's March 29, 1996 AmBit Order. After initially finding no jurisdictional limitation, the Staff changed its position and argued that, although the MEA case was not like the AmBit case, the Commission was prohibited by federal law from requiring MPC to consent to

extending the terms of the bonds in that such a ruling would amount to the equivalent of financial or organizational regulation of the utility.[3]

In its June 10, 2010 Order in the MEA case, the Commission disagreed with the Staff's analysis and, notwithstanding the fact that the matters complained of revolved around the PURPA contact, the Commission found jurisdiction in state law to resolve the issues before it and held:

> The PURPA statute and rule exempt a qualifying cogeneration facility, such as the MEA project, from utility-type regulation by a state commission relating to rates or financial or organizational matters. In this matter, we are considering whether the actions of a public utility, Allegheny Power, are reasonable, and state statutes clearly grant us with authority to review the actions of Allegheny Power. We conclude then, that 16 U.S.C.A. §824a-3(e)(1) and 18 C.F.R. §292.602 do not prevent us from considering the relief that MEA has requested. (June 10, 2010 Order at 8.)

In explaining the factors entering into its decision, the Commission observed that, if MEA could not receive the relief it sought in its Complaint:

> . . . it becomes more likely that the Project will face actual or technical default and ultimate failure. From Allegheny Power [sic] perspective, we appreciate that this particular contract provides less than two percent of the utility's projected peak load. But that is a narrow view that implies that it is not problematic to allow this relatively small electric generation facility to fail. This Project also provides steam to WVU and provides benefits to the community. It is part of the diversification of the Allegheny Power supply portfolio and it is in the best interest of the public for utilities to have a diversified portfolio. We also note that the MEA Project was intended to delay the timing for Allegheny Power to build a new base load generation facility, and Allegheny Power has not built any new base load generation since it entered into the sales contract for electricity generated by MEA. (*Id.* at 9-10)

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[3] See, Transcript of hearing held April 1, 2010 in Case No.09-0985-E-C at pages 29-30 where Staff Counsel explained the Staff's change in position in response to questions from the bench was based upon the ruling in Freehold.

Finally, in finding that it was in the public interest to require MPC to permit MEA to seek to refinance its debt, the Commission stated:

> In most situations, it is reasonable to require parties to a contract to abide by the terms of their bargain. Under certain circumstances, however, it can be prudent for a utility to consider modifying the original bargain. One example is when insisting on full compliance with the original terms would jeopardize the receipt of electricity supplies that may be priced below-market in the future. It can be prudent for a utility to permit a supplier to seek to refinance its debt, so that the supplier may continue to provide electricity to the utility. (*Id.* at 10)

Contrary to the Staff's suggestion otherwise at pages 9 and 10 of the Staff's Motion to Dismiss, the Commission did not find any connection between the 1996 AMBIT Order and the Commission's jurisdiction in the MEA complaint case.

The latest Order in which the Commission has addressed its authority to review PURPA contracts after they have been approved came in the case of Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power, Case No. 11-0249-E-P, Order entered November 22, 2011. There, the Commission ruled that the Commission's decision on the ownership of Alternative and Renewable Energy Credits ("RECs") associated with PURPA projects was not preempted by PURPA. Unlike the situation in Freehold Cogeneration Assocs., v. Bd. of Regulatory Commissioners of N.J., 44 F.3d 1178 (3rd Cir. 1995) where the New Jersey Board of Regulatory Commissioners was found to be preempted by Federal Law when it required the parties to a PURPA contract to renegotiate the terms of the agreement, this Commission rejected the jurisdictional argument claimed by the PURPA projects and held that it was not modifying the terms of the EEPA to consider RECs, but was, as in

the 2010 MEA case, applying state law principles. In its November 22, 2011 Order, the Commission stated in pertinent part:

> In deciding the issue based on state law, this Commission will consider not only the Portfolio Act, but also the other provisions of Chapter 24 of the West Virginia Code that require the Commission to investigate the rates, methods and practices of public utilities, to prescribe rates, and to determine fair and reasonable rates. W.Va. Code §§24-1-1(a), 24-2-2(a) and 24-2-3. In exercising its ratemaking authority, the Commission must determine that costs of the utility are reasonably and prudently incurred. In the exercise of its delegated duties and powers, in all deliberations, the Commission must consider and balance the interests of the current and future ratepayers, the utilities, and the state's economy pursuant to W.Va. Code §24-1-1(b). Case No. 11-0249-E-P, Order entered November 22, 2011 at 14.

The Commission's decision was upheld by both the West Virginia Supreme Court of Appeals[4] and the United States District Court for the Southern District of West Virginia.[5]

The Freehold case does not preclude the Commission's jurisdiction in this case.

Staff has misinterpreted both the applicability of the holding of the United States Court of Appeals for the 3rd Circuit in Freehold Cogeneration v. Bd. of Regulatory Commissioners of N.J., 44 F.3d. 1178 (3rd. Cir. 1995), and the exemption provisions of PURPA applicable to QF's.

The Freehold court dealt with a challenge by a QF to actions of the state of New Jersey's Board of Regulatory Commissioners ("BRC") to force the parties to a PURPA contract to revise the terms of the Power Purchase Agreement ("PPA"). Freehold

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[4] City of New Martinsville v. Public Service Commission of West Virginia, 729 S.E.2d 188 (2012).

[5] City of New Martinsville v. Public Service Commission of West Virginia, unreported decision, 2012 WL 6694078.

Cogeneration Associates, L.P. ("Freehold") was the QF and Jersey Central Power and Light Company ("JCP&L") was the utility that were parties to the PPA that the BRC had approved in 1992.

In 1993, the BRC directed state utilities to notify it of any power supply contracts which were no longer economically beneficial. JCP&L informed the BRC that the Freehold PPA was no longer economically beneficial. The BRC unsuccessfully attempted to formulate a joint agreement between the parties modifying the PPA. Then, in early 1994, the BRC entered an order directing the parties to renegotiate the purchase rate term of the PPA or, in the alternative, to negotiate the buyout of the PPA.[6] Freehold filed a declaratory judgment action seeking a ruling that PURPA pre-empts the BRC order.

In reaching its decision on the preemptive reach of PURPA, the Court correctly found that the rate exemption provisions of PURPA were enacted to protect the QF. The Court stated:

> In enacting PURPA, Congress sought to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities and to reduce the financial burden of state and federal regulation on nontraditional facilities. *FERC v. Mississippi,* 456 U.S. 742, 750–51, 102 S.Ct. 2126, 2132–33, 72 L.Ed.2d 532 (1982). To overcome the first impediment to developing nontraditional sources of power, section 210(a) of PURPA, 16 U.S.C. § 824a–3(a), requires the FERC to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring traditional utilities to purchase electricity from QFs. *FERC v. Mississippi,* 456 U.S. at 751, 102 S.Ct. at 2133. State regulatory authorities will then implement these rules. 16 U.S.C. § 824a–3(f).

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[6] See, Freehold at 44 F.3d. 1178, 1183.

> To surmount the second obstacle, section 210(e) of PURPA requires the FERC to implement regulations exempting QFs from federal regulation to which traditional electric utilities are subject, including most provisions of the Federal Power Act and "[s]tate laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." *Id.* at § 824a–3(e)(1). In accordance with these provisions of PURPA, the FERC promulgated regulations governing transactions between utilities and QFs, including a specific requirement that a utility must purchase electricity made available by QFs at a rate up to the utility's full avoided cost. 18 C.F.R. §§ 292.303–304 (1993).
>
> Acting pursuant to section 210(e)(1) of PURPA, the FERC also promulgated regulations exempting QFs from various federal and state regulatory requirements. The regulations state in pertinent part:
>
> (1) Any [QF] shall be exempted ... from State law or regulation respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities. 18 C.F.R. § 292.602(c). (Emphasis added)

Thus, the prohibition on state regulation of rates under PURPA is related to protecting QF's from traditional utility-type rate making. Unlike the situation here, where both parties are in agreement on the rate terms of the modification of the EEPA and are requesting that the Commission grant the pass through of the impact of such changes on the retail customers of Mon Power, the Freehold case involved the New Jersey commission imposing its utility-type regulation on the QF.

Subsequent to the Freehold decision the Fifth Circuit Court of Appeals held that state commissions were not preempted from considering modifications to a PURPA

contract which had twice before been amended.[7] In the case of Agrilectric Power Partners, Ltd. v. Entergy Gulf States, Inc., 207 F.3d 301 (5th Circ. 2000), the Fifth Circuit held that that the state utility commission was not precluded from reviewing the terms of a PURPA contract. The scope of review approved by the Court recognized the authority of the state to determine the pass through to the utility's customers of the amount paid to the QF for purchased power. That is the same role the Joint Petitioners are asking the Commission to play in this instance. The Joint Petitioners mutually agreed to the revisions to the EEPA, just as they did in 2006. Furthermore, one of the provisions of the Amendment Agreement between the Joint Petitioners is that the Commission will permit Mon Power to fully recover the cost of its purchases from AmBit. This is a role that is consistent with the Commission's regulatory duty under state law as articulated by the Commission in its June 10, 2010 Order in Morgantown Energy Associates v. Monongahela Power Company dba Allegheny Power, Case No. 09-0985-E-C, and the November 22, 2011 Order in Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power, Case No. 11-0249-E-P, and is consistent with the intent of the parties to the EEPA approved by the Commission in 1988.[8]

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[7] The electricity sales contract that was subject to the Court's consideration was originally entered into in 1984 between Agrilectric and Entergy and was amended in 1987 and 1992. The 1992 contract established a 3.54 cents/Kwh flat-rate for the entire remaining ten-year contract term, but subjected this rate to a "regulatory-out" price adjustment clause that was the focus of the Court's attention. (207 F.3d 301, 302)

[8] See Sections 1.2 (f) and 5.3 (h) of the EEPA wherein the Commission's approval of the pass through of the rate terms of the EEPA was a condition precedent to Mon Power's agreement.

In the case of *In re Vicon Recovery Systems*, 572 A.2d 1355, 113 P.U.R.4th 303 (1990), the Vermont Supreme Court rejected a claim that the Vermont Public Service Board was preempted from exercising review authority over a PURPA contract mutually agreed to by the QF and the utility as follows:

> The regulations make clear that utilities and qualifying facilities can *agree* to a rate different than would otherwise be mandated:
>
> *Negotiated rates or terms.* Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or term or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or
>
> (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase. 18 C.F.R. §292.301(b).
>
> * * *
>
> There is no question of Congress's power to preempt the states completely with respect to the regulation of transactions between utilities and small power producers. See *FERC v. Mississippi,* 456 U.S. at 759, 102 S.Ct. at 2137. The issue is whether PURPA represents "so pervasive" an exercise of Congressional power that a state is precluded from reviewing voluntary rate structures. We hold that it does not.
>
> Our conclusion is based primarily upon the plain language of PURPA and FERC's interpretation of its own regulations. Although one of the primary legislative objectives underlying PURPA is to foster a favorable environment for small power producers, Congress did not mandate the creation of a zone in which utility activities would be completely unfettered by regulatory oversight. PURPA itself recognizes the existence of countervailing considerations: § 210(b)(1) of the Act directs that FERC's regulations, with respect to required purchases by public utilities, "shall be just and reasonable to the electric consumers of the electric utility and in the public interest...." Public Utilities Regulatory Policies Act of 1978, § 210(b)(1), 16 U.S.C. § 824a–3(b)(1) (1988). In the context of required relationships between public utilities and small power producers, FERC's regulatory rate scheme presumably accomplishes this goal. Where voluntary power purchase contracts are involved, however, that rate

scheme is inapplicable, and we believe that state regulatory oversight must therefore be contemplated. (572 A.2d 1355, 1358)[9]

The Freehold Court did not hold, nor did the Congress establish, that the parties to a PURPA contract could not themselves modify the agreement.

DISCUSSION

What is clear from the Staff's Motion to Dismiss is the fact that Staff is determined to prevent the Commission from making a fact based determination on the merits of the Joint Petition. In advancing its jurisdictional argument, the Staff has disregarded the ample examples of prior Commission rulings on its authority to review modifications to PURPA contracts. The Commission's exercise of jurisdiction in 2006 was perfectly fine with the Staff at that time and should be fine here as well.[10]

The Staff is simply incorrect to suggest that the 2006 AmBit Order is the only "problematic ruling" from its perspective. In fact, all of the rulings of the Commission cited herein are problematic to the position of the Staff.

1. In 1989, the Commission ruled that the parties could mutually agree to a modification of the terms of the EEPA.

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[9] Consistent with the language in the federal rules, West Virginia's *Rules for the Government of Electric Utilities* ("*Electric Rules*") are virtually identical to 18 C.F.R. §292.301(b). See, *Electric Rule* 12.2.b.

[10] See, Initial and Final Joint Staff Memorandum dated February 13, 2006 where the Staff recommended approval of an increase in the Capacity Cost Rate, an extension of the term of the EEPA and modifications to the tracking account. Staff reiterated its recommendation in a Further Final Joint Staff Memorandum on April 13, 2006.

2. In the 1996 AmBit Order, the Commission ruled that where one party to the EEPA seeks to modify the terms of the contract, the Commission is without jurisdiction.
3. In the 2006 AmBit Order, the Commission approved a modification to the EEPA mutually agreed to by the parties and virtually identical to the situation here at hand.
4. In the 2010 MEA case, the Commission found that it had jurisdiction under state law to protect the interests of the public and rejected the jurisdictional arguments of Staff.
5. In the 2011 decision on renewable energy credits, the Commission determined that it had jurisdiction under state law to consider and balance the interests of ratepayers, utilities and the state's economy pursuant to W.Va. Code §24-1-1(b).

Staff's attempt to differentiate the 2006 AmBit Order from this case is unavailing. The changes approved by the Commission in 2006 resulted in the pass through of the rate terms of a modified EEPA, just as the current petition is seeking.

The Staff is equally incorrect on the significance of the fact that the Joint Petitioners have mutually agreed to a modification of the EEPA. The effect of this mutual agreement is the same as in the prior cases where the Commission has exercised authority under state law as recognized in the 2010 MEA case and the 2011 RECs case. It is precisely because the parties have reached agreement that the Commission has jurisdiction to carry out its responsibility under state law as to whether

the amounts to be paid by Mon Power under the Amended Agreement can and should be passed through to the ratepayers. The Staff recognized the distinction between a unilateral petition and a joint petition based upon a mutually agreed amendment in 2006 and it should recognize it today. This is utility regulation of the electric utility party to the EEPA, not utility regulation of the QF party to the EEPA protected under PURPA.

Finally, it should be noted that on page 4 of its Motion to Dismiss, the Staff incorrectly states that as of October 2017, "costs are expected to increase by approximately $4.6 million per year over the current costs" and notes in footnote 1 that "the increase to ratepayers over the current rate is significantly higher than $4.6 million per year." This is not accurate. In October 2017, rates will NOT increase over the current rate. Rather, the lower capacity rate of $27/MWh previously agreed to will not be implemented. The difference between the lower capacity rate, which would have been effective October 2017, and the current capacity rate of $34.25/MWh, is $4.6 million. The current capacity rate of $34.25/MWh will remain the same unless overall market prices increase dramatically by October 2017 to the point that the 85% of market provision is triggered. Based upon current forward market price forecast, the current capacity rate of $34.25/MWh could remain in place until 2033 or beyond.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Commission has jurisdiction under state law to consider the Joint Petition and the Staff Motion to Dismiss should be denied.

Respectfully submitted this 26th day of June, 2015.

AMERICAN BITUMINOUS POWER PARTNERS, L.P.

MONONGAHELA POWER COMPANY

By Counsel

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CERTIFICATE OF SERVICE

I, John R. McGhee, Jr., co-counsel for American Bituminous Power Partners, L.P., do hereby certify that a copy of the foregoing Response of Joint Petitioners has been served upon the following counsel of record on this 26th day of June, 2015, in the manner so indicated:

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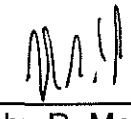

John R. McGhee, Jr