Public Service Commission
of West Virginia

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June 16, 2015

10:01 AM JUN 16 2015 PSC EXEC SEC DIV

Ingrid Ferrell, Executive Secretary
Public Service Commission
PO Box 812
Charleston, WV 25323

Re: CASE NO. 87-0669-E-C
AMERICAN BITUMINOUS POWER PARTNERS, L.P.
v.
MONONGAHELA POWER COMPANY

Dear Ms. Ferrell:

Enclosed for filing are the original and twelve (12) copies of the "Staff's Motion to Dismiss For Lack of Jurisdiction" in the above-referenced proceeding.

A copy has been served upon all parties of record.

Sincerely,

John Auville
Staff Attorney
West Virginia State Bar I.D. No. 8057

JRA/sg
Enclosures

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 87-0669-E-C
AMERICAN BITUMINOUS POWER PARTNERS, L.P.
v.
MONONGAHELA POWER COMPANY

STAFF'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Commission's most complete discussion of the relevant law governing this transaction occurred in an Order dated November 22, 2011, in Case No. 11-0249-E-P, Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power. Starting at the bottom of page 11 of that Order, and continuing until page 13, the Commission stated the following:

Under PURPA, QFs are exempt from certain state laws and regulations respecting the rates and financial and organizational aspects of utilities. The exemption provisions for QFs are found in 16 U.S.C. § 824a-3 (e), which provides in relevant part:

> [T]he [Federal Energy Regulatory] Commission shall... prescribe rules under which ... qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or in part from the Federal Power Act [16 USC §§ 791a et seq], from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production. [Emphasis added].

Federal regulations issued by the Federal Energy Regulatory Commission (FERC) pursuant to 18 C.S.R. §§ 292.601 and 292.602 implement the exemption provisions under 16 U.S.C. § 824a-3(e). The relevant federal regulation governing state law exemptions is found at 18 C.S.R. § 292.602, and provides:

> (c) *Exemption from certain State laws and regulations.* (1) Any qualifying facility shall be exempted (excepted as provided in paragraph (b) (2) of this section from State laws or regulations respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities.

As a general rule, pursuant to the Federal Power Act (FPA), FPA, § 210, FERC has exclusive jurisdiction over the sale of electric energy at wholesale. One exception to FERC's exclusive jurisdiction over wholesale power contracts is the reserve of limited authority granted to states to review and approve proposed PURPA contracts and to set and approve the avoided cost rates for purchases of wholesale electricity under PURPA.

In American Bituminous Power Partners, L.P. v. Monongahela Power Company, Case No. 87-669-E-C, a case involving the Grant Town EEPA, the Commission discussed the limited scope of Commission jurisdiction over PURPA facilities and contracts:

> 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 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. Board of Regulatory Commissioners of NJ, 44 F.3d. 1178 (3rd. Cir 1995).

Order dated March 29, 1996, at 5.

Staff believes regardless of previous Commission decisions that may appear contrary, it is clear that once the Commission sets the avoided cost rate for a PURPA project, the Commission no longer retains the jurisdiction to engage in rate regulation or financial and organizational regulation or any other "utility type regulation" of PURPA projects. The Joint petitioners are asking the Commission to do just that, engage in rate regulation by changing the avoided capacity rate. The Commission's decision in the 1996 AmBit Order citing the Freehold decision is clear: the Commission is preempted from that action. The fact the parties to the Electric Energy Purchase Agreement (EEPA) in this matter have mutually agreed to change the avoided cost rate does not allow the Commission to overcome this preemption. Staff therefore recommends the Commission deny this petition to reopen for lack of jurisdiction.

The Petition

On June 5, 2015, American Bituminous Power Partners, L.P. (AmBit) and Monongahela Power Company (Mon Power, together Petitioners), filed a joint petition to reopen the above referenced proceeding for approval of and amendment to the EEPA and associated ratemaking treatment.

AmBit states it is in financial difficulty, and without a change in the contract price paid by Mon Power, AmBit will have to cease operations. Mon Power pays an avoided energy cost rate plus an agreed upon capacity cost rate for up to 80 MW of energy.

Under the current contract, the capacity cost rate in 3.425 cents per kilowatt-hour ($34.25/MWh). That rate is scheduled to decrease to $27.00/MWh in October of 2017 when AmBit pays off its bonds, and remain at that level through the end of the contract in 2036. The amended agreement at issue here calls for Mon Power to purchase 80 MW at a rate of 85% of all aggregated net revenues for energy, capacity, ancillary services and any other PJM revenues for the project as reported by PJM and paid by or through PJM to Mon Power. The rate paid by Mon Power will never be less than the energy cost rate plus $34.25/MWh and no more than the energy cost rate plus $40.00/MWh. The petitioners state the ratepayers of Mon Power are not expected to see an increase in cost due to this change of the rate before October of 2017. At that time, costs are expected to increase by approximately $4.6 million per year over the current costs.[1] Mon Power's participation in this amended agreement is predicated upon those increased costs being passed on to the ratepayers through the ENEC.

The Joint Petitioners continue the amended EEPA eliminates obligations under the tracking account. Under the current EEPA, excess payments made by Mon Power to AmBit are tracked. AmBit must amortize the balance of that account over time by reducing the energy cost rate to $19.00/MWh until fully amortized, beginning in January of 2020. The amended EEPA eliminates the tracking account, resulting in a reduction of $8,870,000 in accrued expenses to AmBit in 2020, increasing cash flow.[2] The

[1] Staff notes this increase just represents the increase or the current rate of $34.25/MWh. The rate is currently supposed to drop to $27.00/MWh in 2017, so the increase to ratepayers over the current rate is significantly higher than $4.6 million per year.

2 This $8.87 million dollars is owed to the ratepayers, but under the amended EEPA, AmBit does not have to repay this amount to Mon Power and PE's ratepayers. This is another concession to AmBit.

elimination of the tracking account will result in increased costs to ratepayers starting in 2020.

Further, under the current EEPA, Ambit is required to keep a maintenance reserve fund. Due to its financial circumstances, AmBit has been unable to fund this reserve. The amended EEPA caps this fund at $8,000,000,[3] and once it is fully funded, AmBit will not be required to continue to increase the level of reserve. The Joint Petitioners continue that under the current EEPA, Mon Power pays AmBit the energy cost rate based upon the "APS Proxy Units" for any energy in excess of 80 MW. That additional output generally ranges from 1 to 4 MW. Under the amended EEPA, the rate paid would be calculated at 95% of the real-time locational margin price (LMP) as reported by PJM and paid by or through PJM to Mon Power. Lastly, the amended EEPA increases the number of hours Mon Power may reduce the amount of energy it must accept from the project to 100 hours from 80 hours.

Commission Cases

This amended EEPA is the latest in a long line of attempts to make this project work by amending aspects of the EEPA. The first time AmBit was back before this Commission due to financial difficulties was in 1989, just a year after the Commission first approved the EEPA and before construction of the project had been completed. By Order dated October 31, 1989, the Commission, among other things, authorized an increase in senior debt of $20 million to pay for increased costs due to unforeseen delays in project construction. In the fourth ordering paragraph the Commission stated:

3 At the end of the contract, any money left in this account is paid to the owners.

> It is further ordered that modifications to the contract and related documents will not require an approving order by this Commission provided that such modifications are mutually agreed upon by the contracting parties, are filed with the Commission, and the Commission's Staff issues an opinion that they do not increase the overall total purchased power costs under the contract and do not constitute a significant modification of the terms and conditions of the EEPA and related documents.[4]

The next time AmBit came to the Commission for modification of the EEPA because of financial difficulties was in 1995. Much like now, AmBit told the Commission it was experiencing financial difficulties due to much higher than forecasted operating expenses and lower than forecasted avoided energy costs for Mon Power. AmBit requested an increase of the avoided energy cost from 1.455cents to 1.9 cents per KWh. After protracted litigation, the Commission issued an Order on March 29, 1996 that denied AmBit's unilateral attempt to change the rates under the EEPA as preempted by federal law. The Commission cited the ruling by the Federal Court's 3rd Circuit in the Freehold case. In Conclusion of Law 2, the Commission stated:

> The proposed unilateral waiver of federal jurisdictional preemption by one party to the contract over the objections of another party to the contract is without legal basis and not proper.

During the litigation of that particular request, the issue of waiver of the federal preemption was discussed. In an Order dated November 29, 1995, the Commission requested the parties discuss the issue of waiver of jurisdictional preemption. On page three of that Order, the Commission states " [W]e struggle with the concept that a party

[4] This decision of the Commission was issued several years prior to the issuance of the Freehold decision. However, even then, the Commission treated a request to change the avoided cost rate differently than other changes to the EEPA.

can create jurisdiction in a state regulatory body when Congress has apparently determined that federal interests require a federal forum." The Commission noted the US Supreme Court's decision in International Longshoremen's Association v. Davis, 476 U.S. 380 (1986). In a footnote on that same page, the Commission questions how a waiver over "utility type regulation" would work for a project such as AmBit. Would AmBit become another electric utility in West Virginia, subject to rate regulation and everything that goes along with it?[5]

In the March 29, 1996 Order, the Commission made it clear that unlike AmBit argued, PURPA was not designed solely to protect the bargain made by the developers, but also to preserve the bargain made by the utilities, so a unilateral waiver was not possible. The Commission then concluded it was preempted from revisiting the avoided cost rate. The Commission cited the following language from Freehold:

> (W)e hold that once the BRC (Commission) approved the power purchase agreement between Freehold (the developer) and JCP&L (the utility) on the ground that the rates were consistent with avoid cost, any action or order by the BRC (Commission) to reconsider its approval ... was preempted by federal law.

Freehold at 1194 (Emphasis added).

The next time AmBit was before the Commission was in 2000. In an Order dated August 7, 2000, the Commission approved the outcome of an arbitration between Mon Power and AmBit. The parties agreed Mon Power would pay AmBit the sum of

[5] Mon Power, in a brief dated December 6, 1995, stated its belief the Commission had no jurisdiction and the Freehold case made it clear PURPA did not allow a state regulatory Commission to revisit the avoided cost rate once it has been set. Mon Power also argued the Davis case was clear no waiver existed because this was a choice of forum issue, and the law at hand was a federal law, Commission jurisdiction was extinguished and FERC was the proper forum for the request.

$500,000 within 10 days of approval of the settlement by this Commission. The parties also agreed to the deletion of language in Section 1.4(c) and insertion of language which would permit Mon Power in its discretion to reduce the energy accepted on as many as 16 occasions during each calendar year for an aggregate total of not more than 80 hours each calendar year. The parties also agreed to modify language in Section 4.4(a) related to the right of AmBit to review the books and records of Mon Power. On page 3 of that Order, 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.

AmBit again came to the Commission in financial difficulty in 2006. Mon Power and AmBit presented a joint petition to the Commission similar to the one at issue in this case. That amendment increased the capacity rate from $27.25/MWh to $34.25/MWh from the date the Commission authorized the amendment until September 30, 2017. At that time, the capacity cost rate would decrease to $27.00/MWh. That amendment also extended the term of the contract by eight years, allowing AmBit to return value to West Virginia customers for a longer period of time than originally contemplated. Lastly, that joint petition modified the terms of the tracking account so that amortization (pay back to the ratepayers) of that account would not start until 2020. In an Order dated April 13, 2006, the Commission approved the amended EEPA. In the discussion section of the Order, on pages 4 and 5, the Commission explained its reasoning as follows:

> Upon review of the filings, we find that it is appropriate to grant this application to preserve AmBit's ability to operate and continue to provide energy to Mon Power. The proposed amendments to the EEPA have been mutually agreed to by all parties and are reasonable.

Since the 2006 AmBit Order, the Commission has had two more occasions to revisit PURPA projects. The first time was in 2010, in Case No. 09-0985-E-C, Morgantown Energy Associates v. Monongahela Power Company, dba Allegheny Power. In that case Morgantown Energy Associates (MEA) requested the Commission require Mon Power to consent to allow a refinancing of the debt of the project. The Commission requested the parties address the Commission's Order in the AmBit case from 1996 and the Freehold decision and their impact on MEA's filing. On page 8 of an Order dated June 9, 2010 in that case, the Commission summarized the positions of the parties. The Commission noted that Mon Power argued the 1996 Ambit Order stood for the proposition that the Commission did not have the power to reopen a PURPA case to modify the contract terms, and that was just not limited to rate consideration. MEA argued the federal preemption was not that comprehensive and that all of the cases in which states were not permitted to act involved ratemaking. Starting on the bottom of page 8 of that Order and continuing onto page 9 the Commission came to the following conclusion:

> Although Allegheny Power argues for a broad interpretation of our decision in AmBit, we were only considering a request to change the tracker mechanism, which directly affected the energy payments that Allegheny Power would be required to make. Thus, our Order in Ambit is in accord with the cases cited by MEA for **the proposition that once a sales contract has been approved, a state commission may not revisit the sales price.** Because the MEA formal complaint does not involve the sales price, we conclude that our decision today to review whether Allegheny

> Power has acted reasonably is not in conflict with the Commission Order in AmBit. [Emphasis added].

The last time the Commission addressed a PURPA project was in 2011, in Case No. 11-0249-E-P mentioned above. As noted above, the Commission's Order in that case was consistent with the legal principle that the Commission retained some jurisdiction over EEPA entered into by PURPA projects, but the Commission lacked the jurisdiction to engage in rate regulation or financial and organizational regulation or other "utility type regulation."

Argument

The Joint Petitioners direct the Commission's attention to the 2000 and 2006 Orders of the Commission in this docket for the proposition that the Commission has jurisdiction over amendments to a PURPA EEPA where a qualifying facility and the utility have agreed to them and they are otherwise reasonable. The Joint Petitioners do not address the Commission's decision in this docket in 1996, nor the decisions in Case Nos. 09-0985-E-C and 11-0249-E-P, which clearly indicate the Commission has no jurisdiction to revisit the avoided cost rate once the Commission originally sets that rate. Staff believes the Commission can revisit certain aspects of a PURPA EEPA, but the allowed rate is not one of those aspects. The 1996 AmBit case, the MEA case and the REC credit case were all contested cases where the Commission analyzed the law and came to the same conclusion, it did not have the jurisdiction to revisit the rates. In the 2000 and 2006 AmBit cases, no one contested the filings, and the Commission's Order did not engage in any real analysis. If the Commission engages in any analysis of the law

in this matter, it has to come to the same conclusion that Staff has, the Commission cannot grant the requested relief.

Staff believes the 2000 ruling was actually in accordance with the subsequent rulings in the MEA and REC credit cases. The 2000 case did not involve changing the rate. It simply recognized a penalty Mon Power agreed to pay through arbitration and change two ancillary clauses of the EEPA. That is not rate regulation. The problematic ruling is the 2006 ruling. It appears to Staff the Commission simply did not have the jurisdiction to grant the relief it did in that case, but no one brought it to the Commission's attention. The 2006 decision could possibly be justified as not a changing of the rate, but a changing of the timing of the rate, due to lowering of the rate on the back end and extending the rate for a period of eight years. In other words, the total original bargain was preserved because of the back end benefits to ratepayers. In this matter, however, there is no such concession. This is an unambiguous, no doubt, change in the avoided cost rate, which is clearly prohibited by federal law.

The fact the parties to the EEPA have agreed to this change is irrelevant. The parties to the EEPA cannot bestow jurisdiction upon the Commission that does not exist. Further, logically, it does not make sense the Commission can now review this change in rates because it was agreed upon by the parties. It is well established the Commission cannot, on its own, revisit the avoided cost rate once it is set. If the Joint Petitioners' position is correct and the Commission can review this filing because the parties to the EEPA agreed, the Commission is powerless to do anything but accept the rate as filed by the Joint Petitioners, or risk engaging in rate regulation. The Commission may possibly

be able to reject the filing, but the Commission most certainly could not modify the provisions of the rate change if necessary to protect the public interest. That would clearly be engaging in rate regulation. Without its full tool box of options, the Commission cannot properly review a filing to ensure the interests of the public are being protected. Either the Commission can accept, reject or modify a petition or it can do none of those three things. Since it is clear the Commission cannot modify this Petition, Staff believes it can do none of those things.

While the Joint Petitioners did not specifically mention the issue, Staff believes it should address the issue of waiver of lack of jurisdiction. Did the Joint Petitioners through this filing agree to submit to the Commission's jurisdiction? More importantly, can they submit to the Commission's jurisdiction? Staff does not believe such a waiver exists, and from a reading of previous cases, neither did the Commission in 1995/1996. In the November 29, 1995 Order requesting the parties to that proceeding discuss the issue of waiver in more depth, the Commission made the following pointed statement: "(W)e struggle with the concept that a party can create jurisdiction in a state regulatory body when Congress has apparently determined that federal interests require a federal forum." In the subsequent Order dated March 29, 1996, the Commission made it clear a unilateral waiver was not permissible because PURPA was designed to protect both the developer and the utility. Legally, there is no difference between a unilateral waiver and joint waiver in this circumstance. The parties cannot confer jurisdiction on the Commission that does not exist.

Accordingly, Legal Staff recommends the Commission dismiss this joint petition for lack of jurisdiction.

Respectfully submitted this 16th day of June, 2015.

STAFF OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

By Counsel,
John Auville, Staff Attorney

JOHN AUVILLE, Staff Attorney
West Virginia State Bar I.D. No. 8057

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 87-0669-E-C
AMERICAN BITUMINOUS POWER PARTNERS, L.P.
v.
MONONGAHELA POWER COMPANY

CERTIFICATE OF SERVICE

I, JOHN AUVILLE, Staff Counsel for the Public Service Commission of West Virginia, hereby certify that I have served a copy of the foregoing "Staff's Motion to Dismiss For Lack of Jurisdiction" upon all parties of record by First Class United States Mail, postage prepaid on the 16th day of June, 2015.

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