

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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## PUBLIC SERVICE COMMISSION

**WILLIAM M. FLYNN**

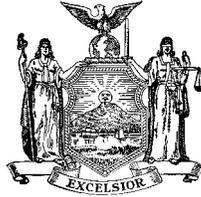
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*Acting Secretary*

July 21, 2003

Honorable Magalie R. Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. EL03-133-000 - American Ref-Fuel Company,  
Covanta Energy Group, Montenay Power Corporation, and  
Wheelabrator Technologies, Inc.

Dear Secretary Salas:

For filing, please find the Notice of Intervention and Protest of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-1585.

Very truly yours,

Penny Rubin  
Managing Attorney

Attachment



price that a utility pays under a PURPA contract is required to compensate a [Qualifying Facility (QF)] only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility."<sup>1</sup> Petitioners claim that the power purchase price, which is equivalent to estimated avoided costs,<sup>2</sup> "cannot be deemed to compensate QFs for RECs associated with renewable generation."<sup>3</sup> Petitioners argue that RECs should be treated separate from avoided costs, and as such, QFs should be entitled to receive additional revenues associated with them.

NYPSC urges the Commission not to issue the requested declaratory ruling on two grounds. First, PURPA contract interpretation is a matter for the courts and the states, rather than the Commission; second, such a ruling would stifle state trading programs and more particularly, could interfere with New York's Environmental Disclosure Program and state Renewable

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<sup>1</sup> Petition at 1-2.

<sup>2</sup> Avoided costs represent the purchasing utility's alternative cost of generating or purchasing an equivalent amount of energy and capacity.

<sup>3</sup> Petition at 9.

Portfolio Standard (RPS) proceeding <sup>4</sup>and attribute trading/accounting programs.

### DISCUSSION

#### I. PURPA Contract Interpretation Is A Matter For The Courts And The States And Not For The Commission

According to Petitioners, the relief they request arises out of disputes over the meaning of the avoided cost price provision in their PURPA power purchase contracts. Where a contract is "silent" on the ownership of RECs,<sup>5</sup> Petitioners believe the Commission can determine ownership by defining the contractual meaning of the avoided cost terminology. While Petitioners disavow any attempt to "revisit the avoided cost determinations made at the time of the purchase obligation,"<sup>6</sup> the interpretation Petitioners request unavoidably entangles the Commission in the enforcement of PURPA contracts, including those contracts allegedly "silent" on the issue of REC

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<sup>4</sup> On February 19, 2003, the NYPSC instituted a proceeding to develop and implement a renewable portfolio standard for electric energy retailed in New York State (Case 03-E-0188, *Retail Renewable Portfolio Standard*, Order Instituting Proceeding (issued February 19, 2003)). Currently pending in that proceeding is the issue of the appropriateness of a renewable attributes trading system, and the components of any such system that might be developed. Briefing before the presiding Administrative Law Judge in this proceeding will be completed on August 26, 2003.

<sup>5</sup> Petition, p. 5.

<sup>6</sup> Petition, p 15.

ownership. Since the Commission lacks jurisdiction to interfere with or enforce PURPA contracts after their execution, it should not grant the relief the Petitioners request.

In New York State Electric & Gas Corporation, the Commission decided that it would not upset long-term PURPA contracts, and it would not interfere with contractual arrangements to reconfigure benefits in the light of changed circumstances.<sup>7</sup> The Commission emphasized that it would not reexamine those contracts because of legal or policy flaws that arose after the time for challenging entry into a contract had passed. The Commission expressly noted that this approach to PURPA contracts "can also work to preserve the bargain entered into by the electric utility."

The courts upheld the Commission's decision.<sup>8</sup> They found that the Commission had no power, either under PURPA or the Federal Power Act, "to revise, rescind or otherwise alter the force and effect" of PURPA contracts.<sup>9</sup> Alteration of contracts, however, is exactly what the Petitioners request. In the guise of seeking a determination on the definition of the avoided cost

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<sup>7</sup> New York State Electric & Gas Corporation, 71 FERC ¶ 61,027 (1995), rehearing den., 72 FERC ¶ 61,067 (1995).

<sup>8</sup> New York State Electric & Gas Corporation v. Saranac Power Partners, L.P., 117 F.Supp.2d 211 (N.D.N.Y. 2000), aff'd 267 F.3d 128 (2nd Cir. 2001).

<sup>9</sup> 117 F.Supp. at 235.

terminology, Petitioners would have the Commission interpret their contracts to provide that REC ownership is awarded to them. Doing so would be to grant the relief the Commission denied in New York State Electric & Gas Corporation, by determining a contract question better left to the courts or the states.

## **II. Petitioners' Request Would Interfere With State Initiatives**

Even if the Commission were able to act, it could stifle state innovation. New York has established an Environmental Disclosure Program which tracks all electric energy purchase transactions from the consumer back to the source electric generator. Under the Environmental Disclosure Program, consumers receive periodic "labels" identifying where the electricity they purchased came from by disclosing the fuel mix and air emissions characteristics of the specific generation resources used to supply the consumers' electricity. The system tracks the sources and air emissions attributes of all types of generation, including electricity derived from renewable resources. It also allows the streaming of generation attributes out of the New York electric spot market to particular Load Serving Entities (LSEs) that buy energy in the spot market.

A "conversion transaction" allows LSEs and generators to convert their separate spot market transactions into combined bilateral transactions for the purposes of environmental disclosure. Conversion transactions, in effect, are analogous to attribute trading or renewable energy credit (REC) trading programs in other states, except that at the end of the conversion transaction in New York the attributes and the energy are re-attached to each other.<sup>10</sup> Other states have established different programs.

Because credits do not have an intrinsic market value like corn, coal, or electricity, their value is derived from the governmental program that creates them. As a result, state credit programs must be fully understood and allowed to develop before a decision is made to establish a national interpretation of PURPA contracts. Existing state programs differ widely. These state credit programs are still in their infancy and may have different purposes so that a "one size fits all" model

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<sup>10</sup> The purpose of the Environmental Disclosure Program is to give consumers information on how their electricity payments influence the development of generation resources and to provide interested consumers with relevant, uniform, and government-verified comparison data to assist them in shopping for electric suppliers that offer electricity from resources with attributes that consumers desire.

would not achieve their intended goals.<sup>11</sup> Yet Petitioners are requesting that the Commission establish a single and preemptive rule for the treatment of PURPA contracts for all state REC and similar programs, that could adversely affect state accounting systems, environmental disclosure programs and renewable portfolio standards.

States are best situated to examine and set the rules associated with the nuances of their particular programs. Moreover, states perform an important national function in establishing such programs, acting as laboratories for different ideas that later can be drawn upon as best practices become apparent.<sup>12</sup> Therefore, as a matter of policy, the Commission should refrain from granting the relief requested.

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<sup>11</sup> For example, if the purpose of the credit trading program is to influence generation by certain resources, it may be appropriate to assign the credit to the QF. If the purpose is to influence the dispatch of existing generation resources where dispatch is contractually controlled by the utility, it may be appropriate to assign the credit to the utility.

<sup>12</sup> See, U.S. v. Lopez, 115 S.Ct. 1624, 1641 (1993).

**CONCLUSION**

The Commission should deny Petitioners' request for a Declaratory Order.

Respectfully submitted,

Dawn Jablonski Ryman  
General Counsel

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of the State of New York  
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Dated: July 21, 2003  
Albany, New York

CERTIFICATE OF SERVICE

I, Jacquelynn Nash, do hereby certify that I will serve on July 21, 2003 the foregoing Notice of Intervention and Protest of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Date: July 21, 2003  
Albany, New York

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Jacquelynn Nash