UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST OF THE MAINE PUBLIC UTILITIES COMMISSION FOR REHEARING, OR, IN THE ALTERNATIVE, CLARIFICATION OF ORDER GRANTING PETITION FOR DECLARATORY ORDER

Pursuant to Rule 713, the Maine Public Utilities Commission (MPUC) requests rehearing of the Commission's October 1, 2003 order in the above-captioned proceeding. *American Ref-Fuel Co. et al*., 105 FERC ¶ 61,004 (2003). As discussed below, the Commission's Order was internally contradictory and failed to give reasoned consideration to MPUC's arguments. As a result, the Commission should grant rehearing and either reject American Ref-fuel's petition or vacate its October 1 order in its entirety. Alternatively, MPUC seeks clarification that the Commission did not intend to make any declaratory ruling regarding the contractutal conveyance of renewable energy attributes.

SPECIFICATION OF ERRORS

1. The Commission erred by reaching contradictory conclusions that, on the one hand, contracts entered into under PURPA do not, absent express language to the contrary, convey renewable energy attributes, but, on the other, that the ownership of renewable energy credits is a matter of state law.
2. The Commission acted arbitrarily in failing to consider and address any of MPUC's arguments regarding the transfer of renewable energy attributes.

3. The Commission acted arbitrarily and illogically in failing to reject Petitioners' request for declaratory order in light of its conclusion that the ownership of renewable energy credits is a matter of state law.

I. The Commission's Order is Internally Contradictory and Should be Vacated.

As the Commission noted at paragraph two of its October 1, 2003 Order, "Petitioners [have sought] an order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits or similar tradable certificates (RECs)." The Commission's order then concludes both (1) "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)" *and* (2) that, applying state law, a state nonetheless "may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs." Id. at ¶ 3.

The simple fact is that the Commission cannot logically conclude both that contracts silent on the issue do not convey renewable energy attributes *and* that whether they they convey such attributes or not is a matter of state law. Conflicting, irreconcilable conclusions are, by definition arbitrary. In fact, a decision reaching opposite conclusions amounts to no decision at all.

The Commission is not bound to issue a declaratory order; the decision to do so rests within its sound discretion., *El Paso Natural Gas Co.*, 44 FERC ¶61,065 at 61,182 (1988). *See also Tenneco Inc. v. FERC*, 688 F.2d 1018, 1023 (5th Cir. 1982).(FERC must "be given extremely broad latitude in determining whether or not to honor the private party's request" for a declaratory order.) If, as it seems from the Order, FERC cannot

decide what its view is, it should not have granted the declaratory order. Instead, as Commissioner Brownell suggests, it should have left this matter for states to decide. Accordingly, the Commission should vacate its October 1, 2003 order in its entirety.

Alternatively, if the Commission did not intend to opine whether RECs are conveyed to the buyer under PURPA contracts, the Commission should grant clarification to that effect. It may be that the Commission's statement "that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs" was a case of inartful drafting. Given the Commission's latter statement that states "may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs," the Commission may only have meant to say that "PURPA does not address whether contracts for the sale of QF capacity convey RECs." If that was the Commission's intent, it should so clarify.

II. The Commission Erred by Ignoring the MPUC's Arguments, Which, if Considered Would Have Led to the Conclusion that the Petition Should be Rejected.

Focusing on what it terms "state-created RECs [renewable energy credits]," the Commission erroneously confuses such *credits* with the renewable energy *attributes* themselves (which are, by definition, inherent components of renewable energy). MPUC has explained in detailed arguments (that were not even acknowledged in Commission's October 1 Order, much less addressed) why the inherent attributes of renewable energy were necessarily conveyed by QFs to purchasing utilities within the avoided cost framework under PURPA. For example, the MPUC explained that the development of renewable energy credits does not create the renewable energy attributes.[1] These

[1] To illustrate, prior to the development of RECs, if a utility was purchasing power from a biomass QF, no one would have ever doubted that the utility was purchasing biomass or renewable power. Similarly, if that

attributes always existed and were an essential part of PURPA contracts. MPUC protest at 5-8. The development of credits only allows for the trading of attributes separate from the energy commodity. The MPUC further explained that the absence of any mention of renewable credits (as opposed to renewable attributes) in the PURPA contacts is due to the fact that the credits (as opposed to the attributes) had not been created when the PURPA contracts were executed. *Id.* at 7-8. In addition, the MPUC argued that the fact that QFs are paid based on utility avoided costs for energy and capacity does not mean that they were not compensated for any extra value that may be associated with renewable and cogenerated power. We stated that "the statutory scheme under PURPA, as well as FERC's implementing regulations, ensure that QF's receive enormous benefit precisely because of the renewable nature of their generation." Protest at 8.[2] MPUC will not repeat all of its arguments here, as they are already explained in full in MPUC's protest, which it incorporates by reference. The considerations raised in those arguments, if taken into account, should have compelled the Commission to reach a different conclusion.. Thus, the Commission has failed to engage in reasoned decisionmaking. *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D. C. Cir. 1992). (reasoned decisionmaking requires Commission to "engage the arguments raised before it.")

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utility chose to resell power from that contract, no one could have disputed that the utility was offering biomass or renewable power. Under the Petitioners' view, however, the utility could not make this claim because it does not own the attribute.

[2] To support its conclusion, the Commission stated in its Order that avoided costs calculations did not distinguish between renewable and cogenerated power. Although this is true, it misses the point. The attribute—whether renewable or cogenerated power—was a fundamental aspect of QF contracts and part of what the utilities were buying. Whether the renewable or cogeneration attribute has value depends on state programs, not on avoided cost calculations. Some states have chosen to give renewable power value through the creation of portfolio requirements, other states have not. Maine has chosen to give value to both renewable and cogenerated power by including both in its portfolio requirement. Thus, the Commission's point that there were no distinctions between the calculation of avoided costs for renewable as opposed to cogenerated power clearly has no relevance in Maine where the attributes of both types of QF power have been given value.

III. If the Commission Believes it Was Correct in Concluding that State Law Would Determine Whether a QF Contract Conveyed Renewable Energy Attributes to the Buyer, It Should Modify its October 1 Order By Vacating the Portion of the Order Granting Am-Fuel's Petition.

If, after reasoned consideration, the Commission came to the conclusion that conveyance of renewable energy attributes in existing QF contracts was a matter of state law, it should not have issued a declaratory order at all, much less granted Petitioners' request. As dissenting Commissioner Brownell notes, having concluded that PURPA "does not address the ownership of RECs," the Commission's "logical conclusion ought to be that whether a particular contract conveys RECs is purely a matter of the particular state law creating the RECs."

Respectfully submitted,

MAINE PUBLIC UTILITIES COMMISSION

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By:_____

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Dated: October 31, 2003

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document by first class mail upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 31st day of October, 2003

/s/ Harvey L. Reiter

Harvey L. Reiter