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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-1001

CITY OF WHEELING,

Defendant Below/Petitioner,

v.

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**THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA and CITY OF BENWOOD,**

Respondents.

**CITY OF WHEELING PETITION FOR APPEAL
FROM AND SUSPENSION OF THE
NOVEMBER 12, 2021 and DECEMBER 1, 2021 ORDERS
OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
IN CASE NO. 21-0372-S-WI**

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December 10, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. ASSIGNMENTS OF ERROR 1

A. The Public Service Commission erred in exercising subject matter jurisdiction and exceeded its authority when it issued a final decision after the expiration of the time period provided in *West Virginia Code* §24-2-1(b)(6) for the Commission to resolve a dispute between a wholesale customer and a locally rate regulated municipality 1

B. The Public Service Commission erred and exceeded its authority when it entered a third tolling order because *West Virginia Code* §24-2-1(b)(6) authorizes tolling only when the Public Service Commission requires additional information and does not authorize tolling based on the complexity of a case 1

C. The Public Service Commission acted arbitrarily and capriciously when it made its third tolling calculation in a manner that was contrary to the Commission's first and second tolling calculations in this case and to established Commission policy and practice 1

II. STATEMENT OF THE CASE 2

Procedural Background before the Commission 5

Factual Background 9

III. SUMMARY OF ARGUMENT 10

IV. STATEMENT REGARDING ORAL ARGUMENT 11

V. ARGUMENT 12

A. The Standard of Review 12

TABLE OF CONTENTS
Continued

V. ARGUMENT [Continued]

B. The Public Service Commission erred in exercising subject matter jurisdiction and exceeded its authority when it issued a final decision after the expiration of the time period provided in *West Virginia Code* §24-2-1(b)(6) for the Commission to resolve a dispute between a wholesale customer and a locally rate regulated municipality 13

C. The Public Service Commission erred and exceeded its authority when it entered a third tolling order because *West Virginia Code* §24-2-1(b)(6) authorizes tolling only when the Public Service Commission requires additional information and does not authorize tolling based on the complexity of a case 17

D. The Public Service Commission acted arbitrarily and capriciously when it made its third tolling calculation in a manner that was contrary to the Commission's first and second tolling calculations in this case and to established Commission policy and practice 19

VI. MOTION TO STAY THE NOVEMBER 12, 2021 AND DECEMBER 1, 2021 ORDERS ENTERED BY THE PSC 22

VII. CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES

Appalachian Power Co. v. State Tax Dep't. 195 W.Va. 573, 587, 466 S.E.2d 424 (1995). 15

Berkeley County Public Service Sewer District v. West Virginia Public Service Commission, 204 W.Va. 279, 512 S.E.2d 201 (1998) 12

Broadmoor/Timberline Apts. v. Public Service Comm'n of W. Va., 180 W. Va. 387, 376 S.E.2d 593 (1988) 13

Central West Virginia Refuse, Inc. v. Public Service Commission of W. Va., 190 W.Va. 416, 438 S.E.2d 596 (1993) 12

Crockett v. Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970) 15

General Investigation Into Capacity Improvement Fees Charged By The Berkeley County Public Service Sewer District and Berkeley County Public Service District dba Berkeley County Public Service Water District, Case No. 09-0961-PSWD-GI, Comm'n Order at 10 & Conclusion of Law No. 8 (Aug. 7, 2012) 2

Hancock County Public Service District, Case No. 06-0582-PSD-CN, Comm'n Order at 1 (Jan. 23, 2007) 22

Hubbard Heights Subdivision Homeowners Ass'n, Case No. 01-1108-S-CN, Comm'n Order at 2 (Dec. 18, 2001) 22

Monongahela Power Co. v. Public Service Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981) 12

Motto v. CSX Transp. Inc., 220 W. Va. 412, 647 S.E.2d 848 (2007) 17

Sexton v. Public Service Commission, 188 W.Va. 305,423 S.E.2d 914 (1992) 13

Sierra Club v. Public Serv. Comm'n, No. 18-0513, Order at 1 (Oct. 4, 2018) 2

Sizemore v. State Farm Gen. Ins. Co., 202 W. Va. 591, 505 S.E.2d 654 (1998) 16

State ex rel. Hager v. Oakley, 154 W. Va. 528, 177 S.E.2d 585 (W. Va. 2007). 17

Walker v. West Virginia Ethics Comm'n, 201 W. Va. 108, 492 S.E.2d 167 (1997) 16

TABLE OF AUTHORITIES
[Continued]

CASES [Continued]

Wilhite v. Public Service Comm'n of W. Va., 150 W.Va. 747, 149 S.E.2d 273 (1966) 13

Zecco v. Hope Gas., Inc., dba Dominion Hope, Case No. 05-0821-G-C, Comm'n Order at 5-6 (Nov. 10, 2005) 2

STATUTES

West Virginia Code §24-1-1(j) 14

West Virginia Code §24-2-1(b) 3

West Virginia Code §24-2-1(b)(6) ..... passim

West Virginia Code §24-2-4 15

West Virginia Code §24-2-4a 15

West Virginia Code §24-2-4a(a) 3

West Virginia Code §24-2-4b 15

West Virginia Code §24-2-11 21

West Virginia Code §24-5-1 2

RULES

P.S.C. Rules for the Construction and Filing of Tariffs, 150 C.S.R. Series 2 ..... *23*

W. Va. R. App. Proc. 10(c)(4) 2, 5

W. Va. R. App. Proc. 14(d) 2

W. Va. R. App. Proc. 14(f) 5

W. Va. R. App. Proc. 20 11

TABLE OF AUTHORITIES
[Continued]

OTHER

Black's Law Dictionary 1625 (9th ed. 2009).....22

Kay Casto & Chaney PLLC,, *Regulation of Publicly-Owned Water and Sewer Utilities* (Sept.. 2014).....14

Seymour, *Most US Municipal Utilities Enjoy Unlimited Authority Over Rates*, Moody's Investors Service, Special Comment, August 19, 2014, page 3 of Exhibit 6 to *Regulation of Publicly-Owned Water and Sewer Utilities,* September, 2014.....14

I. ASSIGNMENTS OF ERROR

A. The Public Service Commission erred in exercising subject matter jurisdiction and exceeded its authority when it issued a final decision after the expiration of the time period provided in *West Virginia Code* §24-2-1(b)(6) for the Commission to resolve a dispute between a wholesale customer and a locally rate regulated municipality.

B. The Public Service Commission erred and exceeded its authority when it entered a third tolling order because *West Virginia Code* §24-2-1(b)(6) authorizes tolling only when the Public Service Commission requests additional information and does not authorize tolling based on the complexity of a case.

C. The Public Service Commission acted arbitrarily and capriciously when it made its third tolling calculation in a manner that was contrary to the Commission's first and second tolling calculations in this case and to established Commission policy and practice.

II. STATEMENT OF THE CASE

This Petition for Appeal and Suspension and Appeal is filed by the City of Wheeling ("City" or "Wheeling") from a final decision entered on November 12, 2021, and the denial on December 1, 2021, by the Public Service Commission of West Virginia ("Commission" or "PSC") of the City's timely filed Petition for Reconsideration.[1] The two Orders were entered by the Commission in an investigation proceeding that the Commission initiated when the City of Benwood ("Benwood"), a purchaser of resale sewer treatment services, filed a complaint against Wheeling regarding revised rates for resale sewer treatment services under *West Virginia Code* §24-2-1(b)(6). This Petition is filed pursuant to the provisions of *West Virginia Code* §24-5-1 and W. Va. R. App. Proc. 14(d). Pursuant to W. Va. R. App. Proc. 10(c)(4), this is a concise account of the history of this case.

This case involves the time period during which the PSC has authority to review the rates of a locally rate regulated municipal water utility. In 2015, the Legislature revised the system of

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[1] This Petition is filed within thirty days of the November 12, 2021 Order because it is unclear whether, for purposes of appeal, the City's Petition would be timely filed if filed within thirty days of the December 1, 2021 Order. In 2018, the PSC moved this Court to dismiss a petition for appeal as premature because a petition for reconsideration of the final Commission decision had been filed, the Commission's powers and jurisdiction are continuing in nature, and an order issued following consideration of the petition for reconsideration would constitute the ultimate judgment of the Commission. This Court granted the Commission's motion and dismissed the petition for appeal as "interlocutory." Sierra Club v. Public Serv. Comm'n, No. 18-0513, Order at 1 (Oct. 4, 2018).

For many years prior to 2018, the Commission held that the filing of a Petition for Reconsideration did not stay the finality of an Order of the Commission unless a stay of a final decision had been requested when a petition for reconsideration was filed and such stay had been granted. *E.g.*, Zecco v. Hope Gas., Inc., dba Dominion Hope, Case No. 05-0821-G-C, Comm'n Order at 5-6 (Nov. 10, 2005); General Investigation Into Capacity Improvement Fees Charged By The Berkeley County Public Service Sewer District and Berkeley County Public Service District dba Berkeley County Public Service Water District, Case No. 09-0961-PSWD-GI, Comm'n Order at 10 & Conclusion of Law No. 8 (Aug. 7, 2012).

Wheeling is not aware of another decision in which the Commission or the Court applied the position taken by the Commission before this Court in Sierra Club subsequent to the Sierra Club case.

utility regulation for political subdivisions of this state providing water and/or sewer service that have at least 4,500 customers and $3 million dollars in annual revenues from utility customers. *West Virginia Code* §§24-2-1(b) & 24-2-4a(a). Wheeling meets these criteria.

Wheeling sets the rates and charges for its public utility sewer services by municipal ordinance, and those utility rates and charges now are outside of the purview of the PSC almost entirely. In a change from the prior regulatory framework, the Commission no longer has authority to suspend or change Wheeling's rates as an interim measure during the pendency of a complaint from a wholesale customer. *West Virginia Code* §24-2-1(b)(6) provides that the rates set by the political subdivision shall remain in effect from the effective date of the ordinance until set aside, altered or amended by the Commission in an order to be followed in the future following the timely filing of a request for an investigation.

West Virginia Code §24-2-1(b)(6) authorizes the Commission to act during a period of 120 days from the filing of a request for an investigation by a wholesale customer. The 120-day time period may be tolled by the Commission until information the Commission considers necessary is filed to show the basis of the rates, fees, and charges. On two occasions in this proceeding, the Commission required Wheeling to provide additional information and tolled, or suspended, the running of the statutory period.[2]

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[2] The Complaint and request for investigation was filed by Benwood on May 31, 2021. On June 2, 2021, the Commission issued its Order requiring Wheeling to provide information, including a customer class cost of service study ("CCOSS"), to be filed no later than 30 days from the date of the Order, and tolling the statutory time period, for the first time, for 45 days resulting in a statutory deadline of October 15, 2021. Because West Virginia Code § 24-2-1(b)(6) permits the Commission to toll, or suspend, the running of the 120-day statutory period "**until the necessary information** showing the basis of the rates, fees, and charges or other information as the commission considers necessary **is filed**," the Commission did not have authority to toll for 45 days.

On July 2, 2021, Wheeling filed the information required by the June 2, 2021 Order. Thereafter, on July 15, 2021, after being made aware of errors in the CCOSS by Commission Staff, Wheeling filed a revised CCOSS. On July 19, 2021, the Staff filed a request for a further tolling of 13 days in order to

On October 26, 2021, just two days prior to the expiration of the statutory period in which the Commission had statutory authority to resolve the dispute (as extended by the two tolling orders), the Commission entered an order on its own motion, writing that the case was complex and the Commission needed an additional period of fifteen days to render its decision.[3] In that order, the Commission stated that a new 120-day period, starting on July 15, 2021, the date that Wheeling filed its Revised Class Cost of Service Study would expire on November 12, 2021. This third tolling calculation by the PSC is not authorized by *West Virginia Code* §24-2-1(b)(6) for the following reasons:

(1) The statute permits tolling of the 120-day period that begins on the date that a complaint is filed. The Commission does not have authority to start the running of the 120-day review period at a later date.

(2) The statute permits tolling, or suspension, of the statutory period until information necessary to show the basis of the rates, fees, charges or other information deemed necessary is filed. No additional information beyond that which was filed by Wheeling on July 15, 2021, was deemed necessary to be filed by the Commission's October 26, 2021 Order to enable the Commission to resolve the complaint.

(3) The statute does not permit additional time because a matter is complex and the Commission requires more time.

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review the revised CCOSS. On July 22, 2021, the Commission issued its second tolling order and tolled the statutory time period for an additional 13 days resulting in a statutory deadline of October 28, 2021.

[3] In its December 1, 2021 Order denying Wheeling's Petition for Reconsideration and Motion for Stay, the Commission abandoned its justification for needing extra time to resolve the complaint. Instead, it stated that its July 22, 2021 Order "did not invoke its full authority to toll the decision due date by 120 days from the date Wheeling filed its Revised Study. . . and the Commission recognized and corrected this oversight when it issued its October 26, 2021, Order that tolled the decision due date of this dispute 120 days from July 15, 2021."

In addition to being contrary to the statute, the method used by the Commission in the third tolling calculation is inconsistent with the first two tolling calculations in this proceeding and with prior Commission orders regarding tolling. Tolling requests are not infrequent at the PSC, and the Commission has explained that tolling is a suspension of an existing time period. In the third tolling calculation, the Commission acted arbitrarily and capriciously by starting a new 120-day clock instead of suspending and reinstating the running of the existing time period.

The final Order entered on November 12, 2021, and the Commission Order on reconsideration entered on December 1, 2021, if permitted to stand, will undo the limitation on Commission jurisdiction set forth in *West Virginia Code* §24-2-1(b)(6) and allow the Commission to select the time period in which to resolve a dispute between a wholesale customers and a locally rate regulated utility. The final Commission Order is contrary to law and represents bad public policy that will adversely affect not only the City of Wheeling, but other locally rate regulated municipalities and public service districts as well as lenders and investors who rely upon the expectation that the Commission will adhere to the statutory scheme established by the Legislature to assure the integrity of the rates that support their investments in the state's publicly owned utility systems.

Procedural Background before the Commission.[4]

Benwood purchases wholesale[5] sewage treatment services from Wheeling.

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[4] The procedural background presented herein is intended to comply with the concise account of the procedural history of the case and a statement of the facts relevant to the assignments of error as required by W. Va. R. App. Pro. 10(c)(4). The full procedural background is set forth in the November 12, 2021 Commission Order, which will be part of the record of the proceedings that the Commission will transmit to the Clerk of the West Virginia Supreme Court pursuant to W. Va. R. App. Pro. 14(f).

[5] The terms "wholesale" and "resale" are used interchangeably in this matter regarding the sewage treatment services that Wheeling provides to other utility entities.

On April 6, 2021, Wheeling passed an ordinance revising the rate charged for wholesale sewage treatment services to $3.68 per thousand gallons ($3.68/Mgal) effective May 21, 2021. On April 14, 2021, the ordinance was filed with the Public Service Commission. ORDUS Wheeling 21B.

On May 3, 2021, Benwood filed a complaint at the PSC, pursuant to *West Virginia Code* §24-2-l(b)(6), against Wheeling and asked the Commission to set aside Wheeling's $3.68/Mgal rate and calculate a new rate in its place. Benwood Formal Complaint at 1-5 (May 3, 2021).

On June 2, 2021, the Commission entered its Order acknowledging Benwood's filing of the complaint and concluded that Wheeling's April 14, 2021 ordinance filing did not include all of the information the Commission believed necessary to show the basis of Wheeling's rates, fees, and charges to allow the Commission to evaluate Benwood's complaint. The Commission required Wheeling to provide additional information within 30 days, including a Class Cost of Service Study, and referred the case to the Division of Administrative Law Judges for further proceedings. The Commission also tolled the running of the 120-day statutory period for 45 days stating that the statutory decision due date would be Friday, October 15, 2021. Comm'n Referral Order at 2-4 (June 2, 2021).

On July 2, 2021, Wheeling filed the information required by the Commission's June 2, 2021 Order, including a Class Cost of Service Study. Following receipt and review of the information, Commission Staff informed Wheeling that there were errors in the Class Cost of Service Study.

On July 15, 2021, Wheeling filed a Revised Class Cost of Service Study to address the Staff's issues.

On July 19, 2021, the Staff filed its Motion Seeking A 13-Day Tolling of the statutory time period under the provisions of *West Virginia Code* §24-2-l(b)(6) to enable Staff to conduct an analysis of the Revised Study; and further requested that the Commission "grant any additional relief the Commission deems appropriate under the premises." The period of the thirteen days tolling request was based on the period of time from July 2, 2021 when the original Class Cost of Service Study was filed to July 15, 2021 when the Revised Class Cost of Service Study was filed.

On July 22, 2021, the Commission granted the Staff's July 19, 2021 Motion and extended the statutory decision due date until October 28, 2021. The Commission also extended the deadline for the Administrative Law Judge ("ALJ") to issue a Recommended Decision to September 18, 2021. Comm'n Order at 3-4 (July 22, 2021).

The ALJ conducted a telephonic hearing on August 17, 2021, after which initial and reply briefs were filed by Wheeling, Benwood, Staff and Amicus Curiae West Virginia Water Development Authority ("WDA").

On September 13, 2021, the ALJ issued his Recommended Decision and approved the $3.68/Mgal sewer treatment rate that Wheeling set by Ordinance. Rec. Dec. at 24 (Sept. 13, 2021).

On September 24, 2021, Benwood filed exceptions to the Recommended Decision, and on September 28, 2021, Commission Staff filed Exceptions. Benwood Exceptions at 1-5 (Sept. 24, 2021); Staff Exceptions & Brief in Support of Exceptions at 1-7 (Sept. 28, 2021).

Wheeling responded to the Benwood Exceptions and Staff Exceptions. Wheeling Reply to Benwood Exceptions at 1-5 (Oct. 4, 2021); Wheeling Reply to Staff Exceptions at 1-10 (Oct. 12, 2021). The WDA also responded to the Staff Exceptions. WDA Response to Staff Exceptions at 1-7 (Oct. 7, 2021).

On October 26, 2021, upon its own motion, the Commission entered an Order further extending the time period to resolve the dispute between Benwood and Wheeling, writing,

> Given the complexity of this case and need for additional time for Commission consideration and review, the Commission will invoke its authority under W. Va. Code §24-2-l(b)(6) to toll the statutory period 120 days from the date Wheeling filed a Revised Study, being July 15, 2021. The statutory deadline in this case should be extended to November 12, 2021.

Comm'n Order at 3 (Oct. 26, 2021).

On November 12, 2021, the Commission issued its final Order and, among other things, recalculated the rate for wholesale sewer treatment services to $2.87/Mgal. The Commission required Wheeling to charge the lower wholesale rate beginning on the date of the Order. Comm'n Order at 13 & App. A (Nov. 12, 2021).

On November 22, 2021, Wheeling filed a Petition for Reconsideration of Final Commission Order and Motion for Stay. Wheeling argued that the Commission did not have subject matter jurisdiction when it entered the November 12, 2021 Order because the Commission acted after the expiration of the time period provided in the statute. If the Commission would not vacate the November 12, 2021 Order, Wheeling asked the Commission to grant a stay of that Order pending appeal. Wheeling Petition for Reconsideration of Final Commission Order and Motion for Stay at 1-12 (Nov. 22, 2021).

On December 1, 2021, the Commission denied Wheeling's Petition for Reconsideration and Motion for Stay, writing that "W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll

the 120-day period for resolution of this dispute from July 15, 2021."[6] Comm'n Order at 3-6 (Dec. 1, 2021).

Factual Background.

Wheeling challenges the third tolling calculation made by the PSC on October 26, 2021. For political subdivisions that provide sewer service and have at least 4,500 customers and annual gross revenues of $3 million or more *West Virginia Code* §24-2-1(b)(6) authorizes the Commission to investigate certain disputes between a political subdivision and a resale customer as follows:

> Investigation and resolution of disputes between a political subdivision of the state providing wholesale water and/or wastewater treatment or other services, whether by contract or through a tariff, and its customer or customers, including, but not limited to, rates, fees, and charges, service areas and contested utility combinations: Provided, That any request for an investigation relating to such a dispute that is based on the act or omission of the political subdivision shall be filed within 30 days of the act or omission of the political subdivision and **the commission shall resolve said dispute within 120 days of filing. The 120-day period for resolution of the dispute may be tolled by the commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed:** Provided, however, That the disputed rates, fees, and charges so fixed by the political subdivision providing separate or combined water and/or sewer services shall remain in full force and effect until set aside, altered or, amended by the commission in an order to be followed in the future. (emphasis provided).

This appeal is narrowly drawn. The language of *West Virginia Code* §24-2-1(b)(6) and in the Commission Orders and the dates relevant provide the essential facts in relation to Wheeling's Assignments of Error.

[6] July 15, 2021 is the date on which Wheeling filed its Revised Class Cost of Service Study.

III. SUMMARY OF ARGUMENT

Created by statute, the Commission has only the powers delegated to it by the West Virginia Legislature. Generally, the Legislature has given broad authority to the Commission to regulate public utilities. *West Virginia Code* §24-2-1(b)(6), enacted in 2015, was one of several recent statutory amendments that limit the PSC's jurisdiction over the actions of publicly owned water and sewer utilities.

West Virginia Code §24-2-1(b)(6) provides 120 days, subject to tolling under specific circumstances, for the Commission to resolve a rate dispute between a wholesale customer and a locally rate regulated utility. The statute provides that the time period of 120 days to resolve complaints under this section of the *Code* is calculated from the date of the filing of the wholesale customer's complaint. The Commission does not have subject matter jurisdiction over such complaints except during the 120-day time period. The Commission did not have subject matter jurisdiction to resolve the dispute between Benwood and Wheeling when the Commission issued orders on November 12, 2021 and December 1, 2021. Wheeling asks this Court to vacate those orders.

West Virginia Code §24-2-1(b)(6) permits the Commission to toll the 120-day period "until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed." The Commission twice tolled the running of the statutory period. On its own motion, the Commission decided to toll for third time, explaining that the case is complex and the Commission needed more time for its review. The third tolling of the statutory time period was not accompanied by a requirement that Wheeling provide any further information than that which had been provided on July 15, 2021 and had triggered the Commission's second tolling order on July 22, 2021. *West Virginia Code*

§24-2-1(b)(6) does not authorize the Commission to toll the running of the statutory period to give itself additional time to review the information that had previously been filed and which formed the basis for the earlier tolling,

The Commission, consistent with prior Commission decisions that have explained that "to toll" is "to suspend," correctly suspended the running of an existing time period in the first two tolling orders from the date of the Benwood filing. The Commission acted arbitrarily and capriciously in the third tolling decision by starting a new 120-day time period based upon the date that Wheeling filed the Revised Class Cost of Service Study. Further, when it entered the third tolling Order without requiring additional information to resolve the dispute, the Commission exceeded its statutory authority.

The Commission exceeded its statutory jurisdiction and powers, and the Commission's decision is thus *ultra vires*. Wheeling asks this Court, therefore, to vacate the orders entered on November 12, 2021 and December 1, 2021 by the PSC.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate under W. Va. R. App. Proc. 20. The issues involved in this matter are of significant importance to locally rate regulated utilities operating in West Virginia. Further, Commission action after the statutory window of time has expired infringes upon the authority of local boards, councils and county commissions that now establish rates for qualifying utilities and jeopardizes the integrity of the investments by the lending institutions that rely upon the timeliness of Commission decisions in resolving the rate disputes that affect the ability of the locally rate regulated entities to meet their debt payment obligations

V. ARGUMENT

A. Standard of Review

This Court has established the standard of review of final orders of the Commission as follows:

> In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Syl. Pt. 2, Monongahela Power Co. v. Public Service Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981).

Syl. Pt. 1, Berkeley County Public Service Sewer District v. West Virginia Public Service Commission, 204 W.Va. 279, 512 S.E.2d 201 (1998). This Court refined the foregoing in the following statement:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission,* 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

Syl. Pt. 1, Central West Virginia Refuse, Inc. v. Public Service Commission of W. Va., 190 W.Va. 416, 438 S.E.2d 596 (1993). Finally, this Court has held that:

> [a]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles. *United Fuel Gas Company v. The Public Service Commission,* 143 W.Va. 33, 99 S.E.2d 1 (1957). Syllabus Point 5, in part, *Boggs v. Public Service*

Comm'n, 154 W.Va. 146, 174 S.E.2d 331 (1970). Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission,* 180 W.Va. 387, 376 S.E.2d 593 (1988).

Syl. Pt. 1, Sexton v. Public Service Commission, 188 W.Va. 305, 423 S.E.2d 914 (1992).

In this case, the Commission exceeded its power and subject matter jurisdiction by issuing a decision after the expiration of the period of time granted to the Commission by *West Virginia Code* §24-2-1(b)(6) and by extending the time period for a reason not authorized by law. The November 12, 2021 Order requires Wheeling, a locally rate regulated municipality, to implement rates that the PSC developed, in lieu of the rates that Wheeling established by municipal ordinance. The current regulatory framework does not permit the Commission to revise locally established rates, unless the Commission complies with the provisions of *West Virginia Code* §24-2-1(b)(6).

B. The Public Service Commission erred in exercising subject matter jurisdiction and exceeded its authority when it issued a final decision after the expiration of the time period provided in *West Virginia Code* §24-2-1(b)(6) for the Commission to resolve a dispute between a wholesale customer and a locally rate regulated municipality.

The Legislature created the Public Service Commission to "exercise the legislative powers delegated to it." *West Virginia Code* §24-1-l(b). It is well settled that the Commission has no inherent power and authority, and has no jurisdiction except as has been conferred on it by statute and through necessary implications therefrom. Syl. Pt. 2, Wilhite v. Public Service Comm'n of W. Va., 150 W.Va. 747, 149 S.E.2d 273 (1966).

Prior to 2015, West Virginia stood out among the nation's other states for the scope of its regulation of water and sewer utilities that are owned and operated by local government. In a 2014, survey of the 50 states to review the extent to which publicly-owned water and sewer

utilities were regulated by state government,[7] it was found that publicly-owned water and sewer utilities in only a few other states besides West Virginia were subject to nearly the same regulatory scrutiny as applied to the service and rates of investor-owned utilities. It was found that local government officials in most other states make operational decisions for water and sewer utilities they operate without state oversight.[8] The report also noted that Moody's Investment Service singled out West Virginia for the state's obstacles to necessary revenue increases and facility maintenance or upgrades for publicly-owned utilities.[9]

Following the release of the 50 state report, the Legislature, in 2015, modified the regulatory framework and adopted statutes that included deregulation measures to limit the Commission's jurisdiction and authorized local officials to enact public utility rates for larger municipalities and public service districts. At the forefront of this new paradigm of regulation, the Legislature enacted *West Virginia Code* §24-1-1(j) which states as follows:

> (j) The Legislature further finds that water and sewer utilities that are political subdivisions of the state providing separate or combined services and

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[7] The firm of Kay Casto & Chaney, PLLC was retained by the West Virginia Rural Water Association, the West Virginia Municipal Water Quality Association, the West Virginia Section of the American Water Works Association, and the West Virginia Water Environment Association to review the extent to which publicly-owned water and sewer utilities are regulated by state government in states other than West Virginia and prepared the report. Kay Casto & Chaney PLLC,, Regulation of Publicly-Owned Water and Sewer Utilities (Sept.. 2014).

This report was provided to the Court as an attachment to the Brief of the West Virginia Rural Water Association of Amicus Curiae in Support of Respondents filed on May 14, 2018, in a prior appeal, Pool v. Public Service Commission & Greater Harrison County Public Service District, Docket No. 18-0280.

[8] The research conducted by Kay Casto & Chaney, PLLC established that only eleven (11) states had any form of regulation of publicly-owned utilities at the state level. The extent of regulation of publicly-owned utilities in the 11 states was found not to be as extensive as that in West Virginia. In most states, rates and practices of publicly owned water and sewer utilities are regulated at the local level by the municipality or the board of the agency providing service.

[9] The Moody's study which was attached as Exhibit 6 to the Kay Casto & Chaney, PLLC report stated: "West Virginia's rate approval process is arduous, lengthy, and elevates risks to bondholders." Seymour, Most US Municipal Utilities Enjoy Unlimited Authority Over Rates, Moody's Investors Service, Special Comment, August 19, 2014, page 9 of Exhibit 6.

> having at least four thousand five hundred customers and annual gross revenues of $3 million or more are most fairly and effectively regulated by the local governing body with respect to rates, borrowing and capital projects. **Therefore, notwithstanding any contrary provisions of this section, the jurisdiction of the Public Service Commission over water and sewer utilities that are political subdivisions of the state is limited to that granted specifically in this code.** (Emphasis added)

The Legislative action in 2015 continued and expanded upon a long-standing preference for local rate control of municipal utility rates. *West Virginia Code* §24-2-4b (1979) previously exempted rates of municipally-owned public utilities from the provisions for Commission rate review and approval in *West Virginia Code* §24-2-4 and 24-2-4a.

For a rate dispute between a wholesale customer and a political subdivision under the new regulatory framework, *West Virginia Code* §24-2-l(b)(6) provides the limited subject matter jurisdiction that the Commission possesses as regards rates for such services:

> Investigation and resolution of disputes between a political subdivision of the state providing wholesale water and/or wastewater treatment or other services, whether by contract or through a tariff, and its customer or customers, including, but not limited to, rates, fees, and charges, service areas and contested utility combinations: Provided, That any request for an investigation relating to such a dispute that is based on the act or omission of the political subdivision shall be filed within 30 days of the act or omission of the political subdivision and **the commission shall resolve said dispute within 120 days of filing. The 120-day period for resolution of the dispute may be tolled by the commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed:** Provided, however, That the disputed rates, fees, and charges so fixed by the political subdivision providing separate or combined water and/or sewer services shall remain in full force and effect until set aside, altered or, amended by the commission in an order to be followed in the future. (emphasis provided).

In determining the meaning of a statutory provision, the Court "look[s] first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). *See also* Syl. Pt. 2, *Crockett v.*

Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."). The Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted). The language of *West Virginia Code* §24-2-l(b)(6) is unambiguous and should be applied as written. Walker v. West Virginia Ethics Comm'n, 201 W. Va. 108, 492 S.E.2d 167 (1997). The Commission only has subject matter jurisdiction to review and resolve disputes between a political subdivision providing wholesale wastewater treatment services during the 120-day period.

Benwood filed its complaint against Wheeling on May 3, 2021. As *West Virginia Code* §24-2-1(b)(6) requires, the Commission calculated the 120-day period in its tolling decisions entered on June 2, 2021, and July 22, 2021, from the date of Benwood's filing[10]:

Date	Description of Pleading or Order	Last Day of Commission jurisdiction
May 3, 2021	Benwood complaint against Wheeling **May 3, 2021** + 120 days	**Aug. 31, 2021**
June 2, 2021	Commission Referral Order (Tolling #1) **Aug. 31, 2021** + 45 days	**30 Days-Sept. 30, 2021** **45 Days-Oct. 15, 2021**
July 22, 2021	Commission Order (Tolling #2) **October 15, 2021** + 13 days	**30 Days -Oct. 13, 2021** **45 Days-Oct. 28, 2021**

[10] The statute allows the Commission to toll the period until necessary information is received. In the first tolling Order, the Commission provided 30 days for Wheeling to provide the information, and as a result the last day of the statutory time period would be September 30, 2021. The Commission improperly ordered tolling for 45 days when it provided only 30 days for the additional information to be filed. With the second tolling of 13 days, the proper statutory due date would be October 13, 2021.

Upon its own motion, the Commission rendered a third tolling calculation and expanded the time period until November 12, 2021, calculated not from the date of the filing of the Benwood complaint, but from the date of the filing of the revised CCOSS by Wheeling on July 15, 2021:

The Commission based its third tolling calculation on the date that Wheeling filed its Revised Class Cost of Service Study:

Date	Description of Pleading or Order	Last Day of Commission Jurisdiction
July 15, 2021	Wheeling's Revised Class Cost of Service Study	
Oct. 26, 2021	Commission Order (Tolling #3 **July 15, 2021 + 120 days**	**November 12, 2021**

As more fully explained below, the last day that the Commission possessed subject matter jurisdiction pursuant to *West Virginia Code* §24-2-1(b)(6) to resolve the dispute between Benwood and Wheeling was actually October 13, 2021. The Commission exceeded its subject matter jurisdiction and was without authority to issue a decision on November 12, 2021. Motto v. CSX Transp. Inc., 220 W. Va. 412, 647 S.E.2d 848 (2007). A final decision taken without subject matter jurisdiction is void and of no effect. State ex rel. Hager v. Oakley, 154 W. Va. 528, 177 S.E.2d 585 (W. Va. 2007).

C. The Public Service Commission erred and exceeded its authority when it entered a third tolling order because *West Virginia Code* §24-2-1(b)(6) authorizes tolling only when the Public Service Commission requires additional information and does not authorize tolling based on the complexity of a case.

West Virginia Code §24-2-1(b)(6) permits the Commission to toll the 120-day period if additional information is needed:

> The 120-day period for resolution of the dispute may be tolled by the commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed . . .

The statute does not authorize the Commission to toll the 120-day period for any other reason.

In the third tolling order entered on October 26, 2021, just two days prior to the expiration of the previously extended statutory time period, the Commission did not request additional information from Wheeling or state that further information was needed. The Commission explained that it extended the deadline to resolve the dispute because the case was complex and the Commission needed additional time for consideration and review. The Order stated,

> **Given the complexity of this case and need for additional time for Commission consideration and review**, the Commission will invoke its authority under W. Va. Code §24-2-l(b)(6) to toll the statutory period 120 days from the date Wheeling filed a Revised Study, being July 15, 2021. The statutory deadline in this case should be extended to November 12, 2021 (emphasis provided).

The Legislature prescribed the circumstances under which the Commission could toll the 120-day period and complexity was not among them. A desire by the Commission for more time likewise was not among them. The Commission's declaration that it needed more time cannot operate to override the language of the statute and countermand the decision of the Legislature to revise the regulatory framework to limit the PSC's authority and permit local boards, councils and commissions to set utility rates for qualifying entities. Simply, the Commission did not have authority to extend the statutory time period "given the complexity of this case and need for additional time for Commission consideration and review." The PSC can toll, or suspend, the running of the 120-day statutory period only when it requires additional information.

The unreasonableness of the Commission's unilateral extension of its review period can be seen by the fact that, in 2020 the Legislature, with the support of the Commission, amended a

companion section of the 2015 regulatory scheme with the enactment of *West Virginia Code* §24-2-1(b)(7). In that section of the Code, the Legislature gave the Commission a longer period of time to resolve other disputes involving locally regulated water and sewer utilities. If the Commission needed more time to resolve disputes under *West Virginia Code* §24-2-1(b)(6), it could have done so at that time. It did not do so.

D. The Public Service Commission acted arbitrarily and capriciously when it made its third tolling calculation in a manner that was contrary to the Commission's first and second tolling calculations in this case and to established Commission policy and practice.

Consistent with *West Virginia Code* §24-2-1(b)(6), in the first two tolling orders entered on June 2, 2021, and July 22, 2021, the Commission suspended its 120 day review period and added days to the period that began on May 3, 2021, which is the date that Benwood filed its complaint. The running of the 120 day review period was then resumed at the conclusion of the number of days which the Commission stated was necessary. The Commission changed course, though, in the third tolling decision entered on October 26, 2021. In that Order, the Commission deviated from its suspension of the running of the original 120 day period and started a new 120-day clock calculated from the date that Wheeling filed its Revised Class Cost of Service Study rather than the date that Benwood filed its complaint:

> Given the complexity of this case and need for additional time for Commission consideration and review, the Commission will invoke its authority under W. Va. Code §24-2-l(b)(6) to **toll the statutory period 120 days from the date Wheeling filed a Revised Study, being July 15, 2021**. The statutory deadline in this case should be extended to November 12, 2021 (emphasis provided).

In the December 1, 2012 Order on reconsideration, the Commission also revised its rationale for the third tolling order. Instead of claiming its third tolling was to give itself more

time due to the complexity of the case, the Commission asserted that it was correcting an oversight:

> The Commission, in its July 22, 2021 Order, **did not invoke its full authority to toll the decision due date by 120 days from the date Wheeling filed its Revised Study.** Instead, the Commission granted Staff's request to toll the decision due date only 13 days from the then-established statutory decision due date of October 15, 2021. **The Commission recognized and corrected this oversight when it issued its October 26, 2021, Order that tolled the decision due date of this dispute 120 days from July 15, 2021.**
>
> * * *
>
> Wheeling's argument that the Commission could not decide this case after October 28, 2021, implies that the Commission had the "necessary information showing the basis of the rates, fees, and charges" on 120 days prior to October 28, 2021, or June 30, 2021. This is simply not the case. Wheeling failed to provide the "necessary information showing the basis of the rates, fees, and charges" for 73 days after Benwood filed its complaint, until July 15, 2021, when Wheeling filed a Revised Study. **Because Wheeling did not provide the necessary information to support its rates until July 15, 2021, W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll the 120-day period for resolution of this dispute from July 15, 2021.** The Commission correctly tolled the statutory decision due date for resolution of this dispute in its October 26, 2021 Order.

Comm'n Order at 3-4 (Dec. 1, 2021) (emphasis provided).

Under either rationale the Commission continued its inappropriate calculation for the running of the 120 days within which it was authorized to render a decision resolving the complaint:

The Commission is wrong in both orders. The statute is unambiguous. The full authority granted to the PSC is to toll the 120-day period that started on the filing date of Benwood's complaint:

> [T]he commission shall resolve said dispute within **120 days of filing. The 120-day period** for resolution of the dispute **may be tolled** by the commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed . . .

West Virginia Code §24-2-1(b)(6) (emphasis provided). The Legislature could have authorized the Commission to start the 120-day clock upon receipt of information that the Commission deems necessary, but lawmakers did not select that approach. The Commission must comply with the language of *West Virginia Code* §24-2-1(b)(6), which provides that the 120-day statutory period provided to the Commission to resolve the dispute begins on Benwood's filing date. It was arbitrary and capricious for the Commission to change course in the third tolling Order and start a new 120-day clock on the date that Wheeling filed its Revised Class Cost of Service Study.

Tolling is not a new or novel concept. The Commission has extensive experience with the time limit and tolling provisions of *West Virginia Code* §24-2-4(b), which sets forth the procedures to change rates of cooperatives and smaller municipally operated public utilities. That Code provision also has a 120-day time period that applied to Wheeling prior to the 2015 enactment of *West Virginia Code* §24-2-l(b)(6). Tolling is similarly routine in certificate proceedings pursuant to *West Virginia Code* §24-2-11, which establishes a window of time for the Commission to render its decision.

In 2001, when an applicant asked the Commission to indefinitely delay processing a certificate application so that Staff could seek a utility to perform administrative, operating and maintenance functions of the sewer system, the Commission explained tolling as follows:

> It was not possible to grant a 90-day extension due to the statutory time limit in which certificate cases must be processed. Hubbard Heights is willing to toll, or suspend, the running of the time period in which the Commission must process this case, so that Staff may provide the assistance Hubbard Heights requested. In the alternative, Hubbard Heights asks that its application be dismissed. **Under these circumstances, it is reasonable to grant Hubbard Heights' motion to toll. The Commission will suspend the running of the statutory time period for 90 days as Staff suggests** (emphasis provided).

Hubbard Heights Subdivision Homeowners Ass'n, Case No. 01-1108-S-CN, Comm'n Order at 2 (Dec. 18, 2001).

Consistent with the language of Hubbard Heights, in 2007 the Commission similarly granted a "request to toll, **that is suspend,** the statutory deadline" to process a certificate application in Hancock County Public Service District, Case No. 06-0582-PSD-CN, Comm'n Order at 1 (Jan. 23, 2007) (emphasis provided). Black's Law Dictionary also defines the word "toll" to mean "suspend or stop temporarily." Black's Law Dictionary 1625 (9th ed. 2009).

The Commission acted arbitrarily and capriciously by starting a new 120-day clock on a date unrelated to the May 3, 3021 filing of Benwood's complaint instead of temporarily stopping the existing 120-day time period consistent with long-standing Commission policy and practice. In doing so, the Commission improperly extended its jurisdictional authority to resolve the Benwood complaint.

VI. MOTION TO STAY THE NOVEMBER 12, 2021 AND DECEMBER 1, 2021 ORDERS ENTERED BY THE PSC

The $3.86/Mgal wholesale rate that Wheeling set by Ordinance was in effect while the PSC case was pending, as *West Virginia Code* § 24-2-1(b)(6) requires. The final Order entered on November 12, 2021 by the Public Service Commission states that the lower $2.87/Mgal rate that the PSC established is to be effective from the date of the Order. Comm'n Order at 13 & App. A (Nov. 12, 2021).

On November 22, 2012, Wheeling requested that the Public Service Commission stay the finality of the November 12, 2021 final Order, but Wheeling's request was denied by Order entered on December 1, 2021.

To prevent Wheeling from incurring unnecessary costs associated with the revision of its rates during the consideration of this Petition for Appeal and to maintain the *status quo* until this Court determines whether the decision of the Public Service Commission complied with the statutory requirements in the revised regulatory framework that the Legislature adopted to limit the Public Service Commission's authority over locally rate regulated utilities, it is respectfully requested that this Court enter an Order to stay the effectiveness of the decisions that the Public Service Commission entered on November 12, 2021 and December 1, 2021.

The impact of the Commission's decision is far reaching. Not only is the Commission action contrary to the revised regulatory framework that applies to any locally rate regulated utility, but the November 12, 2021 decision specifically affected the rates of all of Wheeling's wholesale customers, not just Benwood, West Virginia wholesale customers of Wheeling[11] that purchase wholesale sewer treatment services or supplies of treated water are able to request approval from the Commission to increase the rates that they charge to their own customers (the end users) via an abbreviated rate proceeding that passes through the effect of the higher rate without consideration of other costs and expenses, pursuant to Rule 30B of the Commission's Rules for the Construction and Filing of Tariffs, 150 C.S.R. Series 2.

Wheeling is also aware that at least one of its wholesale sewer customers, Ohio County Public Service District, which is, based upon the same statutory authority that limits the Commission's jurisdiction due to its number of customers and annual revenues, locally rate regulated, increased its rates as a result of the passage of Wheeling's rate ordinance.[12] If no stay of the Commission's Orders in this case is granted, Wheeling will have to reduce the rate to Ohio

[11] Wheeling provides wholesale service to utilities in Pennsylvania as well as West Virginia.

[12] See April 20, 2021 Resolution of The County Commission of Ohio County, West Virginia approving Ohio County Public Service District rates for furnishing Sewer Service. Filed with the Public Service Commission on May 20, 2021 at the Commission's website at RESUS OHIO 21A.

County Public Service District and the other wholesale customers. However, there is no obligation on Ohio County Public Service District or any of the wholesale customers who have received rate relief under Rule 30B, for those utilities to reduce the rates charged to their customers; in essence the end result would be a windfall for the wholesale customers.

Moreover, lenders provide funds for utility construction and repairs via financial agreements that often are in effect for 40 years. In deciding whether to extend credit, and if so under what terms, lenders and investors look closely at the revenues that utilities are expected to generate during the term of the loan or bond and they consider the likelihood that the utilities will be able to implement prompt rate relief when necessary. Concerns from lenders and investors, as reflected by the statement by Moody's that "West Virginia's rate approval process is arduous, lengthy, and elevates risks to bondholders," prompted the Legislature's consideration and adoption of the revised regulatory framework in 2015. That legislation was intended to delegate initial rate decisions to local boards, councils and commissions, simplify the rate approval process and limit the authority of the Public Service Commission over locally rate regulated utilities. Lending institutions and investors rely upon the timeliness of Commission decisions in resolving the rate disputes that affect the ability of the locally rate regulated entities to meet their debt payment obligations. The November 12, 2021 and December 1, 2021 Orders of the Public Service Commission are contrary to law and against public policy.

VII. CONCLUSION

Based upon the foregoing, the City of Wheeling respectfully requests this Honorable Court to suspend the Commission's Orders entered on November 12, 2021, and December 1, 2021, and determine that those orders should be vacated.

Respectfully submitted,

City of Wheeling

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

CITY OF WHEELING,

Defendant Below/Petitioner,

v. **[PSC CASE NO. 21-0372-S-WI]**

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and CITY OF BENWOOD,

Respondents.

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, counsel for the City of Wheeling, do hereby certify that the foregoing City of Wheeling's Petition For Appeal, together with the Certification regarding filing of an Appendix, has been served upon the following parties of record in the underlying Public Service Commission of West Virginia proceeding, on this 10th day of December, 2021, in the manner so indicated:

Via Hand Delivery:

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