

**BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON**



CITY OF WHEELING,

Petitioner,

v.

DOCKET NO. 21-1001

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

Respondents.

**CITY OF WHEELING SUPPLEMENT TO PETITION FOR REHEARING
GRANTED ON SEPTEMBER 20, 2022**

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December 19, 2022

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NOW COMES the City of Wheeling (“Wheeling”) pursuant to the Court’s September 20, 2022 Order and supplements its Petition for Rehearing.

INTRODUCTION

On April 26, 2022 , the Court affirmed the November 12, 2021 final Order of the Public Service Commission of West Virginia (“Commission”) in the case of City of Benwood Sanitary Bd. v. City of Wheeling, Case No. 21-0372-S-WI (“April 26 Decision”). Wheeling’s appeal is based on the fact that the November 12, 2021 Commission Order was entered outside of the 120-day period provided in *West Virginia Code* §24-2-1(b)(6) for the Commission to resolve the dispute regarding the increase in the resale rate adopted by Wheeling for sewer service to the City of Benwood (“Benwood”).

In its April 26 Decision, a majority of the Court construed the unambiguous statute, upheld the Commission Order, and, contrary to the plain language of *West Virginia Code* §24-2-1(b)(6) requiring the Commission to resolve a dispute between Wheeling and Benwood within 120 days of the date of the filing of a petition, found that the 120 day period runs from the date the Commission decides that it has sufficient information from the utility in support of its new rates. This reading of the statute is contrary to the law.

ARGUMENT

The West Virginia Legislature in 2015 established a new paradigm for the regulation of large publicly owned water and sewer utilities by stating that such utilities “are most fairly and effectively regulated by the local governing body with respect to rates” and further, “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.”¹

One area in which the new legislation permits the Commission to exercise jurisdiction over large municipal utilities such as Wheeling is found at *West Virginia Code* §24-2-1(b)(6). Under that section, the Commission has jurisdiction to resolve disputes between political subdivisions regarding a change in rates. However, that section only permits the Commission to exercise such authority upon the filing of a request for an investigation within thirty (30) days of the act or omission of the political subdivision. Once the Commission’s jurisdiction is invoked under that section of the *Code*, there are two other procedural limits to the Commission’s exercise of jurisdiction. The first is that the Commission “shall resolve the dispute within 120 days of filing” the request for investigation, and the second is that “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 required by the commission is filed:” These two limits to the Commission’s authority are under review in this case.

The statute says that the 120-day clock on the Commission’s jurisdiction to resolve the dispute starts on the day the request to investigate the dispute is filed with the Commission. In this case, that day was May 3, 2021. 120 days from the date of filing of the dispute would have been August 31, 2021.

¹ See *West Virginia Code* §24-1-1(j).

On June 2, 2021 the Commission entered an Order (“June 2 Order”) requiring Wheeling to provide information, including a customer class cost of service study (“CCOSS”), to support the rates that had been adopted by City ordinance within thirty (30) days of the Commission Order; by July 2, 2021.² Further, the Commission tolled the 120-day review period for forty-five (45) days,³ and, as Justice Walker observed in her dissent, the statutory decision due date was extended forty-five days to October 15, 2021.⁴ Under the proper reading of the statute, the Commission only had the authority to toll the review period at this point for the 30 day period which it provided for Wheeling to provide the support information; thus until September 30.

On July 2, 2021, Wheeling timely filed all of the information required by the June 2 Order, including a CCOSS which had been prepared following the June 2 Order.⁵ But for the

² It is interesting that while nothing in the statute or Commission rules requires that utilities perform a CCOSS to support rates, and the Legislature determined at *West Virginia Code* §24-1-(j) that local governments are most fairly and effectively regulated by the local governing body with respect to rates, it is the Commission’s requirement that Wheeling perform a CCOSS that contributed to the Commission’s miscalculation of the statutory period of its review jurisdiction.

³ In the Court’s majority opinion, in referring to the June 2, 2021 Order, Justice Moats recognized that the Commission can only toll the 120-day review period until the necessary information showing the basis of the rates, fees, and charges or other information required by the commission is filed. At page 3 of the April 26 decision, he stated; “for reasons that are unclear from the record, the date was tolled for forty-five days until October 15, 2021.” Further, in footnote 2 of the April 26 decision, it states: “rather than toll the deadline for thirty days, the deadline was tolled for forty-five days. The briefs and order do not make clear as to why the tolling was for forty-five days.”

In fact, in its Statement of Reasons filed with the Court on January 28, 2022, the Commission acknowledged that its June 2, 2021 tolling order was incorrect and beyond its authority. On page 15 of the Statement of Reasons, the Commission stated:

The Commission agrees with the Wheeling statement in footnote 10 on page 16 of its Petition that **the Commission improperly presumed a statutory decision date of October 15, 2021 in its June 2, 2021 Order** when it ordered Wheeling to provide supporting information for its rate increase within 30 days. (Emphasis added)

⁴ See Justice Walker’s May 5, 2022 dissent at 2.

⁵ Historically, CCOSSs have not typically been required by the Commission for support of municipal rate changes. As long as the last approved rate design is not changed, such utilities have been permitted to rely on an “across the board” increase (meaning all classes of service receive an equal percentage increase in

Commission's miscalculation of its tolling power in its June 2 Order, the 120 day review period should have, at this point, begun to run again.

On July 15, 2021, Wheeling, on its own and without a request from either the Commission or its Staff, filed a revised CCOSS to address some issues that the Staff had informed the City's consulting engineer had been incorrect in the July 2 filing. Although no CCOSS was required to be filed until the Commission's June 2 Order, and the Commission had not requested the additional information be filed, the Commission, upon the request of the Staff, entered a second tolling Order on July 22, 2021 to give the Staff additional time to review the revised CCOSS and tolled the statutory review period 13 days from October 15, 2021 to October 28, 2021. In giving itself, the Staff, and parties an additional 13 days, to investigate the revised resale rate, the Commission failed to take into consideration the fact that the 13 days should have been added to September 30, rather than to the October 15 date, due to the fact that the Staff and all parties had already had an extra 15 days to review the information previously provided. Thus, the 13 days should have led to a new statutory review date for the Commission to complete its 120 day investigation ending on October 13.

Following the July 22, 2021, Order, the Staff of the Commission issued its report and a hearing was held before an Administrative Law Judge ("ALJ") on August 17, 2021. After the hearing and the filing of briefs by the parties, the ALJ issued a Recommended Decision on September 13, 2021 recommending approval of Wheeling's resale rate. Exceptions were filed by the Staff and Benwood on September 24 and September 28, 2021 respectively.

their rates) and a cash flow analysis to support the overall level of rate increase. Wheeling adopted an equal percentage across the board increase in April 2021 to the prior approved rates and thus did not prepare a CCOSS until ordered to do so on June 2, 2021.

On October 26, 2021, thirteen days after the proper 120 day review period following the first two tolling orders had expired, the Commission issued its third tolling order and extended the review period again to November 12, 2021. This tolling order was not based upon any request for additional information as required by the statute and, unlike the first two tolling orders issued on July 2 and July 22, 2021, was based upon a different method of calculating the statutory review period starting from the date the last information to support the rate increase had been filed, rather than starting such period from the date of the filing of the request for an investigation. In attempting to justify this extension, the Commission stated that the matter was complex and that it needed more time to review the record.

The Majority's failure to deal with the Commission's initial miscalculation in the Court's April 26, 2022 decision exacerbates the Commission's misreading of the statute.

Justice Walker correctly observed that it was not necessary to define the term "toll" and that the Commission clearly understood how to toll the running of a Commission review period for complaint cases involving locally rate regulated utilities ("LLR utilities") like Wheeling.

The 120 day period to resolve Benwood's dispute with Wheeling began on May 3, 2021. It stopped on June 2, 2022 and should have started again on July 3; stopped again on July 22, 2021; and should have started again on August 4, 2021 and expired on October 13, 2021. A new 120 day period should not have commenced on July 15, 2021.

On pages 10 – 11 of the April 26 decision, the Majority stated:

By giving the PSC a full 120 days to evaluate disputes with *all of the necessary information* before it, the statute meets the Legislature's goal for the PSC to timely evaluate disputes and to safeguard the interests of the public and the utilities provided to it. Therefore, the PSC properly tolled the 120-day time period for resolution of the dispute. This interpretation ensures that the PSC will have sufficient time to consider all of the necessary information provided to it.

This reasoning ignores the fact that the statute does not allow the Commission to start the clock on any day but the filing of the request for review. The statute allows the Commission to toll, or stop the running of, the 120 day period until the Commission receives information that it has requested. The Majority's reasoning also ignores the fact that the Commission had **more** than 120 days to consider all of the necessary information. Starting with the language of the statute, the Commission had until August 31 to review the information that was originally filed, The Commission then had an additional 58 days of tolling from the first two tolling orders, plus another 15 days from the October 26 Order; giving the Commission a total of 193 days.

This is not what the Legislature intended when it limited the Commission's review to 120 days from the date of filing the request for investigation. The Legislature, in enacting *West Virginia Code* §24-2-1(b)(6) in 2015 was responding to the desires of publicly owned water and sewer utilities to restrict the Commission's exercise of jurisdiction over their rates between political subdivisions and the time it took the Commission to resolve disputes. The 120 day time period was chosen because that is the same length of time the Commission had under *Code* §24-2-4b to resolve such disputes prior to the enactment of Senate Bill 234 in 2015, and that is the same section of the law and period of time that continues to apply to review of the similar disputes between small municipalities. The Legislature was keenly aware of the time issue when they enacted *Code* §24-2-1(b)(6). The Commission's action in this case is directly opposed to the Legislative intent.

On pages 11-12 of the April 26 decision, the Majority of the Court relied on an unsupported assertion by the Commission in its Statement of Reasons filed January 28, 2022⁶ when it stated:

⁶ See Statement of Reasons at page 12.

Wheeling's "place on hold" interpretation would permit the non-complaining party to drag its feet throughout the 120-day time period by failing to timely provide all of the information necessary for the PSC to resolve the complaint. In these disputes, because **the non-complaining party has absolute control over whether the PSC has the necessary information before it** to resolve the complaint, it is a fair and reasonable interpretation of the statute to afford the PSC the full 120-day time period after all of the necessary information is provided to render its decision.

Emphasis added.

It is simply untrue that the non-complaining party has absolute control of whether such information is filed. In fact, the Commission is the entity in control. If the Commission does not have the information it needs, it can issue a tolling order or orders as it did three separate times in this case. Further, if the non-complaining party ultimately does not produce the information when it is scheduled to be filed, the Commission can proceed to hearing and decide in favor of the complaining party based upon the non-complaining party's failure to produce evidence sufficient to support the rates subject to the investigation.

In this case, the Commission determined that it needed a CCOSS that was not required by statute or Commission rule. It was the Commission that required the CCOSS to be filed within 30 days and added an extra unauthorized 15 days to the tolling period permitted by statute. Wheeling met the 30 day time period for production of the CCOSS, and it provided a revised CCOSS on its own, for which the Commission added another 15 day tolling period for its review. There was no foot-dragging by the utility in this case and had there been, the Commission had the tools to address such.

It was the Commission that miscalculated the permitted tolling period in its first tolling order, and, upon discovery of the mistake that it made, the Commission came up with an excuse in its October 26, 2021, Order to justify its action; after the running of the 120 day review period had expired.

CONCLUSION

Based upon the foregoing, Wheeling respectfully requests that the Court vacate the Commission's November 12, 2021 Final Order for lack of jurisdiction.

CITY OF WHEELING

By Counsel



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CERTIFICATE OF SERVICE

I, John R. McGhee, Jr., counsel for the City of Wheeling, do hereby certify that the foregoing City of Wheeling Supplement to Petition for Rehearing has been served upon the following parties of record on this 19th day of December, 2022, via e-mail and First Class U.S.

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