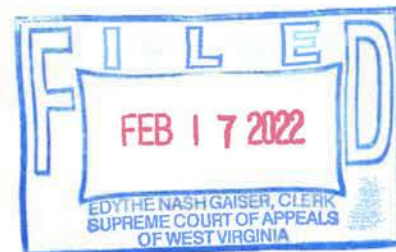


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BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



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CITY OF WHEELING,

Petitioner,

v.

DOCKET NO. 21-1001

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

Respondents.

PETITIONER'S REPLY BRIEF

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February 17, 2022

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**BEFORE THE
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CITY OF WHEELING,

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DOCKET NO. 21-1001

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

Respondents.

PETITIONER’S REPLY BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA:

The City of Wheeling (“City” or “Wheeling”) petitioned for appeal because the Public Service Commission of West Virginia (“Commission” or “PSC”) *West Virginia Code* §24-2-1(b)(6)) did not resolve a complaint filed by one of Wheeling’s wholesale customers within the time period provided in *West Virginia Code* §24-2-1(b)(6). The statutory language is mandatory, and the Commission did not meet this deadline.

I. STATEMENT OF THE CASE

The Commission’s Statement of Reasons provides an incorrect Statement of the Case in its first sentence when it states that Wheeling “argues that the Commission should not have exercised its statutory right to utilize a 120-day review period to evaluate a formal rate complaint by a wholesale sewage treatment customer of the City of Wheeling.” In fact, this case

involves the City of Wheeling's argument that the Commission exceeded its statutory authority and powers by taking in excess of the 120 day statutory period permitted by *West Virginia Code* §24-2-1(b)(6) to resolve the complaint filed by the City of Benwood ("Benwood"), a wholesale sewage treatment customer of the City of Wheeling.

II. SUMMARY OF ARGUMENT

In the very first sentence of its Summary of Argument, the Commission's Statement of Reasons provides the basis for this Court's reversal of the Commission's decision. In that sentence, the Commission states that the statutory requirement is for the Commission "to decide a complaint filed under *West Virginia Code* §24-2-1(b)(6) within 120 days of the date that the public utility provided the Commission with necessary information and support of its rate increase."

The statute clearly and unambiguously states that "the commission shall resolve said dispute within 120 days of the date of filing" the complaint. While the statute does allow the Commission to toll the 120 days until necessary information is filed, contrary to the representations of the Commission, it does not permit the Commission to exercise any discretion to construe the length of time provided in the statute to review the complaint as suggested by the Commission.

III. STANDARD OF REVIEW

The Commission misstates the standard of review in this case. In its first paragraph in the Standard of Review section of its Statement of Reasons, the Commission references a statement of the Court in Pool v. Greater Harrison County Public Service District, 241 W.Va. 233, 237, 821 S.E.2d 14, 18 (2018) regarding interpreting a statute or an administrative rule or

regulation. In this case, it is not necessary to construe the language of *West Virginia Code* §24-2-1(b)(6). At Syllabus Pt. 2 in Berkeley County Public Service Sewer District v. The West Virginia Public Service Commission; *et al.*, 204 W.Va. 279, 512 S.E.2d 201 (1998), the Court stated:

“In deciding whether an administrative agency’s position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. **If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.**” Syl. Pt. 3, in part, *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995). (Emphasis added)

IV. ARGUMENT

A. The Legislature authorized the Commission 120 days to resolve a dispute between a political subdivision of the state providing wholesale water and/or wastewater treatment or other services.

In its first argument, the Commission misstates the statutory provision that is before the Court in this case. At page 6 of its Statement of Reasons, in section A. of its first argument, the Commission states that it has 120 days “to review cost-based justification for a municipal rate ordinance and resolve a wholesale customer rate dispute.” That is not what the statute states.

As discussed in Wheeling’s Initial Brief, the legislative scheme adopted by the Legislature with the passage of SB 234 in 2015 established a revised process for the regulation of publicly-owned water and sewer utilities.

In *West Virginia Code* §24-1-1(j) the Legislature recognized that large municipal utilities like Wheeling are most fairly and effectively regulated by the local governing body with respect

to rates.¹ In the case of Wheeling, the entity deemed by the Legislature as most fairly and effectively regulating the City's utility rates is the Wheeling City Council.

In order to recognize the interests of customers of large municipal utilities, the regulatory scheme adopted by the Legislature in 2015 provides an avenue for wholesale customers such as Benwood, to challenge the ordinance establishing the rates of the municipal utility through *West Virginia Code* §24-2-1(b). In this case, Benwood filed a complaint with the Commission under *West Virginia Code* §24-2-1(b)(6). That subsection provides that the Commission has 120 days to resolve the dispute. *West Virginia Code* §24-2-1(b)(6) further provides that the 120 days for the Commission to resolve the complaint starts from the date of the filing of the Complaint. It also states that the 120 day period to resolve the complaint can be tolled by the Commission until information showing the basis of the rates being complained of deemed necessary by the Commission, are filed.

The City does not challenge the Commission's authority under the statute to toll the running of the 120-day time period until necessary information is filed, but *West Virginia Code* §24-2-1(b)(6) starts the 120 day review clock at the date of the filing of the complaint and the Commission must act in accordance with the statute. Instead, the Commission asserts that it may start the running of the 120-day clock when necessary information is filed,² despite the

¹ This was previously recognized by the Court in Pool v. Greater Harrison County Public Service District, 241 W.Va. 233, 240, 821, S.E. 2d 14, 21 (2018) where it stated:

The Legislature plainly intended to limit the PSC's jurisdiction when it adopted *West Virginia Code* §§ 16-13A-9(a)(2) and 24-2-4a. When the Legislature modified those statutes in 2015, it perceived that the water and sewer rates charged by larger public service districts are best regulated by local elected officials and not the PSC. *See* W.Va. Code §24-1-1(j). These statutes limited the PSC to regulating only the rates charged by smaller public service districts.

² See Statement of Reasons at pages 7, 15 and 16.

Legislature’s requirement to resolve the matter within 120 days “of filing.” The Commission does not have the “authority to determine that the 120-day review period begins on the date the utility files the necessary information.”³

Tolling is not a new concept to the Commission and its regulatory responsibilities, and the Legislature was aware of this at the time of enactment of *West Virginia Code* §24-2-1(b). A substantial portion of the Commission’s work is governed by statutorily-established time periods containing provisions for tolling.⁴ The Commission considers tolling multiple times each year and has repeatedly held that the Commission does not have authority on its own motion to extend a statutory time period because the Legislature provided a time limit in the statute to protect the utility by ensuring prompt action by the Commission.⁵

For at least fifteen years, the Commission has held that a statutorily-established time period, whether for a certificate application or a rate case operates to ensure prompt action by the Commission. The Commission has repeatedly deemed the time period for the tolling provided in

³ *Id.* at 7.

⁴ See, e.g. *West Virginia Code* §§ 24-2-1(b)(6), 24-2-1(b)(7), 24-2-3(b) and 24-2-4b(b).

⁵ A review of the Commission’s records since 2006 reveals at least 47 Orders where the Commission has determined that the Legislature has established a statutory timeline for the benefit of the utilities regulated by the Commission process involved in certificate applications or rate proceedings. These several cases are illustrative of those Commission decisions: Pleasants Co. PSD, County Comm’n of Pleasants Co. & Pleasants Co. Dev. Author., Case No. 08-2110-PWD-PC-CN, Comm’n Order at 2, 3 (Discussion & Conclusions of Law 1 & 3) (Mar. 27, 2009) & 2009 WL 10213169, Comm’n Order at Discussion & Conclusion of Law 1 (July 29, 2009); Mountaineer Gas Co., Case No. 15-0003-G-42T, 2015 WL 668311, Comm’n Order at Conclusion of Law 2 (Jan. 21, 2015); Clay County PSD, Case No. 16-0906-PWD-CN, 2016 WL 6082462, Comm’n Order at Discussion (Oct. 11, 2016); Center PSD, Case No. 20-0126-PSD-CN-42A, 2019 WL 9748082, Comm’n Order at Discussion (July 28, 2019) & 2020 WL 1656374, Comm’n Order at Discussion (Mar. 30, 2020)

the statute is a procedural protection which the entity that the statute is written to protect, but not the Commission, may request be waived.⁶

The term “toll” is not in need of interpretation. Indeed, the Commission has repeatedly ruled that to toll a statutory time period is to suspend it, extend it, or put it on hold.⁷ The Commission argument in its Statement of Reasons that “to toll” may be subject to interpretation under different statutory provisions under its authority⁸ cannot stand in light of these Commission decisions; including the recent case of William Haines v. Berkeley Co. PSD, Case

⁶ See footnote 5.

⁷ See, e.g. Hubbard Heights Subdivision Homeowners Ass’n, Case No. 01-1108-S-CN, 2001 WL 36949317, Comm’n Order at Conclusion of Law 1 (Dec. 18, 2001) (“Hubbard Heights is willing to toll, or suspend, the running of the time period in which the Commission must process this case.”); Town of Marlinton, Case No. 04-0565-S-CN, 2004 WL 7079577, Comm’n Order at Discussion & Conclusion of Law 2 (Aug. 5, 2004) (“The Town’s request to toll, that is suspend, the statutory deadline is reasonable . . .”) & 2005 WL 7858951, Comm’n Order at Conclusion of Law (Jan. 4, 2005) (“[T]he Town’s request to toll, or in effect suspend, the statutory deadline for another sixty (60) days is unreasonable and shall be denied.”); City of Mannington, Case Nos. 04-1455-W-MA & 04-1743-W-CN, 2004 WL 7080461, Comm’n Order at Background (Nov. 16, 2004) (“Mannington did not state how long it wished to toll, or put on hold, the period to process this matter.”); Beallair Homes, LLC, Case No. 05-0760-S-CN, 2005 WL 7858736, Comm’n Order at Conclusion of Law (Dec. 23, 2005) (“Beallair’s request for a 180-day extension of the statutory due date . . .”) & 2007 WL 9190595, Comm’n Order at Conclusion of Law 1 (Jan. 29, 2007) (“Beallair’s request for an additional 60-day extension of the statutory due date . . .”); Putnam PSD, Case No. 06-0743-PSD-CN, 2006 WL 8072718, Comm’n Order at Discussion (Oct. 16, 2006) (“The District’s request to toll, that is suspend, the statutory deadline. . .”) & 2006 WL 8072719, Comm’n Order at Discussion (Dec. 22, 2006) (“The District’s request to toll, that is suspend, the statutory deadline . . .”); Hancock Co. PSD, Case No. 06-0582-PSD-CN, 2007 WL 9190650, Comm’n Order at Discussion (Jan. 23, 2007) (“The District’s request to toll, that is suspend, the statutory deadline . . .”); City of Elkins, Case No. 14-0906-S-CN, 2014 WL 351935, Comm’n Order at Conclusion of Law 1 (July 14, 2014) (“It is reasonable to toll the running of the suspension period for thirty days which extends the statutory suspension to . . .”); Little Creek PSD, Case No. 21-0716-PWD-CN, Comm’n Order at Conclusion of Law 1 (Jan. 11, 2022) (“It is reasonable to toll the statutory deadline until June 27, 2022, to allow an extension of time . . .”); William Haines v. Berkeley Co. PSD, Case No. 21-0765-LRR-W-C, 2022 WL 294443, Comm’n Order at Discussion (Jan. 26, 2022) (“The Commission may, however, toll or suspend the 180-day period. . .”)

⁸ See Statement of Reasons at page 14.

No. 21-0765-LRR-W-C at Discussion (Jan. 26, 2022) which was filed under *West Virginia Code* §24-2-1(b).⁹

The Commission points to the definition of “toll” in Black’s Law Dictionary 11th Ed. (2019) and argues that the Commission’s construction to begin the 120-day statutory time limit on July 15, 2021, is permitted because the definition includes “annul, take away, abate, and stop.” Commission Statement of Reasons at 14-15. The Commission is incorrect. The second entry in the Black’s definition addresses the tolling of a statutory time period as follows:

2. (Of a time period, esp. a statutory one) to stop the running of; to abate
<toll the limitations period>.

Consistent with the second definition in Black’s, the Commission has on multiple occasions in the past correctly held that to toll is to suspend, extend, or put on hold. That is the same application of the term used in the first two tolling orders in this case. To argue that the 120 day clock starts anew upon the filing of new information is opposite of “to stop the running of” as referenced in Black’s definition.¹⁰

In the third tolling Order, however, the Commission used the July 15, 2021 filing of the Revised Class Cost of Service Study to begin a new 120-day clock, instead of tolling, or suspending, the running of the existing time period. This is contrary to *West Virginia Code* §24-2-1(b)(6), which starts the 120-day period in which the Commission has jurisdiction “at filing.”

⁹ Interestingly, the Haines case was filed under *West Virginia Code* §24-2-1(b)(7) which was also originally enacted by the Legislature with the passage of SB 234 in 2015, but was amended in part at the Commission’s request in 2020 to provide the Commission with 180 days to resolve complaint cases filed under that section.

¹⁰ Notably, in the second tolling Order entered July 22, 2021, the Commission addressed the extra time that Staff requested to review the July 15, 2021 filing of Wheeling’s Revised Class Cost of Service by stopping the running of, or extending, the statutory time period for 13 days and stated that the running of “statutory due date is tolled until October 28, 2021.”

The Commission argues that the Legislature has not defined “to toll.” PSC Statement of Reasons at 12. Defining “toll” is not necessary; the meaning is well understood, and the Commission has decades of experience in tolling statutory time periods. If the Legislature wanted a different meaning for “to toll” than the ordinary meaning historically used by the Commission, the Legislature would have provided an alternate meaning of “to toll” in the statute. Also, the Commission could have sought a statutory change at the same time as the Legislature amended *West Virginia Code* §24-2-1(b)(7) in 2020. It did not do so.

This Court has previously recognized that:

If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.” Syl. pt. 3, in part, *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

B. “The complexity of the case” was the original reason stated by the Commission for the improper extension of the tolling period.

The Commission’s brief second section of its Statement of Reasons belies the facts of this case and catches the Commission in a mistake of its own making. At page 11 of its Statement of Reasons, the Commission asserts:

The Commission referenced the complexity of the case in its October 26, 2021 Order only to explain why the full 120 day review period as provided in W.Va. Code §24-2-1(b)(6) was necessary in lieu of a shorter time period.

It is important to review the facts of this matter. First, the October 26, 2021 Order that extended the Commission’s review period was issued *sua sponte* two days before the “statutory due date” of October 28, 2021.¹¹ The October 26, 2021 Order did not reference any additional information that was necessary for the Commission to reach its decision beyond that which was filed on July

¹¹ See footnote 10.

15, 2021, and it did not give any of the parties (Wheeling, Benwood, Staff of the Commission) or the Administrative Law Judge, any additional time to present, argue and decide the case. It only gave the Commission itself extra time beyond the October 28th date that it had previously established as the end of the 120 day statutory review period.

The October 26, 2021 Order gave as the sole reason for the extension of the tolling period the following:

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 §24-2-1(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.

The statutory review period had already been extended to October 28, 2021 for the filing of the July 15, 2021 revised study. Thus, the reason for the further extension was as stated in the October 26, 2021 Order; “the complexity of this case and the need for additional time for Commission consideration and review”.

As argued above, the Commission’s interpretation of the language of the statute is at odds with the clear language of the statute. The 120 day tolling period does not run from the date of the filing of information provided pursuant to prior tolling orders. It runs from the date of the filing of the complaint. The Commission’s October 26, 2021 Order was *ultra vires* and exceeded the Commission’s statutory authority. The decision to grant itself additional time to review the evidence in the case denied the Parties to the case their due process rights to further develop their case and the ALJ further time to review the evidence in the case to reach his decision which was consistent with the original ordinance adopted by the City.

At the time of entering its July 22, 2021 Order establishing the end of the tolling period as October 28, 2021, the Commission stated:

IT IS THEREFORE ORDERED that the running of the statutory due date is tolled until October 28, 2021. (Emphasis added)

The Commission did not say that the running of the statutory due date began on July 15, 2021 and is tolled until October 28, 2021. It stated that the running of the statutory due date is tolled until October 28, 2021. The statutory due date is 120 days from the date of filing and can be tolled solely for the receipt of information deemed necessary by the Commission. The statute does not say that it can be tolled again beyond the statutory due date where no additional information is requested beyond that which was provided to all parties before the ALJ's Recommended Decision for the benefit of the Commission due to the complexity of the case.

C. The Commission's October 26, 2021 Order extending the statutory decision due date to November 12, 2021 was Arbitrary and Capricious.

The Commission acted arbitrarily and capriciously on October 26, 2021, when the Commission, on its own motion, extended the time period in which it could resolve Benwood's complaint. In at least 47 orders issued since 2006, the Commission has consistently held that statutory time limits are enacted by the Legislature to protect the utility by (i) ensuring prompt consideration by the Commission, (ii) ensuring that cases move to timely conclusions, and (iii) guaranteeing expeditious processing of the case.¹² The Order issued on October 26, 2021, cannot be reconciled with those holdings that the Commission has made over the years.

¹² See footnote 5.

The Commission's October 26, 2021 Order voided the procedural protection that the statutory time limit in *West Virginia Code* §24-2-1(b)(6) provides to locally rate regulated utilities, such as Wheeling.

West Virginia Code §24-2-1(b)(6) allows the Commission to toll the 120-day window of time for one reason only -- "until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed."

Wheeling does not challenge the Commission's authority in the first and second tolling Orders to extend the statutory time period pending the receipt of necessary information. On October 26, 2021, the Commission granted itself additional time to review the record in the case without statutory authority to do so. This third tolling of the statutory time period did not require Wheeling to provide any necessary information. *West Virginia Code* §24-2-1(b)(6) does not authorize the Commission to toll the running of the statutory time period for any other reason.

It is curious that the Commission did not assert that the case was complex or that additional time was necessary because of such complexity until after (i) the ALJ issued a Recommended Decision on September 13, 2021,¹³ (ii) Exceptions were pending to that Recommended Decision, and (iii) two days remained until the statutory deadline of October 28, 2021 established in the second tolling Order. Stated another way, the Commission did not determine that additional information was necessary for the ALJ and other parties to proceed in

¹³ The Commission provided 65 days for the parties to develop the case and for the ALJ to issue a Recommended Decision. That is the number of days between Wheeling's July 15, 2021 filing of the Revised Class Cost of Service Study and the September 18, 2021 deadline for the ALJ. During this timeframe, the ALJ conducted a hearing, considered Initial and Reply Briefs and prepared the Recommended Decision. The ALJ actually completed his work five days early on September 13, 2021; giving the Commission an additional five days from receipt of exceptions to the ALJ's Recommended Decision, to review the case. During the proceedings before the ALJ, no entity requested further tolling or suggested that additional information was necessary.

the case. On October 26, 2021, the Commission arbitrarily, capriciously, and without authority, extended the statutory window of time to November 12, 2021, in the absence of any suggestion by the ALJ, Staff, Wheeling, Benwood, *Amicus Curiae* West Virginia Water Development Authority or the Commission that additional information was necessary to resolve the dispute.

On November 12, 2021, the Commission entered its substantive decision on Benwood's complaint and required Wheeling to charge a lower wholesale rate not only to Benwood, but to all of the Wheeling wholesale customers. On November 22, 2021, Wheeling requested a Stay of the November 12, 2021 Order and Reconsideration of that Order.

On December 1, 2021, the Commission denied Wheeling's request and provided a different reason for starting a new 120-day time limit, writing that the Commission's second tolling 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 the Statement of Reasons, the Commission asserts that it "complied with the statutory requirement to decide the complaint within 120 days of the date that the public utility provided the Commission with necessary information," but the Commission is wrong. The 120 day statutory review provision is "within 120 days of filing." The Commission approach reads the words "of filing" out of the statute, instead of giving meaning to all of the words in *West Virginia Code* §24-2-1(b)(6).

In Berkeley County Public Service Sewer District v. The West Virginia Public Service Commission; *et al.* 204 W.Va. 279, 512 S.E.2d 201 (1998), the Court stated:

We explained recently in Syllabus Point 11 of *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995), that “ ‘ [t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.’ Syllabus Point 1, *Smith v. State Workmen’s Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).” Syl. pt. 2, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992). “Syl. pt. 2, *State ex rel. Water Development Authority v. Northern Wayne County Public Service District*, 195 W.Va. 135, 464 S.E.2d 777 (1995).” “ ‘[A] common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them.’ ” *Keatley v. Mercer County Bd. Of Educ.*, 200 W.Va. 487, 493, 490 S.E.2d 306, 312 (1997) (quoting *Bullman v. D & R Lumber Co.*, 195 W.Va. 129, 133, 464 S.E.2d 771, 775 (1995)). Similarly, this Court has previously recognized the “traditional rule of statutory construction that ‘the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.’ ” *Keatley*, 200 W.Va. at 495, 490 S.E.2d at 314.

The Commission does not get to start a new 120-time period when necessary information is filed; the Commission may only extend the existing 120-day time limit that begins at the filing of a complaint.

D. The Commission did not have subject matter jurisdiction when it entered a final decision on November 12, 2021.

In *West Virginia Code* §24-2-1(b)(6) the Legislature authorized the Commission to review a complaint by a Wheeling wholesale customer only during a 120-day window that begins at the filing of the complaint by the wholesale customer. *West Virginia Code* §24-1-1(j) provides that the Commission’s jurisdiction is “limited to that granted specifically in this code.” *West Virginia Code* §24-2-2(c) provides that the Commission’s jurisdiction is limited to that granted specifically in *West Virginia Code* §24-2-1(b). The Commission does not have subject matter jurisdiction over wholesale customer complaints except during the 120-day time period, as extended by proper tolling.

The Legislature created the Public Service Commission to “exercise the legislative powers delegated to it.” *West Virginia Code* §24-1-1(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). Administrative agencies are creatures of statute and delegates of the Legislature. Their power is dependent on statutes, so they must find within the statute warrant for the exercise of any authority which they claim. Division of Justice & Comm. Serv. v. Fairmont State Univ., 242 W. Va. 489, 836 S.E.2d 456 (Nov. 21, 2019); Syl. pt. 3, Mountaineer Disposal Serv., Inc. v. Dyer, 156 W. Va. 766, 197 S.E.2d 111 (1973).

The 120-day statutory period in which the Commission could act pursuant to *West Virginia Code* §24-2-1(b)(6) expired on October 26, 2021. The Public Service Commission may only act within the statutory time period provided by *West Virginia Code* §24-2-1(b)(6). The Commission, therefore, erred, exceeded its authority and was without jurisdiction when it issued its Order on November 12, 2021.¹⁴ Having no jurisdiction to act, the Commission's Order cannot stand, and Wheeling asks the Court to set aside the Order that the Commission entered on November 12, 2021.

E. Voiding the Commission's Orders will not burden a circuit court with adjudication of this rate complaint.

In its final argument in its Statement of Reasons, the Commission presents a curious and unfounded assertion based upon claims of exhaustion of administrative remedies and primary jurisdiction assertions that are simply wrong.

¹⁴ The Commission notes that no party objected to the Commission calculation of November 12, 2021, as the statutory due date. PSC Statement of Reasons at 4. There was no need to challenge the calculation at that time because the decision was interlocutory in nature, not a final ruling on the substance of the Benwood complaint.

In a Corrected Memorandum Decision entered December 15, 2017 in the case of SWVA, Inc., v. Huntington Sanitary Board and City Council of the City of Huntington West Virginia, No. 17-0120 (Cabell County 16-C-807), this Court affirmed the result reached by the Circuit Court of Cabell County in denying a writ of mandamus and injunctive relief for failure to exhaust an available administrative remedy by the Petitioner's challenging the action of the City of Huntington in the adoption of a rate ordinance by failing to go to the Commission for review before going to Circuit Court. In its decision the Supreme Court stated:

SWVA alleges that the public notices provided by the Sanitary Board and the City Council were either *insufficient* or were *in violation* of the notice provisions, codified in §24-2-11(1) – one such "*provision of this chapter*." When §24-2-1(b)(2), the jurisdictional provision, is reviewed in conjunction with §24-2-7(a), it is apparent that jurisdiction with regard to challenges to the notice provisions of chapter 24 is clearly and unambiguously granted to the PSC. This Court has long held that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Applying the statute to these circumstances, the PSC has jurisdiction over SWVA's challenge to the Ordinance for failure to fully comply with the notice provisions set forth in §24-2-11(1).

Memorandum Decision at 6 and 7.

Following this decision, the Petitioner refiled its complaint at the Commission. In an Order entered August 6, 2018 in Case No. 17-1680-S-C, SWVA dba Steel of West Virginia v. Huntington Sanitary Board, the Commission after reviewing the complaint pursuant to the provisions of *West Virginia Code* §24-2-7, dismissed the case. Following the nearly two-year process from passage of the ordinance by the Sanitary Board, the filing of the complaint in the Circuit Court of Cabell County, the decision of the Supreme Court of Appeals, and the final decision of the Public Service Commission, the relevant statute relating to challenges of the

practices of large locally regulated municipal utilities¹⁵ was amended in 2020. That amendment requires that complaints regarding practices of locally rate regulated publicly owned utilities must be filed within 30 days of the matter complained of and the Commission must resolve such complaints within 180 days.

Given the fact that *West Virginia Code* §24-2-1(b)(2) references cases under *West Virginia Code* §24-2-7, and *West Virginia Code* §24-2-1(b)(7) as amended in 2020 refers to complaints regarding the Commission's exercise of the enumerated powers in *West Virginia Code* §24-2-1, there is no reason to believe that any Orders entered in this case will have the result conjured up by the Commission.

CONCLUSION

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 framework established by the Legislature to assure the integrity of the rates that support their investments in the state's publicly owned utility systems. Based upon the foregoing, the City of Wheeling respectfully requests this Honorable Court to vacate the Commission's November 12, 2021 Order.

Respectfully submitted,

City of Wheeling

By Counsel

¹⁵ See, *West Virginia Code* §24-2-1(b)(7).



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CERTIFICATE OF SERVICE

I, Robert R. Rodecker, counsel for the City of Wheeling, do hereby certify that the foregoing Petitioner's Reply Brief has been served upon the following parties of record on this 17th day of February, 2022, in the manner so indicated:

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