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

**City of Wheeling,  
Petitioner**

**vs.)**

**DO NOT REMOVE  
FROM FILE**

**No. 21-1001**

**The Public Service Commission of West Virginia  
And the City of Benwood,  
Respondents**

**SUPPLEMENTAL BRIEF OF THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA**

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
By Counsel,**

**JESSICA M. LANE, ESQ.  
WV Bar No. 7040  
[jlane@psc.state.wv.us](mailto:jlane@psc.state.wv.us)**

**JEFFREY A. FOSTER, ESQ.  
WV Bar No. 9410  
[jfoster@psc.state.wv.us](mailto:jfoster@psc.state.wv.us)**

**201 Brooks Street  
Charleston, WV 25301  
(304) 340-0300**

**December 19, 2022**

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

The Respondent, Public Service Commission of West Virginia (the "Commission"), hereby tenders for filing with this Honorable Court its Supplemental Brief in response to the Order entered September 20, 2022, granting the City of Wheeling's ("Wheeling") Petition for Rehearing of the Opinion Issued on April 26, 2022 ("Petition for Rehearing"). Succinctly, this Court was correct when it issued its original opinion on April 26, 2022. W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll the 120-day period for resolution of wholesale wastewater disputes between a political subdivision of the state and its customers "until the necessary information showing the basis of rates, fees, and charges or other information as the commission considers necessary is filed." That is what occurred here. Wheeling did not file the necessary information showing the basis of its rates until July 15, 2021. Because the 120-day period for resolution of the complaint was tolled until receipt of that information, measurement of the 120-day period began on July 15, 2021. The Commission issued its Final Order on November 12, 2021, which was 120 days from July 15, 2021. The Final Order of the Commission should be affirmed.

## **I. STATEMENT OF THE CASE**

A brief recitation of the underlying facts for purposes of this rehearing is appropriate.<sup>1</sup> On April 6, 2021, Wheeling passed an ordinance increasing the rate charged to its wholesale sewage treatment customers by 45%, to become effective on May 21, 2021. On April 14, 2021, Wheeling filed a copy of its ordinance and revised tariff with the Commission.

On May 3, 2021, the City of Benwood Sanitary Board (hereafter “Benwood”), a political subdivision of the state and purchaser (or resale customer) of wholesale sewage treatment services from Wheeling, filed a formal complaint against Wheeling asserting that the rate increase was unfair, unreasonable, discriminatory and based on improperly allocated costs. Benwood asked the Commission to investigate its complaint pursuant to W. Va. Code §24-2-1(b)(6).

Three Commission orders addressed the 120-day review period and decision due date. First, on June 2, 2021, the Commission issued an Order that, among other things, required Wheeling to provide, within 30 days, sewage treatment and flow volumes and four items of financial information to support Wheeling’s rate increase. The required financial information included a class cost

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<sup>1</sup> A full recitation of the underlying facts is provided in Respondent’s previously filed Statement of The Respondent Public Service Commission Of West Virginia of Its Reasons For The Entry Of Its Orders Of November 12, 2021 And December 1, 2021 In Case No. 21-0372-S-W (“Statement of Reasons”), filed on January 28, 2022. The Commission incorporates the arguments made in its Statement of Reasons as if fully set forth herein. This Supplemental Brief is provided in accordance with the Court’s Order on Wheeling’s Petition for Rehearing, and is meant to address certain issues in addition to those addressed in the Statement of Reasons, and relevant to the rehearing in this matter.



of service study.<sup>2</sup> In addition, the Commission referenced its statutory authority to toll the statutory decision period pending the filing by Wheeling of information supporting the rate increase that was necessary to decide the complaint, and tolled the 120-day statutory decision date for 45 days until Friday, October 15, 2021.<sup>3</sup>

On July 2, 2021, Wheeling filed a class cost of service study and other information purported to contain data required by the Commission's June 2, 2021 Order.

On July 15, 2021, Wheeling informed the Commission that Staff had brought to Wheeling's attention errors in the class cost of service study filed on July 2, 2021 and, as a result, Wheeling was filing "revised versions of the documents." It is not contested that the filing by Wheeling of the revised cost of service study on July 15, 2021, was the *first instance* that the Commission had in its possession the "necessary information showing the basis of rates, fees, and charges or other information as the commission considers necessary" contemplated in W. Va. Code §24-2-1(b)(6).

The Commission issued the second Order on July 22, 2021, in response to a motion filed by Staff to toll the underlying proceeding because the first class cost

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<sup>2</sup> A class cost of service study provides information on the costs of providing service, including detailed operation and maintenance expenses, taxes, debt service requirements and cash surplus needed for plant additions and working capital requirements, and an allocation of those cost of service components to the various customer classes served by the utility.

<sup>3</sup> The Commission admits that setting a tentative end of the statutory 120-day review period based on an estimated responsive filing date by Wheeling should not have been done. The October 15, 2021 date would have been correct only if Wheeling had filed the necessary information 120 days prior to October 15, 2021, which would have been June, 16, 2021.

of service was incorrect. The Commission granted Staff's motion and set October 28, 2021 as the statutory decision date.<sup>4</sup>

The third Order, issued on October 26, 2021, correctly found that Wheeling filed the necessary information showing the basis of the rates, fees, and charges and other information required by the Commission on July 15, 2021. The Commission stated (1) that W. Va. Code §24-2-1(b)(6) authorizes it to toll the review period in wholesale wastewater rate disputes between a political subdivision of the state and its customer until the necessary information showing the basis of the rates, fees, and charges or other information required by the Commission is filed, and (2) the Commission should toll the 120-day statutory period to begin running on July 15, 2021, the date that Wheeling filed the necessary information showing the basis of the rates, fees, and charges and other information required by the Commission. Based on these findings of fact and conclusions of law, the Commission determined that the statutory review and decision period would end 120 days from July 15, 2021, resulting in a statutory decision due date of November 12, 2021.

On November 12, 2021, 120 days from the date Wheeling filed its revised class cost of service study, the Commission issued its final Order.

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<sup>4</sup> The October 28, 2021 date was in response to the Staff petition but was not a statutorily required date because it was not 120 days from the date that Wheeling filed the necessary information to support its rates.



## II. SUMMARY OF ARGUMENT

The final Order issuance date was timely and in compliance with law. W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll the 120-day period for resolution of wholesale wastewater disputes between a political subdivision of the state and its customers "until the necessary information showing the basis of rates, fees, and charges or other information as the commission considers necessary is filed." Id. Based upon the language of the statute and legislative intent, this Court held in its original opinion that the 120-day time period in W. Va. Code §24-2-1(b)(6) begins on the date "all of the *necessary rate justification information*" to adjudicate the complaint is filed by the utility. City of Wheeling v. Public Service Commission of W. Va., No. 21-1001, 2022 W. Va. LEXIS 325, at \*14 (Apr. 26, 2022) (emphasis in original). This reasoning is sound: "this interpretation ensures that the PSC will have sufficient time to evaluate *all* of the necessary information as a whole before issuing a final order." City of Wheeling, No. 21-1001, 2022 W. Va. LEXIS 325, at \*14-15 (emphasis in original).

That is exactly what happened here. It is undisputed that Wheeling alone controlled when it filed the necessary information showing the basis of rates, fees and charges. It is also undisputed that the Commission did not receive the "necessary information showing the basis of rates, fees, and charges" until July 15, 2021, when it filed its revised class cost of service study. In its October 26, 2021 Order, the Commission calculated the statutory deadline to be 120 days from July 15, 2021, which was November 12, 2021. Thus, the Commission was within

its authority when it issued the final Order in the underlying proceeding. Because Wheeling alone controlled its filing of the necessary information, Wheeling's assertion that the Commission chose when the review period would begin and end is incorrect. In fact, the statute and Wheeling controlled the review period.

Ultimately, the Commission applied the statutory language correctly, issued the final Order on time, and the end-result is the correct result. The Commission concedes that its earlier orders<sup>5</sup> regarding the statutory review period confused the issue. However, the earlier orders were not prejudicial to Wheeling and had no impact on the substantive outcome in the underlying proceeding. Thus, even if incorrect or confusing, those prior deadline calculations, which did not reflect the correct end of the review period or the correct date from which to calculate the 120-day statutory deadline, are harmless error.

### **III. STANDARD OF REVIEW**

This Court has held, "As a general rule, '[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.'" Pool v. Greater Harrison Cty. Pub. Serv. Dist., 241 W. Va. 233, 237, 821 S.E.2d 14, 18 (2018); (citing Syllabus Point 1, Appalachian Power Co. v. State Tax Dept of W.Va., 195 W.Va. 573, 466 S.E.2d 424 (1995)).

In Monongahela Power Co. v. Pub. Serv. Comm'n, 166 W.Va. 423, 276 S.E.2d 179, 180 (1981), this Court adopted the comprehensive standard of review

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<sup>5</sup> Comm'n Orders June 2, 2021 and July 22, 2021.

of Commission decisions as applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

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.... 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.

Monongahela Power Co., Syllabus Point 2 (in relevant part).

This three-pronged analysis was summarized in Syllabus Point 1 of Central W. Va. Refuse, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

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.

Id. 190 W.Va. at 420, 438 S.E.2d at 600-601 (1993).

Additionally, this Court is tasked with interpreting statutory language. "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, Appalachian Power Co. v. State Tax Dep't of W. Va., 195 W. Va. 573, 466 S.E.2d 424 (1995). Accord Syl. pt. 1, In re Tax Assessment Against Am. Bituminous Power Partners L.P., 208 W. Va. 250,

539 S.E.2d 757 (2000). “The 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), *cited by* Syl. Pt. 2, City of Wheeling v. PSC of W. Va., No. 21-1001, 2022 W. Va. LEXIS 325, at \*1 (Apr. 26, 2022).

#### IV. ARGUMENT

Wheeling contends that the Commission: (1) erred in exercising subject matter jurisdiction; (2) exceeded its authority when it issued a final decision after expiration of the time period provided in W. Va. Code §24-2-1-(b)(6); and (3) acted arbitrarily when it made tolling calculations. As set forth in Respondent's previously filed Statement of Reasons, each of these arguments fail. Simply put, the Commission properly calculated the statutory deadline of November 12, 2021 in its October 26, 2021, Order. The manner by which that deadline was calculated was authorized and contemplated by statute: 120 days from the date the “necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed.” W. Va. Code §24-2-1(b)(6). Wheeling submitted the required information on July 15, 2021. That put the 120-day deadline at November 12, 2021. The Commission entered its Final Order on November 12, 2021, and was within its authority to do so.

The Commission concedes that the June 2, 2021, order confused calculation of the 120-day review period because it tolled for 45 days when the Commission should have waited until Wheeling filed the required information to



set the 120-day decision date. If Wheeling filed sooner than 45 days that sooner filing date would start the 120 days. Likewise, if Wheeling filed later than 45 days, that later date would start the 120 days. The Commission also concedes that the July 22, 2021, order confused calculation of the 120-day review period because the Commission set a statutory decision date, October 28, 2021, that was sooner than 120 days from the date Wheeling filed the required information. Those prior orders, however, were harmless error. As authorized by law and in accordance with the legislative scheme and Commission authority over disputes between wholesale customers and locally rate regulated utilities, a 120-day review period ultimately applied in this case.

**A. The Public Service Commission was within its statutory authority and did not act arbitrarily and capriciously when it tolled the decision due date until November 12, 2021.**

It should be noted that Wheeling does not appeal the substance of the Commission's Final Order. This case is instead about Commission jurisdiction and whether Wheeling may impose its interpretation of a statutory tolling provision to negate Commission jurisdiction. In this case Commission jurisdiction over Wheeling, a locally rate regulated utility, was invoked when a wholesale customer, Benwood, filed a formal complaint. See, W. Va. Code §24-2-1(b)(6). The statute clearly contemplates that "the 120-day time period for resolution of the dispute be tolled until the PSC has the *necessary rate justification information* to adjudicate

the complaint.” City of Wheeling v. PSC of W. Va., No. 21-1001, 2022 W. Va. LEXIS 325, at \*13-14 (Apr. 26, 2022) (emphasis in original).

The specific language of the statute states:

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.

W. Va. Code §24-2-1(b)(6).

The “may be tolled” proviso of W. Va. Code §24-2-1(b)(6) means that if the Commission does not have all the necessary information before it at the time a complaint is filed (because the utility did not file it with its rate ordinance or on the day the complaint was filed), then the Commission has authority to determine that the 120-day review period begins on the date the utility files the necessary information.

The Legislature had good reason to allow the Commission to toll the statutory decision review period in W. Va. Code §24-2-1(b)(6) complaints when necessary cost-based information to support the rate ordinance is missing. Unlike investor owned public utilities or smaller public service districts that file rate increase applications with the Commission pursuant to W. Va. Code §24-2-4a(a), locally rate regulated<sup>6</sup> municipal utilities like Wheeling are exempt from the rate

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<sup>6</sup> This brief uses the descriptor “locally rate regulated” to refer to a political subdivision of the state providing water or sewer services and having at least 4,500 customers and annual gross combined revenues of \$3 million dollars or more. Several statutes in Chapter 24 of the Code address the reduced level of regulation applicable to these public utilities. W. Va. Code §§24-2-1(b); 24-2-2; 24-2-3; 24-2-4a; 24-2-4b; 24-2-11.



filing requirements of W. Va. Code §24-2-4a(b)-(g), and do not request rate increases from the Commission. They instead pass rate ordinances that are not subject to prior Commission review or approval. W. Va. Code §§8-11-4; 16-13-16; 24-1-1(j). Therefore, unless the utility voluntarily files cost-based information with its ordinance, the Commission does not have financial justification for the utility's rates when they go into effect.

Wheeling did not file rate justification when it filed its municipal ordinance on April 14, 2021. The Commission did not have the necessary information to resolve the Benwood complaint until Wheeling filed its revised customer cost of service survey on July 15, 2021.

Therefore, the Commission tolled the start of the 120-day review period until July 15, 2021 – and had until November 12, 2021 to resolve the dispute. The Legislature delegated adjudication of wholesale customer complaints against locally rate regulated municipal water and wastewater utilities to the Commission. W. Va. Code §24-2-1(b)(6). As this Court recognized in its original decision, by giving the Commission “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.” City of Wheeling v. PSC of W. Va., No. 21-1001, 2022 W. Va. LEXIS 325, at \*14 (Apr. 26, 2022). Therefore, the Commission properly tolled the 120-day time period for resolution of the dispute. This interpretation

ensures that the Commission will have sufficient time to consider all of the necessary information provided to it.

Wheeling's suggested "place on hold" interpretation would not allow for the full 120 days for review and adjudication of the complaint filed by Benwood. Such an outcome would be unjust because Wheeling alone had control over when it provided the Commission with necessary information. Moreover, the Commission could be forced to render a premature decision without having time to evaluate the rate issues. If a utility is recalcitrant in providing support for its rate ordinance, a case could require repeated Commission orders to file necessary information and successive incomplete or inadequate responsive filings by the utility. Each order and response would tick away more days from the 120-day review period. Taken to the extreme, the Commission could be left with an absurdly brief period of time to evaluate the case. A utility that lacks any cost-based support for its rate increase would have an incentive to delay its responses to Commission requests for information in order to run down the clock.

Here the Commission's interpretation of the tolling provision of W. Va. Code §24-2-1(b)(6) is reasonable and comports with its Legislative directive to resolve rate disputes between locally rate regulated utilities and wholesale customers. "[A]bsent clear legislative intent to the contrary," the West Virginia Supreme Court of Appeals affords deference to a reasonable and permissible construction of a statute by a state agency "because it has policymaking authority with regard to the statute." Sniffin v. Cline, 193 W. Va. 370, 374, 456 S.E.2d 451, 455 (1995). See

also, Syllabus Point 1 of Appalachian Power Co. v. State Tax Dep't., 195 W.Va. 573, 466 S.E.2d 424 (1995).

The Commission properly exercised its authority when it entered its tolling order on October 26, 2021. Thus, the Commission properly exercised its jurisdiction when it entered the Final Order on November 12, 2021. That Final Order should be affirmed.

**B. Any alleged errors in prior calculations of the statutory deadline in this proceeding were harmless error.**

Wheeling takes umbrage with the Commission's calculation of the statutory deadline in the Orders dated June 2, 2021, and July 22, 2021. Because the final order was timely under W.Va. Code 24-2-1(b)(6), any confusion caused by those calculations was harmless, particularly when compared to the harm that would befall Benwood customers if Wheeling's unjustified resale rate were reinstated.

The West Virginia Supreme Court of Appeals has acknowledged "that, most errors, including constitutional ones are subject to harmless error analysis." Tex S. v. Pszczolkowski, 236 W. Va. 245, 254, 778 S.E.2d 694, 703 (2015) (internal citations and quotations omitted). "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Syllabus Point 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980). Syl. pt. 2, Robertson v. Truby, 170 W. Va. 62, 289 S.E.2d 736 (1982). Syl. pt. 5, Miller v. Board of Educ. of County of Boone, 190 W. Va. 153, 437 S.E.2d 591 (1993). *Cited by*, Coll v. Cline, 202 W. Va. 599, 610, 505 S.E.2d 662, 673 (1998).

The Orders dated June 2, 2021, and July 22, 2021, gave projected decision dates for the adjudication of the underlying dispute of October 15, 2021, and October 28, 2021, respectively. In retrospect, the Commission should have explained in the earlier orders that under the law, the statutory decision date was contingent on Wheeling's filing of the necessary information. Absent that explanation, the earlier orders confused calculation of the decision date. Even so, the confusion arises only to the level of harmless error.

First, no party was prejudiced by the prior calculation of the projected decision dates. A full hearing was conducted by the administrative law judge on August 17, 2021. Each party was provided a full opportunity to be heard and present its positions. And, in the end, the Commission issued a timely final Order on November 12, 2021, 120 days from the date Wheeling filed its revised class cost of service study on July 15, 2021.

Intervening pronouncements by the Commission that it will issue a decision sooner than 120 days from the date it receives "necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary," may be considered scheduling targets, but would not represent the end of the statutorily allowed review period pursuant to W. Va. Code §24-2-1(b)(6). Here, once the Commission received the correct financial justification for Wheeling's rate increase on July 15, the statutory 120-day decision date was November 12, not sooner and not later.

Moreover, the multiple pronouncements of the decision date in this case were, in large part, a product of Wheeling's inability to timely file the necessary information required to adjudicate the underlying dispute. Wheeling does not contest that July 15 was the date it finally submitted the necessary information to adjudicate the underlying complaint. Wheeling does, however, fail to acknowledge that when it did not provide the "corrected" necessary information until July 15, the statutory decision date became November 12, 2021.

Similarly, the complexity of this wholesale customer complaint case had no impact on the fact that November 12, 2021 was 120 days from the date Wheeling filed the information necessary for the Commission to evaluate the rate issues in this case. 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 period. The October 26, 2021 Order calculated the statutory decision date that the Commission could have established at any time after Wheeling filed the necessary information on July 15, 2021.

The Commission's decision to toll the resolution date was authorized by W. Va. Code §24-2-1(b)(6) and was not arbitrary or capricious. Thus, the Final Order should be affirmed.

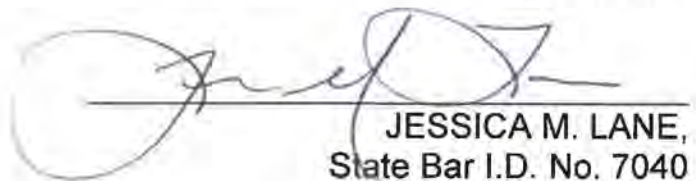


**V. CONCLUSION**

The Commission has a statutory duty to ensure that disputed rates are just, reasonable, applied without unjust discrimination or preference, and based on the costs of providing the services. W. Va. Code §24-1-1(a)(4). When locally rate regulated municipal utility rates are at issue, the Commission cannot perform this duty unless it has information before it that justifies the rate ordinance. The Commission did not exceed its jurisdiction but acted within its authority pursuant to W. Va. Code §24-2-1(b)(6) when it reviewed the Benwood complaint within 120 days of the date it had before it all necessary information. This Court, therefore, should not issue a stay in this matter, but should instead affirm the Commission Orders issued November 12, 2021 and December 1, 2021.

Respectfully submitted this 19th day of December 2022.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
By Counsel,



JESSICA M. LANE,  
State Bar I.D. No. 7040




## CERTIFICATE OF SERVICE

I, Jessica M. Lane, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Supplemental Brief of the Public Service Commission of West Virginia" has been served upon the following parties of record by e-mail and First Class United States Mail, postage prepaid this 19<sup>th</sup> day of December, 2022:

Eric Gordon, Esq.  
Berry, Kessler, Crutchfield, Taylor & Gordon  
514 7<sup>th</sup> Street  
Moundsville, WV 26041  
[egordon@bkctg.com](mailto:egordon@bkctg.com)

Robert R. Rodecker, Esq.  
John R. McGhee, Esq.  
Kay Casto & Chaney PLLC  
PO Box 2031  
Charleston, WV 25327  
[rrodecker@kaycasto.com](mailto:rrodecker@kaycasto.com)  
[jmcghee@kaycasto.com](mailto:jmcghee@kaycasto.com)

Rosemary Humway-Warmuth, Esq.  
Office of City Solicitor  
City of Wheeling  
1500 Chapline Street  
Wheeling, WV 26003  
[rhwarmuth@wheelingwv.gov](mailto:rhwarmuth@wheelingwv.gov)



JESSICA M. LANE  
General Counsel  
WV State Bar I.D. No. 7040