

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

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**STATE OF WEST VIRGINIA ex rel.
MOUNTAINEER GAS COMPANY,**

Petitioner,

v.

No. 22-639

**THE HONORABLE R. CRAIG TATTERSON, Judge of the
Circuit Court of Roane County, West Virginia, THE ESTATE OF CORY
COLTON KEITH CARPER, et al.,**

Respondents.

**From the Circuit Court of Roane County, West Virginia
Civil Action No. 19-C-9**

**AMICUS CURIAE BRIEF OF THE PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA IN SUPPORT OF MOUNTAINEER GAS COMPANY'S
PETITION FOR WRIT OF PROHIBITION**

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

I. STATEMENT OF THE CASE

In this case, Mountaineer Gas Company (Mountaineer or Mountaineer Gas) argues that the Circuit Court exceeded its legitimate powers and committed a substantial legal error when it concluded that the Public Service Commission (PSC or Commission) exceeded its statutory authority by approving Mountaineer Gas' tariff and when it concluded that the Commission approved a tariff that failed to conform with the laws of this State and to rules, regulations, and orders of the Commission. The Commission agrees

with Mountaineer Gas' arguments and files this *Amicus Curiae* brief in support of the Mountaineer Gas petition. The Commission has no independent knowledge of the facts of this case and adopts Mountaineer Gas' Statement of Facts and procedural history as set forth in its brief.

The Circuit Court's July 13, 2022 Order (Circuit Court Order or Order) is concerning to the Commission because it incorrectly limits the Commission's jurisdiction. By filing this *Amicus Curiae* brief, the Commission wishes to address its broad power to regulate public utilities and approve tariffs. The Commission also will discuss the public policy implications of the Order if it is affirmed.

II. SUMMARY OF ARGUMENT

The Legislature created the Commission to exercise legislative powers delegated to it to regulate public utilities in the state. The Commission has the duty to enforce and regulate utility practices, services and rates, and is responsible for balancing the interests of utility customers, utilities, and the state's economy. The Legislature specifically delegated to the Commission jurisdiction to establish and enforce utility tariffs. A Commission approved public utility tariff carries the force of law. In this case, the Circuit Court Order negates the Commission's legislative authority to balance the interests of customers, utilities, and the state economy when approving tariff provisions.

As acknowledged by the July 13, 2022, Circuit Court Order, the Commission recognizes the rural nature of West Virginia and the importance of providing natural gas to customers in rural areas. The Circuit Court also acknowledged that, through its tariff approval process, the Commission encourages utilities such as Mountaineer Gas to provide

service to customers from any available third-party source.

In this case, the Carper family resided within the service territory of Mountaineer Gas, but beyond the reach of the utility-owned distribution system, so the family received natural gas from a field tap on a gas line owned by a non-utility third party. A field tap, also referred to as a mainline or farm tap, is a connection on a production, gathering, or transmission pipeline through which a utility customer receives a supply of natural gas which usually flows from nearby production wells and which has not flowed through a processing or products extraction plant. The pipeline is owned by a third-party entity and not the local distribution utility company. Gas companies that provide gas through farm taps cannot control the quality of unprocessed gas supply.

Consistent with its statutory authority, the Commission approved a tariff provision for Mountaineer that balanced the interest of rural West Virginia customers in having access to natural gas supply, the interest of Mountaineer Gas in being protected from liability for damage caused by locally produced gas over which Mountaineer has no control, and the state economy.

The Commission has legislative authority to approve liability limiting language in tariffs. The Mountaineer Gas tariff provision that limits liability for local gas supplies is legally valid, clear, and should be applied as written.

The Circuit Court Order, if upheld by this Court, could cause utilities to face new exposure to liability for unprocessed gas supplies directly flowing through a local production, local gathering, or transmission pipeline. In the face of increased risk of being held responsible for damages or injuries resulting from unprocessed gas, gas utilities are

likely to seek to abandon the provision of farm-tap service to rural customers. The Circuit Court's Order is erroneous, negates the Commission's jurisdiction, and would negatively affect the availability of gas utility service in West Virginia.

V. ARGUMENT

A. The Legislature vested broad power with the PSC to regulate public utilities while balancing the interests of customers, utilities, and the state economy, and PSC approval of the Mountaineer tariff has the force of law.

The Legislature created the Commission to exercise legislative powers delegated to it to regulate public utilities in the state. The Commission has the duty to enforce and regulate utility practices, services and rates, and is "charged with the responsibility for appraising and balancing the interests of current and future utility customers, the general interests of the state's economy, and the interests of the utilities subject to its jurisdiction in its deliberations and decisions." W. Va. Code §24-1-1(a) and (b). The Legislature specifically delegated to the Commission jurisdiction to establish and enforce utility tariffs.

W. Va. Code §24-2-3(a). This Court has held that:

The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and utilities. Its primary purpose is to serve the interests of the public. Boggs v. Public Service Commission, 154 W. Va. 146, 174 S.E.2d 331 (1970). Syllabus Point 1, West Virginia-Citizen Action Group v. Public Service Commission, 175 W. Va. 39, 330 S.E.2d 849 (1985).

Syllabus Point 1, City of S. Charleston v. West Virginia PSC, 204 W. Va. 566, 567, 514 S.E.2d 622, 623 (1999).

The Commission's responsibility to balance the interests of public utilities and utility customers is also expressed in the Commission's Rules for the Government of Gas Utilities and Gas Pipeline Safety, § 150 C.S.R. 4 (Gas Rules). Gas Rule 2.1.2 states that the rules "are intended to ensure adequate service and to prevent unfair charges to the public, and to protect the utilities from unreasonable demands."

Thus, the Legislature's directive to the Commission to exercise the legislative powers delegated to it by appraising and balancing the interests of the public, the utilities, and the state economy is clear by the applicable statutes and rules. Tariffs set the utility rates as well as terms and conditions of service and, unless specifically exempted,¹ all West Virginia utilities have tariffs that are approved by the Commission. "The term 'public utility tariffs' is universally understood to mean more than just PSC-approved rates and charges. It also governs the rules, regulations, and practices relating to rate-and charge-based services between a utility and its consumers." Holt v. W. Virginia-American Water Co., 233 W. Va. 688, 692, 760 S.E.2d 502, 506 (2014). A Commission approved public utility tariff has the force of law. Whitaker Glessner Co. v. Wheeling T. R. Co., 99 W. Va. 38, 41, 127 S.E. 639, 640 (1925). There is no legislation that prevents the Commission from approving liability limiting language in tariffs to protect utilities from unreasonable demands.

¹ W.Va. Code §24-2-3 exempts initial rate setting from Commission jurisdiction for "municipal power systems and water and/or sewer utilities that are political subdivisions of this state providing a separate or combined services and having at least 4,500 customers and annual combined gross revenues of \$3 million or more: Provided, That the commission may exercise such rate authority over [such utilities] only under the circumstances and limitations set forth in §24-2-4b of this code, and subject to the provisions set forth in §24-2-3(b) of this code."

While the issue of the enforceability of liability limiting language in utility tariffs is an issue of first impression in West Virginia, the United States Supreme Court has long held that provisions in a tariff that limit liability must be enforced. In a case involving a telegraph company, the United States Supreme Court stated: “The limitation on liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.” Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 571, 41 S.Ct. 584, 586 (1921).

In a tariff case involving a West Virginia water utility, the United States Supreme Court stated: “The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be like an enactment by the Legislature.” Bluefield Waterworks & Imp. Co. v. Public Service Comm’n of W. Va., 262 U.S. 679, 683, 43 S.Ct. 675, 676 (1923); *see also* Whitaker, 99 W. Va. 38, 41, 127 S.E. 639, 640.

Further, in a more recent electric case, the Supreme Court of Massachusetts discussed a history of utility regulation and tariff limitations of liability, and why the provisions are enforceable. Maryland Cas. Co. v. NSTAR Elec. Co., 471 Mass. 416, 30 N.E.3d 105 (2015). In Maryland Cas. Co., the Court stated that “once the tariff is approved by the relevant regulatory agency, any deviation from it is strictly prohibited.” (citations omitted). Id. at 112.

Mountaineer Gas is a utility regulated by the Commission and, based on W. Va. Code §24-2-3 and the case law discussed above, its tariffs are presumed to be valid, have

the force and effect of law, and cannot be modified by a circuit court.²

B. The Mountaineer Gas tariff precludes the Plaintiffs' claims

Consistent with its statutory authority, the Commission approved a tariff provision for Mountaineer that balanced the interest of rural West Virginia customers in having access to natural gas supply, the interest of Mountaineer Gas in being protected from liability for damage caused by gas supplied from a third-party line and over which Mountaineer has no control, and the state economy. W. Va. Code §§24-1-1(a) and (b), 24-2-3(a). A Commission approved public utility tariff carries the force of law.

In this case, because the Carper family home was outside the area of Mountaineer's gas distribution system, the family received gas directly from a third party field line. Petition at 4. The Circuit Court acknowledged that, through its tariff approval process, the Commission encourages utilities such as Mountaineer Gas to provide service to customers from any available third-party source. See Order Denying Motion for Summary Judgment (hereinafter "Order") ¶ 11.

Gas received through a field line prior to being processed may not be of pipeline quality and through its tariff, Mountaineer Gas makes clear that it does not owe a duty to field line, or mainline customers regarding the quality of gas. The language of section 2.6 of the Mountaineer Gas tariff provides:

Notwithstanding any provision to the contrary within these Rules and Regulations it is expressly understood that for Mainline Consumers the Company has no control over the quality and quantity of natural gas to be

² The West Virginia Supreme Court of Appeals has authority to adjudicate appeals of PSC decisions and could modify, or direct modifications by the Commission, including tariff-related decisions, that the Court determined were contrary to law or arbitrary and not based on the facts. W. Va. Code §24-5-1.

delivered to the Mainline Consumer by the third party pipeline and the Company makes absolutely no warranty, express or implied, that the natural gas will be of pipeline quality or suitable for use by the Mainline Customer...

Section 3.1 of the Mountaineer Gas tariff precludes claims except those sounding in negligence, and states, in part:

... nor shall it be liable for any injury to person or property from any cause arising from inside the Customer's property line not the result of negligence of the Company; nor shall it be liable for any injury to person or property arising from the use of gas by, or the supply of gas to, the Customer which is not the result of negligence on the part of the Company.

Finally, Section 3.3 of the Mountaineer Gas tariff precludes claims related to a customer's equipment:

The Company will not be liable for damages to or injuries sustained by Customers or others, or by the equipment of the Customer or others by reason of the condition or character of the Customer's facilities and equipment of others on Customer's premises. The Company will not be responsible for the use, care or handling of the gas service delivered to Customer after the same passes beyond the point of delivery.

Mountaineer Gas does not take the position that its tariff provides complete immunity or that it should protect the Company from negligence claims. This Court has held that, "It is clear from our precedents and those of other states that if a gas company has notice of defects in gas lines, pipes or customers' appliances, that are dangerous to human health and safety, it has a duty to repair the defects or shut off the gas until repairs are made." Reed v. Smith Lumber Co., 165 W. Va. 415, 268 S.E.2d 70 (1980). In its petition, Mountaineer Gas stated that, in appropriate factual situations, it can be held liable if it breaches a duty of care. Petition at 14. In this case, the incident occurred after someone tampered with a safety feature on the Carper family's furnace. Petition at 11. A public

utility is not responsible for the condition of a customer's appliances, and it is the customer's responsibility to ensure proper maintenance of inside equipment. A public utility should not be a guarantor or insurer of the customer's facilities. The Commission has established that, pursuant to Gas Rule 5.6.1, a field tap customer is responsible for equipment on a customer's service line located between the gas utility's transmission meter and the meter serving the customer's property. Kerns v. Hope Gas, Inc., dba Dominion Energy West Virginia, Case No. 17-1709-G-C (Commission Order, April 5, 2018) 2018 W. Va. PUC LEXIS 469.

The Commission agrees that it must require public utilities to conform to the laws of this state. Order ¶¶ 65-66. The Circuit Court Order suggests that the Mountaineer tariff violates West Virginia statutes, regulations, and common law. Order ¶ 70.³ While the Circuit Court does not articulate which common law Mountaineer Gas violated, the Circuit Court refers to the duties imposed by the Commission's own Gas Rule 2.4.1 which provides, in part, that "[t]hese rules shall not relieve in any way a utility from any of its duties under the laws of this State" and Gas Rule 7.2.1, which discusses the quality of gas as follows:

All natural gas *distributed* in this State shall be free from dangerous or objectionable quantities of impurities such as hydrogen sulphide, nitrogen or other combustible or noncombustible, noxious, or toxic gases, or other impurities. A gas shall be considered free from undesirable impurities when the quantity of any impurity present is within the limits recognized as allowable in good practice. (*emphasis added*)

³ There are two paragraph 70s in the Order. The Commission is addressing both paragraphs regarding utilities' duties under these rules.

The Circuit Court erred in concluding that Mountaineer used its tariff to shield itself from these rules because 1) Mountaineer does not takes the position that it is shielded from liability for negligence, and 2) with respect to Gas Rule 7.2.1, Mountaineer did not *distribute* gas to the Carper residence because the Carper residence was not located on the Mountaineer distribution system. As explained in this argument, the gas supply was unprocessed gas flowing through a third-party owned line. Therefore, the Commission's approval of the Mountaineer tariff did not relieve Mountaineer of any common law, statutory, or regulatory duties. To the contrary, the tariff provision and the Gas Rules encourage the availability of natural gas to rural customers in our state in a manner that balances the interest of customers in obtaining service with the interest of the utilities in protection from "unreasonable demands." Gas Rule 2.1.2; W. Va. Code §24-1-1(b).

C. The Circuit Court's Order has public policy implications that will negatively affect public utilities, utility customers, and the state economy.

Locally produced, unprocessed natural gas is abundant in our state and our Legislature has recognized the growth of the natural gas industry in West Virginia and the importance of supplying natural gas to its residents, particularly in rural areas.

Growth in the natural gas industry and its accompanying benefits require West Virginia to be proactive and increase the focus on the natural gas infrastructure in this state in order for those benefits to flow to the state and its citizens, including those citizens in areas unserved or underserved by natural gas utilities[.]

W. Va. Code §24-2-1k(4)(a)(4). Commission rules, which carry the force and effect of law, as well as Commission decisions reflect the policy that wherever feasible, West Virginia citizens should have access to natural gas to affordably heat their homes. The

Commission “places a premium value on gas utility service in a state with abundant natural gas.” Hope Gas, Inc., Case No. 97-0937 (Commission Order, December 9, 1998). 1998 W. Va.. PUC LEXIS 813.

Mountaineer is required to provide gas to mainline customers and install facilities for that purpose at its own expense.

When an applicant, or number of applicants, not large enough to merit the installation of an intermediate or low pressure distribution system, desire gas service which must be supplied from a transmission or field line, the utility shall, without cost to the customer, make the tap, install a stop cock, metering and appurtenant equipment, exclusive of the regulator or regulators, oil seal or other type of pressure relief device, and the line. All meters and regulators installed according to this rule shall be housed at the expense of the customer.

Gas Rule 5.6.1. In 2019, the Commission opened a general investigation into the continuation of natural gas services to field tap customers and areas supplied by and dependent on conventional gas production. See Case No. 19-0467-G-GI, Comm'n Order February 12, 2020, 2020 W. Va. PUC LEXIS 2088. In its February 12, 2020, Final Order, the Commission encouraged utilities to explore potential alternate solutions before seeking to abandon field tap customers because abandonment is the “least preferred alternative.” Id.

The Commission estimates that gas utilities provide service to approximately 30,000 rural farm tap customers in the state. Without farm taps, residents of many rural and suburban areas of West Virginia would not have access to affordable natural gas for heating, cooking, hot water, and other life sustaining activities. The Commission recognizes that many West Virginia citizens do not reside on utility distribution systems

and has worked to facilitate access to natural gas, which historically has been the most inexpensive heat sources for residents.

Mountaineer Gas and other gas companies in West Virginia that provide gas through farm taps cannot control the quality of local gas supply delivered to customers located outside of the utility distribution system. The Commission is aware of gas utilities' potential exposure for unprocessed gas, which differs from processed or pipeline quality gas that flows through utility-owned distribution systems. Through language approved by the Commission in tariffs, the Commission has provided the utilities with protection from lawsuits over gas quality as part of the strategy to increase availability of natural gas to end use customers in our state. If the Circuit Court decision stands, the potential cost of insuring and defending against liability for locally produced gas received directly from farm taps, and over which the utility has no control, is likely to make the provision of service to rural customers uneconomic and infeasible.⁴ The Commission anticipates increased utility petitions to abandon the provision of natural gas service to farm tap customers and convert them to other sources of energy under W. Va. Code §24-3-7. While propane and electricity alternatives to natural gas heating and cooking exist, they are historically more costly for customers.

In addition to the economic impact on customers who are abandoned, abandonment comes with cost to the utility to convert customers to an alternative fuel – costs that the

⁴ In addition to exposure to liability as to the quality of locally produced gas, if the Circuit Court Order is upheld, utilities could potentially face new exposure for customers' appliances, piping, and other gas facilities that are downstream of the meter.

utility then passes on to its other ratepayers. The Commission is aware that conversion costs can exceed \$10,000 per customer depending on the new fuel source and the type and condition of existing heating and cooking equipment owned by the customer. Even if gas utilities would not react to affirmation of the Circuit Court Order by seeking to abandon farm tap customers, they will seek to pass on the increased costs of farm tap liability exposure to all gas customers through rate increases. Furthermore, converting customers to alternative fuels would not be consistent with the goals of the Legislature and Commission that readily available gas resources in West Virginia be available to the public at affordable costs. See W. Va. Code §24-2-1k(4); Gas Rule 5.6.


VI. CONCLUSION

The Public Service Commission respectfully requests that this Court issue a writ in prohibition, reverse the judgment of the Circuit Court and direct the Circuit Court to apply Mountaineer's tariff, as written, to its rulings in this case.

Respectfully submitted this 7th day of October, 2022.

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

I, Jordan M. Blatt, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Amicus Curiae Brief of The Public Service Commission of West Virginia in Support of Mountaineer Gas Company's Petition for Writ of Prohibition" has been served upon the following parties by filing the same with the Court's E-Filing System:

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