IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-658

STATE OF WEST VIRGINIA *ex rel.* WEST VIRGINIA-AMERICAN WATER COMPANY**,**

Petitioner,

v.

THE HONORABLE CARRIE L. WEBSTER, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, PRESIDING JUDGE; RICHARD JEFFRIES, individually and on behalf of all others similarly situated; and COLOURS BEAUTY SALON, LLC,

Respondents.

AMICI CURIAE BRIEF SUBMITTED BY NATIONAL ASSOCIATION OF WATER COMPANIES, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF WEST VIRGINIA-AMERICAN WATER COMPANY'S PETITION FOR WRIT OF PROHIBITION

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I. STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The National Association of Water Companies ("NAWC") is a trade association that represents private water companies across the nation. NAWC's members provide quality drinking water and wastewater service to 73 million Americans. The Edison Electric Institute ("EEI") is an association that represents all U.S. investor-owned electric companies. EEI's members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. The American Gas Association ("AGA") is a trade association that represents more than 200 local energy companies that deliver clean natural gas throughout the United States. Amici believe they can provide the Court with a distinct perspective because of their industry-wide viewpoint and expertise.

Amici have a strong interest in the proper application of the legal standards governing the liability of utilities and businesses for service interruptions, and the legal standards for certifying any class of customers in connection with an interruption in service. Amici also have a strong interest in this case because the certification of an issues class under West Virginia Rule of Civil Procedure 23(c)(4) is a matter of first impression in West Virginia. The absence of a uniform set of standards governing the use of issues classes in West Virginia poses significant risk to utilities and businesses through inconsistent adjudications regarding issues certification. This case also provides the Court an opportunity to issue further guidance on the prerequisites for class

[1] Amici requested consent to file this Amicus Brief from counsel for Respondents. Unfortunately, counsel for Respondents refused. As required by Rule of Appellate Procedure 30(b), all counsel of record were notified of Amici's intention to file a brief as amici curiae at least five days prior to the filing of the accompanying motion. Pursuant to W. Va. R. App. P. 30(e)(5), counsel for Amici state that no counsel for any party authored this amicus curiae brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this brief.

certification under Rule 23. For these reasons, Amici file this amici curiae brief in support of the Petitioner, West Virginia-American Water Company.

II. REQUEST FOR ORAL ARGUMENT

The use and certification of an "issues" class under Rule 23(c)(4) of the West Virginia Rules of Civil Procedure is an issue of first impression for this Court. Amici seek to participate in oral argument to discuss the parameters of issues certification under West Virginia law and the policy implications of certifying a liability "issues" class based on an alleged interruption in service, regardless of the impact (if any) on individual customers. Pursuant to West Virginia Rules of Appellate Procedure 20 and 30, Amici request that this Court afford them the opportunity to participate in oral argument.

III. ARGUMENT

A. Under the Circuit Court's ruling, any event resulting in the interruption of a utility service could pose a risk of triggering class certification, exposing the state's utilities to excessive liability, which could increase customer costs.

The circuit court's erroneous class certification order highlights the considerable uncertainty that exists in West Virginia class action jurisprudence. This uncertainty is harmful to all businesses operating in the state, and in particular West Virginia's regulated utilities. By certifying an issues class of those involved with a potential service interruption, without considering impact, the circuit court undermines the regulatory compact that exists between the state's utilities, their customers, and their regulators. In doing so, the circuit court's decision exposes West Virginia's utilities to excessive liability that could raise costs for all customers and eventually make the provision of utility service untenable in the state.

Utility regulation is premised on a "regulatory compact" in which the state sanctions a utility's monopoly within a defined service area – along with the obligation to serve all customers in that defined area – and subjects the utility to various regulatory restrictions and responsibilities.

In exchange for the obligation to provide a particular service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the most efficient service possible to the consumer. *See Preston County Light & Power Co. v. Renick*, 145 W. Va. 115, 126–27, 113 S.E.2d 378, 385–86 (W.Va. 1960) ("Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject for the exercise of the regulatory power of the state.") (citation omitted).

Most states, including West Virginia, regulate utilities through a Public Service Commission ("PSC"), which is authorized to act with technical expertise to administer the regulatory scheme designed by the legislature to ensure that public utilities provide reliable and efficient service to the state's citizens. *See Chesapeake & Potomac Tel. Co. v. Morgantown*, 144 W. Va. 149, 161–62, 107 S.E.2d 489, 496 (W. Va. 1959) (W. Va. Code § 24-3-1 and related statutes set forth "a clear legislative policy" to place the regulation of public utilities under state control for the public good). When exercising this authority, the PSC balances the public's need for reliable, efficient, and reasonable service with the public utility's need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable rate of return on their investment to serve customers. Proper rates are those which produce a fair and reasonable return that will enable the utility to maintain its utility system and provide service to the public. *See Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692 (1923) (observing that a public utility "is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public"); *see also Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (well-established law provides that a utility has the

right to recover its reasonable operating expenses and to earn a reasonable rate of return on its invested capital).

Utility rates are set forth in tariffs, which are approved by the PSC. Rates are adjusted through the general ratemaking process whereby the PSC has sole authority to determine the reasonableness of a utility's rates, rules, and practices. *See United Fuel Gas Co. v. Public Serv. Comm'n,* 103 W. Va. 306, 138 S.E. 388, 390 (W. Va. 1927) (W. Va. Code §§ 24-3-1, 24-2-2, and 24-2-5 give the PSC "almost unlimited power to control the facilities, charges and services of public service corporations[.] . . . The only limitation is that the requirements shall not be contrary to law and that they shall be 'just and fair,' 'just and reasonable,' and 'just and proper[.]' "). The ratemaking process is an inclusive process wherein consumer advocates and the public have an opportunity to participate and comment on how utilities run their systems. Although state PSCs have ultimate decision-making authority with respect to rates, these proceedings provide customers with the opportunity to examine, and potentially influence, every aspect of the utility's operations. As in other states, utility rates in West Virginia are determined and ordered by the PSC after extensively studying the costs of construction, maintenance, operation, administration, and financing of the utility.

The goal of the regulatory compact, then, is twofold – to ensure that customers have access to reliable and affordable service, and that utilities are able to continue to provide that service at a reasonable cost. The goals underpinning the regulatory compact are the reason why utilities' liability for service interruptions are generally limited to gross negligence. *See, e.g.*, *Food Pageant, Inc. v. Consol. Edison Co.*, 54 N.Y.2d 167, 172, 429 N.E.2d 738 (1981) (recognizing that "[t]he liability of a public utility should be limited to damages arising from the utility's willful misconduct or gross negligence") (citation omitted). Placing controllable limits on a utility's

liability for service interruptions is necessary because without these protections, utilities would face broad exposure that would inevitably increase their costs and their customers' costs. Courts have long recognized the relationship between the limiting of liability of utilities as it relates to the public interest served by lower utility rates. *Pilot Industries v. Southern Bell Tel. & Tel. Co*., 495 F. Supp. 356, 361 (D.S.C. 1979) (observing "[t]hat a public utility, through government regulation, may properly limit its liability for certain acts or omissions"); *see also Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) ("The limitation of liability was an inherent part of the rate."); *Cole v. Pacific Telephone & Telegraph Co*., 246 P.2d 686, 688 (1952) ("There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule."). In creating a regulatory compact between utilities, customers, and regulators, a policy decision was made to limit the situations in which utilities could be subject to numerous lawsuits possibly resulting in large verdicts and necessitating a large increase in rates. *See S. Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 800, 204 S.E.2d 457, 460 (1974) (If "it is in the public interest to have uninterrupted service at a reasonable price, it necessarily follows that a reasonable limitation of liability for damages for interrupted . . . service may be considered" as part of the ratemaking process).

Courts and legislatures have determined that the best approach is for a state's PSC to provide oversight to utility operations and to require utilities to make prudent investments in their system that result in reasonable service. While this approach means that costs remain affordable for customers, it does not guarantee that service that will never be interrupted. It is estimated that public water mains in the United States suffer a break on average every two minutes.[2]

[2] A report on the status of the infrastructure in the United States by the American Society of Civil Engineers identified an array of reasons why public water systems suffer from such losses. They identified a lack of

Here, due to the procedural posture of the case, any tariff language regarding a limitation of liability is not yet at issue. However, the policy underpinnings of the regulatory compact are still relevant. The circuit court's decision to certify an issues class stemming from a water line break exposes Petitioner, and potentially every utility in West Virginia, to excessive liability in a way that is inconsistent with the regulatory compact. Under the circuit court's ruling, any event resulting in a service interruption could lead to class action litigation that focuses only on the liability facts leading to the service interruption, without consideration of the varying consequences from the interruption.

By certifying a class solely on the basis of "liability," while ignoring differences in the impact on customers, the circuit court has significantly amplified the liability risk associated with events that are often considered to be part of utilities' typical business operations. This level of risk – of potentially having to defend against an issues class certification after every service interruption – undermines the regulatory compact and will create a barrier to providing affordable service in the state. As a result, it is important for courts to be precise in identifying the circumstances where an issues class is appropriate. This case presents an opportunity for the Court to provide much needed clarity on when it is appropriate to certify an issues class. Reducing ambiguity on this issue will benefit West Virginia's utility customers and positively impact any business operating in the state that may be subject to such a class certification.

B. This Court should authoritatively define the parameters for certifying an "issues" class under West Virginia Rule of Civil Procedure 23(c)(4).

Pursuant to Rule 23(c)(4) of the West Virginia Rules of Civil Procedure, "when appropriate . . . an action may be brought or maintained as a class action with respect to particular issues[.]"

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public investment in infrastructure as a major cause. *See* American Society of Civil Engineers, *A Comprehensive Assessment of America's Infrastructure* (2021). The report is available at https://infrastructurereportcard.org/wp-content/uploads/2020/12/National_IRC_2021-report.pdf.

W. Va. R. Civ. P. 23(c)(4)(A). This Court has never reviewed a certification of a Rule 23(c)(4) class. Because there is an absence of authority in West Virginia law regarding this type of class action, the state's trial courts must rely on non-binding authority in order to determine whether a class should be certified with respect to a particular issue. (*See, e.g.*, Order at ¶ 31, questioning whether "Rule 23(c)(4) issue-only certification" is "subject to the requirements of Rule 23(b)(3)"). This case provides an opportunity for this Court to set forth authoritative guidance regarding issue certification under Rule 23(c)(4), which will, in turn, provide for consistent application of the rule by West Virginia's circuit courts.

Here, the circuit court's certification of an issues class under Rule 23(c)(4)(A) in the context of utility service interruptions is erroneous and improperly subjects utilities to liability without consideration of individual impacts. Moreover, relevant federal precedent also supports that certification of an issues class solely on the basis of liability is improper and cannot stand.

1. The Court should construe Rule 23(c)(4) to operate in conjunction with Rules 23(a) and 23(b) of the West Virginia Rules of Civil Procedure.

This Court has previously noted that "[b]ecause the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal Rules when discussing [the West Virginia Rules of Civil Procedure]." *See Hardwood Group v. Larocco*, 219 W. Va. 56, 61 n. 6, 631 S.E.2d 614, 619 n. 6 (2006); *see also State ex. Rel. Paige v. Canady*, 197 W. Va. 154, 160, 475 S.E.2d 154, 160 (1996). Because Rule 23(c)(4)(A) of the West Virginia Rules of Civil Procedure is nearly identical to its counterpart in the Federal Rules, this Court should look to federal case law for guidance in defining the parameters for issue certification in West Virginia.

The federal courts have consistently construed subsection (c)(4) to operate in conjunction with Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. Notably, the Fifth Circuit has

consistently applied Rule 23(b) requirements to the cause of action as a whole in conjunction with Rule 23(c)(4). *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). When construing Rule 23(c)(4), "the proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* Accordingly, where a court considers the certification of an issues class under subsection (c)(4), such certification is proper where the court's rigorous analysis ultimately determines that the entire cause of action satisfies the predominance and superiority requirements under Rule 23(b). *See id.* Failure to apply the requirements of Rule 23(b) to the entire cause of action necessarily undermines the predominance requirement and opens the gates to class certification where any common issue is present. *Id.* ("[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended."); *see also Gunnells v. Healthplan Services*, 348 F.3d 417, 453 (4th Cir. 2003) (Niemeyer, J., concurring in part and dissenting in part).

The Courts of Appeal are currently split, however, with respect to the application of the predominance and superiority requirements in certifying issues under Rule 23(c)(4), resulting in three distinct approaches—the broad view, the narrow view, and an efficiency-based approach.[3]

[3] *See Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405 (6th Cir. 2018) (applying the "broad view" interpretation of Rule 23(c)(4) and holding that predominance and superiority requirements must be applied to common particular issues); *Castano*, 84 F.3d at 745 n. 21 (applying the "narrow view" by requiring that the action as a whole must meet predominance and superiority requirements and stating that Rule 23(c)(4) "is a housekeeping rule that allows courts to sever the common issues for a class trial"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (refusing to certify issue classes where issue certification would not increase the efficiency of the litigation); *see also Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 374 (D. Colo. 2015) (noting that the majority view taken by the First, Second, Fourth, Seventh, and Ninth Circuits includes isolation of issues for class certification under Rule 23(c)(4) that materially advance the litigation by determining "whether questions of law or fact common to class members predominate over any questions affecting only individual members").

The Fourth Circuit has taken a distinct, albeit inaccurate, approach. *See generally Gunnells v. Healthplan Services,* 348 F.3d 417 (4th Cir. 2003). The majority of the court in *Gunnells* held that Rule "23(c)(4) should be used to separate 'one or more' claims that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met." *Id.* at 441. However, even under the Fourth Circuit's approach, the aims of the predominance requirement set forth in Rule 23(b) are substantially undermined, rendering automatic certification probable. Despite the distinctions between the decisions in *Castano* and *Gunnells*,[4] federal courts have construed subsection (c)(4) of the Federal Rules of Civil Procedure as operating in conjunction with other provisions of Rule 23, including the predominance and superiority requirements.

Federal district courts, in interpreting Rule 23(c)(4), have applied the predominance and superiority requirements, attributing greater weight to the latter. In so doing, these courts have recognized that issue certification is not desirable in all cases and, in particular, should not be implemented where the common issues are so distilled that class certification would not be the superior method:

> As the common issues are narrowed down to make them sufficiently "common," the desirability of issue certification is diminished because, as indicated above, the relatively simple threshold issues can quickly be disposed of in individual trials.

[4] The test in *Gunnells* is even more problematic considering its ambiguity which has led to inconsistent interpretations within the Fourth Circuit and other courts of appeals. *Compare Farrar & Farrar Dairy, Inc. v. Miller-St Nazianz, Inc.*, 254 F.R.D 68, 77 (E.D.N.C. 2008) ("Although the Fourth Circuit appeared to address this issue in *Gunnells*, its analysis is unclear. Specifically, the *Gunnells* court appeared to hold that a district court may certify individual *causes of action*, not individual *issues*, for class treatment.") (emphasis in original) *with Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 298–300 (S.D.W. Va. 2015) (certifying an issues class with respect to particular issues of fault and comparative fault as opposed to a particular cause of action as a whole); *see also Gates v. Rohm and Haas Co.*, 655 F.3d 255, 272–73 (3rd Cir. 2011) (citing *Gunnells* for the proposition that common questions need not predominate over the cause of action as a whole). As a result, *Castano*'s approach is not only required by Rule 23, but also more predictable and clearer.

> This means that the superiority component of Rule 23(b)(3) frequently comes into play to defeat issue certification.

Parker v. Asbestos Processing, LLC, No. 0:11-cv-01800, 2015 WL 127930, *15 (D.S.C. Jan. 8, 2015).

The breadth of federal law regarding Federal Rule of Civil Procedure 23(c)(4) provides guidance to West Virginia trial courts in the absence of mandatory authority. Yet, federal case law is not wholly consistent with respect to the application of the requirements for issue certification. As a result, West Virginia trial courts stand to benefit from this Court's interpretation of Rule 23(c)(4)(A) of the West Virginia Rules of Civil Procedure.

Here, the circuit court certified a "fault-based issues class," based solely on broad issues of liability as to the plaintiffs' claims of breach of contract, negligence, and statutory violations. (*See* Order ¶ 52). Critically, the circuit court's Rule 23(c)(4) analysis glosses over the requirements of Rule 23(b). (*See id.* ¶¶ 7–8). Therefore, under the test set forth in *Castano*, the trial court abused its discretion in failing to first determine whether the predominance and superiority requirements were satisfied as to the cause of action as a whole, prior to severing common issues for class trial.

Instead, the circuit court relied primarily on *Gunnells* for the proposition that "class adjudication of liability issues [is] an appropriate use of Rule 23(c)(4)[.]" (*See* Order ¶ 7). But even *Gunnells* does not support certification of individual issues. As discussed, the majority in *Gunnells* held that Rule 23(c)(4) "should be used to separate 'one or more' *claims* that are appropriate for class treatment[.]" *Gunnells*, 348 F.3d at 441 (emphasis added); *see also Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 77 (E.D.N.C. 2008) ("[T]he *Gunnells* court appeared to hold that a district court may only certify individual causes of action, not individual issues, for class treatment."). Here, there was no contention or finding that any of

the plaintiffs' claims independently satisfied the predominance requirement consistent with *Gunnells*.

Plaintiffs should not be permitted to use Rule 23(c)(4) as an alternative pathway to certification by circumventing Rule 23(b)(3)'s predominance analysis. This Court should affirm that the threshold requirements for certification under Rules 23(a) and 23(b) must be satisfied before the housekeeping mechanism of Rule 23(c)(4) can be applied.

2. Issues certification under Rule 23(c)(4) is inappropriate where, as here, any determination of liability requires individualized proof and fact-finding, precluding findings of commonality and predominance.

Before certifying a class under Rule 23 of the West Virginia Rules of Civil Procedure, "a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and has satisfied one of the three subdivisions of Rule 23(b)." Syl. Pt. 8, in part, *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). When class action certification is being sought pursuant to Rule 23(b)(3), a class action may be certified only if the circuit court is satisfied that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied, which also requires a "thorough analysis." Syl. Pt. 7, in part, *State ex rel. Surnaik Holdings of WV, LLC v. Bedell*, 244 W. Va. 248, 852 S.E.2d 748 (2020). A showing of "predominance" and "superiority" means: (1) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W. Va. Rule Civ. P. 23(b)(3).

The commonality requirement "requires that the party seeking class certification show that 'there are questions of law or fact common to the class.' " *State ex rel. W. Virginia Univ. Hosps.,*

Inc. v. Gaujot, 242 W. Va. 54, 62, 829 S.E.2d 54, 62 (2019) ("*Gaujot II*") (citation omitted). For purposes of Rule 23(a)(2), "a 'question' 'common to the class' must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." Syl. Pt. 2, *Gaujot II*, 242 W. Va. 54, 829 S.E.2d 54 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369, 131 S. Ct. 2541, 2562 (2011)). Thus, for commonality to exist under Rule 23(a)(2), "class members' 'claims must depend upon a common contention,' and that contention 'must be of such a nature that it is capable of classwide resolution.' In other words, the issue of law (or fact) in question must be one whose '*determination* . . . will resolve an issue that is central to the validity of each one of the claims in one stroke.' " Syl. Pt. 3, *Gaujot II*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original) (alterations omitted) (quoting *Dukes*, 564 U.S. at 350, 131 S. Ct. at 2551); *see also State ex rel. Erie Ins. Prop. & Cas. Co. v. Nibert*, No. 16-0884, 2017 WL 564160, at *6 (W. Va. Feb. 13, 2017) ("What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (citation omitted).

"[S]atisfying the predominance requirement is much more demanding than the general commonality requirement under Rule 23(a)." *Surnaik*, 244 W. Va. at 257, 852 S.E.2d at 757. To establish predominance, plaintiffs must show that common issues subject to generalized, classwide proof are more prevalent or important than the non-common, individual questions in the case. *See id.* at 258, 852 S.E.2d at 758 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)). Individual questions are those "where 'members of a proposed class will need to present evidence that varies from member to member[.]' " *Tyson Foods*, 577 U.S. at 453 (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–197 (5th ed. 2012)). A thorough analysis of predominance "includes (1) identifying the parties' claims and defenses and their respective

elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate." Syl. Pt. 7, in part, *Surnaik*, 244 W.Va. 248, 852 S.E.2d 748.

However, service interruption claims do not generate common questions fit for class certification. In fact, most cases, like this one, have generally involved allegations of insufficient preparation by the utility, sought damages related to losses and inconvenience from a service interruption, and sought class action status for very large groups of customers. *See, e.g.*, *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 18 N.E.3d 1050, 1060–62, 1065 (Mass. 2014) (class alleging that power company failed to adequately prepare for winter storms not certified because the issue of whether the company prolonged each plaintiff's outage was an individualized issue); *Entergy Gulf States, Inc. v. Butler*, 25 S.W.3d 359, 361–64 (Tex. App. 2000) (class alleging that electrical utility failed to properly maintain its system, resulting in unreasonably long power outages after a storm, not certified because individualized causation and damages predominated). Thus, courts have recognized that the determination of liability under the plaintiffs' claims requires individualized analysis precluding findings of commonality or predominance.

Here, the plaintiffs contend that WV American failed to perform its contractual and statutory duties "when 25,000 customers lost water for three or more days in June 2015." (Compl. ¶¶ 28–29). Therefore, under the plaintiffs' theory, liability hinges on whether tens of thousands of water service users lost water over a period of several days. *See id.* In order to conduct a sufficiently thorough analysis of the Rule 23 prerequisites, including commonality and predominance, the circuit court was required to analyze whether WV American's liability, as alleged by the plaintiffs, is appropriate for classwide resolution.

Critically, in this case, the plaintiffs expressly conceded that "individual class plaintiffs may have suffered different consequences from having lost water supply as the result of [WV American's alleged] misconduct – some experienced a complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory" (Plfs.' Mem. In Support of Mot. for Class Cert., at 6), and that the proposed class may include individuals "who may have experienced no adverse effects[.]" (Plfs.' Reply, at 11). Thus, the question of WV American's alleged violations of the relevant standards is expressly tied to the impact on customers. Contrary to the circuit court's findings, this connection is not only relevant to the determination of ultimate damages; rather, there can be no liability finding to any plaintiff without a demonstration that the plaintiff was impacted in a way that creates liability under the applicable standard. *See Gaujot II*, 242 W. Va. at 64, 829 S.E.2d at 64 (recognizing the important distinction between liability and damages where the controlling statute was "framed such that liability and damages are two sides of the same coin," and recognizing that the damages would need to be determined as part of the threshold liability determination).[5] Here, individualized fact finding is necessary to determine liability for each individual customer.

In its certification order, the circuit court held, without citing to any authority or the record, that Rule 23(a)(2)'s commonality requirement was satisfied. (Order at ¶ 3). The circuit court found that "issues of law common to Plaintiffs and all Class members" include 1) "whether WV American breached its contracts for failing to maintain its facilities in such condition to provide an adequate and continuous water service," and 2) "whether WV American violated its statutory

[5] After remand, the circuit court in that case concluded that the plaintiffs had identified a sufficient method by which liability could be determined on a classwide basis using common proof. *See State ex rel. W. Va. Univ. Hosp., Inc. v. Gaujot*, No. 21-0737, 2022 WL 1222964 (W. Va. Apr. 26, 2022) ("*Gaujot III*"). In contrast, here, WV American has established (and the plaintiffs have conceded) that the alleged impacts on service cannot be determined on a classwide basis.

duties to maintain adequate and suitable facilities." (*Id.*) The circuit court did not discuss the possibility of disparate liability rulings among the class and did not address how the proposed class is capable of generating common answers to the referenced questions of WV American's liability in the face of WV American's evidence (and the plaintiffs' own concession) that the proposed class members' alleged water service impacts cannot be assumed or demonstrated without individualized proof.

Instead, the circuit court disposed of WV American's arguments on commonality in a single sentence, concluding that "what are inevitable individual variances among class members, from one customer to the next, do not detract from the fact that the commonality threshold is met." (Order at ¶ 4). Following a cursory statement that "core issues of liability are common to all class members," the circuit court "once again conclude[d] that commonality is met in this case." (*Id.*)

Then, in the portion of its Order addressing Rule 23(b)'s predominance requirement, the circuit court concluded that predominance was satisfied because "[t]he fault or liability determination will rely upon common class-wide evidence related to WV American's conduct prior to the June 2015 main break, and what it did or failed to do to maintain an adequate water system that complied with its contractual and statutory duties." (Order at ¶ 39). According to the circuit court, "*each and every liability issue*" in the case "turns upon" common proof regarding WV American's alleged knowledge regarding the likelihood of service interruptions from a break of the water main at issue and "what measures were available to it" to reduce the likelihood. (*Id.* at ¶ 35).

However, no determination of whether WV American is "liable" can occur without evaluating whether (and, if so, how) water service was impacted for individual water users. The impact, if any, to a customer's water service goes to the core of liability under the statutory and

regulatory provisions upon which the plaintiffs' claims are based. For example, the PSC rule on which the plaintiffs rely for their breach of contract claim provides that "[e]ach utility shall at all times construct and maintain its entire plant and system in such condition *that it will furnish safe, adequate, and continuous service*." W. Va. C.S.R. § 150-7-5.1a (emphasis added). Applying the plain language of the PSC rule, any determination of breach necessarily includes consideration of whether each class member received "safe, adequate, and continuous service." *Id.* In its Order, however, the circuit court failed to give any meaning whatsoever to that portion of the regulation; instead, the court inexplicably concluded that "the duty at issue is the duty to 'construct and maintain [the utility's] entire plant and system' in a suitable condition *to prevent service interruptions*[.]" (Order at ¶ 15) (emphasis added).

The circuit court's interpretation of the PSC rule improperly eliminates from any determination of breach whether a particular customer received "adequate and continuous service," effectively establishing a strict liability standard requiring that public utilities "prevent service interruptions." Under the circuit court's interpretation, a utility provider can be alleged to have breached its duty under the PSC regulatory provisions (and thus face the risk of "issues" class certification), any time a break or maintenance event occurs, regardless of whether the event unreasonably impacted the putative class members, so long as the plaintiffs identify the alleged historic condition of the utility system as the "common" issue.

As succinctly stated by WV American (in a proposed surreply that the circuit court declined to consider), "[p]lanned or unplanned events that may impact water service for some customers are part of the operational and maintenance cycle for water utilities as they balance management of complex distribution systems with the need to preserve reasonable rates for their customers." (Def.'s Surreply in Opp. to Class Cert., at 6). West Virginia's utilities are required to provide

reasonable service, but they are not required to provide perfect service. Regardless of the precautions taken by utilities, service interruptions cannot be eliminated entirely and will occur within the normal course of business. Moreover, designing a utility system to be fully immune from all events potentially impacting service is not consistent with maintaining affordable utility service. Exposing West Virginia's public utilities – who are not held to the standard of perfect service – to the risk of an issues class certification for every service interruption is overly burdensome and will result in unreasonable expense.

This Court should not sanction an approach to class litigation that effectively guarantees issue class certification under Rule 23(c)(4) for any event potentially resulting in service impacts in the state.

3. Issues certification under Rule 23(c)(4) is inappropriate where, as here, certification will not materially advance the litigation as a whole and noncommon issues are "inextricably entangled" with common issues.

Aside from the traditional predominance and superiority inquiries, federal courts have generally held that certification of an issues class is improper where the certification would not materially advance the litigation as a whole. *See, e.g.*, *Smith-Brown v. Ulta Beauty, Inc.*, 335 F.R.D. 521, 535 (N.D. Ill. 2020); *Good*, 310 F.R.D. at 296 ("Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.") (citation omitted)); *Morris*, 308 F.R.D. at 379 (holding that certification of an issues class would not advance the litigation because the case involved highly individualized inquiries about the chain of causation, more properly suited for individual trials); *see also Plastic Surgery Associates, S.C. v. Cynosure, Inc.*, 407 F. Supp. 3d 59, 72–73 (D. Mass. 2019) (holding that the need for 300 to 400 individualized trials regarding issues of causation and damages after the resolutions of class wide issues did not materially advance

litigation); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 670–71 (M.D. Fl. 2001) (finding that even the broader issues of whether applicable standards of care were breached or whether the chemical supplied was a defective product would not materially advance the litigation due to the varied circumstances of individual cases). Therefore, courts "should decline to certify issues where there are so many individual issues in the case that certifying the common issues would have a negligible effect on judicial efficiency." *Farrar*, 254 F.R.D at 77 (refusing to certify an issues class where individual issues of causation and affirmative defenses predominated over common issues).

In addition to the determination of whether the certification of an issues class will materially advance the litigation, federal courts also refuse to certify an issues class where noncommon issues are "inextricably entangled" with common issues. *See Caruso v. Celsis Insulation Resources Inc.*, 101 F.R.D 530, 538 (M.D. Pa. 1984); *see also Gresser v. Wells Faro Bank, N.A.*, Civil No. CCB-12-987, 2014 WL 1320092, *9 (D.Md. Mar. 31, 2014) ("Courts typically find bifurcation or the certification of only certain issues helpful where it will materially advance the litigation and where there is a *clear line* between the issues to be certified and those to be dealt with on an individual basis later." (emphasis added)). "Courts should not use [Rule 23(c)(4)] 'if noncommon issues are inextricably entangled with common issues or the noncommon issues are too unwieldly or predominant to be handled adequately on a class action basis.' " *In re Motor Fuel Temperature Sales Pracs. Litig.*, 292 F.R.D. 652, 665 (D. Kan. 2013) (quoting *Fulghum v. Embarq Corp.*, No. 07-2601-Efm, 2011 WL 13615, at *2 (D. Kan. Jan. 4, 2011)); *see also Caruso*, 101 F.R.D at 538 (holding noncommon issues were "inextricably entangled" with common issues where plaintiffs proof of the harmful nature of the product at issue did not resolve individual issues requiring separate trials on causation and damages); *Hurd v. Monsanto Co.*, 164

F.R.D. 234, 241 (S.D. Ind. 1995) (denying issue certification where issues of basic liability were "inextricably entangled" with individual issues of proximate cause).

Here, the circuit court did not provide meaningful analysis as to whether certification of an issues class under Rule 23(c)(4) is appropriate in this case. While the circuit court made findings, albeit erroneous ones, that the predominance and superiority requirements were "satisfied," the circuit court's order failed to adequately consider whether issue certification will materially advance the litigation as a whole and failed to recognize that noncommon issues are "inextricably entangled" with common issues, precluding certification of an issues-based class.

Specifically, the circuit court certified an issues class with respect to the purportedly "overarching common issues of whether [WV American] is liable for breach of contract and negligence, and for actionable violation of its statutory duties under the West Virginia Code." (Order at ¶ 52). However, as discussed as discussed in the context of commonality and predominance, the circuit court's Order erroneously concludes that the impact on customers as a result of WV American's alleged conduct need not be considered in order to determine liability. The plaintiffs allege that WV American is liable for breach of contract based on its alleged "failure to construct and maintain its entire plant and system in such condition that it will furnish safe, adequate, and continuous service." (Compl. ¶¶ 28–30). In addition to breach of contract, plaintiffs claim that they are entitled to damages proximately caused by WV American's alleged negligence and violations of statutory duties to provide reasonable and sufficient service. (Compl. ¶¶ 48–54). The plaintiffs' theories of liability are based on separate and distinct events including: (1) a water break resulting in (a) outages and (b) inadequate water pressure; (2) repair attempts that were unsuccessful; and (3) a subsequent interruption in service caused by an additional problem occurring several days after the initial break. (Compl. ¶¶ 6–11). Therefore, in order to prove

liability based on alleged inadequacies or interruptions in service, the impact on the customer's service, if any, has to be assessed. The impact is not, as the circuit court found, solely related to the question of damages. Because a regulated utility is not subject to strict liability for service interruptions, the impact of the water main break on the customer is necessary to determine liability.

Further, the circuit court erroneously failed to recognize that the question of the impact of a service interruption is inextricably entangled with liability issues. An issues class is particularly inappropriate for a utility service interruption claim, since the questions of the existence and degree of the interruption, the cause of the interruption and the damages flowing from the interruption, all require individualized proof. In instances of service interruptions, the courts have recognized that individual questions of causation inherent in the claims overwhelm any potential common issues. It is unsurprising then that "there are few class actions for service disruptions or outages filed against utilities." *Von Nessi v. XM Satellite Radio Holdings, Inc.*, No 07-2820, 2008 WL 4447115, at *1 n.1 (D.N.J. Sept. 26, 2008). Prior to this case, courts have consistently found that service interruption claims are inappropriate for class certification because of the individualized negligence, specific causation, and damages issues. *See id.* ("Generally, such disruptions require a showing of negligence and that the consequential damages are specific to the individual suing.").

For example, in *Abbott v. American Electric Power, Inc.*, the U.S. District Court for the Southern District of West Virginia denied certification of a proposed class alleging that Defendant Appalachian Power Company was "negligent in the maintenance of its transmission and distribution lines," which allegedly lead to more widespread power outages than otherwise would have occurred after a winter storm. *Abbott v. Am. Elec. Power, Inc.*, No. 2:12-CV-00243, 2012 WL 3260406 (S.D.W. Va. Aug. 8, 2012). The district court specifically rejected the plaintiffs'

contention that a common question existed as to whether "the Defendant's negligence is the proximate cause of the power outage[.]" *Id.* at *4. The court concluded that this question was "not capable of a class-wide determination" because, "[a]lthough a single snowstorm affected West Virginia on December 18 and 19 of 2009, each plaintiff's claim will require an individualized causation analysis." *Id.* The court further observed that the denial of class certification was consistent with the weight of authority:

> When examining the causation element in class actions against a public utility, courts have generally found that a power outage cannot be viewed as a single event that is the result of a single cause. Outages in customers' homes may be caused by factors other than the power company's alleged negligence. This makes a class-wide causation analysis impossible and requires the court to make individualized causation determinations for each customer's claim.
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> . . .
>
> A causation analysis based on specific facts will be required for each putative class member to link the damage he or she allegedly sustained with [Defendant's] alleged negligence. This analysis could not be performed on a class-wide basis because it will require specific evidence based on what occurred at each customer's residence.

Id.

This case closely resembles *Abbott* and other cases brought against utilities for interruptions in service. As discussed above, and as succinctly argued by WV American below, "[g]iven the different service impacts alleged by Plaintiffs, and the complexity of the WV American distribution system and the way in which the water main events in 2015 affected individual water users, these impacts cannot be assumed or demonstrated without individualized proof." (Def.'s Mem. in Opp'n, at 14). Further, WV American outlined that any inquiry regarding liability for a water pressure reduction would require, at a minimum, (1) considerations of pressure waivers for each individual customer, (2) determinations of pressure fluctuations with respect to each individual customer's standard pressure which will necessarily encompass individual determinations, and (3) whether each customer frequently experienced pressure valuations outside

of limits at issue. (Def.'s Mem. in Opp'n, at 18–19). Pointedly, these are the same kind of individualized issues identified by Judge Goodwin in denying class certification of the power outage class claims in *Abbott*.

Reversal of the circuit court's class certification determination is fully consistent with the substantial weight of authority in service interruption cases. The plaintiffs' complaint asserts several theories of liability that require consideration of individual impacts to adequately assess liability. The certification of issues regarding liability implicates individual issues and as a result, any asserted common issues are inextricably entangled with noncommon issues. Even assuming that common issues could be cleanly severed, which they cannot, the remaining issues regarding proximate causation and impact would necessitate individual trials based on each customer's location, requiring re-litigation of liability issues. Therefore, due to the number of causation and damages issues inextricably entangled with liability issues, certification of an issues class in this case does little to materially advance the litigation as a whole and is not in the interests of judicial efficiency. As a result, certification of overarching issues of whether WV American is liable for breach of contract, negligence, and actionable violation of its statutory duties is improper.

IV. CONCLUSION

This case presents an opportunity for this Court to clarify the requirements for the use and certification of issues classes under Rule 23(c)(4) of the West Virginia Rules of Civil Procedure. Without clarity on these issues, every West Virginia utility and business that experiences a service interruption will continue to face an undue level of risk resulting from inappropriate class certification.

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