IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,

Petitioners,

v. No. 24-75

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

BRIEF OF *AMICUS CURIAE* THE CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

In Support of Respondent and Requesting the Court Affirm the Public Service Commission's January 9, 2024, Order

THE CONSUMER ADVOCATE DIVISION OF
THE PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA
By Counsel,

HEATHER B. OSBORN, ESQ.
STAFF ATTORNEY
WV BAR NO. 9074
hosborn@cad.state.wv.us

ROBERT F. WILLIAMS, ESQ.
DIRECTOR
WV BAR NO. 4067
rwilliams@cad.state.wv.us

300 Capitol Street
Suite 810
Charleston, WV 25301
304.558.0526

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AMICUS CURIAE IDENTITY, INTEREST AND AUTHORITY

Pursuant to Rule 30(a) of the Rules of Appellate Procedure, the Consumer Advocate Division of the Public Service Commission of West Virginia ("CAD") is an agency of the State of West Virginia and, therefore, may file an *amicus curiae* brief without the consent of parties or leave of the Intermediate Court or the Supreme Court of Appeals.

The CAD is required by statute and rule to represent the interests of residential ratepayers in utility rate cases and related proceedings that may impact the rates of residential utility customers. As such, the CAD was a party to each of the underlying Public Service Commission proceedings, identified below as Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC. Further, the CAD took on an active role in those proceedings, by developing the record through written discovery and expert testimony. In the underlying cases, the CAD presented substantial evidence to show that the Petitioners acted with imprudence and failed to take reasonable measures which would have minimized or mitigated increasing fuel related costs. The CAD recommended that a substantial portion of a $552.9 million dollar under-recovery balance (an amount which is over and above the dramatically increased fuel costs and expenses the Commission had already authorized the Petitioners to recoup from ratepayers) be disallowed, with the remaining balance of the under-recovery amortized over a number of years to minimize the rate impact of the accumulated under-recovery on West Virginia ratepayers.

Contrary to the Petitioners' claims on appeal, the Consumer Advocate Division believes that the Commission's decision is well within the Commission's legislative ratemaking authority and its responsibility to approve just and reasonable rates, and to disallow rates which are not just and reasonable for a utility's ratepayers. The Commission's decision is adequately supported by the record in this case, as set forth by the findings of fact and conclusions of law in its January 9, 2024, Order, and the clear regulatory policy and reasoning set forth in its decision. The

Commission's decision is also consistent with the various orders which have been entered over these protracted cases while the Commission conducted and completed its prudency review. The Commission's decision is based on the entirety of the developed record, including the responses submitted by the Petitioners in response to the Commission's requests for further information and post-hearing exhibits.

For the reasons set forth in further detail in this brief, the Consumer Advocate Division would urge the Court to deny the Petitioners' appeal, defer to the Commission's regulatory expertise and the analysis of the record performed by the Commission, and not disturb the Commission's January 9, 2024, Order, which granted reasonable and appropriate rate relief to the utilities' affected customers.

STATEMENT OF THE CASE

1. Overview and background of the proceedings below

This appeal arises from a January 9, 2024, Order of the Public Service Commission of West Virginia in three consolidated Expanded Net Energy Cost ("ENEC") cases, all involving Appalachian Power Company and Wheeling Power Company as joint applicants, in Case No. 21-0339-E-ENEC, 22-0393-E-ENEC and Case No. 23-0388-E-ENEC. The Commission had granted the Petitioners multiple rate increases to reflect their increasing ENEC costs for each review period. However, in each case, various parties to this case had identified questionable acts and unreasonable practices and inactions of the Petitioners related to their procurement of coal and their associated inability to economically operate their coal-fired plants. The parties believed that many of the identified actions and inactions of the Petitioners were unreasonable and imprudent, and had led to or greatly increased the magnitude of the under-recoveries which had accumulated on the Petitioners' books during each ENEC review period. The West Virginia Energy Users

Group, the Commission Staff and the Consumer Advocate Division had each recommended that various amounts of the accumulated under-recoveries be disallowed as imprudent and removed from the reasonably incurred energy costs to be recovered from ratepayers, based on the developed record in the cases.

By Order entered on January 9, 2024, after the development of an extensive record over the three years these cases have been pending, the Commission ultimately determined that the overall record supported a finding that $231.8 million of the accumulated under-recoveries should be disallowed as imprudently incurred, with the remaining $321.1 million balance in under-recoveries as of February 28, 2023 to be recouped over a period of 10 years, starting September 1, 2024, with a carrying charge of 4% per year from that date forward.

The Petitioners' appeal essentially claims that the Commission decision is unsupported by the record, that the Petitioners were denied due process in this case, and the Commission's decision is inconsistent with or contrary to the Commission's precedent, and outside of the proper scope of its regulatory authority.

The CAD wholeheartedly disagrees with the positions advanced by the Petitioners on appeal, and supports the Commission's January 9, 2024, decision as a reasonable and appropriate exercise of its regulatory power and authority, well supported by the record below.

A. ENEC proceedings before the Public Service Commission of West Virginia

An ENEC proceeding is a mechanism created by the Public Service Commission, to establish an annual rate increment used to provide for the cost recovery of an electric utility's reasonable and appropriate consumed fuel and fuel handling costs, purchased power costs, financial settlement of transmission losses, transmission revenues, emission allowance costs and gains, consumables and other production costs.

The Commission has explained the purpose, and the logistics, of ENEC proceedings, as follows:

> In originally creating the ENEC specialized and limited rate proceeding, the Commission contemplated an annual filing to enable the Petitioners to adjust rates for fuel related generation costs and certain purchased power and transmission related costs to avoid filing a full base rate case to reflect changes in those cost components. The Commission authorized the development of ENEC rates based on projections of future ENEC cost elements. An important element of the ENEC procedure was an over or under-recovery mechanism whereby Petitioners using the ENEC procedure would defer costs that exceeded or were less than their ENEC revenues and request recovery of under-recoveries or rate crediting of over-recoveries (true-up mechanism). This true-up mechanism, however, is subject to Commission review of the incurred costs and a determination that the costs resulted from prudent actions on the part of the utility and were reasonable. Absent such a finding, there was no guarantee that under-recoveries would be passed on to customers. (Case No. 21-0339-E-ENEC, Order May 13, 2022, at 3, Commission Record at Bates No. 1674 ("CR at BN __"))

The $552.9 million under-recovery reflected in the Commission's January 9, 2024, Order had grown significantly during the course of the three cases. To get a better understanding of what the cumulative under-recovery represents, and the parties' opposition to the Petitioners' immediate recovery of such a vast under-recovery through the normal ENEC over/under-recovery mechanism, it is necessary to review how such a large under-recovery came into being, and the causes and factors which led to its growth.

B. Case No. 21-0339-E-ENEC

By Order entered on September 2, 2021, in Case No. 21-0339-E-ENEC, the Public Service Commission observed that the Petitioners' coal-fired plants were being operated at lower and lower capacity levels, even though the cost of purchasing power from other sources to serve their customers appeared to be higher than the energy costs associated with producing the same quantities of energy with their coal-fired plants, if those coal plants were operated more frequently. (CR at BN 890-891).

The Petitioners had sought an increase in their ENEC rates to produce an additional $73 million in annual ENEC revenues as a part of their original filing in Case No. 21-0339-E-ENEC. Of that requested $73 million, $55.4 was for under-recovery of fuel costs, including $32 million in deferred under-recovery collection from 2020, and $17.6 million in increased projected fuel costs for the period of September 1, 2021 through August 31, 2022.

The Company's initial filing was made on April 16, 2021. Direct and Rebuttal Testimony was submitted by the parties in July of 2021, and hearing in the matter was initially conducted on July 30, 2021. The Commission required additional information to be submitted by the Petitioners on August 9, and initial and reply briefs were filed almost immediately thereafter.

Based on its review of the record, as set forth in the Commission's September 2, 2021, Order and the Commission's subsequent March 2, 2022, Order denying the Petitioners' Petition for Reconsideration in Case No. 21-0339-E-ENEC, the Commission projected that the Petitioners could achieve a $66.68 million reduction in fuel costs over the period from September 1, 2021, through August 31, 2022, if they ran the coal-fired plants at a capacity rate of 69%, using the coal costs and associated fuel handling costs contained in the Petitioners' petition, and additional information which the Petitioners had provided post-hearing in response to the Commission's inquiries. (Commission Order of September 2, 2021, at 5-8, CR at BN 890-896).

As a part of the Commission Order of September 2, 2021 (CR at BN 891, 893), the Petitioners were required to file monthly reports as closed docket entries. (Id. at 6 and 8, CR BN at 891 and 893).

The Petitioners subsequently filed monthly reports for review by the Commission and the parties reflecting the requested information for the months of October, 2021 through December of 2023. Those reports are also a part of the record reviewed by the Commission in this case. Each

report showed net generation from all APCo and WPCo power plants by month, retail and wholesale energy load by month and purchased power energy purchases by month by supplier. Each report also showed purchased power demand and energy costs by month by supplier. (See, e.g., monthly reports filed for October, 2021 and November, 2021 in CR at BN 941-951).

Based on its review of those monthly reports, the Commission's order of March 2, 2022, in Case No. 21-0339-E-ENEC noted that the cost of purchasing energy from PJM was dramatically increasing, and the utilization of the Petitioners' coal-fired plants by PJM had declined even further. The capacity factor at the Amos plant had dropped from fifty-seven percent in September of 2021 to three percent in November of 2021. The Mountaineer plant's capacity factor had dropped from twenty-nine percent to zero in October and November of 2021. The capacity factor at Mitchell dropped from forty-nine percent in September of 2021 to six percent in November of 2021. As a result of these two competing factors, the Petitioners represented that their under-recovery of ENEC costs had grown to $176.1 million at the end of November of 2021, based on the monthly report it had filed on January 21, 2022. (March 2, 2022, Commission Order at 7-9, CR at BN 965-967)

Therefore, as a part of the Commission's Order entered on March 2, 2022, in Case No. 21-0339-E-ENEC (Id. at 11-13, CR at BN 969-971), the Commission reopened the case to receive further updated evidence and amended schedules from the Petitioners. The Commission also immediately increased the Petitioners' ENEC rate to generate an additional $31.4 million in ENEC revenues for the ENEC period ending August 31, 2022, to reflect an adjustment to the Petitioners' fuel handling costs associated with its fuel purchases. (Id at 7, CR at BN 965)

The reopened matter was scheduled for hearing to be conducted on March 23, 2022. The Petitioners were required to file additional information, amended schedules and revised projected

ENEC costs with the Commission on or before March 14, 2022, and the other parties in the case were provided the opportunity to comment on the Petitioners' March 14 filing on or before March 21, 2022.

As a part of the Petitioners' March 14, 2022, filing (CR at BN 995-1078), the Petitioners requested that the Commission increase ENEC rates to produce additional revenues of $155.2 million, effective May 1, 2022, to cover its increasing costs of supplying energy to its customers. The Petitioners were now projecting that their February 28, 2022, ENEC balance had grown to $216.1 million. The Petitioners projected a need for an annual increase of $93 million just to recover their projected annual ENEC costs for the period, over and above the under-recoveries they claimed they had already incurred.

The March 23, 2022, hearing was conducted as scheduled.

Based on the public and confidential responses to CAD data requests that had been submitted by the Petitioners in March of 2022, it became quite clear to the CAD what had transpired to create these large under-recoveries. The Petitioners had failed to schedule and secure the timely and orderly delivery of coal to replace its diminishing inventory of coal on the ground at its plant sites under the coal supply contracts they had in place, and their coal inventories were down to levels which were insufficient to allow for the continued operation of their coal-fired plants at normally expected levels. Instead of running the coal-fired plants during a time when it would have been highly economically advantageous to do so, the Petitioners kept the coal-fired plants down for extended outages, and purchased virtually all of their energy needs from PJM at significantly higher prices. Instead of taking advantage of a favorable energy market with low priced coal it should have had at its disposal under existing contracts, it was idling the coal-fired plants and keeping them idled by placing large adders on its bids into PJM's next day markets.

This preserved and extended the Petitioners' limited coal supplies, and it also required the Petitioners to purchase its energy supplies from PJM at prices which were substantially higher than the energy costs which had already been built into the Petitioners' ENEC rates.

The Petitioners had ignored market signals that natural gas prices were rising, coal exports were increasing, domestic coal inventories were dropping, and coal production capacity had not rebounded since COVID. Therefore, as the increased demand for coal-fired generation picked back up in 2021, the Petitioners were caught unprepared, and without a reliable and steady supply of coal to run its plants.

The Petitioners' suggestion that the Commission used hindsight to reach its conclusion is disingenuous. Not only was it foreseeable, it was predictable. The Petitioners had been forewarned by the CAD's coal expert in real time. CAD's retained coal expert, Emily Medine, of Energy Ventures Analysis, noted the changing market signals in her pre-filed written direct testimony submitted on July 2, 2021. (Case No. 21-0393-E-ENEC, Medine Direct at 15-17, CR at BN 257-259).

Based on its review of the record, including the information submitted in response to CAD Data Request No. 2, filed on March 22, 2022, (CR at BN 1156-1169) it became clear that the Company had failed to responsibly recognize and react to those clear market signals in a timely and prudent manner. (Case No. 21-0393-E-ENEC, Medine Supplemental Direct CR at BN 1093-1101; March 23, 2022 Tr. at 250-254, 259-263; CR at BN 1430-1434, 1439-1443).

In July of 2021, Ms. Medine noted that natural gas prices were increasing. This trend clearly suggested that demand for coal-fired energy generation would be increasing, and the need for securing a safe and reliable source of coal was increasingly important. The Petitioners had deferred 2.7 Million tons of coal it was to have received under contract in 2020 for delivery in

2021. It should have been able to schedule and secure the timely delivery of coal under its existing contracts. The record was revealed that the Petitioners had aggressively burned down their inventories of coal, without taking reasonable and adequate measures to schedule and arrange for the restocking of those inventories. The Petitioners had not sought additional coal supplies in May of 2021, contending that their current contracts would provide sufficient supplies of coal to allow their coal-fired plants to operate at expected levels. The Petitioners' coal inventories had grown during 2019 and 2020 during Covid, and the Petitioners had intentionally burned down those inventories. However, demand for energy was increasing again, and with the increase in natural gas prices, it would naturally flow that the demand for energy from coal-fired plants would significantly increase. They did not take adequate measures to ensure that those inventories and stockpiles would be built back up and sustained. The Petitioners failed to enforce timely current supply obligations under existing contracts. (Id).

Back in July of 2021, Ms. Medine was concerned that the Petitioners had not developed a sufficiently balanced coal supply portfolio, and none of its existing coal contracts appeared to extend beyond 2022. They also appeared to be too highly dependent on the coal production of two major producers, which made the Petitioners more vulnerable to coal market volatilities. Those fears were realized all too soon, and the significant under-recoveries incurred in these cases were the consequences of those failures.

In July of 2021, Ms. Medine had recommended that the Petitioners take a number of measures to address these concerns. Her testimony gave contemporaneous evidence of the changing market factors, which warranted additional measures to secure coal and protect the Petitioners against a volatile market. Despite being advised of market concerns, the Petitioners waited until the end of September 2021 to go to the market. Adding insult to injury, the solicitation

did not even request bids for the balance of 2021. It took another couple of months for the Petitioners to seek coal, then indicating their surprise none was available for the balance of 2021. At the same time, the Petitioners were not even requiring performance under the contracts they had.

If the Petitioners had enforced the coal supply contracts they already had in place, and timely built up their coal inventories and replenished them with coal that they were entitled to receive under contracts they already had in place, the Petitioners would have been in a very favorable market condition. The CAD's review of the information submitted by the Petitioners in discovery provided no justification or claimed Force Majeure reasons that would excuse a supplier's non-performance under the existing coal contracts. Had those supplies been scheduled, secured and delivered in a timely and orderly fashion, the Petitioners' inventories would not have been depleted when the coal market constricted, and the plants would be able to continue to operate. The plants would have been operated very profitably if the lower priced coal supplies under existing contracts had been prudently secured and utilized. Instead, the plants sat idle, the Petitioners purchased larger quantities of energy supplies from PJM at substantially higher prices. If the plants had been on line and burning coal at the coal prices contained in the contract (as was presumed by the Petitioners' original filing in this case, the large under-recoveries the Petitioners experienced would have been averted or at least substantially minimized.

Both the CAD and the West Virginia Energy Users group requested that a full prudency review be conducted before allowing any additional increases in the Petitioners' ENEC rates.

By Order entered on May 13, 2022 (CR at BN 1672-1680), the Commission directed its Staff to conduct an in-depth prudence review of the Petitioners' policies and procedures for maximizing and maintaining adequate fuel inventory levels, bidding their plants into the PJM

market to maximize economical self-generation, recognizing that it may be necessary to sell at a small loss in some hours to capture the net benefits of higher market prices without any twenty-four hour period. The Commission also required evidence of proper and prudent plant maintenance and availability so that the benefits of self-generation can be realized when the opportunities arise. Until the Commission got a full report and gathered further information on the Petitioners' practices, the Commission concluded that it could not find that the under-recoveries that had accumulated should be passed on fully to customers.

Nevertheless, as a part of that same May 13, 2022, Order, the Commission granted the Petitioners an ENEC increase that was designed to produce $93 million in additional revenue to attempt to prevent future rate shock in the event that the Commission determined that the Petitioners' costs, both actual and projected, were prudent. The Commission's order specifically placed the Petitioners on notice that "in adopting those requested rates to cover their update ENEC cost projections, we are not guaranteeing them recovery of those costs if we later determine that some of those costs are excessive, unreasonable, and not prudently incurred." (Case No. 21-0339-E-ENEC, Order May 13, 2022, at 6 and 8, CR at BN 1677-1679). The increased ENEC rates were approved for all services rendered on and after the date of the Commission's Order. (Id.)

C. Case No. 22-0393-E-ENEC

In case No. 22-0393-E-ENEC, the Petitioners sought an additional $297 million in ENEC costs over and above the increased ENEC levels which had been established in Case No. 21-0339-E-ENEC. (2022 ENEC Petition, CR at BN 7280-7420).

To determine the prudence of the fuel procurement costs that were the subject of the 2022 ENEC, the CAD, through its expert witness, examined whether decisions made (or not made) by the Petitioners at a particular time were reasonable based upon the information available at that

time. In other words, the CAD's prudency review was not based upon 20-20 hindsight but, rather, was based upon what the Petitioners knew or should have known at the time.

Using that standard, the CAD found, and presented to the Commission its findings, imprudent conduct by the Petitioners that resulted in significantly increased costs that the Petitioners sought to pass on to customers, in their entirety. More specifically, the CAD found that the Petitioners made a number of costly errors in their coal procurement efforts that could be categorized into three categories. First, that the Petitioners failed to put in place a portfolio of fuel supply agreements consistent with their own Regulated Fuel Procurement Policy and Procedures Manual ("FP Manual"). Second, that the Petitioners failed to respond in a timely manner to the significant market events that were occurring in mid-2021, despite their mandate to closely monitor the market. Third, that the Petitioners failed to secure performance under the coal supply agreements they had in place. (Case No. 22-0393-E-ENEC, Medine Direct Testimony, Sept. 9, 2022 at 4-5, CR at BN 8871-8872).

The scope of the prudency review that was ordered by the Commission in May 2022 was subsequently expanded by the Commission's February 3, 2023, Order in the 2022 ENEC, regarding the Commission requirement that the Petitioners' coal-fired power plants be operated at a minimal annual capacity factor of 69 percent. The Commission indicated therein its intention for the Petitioners to bear the burden of demonstrating prudence if the Petitioners failed to achieve an average of a 69 percent capacity factor. According to the Commission's February 3, 2023, Order:

> "the specific actions that would be necessary to demonstrate prudence will include: (1) maintaining adequate economical fuel supplies, (2) keeping plants available for generation the maximum amount of time, (3) maximum reduction ... of outage times ..., and (4) effective bidding to clear the PJM energy market..." (CR at BN 11357).

In its February 3, 2023, Order, the Commission also denied any further increase in the Petitioners' ENEC rates until the prudency review had been completed, and reviewed and

examined by all parties and the Commission. (CR at BN 11354). The $93 million ENEC increase approved by the Commission's May 13, 2022, Order remained in effect. The record submitted and developed on the Petitioners' 2022 ENEC filing remained open for further review and consideration after the submission of the prudency review.

D. Case No. 23-0377-E-ENEC

On May 26, 2023, the Commission initiated the 2023 ENEC rate review as Case No. 23-0377-E-ENEC, and issued a procedural schedule in all three open ENEC cases. (CR at BN 16955-16965). In its 2023 ENEC filing, the Petitioners sought to recover an additional $641.7 million in increased ENEC costs, over and above the increased ENEC costs which were already in effect. The $641.7 million increase sought by the Petitioners included a total accumulated under-recovery balance of $552.9 million dollars as of February 28, 2023, and projected increased coal and energy related costs of $88.1 million for the forecast period of September 1, 2023 through August 31, 2024. (2023 ENEC Petition, CR at BN 16359-16394).

Notwithstanding their proposed monumental increase in ENEC rates for 2023, in that proceeding, the Petitioners acknowledged that their coal supply was inadequate to address normal expected system demand (much less meet the increased capacity levels targeted by the Commission). Therefore, they were not able to operate their units at levels sufficient to meet jurisdictional demand, let alone allow jurisdictional customers to benefit from any additional net sales into PJM. (Case No. 23-0377-E-ENEC, *inter alia* Stegall Direct Testimony at 24, CR at BN 16579). The Petitioners also acknowledged that certain suppliers were able to force them to purchase extended term contracts at above market prices in exchange for obtaining the coal at all. (Case No. 23-0377-E-ENEC, Chilcote Direct Testimony at 20, CR at BN 16469). Further, the

Petitioners acknowledged that they had to go beyond traditional sources to obtain adequate coal which further increased costs due to higher transportation costs. (Id.)

The report of the independent prudency audit ordered by the Commission was filed with the Commission on April 28, 2023. (CR at BN 11362-11417). Critical Technology Consulting ("CTC"), was hired by Commission Staff to perform the audit. CTC found the following:

- Limited communications between the on-site plant personnel and the fuel purchasing group relative to the Commission's orders,
- No change in fuel procurement and PJM bidding processes to accommodate the Commission's order, and
- The operations were impaired because "insufficient fuel was available to run the plants." (Id., CR at BN 11372).

The independent audit performed by CTC basically confirmed and supported the conclusions and observations of CAD witness Medine about the prudency of the Petitioners' coal procurement practices, and confirmed that there was no mechanical or operating limitation at the Petitioners' coal-fired plants which prevented them from being operated at an overall operating efficiency of 69% or higher. (CR at BN 11372).

Additional testimony and evidence were filed in the consolidated cases. The 2021 and 2022 ENEC cases were heard together on September 5, 2023, and the evidentiary hearing on the 2023 ENEC case was heard immediately thereafter. The evidentiary hearings were completed on September 7, 2023. (Transcript, CR at BN 13708-15527).

At no time did the Petitioners accept responsibility for the position in which they found themselves.

The Commission required the Petitioners to submit a number of post-hearing exhibits for review and consideration at the conclusion of the hearings, and the information reflected in those additional documents was also reviewed and considered by the Commission and the Commission's

technical advisory staff in these consolidated cases, prior to the issuance of the Commission's January 9, 2024, Order.

2. The January 9, 2024, Order of the Public Service Commission

Petitioners' appeal is the culmination of three years of ENEC proceedings, those filed by the Petitioners for the years 2021, 2022, and 2023, specifically. The record in these consolidated cases is quite extensive. As reflected by the record certified to this Court by the Commission's Executive Secretary, the complete record exceeds over 20,000 pages of testimony, exhibits, schedules and questions and responses propounded by various data request and requested post-hearing exhibits. The itemized table of contents identifying the various documents contained in the record, alone, totals 31 pages.

In the Commission's Order of January 9, 2024, from which the appeal arises, the Commission ruled on the reasonableness of the Petitioners' ENEC costs and accumulated under-recoveries for those years, finding it appropriate to disallow $231.8 million of requested ENEC under-recoveries. (Case Nos. 23-0377-E-ENEC, 22-0393-E-ENEC, and 21-0339-E-ENEC, Order Jan. 9, 2024, at 1, CR at BN 20892). The Commission also found it appropriate to delay recovery of the remaining balance of the requested under-recoveries, $321.1 million, until September 1, 2024. The allowable under-recovery balance will be recoverable over a ten-year period, at a rate of approximately $32.1 million per year, with a four percent annual carrying charge. (Id. at 6, CR at BN 20897).

The Commission stated in its January 9, 2024, Order:

> it is necessary to consider the entire record of the 2021, 2022, and 2023 ENEC cases to determine if the [Petitioners] prudently, efficiently, and reasonably used economic self-generation from their own power plants in lieu of higher cost net PJM power.[1] In order to

[1] "PJM" is the PJM Interconnection, LLC, which operates a wholesale electricity market and manages the reliability of its transmission grid. West Virginia is one of thirteen states, and the District of Columbia, in which PJM coordinates the movement of wholesale electricity.

> determine if excessive costs were incurred because of the [Petitioners'] decisions and actions that left them with insufficient supplies of coal for economical self-generation, it is also critical for the Commission to consider whether the [Petitioners] used the minimum amount of high-priced PJM energy market electricity over the period of review or whether the net power supplied through PJM transactions in lieu of self-generation was excessive. (Id.).

The Commission further found that "having insufficient supplies of coal in inventory and scheduled for delivery into the [Petitioners'] plants led to the lowest level of self-generation in the last twenty years during a period when the PJM LMP spikes to the highest levels experienced in the last twenty years." (Id.). Based on its consideration of the entire record of the 2021, 2022, and 2023 ENEC cases, it followed that the Commission found that "[t]he burden of a significant portion of the resulting excessive costs must fall on the [Petitioners] ***because their fuel supply failures and related market offer strategies that lead to rejection of their power plants for dispatch by PJM directly caused the excessive ENEC costs.***" (Case Nos. 23-0377-E-ENEC, 22-0393-E-ENEC, and 21-0339-E-ENEC, Order Jan. 9, 2024, at 6-7, CR at BN 20897-20898) (emphasis added).

The Petitioners did not pursue a Petition for Reconsideration of the Commission's January 9, 2024, decision. They instead elected to appeal the matter directly to this Court.

STANDARD OF REVIEW

Review of a final order of the Commission by the Supreme Court of Appeals of West Virginia is provided in W.Va. Code §24-5-1. This Court has recognized the broad legislative powers of the Commission to address the interests of each party. W. Va. Citizens Action Group v. Pub. Serv. Comm'n, 233 W. Va. 327, 758 S, CR at B C.E.2d 254 (2014) (quoting W.Va. Code §24-1-1(a)-(b) (1986)):

> The principle is well established by the decisions of this Court that an order of the public service commission based upon its finding of facts will not be disturbed unless

> such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.

Syl. Pt. 1, Sierra Club v. Pub. Serv. Comm'n, 827 S.E.2d 224, 2019 W. Va. LEXIS 175, 2019 WL 1890250 (2019) (citing United Fuel Gas Co. v. Pub. Serv. Comm'n, 143 W. Va. 33, 99 S.E.2d 1 (1957); Syl. Pt. 5, Boggs v. Pub. Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970)).

> The detailed standard for our review of an order of the Public Service Commission . . . 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.

Syl. Pt. 2, Pool v. Greater Harrison Cty. Pub. Serv. Dist., 821 S.E.2d 14, 2018 W. Va. LEXIS 695, 2018 WL 5913873 (2018) (referring to Syl. Pt. 2, Monongahela Power Co. v. Pub. Serv. Comm'n, 166 W.Va 423, 276 S.E.2d 179 (1981); citing Syl. Pt. 1, Central W. Va. Refuse, Inc. v. Pub. Serv. Comm'n, 190 W. Va. 416, 438 S.E.2d 596 (1993)).

In W.Va. Citizens Action, the Court recognized that "on questions of expediency, or as to what would be best in the interest of the petitioner, or the public served...the Legislature intended that the judgment of the [Public Service] Commission should prevail." W.Va. Citizens Action, 233 W.Va. at 332, 758 S.E.2d at 259, citing, United Fuel Gas Co. v. Pub. Serv. Comm'n, 73 W.Va. 571, 591, 80 S.E. 931, 939 (1914).

In finding that the Commission carefully explained its decision in an order that contains findings of fact, conclusions of law and a reasoned analysis of the issues the Court stated:

> As a result, under this Court's highly deferential standard of review, we find no reason to disturb the Commission's order.

W.Va. Citizens Action, 233 W.Va. at 338, 758 S.E.2d at 265.

In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Pub. Serv. Comm'n, 188 W.Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power

Co. v. Pub. Serv. Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981), Braxton Cnty. Citizens for a Better Env't v. Pub. Serv. Comm'n, 189 W.Va. 249, 429 S.E.2d 899 (1993), Harrison Rural Electrification Ass'n, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 439, 438 S.E.2d 782, (1993) and Mountain Communities for Responsible Energy v. Pub. Serv. Comm'n, 222 W.Va. 481, 665 S.E.2d 315 (2008).

ARGUMENT

The Petitioners must not be rewarded for the poor, imprudent business decisions made by management in 2021 and 2022. The CAD argued before the Commission that to allow the Petitioners to recover the ENEC expenses incurred as a result of imprudence in 2021 and 2022 would be to place upon the shoulders of ratepayers the significant, negative consequences of management's decisions with respect to coal procurement and contract performance, and the resulting (in)operation of the Petitioners' coal-fired power plants. The Commission agreed, finding it improper to hold customers responsible for the imprudent actions and inactions that resulted in the Petitioners' 2021 and 2022 ENEC under-recoveries. The Commission's decision disallowed a significant portion of those under-recoveries.

In light of the totality of the developed record, the Petitioners failed to demonstrate that the dramatically increased expenses the Petitioners sought to pass on to customers through the ENEC were prudently incurred. Throughout the prudency-related litigation of these cases, the Petitioners failed even to acknowledge, let alone meet, that burden of proof. The Petitioners consistently refused to accept any responsibility for their own actions and decisions. That unwillingness to accept responsibility for their imprudence continues by way of their Petition for Appeal.

1. The Public Service Commission has broad statutory authority to regulate public utilities and to establish rates for public utilities.

The West Virginia Legislature has granted to the Public Service Commission broad authority to regulate and to establish rates for public utilities, including the Respondents herein. The Commission acted within that statutory authority with the issuance of its January 9, 2024, Order that is the subject of the Petitioners' appeal.

West Virginia Code § 24-2-2 provides, in pertinent part:

§24-2-2. General power of commission to regulate public utilities.

(a) The commission may investigate all rates, methods, and practices of public utilities subject to the provisions of this chapter; to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications, schedules, and timetables in effect and used by the public utility or other person to be filed with the commission, and all other information desired by the commission relating to the investigation and requirements, including inventories of all property in the form and detail as the commission prescribes.

Further, West Virginia Code § 24-2-3 provides, in pertinent part:

§24-2-3. General power of commission with respect to rates.

(a) The commission may enforce, originate, establish, change, and promulgate tariffs, rates, joint rates, tolls, and schedules for all public utilities except for municipal power systems and water and/or sewer utilities ...

(c) In determining just and reasonable rates, the commission may audit and investigate management practices and policies, or have performed an audit and investigation of such practices and policies, in order to determine whether the utility is operating with efficiency and is utilizing sound management practices.

The Petitioners contend, without merit, that the Commission "punished" them by requiring a 10-year amortization period, with a 4 percent carrying charge, beginning September 1, 2024, for that portion of the ENEC under-recovery balance that the Petitioners can recover from ratepayers. However, the Petitioners have offered no legal support for their contention that the Commission acted beyond its broad, statutory authority to regulate public utilities and to establish rates. The

reason for the lack of legal authority in support of Petitioners' position is simple: there is none. The Commission can, and on a regular basis does, implement approved rates in the manner it, as the regulating body, believes is most appropriate given the record of the case.

2. The record of Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC is replete with evidence of unreasonable, imprudently incurred ENEC costs that must not be borne by ratepayers.

Perhaps the Petitioners said it best in their Initial Brief to this Court when they stated, "ENEC proceedings are designed to compensate an electric utility for the costs it prudently incurs to produce and provide electricity to its customers, not one dollar more or one dollar less." (WVSCA Initial Brief at 15, CR at BN 21016). And certainly, no person or entity would understand that better than the Commission itself, given that it created the ENEC.

The CAD also agrees with the legal standard for testing prudence that the Petitioners set forth in their Initial Brief, specifically that "[t]he legal standard for testing prudence is undebatable: the prudence of a public utility's decisions is judged on the basis of their reasonableness, given what was known or reasonably knowable at the time those decisions were made." (Id. at 16, CR at BN 21017). In fact, the CAD's expert witness Emily Medine expressed this legal standard many times during the course of her written and oral testimony in the underlying cases. Ms. Medine repeatedly discussed that hindsight cannot be utilized when assessing prudency. For example, with respect to the issue of coal prices in 2021, in CAD witness Medine's July 2021 testimony, she focused her analysis on what was known about the changing energy markets at that time and, therefore, what the Petitioners' knew or should have known at the time.

Notwithstanding the plethora of evidence of what the Petitioners knew or should have known at times when their actions and inactions resulted in increased ENEC costs, the Petitioners never offered any adjustments to their requested 2021 and 2022 ENEC recovery amounts. At all

times during the underlying proceedings, the Petitioners sought to recover far more than "one dollar" in excess of the costs they prudently incurred to produce and provide electricity to their customers.

CAD witness Medine discussed at length the 2021 and 2022 failures of the Petitioners that contributed to the 2023 under-recovery balance of *more than half a billion dollars*.[2] In summary, those failures included: (1) the Petitioners' failure to follow their own Fuel Procurement (FP) Manual directives regarding the need for a contract portfolio, (2) the Petitioners' failure to monitor the coal market in real time, when doing so should have made clear that a market movement was underway, and (3) the Petitioners' failure to enforce existing coal contracts to secure coal they were entitled to receive at prices contracted for.

A. Petitioners' failure to follow their own Fuel Procurement Manual is evidence of unreasonable and imprudent management decisions that led to negative financial consequences that the Petitioners seek to pass on to customers.

In its January 9, 2024, Order, the Commission stated:

> [i]t is not our responsibility to manage the day-to-day operations of the [Petitioners] or dictate the mix of coal contracts. That responsibility lies squarely on the management of the [Petitioners]. As utilities have often reminded us, the Supreme Court of Appeals of West Virginia has held that the Commission is not a super board of directors. However, at the same time, the Court has held that when the utility management acts in an unreasonable and imprudent manner, the Commission has the authority to protect customers from the negative financial consequences of the utility unreasonable actions, or inactions. (Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n 271 S.E.2d 438 (1980) (citing, United Fuel Gas Co. v. Public Serv. Comm'n, 154 W.Va. 221, 243, 174 S.E.2d 304, 317 (1969), (citing, Southern Bell Telephone and Telegraph Company v. Georgia Public Serv. Comm'n, 203 Ga. 832, 848, 49 S.E.2d 38, 66 (1948)), United Fuel Gas Co. v. Public Serv. Comm'n, 154 W.Va. 221, 243, 174 S.E.2d 304, 317 (1969), (citing Northern Pennsylvania Power Co. v. Pennsylvania P. U.C.). (CR at BN 16212).

[2] The failures were initially discussed by witness Medine during the original pendency of the 2021 and 2022 ENEC cases. More recently, in her August 15, 2023, direct testimony in Case No. 23-0377-E-ENEC, witness Medine reiterated and referred back to those failures that she initially pointed out in 2021 and 2022. For ease of reference, cites herein to her testimony and exhibits contained therein will refer to the August 15, 2023, direct testimony, unless otherwise specifically noted. Notably, in July 2021 witness Medine did not request a disallowance. Rather she provided timely concerns about Petitioners' procurement activities based upon her decades of experience. In other words, her first concern was for the Petitioners to address deficiencies in their procurement practices.

One example of a management decision that was examined in the underlying cases was management's failure to follow their own Fuel Procurement Manual ("FP Manual"). The significance of the Petitioners' failure to follow the directives set forth in their FP Manual *vis a vis* the Petitioners' imprudence and the resulting magnitude of the ENEC under-recovery cannot be overstated.

In her testimony (Case No. 23-0337-E-ENEC, EDM Direct Testimony at 59-66, CR at BN 12774-12781), CAD witness Emily Medine summarized those policies and procedures set forth in the FP Manual that are relevant to the underlying cases and to this appeal:

Section 1 describes the general administrative duties of the regulated Fuel Procurement (FP) organization.

The regulated FP organization shall subscribe to or obtain access by a representative number of trade and industry publications and reports by governmental agencies concerning prices for relevant materials and services. Regulated FP shall be knowledgeable of market conditions related to fuel, reagent, and transportation prices and availability. Regulated FP shall maintain appropriate contract with current and potential suppliers, and use other reliable sources of information to maintain a working knowledge of current issues affecting pertinent material or service provided. (Emphasis Added) [Section 1.4]

Section 2.0 describes FP Policy and Procedures and Implementation.

AEP's overall Fuel Procurement Policy shall be used to secure adequate supplies of competitively-price coal, natural gas, reagents, fuel oil, and transportation services to meeting generation, environmental, and operational requirements, while recognizing the dynamic nature of the various associated markets, environmental standards, and requirements. To accomplish these objectives the Company maintains, as appropriate, a mix of physical inventories and a

portfolio of long-term and short-term agreements for firm and discretionary suppliers of fuels, reagents, and transportation suitable for its generating units. (Emphasis Added) [Section 2.2]

Section 3 discusses regulated fuel procurement methods and documentation.

When appropriate, and under the direction of the VP of regulated FP, RFP's should be issued to seek as many competitive offers as possible to obtain the lowest reasonable delivered cost, over time, for a service or material. (Emphasis Added) [Section 3.1]

Any one or more of the approaches described in this policy may be waived whenever it is determined that fuel or reagents must be purchased, or transportation services acquired, due to immediate and unavoidable circumstances that are not conducive to normal procurement practices.... Situations that could potentially lead to emergency actions may include, but are not limited to:

- *Emergency or other extraordinary conditions or circumstances that make it reasonably certain that an adequate supply of acceptable fuel or reagents cannot be obtained from existing agreements and/or spot purchase suppliers. (Emphasis added)*
- *Inability to obtain appropriate quantities to cover unanticipated storages of fuel or reagent that meet minimum quality requirements in a timely fashion using typical procurement practices. [Section 3.3]*

Section 4 provides the Hedging Strategy.

To support AEP's key business objectives, the regulated FP organization may enter into fuel hedges, when appropriate, with the purpose of reducing fuel price volatility. Regulated FP's primary means of hedging to reduce fuel price volatility is through a portfolio of physical supply agreements of various durations. Maintenance of such a portfolio ensures less volatile fuel prices

than a market may bear, while allowing some flexibility in taking advantage of shorter-term pricing options as they become available. (Emphasis Added) [Section 4.2]

Section 5 addresses contract administration.

Contract administration of existing and proposed contractual agreements for the purchase and sale of coal, fuel oil, natural gas, reagents, and related transportation agreements ... is performed by the Energy Contracts & Confirmations group within Enterprise & Credit Risk Management. This group closely interacts with regulated FP Directors and Managers, Legal, Credit, Fuel Accounting Audits, Regulatory services, and power plant personnel to ensure that contractual agreements represent the intended business relationship between the parties, and to monitor the regulated operating Petitioners' rights and obligations under existing agreements. (Section 5.1)

Fuel procurement is conducted by American Electric Power Service Company (AEPSC) for its affiliates, including the Petitioners herein. In her original testimony in the 2021 ENEC proceeding[3], CAD witness Medine raised concerns regarding the Petitioners' failure to develop a portfolio of short- and long-term contracts consistent with the FP Manual. Specifically, CAD noted that at that time there were no contracts that went beyond 2022. CAD was concerned that the Petitioners were not complying with either industry practice or its own guidelines regarding a portfolio procurement strategy. (Case No. 21-0339-E-ENEC, Medine Direct at 21-22, CR at BN 263-264). In response to this concern, the Petitioners' witness Jeffrey Dial indicated in his rebuttal testimony that the Petitioners had changed their strategy, stating, the "Petitioners are focusing on shorter term agreements (two years or less in term length) to avoid situations that lead to excessive inventory and the potential for liquidated damages as a result of reaching inventory pile capacity

[3] Submitted July 7, 2021.

limits." (Case No. 21-0339-E-ENEC, Dial Rebuttal at 2, CR at BN 356). However, as witness Medine noted in her testimony, the FP Manual was never updated to include the change referenced by witness Dial, nor did the Petitioners present any analysis to support such a change.

Further, witness Medine testified that, in her experience, it would not be considered prudent for a utility with an annual burn of 10 million tons plus or minus to rely upon short-term purchasing – an opinion with which AEPSC in its FP Manual agrees. Notably, an internal audit report on fuel procurement dated April 21, 2021, produced by the Petitioners during discovery did not address the Petitioners' failure to develop a portfolio of short- and long-term contracts consistent with the FP Manual. Witness Medine noted in her 2022 direct testimony that "given what occurred in 2021, the audit failed to identify the significant weaknesses in Fuel Procurement's efforts including the failure to follow corporate policies." (Case No 22-0393-E-ENEC, Medine Direct at 35, CR at BN 8902).

The Petitioners' failure to follow the mandates of their own Fuel Procurement Manual, which led to excessive costs, is but one example of the Petitioners' management acting in an unreasonable and imprudent manner. Thus, the Commission properly used its the authority to protect customers from the negative financial consequences of Respondents' unreasonable actions, or inactions.

B. Petitioners' failure to prudently respond to market conditions and timely issue an RFP for additional coal inventory is evidence of unreasonable and imprudent management decisions that led to negative financial consequences that the Petitioners seek to pass on to customers.

The Commission, in its January 9, 2024, Order, found that the Petitioners had insufficient supplies of coal inventory during the period in question (Order Jan. 9, 2024, Finding of Fact 1, at 32, CR at BN 20924) and further found that in July 2021, coal stockpiles were declining yet the [Petitioners] took no action to replenish the stockpiles until September 20, 2021 (Order Jan. 9,

2024, Finding of Fact 2, at 33, CR at BN 20924). With respect to the issue of coal prices in 2021, the Petitioners would have this Court believe that the Commission strayed from the standard that hindsight is not appropriate in a prudency review. This is entirely false, however. The record below contains ample evidence to show that by July 2021, the Petitioners knew or should have known of changing market conditions upon which they should have acted at that time. By way of example, the record shows that CAD witness Medine's testimony has consistently upheld the prohibition against the use of hindsight, including in her July 2021 testimony, when she focused her analysis on what was known about the changing coal market at that time.

Witness Medine's testimony in the 2021 ENEC case is significant to the prudency analysis conducted by the Commission. She noted that both 2019 and 2020 had been anomalous years for coal, stating, "In 2019, the mild winter reduced overall demand for power and reduced the demand for natural gas for heating. The net effect was lower coal burn because of lower demand and switching to natural gas because of its low price. In 2020, the impact of COVID on power demand and industrial activity also affected coal burn. In other words, the increase in inventory levels at the plants was understandable but absent unusual circumstances unlikely to repeat." (Case No. 21-0339-E-ENEC, Medine Direct at 15, CR at BN 257). The CAD did not criticize the Petitioners for their inflated coal inventories in 2019 and 2020.

However, in her July 7, 2021, testimony, witness Medine clearly expressed her concerns that, by mid-year 2021, the situation for coal was changing. She noted that in the first four months of 2021, coal accounted for a higher percentage of generation than in 2020 and that high gas prices and an unusually warm summer were expected to further increase coal generation's share in the balance of the year. (Case No. 21-0339-E-ENEC Medine Direct at 16, CR at BN 258). She further noted that the coal market was strengthening for several reasons, including:

- World steel markets were rallying due to strong steel demand, which has increased consumption and pricing of metallurgical coals both globally and domestically,
- A dispute between China and Australia has resulted in China looking elsewhere for its coal imports,
- High global thermal coal prices due to the economic recovery and high prices for competing fuels such as LNG and pet coke and shortages in supply due to industry contraction was making U.S. coals competitive in global markets. (Id.)

In her July 7, 2021, testimony, she went on to indicate her concern that, at the time, the Petitioners had no contracts beyond 2022 which (a) was contrary to the FP Manual of developing a portfolio of contracts and (b) exposed the Petitioners to higher prices if the market turned before commitments had been made. She further noted that consolidation in the coal industry suggested consideration of increased stockpile targets. (Case No. 21-0339-E-ENEC, Medine Direct at 21, CR at BN 263).

As discussed at length in her July 7, 2021, testimony and again in her August 15, 2023, direct testimony in the consolidated cases on the prudence examination, a standard source for coal pricing information is Coaldesk, which publishes daily information on coal pricing for various time periods. The data from Coaldesk for April through September 2021 for coals typical of the coals purchased by the Petitioners for the three plants was provided by witness Medine in Exhibit 14 to her direct testimony in the consolidated ENEC cases. (Medine Direct at 51, CR at BN 17791). The figures set forth in Exhibit 14 showed that prior to June 2021, coal pricing had been relatively flat; however, beginning in June 2021, prices had started to increase. While there was

backwardation[4] in the market, all prices increased during this period. If coal had been purchased anytime in June, July or even August, pricing would have been substantially lower that what it was at the end of the September, when the Petitioners ***finally*** issued an RFP for additional coal for 2021. The record below demonstrates that the Petitioners, by their own volition, were oblivious to unfolding market events in 2021.

AEPSC could have, and should have, issued an RFP for additional 2021 coal in June, July or even August 2021, but the record below shows that it is undisputed it did not. Instead, AEPSC waited until September 20, 2021, to issue an RFP, by which time prompt NAPP prices had increased by 50 percent and prompt CAPP prices had increased by almost 30 percent. In its September 20, 2021 RFP, AEPSC requested bids for NAPP and CAPP coals for balance of year 2021, 2022, 2023, and 2024. Unfortunately, AEPSC received no bids for the balance of 2021 and limited actionable bids for the future years.

The combination of supply issues, inventory levels, and increased coal usage in the first half of 2021 should have been understood by the Petitioners through AEPSC's regular contacts with its suppliers. The Petitioners certainly knew that over the 12-month period preceding June 2021, it had burned 1.5 million tons more than it had purchased. Moreover, industry data, such as that published by EVA and EIA, should have revealed to the Petitioners that bituminous coal stocks fell by about 16 million tons between May 2020 and May 2021 and another 10 million tons by July 2021. This data was shown for the Petitioners in Exhibit 15 to CAD witness Medine's August 15, 2023, direct testimony in the consolidated ENEC cases. (Medine Direct at 53-54, CR at BN

[4] Backwardation refers to future prices being lower (cheaper) than current prices, suggesting supply issues in the current market that are not expected to persist. Equilibrium markets are typically in what is referred to as contango with slight increases in pricing over time to reflect inflation and other factors.

17793-17794). Further, Exhibit 16 to her August 15, 2023, direct testimony in the consolidated ENEC cases shows about a 10 million ton decline in NAPP inventories and a four million ton decline in CAPP inventories as of the end of July 2021. (Id. at 72, CR BN 17812). Witness Medine went on to show the comparison of coal purchases and burn for July 2020 through June 2021 in Exhibit 17 to her August 15, 2023, testimony. Exhibit 17 shows that for the year ended June 2021, utility burn of NAPP coal was 7.5 million tons above purchases and utility burn of Central and Southern Appalachian coals was 3.7 million tons above purchases. (Id. at 73, CR BN 17813).

Further buttressing this point is Exhibit 18 to witness Medine's August 15, 2023, direct testimony in the consolidated ENEC cases (Medine Direct at 76-77, CR at BN 17816-17817). Exhibit 18 shows that as of the end of the second quarter of 2021, Pittsburgh seam production, the primary source of high sulfur coal purchases for the Petitioners, had not returned to pre-COVID levels.

An increase in the price of natural gas and the increased export demand for Northern Appalachia coal also affected the supply for coal in mid-2021. In her direct testimony, witness Medine explained that in 2021 the price of natural gas increased significantly from 2020 levels, even excluding the short-term bump in February due to Storm Uri. (Consolidated ENEC cases, Medine Direct at p. 45, CR at BN 8912). By July 2021, natural gas prices were approaching $4.00 per MMBtu, a significant increase from 2020 levels, as shown in Exhibit 19 to Ms. Medine's August 15, 2022, direct testimony. (Id.). Witness Medine also recognized the following information set forth in the 2nd quarter 2021 State of the Market Report for PJM prepared by Monitoring Analytics, LLC, the Independent Market Monitor:

> *Higher energy prices and higher gas costs made coal units more economic in the first six months of 2021. The share of total PJM energy produced from coal increased from 17.6 percent in the first six months of 2020 to 23.5 percent in the first six months of 2021, still*

below the coal share in the first six months of 2019, while the share of energy produced from natural gas decreased from 2021.[5]

In Exhibit 20 to her direct testimony, witness Medine demonstrated the increase in the delivered price of coal to northwest Europe from January 2020 through July 2021. (CR at BN 17737-17838). Further, as shown in her Exhibit 21, there was a significant increase in exports of U.S. coals in general and NAPP coals in particular starting in late 2020 and continuing through June 2021. (Id.).

To be clear, the information contained in Exhibits 15, 16, 17, 18, 19, 20, and 21 of witness Medine's direct testimony, as well as that set forth in the 2nd quarter 2021 State of the Market Report for PJM prepared by the Independent Market Monitor, ***was available to AEPSC in July 2021, had it bothered to look for and digest that information***. With this information, ***by July 2021***, management could have, and should have, determined that it was not the only utility burning down its coal inventory but that many utilities were as well. With this information, ***by July 2021*** management could have and should have understood that utilities collectively consuming more coal than they were purchasing was a signal to buyers that the supply was matching purchases, not burn, ultimately leading to the industry being undersupplied.

Despite the information set forth above, all of which is contained in the record below and all of which was readily available to management ***by July 2021***, the Petitioners did not issue an RFP for additional 2021 coal until late September 2021. The Petitioners' failure to act earlier led to excessive costs and is another example of the Petitioners' management acting in an unreasonable and imprudent manner. Thus, the Commission properly used its the authority to protect customers from the negative financial consequences of Respondents' unreasonable actions, or inactions.

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[5] https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2021/2021q2-som-pjm.pdf, page 1

C. Petitioners' failure to prudently enforce and/or comply with major coal contracts is evidence of unreasonable and imprudent management decisions that led to negative financial consequences that Petitioners seek to pass on to customers.

Throughout the cases below, and indeed within this appeal itself, the Petitioners have put forth a redundant theme: the excessive under-recoveries that we seek to pass on to customers are the result of "circumstances outside of our control." The evidentiary record is clear that this attempt to excuse their imprudence is in no way justified and should be rejected by this Court, just as the Commission rejected it.

A prime example of the Petitioners' unreasonable and imprudent management decisions is demonstrated by their failure to enforce and/or comply with major contracts in place with a major coal supplier, ACNR.

The Petitioners' largest contracts for coal supplies were in place with ACNR in 2020 and 2021. Petitioners experienced significant shortfalls from ACNR under three contracts, two of which were to supply coal to the Amos and Mountaineer plants and one that was to supply coal to the Mitchell plant. Specifically, in 2020, the total shortfall from ACNR to Appalachian Power Company was 1,727,244 tons; while the following year 1,652,643 tons of coal were not delivered to Appalachian Power Company and/or the Petitioner failed to take delivery of that coal.[6] These shortfall amounts constituted a substantial impediment to the Petitioners' ability to operate their plants and, thus, are a significant reason why the Petitioners sought to burden their ratepayers with excessive ENEC under-recoveries for 2021 and 2022. Absent those shortfalls of coal, the Petitioners would have had much more adequate supplies of coal on the ground – at contract prices – thereby lowering the eventual cost of coal supplies.

[6] The CAD has not included in these figures the shortfall with respect to WPCo/Mitchell, inasmuch as those volumes were not the subject of litigation, to the best of the CAD's knowledge, and therefore have not been made available publicly.

APCo subsequently filed two lawsuits against ACNR arising out of the contract shortfalls.[7] Notably, ACNR denied that it was responsible for the shortfalls and, in turn, filed counterclaims against the Petitioner, ***alleging that the Petitioner itself caused the shortfalls by failing to arrange for and take delivery of the contracted for coal.***

CONCLUSION

The Petitioners claim that all of the circumstances leading to the significant under-recoveries for which they want to burden ratepayers, rather than shareholders, were outside of their control. Based on the totality of the evidence below, however, the Commission properly found that the Petitioners' assertion was not supported by the facts.

There is no question that the Petitioners' failure to secure necessary coal supplies was a costly error and constituted the majority of the under-recoveries in these cases. The CAD believes that the Commission has conducted a reasonable and appropriate calculation of those costs using the methodology described in its final Order and as explained in the Commission's Statement of Reasons. The disallowance of $231.8 million is well-supported by the record and deferring the remaining balance is consistent with the CAD's recommendation and is based on sound rate making principles.

For all of the reasons set forth above, the Consumer Advocate Division of the Public Service Commission of West Virginia respectfully requests that the Court affirm the January 9, 2024, Order of the Public Service Commission.

[7] Franklin County Ohio Court of Common Pleas Case No. 22-CV-003705 and Case No. 653609/2022, before the Supreme Court of the State of New York, New York County.

Respectfully submitted this 15th day of April, 2024.

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
By Counsel,

HEATHER B. OSBORN
WV BAR NO. 9074
hosborn@cad.state.wv.us

ROBERT F. WILLIAMS
WV BAR NO. 4067
rwilliams@cad.state.wv.us

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,
Petitioners,

v. No. 24-75

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, Heather B. Osborn, counsel for *amicus curiae* the Consumer Advocate Division of the Public Service Commission of West Virginia, do hereby certify that a true and accurate copy of the foregoing "Brief of *Amicus Curiae* the Consumer Advocate Division of the Public Service Commission of West Virginia" has been served upon the following parties of record by First Class United States Mail, postage prepaid, this 15th day of April, 2024:

Jessica Lane, Esq.
General Counsel
Public Service Commission of WV
P.O. Box 812
Charleston, WV 25323
Counsel for Respondent

Keith D. Fisher, Esq.
AEPSC
200 Association Drive
Charleston, WV 25311
Counsel for Petitioners

William C. Porth, Esq.
Anne C. Blankenship, Esq.
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
Counsel for Petitioners

Barry A. Naum, Esq.
Steven W. Lee, Esq.
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Counsel for Amicus Curiae WVEUG

Susan J. Riggs, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East
Charleston, WV 25301
Counsel for Amicus Curiae WVEUG

Heather B. Osborn (WVSB 9074)