
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appalachian Power Company and Wheeling Power Company,
Petitioners,

v.

The Public Service Commission of West Virginia,
Respondent.

**AMICUS CURIAE BRIEF OF THE WEST VIRGINIA ENERGY USERS GROUP
IN SUPPORT OF THE DECISION OF THE
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA**

Barry A. Naum (WV State Bar # 12791)
Steven W. Lee (WV State Bar # 14379)
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
Phone: (717) 795-2741
Fax: (717) 795-2743
bnaum@spilmanlaw.com
slee@spilmanlaw.com

Susan J. Riggs (WV State Bar #5246)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Phone: (304) 340-3800
Fax: (304) 340-3801
sriggs@spilmanlaw.com

Counsel for the West Virginia Energy Users Group

April 15, 2024

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE.....1

III. ARGUMENT.....3

A. The Standard of Review.3

B. The Commission Correctly Determined that Petitioners Acted Imprudently.....4

1. The Commission Properly Determined that Petitioners' Coal Supply Practices and ENEC Costs Incurred as a Result Were Not Prudent Under the Circumstances.4

a. The Petitioners had actual knowledge of a multitude of factors that should have caused them to acquire additional coal.6

b. Relevant information was reasonably knowable to the Petitioners in 2021 that should have caused them to seek and procure additional coal supplies.....9

c. The Petitioners failed to respond prudently and reasonably to all the known and reasonably knowable information and thus incurred excess ENEC costs that should not be imposed on ratepayers.11

2. The Commission Appropriately Weighed the Evidence to Determine that the Petitioners' Claim that Plant Outages Caused Increased Fuel Costs was Unpersuasive.....12

IV. CONCLUSION14

TABLE OF AUTHORITIES

Cases

Central West Virginia Refuse, Inc. v. Public Service Comm'n of W. Va., 190
W.Va. 416, 438 S.E.2d 596 (1993).....3

Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n., 165 W. Va. 762, 765,
271 S.E.2d 438, 440 (1980)3

Monongahela Power Co. v. Public Serv. Comm'n., 166 W. Va. 423, 276 S.E.2d
179 (1981).....4

Trulargo, LLC v. Public Serv. Comm'n. of W. Va., 242 W. Va. 482, 483, 836
S.E.2d 449, 450 (2019)3

I. INTRODUCTION

The West Virginia Energy Users Group ("WVEUG") submits this *Amicus Curiae* Brief in support of the January 9, 2024, Order ("Commission Order") of the Public Service Commission of West Virginia ("PSC" or "Commission") in Case Nos. 21-0339-E-ENEC ("2021 ENEC" or "2021 ENEC Reopener"), 22-0393-E-ENEC ("2022 ENEC"), and 23-0377-E-ENEC ("2023 ENEC") that is the subject of this appeal.¹ WVEUG respectfully requests this Court to affirm the Commission's decision to disallow \$231.8 million of Appalachian Power Company ("APCo") and Wheeling Power Company's ("WPCo") (collectively, "Petitioners" or "Companies") \$552.9 million requested Expanded Net Energy Cost ("ENEC") under-recovery.²

II. STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

WVEUG is an association of energy-intensive industrial customers receiving electric service from both APCo and WPCo pursuant to the Petitioners' current Rate Schedules LCP, IP, and Special Contracts.³ WVEUG members provide thousands of jobs in West Virginia with millions of dollars in combined annual payroll, and they contribute millions of dollars in annual state, local, and property taxes, over and above the substantial contributions that these corporate

¹ Pursuant to Rule 30(e) of the West Virginia Rules of Appellate Procedure, WVEUG represents that no counsel for a party to this action authored this Brief in whole or in part. The undersigned, who drafted this *Amicus Curiae* Brief, is a member of Spilman Thomas & Battle, PLLC, and was retained by WVEUG to provide legal services, and the undersigned prepared this *Amicus Curiae* Brief in that context. Neither a party in this dispute nor counsel for a party in this dispute made a monetary contribution to WVEUG of any sort, including any contribution specifically intended to fund the preparation or submission of this Brief.

² In this Brief, WVEUG cites to the evidentiary record that the Commission transmitted to this Court pursuant to Appellate Rule 14. Because the proceedings below spanned several years, multiple rounds of pre-filed written testimony, and multiple evidentiary hearings, WVEUG has included information in its citations to the record to highlight when testimony was filed or occurred at hearing. For example, where necessary, WVEUG has denoted filings as "2021 ENEC," "2021 ENEC Reopener," "2022 ENEC," "2023 ENEC," or "2024 Appeal," and has included the year in its citations to hearing transcripts.

³ For purposes of this appeal, WVEUG members include: (i) The Chemours Company, LLC; (ii) Constellium Rolled Products Ravenswood, LLC; (iii) Huntington Alloys (Special Metals); (iv) Marathon Petroleum Company LP (MarkWest); (v) Westlake Sodium LLC; and, (vi) WVA Manufacturing, LLC.

citizens make to their local communities and charities. The cost of electric utility service is a significant element in the cost of operation for WVEUG members.

This appeal directly and significantly impacts WVEUG members. The magnitude of the Petitioners' ENEC under-recovery, if imposed on the Petitioners' captive ratepayers in full, would have a detrimental effect on large industrial and manufacturing customers. Specifically, manufacturing and industrial customers compete nationally and internationally. Electric utility service cost increases, especially of the magnitude requested by the Petitioners in these cases, adversely impact the competitiveness and economic strength of West Virginia manufacturing and industry. Due to this risk, WVEUG actively participated in each iteration of these proceedings and recommended significant disallowance of the Petitioners' under-recovery due to their imprudent and unreasonable actions with regards to their management of coal inventories during the review periods of the ENEC cases subject to this appeal,⁴ and now files this brief to support the Commission's Order on appeal.

Reversal of the Commission's Order would provide Petitioners with carte blanche recovery of costs that they imprudently incurred during the review periods, thereby eliminating Petitioners' responsibility to serve customers at the lowest reasonable cost. Therefore, WVEUG respectfully requests this Court affirm the Commission's Order.

⁴ During the proceedings, WVEUG recommended that the Commission disallow *at least* \$82.5 million from the Petitioners' ENEC under-recovery as the bare minimum amount to be disallowed due to the Petitioners' imprudent and unreasonable actions. *See e.g.*, 2022 ENEC, Direct Testimony of Stephen J. Baron, WVEUG Exhibit ("Ex.") SJB-D ("2022 ENEC WVEUG Ex. SJB-D"), p. 7, lines 17-21; 2023 ENEC/2022 ENEC/2021 ENEC, Direct Testimony of Stephen J. Baron, WVEUG Ex. SJB-D ("2023 ENEC/2022 ENEC/2021 ENEC WVEUG Ex. SJB-D"), p. 19, lines 12-18; 2022 ENEC/2021 ENEC, WVEUG Initial Brief ("I.B."), pp. 19-20.

III. ARGUMENT

A. The Standard of Review.

This Court has established the standard of review of Final Orders of the Commission as follows:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.⁵

Accordingly, this Court has held that:

[O]ur Court is guided by three central principles: first, that the primary purpose of the PSC is to "serve the interest of the public"; second "[t]hat 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"; and, third, that the Legislature has empowered the PSC to regulate and control the public utilities in this State in a manner that is just and reasonable and not contrary to the law.⁶

When reviewing Commission decisions, this Court has also held that:

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.⁷

⁵ *Central West Virginia Refuse, Inc. v. Public Serv. Comm'n of W. Va.*, 190 W.Va. 416, 438 S.E.2d 596 (1993).

⁶ *Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n.*, 165 W. Va. 762, 765, 271 S.E.2d 438, 440 (1980) (further citations omitted).

⁷ *Trulargo, LLC v. Public Serv. Comm'n. of W. Va.*, 242 W. Va. 482, 483, 836 S.E.2d 449, 450 (2019) (internal citations omitted).

Finally, the Court has recognized that its "responsibility is not to supplant the Commission's balance of these interests [*i.e.*, the public's and the utility's interests] with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."⁸

B. The Commission Correctly Determined that Petitioners Acted Imprudently.

1. The Commission Properly Determined that Petitioners' Coal Supply Practices and ENEC Costs Incurred as a Result Were Not Prudent Under the Circumstances.

The Commission, WVEUG, and the Petitioners appear generally aligned in their understanding of evaluating prudence in these cases. The Petitioners had the burden of proof to demonstrate that the ENEC costs were reasonably and prudently incurred.⁹ Specifically, the Petitioners had the burden to demonstrate that the costs associated with their ENEC revenue increase request were "reasonable and the result of prudent management of their generation assets, fuel supplies and purchased power costs."¹⁰ The Commission, WVEUG, and the Petitioners also agree that the standard of prudence includes an evaluation of the Petitioners' actions based on what was known or reasonably knowable at the time.¹¹ Despite the Petitioners' understanding of the prudence standard, their application of that standard is as unreasonable as the ENEC costs they incurred.

⁸ Syl. pt. 1, *Monongahela Power Co. v. Public Serv. Comm'n.*, 166 W. Va. 423, 276 S.E.2d 179 (1981).

⁹ Commission Order, p. 10; 2022 ENEC, Direct Testimony of Randall R. Short, Petitioners' Ex. RRS-D ("2022 ENEC Petitioners' Ex. RRS-D"), p. 5, lines 13-14; *see also* 2022 ENEC, Oct. 4, 2022, Transcript ("Tr."), p. 52, lines 11-16 (Petitioners' witness Short).

¹⁰ 2021 ENEC Reopener, Commission Order (issued May 13, 2022) ("Reopener Order"), p. 6; *see also* 2021 ENEC, Commission Order (issued Mar. 2, 2022) ("Reconsideration Order"), p. 3 (stating that "the Companies will have the opportunity to recover actual costs if they can demonstrate that the costs are reasonable and prudently incurred."); 2021 ENEC, Commission Order (issued Sept. 2, 2021) ("September 2021 Order"), p. 6 (explaining that "[t]he Companies will have the burden of proof to demonstrate that its actual costs are reasonable, prudently incurred and not contrary to the public interest in West Virginia").

¹¹ *See* Commission Order, p. 10; 2024 Appeal, Petitioners' I.B., pp. 16, 19; 2022 ENEC, Petitioners' I.B., p. 2.

All parties agree that the record demonstrates that the primary factor causing the Petitioners to incur their astronomical ENEC under-recovery was a lack of coal.¹² The parties disagree, however, on whether the lack of coal and the resulting ENEC under-recovery were prudent and reasonable under the circumstances. Despite Petitioners' claims to the contrary,¹³ the circumstances giving rise to that shortage were known and/or reasonably knowable to the Petitioners, consistent with the record. Indeed, these known and knowable trends caused similarly situated West Virginia utilities to seek out and successfully acquire coal in the summer of 2021 for delivery in 2021. The information known or reasonably knowable by the Petitioners in 2021 should have caused the Petitioners to expeditiously seek to acquire additional coal supplies in the middle of 2021.¹⁴ They did not; in fact, the Petitioners waited almost a full month after finally realizing their plight to issue a Request for Proposals ("RFP") in late September 2021.

As detailed below, the Commission thus appropriately determined, based on the record, that the Petitioners failed to provide sufficient evidence to substantiate a finding that they acted reasonably and prudently in incurring their ENEC costs, based on what the Petitioners knew and should have known at the time.¹⁵ The Commission was thus correct to incorporate a significant disallowance for the Petitioners' unreasonable and imprudent incurrence of ENEC costs.¹⁶

¹² See Commission Order, p. 10; 2024 Appeal, Petitioners' I.B., pp. 7, 18; 2022 ENEC, WVEUG I.B., pp. 9-10 (quoting multiple Petitioners' witnesses explaining that coal supply dictated the coal units' insufficient capacity factors).

¹³ See 2024 Appeal, Petitioners' I.B., pp. 19-33.

¹⁴ See Commission Order, pp. 10-12.

¹⁵ *Id.* at 10-22.

¹⁶ See generally, Commission Order.

a. The Petitioners had actual knowledge of a multitude of factors that should have caused them to acquire additional coal.

The record of these cases is fraught with evidence demonstrating that the Petitioners **actually knew** myriad information that should have led the Petitioners to procure additional coal supplies well in advance of September 20, 2021, the date on which they finally issued an RFP for coal.¹⁷ This information was addressed in multiple instances over the course of the proceedings.

Detailed below is a compilation of **information that was known** to the Petitioners:

- In May 2021, the Petitioners were forecasting higher capacity factors for September 2021 with full knowledge that 75 percent of the outages that ultimately occurred from September through December 2021 were at the time **planned outages**, thus the need for coal supplies was obvious;¹⁸
- Starting May 1, 2021, the Petitioners were including "negative adders" with their day-ahead bids into PJM Interconnection, L.L.C. ("PJM"),¹⁹ in order to enhance dispatch of their plants, which in turn was depleting their coal inventory levels;²⁰
- By June 2021, both domestic coal prices and the export market for coal were experiencing price increases;²¹

¹⁷ See 2022 ENEC, Oct. 4, 2022, Tr., p. 279, line 5 to p. 280, line 1 (Petitioners' witness Dial) (also demonstrating that the RFP did not contemplate the September 2021 Order setting a 69 percent capacity factor target).

¹⁸ See 2022 ENEC, Oct. 5, 2022, Tr., p. 68, line 10 to p. 72, line 14 (Petitioners' witness Vaughan); 2022 ENEC, Oct. 4, 2022, Tr., p. 163, line 15 to p. 164, line 4 (Petitioners' witness Sink); 2022 ENEC, Petitioners' I.B., pp. 10-11 (stating that the coal units only had 3.99 percent unplanned downtime during the review period).

¹⁹ Negative adders are bids submitted that are below the "market offer" price, meaning that the Petitioners were offering power on the PJM market at a discount.

²⁰ See 2022 ENEC, Oct. 5, 2022, Tr., p. 55, line 14 to p. 58, line 7 (Petitioners' witness Vaughan); 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 188, lines 4-14 (Petitioners' witness Stegall); 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 210, lines 15-23 (Petitioners' witness Stegall).

²¹ See 2021 ENEC Reopener, Direct Testimony of Jeffrey C. Dial, Petitioners' Ex. JCD-RO ("2021 ENEC Reopener Petitioners' Ex. JCD-RO"), p. 4, Figure 1; 2021 ENEC Reopener, Direct Testimony of Alex E. Vaughan, Petitioners' Ex. AEV-RO ("2021 ENEC Reopener Petitioners' Ex. AEV-RO"), p. 8, Figure 1.

- By July 1, 2021, the Petitioners ceased using negative adders and began submitting bids into PJM at the "market offer"²² in recognition of their decreasing coal supplies;²³
- Coal inventories declined precipitously at each of the Petitioners' generation plants over the course of Summer 2021, as recognized by Petitioners' witness Mr. Dial;²⁴
- On July 1, 2021, the Petitioners' coal inventories at both the Mitchell and Amos plants were already below their own nominal goal of having 30 days supply of coal available,²⁵ with each having only 28 days of full load burn available;²⁶
- On August 1, 2021, Amos and Mitchell coal inventories had declined even further to only 18 and 19 days of full load burn available, respectively;²⁷
- On August 18, 2021, the Petitioners began using "positive adders"²⁸ with their day-ahead bids to PJM so as to actively preserve coal supplies (and thereby restrict dispatch even when dispatch would have been economic);²⁹
- On August 24, 2021, the Petitioners' Commercial Operations team concluded that there was a coal shortage issue;³⁰
- On September 2, 2021, the Commission directed the Petitioners to run their coal-fired plants at a targeted 69 percent capacity factor;³¹ and,

²² Market offers are bids submitted to PJM that are being offered at the Petitioners' actual cost to produce the power.

²³ See 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 188, lines 15-22 (Petitioners' witness Stegall).

²⁴ See 2022 ENEC, Direct Testimony of Jeffrey C. Dial, Petitioners' Ex. JCD-D ("2022 ENEC Petitioners' Ex. JCD-D"), p. 6, Figures 3 and 4; 2022 ENEC, Oct. 4, 2022, Tr., p. 272, line 17 to p. 273, line 18 (Petitioners' witness Dial); 2022 ENEC, Petitioners' Post-Hearing Ex. 3, Q 3 Supplement, p. 4.

²⁵ Seemingly in recognition of their conservative fuel target goals, the Petitioners have since increased their target inventory for all facilities to 35 days instead of 30 days. See 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 170, lines 1-3 (Petitioners' witness Chilcote).

²⁶ See 2022 ENEC, Petitioners' Post-Hearing Ex. 3, Q 3 Supplement, p. 4.; 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 5, 2023, Tr., p. 204, lines 2-9 (Petitioners' witness Plewes).

²⁷ See 2022 ENEC, Petitioners' Post-Hearing Ex. 3, Q 3 Supplement, p. 4.

²⁸ Positive adders are bids over the PJM market offer price to keep the Petitioners' coal plants from running so as to preserve coal.

²⁹ See 2022 ENEC, Oct. 5, 2022, Tr., p. 60, lines 1-11 (Petitioners' witness Vaughan); 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 188, lines 4-14 (Petitioners' witness Stegall); 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 7, 2023, Tr., p. 55, line 17 to p. 56, line 24 (Petitioners' witness Scalzo).

³⁰ See 2022 ENEC, Oct. 4, 2022, Tr., p. 276, lines 1-4 (Petitioners' witness Dial).

³¹ See September 2021 Order, p. 8.

- On September 20, 2021, the Petitioners finally issued an RFP for more coal in 2021 and 2022.³²

This litany of information **was known** by the Petitioners during the review period, and more specifically, over the course of Summer 2021. Instead of reacting and responding reasonably, the Petitioners waited until September 20, 2021, to issue an RFP (which also neglected to contemplate the Commission's 69 percent capacity factor directive).³³ In turn, the Petitioners could not secure any additional coal supplies for the balance of 2021.³⁴

In response to all of this knowledge, dwindling inventories, increasing coal prices, positive adders being used to preserve coal supplies, and high forecasted capacity factors for the Petitioners' coal units, the Petitioners decided to wait. In their Initial Brief, the Petitioners claim that their fuel supply constraints were unforeseeable and unavoidable;³⁵ yet the record summarized above demonstrates there was significant information that the Petitioners **knew** that should have caused them to respond expeditiously to their diminishing coal supplies. To the contrary, the Petitioners decided to passively watch as their coal inventories dwindled through the summer of 2021. The Commission thus appropriately found that the Petitioners' response, or lack of response, to this **actual knowledge** was imprudent and caused the Petitioners to incur significant ENEC costs to the detriment of their ratepayers.³⁶

³² See 2022 ENEC, Oct. 4, 2022, Tr., p. 280, lines 6-19 (Petitioners' witness Dial).

³³ *Id.*

³⁴ See 2022 ENEC, Oct. 4, 2022, Tr., p. 279, line 5 to p. 280, line 1 (Petitioners' witness Dial); 2024 Appeal, Petitioners' I.B., p. 8.

³⁵ 2024 Appeal, Petitioners' I.B., p. 30.

³⁶ See Commission Order, pp. 10-22; 2024 Appeal, Statement of Respondent Public Service Commission of West Virginia of its Reasons for the Entry of its Order of January 9, 2024 ("Commission Statement of Reasons"), pp. 13-19, 29-30.

b. Relevant information was reasonably knowable to the Petitioners in 2021 that should have caused them to seek and procure additional coal supplies.

In addition to all of the information actually known by the Petitioners in 2021, further information was reasonably knowable to the Petitioners that should have caused them to react more quickly to acquire additional supplies of coal.

- In both May and June 2021, the U.S. Energy Information Administration ("EIA") was forecasting a rise in coal-fired electricity generation for both the remainder of 2021 and into 2022;³⁷
- The average monthly price of exported coal was increasing beginning in May and increased significantly in June and July 2021;³⁸
- Natural gas prices were on the rise and had spiked higher as early as February 2021;³⁹ and,
- The responses to the Petitioners' issuance of an RFP in May 2021 indicated coal-constrained market conditions.⁴⁰

The Petitioners contend that the Commission failed to acknowledge various market conditions in 2021.⁴¹ The record detailed above demonstrates that the PSC had before it significant evidence of what the Petitioners both knew and should have known and explicitly considered relevant market information in the Commission Order.⁴² The Commission was correct to

³⁷ See 2022 ENEC, Rebuttal Testimony of Ruben Moreno, Petitioners' Ex. RM-R ("2022 ENEC Petitioners' Ex. RM-R"), p. 16, lines 11-12 (Petitioners' witness Moreno admitting that the Petitioners' consider information from the EIA); 2022 ENEC WVEUG Ex. SJB-D, p. 24, line 20 to p. 25, line 7 (quoting *Short-Term Energy Outlook*, EIA, p. 3 (May 2021), available at <https://www.eia.gov/outlooks/steo/archives/may21.pdf>); *id.* at 25, lines 12-15 (quoting *Short-Term Energy Outlook*, EIA, p. 3 (June 2021), available at <https://www.eia.gov/outlooks/steo/archives/jun21.pdf>).

³⁸ See 2022 ENEC Petitioners' Ex. JCD-D, p. 7, Figure 2; 2022 ENEC WVEUG Ex. SJB-D, p. 26, line 4 to p. 28, line 5.

³⁹ See 2022 ENEC, Consumer Advocate Division ("CAD") I.B., pp. 18-19.

⁴⁰ See *id.* at 19.

⁴¹ 2024 Appeal, Petitioners' I.B., p. 33.

⁴² Commission Order, pp. 10-15.

recognize that in response to this information that was reasonably knowable, the Petitioners chose not to act.⁴³

The Petitioners' inaction in response to reasonably knowable information exemplifies their imprudence when compared to the actions taken by FirstEnergy utilities Monongahela Power Company ("Mon Power") and The Potomac Edison Company ("Potomac Edison") (collectively, "FirstEnergy") in 2021. According to FirstEnergy's 2021 ENEC filing, issues with the increased price of coal started to become evident beginning in June 2021.⁴⁴ FirstEnergy responded by entering into seven coal contracts with signatory dates in the July through October 2021 period, with terms beginning July 1, 2021, and up to November 1, 2021, accounting for over 650,000 tons of coal.⁴⁵ While the Petitioners' contention that coal supply constraints were widespread across the electric utility industry may be accurate,⁴⁶ the record demonstrates that Petitioners failed to respond appropriately to the market constraints (both known and reasonably knowable to them) that would have mitigated the Petitioners' ENEC under-recovery.

If the Petitioners had acted to acquire additional coal earlier than September 2021 in response to changing market conditions, then the Petitioners' coal constraints would have been significantly less severe. In fact, had the Petitioners been able to contract for and acquire even 650,000 tons of additional coal in 2021, that would have accounted for a significant portion of the Petitioners' coal delivery shortfall that year.⁴⁷ Instead of recognizing obvious market conditions

⁴³ Commission Order, p. 10.

⁴⁴ See 2023 ENEC/2022 ENEC/2021 ENEC WVEUG Ex. SJB-D, p. 32, lines 8-12 (citing *Monongahela Power Co. and The Potomac Edison Co.*, Case No. 21-0658-E-ENEC, Direct Testimony of Mark Valach, p. 4, lines 2-3 (stating, "The coal market prices in all of the producing basins increased slightly from July of 2020 through May of 2021 with a significant increase seen in June through July of 2021[.]")).

⁴⁵ *Id.* at 32, line 14 to p. 33, line 1.

⁴⁶ See 2024 Appeal, Petitioners' I.B., p. 26.

⁴⁷ See 2024 Appeal, Petitioners' I.B., p. 24; 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 140, line 24, to p. 141, line 11 (Petitioners' witness Chilcote).

and trends and reacting as FirstEnergy did by seeking to acquire additional coal supplies, the Petitioners chose to wait until late September 2021 to try to obtain any additional coal. Critical information was reasonably knowable to the Petitioners at the time, yet the Petitioners chose to delay taking affirmative action to acquire additional coal in response. The Commission appropriately determined that this inaction and delay was imprudent and unreasonable under the circumstances.⁴⁸

c. The Petitioners failed to respond prudently and reasonably to all the known and reasonably knowable information and thus incurred excess ENEC costs that should not be imposed on ratepayers.

The Commission was correct to find that the Petitioners' inaction and delay in response to the compendium of information known and reasonably knowable to them in 2021 resulted in increased ENEC costs to the detriment of the Petitioners' captive ratepayers.⁴⁹ Market conditions changed. Coal inventories declined below the Petitioners' target levels. Positive adders were implemented to PJM bids to preserve coal supply. And the Petitioners waited. They waited until September 20, 2021, to issue an RFP for coal.⁵⁰

As a result, in Fall 2021, without additional coal on hand, the Petitioners implemented more severe positive adders to prevent their plants from dispatching in order to preserve their coal inventories⁵¹ and extended outages because they would have run out of coal had their plants been running during times of economic dispatch.⁵² The Petitioners' coal supply constraints were the

⁴⁸ Commission Order, pp. 10-22, 28-29, 35.

⁴⁹ Commission Order, p. 21 (stating that "had the Companies reacted sooner and acquired even more new coal supplies its under-recovery would have been less and it would be facing less of a cost recovery disallowance").

⁵⁰ See 2022 ENEC, Oct. 4, 2022, Tr., p. 280, lines 6-19 (Petitioners' witness Dial).

⁵¹ See 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 189, lines 9-10 (Petitioners' witness Stegall); 2022 ENEC, Petitioners' Post-Hearing Ex. 1, p. 304 (stating "all market-based offers with adders to the cost-based offer were to conserve the limited amount of coal the Companies had on hand.").

⁵² See 2022 ENEC, Petitioners' I.B., p. 10.

sole limiting factor causing them to incur substantial ENEC costs during this time period. The Petitioners explicitly stated: "The limitation on the amount of generation provided by the Companies' coal units . . . was strictly a matter of coal supply as the tons were not available at all."⁵³ Neither of these actions (keeping or extending outages and manipulating bids) were reasonable in response to the overwhelming information that was known and reasonably knowable to the Petitioners beginning in May 2021, especially in light of the opportunity for economic dispatch during Fall 2021.

The Petitioners' delayed response to all of the known and reasonably knowable information caused them to restrict coal-fired generation during periods when it would have been economic to dispatch, all to the detriment of the Petitioners' captive ratepayers. The Commission thus appropriately determined that the Petitioners' lack of action in response to all of the known and reasonably knowable information could not be interpreted as anything but imprudent and unreasonable.⁵⁴

2. The Commission Appropriately Weighed the Evidence to Determine that the Petitioners' Claim that Plant Outages Caused Increased Fuel Costs was Unpersuasive.

In their Initial Brief, the Petitioners misleadingly rely on outages as the reason why they could not economically dispatch their plants.⁵⁵ The Commission appropriately recognized this as

⁵³ 2022 ENEC, Petitioners' Post-Hearing Ex. 1, p. 307 (emphasis added); *see also* 2023 ENEC/2022 ENEC, 2021 ENEC, Petitioners' Cross Ex. No. 3 (entered into record 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 5, 2023, Tr., p. 129), Petitioners' Discovery Response to Prudency Review Staff Set 1, Bates No. 000005 (The Petitioners stated: "The unavailability of coal is the primary reason driving the capacity factors for the Companies' coal plants over the past year.") (emphasis added).

⁵⁴ *See generally*, Commission Order.

⁵⁵ *See* 2024 Appeal, Petitioners' I.B., pp. 47-49.

a red herring to "distract" it, and now this Court, from recognizing that the Petitioners imprudently and unreasonably managed their coal supplies.⁵⁶

The record of these cases is unequivocal: the Petitioners are able to delay, modify, extend, or shorten outages depending on certain conditions.⁵⁷ Such conditions include coal inventories, and in Fall 2021 the Petitioners extended outages⁵⁸ rather than delaying or shortening outages specifically due to coal inventory concerns:

Q. So Mr. Scalzo, if reality had been different, and if the coal --- if the scheduled and contracted coal supplies had actually come through in 2021, would there have had to be any curtailment of the plant --- at the plants?

A. I think how you look at it is if we had the coal --- we were scheduled for outages. Market conditions changed. We might have had other options, you know, the --- pull things out of outage, maybe not start an outage. You know, however that may have played out. If we had the coal, we might have been able to react different.⁵⁹

Mr. Scalzo also stated:

So if we had coal and we weren't in outages, those plants would have dispatched. And likewise, if we had coal, we would examine whether, if we were in outages, whether we should be bringing them out.⁶⁰

Petitioners' witness Zwick (whose testimony was adopted by witness Sink) similarly testified that coal is a consideration for outages:

Q. And I think earlier, Witness Scalzo indicated that there was some planned outages and it may have been extended due to less coal on the ground or under contracts. Were any of these outages extended due to the lack of available coal supplies?

⁵⁶ See Commission Order, pp. 21-22; 2024 Appeal, Commission Statement of Reasons, p. 19.

⁵⁷ 2022 ENEC, Oct. 4, 2022, Tr., p. 164, lines 8-14 (Petitioners' witness Sink).

⁵⁸ 2022 ENEC, Oct. 4, 2022, Tr., p. 175, line 20 to p. 179, line 19 (Petitioners' witness Sink discussing multiple outages being extended in Fall 2021); 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 6, 2023, Tr., p. 96, line 1 to p. 100, line 25 (Petitioners' witness Kerns discussing multiple outages being extended in Fall 2021).

⁵⁹ 2021 ENEC Reopener, Mar. 23, 2021, Tr., p. 81, line 18 to p. 82, line 3 (emphasis added).

⁶⁰ *Id.* at 100, lines 16-19 (emphasis added); 2022 ENEC WVEUG Ex. SJB-D, p. 24, lines 1-3.

A. I would say that it came into the calculation because the question was asked, like John Scalzo mentioned, of can we bring these units back into service? And in some cases toward the end of those outages, you can. And when you bring those back in service, you know, we would have run out of coal and wouldn't have been available for January and February. So yes, it does come into the risk calculation.⁶¹

The Petitioners instead extended outages for maintenance due to a lack of coal supplies, despite economic dispatch conditions.⁶² The failure to dispatch was not caused by the outages; it was caused by a lack of coal. As the Petitioners stated quite simply: "The limitation on the amount of generation provided by the Companies' coal units . . . was strictly a matter of coal supply as the tons were not available at all."⁶³ These tons were not available because the Petitioners failed to act prudently to acquire them.

The Commission properly recognized that the Petitioners' reliance on outages as the primary factor in causing their severe ENEC under-recovery was, and continues to be, a distraction from the Petitioners' imprudent actions and failure to maintain fuel supplies.⁶⁴

IV. CONCLUSION

It is abundantly clear that the Commission reasonably weighed the evidence and concluded that the Petitioners' actions (and inaction) during the review period were imprudent and unreasonable. The Petitioners failed to meet their burden of proving the prudence and reasonableness of their actions and decision-making that gave rise to their enormous ENEC under-recovery. To the contrary, the record demonstrates that the Petitioners failed to fulfill their

⁶¹ 2021 ENEC Reopener, Mar. 23, 2021, Tr., p. 145, line 25 to p. 146, line 12 (emphasis added) (Petitioners' witness Zwick); 2022 ENEC WVEUG Ex. SJB-D, p. 24, lines 8-13.

⁶² See 2022 ENEC, Petitioners' I.B., p. 10.

⁶³ 2022 ENEC, Petitioners' Post-Hearing Ex. 1, p. 307 (emphasis added); see also 2023 ENEC/2022 ENEC, 2021 ENEC, Petitioners' Cross Ex. No. 3 (entered into record 2023 ENEC/2022 ENEC, 2021 ENEC, Sept. 5, 2023, Tr., p. 129), Petitioners' Discovery Response to Prudency Review Staff Set 1, Bates No. 000005 (The Petitioners' stated: "The unavailability of coal is the primary reason driving the capacity factors for the Companies' coal plants over the past year.") (emphasis added).

⁶⁴ See Commission Order, pp. 21-22; 2024 Appeal, Commission Statement of Reasons, p. 19.

obligations to serve customers at the lowest reasonable cost. The Commission thus properly determined that the Petitioners should be held responsible for a significant portion of the ENEC under-recovery. As such, WVEUG respectfully requests this Court affirm the Commission's January 9, 2024, Order.

Respectfully submitted this 15th day of April, 2024.

WEST VIRGINIA ENERGY USERS GROUP

By SPILMAN THOMAS & BATTLE, PLLC

/s/ Barry A. Naum

Barry A. Naum (WV State Bar # 12791)

Steven W. Lee (WV State Bar # 14379)

1100 Bent Creek Boulevard, Suite 101

Mechanicsburg, PA 17050

Phone: (717) 795-2741

Fax: (717) 795-2743

bnaum@spilmanlaw.com

slee@spilmanlaw.com

Susan J. Riggs (WV State Bar #5246)

300 Kanawha Boulevard, East

Charleston, WV 25301

Phone: (304) 340-3800

Fax: (304) 340-3801

sriggs@spilmanlaw.com

CERTIFICATE OF SERVICE

I, Barry A. Naum, Counsel for the West Virginia Energy User Group, do hereby certify that a copy of the foregoing "Amicus Curiae Brief of the West Virginia Energy Users Group in Support of the Decision of the Public Service Commission of West Virginia" has been served upon the following parties of record by First-Class Mail and Electronic Mail, this 15th day of April 2024:

William C. Porth, Esquire
Anne C. Blankenship, Esquire
Robinson and McElwee PLLC
P.O. Box 1791
Charleston, WV 25326
wcp@ramlaw.com
acb@ramlaw.com

Keith D. Fisher, Esquire
American Electric Power Service
Corporation
200 Association Drive
Charleston, WV 25311
kdfisher@aep.com

Jessica M. Lane, Esquire
Susan M. Stewart, Esquire
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301
jlane@psc.state.wv.us
sstewart@psc.state.wv.us

Lucas Head, Esquire
Staff Attorney
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301
lhead@psc.state.wv.us

Robert F. Williams, Esquire
Heather B. Osborn, Esquire
John Auville, Esquire
Consumer Advocate Division
700 Union Building
723 Kanawha Boulevard, East
Charleston, WV 25301
rwilliams@cad.state.wv.us
hosborne@cad.state.wv.us
jauville@cad.state.wv.us

Christopher M. Settles, Esquire
Kanawha County Commission
P.O. Box 3627
Charleston, WV 25336
chrissettles@kanawha.us

Marc J. Slotnick, Esquire
Bailey & Wyant, PLLC
P.O. Box 3627
Charleston, WV 25336
slotnick@baileywyant.com

Charles K. Gould, Esquire
Jenkins Fenstermaker, PLLC
325 Eighth Street, 2nd Floor
Huntington, WV 25701
ckg@jenkinsfenstermaker.com

H. Brann Altmeyer, Esquire
Jacob C. Altmeyer, Esquire
Phillips, Gardill, Kaiser, & Altmeyer, PLLC
61 Fourteenth Street
Wheeling, WV 26003
brannaltmeyer@pgka.com
jacobaltmeyer@pgka.com

/s/ Barry A. Naum

Barry A. Naum (WV State Bar # 12791)