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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

From the Public Service Commission of West Virginia
Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC

PETITIONERS' INITIAL BRIEF

APPALACHIAN POWER COMPANY
and WHEELING POWER COMPANY

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Court Cases

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C & P Telephone Co. v. Pub. Serv. Comm'n,
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Eureka Pipe Line Co. v. Pub. Serv. Comm'n,
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W. Va. Citizen Action Group v. Pub. Serv. Comm'n,
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Wilhite v. Pub. Serv. Comm'n,
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Administrative Cases

In re Appalachian Power Co.
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Virginia Electric and Power Company,
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Petitioners Appalachian Power Company ("APCo") and Wheeling Power Company ("WPCo") (together, the "Petitioners"), pursuant to W. Va. Code § 24-5-1 and Rule 14 of the Rules of Appellate Procedure, submit this brief in support of their appeal from the January 9, 2024 final order ("Order") entered by the Public Service Commission of West Virginia ("Commission") in Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC. For the reasons set forth herein, the Petitioners respectfully request that this Court reverse and set aside that Order.

ASSIGNMENTS OF ERROR

1. The Commission failed to apply the required legal standard for assessing prudence.

2. The Commission erred in its finding of imprudence by ignoring the Petitioners' critical evidence that their coal procurement practices were prudent and that their coal inventories were instead negatively impacted by unforeseeable circumstances outside their control.

3. The Commission violated the Petitioners' fundamental due process rights in calculating a disallowance based on information outside the record and faulty assumptions.

4. The Commission exceeded its jurisdiction and authority when it levied punishment upon the Petitioners in a cost recovery proceeding without evidentiary support.

STATEMENT OF THE CASE

This is an appeal from the January 9, 2024 Commission Order denying the Petitioners an unprecedented approximately $232 million in costs reasonably and prudently incurred to produce and provide electricity to their customers in West Virginia and unjustly depriving the Petitioners of timely, adequate recovery of another approximately $321 million in such costs.[1]

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[1] In this brief, the Petitioners cite to the evidentiary record that the Commission will transmit 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, the Petitioners have included information in their citations to the record to highlight when testimony was filed or occurred at hearing. For example, where necessary, the Petitioners have denoted pre-filed testimony as "2021," "2021 Reopener," or "2022"

I. Factual Background

A. The Petitioners' Diverse Generation Portfolio and the Competitive Wholesale Electricity Market in Which They Operate

The Petitioners are public utilities providing electric service to approximately 461,000 customers in West Virginia.[2] APCo owns and operates two coal-fired electric generating facilities in West Virginia: the Amos Plant and the Mountaineer Plant. WPCo owns a 50% undivided interest in the coal-fired Mitchell Plant, also located in West Virginia. In addition, APCo owns and operates gas-fired electric generating facilities and hydroelectric facilities, and purchases power from hydroelectric, wind, solar and coal-fired facilities under agreements that are commonly known as "purchased power agreements."

To serve the electric energy needs of their customers, the Petitioners rely upon their diverse portfolio of owned generation and purchased power agreements, as well as energy purchases from the PJM Interconnection LLC ("PJM") Energy Market. PJM operates a competitive wholesale electricity market to ensure reliability for more than 65 million customers in all or parts of 13 states (including West Virginia) and the District of Columbia. *See* "PJM Who We Are," www.pjm.com.

Each day, the Petitioners (and all other PJM participating utilities) offer their available electric generation into the PJM Energy Market.[3] Cos. Exh. JMS-D (2022) at 3, 6-7. PJM selects the offered resources based on a principle known as "economic dispatch" whereby the offers

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and have included the year in their citations to hearing transcripts. Citations to the Petitioners' written testimony filed in 2023 begin with "APCo/WPCo" per the Commission's general order on formatting issued in late September 2022. Prior to that general order, the Petitioners' testimony was denoted as "Cos. Exh."

[2] APCo also provides electric service in the Commonwealth of Virginia, where it is subject to regulation by the Virginia State Corporation Commission ("VSCC").

[3] The availability of a generation resource is referred to as its Equivalent Availability Factor ("EAF"), and the offers involve "more than submitting a single offer price for a generating unit. The offers can include different prices for up to 20 segments of the unit, thus offers are often called generator offer curves. Beyond price, the offers include commitment status and a variety of unit parameters (such as ramp times and minimum and maximum run times)." APCo/WPCo JCP-D at 53.

(sometimes also called "bids") are accepted in order of lowest to highest priced and the selected resources are dispatched accordingly to generate electricity. In other words, the cheapest offered resources are selected first, followed by more expensive resources, until all customers' needs are met for a given day. Economic dispatch ensures that customers within the PJM footprint, including West Virginia customers, are paying the lowest price for the available electricity. *Id.* at 4.

While the Petitioners determine the offers that they submit each day, it is PJM, through economic dispatch, that ultimately determines how much electricity the available resources of Petitioners and other utilities will generate on a day-to-day basis.[4] *Id*. The key drivers for the Petitioners' offer price into the PJM Energy Market are the cost and availability of fuel (coal and natural gas) to run their fossil-fueled electric generating units. When fuel supply is constrained or when purchasing power from the PJM Energy Market is cheaper than self-generation, the Petitioners will end up using less of their own generation and purchasing more energy from that market to meet their customers' needs in the most economical manner. APCo/WPCo Verified Petition, Apr. 28, 2023 ("2023 Pet."), at 4.

B. The Petitioners utilize outages to ensure the reliability, safety, and continued operation of their coal-fired generating fleet.

Coal-fired electric generating facilities are large, complex, and require regular maintenance and repair to ensure that they operate in a safe and reliable manner. During the relevant time periods, the Petitioners utilized outages to complete necessary upgrades, maintenance, and repairs at all three of their coal-fired plants, including lengthy outages to install the environmental controls that the Commission ordered them to complete in Case No. 20-1040-E-CN. Cos. Exh. MJZ-D

[4] The amount that an available resource actually generates electricity over a certain time period, compared to the amount of generation that would have been produced if the resource operated at its full load rating for the entire period, is known as its Net Capacity Factor ("NCF") or simply Capacity Factor ("CF"). Cos. Exh. MJZ-D (2022) at 3-4.

(2022) at 11; APCo/WPCo TCK-R at 11-16. Across the electric utility industry, outages are scheduled predominantly in the spring and fall, what are commonly referred to as the "shoulder months," due to the historically lower demand for electricity in those months. In fact, PJM prohibits planned outages from mid-June to early September of each year, when hot weather typically drives up electricity consumption. Cos. Exh. JMS-D (2022) at 6.

There are three types of outages: planned, maintenance, and forced. A planned outage is scheduled well in advance in conjunction with PJM, strategically in a shoulder period, for major projects or upgrades. Cos. Exh. MJZ-D (2022) at 8. A maintenance outage allows equipment to be repaired and is also planned ahead of time, but it can have a flexible start date with less lead time. *Id.* at 10. Conducting such outages in shoulder months helps to increase the likelihood of higher unit availability during peak demand conditions such as in the winter and summer months. Cos. Exh. AMS-R (2022) at 4-5. A forced outage occurs when a unit must be removed from service, either immediately or prior to the end of the next weekend, typically due to equipment failure, startup failure, or lack of fuel. *Id*. at 5.

Although outages impact the amount of self-generation available for offering into the PJM Energy Market, they are a vital and necessary part of the Petitioners' continued operation of their coal-fired generating units. By properly managing and carrying out their coal unit outages during the relevant time periods, the Petitioners prevented forced outages and shutdowns, allowing those units to operate as reliably and safely as possible. *See generally* Cos. Exh. MJZ-D (2022), AMS-R (2022); APCo/WPCo TCK-R.

C. The fuel and energy markets experienced significant, rapid change starting in late Third Quarter 2021.

The Commission has long recognized that the "cost components associated with the generation and purchase of electric power are [] subject to volatile price and market changes and

can be difficult to project." *In re Appalachian Power Co.*, Case No. 12-0399-E-P, 2012 WL 3893119 (W.Va. P.S.C. July 26, 2012). Volatility in the fuel and energy markets can cause the price of fuel and purchased power to increase or decrease, as seen both historically and more recently. For instance, volatility in the 2008-09 timeframe led to high coal prices.[5] Then, for approximately a decade prior to the Fall of 2021, the market prices for natural gas and coal were relatively stable. APCo/WPCo KKC-D at 9-10.

In 2020, a mild winter followed by the economic impact of the COVID-19 pandemic significantly lowered the demand for electricity. Cos. Exh. JCD-D (2021) at 5. With lowered electricity demand came the lowest natural gas prices in decades. *Id.* This resulted in a severe reduction in the dispatching of coal-fired generating units in PJM (down to an average 25.6% capacity factor) and, thus, reduced demand for thermal coal. Coal production sharply declined from pre-pandemic levels. APCo/WPCo KKC-D at 6-7; APCo/WPCo JJS-R at 16-17. With coal-fired generation dispatching less, coal inventories across the electric utility industry built up through 2020 and into 2021. Cos. Exh. JCD-D (2021) at 5.

Given their delivery schedules and physical storage limitations, the Petitioners had to negotiate with coal suppliers in 2020 to defer deliveries to future periods, so as to avoid liquidated damages and exceeding safe coal storage pile limits. *Id.* at 8. At the start of 2021, while the COVID-19 pandemic persisted, the Petitioners had elevated coal inventories, and coal and natural

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[5] According to the Commission, "in 2008 there were dramatic increases for energy costs when spot market coal prices peaked at more than $140 a ton in July 2008 before declining in late 2008. The impact of this unexpected increase in coal costs on APCo/WPCo was complicated by a near melt down of the financial market. In the 2009 ENEC proceeding, the Commission faced the difficult task of reacting to the unprecedented fly-up in coal prices, the struggling national economy and tight financial markets, and environmental control pressures that seemed then, and still seem today, almost certain to escalate costs of coal-fired generation." *In re Appalachian Power Co.*, Case Nos. 11-0274-E-GI and 11-0265-E-PC, 2011 WL 3211050 (W.Va. P.S.C. June 30, 2011).

gas prices were stable. Cos. Exh. JCD-D (2021 Reopener) at 2; RM-R at 23. Coal was projected to be available in the market as there was low demand and high inventory levels across the electric utility industry, along with limited domestic coal being shipped in the export market. Cos. Exh. JCD-D (2021 Reopener) at 2; RM-R at 24-25.

Through the first half of 2021, coal prices were generally flat and the Petitioners had enough coal either on the ground or under contract to operate at capacity factors near or greater than the PJM 10-year average,[6] depending on the plant, and to meet forecasted burns for the next two years. APCo/WPCo JJS-R at 15. Because coal inventories and expected deliveries under existing contracts were projected to be adequate for 2021, especially considering the scheduled fall outages when coal units would not be running, the Petitioners did not request additional coal for 2021 in their May 2021 Request for Proposal ("RFP"), but only for subsequent years (2022-2024). Cos. Exh. JCD-R (2022) at 8; JCD-D (2021 Reopener) at 1-2; JJS-D (2021 Reopener) at 3. From the May 2021 RFP, additional coal was purchased for the years 2022-2023, which followed the Petitioners' accepted practice of adding to their stockpiles over time. *Id.*

It was not until August and September 2021 that commodity prices exceeded the historical average and started to break into unprecedented territory. APCo/WPCo JCP-D at 17. For context,

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	Coal Unit Annual Capacity Factors in PJM
2013	49.5%
2014	50.2%
2015	45.6%
2016	32.5%
2017	46.6%
2018	44.4%
2019	40.6%
2020	25.6%
2021	42.0%
2022	41.8%
Average	41.9%

[6] APCo/WPCo JJS-R at 15.

it is important that average monthly energy prices (at the AEP pricing point in PJM) started out in 2021 well below the average from the 10 years prior to the anomalous 2020 (except for a temporary weather-related jump in February 2021), such that any increases in energy prices from the start of the year 2021 appear magnified. *Id*. According to the Petitioners' witness Jeff Plewes, by Summer 2021, prices "were not anomalous compared to years prior to 2020" and it was "perfectly reasonable" for the Petitioners to "expect that: PJM power prices would decrease in Fall 2021, [their] contracted coal deliveries would be realized and replenish inventories, and that coal consumption rates would decrease due to some planned outages." *Id*. at 50; JCP-R at 15.

Economic activity began to recover in late Summer 2021 and increased in Fall 2021, and with it came increased electricity demand and higher natural gas prices. APCo/WPCo JCP-D at 28. Coal suddenly became attractive as a fuel source compared to natural gas; however, reduced mine production and an inability to quickly ramp up production meant there was insufficient coal supply to meet demand, particularly when global demand for coal spiked. *Id*. As a result, an unprecedented volatility occurred in the coal market -- prices rose significantly and coal was scarce. *Id*. This volatility continued into and throughout 2022, with the impacts felt across the electric utility industry. APCo/WPCo JJS-R at 15; *see also* Section III.B.1 *infra*. Regarding fuel constraints, Petitioners' witness Alex Vaughan stated in October 2022: "it's not just APCo's units. It is the entire AEP fleet. It's all of our 11 states. It's every jurisdiction I've talked to. It's nationwide. If you look at the press, it's actually worldwide." Oct. 5, 2022 Hrg. Tr. at 64-65. Further, beginning in Third Quarter 2021, the Petitioners were negatively impacted by the unexpected failures of certain coal suppliers to deliver large amounts of coal that the Petitioners had contracted for. APCo/WPCo JJS-R at 15-16, Attachment 3. "It is not in dispute that the [Petitioners'] coal plants were constrained by available coal volumes from September 2021

through approximately October 2022[.]" APCo/WPCo JCP-D at 6. However, the Petitioners "encountered the constraints despite reasonable fuel procurement decisions." *Id.* at 7.

D. The failures of coal suppliers to deliver coal to the Petitioners compounded the challenges posed by the volatile fuel and energy markets.

When a supplier fails to meet its contractual obligations to supply coal, the missing amount is commonly referred to as a "shortfall." Coal shortfalls can result from any number of things, including in recent years non-conforming quality specifications, supplier under-performance, roof falls and methane levels, and employee absenteeism due to COVID-19. Cos. Exh. JCD-D (2021) at 9; JCD-D (2022) at 11-12. The Petitioners have a long history of successfully working with suppliers to resolve shortfalls. *Id.*

Following elevated levels of coal generation in the peak summer months of 2021, the Petitioners encountered an unexpectedly large amount of coal shortfalls beginning in the third quarter of 2021. Cos. Exh. JCD-D (2022) at 9; APCo/WPCo JJS-R at 15-16, Attachment 3. It was not until late August 2021 that the Petitioners' projected year-end coal inventories were below target. Cos. Exh. JCD-D (2022) at 9. In response, the Petitioners issued an open-ended RFP on September 20, 2021, seeking any amounts of additional coal for 2021. *Id.* As Petitioners' witness Jeffrey Dial explained:

> The combination of existing inventories and the expected fulfillment of contractual supply commitments fully justified the Companies' assessment that it was adequately supplied until near the end of the summer of 2021. At that point, the Companies acted promptly and issued an RFP in September 2021.

Id. at 10. The response to that RFP was disappointing, however, and the shortfalls were exacerbated when certain of the suppliers did not agree to make them up in a timely fashion, contrary to historical practice. Cos. Exh. JCD-R (2022) at 6-7.

Given the aforementioned shortfalls and the disappointing response to their open-ended RFP, the Petitioners made tremendous efforts to procure additional coal starting in September 2021, including frequent personal contacts with vendors, attempts to renegotiate existing contracts, taking advantage of non-conventional sources of coal, initiatives to help coal suppliers bring on new production, and negotiations with the producers who supplied less coal than the Petitioners had contracted for. Cos. Exh. JCD-D (2022) at 14; JCD-R (2022) at 3, 6-7, 10; Tr. Oct. 4, 2022 at 280 (Dial); APCo/WPCo JCP-D at 47. As a result of these efforts, after September 2021, the Petitioners were able to increase the number of their coal contracts and obtain contractual commitments through 2027. Cos. Exh. JCD-D (2022) at 11; JCD-R (2022) at 3-4; Tr. Oct. 5, 2022 at 15-16 (Dial); APCo/WPCo KKC-R at 3. They were also able to negotiate with various suppliers for the delivery of coal in 2022 to make up for shortfalls in 2021 deliveries - at the contract prices for 2021 - and to obtain a financial settlement from another supplier for delivery shortfalls. Cos. Exh. JCD-D (2022) at 12; JCD-R (2022) at 7. In the case of the supplier responsible for a major portion of the 2021 delivery shortfalls, the Petitioners were unable to negotiate a resolution despite their best efforts and took the final step of filing lawsuits in courts in Ohio and New York. Cos. Exh. JCD-R (2022) at 7; Tr. Oct. 4, 2022 at 75-86 (Short); 265 and 286 (Dial).[7]

By March 2023 (the end of the time periods under review), the Petitioners had to navigate uncertainty, market volatility, supply disruptions, and the challenges for utilities that naturally come with them. As determined by two outside industry experts, the Petitioners' coal procurement and inventory practices were reasonable, prudent, and consistent with both (1) their obligations as regulated utilities to safely and reliably serve their customers, and (2) the unprecedented

[7] Those lawsuits were settled on terms that are beneficial to the Petitioners' customers, taking into account the circumstances and various factors such as the uncertainties of litigation. *See generally* APCo/WPCo JJS-SD; JJS-SD Attachment 1.

circumstances impacting the fuel and energy markets. Cos. Exh. RM-R at 6; APCo/WPCo JCP-D at 6, 79.

II. Procedural History

The costs of fuel (and related expenses) and purchased power used to serve customers in West Virginia are part of a group of costs known as Expanded Net Energy Cost ("ENEC").[8] Generally, the Petitioners make an annual filing to request that the Commission approve ENEC rate adjustments that consist of (1) a true-up of actual costs for the previous year (the "historical" or "review" period) and (2) an estimate of the next year's projected costs (the "forecast" period). To "true up" their ENEC rates in any given proceeding, the Petitioners will seek to increase rates for any under-recovery of their actual costs incurred during the review period or, alternatively, will seek to credit back to customers any over-recovery that exceeded their actual costs.

Prior to the proceedings below, in their 2020 ENEC filing, the Petitioners requested an additional $82 million in annual ENEC revenues. That proceeding was resolved shortly after the onset of the COVID-19 pandemic through a settlement agreement wherein the parties agreed to an ENEC rate increase of approximately $50.1 million beginning September 1, 2020. The approximate $32 million decrease from the Petitioners' original request, in recognition of the COVID-19 pandemic and the hardships caused by it, would continue to be deferred, and the next ENEC case was to be filed in April 2021. *See* Case No. 20-0262-E-ENEC; (App. at 001-031).

A. 2021 ENEC Case (21-0339-E-ENEC)

On April 16, 2021, the Petitioners initiated their 2021 ENEC case and requested additional annual ENEC revenues of approximately $73 million, comprised of $55.4 million for under-

[8] According to the Commission, the ENEC "includes expenses the utility must pay to purchase power or the fuel to generate electricity and certain specified environmental compliance and construction costs related to generation and transmission. The ENEC rate is determined in an annual review and true-up process by the Commission." *What Is In An Electric Bill*, http://www.psc.state.wv.us/electric/bill.html.

recovery of costs during the review period (March 1, 2020 through February 28, 2021) and $17.6 million in projected increased costs for the forecast period (September 1, 2021 through August 31, 2022). In support of that request, the Petitioners filed direct and rebuttal testimony on April 16, 2021 and July 21, 2021, respectively. The other parties and the Commission's Staff ("Staff") filed the direct testimonies of their respective witnesses on July 7, 2021. The Commission held the first of what has now become three evidentiary hearings in the 2021 ENEC case on July 30, 2021.

The Commission issued its first substantive order in the 2021 ENEC case on September 2, 2021. (App. at 032-041.) In that order, the Petitioners received only a $6 million rate increase.[9] The Petitioners promptly filed a Petition for Reconsideration or Clarification of that Order, asking, *inter alia*, for clarification of the Commission's discussion of the Petitioners operating their coal-fired power plants at a 69% capacity factor, without a discussion of whether this would be economical for the Petitioners' customers.[10] On March 2, 2022, the Commission entered an order granting, in part, the Petition for Reconsideration and increasing the Petitioners' ENEC rates by $31.4 million, to correct mistakes made in the calculations in its earlier order.[11] (App. at 042-057.) The Commission also reopened the evidentiary record of the 2021 ENEC case to take additional evidence on the causes of the Petitioners' growing ENEC under-recovery.

On March 14, 2022, the Petitioners filed the further testimony and exhibits of six witnesses in the 2021 ENEC case. The second evidentiary hearing in the 2021 ENEC case was held on March 23, 2022. On May 13, 2022, the Commission issued a further order in the 2021 ENEC

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[9] The Commission granted recovery of the Petitioners' requested $55.4 million under-recovery but reduced their projected ENEC costs by approximately $66.7 million, based upon the concept (which was neither realistic nor advocated or supported by any party in the case) that the Petitioners' coal-fired power plants would be dispatched in the PJM Energy Market at a 69% capacity factor during the forecast period.

[10] For comparison, the annual average capacity factor for coal units in PJM from 2013 through 2021 was approximately 41.9%. APCo/WPCo JJS-R at 14-15.

[11] The Commission declined to address the Petitioners' request for clarification about the Commission's discussion of operating the plants at a 69% capacity factor.

case, which granted the Petitioners recovery of an additional $93 million for projected increased costs, subject to future review for prudence, and ordered its Staff to conduct an "in-depth prudence review of the Companies' policies and procedures for maximizing and maintaining adequate fuel inventory levels, [and] bidding their plants into the PJM market to maximize economical self-generation[.]" (App. at 058-066.)

B. 2022 ENEC Case (22-0393-E-ENEC)

On April 19, 2022, the Petitioners filed a petition to initiate their 2022 ENEC case, in which they sought an annual ENEC rate increase of approximately $297 million, consisting of an under-recovery balance of $212.7 million (as of February 28, 2022) and a projected increase of approximately $83.9 million for the forecast period (September 1, 2022 through August 31, 2023), supported by the direct testimony and exhibits of eight witnesses. The other parties and Staff filed the direct testimonies of their respective witnesses on September 9, 2022. On September 23, 2022, the Petitioners filed the rebuttal testimonies and exhibits of seven witnesses, including an outside consultant engaged to review and opine on, *inter alia*, the circumstances prevailing throughout the review period. On October 4-5, 2022, the Commission held the first of what has now become two evidentiary hearings in the 2022 ENEC case. On February 3, 2023, the Commission issued an order in the 2022 ENEC case that deferred a decision on the Petitioners' requested rate increase until completion of the Staff's prudence review.[12] (App. at 067-074.)

C. 2023 ENEC Case (23-0377-E-ENEC)

On April 28, 2023, the Petitioners filed a petition to initiate their 2023 ENEC case, in which they requested the recovery of approximately $641.7 million, comprised of an accumulated under-recovery balance of approximately $552.9 million (as of February 28, 2023) and a projected

[12] The Staff had engaged an outside consultant, Critical Technologies Consulting, LLC ("CTC"), to perform that prudence review.

increase of approximately $88.8 million for the forecast period (September 1, 2023 through August 31, 2024).[13] Petitioners proposed two alternate mechanisms for recovery of their ENEC costs: (1) securitization pursuant to the recently enacted W. Va. Code § 24-2-4h; or (2) a three-year amortization with an adequate carrying charge. Also on April 28, 2023, the Staff filed the "Independent Technical Prudency Review of the Activities Affecting the Operation of Amos, Mountaineer, and Mitchell Coal Plants Case Nos. 22-0393-E-ENEC and 21-0339-E-ENEC" that had been prepared by its consultant CTC (hereinafter, the "CTC Report").

On May 26, 2023, the Commission issued a single procedural order in the 2021-2023 ENEC cases, which, *inter alia*, reopened the 2021-2022 ENEC cases to hear evidence on the CTC Report and set a procedural schedule in all three ENEC cases. (App. at 075-085.) The Petitioners filed direct testimony in response to the CTC Report on July 28, 2023. The other parties and Staff filed testimony in all three cases on August 15, 2023. On August 29, 2023, the Petitioners filed the rebuttal testimony and exhibits of six witnesses in all three cases.

The third hearing in the 2021 ENEC case, the second hearing in the 2022 ENEC case, and the only hearing in the 2023 ENEC case took place from September 5 through 7, 2023.[14] During that hearing, the Commission directed the Petitioners to file three Commission Requested Exhibits (Nos. 2 through 4) after the hearing concluded. The Petitioners complied and filed such post-hearing exhibits on September 15, 2023. On January 9, 2024, the Commission issued a final Order in the 2021, 2022, and 2023 ENEC cases, which is the subject of this appeal. (App. at 092-128.)

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[13] By order dated September 13, 2023, the Commission granted the forecast portion of the Petitioners' request (*i.e.,* $88.8 million) on the grounds that no party challenged the methodology or reasonableness of the estimates and projections supporting it. (App. at 086-091.). Notably, those projections did not have the coal plants running at a 69% capacity factor.

[14] On September 5, 2023, the Petitioners filed a Commission Requested Exhibit per a Commission Order dated August 31, 2023. That exhibit was labeled and admitted at the hearing as Commission Requested Exhibit No. 1.

SUMMARY OF ARGUMENT

This Court's review and action is needed to overturn an egregious Commission decision that turns the prudence standard on its head. In its Order disposing of the Petitioners' 2021-2023 ENEC proceedings, the Commission failed to apply the correct legal standard that a utility's actions and decisions are judged based on their reasonableness under the facts and circumstances existing at the time, substituting for it an unsupported, unworkable approach that looks at a utility's actions only through hindsight. Furthermore, the Commission's finding of imprudence is contrary to the evidence of record and is completely divorced from reality. The challenging, unavoidable circumstances which impacted the entire electric utility industry from Fall 2021 and through the year 2022 are virtually ignored in the Commission's Order. Moreover, the failures of some of the Petitioners' coal suppliers to deliver on their contractual obligations are completely ignored. The bias in the Commission's result-oriented, conclusory analysis is apparent, and its methods in calculating a $232 million disallowance offend bedrock constitutional principles. The Commission also committed reversible error by exceeding its jurisdiction and authority in its amortization of another $321 million in costs – a thinly veiled punishment unsupported by the record. As discussed below, the Order should be reversed and set aside.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under W. Va. Code § 24-5-1 and Rule 19 of the Rules of Appellate Procedure, as it would aid in the decisional process and this case involves the Commission's misapplication of settled legal principles, its abuse of discretion and authority, and its failure to weigh the evidence in reaching its unsupported findings and conclusions.

STATEMENT REGARDING CONFIDENTIAL RECORDS

Pursuant to Rule 40(c) of the Rules of Appellate Procedure, the Petitioners hereby notify the Court that portions of the case record from the proceedings below were marked "Confidential" and filed with the Commission under seal, accompanied by requests for protective treatment, based on one or more exemptions from public disclosure under the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-4.

ARGUMENT

I. Standard of Review

An order of the Commission may be overturned on appeal if it is "contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." *United Fuel Gas Co. v. Pub. Serv. Comm'n*, 143 W. Va. 33, 45, 99 S.E.2d 1, 8 (1957). This Court's standard of review for Commission orders 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." *W. Va. Citizen Action Group v. Pub. Serv. Comm'n*, 233 W. Va. 327, 332, 758 S.E.2d 254, 259 (2014) (citing *Monongahela Power Co. v. Pub. Serv. Comm'n*, 166 W. Va. 423, 276 S.E.2d 179 (1981)). As part of its review, this Court should "examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence." Syl. Pt. 2, in part, *Monongahela Power Co.*, 166 W. Va. at 423, 276 S.E.2d at 180.

II. The Commission failed to apply the required legal standard for assessing prudence.

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.

Therefore, one of the most critical tasks for the Commission to perform below was a proper examination and evaluation of the prudence of the Petitioners' decisions respecting ENEC matters. With three years of ENEC activity pending without regulatory resolution, by the time the Petitioners filed their 2023 ENEC case, their total of ENEC costs actually incurred to serve their customers but without recovery in rates had grown to approximately $553 million. In all three proceedings the Commission had a robust record before it on which it could have performed a proper examination and evaluation of prudence.

The 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. *See In re Hope Gas, Inc.*, Case No. 12-1070-G-30C, 2013 WL 2370525 (W.Va. P.S.C. May 10, 2013); *In re Appalachian Power Co.,* Case No. 09-0177-E-GI, 2009 WL 3756478 (W.Va. P.S.C. Sept. 30, 2009); *In re Hope Gas, Inc.,* Case No. 04-1188-G-30C, 2006 WL 2134651 (W.Va. P.S.C. April 3, 2006). This legal standard is black letter law of the deepest possible dye. No party to the proceedings below challenged it or contended that any other standard should be applied.

The Commission articulated the standard that it is bound to apply in assessing prudence in its 2006 *Hope Gas* Order:

> To find that a utility has acted imprudently, the Commission must have evidence before it to show that the utility's decisions were unreasonable based on actual data that was available at the time the utility was making its decisions. Another way of saying this is that the Commission would have to determine that an alternative utility action was reasonable and should have been made based on facts available at the time the decision was made. The Commission may not find imprudence based on outcomes or new facts that the utility cannot have reasonably been expected to know, or assume.

2006 WL 2134651, at Conclusion of Law No. 5. In its 2013 *Hope Gas* Order, the Commission recognized:

> [T]he prudence of management decisions will not be evaluated with the benefit of 20/20 hindsight. There is no expectation or requirement that management have a perfect crystal ball when making decisions that will affect its future costs.

2013 WL 2370525. More recently, the Commission confirmed that "examining prudency is not a backward looking endeavor." *In re Mountaineer Gas Co.*, Case No. 21-0592-G-30C, 2022 WL 836386 at *10 n.2 (W.Va. P.S.C. Mar. 16, 2022).

Had the Commission adhered to the required legal standard of judging prudence, the Petitioners would not be before this Court today. But the Commission flouted that standard and reached its conclusion of imprudence in utter derogation of it. The Commission hardly paid lip service to the correct legal standard in its Order, and when it did it shifted the focus from what was known or reasonably knowable at the time relevant decisions were made to an impermissibly vague "continuum of actions" leading up to those decisions.[15] This is the very same "backward looking endeavor" that the Commission itself previously held was improper. *In re Mountaineer Gas Co.*, 2022 WL 836386 at *10 n.2. As discussed below, all of the challenges facing the electric utility industry resulted in impacts to Petitioners that were managed at the time in a prudent manner. The Commission was required to consider those headwinds and reactions by the Petitioners to properly determine prudence.

The Commission's failure to apply the required standard for judging prudence and its substitution of a result-oriented appraisal requires correction by this Court. In Syllabus Point 1 of *C & P Telephone Co. v. Public Service Commission*, this Court stated:

[15] Conclusion of Law No. 2 states: "While any contemporary action must be based on what is known or reasonably knowable at the time the action is taken, a continuum of actions leading up to a decision point must also be taken into consideration when determining prudency." (App. at 126.) It is mystifying what leeway the Commission thinks it gains in considering a "continuum of actions." Obviously, over the course of time (weeks, months, and years) Petitioners made a long series of decisions affecting ENEC matters. But each of the decisions in that series must be judged by what was known or reasonably knowable at the time it was made. The fact that a given decision was preceded by earlier decisions and followed by later decisions does not warrant their assessment by 20/20 hindsight.

> In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence.

171 W. Va. 708, 301 S.E.2d. 798 (1983) (quoting Syl. Pt. 2, *Monongahela Power Co.,* 166 W. Va. 423, 276 S.E.2d. 179). Had the Commission followed the correct legal standard for assessing prudence – in other words, had it "employed the methods of regulation which it has itself selected" – not that, in this instance, it could have adopted any other – it would have looked at each stage and element of the Petitioners' decision-making and their choices to act or not to act during the relevant review periods. The Commission would then have been able to determine if what the Petitioners knew or should have known at any point reasonably supported those choices. And this Court would have been able to judge if each of those Commission determinations was supported by substantial evidence.

The Commission, however, did nothing of the kind. It turned the legal standard for assessing prudence on its head. As discussed below, it ignored the Petitioners' decisions (and the contemporaneous circumstances driving them) and considered only the <u>result</u> that, starting in the later months of 2021, at a time of unpredictably soaring prices of coal and natural gas, unavailability of coal to purchase, and failure in delivery of large quantities of coal that the Petitioners had previously contracted for, the Petitioners had limited amounts of coal to use for self-generation. By focusing on that <u>result</u>, and ignoring the knowledge that informed Petitioners' decisions and the multiplicity of circumstances that produced that result, the Commission concluded that Petitioners must have acted imprudently or they would have had more coal. (*See*, *e.g.*, App. at 101-02, 112, 126-27.) This extremely simple, result-oriented analysis ignored all the facts in the record that multiple hearings were held to consider. To reach its conclusion of

imprudence, the Commission had to ignore the realities of COVID, the war in Ukraine, weak coal production, and coal supplier non-performance.

The standard of prudence requires reviewing the circumstances known or reasonably knowable at the time decisions are made and not on the basis of ultimate outcomes considered with 20/20 hindsight. Using its new standard that looks only at results, the Commission ignored the overwhelming record evidence clearly establishing the extremely challenging circumstances confronting the Petitioners as they reliably produced and provided electricity to their customers during the time periods under review. Without any basis in law, the Commission Order holds the Petitioners strictly liable for the widespread constraints that affected the entire electric utility industry and imposes on them a burden far more onerous than prudence and far more risky than cost-conscious buying; it requires the Petitioners to hoard coal (which is a very expensive and unsafe endeavor) and always have more on hand than is reasonably expected to be used to generate electricity in the PJM Energy Market.[16] It is incumbent on this Court to rein in the Commission and compel it to return to the proper and legitimate exercise of its regulatory duties.

III. The Commission erred in its finding of imprudence by ignoring the Petitioners' critical evidence that their coal procurement practices were prudent and that their coal inventories were instead negatively impacted by unforeseeable circumstances outside their control.

[16] The Petitioners established below that running their coal plants outside of economic dispatch to achieve a specific capacity factor would be harmful to their customers. For example, in the first six months of 2023, it would have cost customers an <u>additional</u> $156 million if the Petitioners had run their coal plants at a 69% capacity factor, versus following economic dispatch in PJM. APCo/WPCo JCP-D at 21-24. Nevertheless, the Commission repeatedly references a 69% capacity factor "target" in its Order and vaguely threatens adverse action if not met. (*See* App. at 099-100, 124.). Whatever shock value these references and threats are supposed to have is fully mitigated by the Commission's own failure to clarify its 69% capacity factor "target" language, despite repeated requests, and by the Commission's own admission in the Order that, "The issue in this case is not whether the Companies achieved a 69 percent capacity factor, or any specific capacity factor[.]" (App. at 100.)

Apart from applying the wrong legal standard in the proceedings below, the Commission blatantly ignored critical evidence, including incontrovertible factual data, in its conclusory, result-oriented analysis. The evidence below established that Petitioners' coal procurement practices were reasonable and consistent with the principle of economic dispatch and prudent utility practice. The evidence further demonstrated that Petitioners encountered extreme market volatility and unavoidable coal supply constraints beginning in the latter half of 2021 that continued through 2022 and led to a significant ENEC under-recovery, just like their peers across the electric utility industry. These constraints included millions of tons of coal that was contracted for, but not delivered to Petitioners, in the relevant period. The only way for the Commission to arrive at its finding of imprudence and unprecedented $232 million disallowance was to ignore the Petitioners' evidence and hold them strictly liable for events entirely outside their control.

The Commission's Order speaks volumes to its selective, result-oriented analysis. Citations to the voluminous record are few and far between. Instead, where it chose to, the Commission dipped ever so slightly into the well-developed record, carefully excising small bits and pieces to try to support its erroneous conclusions, while steering clear of the countervailing evidence. In a case where the Petitioners experienced <u>3.8 million tons</u> of coal delivery shortfalls, the fact that the Order does not address those shortfalls in any meaningful way perfectly encapsulates the obvious truth that the Commission was not interested in hearing the Petitioners' evidence or confronting reality. The Commission's Order is not supported by the evidence of record and, therefore, it should be reversed. *See Atl. Greyhound Corp. v. Pub. Serv. Comm'n*, 132 W. Va. 650, 665-66, 54 S.E.2d 169, 178 (1949) ("[A]n order of the commission entered upon a finding which is contrary to the evidence or is not supported by evidence will be set aside.").

A. The Petitioners' longstanding coal procurement practices aligned with industry standards and were prudent under the circumstances.

The Commission's central finding on which its disallowance relies is that the Petitioners "had insufficient supplies of coal inventory during the period in question." (App. at 123.) Under basic principles of causation, the conclusion that must be reached to support any disallowance is that the "insufficient supplies of coal" were the fault of the Petitioners. Such a conclusion is not supported by the evidence of record, however, and the Order itself reveals that the Commission largely ignored the Petitioners' evidence to the contrary. To begin, the Commission in its Order failed to consider how the Petitioners' coal procurement practices aligned with industry standards and adapted to changing circumstances.

A successful fuel procurement strategy "requires a careful balance of several objectives and the use of available information to make the best possible decisions in an uncertain environment." APCo/WPCo JCP-D at 26. As part of their own strategy, the Petitioners' objectives are "to secure sufficient coal to meet projected generation needs but not over-procure; to anticipate expected coal burn based on power price and [customer] demand forecasting; and to achieve the most economical power supply for customers, both on a PJM market vs. self-generation basis and through strategic fuel purchase behaviors (e.g., reasonable diversity of supply sources and contract durations)." *Id*. Prudency in coal procurement requires that the Petitioners "make reasonable decisions to accomplish these objectives given the information known or reasonably knowable at the time[;]" it does not require 100% success based on hindsight. *Id*.

The Petitioners' overall coal procurement strategy and coal supply portfolio have not been static, but have adapted over time to changing circumstances. Cos. Exh. JCD-R (2022) at 2-3; APCo/WPCo KKC-R at 3. Importantly, every coal supply agreement is dependent on a meeting of the minds of the purchaser and the supplier; the Petitioners alone do not dictate the terms of their coal supply agreements. Cos. Exh. JCD-R (2022) at 3. The willingness of coal suppliers to

enter into short-term versus long-term agreements has shifted over time with changes in the market. *Id.* Before the surge in prices in late 2021, coal suppliers were generally unwilling to enter into long-term agreements on the theory that lower prices could not support long-term viability of their mines. *Id*. at 3-4; Cos. Exh. RM-R at 40. As the market price of coal increased, suppliers became willing to commit to longer terms, and in fact, many suppliers began requiring longer term deals in order to obtain financing for their operations. Cos. Exh. JCD-R (2022) at 4. As a result of their longstanding, successful coal procurement practices, the Petitioners had coal inventories above target at their coal plants until massive unexpected shortfalls and extreme market volatility impacted those inventories. APCo/WPCo JJS-R Attachment 3.

Notwithstanding extremely challenging market conditions during the periods under review, the Petitioners were able to secure contracts of different durations with multiple suppliers by the end of 2021 and through 2022. Cos. Exh. JCD-R (2022) at 4; APCo/WPCo KKC-R at 3. The Petitioners' coal procurement practices were examined in the proceedings below by outside consultants and found to be consistent with overall industry practices. *See, e.g.*, Cos. Exh. RM-R at 41. Though its Order suggests the Commission recognizes the value of having a "mix" of coal supply agreements (App. at 102), it fails to acknowledge the Petitioners' own mix of agreements of varying lengths and the evidence of record that their coal procurement practices were reasonable, prudent, and consistent with industry standards.

B. Notwithstanding their prudent coal procurement practices, the Petitioners were confronted with extremely challenging circumstances that were outside their control during the relevant time periods.

Any thoughtful, reasoned discussion of coal supplies should begin with the suppliers themselves and whether they actually produced and delivered the coal that was needed during the time in question. The evidence of record shows that coal production sharply declined in 2020 and

remained depressed through 2022, as compared to pre-pandemic levels, both in West Virginia and across the country. *See, e.g.*, APCo/WPCo JJS-R at 16-17. The idea that there were vast amounts of coal available for purchase and near-term delivery in 2021-2022 is simply not supported by the record.

Constrained coal supply is just one of the many incontrovertible facts that the Petitioners faced over the relevant time periods, yet the Commission failed to address in its Order. Such failure is particularly egregious given that the Commission was apt to recognize overall macro challenges to the industry and in particular those very coal supply constraints in both its own news releases and formal proceedings. In a column featured on its website, the Commission stated:

> It is all over the news: inflation and unexpected high bills. We are all experiencing significant financial uncertainty with rising prices, supply chain issues, COVID 19 and other challenging disruptions around the world. **Unexpected world events, such as the war in Ukraine, can cause supply interruptions of oil, gasoline, <u>coal</u>, natural gas, liquefied natural gas and propane around the globe**. We all see how this financial uncertainty affects our own household expenses, so **it's not surprising these events also affect our utility providers.**

Chairman Lane's Column, "Sign Up for Budget Payment Plans" (July 5, 2022), accessed at http://www.psc.state.wv.us/Communications/Chairman/2022/Column_20220705103523.pdf (emphasis added). Around the same time, the Commission also remarked in a gas utility matter that, "[t]his year, the United States has experienced market prices for natural gas significantly higher, more than double, from last year and at levels not seen since 2008. . . . **Previously, high natural gas prices would have resulted in more coal-fired electricity generation. However, coal-fired power plants have been limited in their ability to increase power generation due to historically low inventories, constraints in fuel delivery to coal plants, and continued coal capacity retirements**." *In re Mountaineer Gas Co.*, Case No. 22-0702-G-30C, 2022 WL 13288059 (W.Va. P.S.C. Sept. 9, 2022) (citing Energy Information Administration ("EIA") Short-

Term Energy Outlook released Sept. 7, 2022) (emphasis added).[17] Inexplicably, the Commission is willing to warn the public about these real industry barriers, but fails to accept those realities and abandons its own general industry knowledge in the January 9, 2024 Order.

In the proceedings below, the Petitioners submitted evidence to the Commission of coal supply constraints and all the same barriers the Commission had publicly recognized, including massive unexpected shortfalls from certain suppliers. Indeed, the Petitioners compiled multiple relevant data points in a detailed monthly timeline showing, *inter alia*, coal inventory levels, coal shortfalls, coal market pricing, and forward energy market pricing. APCo/WPCo JJS-R Attachment 3. From that timeline, the coal shortfalls can be briefly summarized as follows:

End Of	**Cumulative Shortfalls in Petitioners' Contracted-for Coal Deliveries (in Tons)**
Second Quarter 2021	500,000
Third Quarter 2021	1,200,000
Fourth Quarter 2021	2,100,000
First Quarter 2022	2,700,000
Second Quarter 2022	3,000,000
Third Quarter 2022	3,300,000
Fourth Quarter 2022	3,800,000

Id. Yet, after multiple hearings and several years of record evidence, the Commission approaches this anomalous time in the industry from a 1,000 foot level without acknowledging the myriad challenges facing the entire industry. The failure of the Commission's Order to recognize Petitioners' evidence as to coal supply constraints, let alone properly weigh those facts, is

[17] Furthermore, in April 2022, the President of the West Virginia Coal Association announced that "available domestic coal supplies are constrained for a variety of reasons and production has not responded to increased demand," *see* Case No. 22-0352-E-P, stating also that "[t]he supply side has been suppressed so dramatically that our [2022] production from operation in this state is sold out," *see* "WV fossil fuel leaders acknowledge limits in state's ability to support Europe through energy exports," Apr. 27, 2022, West Virginia Gazette Mail (quoted in 2023 Pet. at 14).

reversible error. *See* Syl. Pt. 2, in part, *Monongahela Power Co.*, 166 W. Va. 423, 276 S.E.2d 179 ("[E]ach of the order's essential elements [must be] supported by substantial evidence."); *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996) ("[T]he agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.").

The Commission further erred by giving no weight to the Petitioners' tremendous efforts to navigate such challenging circumstances for the benefit of their customers. When shortfalls swiftly increased in Third Quarter 2021, the Petitioners did not sit idly by, as the Commission wrongly concluded in its Order. (App. at 124.) As discussed above, the Petitioners' fuel procurement personnel actively engaged and continued negotiating with the underperforming suppliers to resolve the shortfalls, as it had been successful before in doing. (Stmt. of Case, Sec. I.D. *supra*.) The Petitioners also sought new supplies of coal to replace that which was already under contract but not being delivered. And they did not stop with the September 2021 RFP; they continued to search for whatever coal was available, even meeting with the West Virginia Coal Association for assistance. APCo/WPCo KKC-D at 20. These actions were taken after coal suppliers did not deliver on their contractual obligations, as part of the Petitioners' ongoing efforts to purchase coal economically to serve customers. The fact that the Commission was able to conclude so boldly that the Petitioners were imprudent in their coal procurement (to the tune of $232 million, no less), with virtually no discussion of the severe coal supply constraints outside their control, is a complete abandonment of the requirement of the prudence standard to understand the circumstances facing the industry at the time. In determining prudence, the Commission was bound to consider and weigh such evidence; it erred by failing to do so in its Order. *See United*

Fuel Gas Co. v. Pub. Serv. Comm'n, 73 W. Va. 571, 80 S.E. 931, 940 (1914) (Poffenbarger, J. (concurring)) ("[The Commission] cannot wholly disregard evidence adduced before it [at] hearing[.] . . . Action in disregard of the evidence is, therefore, action outside of and beyond the statutory authority of the Commission and void."); *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 689, 43 S. Ct. 675, 677-78 (1923) ("The record clearly shows that the commission, in arriving at its final figure, did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous.").

1. Coal supply constraints were widespread across the electric utility industry and caused many electric utilities to experience significant fuel under-recovery balances.

The correct prudence standard involves an element of "reasonableness"[18] that, by its nature, must not be examined in a vacuum, but requires an examination of the circumstances existing at the time of a utility's decisions and actions under review. Accordingly, in their case in chief, the Petitioners buttressed their evidence of challenging circumstances with the publicly available information filed by similarly situated electric utilities having coal-fired generation. 2023 Pet. at 14-18. Overwhelmingly, those utilities reported the same circumstances and effects as the Petitioners, including significant fuel cost under-recovery balances, and their respective commissions properly recognized them.

[18] "There is a range of reasonable and prudent actions and decisions, and these cannot be labeled as imprudent if the decision falls within the range of what a reasonable person would have done in the circumstances." Cos. Exh. RM-R at 10.

In Virginia, the Virginia Electric and Power Company (a/k/a Dominion Energy Virginia) reported a $1.020 billion fuel deferral balance as of June 30, 2022, noting in its request for cost recovery that "the dramatic increases in fuel prices as a result of the pandemic, inflation generally, and the war in Ukraine have created a significant fuel cost under-recovery" and that its "March 2021 commodity price projections" had not accounted for "significant increases in the price of purchased power, coal, and natural gas which have only been exacerbated by the war in Ukraine." VSCC Case No. PUR-2022-00064, May 5, 2022 Application at 2 (quoted in 2023 Pet. at 15).[19, 20]

In an April 28, 2022 order granting increased fuel rates to Dominion Energy South Carolina ("DESC") to mitigate both historical and projected fuel cost under-recoveries, the Public Service Commission of South Carolina ("PSCSC") properly recognized that "coal prices will remain above the level seen in recent years until demand decreases or supply increases above demand[,]" that "[c]urrent [coal] production is not adequate to meet near term demand[,]" and that "there had been transportation delays in the review period due to an increased need for transportation services due to the economic emergence from the COVID-19 economic slowdown." PSCSC Docket No. 2022-2-E, 2022 WL 1521971 at *7 (citing DESC testimony). Upon returning to the PSCSC just a few months later for a "mid-period adjustment" in fuel rates, "[g]iven the unforeseen unpredictable

[19] Within a few months of Dominion's filing, the VSCC entered an order on September 16, 2022 approving the utility's plan to recover both deferred and projected fuel expenses, resulting in an annual fuel revenue increase of approximately $1.105 billion between July 1, 2022 and June 30, 2023 (an increase of $14.93 or 12.2% for the average residential customer). *See* Case No. PUR-2022-00064.

[20] As indicated early in this brief, APCo provides retail electric service in Virginia as well. Like Dominion Energy Virginia, APCo seeks to recover its fuel costs in Virginia cases similar to the ENEC. While a VSCC order has yet to be issued, during its audit of a number of those cases, the VSCC Staff reviewed APCo's fuel procurement and dispatch of generation units, during the same period covered by the Order on appeal here, and found that APCo's coal procurement activities were reasonable and prudent. *See* VSCC Case No. PUR-2023-00156, Testimony of Oliver Collier and Patrick Carr, https://scc.virginia.gov/docketsearch#caseDocs/144442.

market changes causing a substantial rise in fuel costs," a DESC witness aptly described the circumstances that were negatively impacting coal supply and driving up costs:

> [i]n Docket 2022-2-E, the Company updated the Commission on **certain market conditions outside of Company control that were significantly impacting coal prices.** The Company testified regarding the increasingly volatile coal market and the upward pressures facing the market moving forward. **A variety of factors were contributing to the changing market. Those factors include:**
>
> > 1. long-term impacts due to under-capitalized coal producing and delivery infrastructure, increased mining expenses, coal supplier bankruptcies, and a severe lack of capital resources, which led to coal mine closures;
> > 2. geopolitical events are driving increased worldwide demand for coal and US coal exports, this will continue to impact pricing and domestic availability for the foreseeable future;
> > 3. rising rates of inflation;
> > 4. coal production and transportation-related fuel costs;
> > 5. lack of qualified miners and support staff;
> > 6. transportation issues and delays resulting from increased freight demand and a lack of qualified rail crews;
> > 7. continuing Covid-related impacts on production, transportation, and other supply-side factors; and
> > 8. inclement weather delays and impacts on coal production and delivery.
>
> These factors, among other market conditions, will continue to keep coal production costs elevated during 2022 and beyond. . . . **Current production and transportation capacity is not adequate to meet near-term domestic and export demand**.

PSCSC Docket No. 2022-259-E, Testimony of DESC witness Michael Shinn at 4-5 (emphasis added) (quoted, in part, in 2023 Pet. at 16).[21]

In North Carolina, Duke Energy ("DEC") reported a $245 million fuel under-recovery in a filing made with the North Carolina Utilities Commission ("NCUC") on March 1, 2022 (NCUC

[21] On November 28, 2022, the parties to that case filed a joint stipulation wherein they agreed to increased fuel rates for DESC that would result in a net increase of approximately $7.74 or 5.8% for the average residential customer. *See* Docket No. 2022-259-E, https://dms.psc.sc.gov/Web/Dockets/Detail/118294.

Docket No. E-7 Sub 1263). Pointing to "[r]apidly escalating coal commodity prices in the latter half of 2021," a DEC witness explained that:

> In addition, the coal supply chain experienced increasing challenges throughout 2021 as historically low utility stockpiles combined with rapidly increasing demand for coal, both domestically and internationally, made procuring additional coal supply increasingly challenging. **Producers were unable to respond to this rapid rise in demand due to capacity constraints resulting from labor and resource shortages**. These factors combined to drive both domestic and export coal prices in 2021 to record levels.

NCUC Docket No. E-7 Sub 1263, Testimony of DEC witness John Verderame at 6-7 (emphasis added) (quoted in 2023 Pet. at 17).[22] And in Indiana, Duke Energy made a filing with the Indiana Utility Regulatory Commission ("IURC") on April 28, 2022 requesting increased fuel costs with estimated bill impacts of a 16.0% increase for residential, 20.2% increase for commercial, and 25.7% increase for industrial, which one company witness testified was among the highest fuel costs seen since 2008. IURC Cause No. 38707-FAC132, Application at 6 (cited in 2023 Pet. at 17-18); June 28, 2022 Order, 2022 WL 2400639 at *11.

These experiences of other electric utilities confirm that the circumstances confronting the Petitioners in 2021-2022 were widespread, extremely challenging, and outside their control. Fuel cost under-recoveries in that time period were an inescapable reality. In addition to the other commissions which properly recognized the forces outside the utilities' control that wreaked havoc on fuel supply and costs, PJM recognized, as well, in its "Temporary Manual Changes to Address Global Fuel Supply Issues," dated October 2021, that action was necessary to "give PJM and generator owners more flexibility and additional tools to manage their inventories, so they can be

[22] On August 16, 2022, the NCUC entered an order noting a total requested increase of $457 million "associated with fuel and fuel-related costs" and granting DEC increased rates to be effective through August 31, 2023. *See* Docket No. E-7 Sub 1263, https://starw1.ncuc.gov/NCUC/PSC/DocketDetails.aspx?DocketId=861247ff-dbc7-4596-9b67-821ea42b7d2d.

available when they are needed for reliability[,]" in light of "coal supply chain issues and inventory levels heading into winter[.]" A proper application of the prudence standard required the Commission to examine the circumstances facing the Petitioners in the periods under review. *See, e.g., In re Hope Gas*, 2013 WL 2370525. By ignoring the evidence of the prevailing circumstances and the applicable legal standard, the Commission placed its Order on untenable ground. *See* Syl. Pt. 3, *Atl. Greyhound Corp.*, 132 W. Va. 650, 54 S.E.2d 169 ("A final order of the Public Service Commission, based upon findings not supported by evidence, or based upon a mistake of law, will be reversed and set aside by this Court upon review.").

C. Fuel supply constraints and market volatility were unforeseeable and unavoidable.

For the most part in its Order, the Commission merely settles for vague rhetoric, repeated over and over, that the Petitioners had insufficient amounts of coal and were entirely to blame for it, contrary to the record. Where it does attempt to support its findings, the Commission posits that in Spring 2021, and certainly by May 2021, the future volatility in the fuel and energy markets was not only obvious but that future coal shortages could somehow have been avoided if the Petitioners had acted at that time to buy more coal. (App. at 101-02, 106.) This is yet another instance of the Commission basing its conclusions on hindsight rather than the evidence of record viewed under the correct prudence standard.

As shown above, coal supply constraints and market volatility were not anticipated by the electric utility industry, including the Petitioners' peer utilities, a fact recognized by public utility commissions in other states and by PJM. As if it was not enough to ignore the record in this regard, the Commission actually distorts it by claiming that the Petitioners had "diminishing stockpiles of coal in inventory" "by May 2021" and that, "[b]y July 2021, the coal stockpiles were critically short[.]" (App. at 99, 102.) To the contrary, the record shows that the Petitioners' coal inventories

remained above target at all plants through June 2021 and were above target or near target in July 2021. APCo/WPCo JJS-R Attachment 3.[23] For ease of reference, the Petitioners summarize here their actual coal inventories at the time:

Days of Full Load Burn			
Month (2021)	**Amos**	**Mountaineer**	**Mitchell**
January	58	125	48
February	44	120	42
March	50	114	47
April	58	117	52
May	54	111	52
June	43	106	45
July	29	90	28

The Commission also ignores that, in May 2021, the Petitioners issued an RFP and purchased coal for the years 2022-2023. At that time, more coal purchases for 2021 were not needed pursuant to existing contracts, as the Petitioners were expecting delivery of an additional 3.8 million tons of coal by year end 2022 (ultimately not delivered in that time period due to the above-described unforeseen shortfalls). APCo/WPCo JJS-R Attachment 3. This is a critical set of facts ignored by the Commission that both fully explains and justifies why the Petitioners did not purchase additional coal for immediate delivery in 2021.[24] This also illustrates why a prudence review must take into account the facts facing the decision maker at the time with all the circumstances being considered.

[23] "The [Petitioners] seek to maintain an average of 30-days of coal supply at full load burn while permitting flexibility in inventory levels to be responsive to known and anticipated changes in market conditions." Cos. Exh. RM-R at 35. "Full load burn" means running a coal plant at 100% load over a given time period. Mar. 23, 2022 Hrg. Tr. at 18 (Scalzo).

[24] Indeed, Petitioners' outside industry expert testified that "the level of [coal] inventory [after July 2021] would have looked much more aligned with the industry pattern if the [shortfall] tons not delivered by supplier had been delivered." Cos. Exh. RM-R at 38.

With ample coal on the ground and under contract at that time, the Petitioners also had to consider their coal storage pile limitations, supply contract obligations, and what an overabundance of coal would cost customers if not used.[25] Put simply, even though the Petitioners had sufficient coal on the ground and under contract to run the plants at capacity factors near or greater than the PJM 10-year average capacity factor, the Commission claims, based entirely on hindsight, that the Petitioners should have purchased even more coal in Spring 2021.[26] If affirmed, the Commission's Order would set a dangerous precedent that threatens all West Virginia electric utilities and their customers' bills under the majority of circumstances; it would require the extremely expensive hedge of hoarding massive amounts of coal, whether expected to be used or not, and in that way discourages the cost conscious buying practices that protect customer rates.

In the proceedings below, the Petitioners provided the testimony (both pre-filed and at hearing) of two outside consultants who thoroughly analyzed the information available at the times the Petitioners made decisions or took actions with respect to coal procurement. The Petitioners' witness Moreno testified that, "[w]ithout the use of hindsight, there were no obvious signs in domestic or international markets that there was systemic pressure for a long-term rise in coal prices that would merit a change in the Companies' procurement and inventory practices." Cos. Exh. RM-R at 22; Hrg. Tr. Oct. 5, 2022 at 162-63 (Moreno). Mr. Moreno further explained that

> the Forward prices for near-term delivery [of coal] were not expected to persist because the market was backwardated. Utilities typically analyze the price of coal

[25] Storage pile limitations exist for multiple reasons, including safety and environmental, and the Petitioners' coal contract obligations require them to have sufficient space to accept and store deliveries of coal. APCo/WPCo JJS-R at 19; KKC-R at 8.

[26] As discussed below, the Commission ultimately concluded that the Petitioners needed approximately 6.4 million additional tons of coal through the review periods. Under the Commission's "crystal ball" logic, for the Petitioners to be prudent, they needed to predict the future and secure delivery of those 6.4 million tons of coal in Spring 2021 before the shortfalls and market volatility occurred. Assuming *arguendo* that such a massive amount of coal was even available then, if the Petitioners had guessed wrong and that coal was not needed for self-generation, the consequences would have been disastrous in light of the Petitioners' coal storage limitations and their own obligations under coal supply agreements.

> with longer delivery times when analyzing opportunities for new RFPs or changes in their inventory practices. The behavior of prices so close to delivery will not influence longer-term procurement decisions. . . . [A] market participant would have looked at the rise in prices for very near-term delivery and would have concluded this was expected to be a short-term phenomenon.

Cos. Exh. RM-R at 19-20. The Petitioners' witness Plewes testified at hearing:

> [I]n my review, I didn't see any – any forecast that came close to estimating the actual change in the market. And I did look. So to say it was clear that something was going to happen that I don't think anybody was predicting, again, you may find someone in their basement that put out a newsletter that said, this is going to happen, I still haven't seen that. You know, it definitely was not clear. And that – using reliable sources, but reasonably known sources and information that was available at the time, absolutely not clear at all.

Tr. Sept. 6, 2023 at 61-62 (Plewes).[27]

The Commission has pointed to no better resources of available market information in its Order, and its discussion of increases in market energy prices fails to acknowledge that prices were depressed in 2020 due to COVID (making that year a poor baseline to use in examining subsequent increases), that in July 2021 prices matched historical levels,[28] and that no significant change in forward energy market pricing was seen until October 2021. APCo/WPCo JJS-R Attachment 3. What the record actually shows is that, when natural gas prices increased swiftly and dramatically in late Third Quarter 2021, the demand for coal generation also increased, both domestically and internationally; but it was never clear in advance this would happen or would be sustained for a meaningful time.

D. The Commission's reasoning is flawed and would cause serious, long-term consequences if affirmed.

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[27] In fact, the EIA's publicly available Short Term Energy Outlook ("STEO"), available in June 2021, showed that no coal market constraints were expected. U.S. EIA STEO, Table 2. Forecast data from June 2021 issue dated June 8, 2021, and Actual data from July 2023 issue dated July 11, 2023 (included in APCo/WPCo JCP-D at 32).

[28] "[P]rices in Summer 2021 were not anomalous compared to years prior to 2020. For example, the average [market] energy price at the AEP Hub in July 2021 was $36.60/MWh, while the July average for the 10 years prior to the pandemic (2010-2019) was $36.49/MWh." APCo/WPCo JCP-R at 15.

Under the Commission's reasoning, the only way for the Petitioners to be prudent during the 2021-2022 time period was to have enough coal to run their plants at capacity factors significantly higher than the industry average, notwithstanding coal supply constraints and supplier under-performance. This reasoning is seriously flawed in several respects. First, and perhaps most obvious, if increased coal generation was the key to prudency, there should have been increased capacity factors for coal generation within PJM and across the United States during that time. But the incontrovertible facts say otherwise. Looking first at PJM, the average capacity factors for coal-fired generation were: 40.6% in 2019; 25.6% in 2020; 42% in 2021; and 41.8% in 2022. APCo/WPCo JJS-R at 17-18. That is, coal generation in PJM actually decreased from 2021 to 2022 and was not greater than the previous 10-year average.[29] The EIA reported that coal-fired generation across the United States in 2021 and 2022 did not exceed historical levels (and the shoulder months were the lowest annually, as expected). Cos. Cross Exh. 3 (2023). This is incontrovertible evidence that the very coal the Petitioners are being punished for not having, in reality never existed. Pure economics dictate that if there was a golden opportunity that the Petitioners missed in 2021, there would have been higher capacity factors across PJM coal plants in 2022 based on the "phantom tons" of coal that would have been burned then. APCo/WPCo JJS-R at 18. Similarly, if massive amounts of economical coal generation were available to displace other types of generation like natural gas, market energy prices would have been lower. But the Commission's own Order tells us that did not happen.

Apart from being incompatible with the evidentiary record and with reality, the Commission's reasoning carries with it serious, long-term consequences for all electric utilities

[29] Also, for comparison, the Petitioners have determined that the Commission's extra-record disallowance calculation assumes that the Petitioners' coal units would operate at an approximate 58% capacity factor on average in the year 2022, that is, significantly above what actually occurred across PJM.

operating in West Virginia.[30] To explain, the Commission has effectively shifted all risk of supplier non-performance to the utility by giving absolutely no weight to the Petitioners' evidence of shortfalls and other coal supply constraints. It was not enough for the Commission that the Petitioners had coal under contract and that they reacted when suppliers did not meet their contractual obligations; the Petitioners had to "assure" or "ensure" in the first instance that coal was mined and delivered. (App. at 103, 126.) The Commission tries in vain to support this shifting of risk through a tortured interpretation of W. Va. Code § 24-2-1q, which requires coal-fired power plants in West Virginia to have "a minimum 30-day aggregate coal supply under contract . . . ." The statute, however, is plain and unambiguous – a utility must contract for a 30-day supply – and at all times the Petitioners were in compliance with the statute. If the Commission desires what it tries to graft onto the statute – that suppliers must meet their contractual obligations to supply coal – then it is for the Legislature to make it so; the Commission does not have jurisdiction over the suppliers. The Commission's attempt to legislate through its Order and impermissibly shift all risk of supplier performance onto the Petitioners and other electric utilities in West Virginia should be swiftly rejected.

Additionally, the Commission's Order sets an ominous precedent for all electric utilities, as their efforts to mitigate challenging circumstances outside their control will receive no weight in prudency determinations. Indeed, the Order begs the question, if electric utilities are never

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[30] To survive an equal protection challenge, the Commission's new standard would need applied to all electric utilities under the Commission's purview, if not all types of utilities. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'") (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)) (internal citations omitted).

going to get credit for reacting to unpredictable, ever-changing circumstances, then what incentive is there to continually adapt for their customers' benefit? By the Commission's reasoning, particularly its vague "continuum of actions" language, any decision or action at any point in the past, no matter when it occurred or whether it is particularly identified or not, can be leveraged to support a disallowance. This is not an appropriate regulatory framework.

Through all the rhetoric and repetition in the Order, it is not difficult to see that the Commission performed a result-oriented review of the record, considering only the parts that supported its predetermined notions of imprudence. There was no proper weighing of the evidence, and the Commission violated the required legal standard for prudence by relying on hindsight and by ignoring economics, war, pandemics, broken contracts, basic supply and demand principles, and decades of coal purchasing practices to serve customers at a least reasonable cost. The Commission's findings and conclusions as to imprudence are not supported by the record, indeed they are contrary to the very evidence it ignored, and therefore its Order should be reversed and set aside. *See, e.g., Atl. Greyhound Corp.*, 132 W. Va. at 665-66, 54 S.E.2d at 178.

IV. The Commission violated the Petitioners' fundamental due process rights in calculating a disallowance based on information outside the record and faulty assumptions.

Compounding its errors in applying the wrong legal standard and ignoring critical evidence, the Commission violated bedrock constitutional principles by relying on information outside the evidentiary record and its own faulty assumptions and calculations, performed after the close of the evidence, to arrive at its untenable $232 million disallowance. Under the West Virginia and United States Constitutions and controlling precedent, this is reversible error.

A. Due Process Legal Standard to Which the Petitioners Were Entitled in the Proceedings Below

The Commission is an administrative body of statutory origin whose duties demand the exercise of quasi-judicial functions and whose ENEC proceedings are adjudicatory in nature. *Atl. Greyhound Corp.*, 132 W. Va. at 667-68, 54 S.E.2d at 179 (quoting *Village of Bridgeport v. Pub. Serv. Comm'n*, 125 W. Va. 342, 24 S.E.2d 285, 287 (1943)); *Appalachian Power Co. v. Pub. Serv. Comm'n*, 162 W. Va. 839, 848-51, 253 S.E.2d 377, 384-85 (1979) (citing, *inter alia*, *Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906 (1936) ("*Morgan I*")). In such proceedings, the Commission is bound "to perform its duties according to statutory guidelines from the Legislature and the State and United States Constitution." *In re Appalachian Power Co.*, Case No. 10-0699-E-42T, 2011 WL 2150661 at 60 (W.Va. P.S.C. Mar. 30, 2011).

The "[f]ederal and state constitutions alike provide that no person may be deprived of life, liberty, or property without 'due process of law.'" *Virginia Elec. and Power Co. v. Pub. Serv. Comm'n*, 162 W. Va. 202, 208-09, 248 S.E.2d 322, 326-27 n.3 (1978). "Due process is succinctly stated in article III, § 10 of the *West Virginia Constitution*: 'No person shall be deprived of life, liberty, or property, without due process of law, and judgment of his peers.' This Court has recognized that '[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals[.]'" *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 511, 482 S.E.2d 124, 128 (1997) (quoting Syl. Pt. 2, *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960)) (internal footnote omitted). More particularly, this Court has found that article III, § 10 of the *West Virginia Constitution* contains "an implied mandate of procedural due process" with regard to Commission proceedings. *Appalachian Power Co.*, 162 W. Va. at 851, 253 S.E.2d at 385.

The Petitioners have a property right in the timely, adequate recovery of their reasonably and prudently incurred costs via the Commission's ENEC proceedings. *See Kisner v. Pub. Serv.*

Comm'n, 163 W. Va. 565, 569-70, 258 S.E.2d 586, 588-89 (1979) ("For the purpose of due process analysis a 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings."). In seeking recovery of approximately $553 million in reasonably and prudently incurred costs through the ENEC proceedings below, the Petitioners were entitled to due process of law. *See Virginia Elec. and Power Co.*, 162 W. Va. at 208, 248 S.E.2d at 326 ("[T]here is no question that a significant reduction in a utility's tariff is a taking of property which must be accompanied by some fair procedure to preclude an unlawful taking.").

The due process protections that government regulators must afford to the litigants before them in administrative, quasi-judicial proceedings have long been entrenched in the precedent of both this Court and the Supreme Court of the United States. *See, e.g., Appalachian Power Co.*, 162 W. Va. 839, 253 S.E.2d 377 (relying on *Morgan I*, 298 U.S. 468, 56 S. Ct. 906). Nearly a century ago, in *Morgan v. United States*, the Supreme Court examined the "very foundation of the action of administrative agencies [e]ntrusted by the [Legislature] with broad control over activities which in their detail cannot be dealt with directly by the Legislature." 304 U.S. 1, 14, 58 S. Ct. 773, 775 (1938) ("*Morgan II*"). Examining the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies, the Supreme Court noted that the "field of administrative regulation" is made possible "by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that **in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play.**" *Morgan II,* 304 U.S. at 13-15, 58 S. Ct. at 777-75 (emphasis added); *accord State ex rel. Peck v. Goshorn*, 162 W. Va.

420, 422, 249 S.E.2d 765, 766 (1978) ("Due process of law is synonymous with fundamental fairness").

Under *Morgan II*, the Petitioners here were entitled to more than just a full hearing in the ENEC proceedings below; they were entitled to a "fair and open hearing" with "not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. . . . **Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command**." *Id.* at 18-19, 58 S. Ct. at 776 (emphasis added).

Faced with a fact pattern strikingly similar to the instant case, the Supreme Court in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* reversed an order of the Public Utilities Commission of Ohio ("PUCO") which rested upon evidence outside the record. 301 U.S. 292, 57 S. Ct. 724 (1937). Under investigation in that case were the "rates chargeable by the appellant . . . for intrastate telephone service to subscribers and patrons in Ohio" and as part of the record was evidence as to "the value of the [appellant's] property on the basis of historical cost and cost of reproduction, and to the deductions chargeable to gross revenues for depreciation reserve and operating expenses generally." *Ohio Bell Tel. Co.*, 301 U.S. at 293, 295-96, 57 S. Ct. at 726-27. In addition to a valuation of the appellant's property as of a date certain in the year 1925, the PUCO "undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifying the value which it had found as of the date certain by the percentage of decline or rise applicable to the years thereafter." *Id.* at 296, 57 S. Ct. at 727. According to the appellant, "the trend percentage accepted in the findings as marking a decline in values did not come from any official sources which the Commission had

the right to notice judicially; that they had not been introduced in evidence; that the company had not been given an opportunity to explain or rebut them; and that by their use the Commission had denied a fair hearing in contravention of the requirements of the Fourteenth Amendment." *Id.* at 298, 57 S. Ct. at 728.

Agreeing with the appellant and reversing the PUCO's order, the Supreme Court held that **"[t]he fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts <u>not spread upon the record</u>**." *Id.* at 300, 57 S. Ct. at 728 (emphasis added). The Supreme Court explained: "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. . . . Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. **This is not the fair hearing essential to due process. It is condemnation without trial**." *Id.* at 300, 57 S. Ct. at 728-29 (emphasis added).

In closing its discussion of the PUCO's violations of due process, the Court explained that the decisions of an administrative tribunal are given deference only when they "ha[ve] been reached with due submission to constitutional restraints." *Id.* at 304, 57 S. Ct. at 730. With respect to such tribunals, "[a]ll the more insistent is the need, when power has been bestowed [upon them] so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Id.* at 304-05, 57 S. Ct. at 730-31 (internal citations omitted). As in the instant case, the PUCO had violated due process by relying upon

"statistics which it collected for itself[] [and] [t]here was no 'suitable opportunity through evidence and argument to challenge the result.'" *Id.* at 306, 57 S. Ct. at 731 (quoting *W. Ohio Gas Co. v. Pub. Util. Comm'n,* 294 U.S. 63, 70, 55 S. Ct. 316, 320 (1935)).

This Court has followed the guidance of *Morgan I* and *Ohio Bell Telephone Co.* in deciding appeals of Commission orders that were arrived at in violation of due process. In *Appalachian Power Co.*, this Court recognized the "fundamental procedural requirements" of administrative proceedings set forth in *Morgan I*, noting that the Supreme Court "found that the duty imposed by [the Legislature] carried with it certain fundamental procedural requirements; i.e., a full hearing, findings of fact, adequate evidence to support those findings, and **a decision based only on material evidence on the record**." 162 W. Va. at 849, 253 S.E.2d at 384 (emphasis added).

In *Kanawha Valley Transportation Co. v. Public Service Commission*, the appellant challenged an order of the Commission revoking its certificates of convenience and necessity to operate as a common carrier, arguing, *inter alia*, that "the Commission's order is based, in part, on extra-record matters which were not introduced at the [appellant's] revocation hearing and the appellant was thereby denied the right of cross-examination and the right to answer or dispute those matters in violation of its constitutional right to due process of law[.]" 159 W. Va. 88, 93, 219 S.E.2d 332, 337 (1975). Though it ultimately affirmed the order on other grounds, this Court agreed with appellant that the Commission's reliance on certain information, "which occurred after the hearing and which was not developed on the record, was improper and should not have been considered in any manner by the Commission." *Kanawha Valley Transp. Co.*, 159 W. Va. at 96-97, 219 S.E.2d at 338-39. This Court explained that, "with few exceptions, **evidence acted on by the Commission . . . must be contained in the record and commissioners cannot act upon their own information. The parties must be fully informed of the evidence submitted or to**

be considered and must be given an opportunity to cross-examine witnesses, to inspect documents and offer evidence in rebuttal." *Id.* at 97, 219 S.E.2d at 339 (emphasis added) (citing, *inter alia*, *Ohio Bell Tel. Co.*, 301 U.S. 292, 57 S. Ct. 724.) "In addition, if the Commission intended to rely on its own records . . . , it should have introduced these official records at the hearing in order to permit the appellant to object, cross-examine, rebut or argue against their implications." *Id.* at 98, 219 S.E.2d at 339. Simply stated, "**[t]he Commission places its decisions and orders in a precarious position when it bases them on extra-record adjudicative facts without advising a party that it intends to do so and without affording the party the opportunity for cross-examination and rebuttal**." *Id.* (citing 2 Davis, *Administrative Law Treatise*, ss 15.01-15.15 (1958)).

B. The Commission departed from the evidentiary record and relied on evidence not developed consistent with due process standards.

The starting point for the Commission's departure from the evidentiary record was a <u>post-hearing</u> exhibit filed by the Petitioners at the Commission's request (referred to in the Order as "Post-Hearing Exhibit 4"). The Commission's request was a thorny one, requiring a lengthy explanation from the Petitioners in the exhibit itself as to why the requested information should not be relied upon for any purpose. The Petitioners explained, in part, that "the [requested] data has limited evidentiary value in its native form, depends on multiple speculative assumptions, and was not admitted into the evidentiary record at hearing. Such assumptions would include: coal was available and/or delivered per contract, and any additional [coal generation] dispatch would not have lowered PJM energy prices."

The Commission, however, did not heed the Petitioners' warnings. Instead, the Commission proceeded to not only rely upon the post-hearing exhibit, but to modify it with extra-record information using its own "evidence" collected outside the record, as well as faulty

assumptions, with no opportunity for the Petitioners to question, challenge, or rebut the same. (App. at 113-119.) The Commission balked at the very information it had requested and, with little explanation, supplanted it with other, undisclosed information from "monthly coal reports" that are not part of the record of these cases. (*Id.* at 114.) As part of its modifications to Post-Hearing Exhibit 4, the Commission incorrectly assumed a non-factual, impossibly low-cost basis of fuel (that the record shows did not exist) and related costs. (*Id*. at 114-15, 117-19.) All of this was done after the close of the evidence with no opportunity for the Petitioners to question what the Commission had done or to present evidence in rebuttal, in direct contravention of due process. It was only through its flawed, untested modifications that the Commission arrived at its $232 million disallowance.

Had the Commission properly afforded the Petitioners an opportunity at hearing to question and challenge its backroom calculations, the record would have revealed those calculations to be fraught with significant errors. To briefly explain, the monthly coal reports referenced by the Commission are an accounting report showing in a particular month the average delivered cost of coal that was previously contracted for; the reports do not accurately reflect the current market price or availability of coal in that month. From there, the Commission improperly used the monthly coal reports to convert the aforesaid cost of coal to an unrealistic price per megawatt-hour of electricity. Though the Commission's precise method and inputs to achieve that conversion are a mystery (because they were not disclosed at hearing), the Petitioners were able to uncover that it involved seriously flawed assumptions that have no basis in the evidentiary record. For purposes of illustration, the example below shows the Commission's faulty cost assumptions at APCo's Mountaineer Plant for the month of August 2022, when both PJM market

energy prices and fuel commodity prices were among their highest during the two-year period covered by the Order.

	PSC Created Values		APCo's Actual Cost-Based Offer under PJM Rules[31]	
Fuel Expense	**$**	**27.77**	**$**	**73.44**
Fuel Handling	**$**	**1.70**	**$**	**2.77**
Scrubber Chemicals & Emission Allowances	**$**	**4.00**	**$**	**17.37**
PJM Manual 15, Sec. 2.9 Amount	**$**	**-**	**$**	**9.36**
	$	**33.47**	**$**	**102.94**
Difference in PSC Created vs. Actual Cost			**$**	**69.47**
Additional Megawatt hours in PSC Analysis				**265,610**
PSC Theoretical Margin Inflated by			**$**	**18,451,927**

As seen in this example, which covers only one month of the two-year period for a single one of the Petitioners' six coal units, the Commission's untested calculation missed the mark by a staggering $18.4 million. The values used in its off-the-record calculations are not supported by any evidence offered by any party at hearing, let alone any evidence that was admitted into the record. Furthermore, the Commission's $232 million disallowance calculation suffers from additional serious infirmities:

- The Commission's variable costs assume, without any proof, that the Petitioners could have acquired massive additional amounts of coal at historical prices equal to the previously contracted coal delivered that month (despite all the publicly available information and record evidence of a severely constrained, high priced coal market);[32]

[31] As established in the proceedings below, the Petitioners' cost-based offers are "strictly defined by the rules established in PJM Manual 15 and subject to a Fuel Cost Policy filed with PJM's Independent Market Monitor." APCo/WPCo JMS-R at 10.

[32] To accommodate the level of additional coal generation contemplated by the Commission's disallowance calculation, an additional 6.4 million tons of coal would have to be produced by suppliers and actually

- The Commission did not account for the fact that all of its theoretical additional coal generation would have materially depressed PJM energy prices, thereby overstating its hypothetical margins;[33]
- The Commission did not account for actual plant operating characteristics, such as ramp rate and start time, and additional startup costs. In simple terms, the Commission wrongly assumed that the Petitioners' coal units can be turned on and off like a light switch from hour to hour; and
- The Commission failed to acknowledge that the Petitioners' PJM offers and coal conservation efforts allowed them to move coal generation to higher priced periods when reliability was at a premium, to the benefit of customers.[34]

While there is no evidence in the record supporting the Commission's calculations and assumptions, there is substantial evidence regarding the infirmities of those calculations and assumptions, which, like the bulk of the Petitioners' evidence, was ignored by the Commission in its Order.

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delivered to the Petitioners. The Commission has not supported, and based on the evidence discussed herein that it ignored, cannot support that assumption.

[33] One of the reasons PJM energy prices were so high during this period was because the 52 gigawatts of coal generation in PJM did not have adequate amounts of coal due to the production shortages in the coal market. Otherwise, those 52 gigawatts would have been bid in and dispatched at a significantly higher rate thereby reducing market prices by displacing the highest cost natural gas generation that was setting PJM energy prices.

[34] According to Petitioners' witness Plewes, their actions in this regard were prudent for multiple reasons: (i) "During the coal constrained period, every ton of coal burned was a ton of coal that could not be burned at a later time, and thus all generation carried the opportunity cost of future generation until coal constraints could be overcome."; (ii) "[S]tarting in late 2021, PJM placed significant restrictions on market participation of resources that had coal inventories less than 10 days at full load."; (iii) "If a plant was unable to run due to lack of fuel, the capacity value of the plants could decrease and the Companies might need to purchase more capacity from PJM's capacity market or from other capacity resources. This could prove very costly."; and (iv) "The[r]e are periods of system scarcity during which capacity resources are expected to perform, and they are either greatly rewarded for performance above expectations or heavily penalized for performance below expectations[,]" like Winter Storm Elliott. APCo/WPCo JCP-D at 60-61.

In calculating its unprecedented $232 million disallowance based on materials "not spread upon the record," the Commission plainly violated the fundamental principles of due process and the concomitant "requirements of fair play" long recognized by this Court and the Supreme Court. Indeed, the lengths to which the Commission went outside the record to carry out its flawed calculations are frankly shocking. Accordingly, its Order should be reversed and set aside.

V. The Commission exceeded its jurisdiction and authority when it levied punishment upon the Petitioners in a cost recovery proceeding without evidentiary support.

A. The Commission's 10-year amortization, with a 4 percent carrying charge, is punitive by the very language of the Order.

Following its disallowance of $232 million of the reasonably and prudently incurred costs requested by the Petitioners, the Commission ordered that the remaining $321 million under-recovery be amortized over ten years, with a 4% carrying charge, and that both the rate increase and carrying charge would not begin until September 1, 2024 – nearly 8 months after the issuance of the Order. (App. at 120.) The harm from this directive is real: the Petitioners' cost to finance this amount on its books for 10 years and 8 months (i.e., their weighted average cost of capital) is currently more than double the unsupported 4% carrying charge authorized by the Commission, meaning that Petitioners will suffer a further estimated $78 million in unrecovered costs to finance the Commission's recovery method.

It is clear from the language of the Order that the Commission was no longer engaged in a prudency review when it discussed this amortization mechanism, but had moved to punishing the Petitioners based on speculation that they could have foregone outages at their coal units during the periods under review. The Commission did not even bother to set forth any findings of fact to specifically address the amortization. (*Id.* at 123-26.) Instead, the Commission simply stated that "our calculations and disallowance of $231,769,431 does not take into consideration that the power

plants were offline and unavailable for generation at times when market prices were very high" and then concluded, without any citation to the record, there was a "likelihood" that the Petitioners were unable or unwilling to "offset a portion of the remaining $321,106,227 under-recovery by different decisions for taking or keeping plants out-of-service[.]" (*Id*. at 120.) The fact that the Commission rested the fate of hundreds of millions of dollars on a "likelihood," without any meaningful analysis in its Order of those possible "different decisions," is reversible error. *See, e.g., Monongahela Power Co.*, 166 W. Va. at 423, 276 S.E.2d at 180. Furthermore, the Commission's unsupported amortization is a thinly-veiled form of punishment that exceeds the Commission's proscribed jurisdiction and authority in ENEC proceedings.

B. There is no substantial evidence to support any extra "punishment" beyond the Commission's flawed disallowance.

The Commission does not offer any reasonable justification or evidence to support its methods (ten-year amortization, with a 4% carrying charge, and an 8-month deferral); the only alleged basis for its punitive recovery method was related to the Petitioners' necessary planned and maintenance outages of their coal units. With no citations to the record and no findings of fact regarding outages, the Commission claims that the "testimony by witnesses for the Companies indicates that the return to service was possible, but that the Companies maintained the out-of-service status due to insufficient coal supplies." (App. at 120.) This is yet another instance of the Commission playing fast and loose with the record and reaching a conclusion without any meaningful analysis.

Though it is not addressed in the Order, the record is replete with the Petitioners' evidence showing that the return to service of coal units was not possible and that coal inventory was not, and under PJM's rules could not be, the basis for deciding when to take planned or maintenance outages. Planned outages (as the name implies) are planned well in advance with PJM, sometimes

even years ahead. Cos. Exh. AMS-R (2022) at 6; APCo/WPCo TCK-R at 13-14. The Petitioners consider various factors in deciding whether to extend planned outages or to request maintenance outage time to address equipment issues.[35] It was uncontested in the proceedings below that planned and maintenance outage requests submitted to PJM are specific to equipment repair and maintenance needs and are not based on fuel availability. *Id*.[36] Petitioners' witness Tim Kerns testified unequivocally that "[t]he [Petitioners] would have taken the Planned Outages during October and November 2021 regardless of coal inventories." APCo/WPCo TCK-R at 12.[37] And in response to the unsupported notion that coal units should have been quickly returned to service from a planned or maintenance outage, the Petitioners' witness Sink reminded the Commission of the "key facts" that, "[d]uring a scheduled outage, a generating unit's components are dismantled, often with pressure parts (parts that contain steam at very high pressures and temperatures when operating, such as boilers, turbines, etc.) to be inspected, maintained, and/or replaced. **It is very difficult if not impossible to safely and quickly return a unit to service or deviate from the work plan for the outage, particularly when major equipment is disconnected/dismantled for repair**." Cos. Exh. AMS-R (2022) at 6 (emphasis added). At best, then, the Commission's statement as to outages appears to rest entirely on a misunderstanding of testimony at hearing that, if coal units could have been returned to service in Fall 2021 (i.e., shoulder months), it would risk

[35] Those factors include, but are not limited to, the future availability of the units, equipment condition and risk of failure, ability to operate equipment safely, and the ability to complete work identified during a scheduled outage that was discovered during equipment inspections. Cos. Exh. AMS-R (2022) at 5.
[36] Petitioners' witness Aaron Sink testified that fuel inventory is not a factor to consider in determining planned outages and any reforecasting of planned outages. Tr. Oct. 4, 2022 at 169 (Sink). Specifically, Mr. Sink explained that "[w]e have to give specific reasons [to PJM] for the equipment that we're going to work on. And so fuel is not a reason." *Id*.
[37] Mr. Kerns reiterated this point during the September 2023 evidentiary hearings and explained that fuel availability is not a consideration in terms of the timing of either taking or shortening an outage and that the outages taken in the Fall of 2021 were because of the work that needed to be done (much of which was ordered by the Commission), not because of lack of coal. Tr. Sept. 6, 2023 at 96-97 (Kerns).

reliability in a constrained coal market to bring them back and run them out of coal before the peak winter months. *See* Mar. 23, 2022 Hrg. Tr. (Scalzo, Zwick). The vitally important missing piece of the puzzle in the Order is that, upon the Petitioners' analysis as established by the evidence, the coal units could not be returned to service quickly based on the work that was needed to ensure reliability and safety.

The Petitioners' evidence painstakingly established that the outages taken were necessary for the continued operation, reliability, and safety of their highly complex coal units and were taken at the appropriate times, including to install Commission-ordered environmental retrofits to comply with federally-mandated deadlines. *See generally* Cos. Exh. MJZ-D (2022); AMS-R (2022); APCo/WPCo TCK-D; TCK-R. The Petitioners successfully maintained and ensured that the coal units were available for the benefit of customers during the peak demand winter months, avoiding major forced outages and catastrophic failure. APCo/WPCo TCK-R at 16. Therefore, not only is coal inventory irrelevant with regard to when their outages were scheduled, the Petitioners acted prudently in conducting outages to ensure the units' reliability and safety.

The record also shows that the Commission's 4% carrying charge is not sufficient to cover the cost the Petitioners will incur to carry the balance approved by the Commission over a term as lengthy as 10 years. In the 2023 ENEC case, the Petitioners proposed an option to amortize the recovery of the ENEC balance over three years using a weighted average cost of capital ("WACC") to determine the appropriate carrying charge of 8.568%. APCo/WPCo RRS-R at 3. Compared to the Petitioners' proposed carrying charge of 8.568%, the Commission's unsupported 4% carrying charge would leave the Petitioners with an estimated $78 million in unrecovered costs to finance the ENEC balance over 10 years. Simply put, the Petitioners cannot acquire this amount of capital at the 4% carrying charge imposed by the Commission, and the cost of carrying the

amortized balance would be significantly higher than the amount recovered with a 4% carrying charge. *Id.* at 3-4. There is no support in the record for such punishment.

C. The Commission does not have the authority to punish an electric utility in an ENEC proceeding, only to decide matters of cost recovery.

The Commission has no inherent jurisdiction, power, or authority and can exercise only such as is authorized by statute. *Eureka Pipe Line Co. v. Pub. Serv. Comm'n*, 148 W. Va. 674, 137 S.E.2d 200 (1964); *Wilhite v. Pub. Serv. Comm'n,* 150 W. Va. 747, 149 S.E.2d 273 (1966). Furthermore, ENEC proceedings were created as a narrow mechanism "to allow electric utilities to request rate adjustments to recover or flow back to the ratepayers the difference between the current costs allowed in rates and the utility's actual costs of obtaining fuel and fuel-related purchased power that the utility uses to produce electricity . . . ." *In re Appalachian Power Co*., 2012 WL 3893119. Importantly, "ENEC proceedings are cost recovery vehicles only, and electric utilities do not earn a return on these costs. Customers pay these costs dollar for dollar, provided they are reasonable and prudently incurred." *In re Appalachian Power Co.*, 2011 WL 3211050. Therefore, the Commission can decide matters of cost recovery in an ENEC proceeding, but it does not have arbitrary discretion to punish a utility by deferring and prolonging rate recovery for reasons not supported by the evidence.

This Court has considered the limits to the Commission's jurisdiction and has held that the Commission cannot punish a utility in a rate case, as it has other means of countermanding noncooperation. *C&P Tel. Co.*, 171 W. Va. 708, 301 S.E.2d 798. In *C&P Telephone Co.*, this Court held that the Commission could not punish the utility by denying an item in a rate case because it failed to provide requested information. *Id.* at 720, 301 S.E.2d at 809. Specifically, this Court stated that the Commission "should revise that portion of its final order that indicates its decision not to apply the inflation factor to Western Electric purchases was punitive." *Id.*; *accord*

Arizona Pub. Serv. Co. v. Arizona Corp. Comm'n, 526 P.3d 914, 921 (Ariz. App. 1st Div. 2023) (finding that the Arizona Corporations Commission exceeded its ratemaking authority by reducing the utility's return on equity by 20 basis points based on "deficiencies in the [utility's] customer service performance" and vacating that reduction).

Likewise, in the case *sub judice*, the Commission has exceeded its authority by deferring recovery with a ten-year amortization and an inadequate carrying charge not because of any imprudence proven and explained on the record, but because the Commission merely hypothesizes that some different course of action could have been taken with respect to outages. As in the cases cited above, by requiring a deferral and a decade-long period to recover an already unreasonably reduced amount of ENEC costs, the Commission acted arbitrarily and outside of its jurisdiction in punishing the Petitioners, and its Order should be reversed.

CONCLUSION

For the reasons stated herein, and any other reasons appearing to the Court, the Petitioners respectfully request that the Court reverse and set aside the Commission's January 9, 2024 Order and direct the Commission to grant the Petitioners' request to recover their reasonably and prudently incurred costs, as set forth in their April 28, 2023 Petition filed in the 2023 ENEC case, along with such further relief as the Court deems necessary and appropriate.

CERTIFICATE OF SERVICE

I certify that on February 8, 2024, I delivered a true and correct copy of the foregoing Petitioners' Initial Brief to the following, via hand delivery.

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