Docket No. 24-75

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appalachian Power Company and Wheeling Power Company,
Petitioners,

v.

The Public Service Commission of West Virginia
Respondent.

STATEMENT OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF JANUARY 9, 2024

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPLEALS OF WEST VIRGINIA:

The Respondent, Public Service Commission of West Virginia (Commission), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of January 9, 2024, in Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC that is the subject of this appeal.

I. STATEMENT OF THE CASE

In this appeal, Appalachian Power Company (APCo) and Wheeling Power Company (WPCo) (jointly Petitioners) incorrectly argue that the Commission failed to apply the correct legal standard when determining that Petitioners' actions were not prudent. The Petitioners also incorrectly argue that the Commission exceeded its jurisdiction and authority when it authorized an amortization of $321 million in costs plus a 4% carrying charge to be included in customer rates over a period of ten years, beginning on September 1, 2024.

Annually, Petitioners file an Expanded Net Energy Cost (ENEC) case with the Commission.[1] These cases are designed to allow electric utilities to recoup net energy power

[1] Up until the mid-1970's the Commission allowed electric utilities to file rate adjustments to reflect changes in the cost of generation fuel at their power plants. The authorized adjustments were referred to as "Fuel Adjustment Clauses." In the mid-1970's the Commission eliminated the fuel-cost adjustments and required that changes in fuel costs be included in base rate cases. After the Commission eliminated fuel adjustment clauses, the Legislature also required that such adjustments be eliminated as a matter of Statutory Law.

> The commission shall not enforce, originate, continue, establish, change or otherwise authorize or permit an increase in the charge or charges for electric energy over and above the established and published tariff, rate, joint rate, charge, toll or schedule through any automatic adjustment clause or fuel adjustment clause.

W. Va. Code § 24-2-15. In the late 1970's, the Commission established expedited rate proceedings outside of base rate cases allowing electric utilities to file for rate changes based solely on changes in the cost of fuel used for generation at their power plants. These filings were subject to notice, opportunity for intervention, and evidentiary hearings. Therefore, the Commission did not consider these proceedings as "automatic adjustments." The filings were referred to as "Fuel-Review" proceedings. Over the years the Commission added other energy cost components such as variable non-fuel generation costs and purchased energy costs into the proceedings, referring to them as "Energy

supply costs, including fuel, purchased energy, purchased capacity, purchased transmission, and other related costs, net of profits they make on net wholesale electricity and transmission transactions, without the details and expense of a full base rate case. The Commission allows deferral accounting whereby actual ENEC costs and revenue are tracked during the months that ENEC rates are in effect. Excess costs or revenue are deferred on the Petitioners' books to be considered for inclusion in future ENEC cases. The under-recoveries or over-recoveries are calculated by comparing the actual net ENEC costs incurred on a month-by-month basis with the actual recoveries of ENEC costs at rates then in effect. If net ENEC costs in a month are greater than the ENEC revenues billed to customers, an under-recovery is recorded. If net ENEC costs in a month are less than the ENEC revenues billed to customers, an over-recovery is recorded. The Companies defer over- and under-recoveries on their books, and the Commission considers accumulated balances (net over-recoveries or under-recoveries) for deduction or addition to projected future ENEC revenue requirements to set prospective ENEC rates. Normally, the Commission reviews over- or under-recovery balances and builds them into rates annually so that a fixed accumulated balance is amortized (built into rates) over one or more future ENEC rate periods rather than being carried forward from year to year without a recovery increment in rates.

Cost" proceedings. When profits on sales of energy into the non-firm opportunity wholesale market were added as credits to the costs considered in the proceedings, they came to be referred to as "Net Energy Cost" (NEC) proceedings. Finally, when the Commission further expanded the cost elements to be considered in the proceedings to include wholesale transmission costs and wholesale capacity payments and revenue, which are presently part of the proceedings, they were referred to as "Expanded Net Energy Cost" or ENEC proceedings. In ENEC cases the utility, usually annually, files a projection of its expected load and energy sources for a future twelve-month period, the projected cost of those energy sources, the projected net wholesale transactions which are net sales or deliveries of capacity and energy to other utilities (deliveries excluding firm sales under FERC approved Full Requirements Tariffs less costs or receipts of buy-back of capacity and energy to serve internal load) and the "net margins" (profits) they expect to earn on net wholesale transactions. In addition, the utility includes a cost or credit for under or over recoveries of its ENEC costs over a recently completed twelve-month period. Under-recoveries are usually added to the next-projected ENEC costs while over-recoveries are usually subtracted from the next-projected ENEC costs to arrive at the ENEC rate increment charged to customers prospectively.

Beginning with Case No. 21-0339-E-ENEC (2021 ENEC), the Commission expressed concerns that the Petitioners were planning on serving load with expensive energy from the PJM Interconnection, LLC (PJM)[2] instead of maximizing generation from their plants at a lower cost.

In the 2021 ENEC, filed on April 16, 2021, the Commission questioned the prudency of Petitioners' plans to purchase large amounts of energy from PJM at a higher price than it would cost Petitioners to generate from the plants they own. The Petitioners' projected ENEC costs in their 2021 ENEC petition filed on April 16, 2021, were heavily weighted to include purchased power. 2021 ENEC, Sept. 2, 2021 Comm'n. Order at 5, Commission Record[3] at Bates No. 890. (hereinafter CR at BN __). The Commission established rates to go into effect on September 2, 2021, for recovery of projected costs. The Commission adjusted the Petitioners' projections to reflect less purchased power and more self-generation than the ratios the Petitioners projected. Those rates should have been sufficient based on the Petitioners' projections of purchased power prices and generation costs. 2021 ENEC, Sept. 2, 2021 Comm'n. Order, generally, CR at BN 886-889, 20895; Comm'n. Order, Jan. 9, 2023 at 4, CR at BN 20895. The Commission found that the Petitioners could decrease ENEC costs by increasing generation at their plants and the Commission

[2] PJM operates a competitive wholesale electricity market and manages the reliability of its transmission grid. PJM provides open access to transmission and performs long-term planning. In managing the grid, PJM centrally dispatches generation and coordinates the movement of wholesale electricity in all or part of thirteen states (Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia) and the District of Columbia. PJM's markets include energy (day-ahead and real-time), capacity and ancillary services. PJM was founded in 1927 as a power pool of three utilities serving customers in Pennsylvania and New Jersey. In 1956, with the addition of two Maryland utilities, it became the Pennsylvania-New Jersey-Maryland Interconnection, or PJM. PJM became a fully functioning Independent Systems Operator in 1996 and, in 1997, it introduced electricity supply markets with bid-based pricing and locational marginal price (LMP). FERC designated PJM a Regional Transmission Operator in 2001. https://www.ferc.gov/industries-data/electric/electric-power-markets/pjm.

[3] The Commission electronically submitted the Commission Record of Case Nos. 21-0339-E-ENEC, 22-0393-E-ENEC, and 23-0377-E-ENEC to the Court on March 9, 2024, with a supplemental filing on March 22, 2024.

suggested a 69% capacity factor[4] rate as a minimum goal or target that the Petitioners should achieve given the projected cost of self-generation and the projected cost of PJM purchased power as filed by the Petitioners. 2021 ENEC, Sept. 2, 2021 Comm'n. Order, at 6, CR at BN 891.

On March 2, 2022, the Commission reopened the 2021 ENEC at the request of the Petitioners and learned that under-recoveries were increasing because the net cost of PJM transactions was escalating, and the Petitioners were relying on expensive purchased power from PJM more than they had originally anticipated instead of relying on less expensive self-generation. 2021 ENEC, Mar. 23, 2022 Evidentiary Hearing Transcript (Tr.) at 29-33, CR at BN 1209-1213. In the Spring of 2022, however, instead of justifying an increase in reliance on purchases of power from PJM as economical, the Petitioners began to blame their increased reliance on PJM power on an inability to obtain sufficient coal supplies to maximize economic self-generation. 2022 ENEC, Petition, Apr. 19, 2022, at Exh. JCD-D generally (pre-filed testimony of Jeffrey Dial), CR at BN 7318-7349, generally; 2023 ENEC, Cos. Initial Br., Oct. 10, 2023, at 6, CR at BN 20600.

The Commission ordered its Staff to conduct a review of the Petitioners' generation plant availability and utilization and ENEC costs. (Prudence Review). 2021 ENEC, May 13, 2022 Comm'n. Order at 6, CR at BN 1677. Although the Commission was concerned about Petitioners' failure to self-generate at reasonable levels and the resulting increased expenditures for purchased power and the Prudence Review had not been completed, the Commission granted Petitioners an additional $93 million in ENEC rates for prospective costs subject to future review and adjustments, to attempt to moderate future rate shock for the Petitioners' customers. Id.

[4] Capacity factor refers to the net generation over a period compared to the maximum possible generation over that period. For example, if a generation unit had a net capacity capability of 1,000 megawatts, then in a year of 8,760 hours, the theoretical output of the plant would be 8,760,000 megawatt hours. If the actual net generation in that year was 6,100,000 megawatt hours, its capacity factor would be 6,100,000 ÷ 8,760,000, or 69.6%.

In Case No. 22-0393-E-ENEC (2022 ENEC), Petitioners requested an additional $297 million in ENEC revenues. 2022 ENEC, Petition, Apr. 19, 2022, CR at BN 7280-7420. The Commission denied this increase until completion and submission of the Prudence Review by Staff and consideration of the Prudence Review by the Commission. 2022 ENEC, Feb. 3, 2023 Comm'n. Order at 3, CR at BN 11354.

In Case No. 23-0377-E-ENEC (2023 ENEC), filed April 28, 2023, the Petitioners requested a revenue increase that included $552.9 million to recover an under-recovery balance accumulated from March 1, 2021, through February 28, 2023, and an additional revenue increase for projected increased ENEC costs of $88.8 million for the forecasted period of September 1, 2023, through August 31, 2024. On September 13, 2023, the Commission granted the Petitioners an increase in ENEC rates for the forecasted $88.8 million increase in ENEC costs. On January 9, 2024, the Commission disallowed $231.8 million of the $552.9 million requested ENEC under-recoveries on the grounds that the Petitioners incurred this amount imprudently by a lack of action to maintain fuel inventories and fuel supplies that would allow them to generate power at their power plants during periods when the PJM energy prices were much higher than the cost of self-generation. The Commission authorized a prospective recovery of the remaining $321.1 million in under-recoveries over ten years beginning September 1, 2024[5] with carrying costs of 4%t. Jan. 9, 2024 Comm'n. Order at 36, CR at BN 20927.

In addition to Petitioners and Commission Staff, several parties participated in these cases as intervenors. West Virginia Energy Users Group (WVEUG), the Consumer Advocate Division of the Commission (CAD), and Steel of West Virginia, Inc. (SWVA) intervened in the 2021

[5] The Commission ordered recovery to begin on September 1, 2024, to provide the Petitioners sufficient time to present to the Commission a plan for levelized annual amortization or straight-line amortization. The Petitioners were ordered to present the plan in their next ENEC to be filed in April 2024.

ENEC. WVEUG, CAD, SWVA, and the West Virginia Coal Association (WVCA) intervened in the 2022 ENEC. In the 2023 ENEC, Intervenors included CAD, WVEUG, WVCA, and the Kanawha County Commission.

II. SUMMARY OF ARGUMENT

The Commission was within its authority to rule, under the facts presented in this case, that Petitioners' did not act prudently when they allowed coal inventories to fall to unreasonably low levels and failed to maintain coal supply contracts that would allow them to sufficiently replace coal in their coal inventories as it was burned. As a result of that failure, coal inventories fell to such low levels that they were unable to generate electricity during a period when purchasing energy from the PJM market caused excessive and unreasonable purchased power costs. Furthermore, the Commission correctly considered the actions and inactions of the Petitioners leading up to dwindling coal inventories and a lack of incoming coal supplies to determine their imprudence. The Commission did not violate the Petitioners' due process rights by using data provided by the Petitioners in a post-hearing exhibit and statutorily required monthly coal delivery reports filed by Petitioners.

Finally, granting prospective rate recovery of past costs to the Petitioners over a period of time while providing Petitioners with a carrying charge is a reasonable method of rate recovery. Deferring collection over time is commonly used by this Commission in cases involving Petitioners and other utilities to avoid rate shock for industrial, commercial, and residential ratepayers.

Petitioners' Appeal should be denied, and the Commission's Final Order of January 9, 2024, should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT

The Commission defers to the Court and stands ready to make oral argument if scheduled by the Court.

IV. STANDARD OF REVIEW

The Court has stated its standards of review of Commission Orders as:

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

Central West Virginia Refuse, Inc. v. Public Serv. Comm'n., 190 W.Va. 416, 420; 438 S.E.2d 596, 600-601 (1993). When reviewing orders of the Commission,

> our Court is guided by three central principles: first, that the primary purpose of the PSC is to "serve the interest of the public"; second "[t]hat an order of the Public Service Commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles"; and, third, that the Legislature has empowered the PSC to regulate and control the public utilities in this State in a manner that is just and reasonable and not contrary to the law.

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

Concerning this Court's review of Commission decisions, this Court has also previously held:

> The principle is well established by the decisions of this Court that an order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles. United Fuel Gas Company v. Public Service Commission, 143 W. Va. 33, 99 S.E.2d 1 (1957); Syl. Pt. 5, Boggs v. Pub. Serv. Comm'n, 154 W. Va. 146,

174 S.E.2d 331 (1970); Syl. pt. 1, Sierra Club v. Pub. Serv. Comm'n of W. Va., 241 W. Va. 600, 827 S.E.2d 224 (2019).

Trulargo, LLC v. Public Serv. Comm'n. of W. Va., 242 W. Va. 482, 483, 836 S.E.2d 449, 450 (2019). The Court has also recognized that its "responsibility is not to supplant the Commission's balance of these interests [public's and utility's interests] with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Syl. pt. 1, Monongahela Power Co. v. Public Serv. Comm'n., 166 W. Va. 423, 276 S.E.2d 179 (1981).

V. ARGUMENT

A. The Commission Applied the Correct Legal Standard to Determine that the Petitioners Did Not Act Prudently.

The West Virginia Code authorizes the Commission to investigate all rates, methods, and practices of public utilities subject to the provisions of Chapter 24 of the Code. W. Va. Code § 24-2-2. "The Commission expects an electric utility to be prudent, reasonable, and vigilant in acquiring fuel for generation [and] managing its purchased power expenses." Monongahela Power Co. and The Potomac Edison Co., Case No. 08-1511-E-GI, Comm'n. Order, Dec. 29, 2008, at 7.

The Commission applied the correct legal standard to determine prudence in the cases below. The Commission considered all evidence of the Petitioners' decision-making and determined that Petitioners did not act in a manner that would allow them to maintain adequate coal supplies in inventory to hedge against market fluctuations that resulted in purchased power costs that could have been averted by self-generation at the Petitioners' power plants.

It is well established that Petitioners are free to manage their businesses. That freedom comes with an expectation, however, that they should bear responsibility for excess costs,

including, as in this case, purchased power supply costs which would not have been incurred had they maintained an adequate coal inventory and incoming coal supplies. Sufficient fuel is an absolute requirement to keep ratepayer-supported power plants from becoming billions of dollars of unusable pipes and machinery. Yet, the Petitioners incurred unnecessary power supply costs by failing to maintain a constant and adequate coal inventory and incoming coal supplies needed to run the plants at maximum reasonable output. In following their management discretion, as was their right and risk, Petitioners either disregarded or discounted trends and market signals that were available to them and as were pointed out by experts testifying in the 2021 ENEC regarding coal procurement practices and warning signals in the market. They also disregarded or discounted the Commission's observations that their plans for projected purchased power levels in 2021 and 2022 were overly dependent on purchases of power from the PJM market even though their own projections showed that self-generation was a more economical and reasonable alternative. 2021 ENEC, May 13, 2022 Comm'n. Order at 4-6, CR at BN 1675-1677. As a result, the Petitioners did not sufficiently address problems with fuel deliveries or timely seek new coal supplies and imprudently allowed inventories of coal to fall to unreasonably low levels.

Petitioners state or imply that the Commission did not consider all of the facts presented in the case. That is not correct. The Commission considered all facts to reach its conclusions and decision, including facts that supported different conclusions from those of the Petitioners. Upon consideration of all of the facts, the Commission concluded that the Petitioners did not act prudently. The Petitioners knew or should have known that their coal supplies were trending toward dangerously low levels before they became dangerously low. The Petitioners knew that a major coal provider was failing to provide the contractually obligated coal supplies. The Petitioners failed to respond to those shortfalls in a meaningful way for months – until it was too

late. These failures were more than simple, understandable, and forgivable mistakes. As described by the Commission, it was "unconscionable that the Companies would allow their inventories of coal to drop to such low levels that they were unable to generate electricity in any semblance of reasonable quantities to offset incoming PJM energy at costs that were not just meaningfully higher but were much higher than self-generation." Jan. 9, 2024 Comm'n. Order at 11, CR at BN 20902.

B. The Commission Correctly Determined that Petitioners Acted Imprudently.

1. Petitioners' Coal Supply Practices Were Not Prudent Under the Circumstances.

Petitioners ignored the Commission's September 2, 2021 Order suggesting that their strategies, as represented by their projections of ENEC costs, would result in excessively high ENEC costs. The Commission warned that the evidence indicated that the Petitioners should reduce their reliance on purchased power, increase their use of self-generation, and target the ability to operate at a minimum 69% capacity factor. Had the Petitioners recognized when preparing their projections for 2022 power supply requirements that their planned over-reliance on PJM power supply was not prudent, they would have realized that they needed more coal on the ground and more coal under contract to be able to generate at cost-efficient levels. Failing to recognize their planning shortfalls, Petitioners then failed to heed the Commission's suggestion in the September 2, 2021 order that more coal was needed to generate at cost-efficient levels which the Commission had determined would be prudent. This need for a larger coal supply to self-generate at a higher level than projected was evident given a reasonable analysis of the cost projections supplied by the Petitioners themselves. Sept. 2, 2021 Comm'n. Order at 4-6, CR at BN 889-891. The Petitioners additionally failed to acknowledge that the reason they had a substantial shortfall of coal was because they had reduced the historical diversity of suppliers and instead were

relying on a small contingent of producers to provide the majority of their coal. 2021 ENEC, CAD pre-filed testimony of Emily Medine, July 7, 2021, at 21-22, CR at BN 786-787.

Petitioners complain that the Commission failed to acknowledge Petitioners' own mix of coal contracts of varying lengths. Petitioners' Initial Brief at 22 (hereafter Pet. Br. at ___). Petitioners, however, fail to acknowledge that a mix of contracts of varying lengths is not sufficient, and certainly not prudent, if the contracts lack the flexibility needed to assure that coal inventories can be replenished when market conditions dictate that the most economical supply of electricity must come from increased utilization of generating plants. Even if Petitioners correct their weaknesses prospectively, the Commission cannot cavalierly excuse the excess of $200 million in unreasonable, costly market purchases because the Petitioners have learned their lesson.

The Petitioners failed to manage their fuel supplies and generation plants in the customers' best interest. The generating plants of the Petitioners represent billions of dollars in sunk costs that are fully supported by ratepayers. Petitioners have argued for years that their generating plants are a hedge against the vagaries of the electricity markets and that hedge justifies hundreds of millions of dollars of investment on which they receive a return. Jan. 9, 2024 Comm'n. Order at 10 (citing Case No. 20-1040-E-CN), CR at BN 20901. To allow the on-site and incoming fuel supplies at those plants to dwindle so as to render them practically unusable cannot by any stretch of the imagination be considered prudent or reasonable. Prudent managers of a public utility must consider the reasonableness of actions from the standpoint of customers who are captive to utility decisions. When utility decisions fail to protect customers from unreasonable costs, it is appropriate for the state regulatory commission to disallow those costs in setting reasonable rates.

> While the PSC is not to be seen as a super board of directors for the public utility companies of the State, at the same time "[t]heir function is to regulate and disapprove any dishonest or clearly inefficient conduct and practice by the utility."

Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n. 165 W.Va. 762,769, 271 S.E.2d 438, 443 (1980), citing United Fuel Gas Co. v. Public Serv. Comm'n., 154 W.Va. 221, 243, 174 S.E.2d 304, 317 (1969)(further citation omitted).

In its prudency report, Critical Technologies Consulting, LLC (CTC), consultants hired to assist Commission Staff with the Prudence Review, expressed concern that the Petitioners did not take seriously the Commission recommendation to plan and achieve the ability to utilize their generation plants at a 69% capacity factor. 2021 ENEC, Prudency Report, Apr. 28, 2023, at 26, CR at BN 2253. Petitioners did not inform their witness Mr. Dial, who was in charge of fuel procurement, of the Commission's September 2, 2021 Order and he did not know about the suggested capacity factor target. 2021 ENEC, Mar. 23, 2022 Tr. at 173-74, 211, CR at BN 1353-1354, 1391. This lack of communication with the main fuel procurement officer appears to be inconsistent with Petitioners' witness Mr. Scalzo's testimony during the 2021 hearing on the Petition to Reconsider, who testified that the September 2021 RFP was a direct reaction to the Commission's September 2021 order. Id. at 90, CR at BN 1270. Regardless of Mr. Scalzo's belief, if the person in charge of fuel procurement was not aware that he should have sufficient fuel supplies to achieve a 69% capacity factor, the September 2021 RFP is not likely to have been structured to meet that expectation. Even after the March 2, 2022, Commission Order on the Petition for Reconsideration, the Petitioners did not advise Mr. Dial of a need to procure an amount of coal sufficient for the Petitioners to achieve the 69% capacity factor. The Staff Prudence Review found that the Petitioners did not make changes in the fuel procurement process to assure adequate inventories and coal supply contracts that would allow them to reasonably bid their energy into PJM to provide more self-generation and increase the capacity factor at their plants. 2021 ENEC, Prudency Report, Apr. 28, 2023, at 26-30, CR at BN 2253-2257. Prudent and timely

implementation of fuel procurement based on an understanding of the need for more self-generation could have lowered the cost of generation and reduced reliance on high-cost purchased power to benefit ratepayers during the time period at issue in the cases below.

2. When Petitioners Were Faced with Challenging Circumstances, They Should have Acted Promptly to Remediate their Lack of Coal.

Emily Medine, the expert witness for the CAD, recommended in testimony filed in July 2021, and again in supplemental testimony filed in March 2022, that the Petitioners should be tasked with developing "an extended coal procurement and inventory strategy to support a stable fuel supply for its coal fired units over an extended period." 2021 ENEC, CAD pre-filed testimony of Ms. Medine (ESM-SD) at 3, CR at BN 1097.

Further, Ms. Medine testified that "[i]t is the obligation of the utilities to ensure full contract performance, particularly when market prices are substantially higher than the contract prices." Id. at 2, CR at BN 1096.

Based on the evidence presented in the cases below, contrary to the Petitioners' claim that they acted prudently as their coal inventories and incoming coal supplies dwindled, the Commission concluded that the Petitioners instead failed to act with due diligence and speed when faced with declining coal supplies. Depleted coal stockpiles make it impossible for an electric utility to offset high purchased power costs with self-generation. The Petitioners argued that they tried to obtain coal in late September 2021 after they realized earlier that month that their coal supplies were low, but coal was not available. 2021 ENEC, Mar. 23, 2022 Tr. at 92, 163, and 169, CR at BN 1272, 1343, 1349. The managers of multi-billion dollar, ratepayer-supported generation plants that should, by their own testimony, provide a physical hedge against electric market price escalations, should not have just suddenly realized in September that their depleted coal stockpiles were a concern, requiring action. To say that the Petitioners' efforts to protect customers from

high-priced purchased power was a day late and a dollar short would be an understatement. In fact, the Petitioners' efforts to protect customers from high-priced purchased power costs were months late and hundreds of millions of dollars short. Based on all the evidence and the Commission's judgment of the evidence, the Commission fully considered the petitioners' arguments, found them wanting, and did not accept the Petitioners' argument that they acted prudently and were blameless in a $500 million ENEC cost under-recovery debacle. The Commission did not agree with the Petitioners that they were innocent parties and the entire ENEC under-recovery should be passed on to ratepayers.

Although the Petitioners' position was that they had adequate coal supplies until September 2021, when the stockpiles began to diminish, Ms. Medine first expressed concern over a significant amount of the Petitioners' coal supply being concentrated with only two suppliers on July 7, 2021. 2021 ENEC, July 30, 2021 Tr. at CAD Exh. ESM-D at 21-22 CR at BN 786-787. Ms. Medine expressed further concern in her March 2022 supplemental testimony:

> An RFP was not issued until September 2021 for additional coal supplies, despite the tightening of the market starting in late spring and the increase in the price of natural gas. Higher natural gas prices increase the demand for coal generation.

2021 ENEC, CAD pre-filed testimony of Ms. Medine, Mar. 21, 2022, at 2, CR at BN 1096. Although Petitioners' witness Dial testified in the cases below that prices increased in the second half of 2021, his own chart of domestic coal market prices shows a steady incline through early 2021 with a significant increase on June 1, 2021, and also a steady rise in pricing for the export market during that same period. 2021 ENEC, Cos. pre-filed testimony of Mr. Dial, Mar. 14, 2021, at 4-5, CR at BN 1016-17.

The Commission previously "cautioned electric utilities that they have the responsibility to minimize the net ENEC costs that are passed through to customers, particularly in expedited,

non-base rate proceedings." Jan. 9, 2024 Comm'n. Order at 15, CR at BN 20906. In the 2021 ENEC, the Commission concluded that the Petitioners' own projections indicated an over-reliance on market-supplied power at cost levels that were already trending upward from the 2020 levels and that over-reliance on net purchased power indicated an imprudent under-reliance on the utilization of Petitioners' power plants. 2021 ENEC, May 13, 2022 Comm'n. Order at 4-5, CR at BN 1675-1676.

While it is a fact that coal prices were increasing in 2022 and reports of shortages and supply chain issues were occurring across many fields, the issue, in terms of whether the Petitioners acted with prudence, was not whether they faced a shortage of coal supplies, but why did they have a shortage of coal and, equally importantly, how did they handle that shortage. Coal-fired power plants are considered more reliable and resilient than other types of power plants, except for nuclear plants, because they can store a supply of coal on-site that can allow constant generation over many weeks, or even months as long as they plan reasonably to replenish the stockpiles as they are used. The Commission concluded, based on the evidence in the cases below, that the Petitioners failed to take advantage of the on-site storage function, unique to coal-fired fossil fuel plants, and failed to maximize the reliability of their power plants, thereby allowing a coal inventory shortage to develop. The Petitioners also fell short in planning and managing incoming coal supplies to replenish dwindling stockpiles.

3. The Commission Gave the Proper Weight to Petitioners' Testimony and Evidence Regarding Coal Supply Constraints.

The Commission heard the Petitioners' testimony and considered their evidence on their attempts to contract for more coal, which included calling the coal providers later, in October 2021. Sept. 7, 2023 Tr. at 53, CR at BN 20142. Although Petitioners testified that they attempted to obtain coal through other providers and the West Virginia Coal Association, the evidence indicated

that efforts did not begin until the after Petitioners issued the September 20, 2021 RFP. Id. The phone calls and other efforts following the lack of responses to the RFP may have been unproductive because the main coal purchaser, Mr. Dial, was unaware of the need and urgency to plan for the utilization of the power plants at a minimum 69% capacity factor. 2021 ENEC, March 23, 2022 Tr. at 173-74, CR at BN 1353-1354. In any case, by the time of the RFP, their efforts were too late to receive meaningful bids for timely coal supplies from the September 2021 RFP. Unlike historical time periods when Petitioners relied on their own (and affiliated) self-generation to meet load, and even supplied power to neighboring utilities, the Petitioners became too comfortable with the knowledge that they did not have to manage their self-generation capability because they could always fall back onto the PJM Market for power supply. This led to a disastrous and imprudent over-reliance on the PJM Market during the review period.

Petitioners report on the difficulties encountered by other electric utilities, one in each of three southern states, to support their arguments. The facts and circumstances of companies in other states, further from coal supplies, and with a more diverse mix of generation have not been analyzed. Furthermore, regulatory policies and statutory requirements with regard to coal-fired generation and carbon emissions in other states are not part of the record, and the coal supply issues of utilities in other states should have no probative value in the case at hand. Moreover, the other utility examples reference an increase in fuel costs. The imprudence found by the Commission was not that Petitioners had increased fuel costs or coal costs. The Commission did not adjust or reprice the fuel costs of Appalachian Power Company. The Commission noted in its Order that it recognized that coal costs rose during the period in reviews and the Commission did not disallow the pass-through of increased coal prices to customers.

The imprudence was mismanagement of coal procurement, inventories and incoming supplies which, even at increased coal costs, would have significantly reduced the excessive purchased power costs. The excessive purchased power costs would have been mitigated had Petitioners not run out of coal and failed to self-generate.

Petitioners also argued that the Commission ignored the fact that, as of May 2021, Petitioners were expecting 3.8 million tons of coal by year-end 2022. Pet. Br. at 31. This was not ignored. But the Commission found that the expected quantity indicated an unappreciation by Petitioners of the amount of coal required to approach the 69% capacity utilization that the Commission suggested in its September 2, 2021 Commission Order as being more economical for ratepayers. Moreover, receiving 3.8 million tons by "year-end" 2022 did not alleviate the need for more coal throughout the year 2022. 2023 ENEC, Cos. pre-filed rebuttal testimony of John Scalzo at Att. 3, CR at BN 18614-18616. In light of the decreasing coal stockpiles and the coal shortages occurring in May, June, and July of 2021, 3.8 million tons by year-end 2022 was far too little and too late.

The Commission's adjudicatory function is to weigh the evidence presented to it. The Commission found the testimony of Ms. Medine, testifying for CAD, Mr. Baron, testifying for WVEUG, and other testimony describing the planning deficiencies for coal supplies and bidding generation into the PJM market, to be more persuasive than that of Petitioners' testimony with regard to the challenges the Petitioners faced and whether the Petitioners could have taken reasonable alternative actions to avoid depletion of coal inventories and incoming coal supplies. The fact that certain evidence was more persuasive to the Commission does not mean that the Commission ignored other testimony. The Commission considered all testimony, from all parties, and weighed that testimony carefully and thoroughly.

4. The Commission Properly Considered the Law and the Facts, Fully Considered the Arguments of the Petitioners, Balanced the Interests of Customers and the Petitioners, and Protected Customers by Disallowing Excessive and Unreasonable Costs that Could Have Been Mitigated Through Prudent Coal Supply Practice.

When a utility fails to make timely efforts to mitigate excessive costs that occurred when it failed to maintain adequate coal supplies to utilize its power plants at economical levels, then it is the utility not its customers that should pay for the utility's mistakes in failing to mitigate damages. The Petitioners incorrectly argue that the Commission relied on a misinterpretation of the law to determine that their declining inventory levels violated the law, and therefore by implication want the Court to think that the Commission decision was based on a misapplication of the Law. That argument is purely a straw-man that is inaccurate and misrepresents the Commission decision.

The Commission did not, as Petitioners' argue, misinterpret 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." Moreover, even if they had complied with W. Va. Code § 24-2-1q, such compliance does not provide blanket protection against responsibility for imprudent actions or inactions. A utility is imprudent if its contracts do not provide for the replenishing of stockpiles or if the utility does not enforce a contract to assure replenishment of stockpiles that are dwindling well below an on-site 30-day coal supply. These inactions are particularly imprudent when the regulatory body overseeing that utility has suggested that the utility would operate more economically if it reduced its reliance on more expensive purchased power and increased its generation of energy from its power plants.[6] 2021 ENEC, Sept. 2, 2021 Comm'n. Order at 6, CR

[6] For example, if a 30-day supply of coal for a power plant with a remaining life of twenty years was 20,000 tons, and a utility entered into a 20-year contract for 20,000 tons of coal, it might appear without further investigation that the utility had a 30-day coal supply under contract for the remainder of the life of the plant. However, if the contract called

at BN 891. The Commission determined that Petitioners acted imprudently because they failed to maintain sufficient inventories and incoming coal supplies to respond to increased purchased power costs.

To distract the Court from the fact that the Petitioners incurred imprudent costs by failing to maintain fuel supplies, the Petitioners painstakingly describe to the Court about planned plant outages that they must report to PJM. The Petitioners fail to address, however, the fact that in a period when PJM generation prices were increasing rapidly and Petitioners' generation plants were low on coal because the Petitioners failed to maintain sufficient inventories, they chose to extend their planned outages weeks or months beyond the time initially planned. Sept. 7, 2023 Tr. at 139-40, CR at BN 20225-20226. Petitioners failed to adequately plan for self-supply and instead relied on buying more expensive generation from PJM because they assumed they would easily recoup the costs from captive customers in their annual ENEC. Petitioners failed to consider, at the time, and fail to now acknowledge, that they should be held to a high standard of reasonableness when they are betting with ratepayer money.

When utility management acts in an unreasonable and imprudent manner, the Commission has the authority to protect customers from the negative financial consequences of the utility's unreasonable actions or inactions. Comm'n. Order, Jan. 9, 2024, at Concl. of Law 4, CR at BN 20926 (citing Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n., 165 W. Va. 762, 271 S.E.2d 438 (1980)(citing United Fuel Gas Co. v. Public Serv. Comm'n., 154 W. Va. 221, 243, 174 S.E.2d 304, 317, (1969))(further citation omitted).

for the coal to be delivered at the rate of 1,000 tons per year over the next twenty years, then the contract would be worthless as far as ensuring "grid resiliency and homeland security."

C. The Commission Did Not Violate the Petitioners' Due Process Rights.

The Commission agrees with Petitioners that it is an administrative body of statutory origin that performs quasi-judicial functions, and rate cases are adjudicatory in nature. Appalachian Power Co. v. Public 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). Further, the Commission agrees with Petitioners that they have a property right in recovery of their prudently incurred fuel costs.

Due process is synonymous with fundamental fairness. Morgan v. United States, 304 U.S.1, 58 S. Ct. 999 (1938)(Morgan II); State ex rel Peck v. Goshorn, 162 W. Va. 420, 422, 249 S.E.2d 765, 766 (1978). A regulated entity is "entitled to be fairly advised of what the Government proposed and to be heard upon its proposals before it issues its final command." Morgan II at 18-19, 58 S.Ct. at 776. The Commission did not violate the Petitioners' due process rights. The Petitioners received an evidentiary hearing on the issue of whether they prudently incurred ENEC costs. The Commission decided that the failure to maintain adequate levels of fuel inventory and incoming coal supply contracts emanated from imprudent decisions, actions and inactions. There was no surprise in the purpose of the Commission proceeding and the question of prudence that was the focus of the proceeding. The Petitioners knew that if the Commission determined imprudence and that excessive ENEC cost resulted from the inability to reduce dependence on purchased power, the Commission would have to quantify the extent of excessive costs resulting from the imprudence. The Commission made its decision on imprudence based on the evidence in the record. To determine harm, it was necessary for the Commission to have before it detailed information regarding market prices, generation station capability and self-generation costs. The Commission requested that information from the Petitioners and ultimately made its determination

of harm based on information the Petitioners themselves provided. The Commission took the data from Post-Hearing Exhibit 4, the Petitioners' own coal reports, and all other information presented in these cases, and followed the guidance of Petitioners' own expert witness, Mr. Plewes, who testified that it if, in fact, the Commission determined that the Petitioners acted imprudently, it was a necessary and common practice to compare actual costs that occurred to some imputed costs in order to quantify the impact of the imprudence.

> But if it were to be found that there was [imprudence] I think that any disallowance calculation should follow some very basic principles. First of all, you'd have to determine what was even imprudent in the first place, what decision it was that they are finding imprudent and then finding out what the impact of that imprudency was and then comparing that to what actually happened. Right. It's very simple. It's used all the time.

Sept. 5, 2023 Tr. at 183-84 (Mr. Plewes testimony), CR at BN 18917-18918.

1. The Commission Provided Sufficient Notice of Post-hearing Exhibit 4 to Enable Petitioners to Clarify the Commission Request and Explain the Data.

Petitioners knew that the cases below centered on the prudence of coal inventory and coal contracting practices and decisions and the ability to achieve the lowest reasonable ENEC cost by maximizing self-generation when it was the economical choice for power supply. Petitioners also knew that the Commission was questioning the prudency of their coal inventory and contracting practices and their inability to offset high-priced purchased power supply with more economic self-generation.

Petitioners generated power supply from their generation plants and delivered that power supply into PJM. Simultaneously, the Petitioners acquired power from PJM to meet their customers' requirements (load). PJM normally dispatches power from power plants based on the lowest cost bids from a multitude of suppliers. Petitioners, therefore, had a significant level of control over the use of their power plants based on how they bid power into the market. Bids in

the PJM day-ahead market are extensive hour-by-hour bids for discreet blocks of power that may not encompass the entirety of each generation unit's capacity. Petitioners make a "cost-based-bid" and a "market bid" to inform PJM of the price they demand under non-restricted grid operating conditions (market bid) and the minimum price they will accept if called upon to run under restricted or emergency grid conditions (cost-based-bid).[7]

The market and cost-based bids into the PJM market, the corresponding LMP clearing prices, and the resulting market clearing volumes of Petitioners' self-generation were the subject of exhibits, direct and rebuttal testimony, cross-examination, Commission questions, and responses on the record. These elements are directly relevant and required to quantify the impact of imprudence, if it exists. To get the necessary detail of the hour-by-hour, plant-by-plant market and cost-based bids, the PJM market clearing prices, and the resulting market clearing volumes of Petitioners' self-generation, the Commission requested during the hearing that Petitioners provide that information as a post-hearing exhibit. Sept. 7, 2023 Tr. at 103, 113-14, and 419-20, CR at BN 20189, 20199-20200, and 20505-20506.

Petitioners argued that they filed the Post-Hearing exhibit after the record was closed. Clearly, the record was not closed for purposes of receiving post-hearing exhibits because the Commission requested this and other post-hearing exhibits to be filed one week after the hearing.

The Commission requested Post-Hearing Exhibit 4 early on the third day of the hearing and all parties had an opportunity to question Petitioners' witnesses on their understanding of the data requested. Sept. 7, 2023 Tr. at 103, CR at BN 20189. The Petitioners had ample opportunity

[7] In PJM Markets, the term "cost-based bids" is sometimes referred to as "cost-based offers." Reference to cost-based offers or bids in the PJM Energy Market have the same meaning. As defined by PJM, cost-based bids or offers are: "Offers that shall not exceed the variable cost of producing such energy or other service, as determined in accordance with the Cost Development Guidelines. PJM uses cost-based offers to schedule generation in cases in which structural market power is found to exist. The term "market bid" is sometimes referred to as "market offer," "price bid," "price-based bid," or "incremental offer." Except for situations where structural market power is found to exist, the market bid is used to determine if a unit is accepted into the PJM Market (clears the market). PJM Manual 11, generally.

to ask questions of their witnesses regarding their understanding of the data requested or any other comments or observations they wished to make regarding their bidding strategies, the extent to which their bidding strategies related to the inability to operate the plants due to the lack of coal, or any other information they felt was important regarding the Post Hearing Exhibit 4 information.

Mr. Williams, the Consumer Advocate, questioned Petitioners' witness Jason Stegall about the adders that would be present in the exhibit and what those adders would show. Mr. Stegall then provided a lengthy explanation of the data that would be shown in the exhibit. Sept. 7, 2023 Tr. at 296-97, CR at BN 20382-20383. Nothing prevented Mr. Stegall from expanding on the implications, meaning, and value of the data in the context of the proceeding. Furthermore, the Petitioners had the opportunity to discuss the post-hearing exhibit in briefs filed on September 28 and October 5, 2023. CR at BN 20592-20618 and 20673-20694. Petitioners knew precisely what calculations could be made based on the data requested by the Commission which is why they also filed, with the post-hearing exhibit, an explanation as to why, in their opinion, the information in the exhibit had limited evidentiary value. Post-hearing exhibit 4, Sept. 15, 2023, CR at BN 20570-20571. There was no due process violation attached to Post-Hearing Request No. 4 or the Commission's reliance on the data provided by Petitioners themselves.

Petitioners argued that they were unable to question the Commission on the intended use of this material. Petitioners were well aware that the Commission was reviewing the prudency of their power purchases and their inability to generate electricity due to a lack of coal. They knew exactly what the data would show and they knew exactly what the data could be used for. This is evident because they expanded on the simple data request by including their own calculations (not part of the Commission request), of two scenarios: (1) additional power that they could have self-generated if they had not been restricted by their bids, and additional margins (profits) they could

have achieved if all available economic power was sold into the market, and (2) a similar calculation of profits and losses if all power, economical and uneconomical, was sold into the market. There was no need for the Petitioners, with their expertise in the PJM market rules and their own bidding strategies for PJM market access, to question the Commission on its intended or possible use of the data. Furthermore, while the Commission allows and answers clarifying questions when it requests data to be filed by a party in a proceeding, parties to an evidentiary hearing, much like in a trial, do not cross-examine the decision-maker.

Petitioners incorrectly state that the fact pattern in Ohio Bell Telephone Co. v. Public Utilities Comm'n. of Ohio, 301 U.S. 292, 57 S.Ct. 724 (1937), is "strikingly similar" to the present cases. The Ohio Commission decided that case on evidence including "price trends during [the years 1926 to 1933]." Unlike Ohio Bell, in the present case, the Commission properly and reasonably relied on actual numbers from the regional transmission authority from which Petitioners purchased their power, as provided in Post-Hearing Exhibit 4. Furthermore, in the case at hand, the Commission requested information from the Petitioners during the evidentiary hearing. Unlike the scenario presented in Ohio Bell, it was not "secretly collected and never yet disclosed." Ohio Bell Telephone Co. at 300. Post-Hearing Exhibit 4 was, in fact, on the record. Sept. 7, 2023 Tr. at 103, 296-97, CR at BN 20189, 20383-20383. Furthermore, Petitioners had the opportunity to question the Commission about the use of the requested information and offered a rebuttal against the use of the information when they submitted it.

The Petitioners also rely on Kanawha Valley Transp. Co. v. Public Serv. Comm'n., 159 W. Va. 88, 219 S.E.2d 332 (1975). In that case, however, this Court upheld the Commission's decision and recognized as proper the Commission's administrative notice of information about which the petitioners in that case were aware. The information that the Commission relied on in

that case was (1) a lack of liability insurance that had been addressed in a Commission Order in a separate case; (2) the revocation of corporate charters by the West Virginia Secretary of State which occurred after the evidentiary hearing; and (3) Commission records pertaining to the failure of one of the taxi cab companies to operate a stand in a certain area. Unlike Kanawha Valley Transp. Co., the Commission in the present case did not rely on information that occurred after the evidentiary hearing. In the present case, the Commission requested the information during the evidentiary hearing and Petitioners had an opportunity to argue why it should not be used when they submitted the evidence and in their initial and reply briefs in the cases below. Neither Ohio Bell nor Kanawha Valley Transp. Co. are dispositive to the present case.

2. The Post-Hearing Exhibit and the Petitioners' Own Coal Reports Were Necessary to Determine the True Marginal Cost of Self-Generation.

a. The Post-Hearing Exhibit enabled the Commission to Determine that the Petitioners Overstated Implied Generation Costs.

The Commission determined that Petitioners understated many of the "Winners Only Additional Margins" calculations contained in Post-Hearing Exhibit 4. The Commission compared actual costs of coal as reported by the Petitioners in the monthly coal reports to the cost-based bid data[8] used by Petitioners to calculate potential reduced costs of self-generation. By reviewing the information contained in Post-Hearing Exhibit 4 and the monthly coal reports, the Commission determined that "the sudden and irregular increases in implied generation costs used by the Companies are unreasonable and cannot be justified based on the cost of coal being acquired by the Companies at each of their generating plants over the calculation period." Jan. 9, 2024 Comm'n. Order at 26, CR at BN 20917. The Commission, therefore, calculated the cost of

[8] To calculate potential margins, or profits, the Petitioners used their cost-based bids as an assumed cost of generation. The Commission qualified its reference to these data as "implied" cost of generation because, as explained by the Commission, the cost-based bids do not represent the true marginal cost (out-of-pocket cost) of generating electricity at the Petitioners' generation plants.

generation during those periods when the Petitioners' implied costs were inflated significantly above the true marginal cost of generation to reflect costs based on increased actual coal costs reported by the Companies in their coal reports.

b. The Petitioners Overstated Their Marginal Cost of Generation and They Mischaracterized the PJM Requirements for Cost-Based Bids.

The Petitioners complain that their cost-based bids were allowed by PJM rules but were rejected by the Commission to calculate potential savings from self-generation. In an effort to confuse or mislead this Court, Petitioners seem to suggest that they had no choice but to place adders on their cost-based bids because of "strictly defined" PJM rules.

> 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."

Pet. Br. at 44 (quoting pre-filed rebuttal testimony of Cos. witness Mr. Stegall, JMS-R at 10, CR at BN 18549). They fail to inform the Court that PJM Manual 15 sets the upper limit for cost-based bids under unusual circumstances and includes adders that are optional but not required to be included in cost-based bids. These adders, which do not represent true variable or marginal costs of generation, have been opposed by State Commissions, customers, and the PJM Independent Market Monitor. FERC Order, Apr. 15, 2019, Docket No. ER 19-210-001, 167 FERC ¶ 61,030.[9] Moreover, contrary to the implication of the Petitioners' reference to "strictly defined" PJM rules, the adders, which the West Virginia Commission has determined are not appropriate to represent

[9] "The IMM explains that short-run marginal costs consist of fuel and variable operation and maintenance costs associated with other consumables used at the time of electric production . . . The IMM recommends that . . . the PJM Tariff define cost-based offers as equal to short-run marginal costs, which should be defined as 'cost of inputs consumed and the net costs of byproducts created at the time of electric production.' The IMM recommends that . . . maintenance costs are not short-run marginal costs, but rather are avoidable costs. . . The PJM Load Coalition similarly argues that . . . such costs are not short-run marginal costs."

the true marginal cost of generation (out-of-pocket costs) are not required to be included in cost-based offers.[10] Jan. 9, 2024 Comm'n. Order at 24-25, CR at BN 20915-20916.

The Petitioners misstate and obfuscate the validity of the Post-Hearing Exhibit 4 data and attempt to mislead the Court regarding the Commission review and use of the data. Petitioners claim that the Commission failed to heed their warnings that the data had limited evidentiary value in its native form, and depended on multiple speculative assumptions. The Commission fully considered but disagreed with the Petitioners' warnings. The Commission discussed the reasons that the Petitioners' warnings were nothing more than an attempt to redirect the Commission's attention from the sobering story told by the data. Jan. 9, 2024 Comm'n. Order at 23-25, CR at BN 20914-20916.

A necessary variable in determining the cost to customers of imprudent coal supply decisions is the cost of self-generation, or what that cost could have been if the Petitioners had not allowed their coal supplies to dwindle to the point that they could not economically self-generate. Here, because the Petitioners had not purchased sufficient coal or maintained sufficient inventories over time, the Commission looked to the actual costs of coal delivered into the Petitioners' power plants by month over the period of review. The Commission obtained this information from Petitioners' coal reports, filed with the Commission, containing coal delivery data covering the relevant period for the cases being considered in this appeal. Coal Reports, Feb. 2021 – Feb. 2023, CR at BN 21054-21612. The coal reports are not contrived or spur-of-the-moment data sets dug up by the Commission. The reports are a statutorily required detailed accumulation of data

[10] "Market Sellers may elect, but are not required, to include maintenance and operating costs in their cost-based energy offers." PJM 2023 VOM Education Session slides, specifically, https://sdc.pjm.com/-/media/committees-groups/committees/mic/2023/20230510-special/item-01---vom-education.ashx. PJM Website last accessed March 13, 2024. Also see PJM Manual 15, generally.

providing information on the volume, quality, source, and cost of each delivery of coal into each generating plant of the Petitioners. West Virginia Code § 24-2-14 provides:

> (a) On a monthly basis and within thirty days of the last day of the month for which the information is required, each electric utility shall submit to the commission, on an individual basis for each power plant it owns or operates, a list of each purchase or other acquisition of coal or other fuel at the plant, the tonnage or other amount of each purchase or acquisition, the fuel's cost at the mine or other source, fuel handling costs (including but not limited to costs of loading and unloading such fuel and the cost of storage thereof), fuel transportation costs and the method or mode of such transportation, the name of the person, firm or corporation from which the fuel was purchased or otherwise acquired, the mine or other source of the fuel, the heat value of the fuel expressed in British Thermal Units, the sulfur and ash content of the fuel, the fuel's actual cost per one million British Thermal Units; the terms of purchase of such fuel; whether the fuel was purchased under a long-term or short- term agreement or was a spot market purchase; the terms of purchase of such fuel; the date of execution of any contract pertaining to the purchase of such fuel and the expiration date of such contract; if the fuel is coal, the amount mined underground and on the surface; and whether the source of the fuel was an affiliated or nonaffiliated person, firm or corporation.

The coal reports show the actual cost of coal deliveries into each plant of the Petitioners every month over the period for which the Commission was considering the cost of market purchases as compared to the reasonable cost of self-generation. Although coal costs before the period when the Petitioners allowed their stockpiles to dwindle to imprudently low levels were in the range of $40 per ton, the Commission used the monthly reports to recognize that, as the PJM market prices were increasing, so was the cost of coal. The cost of coal for some deliveries during the period under review exceeded $100 per ton. By using the average monthly cost of coal purchases in a rising coal price market, the Commission gave the Petitioners the benefit of the doubt that the historical cost of coal would have increased throughout the period of review as the lower-cost coal in inventory was used and replaced by higher-cost coal. The Commission's use of the actual cost of coal deliveries in a rising-cost coal market overstates the cost of self-generation from what it would have been if the Petitioners had acquired more of the lower-cost coal before

the price increases began and before the Petitioners lost market and bargaining power for coal supplies because of their imprudent actions. The disingenuous attempt by Petitioners to claim no knowledge of their own reports and to claim that the Commission should not consider information filed by the Petitioners themselves is absurd. Petitioners are most certainly aware of the coal reports that they prepare and file with the Commission.

c. The Post-Hearing Exhibit and Coal Reports Show that the Petitioners Used Adders in a Way That Reduced Self-Generation.

Petitioners presented their purported cost of generation in the cases below. The Commission considered those costs, including the adders used by Petitioners, and disagreed with their proposed costs because they did not represent the marginal cost of generation. The Commission explained in detail why adders to cost-based bids, although allowed by PJM, do not reflect the marginal "out-of-pocket" costs of generation. CR at BN 20914-20916. The Petitioners' witnesses admitted that they implemented adders during the period of review to keep their plants out of the market because of insufficient coal inventories and incoming supplies:

> [T]he Company started using adders, which is an attempt to conserve coal for when it's more valuable in the future.

Sept. 5, 2023 Tr. (Plewes testimony) at 197, CR at BN 18931.

> So what you do, this is again why I think that adders were well done, is that you ensure that you don't generate when prices are lower than you expect the prices to be in the future in the market.

Id. at 214, CR at BN 18948.

> So for example, if prices are, say, at $80, as they were in October . . . wouldn't it be great to just burn as much coal as possible . . . because every megawatt hour you generate with your coal is giving you a savings for your customer over getting it in the market. But if your coal is constrained, you have to think about, well, what happens if in December and January, for example, when prices are expected to be higher. . . . What if the power prices are $200, as they exceeded later in 2022? . . . if you burn it to save some consumers some money in October, and you don't have

> a way to replace it, and you're not available when you call for an event, thousands of dollars per megawatt hours lost.
>
> And so what you do is you put in adders. You don't just take the units out, you put in adders that represent the opportunity cost of that coal in the future.

Id. at 214-15, CR at BN 18948-49.

The Commission stated in the Order: "This testimony, while applauding the Companies' efforts to conserve coal by putting adders on their "cost-based" bids to reduce the likelihood of getting into the market, demonstrates that the failure to minimize market purchases and to maximize self-generation was a direct result of a failure to maintain adequate coal stockpiles and incoming coal supplies to self-generate even when doing so could reduce ENEC costs." Jan. 9, 2024 Comm'n. Order at 25, CR at BN 20916.

Contrary to the arguments of the Petitioners, in evaluating the data supplied by the Petitioners, the Commission accepted the cost numbers for what they were, efforts to jack up cost-based bids to ensure they were not dispatched by PJM because of a lack of coal in inventory and a lack of incoming coal supplies.

The Petitioners' argument to the Court helps demonstrate with actual data that the questionable adders were employed by the Petitioners to keep their generation out of the market. On page 44 of their Initial Brief to this Court, the Petitioners focus on a single month of the Review Period to demonstrate the differences between their imputations of generation costs with non-variable adders and the Commission calculations of true, variable marginal costs.

	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

First, the Petitioners' representation of Fuel Expense at $73.44, which includes PJM allowed adders, is grossly overstated as compared to realistic marginal fuel costs. The $27.77 value used by the Commission was based on the actual cost of coal delivered to the Mountaineer Plant as reported by the Companies. Moreover, the Commission tested the reasonableness of its calculation by comparing it to the cost of fuel delivered to the Petitioners' plants as they had reported to the Energy Information Administration (EIA). Id.at 19, CR at BN 20910. In every month from March 2021 through December 2022, the calculated cost of generation at Mountaineer based on the cost of fuel deliveries to the plant as reported in the EIA data and as based on the statutorily required coal report data compared very closely. The cost based on the coal reports was slightly higher than costs based on EIA data until December, 2022, after which the costs based on the coal report data went noticeably higher than the costs based on the EIA data. The Commission used the higher coal report cost data for its calculations, thereby reducing the calculation of excess costs incurred by the Petitioners when they kept their plants out of the high-priced PJM Market due to their lack of sufficient coal inventories and incoming supplies.

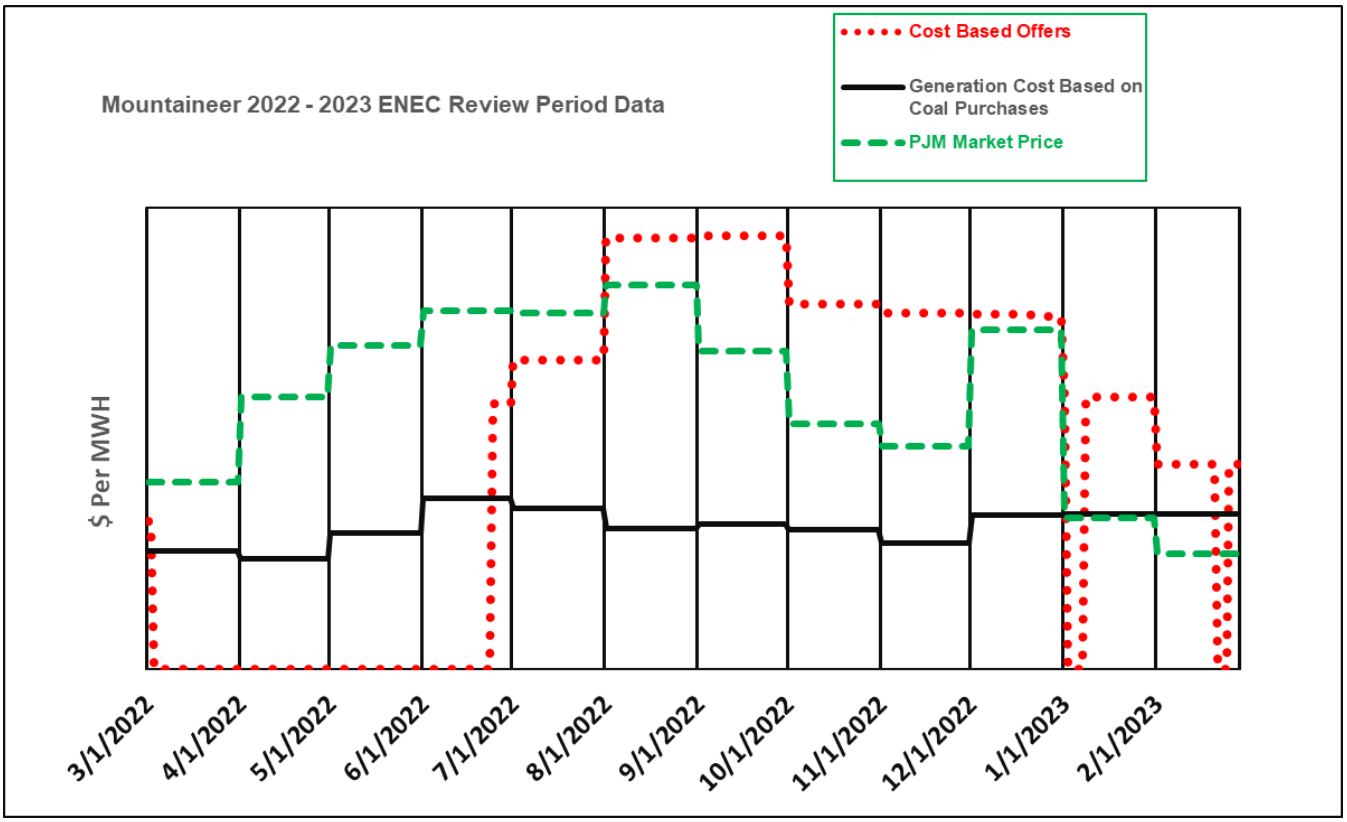
The consumable costs (Scrubber Chemicals and Emission Allowances) are extraordinary and simply lack any evidentiary support. As fully explained in the Order, the Commission added $4.00 per MWH to arrive at a truly variable marginal cost of generation. This $4.00 cost used by the Commission is more in line with the evidence presented to the Commission in the 2023 ENEC Case. In their filing, Petitioners included data showing that the actual cost of consumables and allowances for the twelve months ended February 28, 2022, were $27,703,000 for APCo and $3,232,000 for Wheeling.2023 ENEC, Petition, Apr. 28, 2023, SAS-D attachment 1, CR at BN 16510. Actual coal-fired generation for the period was 11,367,000 MWH for APCo and 1,574,000 MWH for Wheeling. Thus, for the actual twelve months ending Feb 28, 2022, the cost of consumables and allowances was $2.44 per MWH for APCo and $2.05 per MWH for Wheeling.

The Commission gave the Petitioners the benefit of the doubt and increased its cost of consumables and allowances to $4.00 per MWH. It is simply unfathomable that the Petitioners could have reasonably calculated a cost-based-bid that included consumables and allowances of $17.37 per MWH for Mountaineer unless that bid included very high costs and assumed that there would be very few MWH actually generated. If that was the case, it is a clear example of jacking up a cost-based bid to keep generation out of the market because of a lack of adequate fuel inventories and incoming fuel supplies.

Finally, to add the cherry on top of their bid, they added the "PJM Manual 15, Sec. 2.9 Amount." They likely were embarrassed to call that amount what it really is, an unspecified 10% adder that PJM allows without any justification or representation that it can in any way, shape, or form be considered a marginal cost of generation. After Petitioners calculate costs that are far in excess of the marginal cost (out-of-pocket cost) of generation, ($73.44 + $2.77 + $17.37 = $93.58)

they add another 10%, or $9.36, to their "cost-based" offer, just because PJM allows them to do so.

Because the Petitioners included data in Post Hearing Exhibit 4 showing their offers as compared to the Commission calculations at Mountaineer, it is appropriate to show the Court the differences at an average monthly level.[11]



The chart represents data derived from numbers supplied in Post-Hearing Exhibit 4 and marginal cost of generation numbers calculated by the Commission. To briefly explain, the red dotted curve is the so-called "cost-based" bids submitted to PJM by Petitioners. When the red

[11] The Commission indicated that it would treat the bidding data as confidential due to the competitive features of the PJM Market. Petitioners offered cost data to this Court on page 44 of their Initial Brief. Nevertheless, the Commission has not identified the scale of the vertical axis on the Mountaineer Generating Plant 2022-2023 ENEC Review Period chart. It is the range and relative levels of the data that is important to demonstrate the potential cost savings of self-generation and the self-inflicted dispatch exclusions due to Petitioners' bidding necessitated by the lack of sufficient coal supply to run the plant when it would have been economical to do so.

dotted curve goes to zero, that means that there were no bids or offers to sell from the plant into the PJM Market. The dark solid curve shows the more realistic and reasonable costs of generation calculated by the Commission. This curve shows a calculated cost-based bid that Petitioners could have offered if they had prudently managed their coal supplies so that they could have bid into the PJM Market at a cost that was based on the actual cost of coal delivered to the Mountaineer plant each month. The green dashed curve represents the PJM market price.

Whenever the green dashed curve is higher than the solid black cost curve, Petitioners could have self-generated at a lower cost than purchasing power if they had prudently managed their coal supply to be able to use their plants to hedge against PJM market prices.[12]

When the bid price used by Petitioners, represented by the red dotted curve, (or their alternative high market bid) is above the PJM market price, the plant would not have been accepted in the market, thereby losing the opportunity to save money by self-generating instead of buying expensive purchased power.[13]

The Commission explained the unreasonableness of many of the Petitioners' cost-based offers and why those numbers could not reasonably be used to determine the savings that could have been achieved at a more realistic cost of generation.

[12] The Commission calculated the generation cost for each month; however, it did not assume potential generation during those periods when Petitioners bid zero presumably showing that the plant was not available for generation.

[13] One curve not shown in the interest of reduced clutter is the market-based bid. While it could be either higher or lower than the cost-based bid, in most cases it was also excessively high to keep the plant out of the market.

D. The Commission Correctly and Reasonably Authorized Amortization of the Allowed ENEC Under-Recovery Over a Period of Years with a 4% Carrying Charge to Avoid Rate Shock to Ratepayers.

After quantifying allowable and non-allowable net ENEC costs, the Commission then decided on the recovery of allowable costs after balancing the interests of the utilities, the ratepayers, and the state's economy. W. Va. Code § 24-1-1(b). For the period March 1, 2021, through February 28, 2023, the Commission approved $219.6 million in ENEC rate increases.[14] Including the most recent increase of $321.1 million granted in the order on appeal before this Court, the Commission has authorized ENEC-related increases of $540.7 million since September 2021. It was this last increment of $321.1 million that the Commission reasonably concluded should be spread over a period of years. The Commission rightfully and lawfully did this pursuant to W. Va. Code § 24-1-1(b). In balancing those interests, the Commission considered the magnitude of ENEC rate increases in recent years. WVEUG witness Stephen J. Baron testified that with ENEC and other rate increases, large commercial and industrial customers had seen a 25.45% increase in rates from March 1, 2019, through September 1, 2023, with another 60% increase requested in the cases below and Case No. 23-0298-E-P. 2023 ENEC, WVEUG pre-filed direct testimony of Mr. Baron (SJB-D) at 14-16, CR at BN 17606-17608. Residential and other ratepayer classes saw even larger increases.

To spread unusually large rate increases related to non-base rate factors over a period of years is not a novel concept and is consistent with the Commission's duty to weigh the interests of the utilities, the ratepayers, and the state's economy. W. Va. Code § 24-1-1(b). See e.g. Appalachian Power Co. and Wheeling Power Co.; Case No. 09-0177-E-GI, Comm'n. Order Sept.

[14] 2021 ENEC, Sept. 2, 2021 Comm'n. Order ($6.4 million); 2021 ENEC, Mar. 2, 2021 Comm'n Order ($31.4 million); 2021 ENEC, May 13, 2022 Comm'n. Order ($93 million); and 2023 ENEC, Sept. 13, 2023 Comm'n. Order ($88.8 million).

30, 2009. In the proceedings under review by this Court, the Commission elected to spread the portion of the total $540.7 million under-recovery of ENEC costs that it did not disallow, $321.1 million, over a period of years with a carrying charge to prevent rate shock to customers while still considering the interest of the Petitioners.

Petitioners are correct that the Commission established ENEC proceedings to provide a mechanism for return of reasonable and prudent fuel costs, and ENEC cases are cost recovery vehicles only. Pet. Br. at 50. Nowhere does the Commission state, however, that a utility has a right to full recovery of extraordinary levels of under-recoveries in a one-year period. There have been instances when the Commission spread deferred extraordinary costs over a period of years, and there also have been times when the Commission spread over-recoveries over a period of years, allowing utilities to keep customer money over an extended amortization period. See e.g. Black Diamond Power Co., Case No. 22-0740-E-P, Nov. 29, 2022 Comm'n. Order; Black Diamond Power Co., Case No. 23-0690-E-P, Nov. 8, 2023 Comm'n Order. Decisions on the number of years over which to spread both regulatory assets (amounts owed to utilities by customers) and regulatory liabilities (amounts that utilities owe to customers) are fact and circumstances-based and decided by the Commission on a case-by-case basis. In the cases below, the Commission decided that a ten year amortization and a 4% carrying cost were reasonable and fairly balanced the interests pursuant to W. Va. Code 24-1-1(b). Even the Petitioners recognized the potential hardship on customers from the extraordinarily large ENEC rate increase request when they offered amortization or securitized debt financing of the under-recovery to reduce the annual rate impact on customers. The Commission amortization requirement balanced the interests as opposed to the thumb on the scale proposals of the Petitioners which gave the appearance of balance, but not the reality.

Petitioners also questioned the 4% carrying charge granted by the Commission. The Commission's Rules for the Construction and Filing of Tariffs, 150 C.S.R. 2, do not provide for carrying charges for recovery of deferred costs. The Commission, historically, has considered a carrying charge when requiring an amortization of a large deferred cost, but a carrying charge is not a guarantee and has not always been allowed. In recent years, these carrying charges, when allowed, have been at a 4% rate.[15] Until recently, even 4% tipped the scale in the favor of the utilities. Currently, market-based interest rates for low-risk debt is not far removed from the 4% carrying charge allowed by the Commission. If one considers the allowable under-recoveries as a debt owed to Petitioners by customers, it is low-risk debt because it is incorporated in the rates for electric service. A customer's refusal to pay causes the customer to lose electric service, a strong incentive to pay. Even if customers leave the system, the deferred cost and the carrying charge are not stranded from recovery by Petitioners because the rate increment assures recovery and is picked up by remaining customers.

Even given the recent increase in bank overnight interest rates, low-risk government security interest rates, and interest on corporate bonds, a carrying charge in the 4% range is not unreasonable or punitive. From March 2021 through February 2024, the average interest yield on 10-year U.S. treasury Bonds has been only 3%. Although the February 2024 rate was 4.2%, the trend since October 2023 has been downward.[16] Over the same period, the highest rated triple A,

[15] Monongahela Power Co. and The Potomac Edison Co.; Case No. 23-0735-E-ENEC (Companies requested a 4% carrying charge in their petition); Monongahela Power Co. and The Potomac Edison Co., Case No. 17-0296-E-PC, Comm'n. Order Jan. 26, 2018 at 66 (Companies granted a 4% carrying charge for deferred Temporary Surcharges for industrial customers); Appalachian Power Co. and Wheeling Power Co., Case No. 13-0557-E-P, Comm'n. Order Mar.18, 2014 at 14 (4% carrying charge).

[16] Federal Reserve Economic Data, Federal Reserve bank of Saint Louis, link https://fred.stlouisfed.org/series/GS10, viewed 3/13/2024.

or AAA rated corporate bond interest rates have averaged 4%. Even lower-rated B double A, or BAA rated corporate bond interest rates have averaged only 4.9% from March 2021 through February 2024.[17] These interest rates are all readily available in the public domain.

A carrying charge on amortization of unrecovered deferred costs has been allowed by the Commission but is never guaranteed. Any carrying charge and term of amortization are dependent on circumstances and the Commission's judgment of a fair balancing of interests. The Commission applied its reasoned judgment fairly in a non-arbitrary, non-capricious, and non-punitive manner to arrive at a fair and reasonable 4% carrying charge rate.

VI. CONCLUSION

The arguments of the Petitioners to the Commission and this Court are a broken record. We were running out of coal. Our inventories were declining to dangerously low levels. We could not get adequate supplies. We had to manipulate our energy market bids upward to keep our units out of the market because, due to our coal shortages, we could not have generated if PJM had dispatched us. We had to buy hundreds of millions of dollars of purchased power, because we could not use our billion-dollar generating plants to self-generate due to our lack of coal. But it is not our fault. We should not have to pay for our mistakes. Instead, our customers should have to pay even though they are innocent bystanders who had no choice in the matter. The Commission did not accept these excuses, and neither should this honorable Court.

The Commission properly held that the Petitioners acted imprudently when purchasing, or failing to purchase, coal from its suppliers during the timeframes reviewed in the 2021 ENEC, 2022 ENEC, and 2023 ENEC below. Petitioners relied too heavily on costly purchased power from PJM at the expense of the ratepayers of West Virginia.

[17] Id. https://fred.stlouisfed.org/series/AAA and https://fred.stlouisfed.org/series/DBAA.

The Commission ruled appropriately on the evidence before it and considered what the Petitioners knew or should have known at the time they were making coal supply, electric generation, and purchased power decisions. Petitioners failed to take seriously, and failed to plan for, the Commission's suggestion that generating more power themselves would be more economical than purchasing power from PJM. Petitioners failed to act timely to avoid costly fuel purchases and then sought to pass through the costs of their inaction to captive ratepayers.

The Commission did not violate the due process rights of Petitioners by requesting Post-Hearing Exhibit 4 or relying on that exhibit to calculate savings that could have been achieved if Petitioners had prudently managed their fuel supplies and had been able to self-generate when PJM market prices peaked during the review period. Likewise, the Commission did not violate the Petitioners' due process rights by relying on coal reports filed by the Petitioners to determine actual coal costs delivered to Petitioners' plants during the review period. Neither did the Commission err by calculating the potential savings of self-generation because the Petitioners did not have the amount of coal that would have been needed to minimize their purchased power costs. The lack of sufficient coal was caused by a history of imprudent fuel supply practices that were the direct cause of having insufficient coal supplies. As the Petitioners' own witness testified. It's a simple calculation that is used all the time if imprudence is found.

1. You know what actually happened.

2. You compare that to what would have happened absent the imprudence.

3. You use that comparison to determine the harm caused by unreasonable practices.

Imprudent and unreasonable actions and inactions that led to deficient coal supplies should not be rewarded by accepting Petitioners' argument that "we could not have generated at the levels the Commission calculated, because we did not have enough coal." Finally, the Commission did not

act punitively by spreading rate recovery over a period of years with a 4% carrying charge. The Commission Order reflects the Commission's weighing of the interests of utility customers, the general interests of the State's economy, and the interests of the Petitioners and fully explains its reasoning, findings, and calculations.

This Court should consider its historical decisions and standards regarding review of Commission orders. The Court should note recent United States Supreme Court decisions that held similarly to this Court's standards of review and affirm the Commission's final order of January 9, 2024. See e.g. Federal Elec. Reg. Comm'n. v. Electric Power Supply Ass'n, 577 U.S. 260, 136 S.Ct. 760 (2016).[18]

Respectfully submitted this 25th day of March 2024.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
By Counsel,

/s/*Susan M. Stewart*
SUSAN M. STEWART (WVSB# 7342)
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[18]

> The Commission, not this or any other court, regulates electricity rates. The disputed question here involves both technical understanding and policy judgment. The Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced. In upholding that action, we do not discount the cogency of EPSA's arguments in favor of LMP–G. Nor do we say that in opting for LMP instead, FERC made the better call. It is not our job to render that judgment, on which reasonable minds can differ. Our important but limited role is to ensure that the Commission engaged in reasoned decision making - that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice. FERC satisfied that standard.

577 U.S. at 295, 136 S.Ct. at 784.

CERTIFICATE OF SERVICE

I, Susan M. Stewart, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of Its Reasons for the Entry of its Order of January 9, 2024" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 25th day of March, 2024:

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