

BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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HUNTINGTON SANITARY BOARD,

Petitioner,

vs.

No. 24-637

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA and HUBBARD HEIGHTS
SUBDIVISION ASSOCIATION,

Respondents.

**BRIEF OF THE CITY OF ELKINS AND THE TOWN OF HARMAN
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*¹

The City of Elkins and the Town of Harman are similarly situated with the Huntington Sanitary Board in that both municipalities operate municipal utilities and have been deemed capable proximate utilities under the Distressed and Failing Utilities Improvement Act, *West Virginia Code* §24-2H-1 *et seq.* (the “Act”) by the Public Service Commission of West Virginia (“PSC”) and have been ordered to acquire the assets of distressed and failing utilities. Both have been, and continue to be, faced with known and unknown costs of the systems to be acquired without adequate resources to carry out the PSC’s orders under the Act due to the PSC’s failure to determine the cost of compliance with its orders and the impact of such orders as required by the Act.

The City of Elkins

The City of Elkins (“Elkins”) is a West Virginia Municipal Corporation and provides water service as a public utility through its Water Department to 3,981 customers within the City limits of Elkins and its environs, and to resale customers located in Randolph County. On May 25, 2023, in Case No. 22-0993-W-DU, *Whitmer Water Association, Inc.*, the Public Service Commission of West Virginia (“PSC”) issued its Final Order finding that the Whitmer Water Association, Inc. (“Whitmer”) is a distressed utility under the Act and that Elkins is the most suitable capable proximate utility as that term is defined under the Act.² In said Order, the PSC directed Elkins to acquire Whitmer through a mutual agreement and to file the acquisition

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(a), a municipality of the State may file an amicus curiae brief without the consent of parties or leave of the Intermediate Court or the Supreme Court.

² Supp. App. 000044.

agreement for approval. On July 13, 2023, in Case No. 23-0590-W-19A-PC, *Elkins Municipal Water Department and Whitmer Water Association, Inc.*, Elkins and Whitmer filed an Asset Purchase Agreement (“Purchase Agreement”) wherein Elkins agreed to acquire Whitmer’s water treatment, storage, and distribution system “conditioned upon receipt of appropriate funds for the acquisition and upgrade of the Whitmer Water Facilities.”³ On September 13, 2023, the PSC approved interim rates for Whitmer, a modified Interim Operating Agreement and the Purchase Agreement.⁴ On February 1, 2024, the PSC approved the interim rates as final rates and required the parties to close on the Purchase Agreement within thirty days.⁵

Because of unknown and unexpected issues with the Whitmer System and the lack of grant funding and sufficient revenues to cover the cost of operations, Elkins has been unable to close on the acquisition of the Whitmer system.

The Town of Harman

The Town of Harman (“Harman”) is a West Virginia Municipal Corporation and provides water service as a public utility to 200 customers within the city limits of Harman, Randolph County and its environs. One of its customers is Craig F. Bessinger, doing business as Bessinger Rental Management (“Bessinger”) which purchases water for resale to its tenants residing in its mobile home park.

By Order dated October 7, 2022, in Case Numbers 20-0707-W-DU and 20-0997-W-X, *Craig F. Bessinger, doing business as Bessinger Rental Management*, the PSC designated

³ Supp. App. 000059.

⁴ Supp. App. 000111.

⁵ Supp. App. 000124.

Bessinger as a failing water utility pursuant to the Act, and ordered Harman to acquire Bessinger's failing water system.⁶

On October 17, 2022, Harman filed a Petition for Reconsideration of the October 7, 2022 Order based upon its lack of resources to acquire Bessinger's water system.⁷ In an Order entered February 8, 2023, the PSC granted the Petition for Reconsideration.⁸ Harman has repeatedly met with representatives of funding agencies to obtain grant funds to enable Harman to acquire the Bessinger water system. Those efforts have been unsuccessful.

Like the Huntington Sanitary Board, both Elkins and Harman are faced with known and unknown costs of the systems to be acquired without adequate resources to carry out the PSC's orders under the Act due to the PSC's failure to determine the cost of compliance with its orders and the impact on the capable proximate utilities and their customers prior to the entry of the acquisition orders.

⁶ Supp. App. 000001.

Bessinger also provides sewer service to the residents of the mobile home park, but by order entered May 3, 2020 in Case No. 19-0313-WS-C, *Bonnie and Lewis Ward v. Craig F. Bessinger*, the PSC stated as follows:

The record in this case established that BRM has ten sewer customers. Transcript of evidentiary hearing (Tr.) at 34. The Commission has jurisdiction over sewer systems servicing twenty-five or more persons or firms other than the owner of the sewer system. W. Va. Code §24-2-1. The BRM system does not fall under the jurisdiction of the Commission and, therefore, the Recommended Decision should not have found that BRM is a sewer utility over which the Commission has jurisdiction. The Commission will modify Conclusion of Law No. 1 of the Recommended Decision to limit Commission jurisdiction over BRM to only the water utility.
Supp. App. 000162

⁷ Supp. App. 000012.

⁸ Supp. App. 000033.

SUMMARY OF ARGUMENT

This appeal represents a challenge to the PSC's failure to comply with the Distressed and Failing Utilities Improvement Act under the provisions of *West Virginia Code* §24-2H-5(b) by having failed to perform a sufficient analysis of the financial, managerial, operational and rate demands that may result from the proceeding to determine whether a utility qualifies as a capable proximate utility as required by *West Virginia Code* §24-2H-5(b)(3).

ARGUMENT

THE PUBLIC SERVICE COMMISSION EXCEEDED ITS POWER BY COMPELLING THE HUNTINGTON SANITARY BOARD TO ACQUIRE THE ASSETS AND RESUME THE OPERATIONS OF A DEFUNCT HOMEOWNER ASSOCIATION WITHOUT COMPLYING WITH THE DISTRESSED AND FAILING UTILITIES IMPROVEMENT ACT.

There is no dispute that the Hubbard Heights sewer system that was the subject of the proceedings before the PSC in the case below is an abandoned system. There is also no dispute that the Legislature, in enacting the Distressed and Failing Utilities Improvement Act, *West Virginia Code* §24-2H-1 *et seq.* (the "Act") has authorized the PSC to require a suitable capable proximate utility, as that term is defined in *West Virginia Code* §24-2H-5, to acquire a failing utility in appropriate circumstances.⁹

It is well settled that in reviewing the orders of the Public Service Commission, the Court will determine whether the Commission has exceeded its authority.

⁹ West Virginia Code §24-2H-7(a).

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. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these 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. Syllabus Point 2, *Monongahela Power Co. v. Public Service Commission of West Virginia*, 166 W. Va. 423, 276 S.E.2d 179 (1981).

And,

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. Syllabus Point 1, *Central West Virginia Refuse, Inc. v. Public Service Commission of West Virginia*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

The Huntington Sanitary Board ("HSB") emphasized as one of the bases for its appeal of the PSC's October 7, 2024 Order the fact that the PSC failed to comply with the requirement set forth at *West Virginia Code* §24-2H-5(b)(3) which states as follows:

(b) In determining whether a utility is a capable proximate utility, the commission shall consider the following factors:

*

*

*

(3) The financial, managerial, operational, and rate demands that may result from the current proceeding and the cumulative impact of other demands where the utility has been identified as a capable proximate utility; . . .

The record below reflects the fact that the PSC and its Staff did not perform an analysis of the financial, managerial, operational, and rate demands that may result from the determination of the HSB (or any of the other parties) as being a capable proximate utility and the impact of other demands would have. Under questioning by the Administrative Law Judge (“ALJ”) at the first hearing in this matter, Staff witness Crace made it clear that the Staff was not equipped to and did not have the resources to conduct the type of study that would need to be performed in order to satisfy the requirements of *West Virginia Code* §24-2H-5(b)(3).¹⁰ In fact, Mr. Crace affirmed the ALJ’s suggestion that “. . . you’re saying pick a capable proximate and then let them figure out how they want to fix it?”¹¹ At the second hearing, Mr. Crace went further and stated that “in the case of the severe degradation or failure of this one, that without knowing what the cost of construction is, you don’t know how to determine your rate impact.”¹²

In response to HSB’s assertion that the ALJ did not consider the financial impact on Huntington in the Recommended Decision, the PSC responded by referencing the cost recovery mechanisms provided under *West Virginia Code* §24-2H-9.¹³ The reference to possible cost recovery mechanisms does not satisfy the requirements of *West Virginia Code* §24-2H-5(b)(3) that the PSC consider the financial, managerial, operational, and rate demands that may result from the determination that HSB is a capable proximate utility and the impact of other demands would have on HSB and its customers. The PSC’s response and its decision in this case has the

¹⁰ App. 497 – 498.

¹¹ *Id.* at 498.

¹² App. 752-753.

¹³ App. 979.

effect of essentially “putting the cart before the horse.” As Mr. Crace testified,¹⁴ without knowing the cost of the acquisition, the availability, type of (*i.e.* grant and loan), and timing of the funding, the PSC would be unable to know the impact of its order.

The PSC did not consider the impact of selecting HSB to be a proximate capable utility and requiring HSB to work with the PSC Staff to develop and implement a plan and acquire the assets of the Hubbard Heights sewer system and resume operations.¹⁵ The PSC’s response to the Exceptions filed by HSB reflects that it is not fazed by the fact that HSB may not have access to any grant funds at all, or that any such funds may be delayed because of the demand for available grant funds through the Act far exceeds the amount provided by the current amounts permitted to be allocated by the Legislature. In its response to HSB’s exception to the ALJ’s Recommended Decision, the PSC stated:

The Recommended Decision recognized that as a political subdivision of the State, Huntington “has access to public funding.” Huntington asserted that the five million dollars of grant funding is not available due to WIJDC Project Nos. 2021W-1982 and 2021S-1980 and Case No. 20-1033-WS-DU. The Commission understands that applying for and receiving funds from the Distressed Utilities Account may take time. The Commission encourages Huntington to work with Staff to identify and secure other sources of funding.¹⁶

What the PSC did not mention in the language quoted above is the fact that the entire \$5 million in the Distressed Utilities Account for fiscal years 2024 and 2025 has been committed to other utilities. Nor did the PSC address the matter of how HSB will fund the costs associated with carrying out its October 7, 2024 Order.

¹⁴ *Supra*, fn. 12.

¹⁵ App. 942.

¹⁶ App. 980.

Both Elkins and Harman have had similar experiences with the PSC's failure to consider the impact on their systems and customers as a result of being ordered to acquire failing utilities under the Act and the insufficiency of grant funding to protect the customers of the capable proximate utility chosen by the PSC.

Elkins was ordered to acquire the assets of Whitmer, which had been abandoned by its Board.¹⁷ As in the HSB case, there was no consideration of the cost to carry out the Commission's Order or the impact on Elkins and its customers of doing so.

In order for Whitmer to transfer its property to Elkins, Whitmer had to reactivate its Board of Directors¹⁸ and adopt a plan of dissolution in accordance with *West Virginia Code* §31E-13-1301 *et seq.* Whitmer had no funds to pay for the legal work necessary to establish the plan of dissolution and no access to governmental funding. Thus, in order for Elkins to comply with the PSC Order, Elkins retained the services of its PSC attorney to prepare the necessary documents as well as provide assistance with funding agencies for both Whitmer and Elkins.

For customers on the Whitmer system to receive service until a transfer could take place, Elkins and Whitmer had to enter into an operation and maintenance agreement. Before Elkins could begin operations of the Whitmer system, it had to pay more than \$9,000.00 to prevent the termination of electric service and more than \$500.00 in overdue telephone and internet bills for service that is necessary for telemetry service for maintaining water storage. These actual and

¹⁷ Supp. App. 000044.

¹⁸ Whitmer's corporate status had been revoked by the Secretary of State's office in 2015 for failure to file its annual reports.

anticipated costs were itemized in Elkins’ April 30, 2024 Petition to Reopen Case No. 22-0993-W-DU and Case No. 23-0590-W-19A-PC and totaled \$1,294,325.¹⁹

Costs of Acquisition of Whitmer²⁰	
\$197,668.74	Incurring Costs to Date from Table 2
\$200,000.00	Legal and Accounting Fees to Resolve Tax Liability and close on acquisition
\$695,739.27	Projected Capital Costs from Table 3
\$200,917.00	Outstanding DWTRF Bond
\$1,294,325.01	Total Acquisition Costs

In its May 10, 2024 Order in Case No. 22-0993-W-DU and Case No. 23-0590-W-19A-PC, the PSC granted Elkins’ Petition to Reopen and recommended that the West Virginia Infrastructure and Jobs Development Council (“WVIJDC”) approve Elkins’ request for \$1,294,325 from the Distressed Utilities Account to the extent that the request qualifies under *West Virginia Code* §31-15A-9(i).²¹ Following the entry of the May 10 Order, representatives of Elkins met with representatives of the WVIJDC and the West Virginia Water Development Authority (“WDA”) to discuss the City’s eligibility for funding. During the discussions with the representatives of the WVIJDC and the WDA, the representatives of Elkins were informed that all of the money in the Distressed Utilities Account for fiscal years 2024 and 2025 have already been committed. Further, Elkins’ representatives were informed that the only amounts that would be potentially eligible for grant funding from the Distressed Utilities Account and other

¹⁹ Supp. App. 000129.

²⁰ *Id.* at 000141.

²¹ Supp. App. 000150.

sources of State funds would be amounts for capital costs. None of the funds expended by Elkins for legal services to reactivate the Whitmer system, the costs to reactivate electric and internet service, or the costs of operation and maintenance would be eligible for funding.

The representatives of Elkins also appeared before the Randolph County Commission and requested that the County Commission assist with the amounts owed by Whitmer. Following those meetings, the County Commission did agree to cover the cost of tax liens pending on Whitmer's property²² but declined to provide assistance to retire the bonded indebtedness or assist Elkins in covering operational and capital costs associated with the Whitmer system. Thus, the customers of Elkins are currently faced with taking on the burden of retiring the long term debt of Whitmer in excess of \$200,000, the cost of upgrading the Whitmer system and the cost of operating and maintaining a water system serving less than one hundred customers located more than twenty miles from Elkins.

None of this information was known to the PSC or to Elkins at the time of the May 25, 2023 Order requiring Elkins to acquire the assets of Whitmer.

In the case of Harman, on October 7, 2022, the PSC designated Craig F. Bessinger, doing business as Bessinger Rental Management ("Bessinger") as a failing utility under the Act and ordered Harman to acquire Bessinger's failing water system.²³

On October 17, 2024, Harman filed a Petition for Reconsideration of the October 7, 2022 Order based upon its lack of resources to acquire Bessinger's water system.²⁴ In its Petition for Reconsideration, Harman stated that "Harman believes it is unreasonable to be forced to take

²² The total amount of known State and Federal tax liens is in excess of \$9,000.00 to-date.

²³ Supp. App. 000001.

²⁴ Supp. App. 000012.

over Mr. Bessinger's failing utility when his plan is, and has been, to kick the residents of the MHP out of the park, and the result will be to cause Harman to become a failing utility itself."²⁵ Further, Harman argued that the PSC had failed to consider the financial demands on Harman as follows:

The Commission did not consider the financial demands on Harman as required by *W. Va. Code* § 24-2H-5(b)(3). Ms. Teter made it clear that the Town does not have enough money to meet its current obligations. Those obligations are manifold: Harman owes its professionals on whom it relies for accounting and legal assistance in excess of \$85,000. Among the accounts owed is \$10,600 to the accounting firm that prepares its annual state audit and another is audit is due. It owes its accountant who prepares its PSC reports and rate support approximately \$25,000 and its local attorney approximately \$29,000. The undersigned counsel's firm has not received payment for services since August 28, 2020. Under existing rates, there is no reasonable likelihood that Harman will be able to pay for the two years of invoices that are currently outstanding for legal services provided. Likewise, there is no reasonable likelihood that Harman will be able to pay the outstanding invoices from other providers of professional services.²⁶

Harman also argued that given the state of its own financial condition the devotion of any action, personnel, or expenditure to acquire, operate, maintain, repair and upgrade the Bessinger system would be adverse to Harman's existing customers and would violate *West Virginia Code* §24-2H-3(c).²⁷ *West Virginia Code* §24-2H-3(c) provides, among other things, that a capable proximate utility is one where operation of the distressed utility must be "nonadverse to the interests of the current customers of the nondistressed utility."

On February 8, 2023, the PSC granted the Petition for Reconsideration and ordered Harman to provide water service to residents of the mobile home park who apply directly to

²⁵ *Id.* at 000016-000017.

²⁶ *Id.* at 000019.

²⁷ *Id.* at 000022.

Harman for service.²⁸ The Order also required Bessinger to grant utility easements to Harman along its water lines or elsewhere if necessary to enable Harman to provide water service to Bessinger's former customers.²⁹ Since the entry of the February 8, 2023 Order, a total of seven (7) residents of the mobile home park have applied to Harman to receive public utility water service. However, without having legal access to the Bessinger property in order to serve these customers directly, service to those customers remains the responsibility of Bessinger. Bessinger is not permitted to terminate service for non-payment and Harman cannot terminate service to Bessinger for his failure to pay for the service which Harman is required to provide.

Harman has repeatedly attempted to negotiate a transfer of the property and easements upon, through, and under the mobile home park to enable Harman to satisfy the PSC's Orders without success. Harman's representatives have repeatedly met with representatives of funding agencies to determine the availability of grant funds to acquire the Bessinger water and sewer systems and to retire the amounts owed to professionals who have assisted Harman in the defense of the PSC proceedings under the Act and in negotiations with Bessinger. All of this activity has been unsuccessful and has caused Harman to incur thousands of dollars for professional services which its 200 customers cannot afford to pay. Further, the Town does not have sufficient resources to pay the filing fee for a condemnation action to acquire title to Bessinger's utility assets and rights of way. In the meantime, because Harman does not have access to the facilities on Bessinger's property to serve the residents or to terminate service for non-payment, the Town continues to provide water and sewer service to Bessinger without full

²⁸ Supp. App. 000033.

²⁹ *Id.* at 000042.

payment for services and without a payment plan. None of these issues were considered by the PSC at the time of determining Harman to be a capable proximate utility.

CONCLUSION

The fundamental issue in this case is not that HSB is, or is not, a capable proximate utility. Instead, the issue is that, in exercising its authority under the Distressed and Failing Utilities Improvement Act to determine the appropriate capable proximate utility, the PSC has failed to perform the necessary investigation and consideration of the financial, managerial, operational, and rate demands that may result from its order determining the capable proximate utility to take over the Hubbard Heights sewer system. Further, the PSC did not consider the cumulative impact of other demands on HSB, or any of the other capable proximate utilities. Instead, the PSC concluded that because of the larger size of the capable proximate utility, and the possibility of obtaining grant funding or low cost financing, the customers of HSB, like the customers of Elkins and Harman, should bear the burden of the failed utility, regardless of the cost. That approach is inconsistent with *West Virginia Code* §24-2H-3(c) wherein the Legislature stated that the operation of the distressed utility should be “nonadverse to the interests of the current customers of the nondistressed utility.”

The PSC’s October 7, 2024 Order in the Hubbard Heights case should be reversed and remanded to the PSC to conduct appropriate analyses of the impact of its decisions under the Act upon the capable proximate utility and its customers prior to ordering the acquisition of a distressed or failing utility. Such order should further require the PSC to reopen the prior cases where it has failed to adequately consider the impact of its determination of capable proximate utility. Such reopened proceedings should include an analysis of the cost of acquisition, the

actual availability and sufficiency of grant funds to the capable proximate utility, and the rate impact upon the customers of the capable proximate utility.

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Town of Harman

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December 12, 2024

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Petitioner,

vs.

No. 24-637

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
and HUBBARD HEIGHTS SUBDIVISION ASSOCIATION,

Respondents.

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, counsel for City of Elkins and Town of Harman, do hereby certify that copies of the foregoing Brief of The City of Elkins And The Town of Harman As *Amicus Curiae* In Support of Petitioner have been served upon the following parties and counsel indicated below by email, where available, and by First Class U.S. Mail, postage prepaid, on this 12th day of December, 2024:

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