IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-

HUNTINGTON SANITARY BOARD,
Petitioner

v.

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

BRIEF OF THE PETITIONER

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2. The Public Service Commission erred as a matter of law by compelling the Huntington Sanitary Board to acquire the assets and resume the operations of a defunct sewer system where its order failed to comply with the Distressed and Failing Utilities Improvement Act.

II. STATEMENT OF THE CASE

In January 2023, Tim Dillon, a resident, filed a petition for a determination that a homeowner association, Hubbard Heights Subdivision Homeowners Association, Inc. ["Hubbard Heights"], *administratively terminated almost a decade earlier*,[1] was a distressed or failing utility.[2]

[1] Although Mr. Dillon filed the petition on behalf of Hubbard Heights Subdivision Association, Inc., it was terminated for failure to file annual reports as of December 30, 2014. *See* https://apps.wv.gov/SOS/BusinessEntitySearch/Details.aspx?Id=86E98GtikqJ397f9hGtmrg==&Search=vDL7YWK2ARXH1BFEXYZNZw%3d%3d&Page=0 Indeed, Mr. Dillon testified, "We were unaware of the situation of even having a Homeowner's Association and or the sewer lagoons when we bought our house. We were not informed of that." App. 453. Moreover, PSC Staff acknowledged, "[T]here has been no operations … by the Association. No longer having a license to do business in the State of West Virginia … since 2014 … So their license to do business in the state is no longer valid." App. 466.

[2] App. 1. It is not insignificant that the PSC invited Mr. Dillon's petition and that once he realized the cost implications to the residents of Hubbard Heights, he expressed second thoughts:

> So when I was contacted by someone, a manager at the PSC, that said, hey, this law has been passed, possibly if someone there could file a petition to have your utility classified under this legislation, you should probably do so. So I said, okay, that sounds good. I said --- but he said, oh, there will be money available to do this. In other words, *I don't want to get hung from the tallest tree as the guy who said, who drugged the state into this, which they were already in it, but many people weren't aware of that*.
>
> And so now I'm hearing some rumblings after I did --- *because it was portrayed to me, oh, yes, there's money available. Now I'm starting to hear some things that, well, not so much.* This is

Later, the Town of Ceredo, Northern Wayne Public Service District, Kenova Municipal Sewer, Spring Valley Public Service District, Huntington Sanitary Board, and West Virginia-American Water Company were added as respondents.[3]

Over a year later, in April 2024, an Administrative Law Judge determined that Hubbard Heights was a failing utility and that the Huntington Sanitary Board should assume its operations.[4] The Huntington Sanitary Board filed exceptions with the PSC, arguing (1) the PSC lacked jurisdiction as Hubbard Heights has fewer than the statutorily required 25 customers and (2) the ALJ failed to consider proximity, financial impacts, the non-availability of funding, and other factors.[5] On October 7, 2024, the PSC rejected the Huntington Sanitary Board's exceptions.[6]

First, the PSC concluded that because it had exercised jurisdiction over Hubbard Heights over two decades earlier, it could continue to exercise jurisdiction even though (1) the PSC's involvement occurred in 2002, *more than two decades ago*, and (2) the statute under which the PSC was exercising jurisdiction was not enacted until 2020.[7] In other words, the PSC has held that it has jurisdiction under a law that did not exist when it last exercised jurisdiction over a utility, even though there is no record evidence that one of the statutory threshold for exercising such

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> going to come back. They're going to come back, and all you homeowners are going to be charged these fees to get all this done …
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> *I don't want to get hanged from a tree*. It doesn't sound like a good time. So anyway, just going to throw that out there, turn it out on the record. Thank you.

App. 695-696 (emphasis supplied).

[3] App. 20, 21, 33, 625.

[4] App. 122.

[5] App. 944.

[6] App. 975.

[7] App. 977-978.

jurisdiction (25 or more customers) currently exists.

Second, the PSC concluded that even though there are other closer utilities, it could require the Huntington Sanitary Board to incur over $4 million[8] in capital expense to provide services to Hubbard Heights because it is better capitalized than the utilities much closer in proximity.[9]

Third, although acknowledging that the Huntington Sanitary Board has no present ability to finance the extension of services to a small handful of residents in a dissolved subdivision association, the PSC suggests that the City of Huntington, a non-party, can do so in the future, and implies that it has the power to direct Huntington's "City Council" to "appreciate the interests of the public and the local economy" and raise rates to finance the capital improvements.[10]

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[8] Northern Wayne and Ceredo estimated the total project cost at $4.2 million. App. 164, 166, 284, 286.

[9] App. 978.

[10] App. 979. It is important to note that the Huntington City Council and the Huntington Sanitary Board are separate legal entities. W. Va. Code § 16-13-1(a)(1) provides, "Any municipal corporation and/or sanitary district in the state of West Virginia is hereby authorized and empowered to own, acquire, construct, equip, operate and maintain within and/or without the corporate limits of such municipal corporation … A sewage collection system and/or a sewage treatment plant or plants …" W. Va. Code § 16-13-2(a) provides, "The construction, acquisition, improvement, equipment, custody, operation and maintenance of any works for the collection, treatment or disposal of sewage and, in addition, for the collection and control of stormwater and the collection of revenues therefrom for the service rendered thereby, shall be under the supervision and control of a sanitary board appointed by the governing body as set forth in section eighteen [§ 16-13-18] of this article." W. Va. Code §§ 16-13-18(a) and (d) provide, "The governing body shall provide by ordinance the organization of the board, and that the custody, administration, operation and maintenance of such works are under the supervision and control of a sanitary board, created under this section" and "The sanitary board may establish bylaws, rules and regulations for its own governance." Municipal sanitary boards have the power to contract, but the power of the purse remains with the municipality. W. Va. Code § 16-13-3 ("The board shall have power to take all steps and proceedings and to make and enter into all contracts or agreements necessary or incidental to the performance of its duties and the execution of its powers under this article: Provided, That any contract relating to the financing of the acquisition or construction of any works, or any trust indenture as provided for, shall be approved by the governing body of the municipality before the same shall be effective."). The financing of municipal sewer systems is limited under W. Va. Code § 16-13-9: "Nothing in this article contained shall be so construed as to authorize or permit any municipality to make any contract or to incur any obligation of any kind or nature *except such as shall be payable solely from the funds provided under this article*." (emphasis supplied). For each bond issue, a statutory and contractual covenant with the bondholders arises, including the following: "Any resolution authorizing the issuance of bonds hereunder,

Alternatively, the PSC suggests it has the jurisdiction to order the City of Huntington, a non-party, to submit and prosecute a grant application to the Distressed Utilities Account.[11]

Fourth, the PSC has ordered the Huntington Sanitary Board to work with its Staff "to develop and implement a plan to acquire Hubbard assets and resume operations,"[12] which may prove difficult when the Board has no available funding. Moreover, no legal entity exists to convey the "Hubbard assets" to the Board as the Hubbard Heights Subdivision Homeowners Association, Inc., was administratively terminated by the Secretary of State on December 30, 2014.[13]

Finally, the PSC rejected having the handful of residents to be served who still need to do so to install home aeration units. Although the PSC did not dispute that home aeration units are an acceptable alternative,[14] it concluded, without citing any legal authority, that each homeowner would need a separate NPDES permit, and a utility would be required to monitor compliance.[15]

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or any trust indenture with any bank or trust company within or without the State, for the security of the bonds, may contain covenants with the holders of such bonds as to … Limitations or restrictions upon the issuance of additional bonds or other obligations payable from the revenue of such sewerage system or stormwater system, and the rank or priority, as to lien and source and security for payment from the revenues of the sewerage system or stormwater system, between bonds payable from the revenues …" W. Va. Code § 16-13-22g(e). The PSC has considered none of the preceding in ordering the Huntington Sanitary Board to finance, acquire, construct, and maintain a sewer system for Hubbard Heights.

[11] App. 980. The PSC also ignores that, in addition to the up-front capital expense, the Huntington Sanitary Board would be required to subsidize the ongoing operations due to the small number of Hubbard Heights customers.

[12] App. 980-981.

[13] *Supra* Note 1. Moreover, the "lagoons are on private property" and "are not owned by … Hubbard Heights. And the lagoons aren't on say one gentleman's property. They property lines, they intersect in the lagoon … As you can see, accessibility is an issue. The Homeowner's Association never acquired the property …" App. 505. As the witness for the Huntington Sanitary Board explained, requiring it to assume ownership over private property might require the exercise of eminent domain. App. 566. Yet, the PSC has provided no guidance on how the Huntington Sanitary Board is expected to acquire real property privately owned by citizens over which the PSC has no jurisdiction.

[14] Indeed, five to six Hubbard Heights residents have installed state and local-approved home aeration units. App. 449, 496, 534, 829, 830, 924.

[15] App. 981.

III. SUMMARY OF ARGUMENT

The PSC erred as a matter of law by asserting jurisdiction over a petition by a resident of Hubbard Heights based on its prior exercise of jurisdiction in an unrelated matter nearly two decades before the enactment of a statute affording it jurisdiction when there is no record evidence that the statutory threshold of 25 customers has been satisfied.

The PSC erred as a matter of law by compelling the Huntington Sanitary Board to acquire the assets and resume the operations of Hubbard Heights, where it failed to comply with the Distressed and Failing Utilities Improvement Act.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

R. App. P. 20 disposition is warranted because this appeal involves a 2020 statute under which the PSC has exercised jurisdiction without one of the express statutory predicates and has ordered the Huntington Sanitary Board to acquire, construct, and maintain a sewer system for likely less than 20 residents at a capital cost of more than $4 million without the financial and staffing ability to do so.

V. ARGUMENT

A. STANDARD OF REVIEW

"The detailed standard for our review of an order of the Public Service Commission … may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and (3) whether the substantive result of the Commission's order is proper."[16] Here, the PSC exceeded

[16] Syl. pt 1, *Central West Virginia Refuse, Inc. v. Public Service Commission of West Virginia*, 190 W. Va. 416, 438 S.E.2d 596 (1993) (citation omitted).

its jurisdiction, and the substantive result of its order is improper.

B. THE PUBLIC SERVICE COMMISSION ERRED AS A MATTER OF LAW BY ASSERTING JURISDICTION OVER A PETITION BY A DEFUNCT HOMEOWNER ASSOCIATION BASED ON ITS PRIOR EXERCISE OF JURISDICTION IN AN UNRELATED MATTER NEARLY TWO DECADES BEFORE THE ENACTMENT OF A STATUTE AFFORDING IT JURISDICTION WHEN THERE IS NO RECORD EVIDENCE THAT THE STATUTORY THRESHOLD OF 25 CUSTOMERS HAS BEEN SATISFIED.

A challenge to an agency's jurisdiction is a threshold matter that must be addressed before reaching the substance of any appeal and presents a question of law that is reviewed *de novo*.[17] Here, the PSC's order states, "In 2020, the West Virginia Legislature enacted W. Va. Code § 24-2H-1, et seq. (the Act) and thereby authorized the Commission to protect the consumers of distressed and failing water and wastewater utilities by ordering various corrective measures up to and including [the] acquisition of a failing utility …"[18] But before 2020, *the PSC had no such jurisdiction*.

This relatively new statute was enacted in 2020 as the "Distressed and Failing Utilities Improvement Act."[19] The statute was directed toward "water and wastewater utilities," which face "substantial capital investment needs to maintain and replace aging infrastructure with limited financial resources," have an inability "to maintain reasonable rates and ability to borrow funds to address such needs," and have "experienced a loss of customers resulting from decline in

[17] *Austin Gardens, LLC v. City of Chi. Dep't of Admin. Hearings,* 2018 IL App (1st) 163120, P16, 96 N.E.3d 367, 371, 420 Ill. Dec. 282, 286 (2018) ("As a challenge to jurisdiction is a threshold matter we must address it first, before we can reach the substance' of the appeal. 'Whether an administrative agency has jurisdiction is a question of law that is reviewed de novo.'") (cleaned up and citations omitted); *Modrytzkji v. City of Chicago*, 2015 IL App (1st) 141874, P9, 42 N.E.3d 14, 18, 397 Ill. Dec. 388, 392 (2015) ("A determination of the Department's jurisdiction necessarily informs the issue of jurisdiction in the circuit court and in the appellate court. Thus, we initially consider whether the Department had 'jurisdiction' or authority to act. Whether an administrative agency has jurisdiction is a question of law that is reviewed *de novo*.") (citation omitted).

[18] App. 976.

[19] W. Va. Code § 24-2H-1.

populations served which has created an additional rate burden on the remaining population."[20] The statute only applies to "water and wastewater utilities" and does not apply to entities that are not existing water or wastewater utilities.

Setting aside the undisputed fact that Hubbard Heights is not an operational water or wastewater utility, as it has been non-functioning for decades and bills no customers,[21] the Legislature has limited the PSC's jurisdiction over utilities. Specifically, W. Va. Code § 24-2-1(a)(8) provides, "The jurisdiction of the commission extends to all public utilities in this state and includes any utility engaged in any of the following public services … Sewer systems servicing *25 or more persons* or firms other than the owner of the sewer systems."[22] This Court has noted that "According to W.Va. Code § 24-2-1 (2003), the PSC's jurisdiction extends to sewer systems servicing 25 or more persons or firms other than the owner of the sewer systems."[23] It must exist *when the PSC exercises jurisdiction* to satisfy that jurisdictional prerequisite.[24]

"Interpreting a statute or an administrative rule or regulation presents a purely legal

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[20] W. Va. Code §§ 24-2H-2(c), (d), and (e).

[21] App. 465 ("[T]here was no funds being collected from the property owners for many years … The Association does not currently have or couldn't really provide any records of asset management plan or anything. They just didn't have anything available to them to say that these were the assets of the Association. There was no management. There's no board of directors. There's no operations manager. There was no infrastructure whatsoever on that side. And like I said, the financials, they were non-existent.").

[22] (Emphasis supplied).

[23] *Buda v. Town of Masontown*, 217 W. Va. 284, 290 n.10, 617 S.E.2d 831, 837 n.10 (2005).

[24] *See, e.g., Broadmoor/Timberline Apartments v. Public Serv. Comm'n*, 180 W. Va. 387, 389, 376 S.E.2d 593, 595 (1998) ("W. Va. Code, 24-2-1, states, in part, as follows: 'The jurisdiction of the [public service] commission shall extend to all public utilities in this state, and shall include any utility engaged in any of the following public services: … sewer systems servicing *twenty-five or more persons or firms* other than the owner of the sewer systems[.]' The record shows that, in addition to Broadmoor tenants, two local businesses were permitted to tap onto Broadmoor's lines. These businesses, a tavern and a laundromat, paid a consideration to Broadmoor for the tap.") (emphasis supplied).

question subject to de novo review."[25] "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."[26] The statute could not be more unambiguous – "The jurisdiction of the commission extends to … Sewer systems servicing 25 or more persons or firms." This Court needs to look no further than *Pool v. Greater Harrison Cty. Pub. Serv. Dist.*, 241 W. Va. 233, 821 S.E.2d 14 (2018), to determine that the PSC lacked jurisdiction in this case.

In *Pool*, this Court addressed a similar jurisdictional limitation on the PSC's authority:

> Prior to 2015, when any public service district wanted to change the rates it charged for water or sewer service, state law required the public service district to obtain approval from the PSC. In 2015, the Legislature adopted deregulation measures to limit the PSC's jurisdiction and to exempt larger public service districts from this requirement. After 2015, "larger" public service districts are statutorily defined as having at least 4,500 customers and are only required to obtain approval of a rate change from a local elected body, such as a county commission.[27]

A resident of a public service district filed a complaint with the PSC challenging a rate increase approved not by the PSC but by a county commission, arguing that there were only 4,010 customers.[28] The district opposed the resident's complaint, noting that it had 5,547 customers, combining its water and sewer customers, and the PSC agreed.[29] Affirming the PSC's decision to decline jurisdiction under a customer threshold similar to the one in this case, this Court held, "The Legislature plainly intended to limit the PSC's jurisdiction … *These statutes limited the PSC*

[25] Syl. pt. 2, *Mason Cnty. Pub. Serv. Dist. v. PSC of W. Va.*, 247 W. Va. 580, 885 S.E.2d 161 (2022) (quotation marks and citations omitted).

[26] Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

[27] *Pool, supra* at 236, 821 S.E.2d at 17.

[28] *Id.* at 236-237, 821 S.E.2d at 17-18.

[29] *Id.* at 237, 821 S.E.2d at 18.

to regulating only the rates charged by smaller public service districts."[30] Conversely, in this case, W. Va. Code § 24-2-1(a)(8) limits the PSC to regulating only public utilities servicing "25 or more persons or firms."[31] Indeed, the PSC's Staff conceded at the hearing if there are fewer than 25 sewer customers, the PSC lacks jurisdiction.[32]

The record evidence is that, in 2002, Hubbard Heights had 27 homeowners,[33] but as of January 2023, when the subject petition was filed and the PSC was asked to assume jurisdiction, "a portion of those customers [had] switched to home aeration systems,"[34] a portion of Hubbard Heights was no longer connected to the sewer system,[35] and approximately five or six homeowners had state and local regulatory approval to use home aeration systems.[36] Notably, the PSC's Staff testified, "There is no evidence that's been provided to staff to find out exactly how many people actually are still in the Hubbard Heights Association"[37] and it "was unable to determine the

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[30] *Id.* at 240, 821 S.E.2d at 21 (emphasis supplied).

[31] This Court has referenced the limited jurisdiction of the PSC in other contexts. *See, e.g., SWVA, Inc. v. Huntington Sanitary Bd.*, 2017 W. Va. LEXIS 920, *9 n.11 (2017) (memorandum) ("West Virginia Code § 24-2-1(b) provides that the PSC's jurisdiction over large, publicly-owned utilities, as defined in that section, *is limited to issues arising from the contexts enumerated in §24-2-1(b)(1) to -(b)(8).*") (emphasis supplied).

[32] App. 479 ("And if you're under 25, does the Commission have jurisdiction over you? … A. That is a legal issue, but I would say no.").

[33] *Id.*

[34] App. 939.

[35] App. 448 ("[T]hat part of our subdivision is no longer on this sewer pond or whatever it is. There was a pipeline that went through in 2016 that severed our connection with that. So the eastern part of … Hubbard's Heights, is now, pursuant to the Wayne County Health Department and the DEP, on aeration systems necessitated by the pipeline. … So there are about six homes on the eastern side of Hubbard's Heights, which most of those people don't even know they're in Hubbard's Heights, to be honest with you.")

[36] App. 449, 496, 534, 829, 830, 924.

[37] App. 465-466; see also App. 515 ("[Y]ou not know how many customers Hubbard Heights currently has? … Unknown.").

customer count … because Hubbard [Heights] has no billing."[38] Finally, Staff conceded that "PSC didn't have any knowledge whatsoever about the failing nature of Hubbard Heights prior to the initiation of this case."[39]

As in *Pool*, the PSC had previously declined jurisdiction over a residential sewer system with 23 customers because it did not have 25 "billed entities."[40] However, the PSC distinguished that case by reasoning, "County Home Park was already below the necessary twenty-five billed entities when the complaints were filed."[41] Of course, in this case, the number of "billed entities" was zero when the petition was filed.

The PSC reasoned that because it had exercised jurisdiction over Hubbard Heights in 2002, *eighteen years before the Distressed and Failing Utilities Improvement Act existed*, it somehow had jurisdiction in a wholly unrelated matter.

First, the PSC's jurisdiction ended in 2002 when it did nothing more than issue a certificate of convenience and necessity for what then was a 27-customer sewer system.[42]

Second, applying the PSC's rationale to the statutory limitation in the *Pool* case, the PSC could have exercised jurisdiction over the public service district with more than 4,500 customers as it had previously issued a certificate of convenience and necessity for that district. Noticeably

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[38] App. 520-521. Indeed, Staff testified, "The last annual statement was filed with the Commission in 2011, which had very little financial information on it, and there was no funds or nothing billed or received by the Association from the sewer department since the 2011 annual statement." App. 463-464.

[39] App. 520-521.

[40] *Bruce Schoolcraft v. Tyrone Tuel*, Case No. 13-0140-S-C, at 2 (Comm'n Order, March 19, 2013); see also App. 977.

[41] App. 977.

[42] App. 421. According to Staff, the PSC had taken no subsequent action involving Hubbard Heights since granting the certificate of convenience and necessity on June 4, 2002. App. 430-431. Indeed, the same tariff established by the PSC in 2002 has never been modified. App. 469.

absent from the PSC's order is a single authority for the proposition that a regulatory agency has continuing jurisdiction to entertain unrelated requests for relief under statutes not enacted almost two decades later. It is a straightforward concept that an agency's limited jurisdiction may exist in one context, such as granting a certificate of convenience and necessity, but does not exist in another context, involuntarily compelling a local sanitary board to spend over $4 million to assume the operations of the utility granted a certificate two decades earlier.

For example, in *State ex rel. PSC v. Town of Fayetteville*, 212 W. Va. 427, 573 S.E.2d 338 (2002), this Court differentiated between the PSC's jurisdiction in one context but not in another relative to municipal utilities:

> Resolution of the issues presently before this Court must be founded upon an accurate understanding of the extent of the exemption provided by West Virginia Code § 24-2-4b. The statute merely exempts municipalities from the rate approval sections of 24-2-4 and 24-2-4a; it does not deprive the PSC of jurisdiction over the municipality or eliminate the PSC's authority to otherwise address issues of the municipally operated public utilities. The rate making functions, statutorily limited with regard to municipalities, are not identical to the adjudicatory functions. In exempting municipalities from the extremely detailed rate procedures outlined in sections 24-2-4 and 24-2-4a, the statutory scheme does not remove municipalities from the authority of the PSC to exercise its general powers to require reasonable, non-discriminatory practices based primarily upon the cost of service.[43]

Huntington Sanitary Board does not dispute that the PSC properly exercised jurisdiction over Hubbard Heights in 2002 relative to issuing a certificate of convenience and necessity, but just as the PSC has no jurisdiction over municipal utilities relative to ratemaking though it has jurisdiction over those utilities relative to other matters, it had no jurisdiction over Mr. Dillon's complaint in January 2023 unless Hubbard Heights had 25 or more customers at that time.

An administrative body is vested with only that power granted by the Legislature. In other

[43] *Fayetteville, supr*a at 432-433, 573 S.E.2d at 343-344 (footnote omitted).

words, "[a]n administrative agency is but a creature of statute and has no greater authority than [that] conferred under the governing statutes."[44] "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication."[45]

"Courts have long recognized that 'the jurisdiction of the [c]ourt depends upon *the state of things at the time of the action brought*.'"[46] A tribunal's "jurisdiction … depends on the state of facts existing *at the time it is invoked*" and "continues [only] *until the final disposition or determination of the case* in the manner prescribed by law."[47] Once the PSC granted Hubbard Heights a certificate of convenience and necessity in 2002, its jurisdiction ended with that final disposition.[48] The proposition that two decades later, the PSC still had jurisdiction in a completely separate matter under a statute that did not exist in 2002 is like arguing that a court has jurisdiction over an Alaskan

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[44] *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 16, 483 S.E.2d 12, 16 (1996) (citations omitted).

[45] Syl. pt. 3, *Appalachian Reg'l Health Care, Inc. v. West Virginia Human Rights Comm'n*, 180 W. Va. 303, 376 S.E.2d 317 (1988) (quotation marks and citations omitted).

[46] *Heartland Express v. Gardner*, 675 N.W.2d 259, 266 (Iowa 2003) (alteration in original) (*quoting Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) (emphasis supplied).

[47] *State ex rel. Hinkle v. Skeen*, 138 W. Va. 116, 128-129, 75 S.E.2d 223 (1953) (emphasis supplied and quotation marks and citation omitted); *see also State v. Tomaskie*, 2007 MT 103, P22, 337 Mont. 130, 136, 157 P.3d 691, 694 (2007) ("[T]he jurisdiction of a court depends on the state of facts existing at the time it is invoked, and once jurisdiction of the person and subject matter attaches it continues until final disposition or determination of the case.") (quotation marks and citation omitted).

[48] *See, e.g., State ex rel. Rodriguez v. Industrial Comm'n of Ohio*, 67 Ohio St. 3d 210, 213, 616 N.E.2d 929, 1993-Ohio-89 (1993) ("We routinely have held that the filing of an appeal terminates an administrative agency's continuing jurisdiction.") (citations omitted); *Floyd v. Bd. of Comm'rs*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002) ("When the jurisdiction of an administrative agency has terminated, there is no longer any power to reconsider or change the determination, and even a statutory provision for continuing jurisdiction may be held to end when the matter is no longer pending before the agency.") (citation omitted).

resident with no current minimum contacts in West Virginia because it exercised jurisdiction over the resident twenty years ago when they lived in West Virginia.

"[A]dministrative agencies do not have [the] power to retain jurisdiction by merely declaring it."[49] For example, in *State ex rel. Hopkins v. Atchison, T. & S. F. R. Co.*,[50] a state utilities commission had previously exercised rate-making jurisdiction applicable to intrastate transportation of cattle. After rendering its decision, the utilities commission changed the rates it had set previously without complying with the statutorily mandated procedures for exercising jurisdiction. The Kansas Attorney General filed a mandamus petition challenging the commission's jurisdiction. The Supreme Court of Kansas agreed, stating, "It probably cannot be successfully questioned that the public utilities commission has power to continue from time to time any proceeding pending before it, to make incidental orders therein, or to make partial or supplemental orders in proper cases; but the commission does not have power, after a proceeding to fix railroad freight rates has been disposed of on an application pending before it, to retain jurisdiction and thereby defeat statutory requirements concerning notice."[51] In the court's single syllabus, it held, "The public utilities commission cannot, by declaring that it retains jurisdiction of a matter in which it makes a complete order fixing railroad freight rates in response to an application pending before it, defeat the necessity of giving the thirty days notice required by section 8341 of the General Statutes of 1915, in a subsequent proceeding …"

Likewise, in this case, the PSC cannot, by declaring that it retained jurisdiction for two

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[49] *Clawson v. State*, 49 Kan. App. 2d 789, 802, 315 P.3d 896, 906 (2013) (citation omitted).

[50] 108 Kan. 847, 197 P. 192 (1921).

[51] *Hopkins, supra* at 851, 197 P. at 193.

decades because it issued a certificate of convenience and necessity in 2002, exercise jurisdiction in a completely separate matter in 2023 under a statute that did not exist until 2022. Accordingly, the PSC's order should be set aside and the case remanded for dismissal of Mr. Dillon's petition.

C. THE PUBLIC SERVICE COMMISSION ERRED AS A MATTER OF LAW 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.

Even assuming the PSC had jurisdiction, it erred as a matter of law by compelling the Huntington Sanitary Board to acquire the assets and assume the operations of a defunct subdivision association where (1) other utilities have greater geographic proximity, (2) it has no financial capacity make the required $4 million capital investment, (3) the City of Huntington, which is necessary to undertake the capital project, approve the capital investment, enact a bond ordinance, exercise eminent domain, etc., is not a party, (4) an acceptable alternative of home aeration exists that many of the residents have already implemented, and (5) the PSC failed to comply with the provisions of the Distressed and Failing Utilities Improvement Act.

PSC Staff described lagoon ponds that had been completely abandoned and were non-functional.[52] Staff conceded that anyone assuming responsibility would start from scratch[53] and acknowledged "that the cost" of constructing a new sewage treatment system "has not been established at this time."[54] Likewise, regarding operation and management costs, Staff testified, "We are unable … to determine what the actual O&M costs associated with the system are."[55]

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[52] App. 491-495.

[53] App. 496 ("you're basically starting over from scratch").

[54] App. 481.

[55] App. 494 ("the estimated operation and maintenance costs are unknown to staff").

Finally, regarding environmental compliance, Staff testified, "[T]hey're operating without a permit … as there is no one to fine."[56]

Staff presented two alternatives: (1) "a possible decentralized or packaged plant" constructed and operated by "Northern Wayne, Kenova, Spring Valley, Ceredo, or Huntington"[57] or (2) "a new collection system" operated by Northern Wayne or Ceredo" with "Northern Wayne appear[ing] to be the closest tie-in point."[58] Additionally, Staff conceded that "individual or private aeration units located on each parcel may be an option."[59] Indeed, the testimony was as follows:

> I believe it's an option that should be weighed. I think one thing that's very important with this specific DU is that the question that engineering staff or staff has imposed in a distressed utility case is name approximate capable utility. In a situation like this, there needs to be a full blown study of the area to verify how many homes there are, how many services there would be, how many connections there would be. And that would be in the neighborhood of 6 to 12 months of a professional engineering firm evaluating all of that information. And engineering staff just does not have those tools in their tool belt, as well as the resources to be able to do a full blown --- basically a preliminary engineering report is what typically is attributed to disclosing all of these details.[60]

In other words, Staff conceded it had been unable to conduct a sufficient investigation to make an informed recommendation regarding the best method of addressing sewage treatment for Hubbard Heights, which caused the Administrative Law Judge to remark, "[A]ren't you setting up a catch-22 situation here? I don't know … who is the best until I know which method's going forward," to

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[56] *Id.*

[57] App. 496.

[58] *Id.*

[59] App. 497.

[60] App. 498.

which Staff agreed: "we do not have the resources to be able to say which direction to jump."[61]

Additionally, a Staff witness testified, "We don't --- engineering staff does not have enough information from every utility or this utility to be able to determine if a utility can even handle the flow or what the flow is from Hubbard, because we don't even know the number of customers. We have no idea the number of customers. We don't even know how far the lines need to go. We don't have any cost analysis. We have no --- we don't know which way it's going to go."[62]

As to why Huntington should even be considered when Northern Wayne and Ceredo are closer and obtained a $4.2 million estimate, the testimony was only because it is the "[m]ost financially capable … And getting the financing for a $4,000,000 project, give or take, would have a lesser impact …"[63] Candidly, the witness testified, "[I]t is indeed a question of which utility is going to get stuck. And I don't think there's anything better to describe that."[64]

As the Huntington Sanitary Board's witness testified, (1) it currently has no one licensed to operate a decentralized system;[65] (2) there was "[n]o chance whatsoever" that it had the staffing to operate and maintain a system at Hubbard Heights,[66] (3) "Huntington does not have the funds available to make any improvements or to operate a system like Hubbard Heights,"[67] (4) "It would break our bond covenants and our ability to bond currently,"[68] and (5) not only would bondholder

[61] App. 500.

[62] App. 774.

[63] App. 532-533.

[64] App. 533.

[65] App. 558.

[66] *Id.*

[67] *Id.*

[68] *Id.*

consent be required for additional funding, but the approval of the Huntington City Council.[69] Understandably, the witness testified that spending over $4 million to provide sewer service to less than 20 customers, or over $200,000 per customer, was not likely to be approved by the City Council.[70]

Ultimately, the ALJ swept aside these concerns, finding that although Ceredo, Northern Wayne, Kenova, and Spring Valley are closer in geographic proximity to Hubbard Heights, "remediating Hubbard would likely place a material burden on the customers of these small sewer utilities … Huntington … has the ability to spread the costs it incurs over a relatively large customer base."[71] Relative to the transfer of title, ignoring the undisputed evidence that the Association does not own any of the affected real property but that property has multiple private owners, the ALJ further held, "appointment of a receiver may be necessary to transfer title"[72] as if a receiver can transfer a title that does not exist and "the Commission will direct Huntington to acquire Hubbard," with "Huntington to formulate a plan to acquire Hubbard assets and resume operations in the Hubbard service territory" and "to file periodic status updates on its efforts to acquire Hubbard every 180 days until the plan it develops is implemented."[73]

Relative to the jurisdiction issue, the ALJ flipped the burden to the Huntington Sanitary Board: "the factual basis for the motion [to dismiss] is speculative."[74] Additionally, ignoring W.

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[69] App. 558-559.

[70] App. 564.

[71] App. 937.

[72] App. 937-938.

[73] App. 938.

[74] *Id.* Of course, this ignores not only the extensive evidence of record regarding the number of customers at the time the petition was filed, but conflicts with the ALJ's finding that, "Hubbard had

Va. Code § 24-2-1(a)(8), the ALJ held "the [Distressed and Failing Utilities Improvement] Act which is the operative authority for this proceeding does not include a minimum customer count,"[75] as if the Legislature intended to authorize the PSC to exercise jurisdiction over sewer systems with a single customer.

Just as the Commission's jurisdiction over all sewer utilities to those with 25 or more customers, its jurisdiction to order the acquisition of a failed utility under the Distressed and Failing Utilities Improvement Act is limited, specifically, the Act provides:

> In determining whether a utility is a capable proximate utility, the commission *shall consider the following factors*:
>
> (1) *The financial, managerial, and technical ability of all proximate public utilities providing the same type of service*
>
> (2) Expansion of the franchise or operating area of the acquiring utility to include the service area of the distressed utility
>
> (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* and
>
> (4) Eligibility of the capable proximate utility to receive state grant funding and federal grant funding in a similar manner as the distressed utility and
>
> (5) Any other relevant matter.[76]

Here, there is no dispute in the record that there has been no determination of (1) the type of sewage treatment system to be constructed, (2) the cost of constructing the sewage treatment system, (3) the cost of financing, operating, and managing the sewage treatment system, (4) the

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approximately 29 customers, but a portion of those customers [5 or 6 either of which would reduce the customers below the 25-customer threshold] have switched to home aeration systems." App. 939.

[75] App. 938.

[76] W. Va. Code § 24-2H-5(b) (emphasis supplied).

cost of operating the sewage treatment system, (5) whether personnel with the necessary licensure can be found to operate the sewage treatment system, (6) the impact of other rate demands, or (7) the identifiable source(s) of the funding required to construct a sewage treatment system for perhaps fewer than 20 customers estimated to cost over $4 million. Moreover, many of the Hubbard Heights residents have already implemented home aeration systems; there was no evidence that any of those systems were in non-compliance with applicable health, safety, and environmental regulations; and there was no evidence that the other residents could not install home aeration systems.[77] Finally, the PSC's acquisition order ignores other substantial practical impediments to the Huntington Sanitary Board's "acquisition" of the sewer system.

For example, W. Va. Code § 24-2H-8(a) provides, "After an order has been entered pursuant to §24-2H-7 of this code, the distressed utility and another acquiring public utility shall

[77] The PSC's dismissal of this alternative is illogical. First, the PSC complained that "Huntington is not willing to help convert the remaining customers," App. 981, but (1) Huntington has no duty to provide that assistance, (2) these residents live outside Huntington's corporate limits, and (3) there are other closer utilities that could provide that assistance. Second, the PSC noted, "each homeowner would need to obtain a … NPDES … permit would be liable for all sewage," *id.*, but there was no evidence that those requirements, which apply to residents throughout West Virginia who manage to comply, renders home aeration units an inappropriate alternative. Finally, the PSC claims, "a utility would still have to monitor the system to ensure compliance, *id.*, but (1) that was not the witness's testimony referenced in the PSC's order, and (2) it is simply wrong. The witness's testimony referenced monitoring a sewer treatment facility, not individual aeration systems. App. 797-798. Individual home aeration systems, common in West Virginia, are permitted by the DEP. WVDEP, Home Aeration Unit ("The Home Aeration Unit General Permit, WV0107000, provides expedited coverage for individual residential sewage treatment facilities with capacities of 600 gallons per day or less, and that will directly discharge treated waste water into the State's waters. Anyone constructing or operating a sewage treatment facility in this category must apply for site registration under this permit."). https://dep.wv.gov/WWE/permit/general/Pages/default.aspx; see also https://dep.wv.gov/WWE/permit/general/Documents/HAU/2024%20HAU%20General%20Permit.pdf. A real estate broker witness testified that home aeration systems cost between $10,000 and $15,000. App. ____. Another witness testified that homeowners are responsible under NPDES permits for home aeration systems. App. 764 ("My understanding is, through certain aeration units, your effluent is treated with UV or disinfectant prior to the effluent exiting an aeration style unit. And that requires each homeowner to have an approved NPDES Permit to discharge, and that meets permit limits … That assigns the homeowner liable for all sewage.").

file a petition with the commission under §24-2-12 of this code to approve the necessary operating agreement if such alternative is directed by the commission," but the "distressed utility" does not exist as a legal entity and the land on which the existing sewer treatment facilities are located is owned by non-parties.

W. Va. Code § 24-2H-8(a) further provides, "After an order has been entered pursuant to §24-2H-7 of this code, the failing utility and acquiring utility shall file a petition with the commission under §24-2-12 of this code, to approve the purchase price of the acquisition. Where the parties are unable to agree on an acquisition price, the filing may request that an evidentiary hearing be held so that the commission may determine the acquisition price and any other issues related to the acquisition," but with whom is the Huntington Sanitary Board to negotiate when the Hubbard Heights Homeowner Association does not exist as a legal entity?

W. Va. Code § 24-2H-8(c) provides, "As part of the proceeding, the acquiring utility may propose to the commission that it be permitted for a reasonable period of time after the date of acquisition, to charge and collect rates from the customers of the failing utility pursuant to a separate tariff, which may be higher or lower than the existing tariff of the distressed or failing utility, or may allow a surcharge on both the acquired and existing customers. A separate tariff or rate filing must be made by the acquiring utility before the commission will consider any increase in rates or allow a surcharge to be placed on the acquiring utility's acquired or existing ratepayers." How are less than 20 customers supposed to afford the rates necessary to recapture more than $4 million in capital investment?[78]

[78] Plainly, the Legislature contemplated that the entire cost could be placed on the customers of the failing utility. W. Va. Code § 24-2H-8(g) provides, "The capable proximate utility may propose one or more of the cost recovery methods or incentives set forth in §24-2H-9 of this code as part of its petition for approval from the commission." W. Va. Code § 24-2H-9 provides, "The commission may approve an

W. Va. Code § 24-2H-8(d) provides, "The failing utility shall cooperate with the acquiring utility in negotiating agreements with state and federal agencies, including, but not limited to, negotiation of hold harmless agreements, consent orders or enforcement moratoria during any period of remediation. In addition, the failing utility shall cooperate with the acquiring utility in obtaining the consent of the failing utility's and the acquiring utility's bondholder(s) to the acquisition." Again, there is no "failing utility" as a legal entity to fulfill these statutory obligations.

Simply stated, the PSC's "shoot first, aim later" approach is wholly inconsistent with the Distressed and Failing Utilities Improvement Act. The purposes of the Act are beneficial, but the PSC has exceeded its authority where (1) other utilities have much greater geographic proximity, (2) the Huntington Sanitary Board has no capacity to finance the over $4 million required, (3) the Huntington City Council, whose acts are necessary to take private property by eminent domain, must improve the capital investment, and enact a revenue bond ordinance, is not a party,[79] and (4) an acceptable alternative of home aeration systems exists that many of the residents have already implemented.

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appropriate and reasonable cost recovery mechanism to allow the capable proximate utility to recover its acquisition costs and projected cost of service of operating, maintaining and improving the facilities of the failing water or wastewater utility or its net costs incurred for operating, maintaining and improving the distressed utility under an operating agreement. The cost recovery mechanism may include *a surcharge* or surcharges *on* both *acquired* and existing *customers* if approved by the commission in a separate rate or tariff proceeding which shall be considered by the commission on an expedited basis without the need for a full base rate proceeding. Rate increments and surcharges established pursuant to this section shall be subject to adjustment on an annual basis to reflect changes in costs, additional projected capital and operating costs and true-up of any over or under recoveries of costs. Cost recovery mechanisms may also include … (1) A surcharge above existing rates that allows recovery of additional incremental cost increases, net of contributions necessary to operate, maintain and improve the failing utility's service level to an acceptable level and into compliance with all applicable regulatory standards …" (emphasis supplied).

[79] The PSC's efforts at moral persuasion: "the Commission expects that if a rate increase is necessary, City Council will appreciate the interests of the public and local economy … and cooperate with a plan to be developed by Huntington with the assistance of Staff," App. 979, significantly undermines the PSC's order.

VI. CONCLUSION

This Court should reverse the Public Service Commission's order and remand with directions to dismiss the case for lack of jurisdiction, as there is no record evidence that Hubbard Heights had 25 or more customers when the petition was filed under the Distressed and Failing Utilities Improvement Act. Alternatively, the Court should reverse the Public Service Commission's order and remand with directions that it cannot compel the Huntington Sanitary Board to acquire and operate a sewer system providing services to Hubbard Heights until it complies with the provisions of the Act.

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