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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GAULEY RIVER PUBLIC SERVICE DISTRICT,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

**From the Public Service Commission of West Virginia
Case No. 22-0456-PWD-DU**

PETITIONER GAULEY RIVER PUBLIC SERVICE DISTRICT'S BRIEF

**GAULEY RIVER PUBLIC SERVICE
DISTRICT,**

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I. INTRODUCTION

This appeal is about the Respondent Public Service Commission of West Virginia (“PSC”) exceeding its statutory jurisdiction and powers under the *Distressed and Failing Utilities Improvement Act* (the “*Distressed Utilities Act*”), W. Va. Code § 24-2H-1, *et seq.*

Petitioner Gauley River Public Service District (“Gauley River”)—a water only public utility—appeals the PSC’s Commission Order of October 31, 2024 (the “Halloween Order”). GR-Appx. at pp. 1-32. The PSC issued the Halloween Order under §§ 24-2H-7(a) and -7(b) of the *Distressed Utilities Act*. It compels Gauley River to enter into an Operation & Maintenance Agreement (the “PSC Ordered O&M Agreement”) with West Virginia-American Water Company (“WVAWC”). *Id.* at pp. 8-28. The PSC Ordered O&M Agreement would strip Gauley River of the power to operate and manage its water facilities, properties, and employees, and would transfer operation, management, and control of these assets and employees to WVAWC for a term of ten years.

The PSC Ordered O&M Agreement will not improve Gauley River. Rather, it will eradicate Gauley River by giving WVAWC unlimited control of Gauley River’s assets and employees. WVAWC’s assumption of control will, for all practical purposes, kill Gauley River as an independent, standalone entity.

The PSC Ordered O&M Agreement is unlawful because the PSC has not determined that Gauley River is a “failing utility” that may be subject to an ordered acquisition. W. Va. Code § 24-2H-7(a) (requiring “failing utility” determination as predicate to ordering acquisition by most suitable capable proximate water utility).

The PSC instead has determined that Gauley River is a “distressed utility.” GR-Appx. at pp. 224-238, Commission Order (Aug. 25, 2023) (the “Distressed Utility Order”). Assuming *arguendo* that this finding is proper, the *Distressed Utilities Act* authorizes the PSC to consider, as an alternative to an ordered acquisition, “[o]peration of the distressed utility by another public utility or management or service company.” W. Va. Code § 24-2H-7(b)(2). This alternative, however, is circumscribed by an important statutory requirement; that is: The resulting operation and maintenance agreement must be “a mutually agreed arm’s length contract.” *Id.*

Gauley River and WVAVC did not mutually agree to the terms of the PSC Ordered O&M Agreement in an arm’s length negotiation. The PSC Ordered O&M Agreement is a contract of adhesion that the PSC foisted on these utilities. Its express terms effectuate a *de facto* ordered acquisition of Gauley River’s assets and employees, without the statutorily required determination by the PSC that Gauley River is a “failing utility.” Additionally, the *de facto* ordered acquisition is not supported by the evidence; does not advance the policy goals of the *Distressed*

Utilities Act; and has not been recommended to or considered by the Fayette County Commission.

The *de facto* ordered acquisition compelled by the Halloween Order exceeds the PSC's statutory jurisdiction and powers. Therefore, this Court should set aside and annul the Halloween Order and grant the additional relief requested in the Conclusion section of this brief, pursuant to W. Va. R. App. P. 14.

II. ASSIGNMENTS OF ERROR

Did the PSC exceed its statutory jurisdiction and powers in stripping Gauley River of the authority to operate and manage *its* water utility facilities, properties, and employees, and in empowering WVAWC to exercise complete control over these assets and employees for a term of ten years, where:

- The PSC has not determined that Gauley River is a “failing utility” that may be subject to an ordered acquisition, as required by § 24-2H-7(a) of the *Distressed Utilities Act*;
- Gauley River and WVAWC did not mutually agree at arm's length to the terms of the PSC Ordered O&M Agreement, as required by § 24-2H-7(b)(2) of the *Distressed Utilities Act*; and
- The PSC Ordered O&M Agreement is not supported by the evidence; does not advance the policy goals of the *Distressed Utilities Act*; and has not been recommended to and considered by the Fayette County Commission?

The answer is “Yes” on each point, and each point provides an independent basis requiring this Court to set aside and annul the PSC's Halloween Order compelling the PSC Ordered O&M Agreement.

III. STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of the PSC. W. Va. Code § 24-5-1; *see also* W. Va. R. App. P. 14. As this Court has recognized, the Legislature’s use of the term “final order” in § 24-5-1 of the *Public Service Commission Act* is “meant to cover all such orders as change the position of the parties, as take from one and give to the other something that [it] was not entitled to and could not receive before.” *City of Charleston v. Pub. Serv. Comm’n*, 83 W. Va. 718, 99 S.E. 63, 64 (1919) (“If we do not give the statute this construction, then the Public Service Commission may . . . put its actions in most cases beyond the review of this court for such a period of time as would make the relief of little value when it was finally obtained.”); *see also* W. Va. Code § 24-5-1 (formerly § 16 of the *Public Service Commission Act*, Chapter 9 W. Va. Acts 1913, as referenced in the *City of Charleston* decision).

The Halloween Order that Gauley River appeals is a final order because it changes the position of the parties markedly. In particular, the PSC Ordered O&M Agreement that is compelled in the Halloween Order would strip Gauley River of the power to operate and manage its water facilities, properties, and employees, and would transfer the operation, management, and control of these assets and employees to WVAWC. As the *City of Charleston* decision notes, the Legislature

intended § 24-5-1 “to provide a quick . . . remedy for correcting the arbitrary and unwarranted orders of the [PSC].” *City of Charleston*, 99 S.E. at 65.

Further, the *Distressed Utilities Act* does not foreclose this appeal. Its unique provisions recognize that the PSC’s Distressed Utility Order (GR-Appx. at pp. 224-238) is a “final order,” but that the PSC has the discretion to make a subsequent order under § 24-2H-7(b) to consider and implement alternatives to an ordered acquisition. W. Va. Code §§ 24-2H-7(a), -7(b). The Halloween Order that Gauley River appeals is the “final order” tagalong. *Id.*

IV. STANDARD OF REVIEW

This Court reviews final orders of the PSC to determine “(1) whether the [PSC] exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the [PSC’s] findings; and (3) whether the substantive result of the [PSC’s] order is proper.” Syl. Pt. 1, *Mason Co. Pub. Serv. Dist. v. Pub. Serv. Comm’n of W. Va.*, 247 W. Va. 580, 885 S.E.2d 161 (2022); *see also Trulargo, LLC v. Pub. Serv. Comm’n of W. Va.*, 242 W. Va. 482, 484-85, 836 S.E.2d 449, 451-52 (2019).

Where the evidence “plainly establishes” that an order of the PSC is “arbitrary in law, unreasonable or not supported by the evidence, or clearly unjust,” this Court has jurisdiction to “set aside and annul” the order. *Western Maryland Ry. Co. v. Pub. Serv. Comm’n of W. Va.*, 144 W. Va. 110, 114, 106 S.E.2d 923, 926 (1959); *see also*

City of Wheeling v. Pub. Serv. Comm’n of W. Va., 199 W. Va. 252, 263, 483 S.E.2d 835, 846 (1997) (recognizing PSC’s “clearly wrong orders . . . will be reversed.”).

V. STATEMENT OF THE CASE

A. Pertinent Facts & Procedural History

Gauley River is a water only public service district that serves approximately 1,243 customers. It utilizes over 90 miles of water distribution mains located in Fayette, Nicholas, and Clay Counties, West Virginia.¹

Gauley River does not own a water treatment plant. Instead, it purchases water from the Kanawha Falls Public Service District (“Kanawha Falls”) and the City of Summersville (“Summersville”). The water Gauley River purchases from Kanawha Falls fills the tanks that serve the Mt. Olive Correctional Complex (“Mt. Olive”) in Fayette County.²

Kanawha Falls experienced difficulties providing Gauley River with a continuous supply of water to fulfill its customers’ needs. Frequently Kanawha Falls

¹ GR-Appx. at p. 68, Pre-filed Direct Testimony of Anthony B. Brown, *In re: Gauley River Pub. Serv. Dist.*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm’n of W. Va. (Mar. 10, 2023) (stipulated into evidence per Joint Stipulation and Agreement for Settlement, GR-Appx. at pp. 205-207).

² Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm’n of W. Va. (June 1, 2023) at pp. 42:17-43:9.

personnel would call Gauley River's water operators and request Gauley River to refrain from taking water.³

Water service to Mt. Olive was interrupted several times in the three-months between December 2021 and February 2022. The interruptions occasioned the PSC's initiation of two proceedings under the *Distressed Utilities Act*, one involving Gauley River and the other involving Kanawha Falls.⁴

At the time of the interruptions of service, the master meter purchased and installed by Kanawha Falls—which was intended to measure the water Kanawha Falls was sending to Gauley River—was not providing reliable measurements.⁵ Gauley River, however, was aware that water shortages were occurring at Mt. Olive, as the telemetry system that measures the tanks that serve the correctional complex

³ GR-Appx. at p. 43, Pre-filed Direct Testimony of Ralph Arthur, *In re: Gauley River Pub. Serv. District*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm'n of W. Va. (Mar. 10, 2023); *see also* Prefiled Rebuttal Testimony of Jonathan M. Fowler, P.E., *In re: Gauley River Pub. Serv. District*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm'n of W. Va. (Mar. 24, 2023) at pp. 4:10-14 and 5:6-9.

⁴ Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at p. 50:9-16. The separate PSC Distressed Utility proceeding concerning Kanawha Falls is *In re: Kanawha Falls Pub. Serv. Dist.*, Case No. 22-0631-PWD-DU, Pub. Serv. Comm'n of W. Va. On October 31, 2024, the PSC issued an order in the *Kanawha Falls* proceeding in which it similarly directed Kanawha Falls to enter into an ordered, comprehensive operations and maintenance agreement with WVAWC. The *Kanawha Falls* proceeding was not consolidated with the *Gauley River* proceeding. The underlying facts and records in the two proceedings differ substantially.

⁵ GR-Appx. at pp. 44-45; Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at p. 14:16-24.

notified Gauley River that the water levels in the tanks were low.⁶ Gauley River asked Kanawha Falls to provide it with more water, but due to the inaccurate master meter it is unclear to what extent Kanawha Falls provided water.⁷ Gauley River personnel looked for leaks on the Gauley River system while the water shortages were occurring. They did not discover any major leaks.⁸

PSC Staff issued a report on the shortages. Significantly, *PSC Staff did not identify any act or omission by Gauley River that contributed to the interruptions of water service at Mt. Olive.*⁹

For two years and nine months now—since February 2022—Gauley River has provided uninterrupted and ample water service to Mt. Olive.¹⁰

Gauley River does not believe it took any actions or omitted taking any actions that led to the water service outages at Mt. Olive. To reiterate, Gauley River checked for leaks in its water facilities immediately following the interruptions of water service at Mt. Olive. Gauley River did not need to perform any major leak repairs.

⁶ GR-Appx. at p. 43.

⁷ *Id.* at pp. 43-45.

⁸ *Id.* at pp. 43-44.

⁹ GR-Appx. at pp. 167-168, Pre-filed Rebuttal Testimony of Ralph Arthur, *In re: Gauley River Pub. Serv. District*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm'n of W. Va. (Mar. 24, 2023).

¹⁰ GR-Appx. at p. 44.

Had leakage on Gauley River's system been the cause of the service interruptions at Mt. Olive, it would have come to light.¹¹

Gauley River attributes the increased reliability of service to Mt. Olive to Kanawha Falls' installation of several new or replacement pumps at its water treatment plant. This occurred in April of 2022.¹²

In the last 14 years, Gauley River has had no formal quality of service complaints filed against it at the PSC.¹³ It receives very few informal complaints from its customers.¹⁴ From March 1, 2022, to March 10, 2023, Gauley River issued only four boil water advisories.¹⁵ These related to distinct portions of its system due to leaks and other repairable conditions.¹⁶ Gauley River receives good compliance scores from the Health Department.¹⁷

¹¹ *Id.*

¹² *Id.* at p. 45.

¹³ *Id.* at pp. 46-47.

¹⁴ Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at p. 60:17-20.

¹⁵ By comparison, the PSC deemed the Armstrong Public Service District a failed utility, in significant part, because it had all of its customers under a boil water advisory for 102 days over a three-year period, and then placed them under a permanent boil water advisory. Comm'n Or., *In re: Armstrong Pub. Serv. Dist.*, Case No. 22-0911-PWD-DU, Pub. Serv. Comm'n of W. Va. (Aug. 25, 2023) at p. 15.

¹⁶ GR-Appx. at p. 47.

¹⁷ Hearing Transcript, *In Re: Gauley River* at p. 30:13-23.

The PSC Staff witness from the PSC’s Utilities Division testified that the financial performance of Gauley River did not warrant a finding that it was a distressed utility.¹⁸ The PSC Staff witness from the PSC’s Engineering Division submitted pre-filed written direct testimony in advance of the evidentiary hearing recommending that Kanawha Falls and Gauley River be acquired or operated by a more capable, larger water utility.¹⁹ However, based on meetings and field visits that the PSC Staff engineer conducted in the period between the date he filed his written testimony and the date of hearing, the PSC Staff engineer noted at the hearing numerous improvements that Gauley River had undertaken.²⁰ Based upon these improvements that PSC Staff observed, PSC Staff (from the Engineering, Utilities, and Legal Divisions of the PSC) changed its initial recommendation on the “distressed utility” issue.²¹ Specifically, PSC Staff joined in a Joint Stipulation and Agreement for Settlement of all parties that includes a recommendation that the PSC

¹⁸ Prefiled Direct Testimony of Roger L. Estep, *In re: Gauley River Pub. Serv. District*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm’n of W. Va. (Mar. 10, 2023) at p. 6:14-15 (“From a financial perspective, the Utilities Division does not believe [Gauley River] to be a distressed or failing utility at this time.”).

¹⁹ Prefiled Direct Testimony of Jonathan M. Fowler, P.E., *In re: Gauley River Pub. Serv. Dist.*, Case No. 22-0456-PWD-DU, Pub. Serv. Comm’n of W. Va. (Mar. 10, 2023) at p. 4:2-3.

²⁰ Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at pp. 11:21-13:6; 13:23-15:17; 17:14-19:6.

²¹ GR-Appx. at pp. 202-216, Joint Stipulation and Agreement for Settlement; *see also* Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at pp. 19:7-33:10.

make no finding as to whether Gauley River is a distressed utility. The Joint Stipulation also seeks to resolve the proceeding by requiring Gauley River to undertake a corrective action plan (“CAP”).²² At the close of evidence in the evidentiary proceeding, no party believed or recommended that the PSC should determine that Gauley River is a distressed utility.

The record also reflects that Gauley River had retained an engineer to develop a project enabling it to bring a redundant source of water from Summersville to feed the tanks that serve Mt. Olive. This occurred before the interruptions of service.²³ PSC Staff testified that if the PSC had promptly approved the Joint Stipulation and CAP, the redundant source project could be complete by March 31, 2024.²⁴ That project has stalled due to doubt about Gauley River’s future, as a result of the PSC’s determination that it is a distressed utility.²⁵ Ironically, this proceeding—which was initiated over concerns about the adequacy of the water supply to Mt. Olive—is now impeding improvements to the reliability of the water supply to Mt. Olive.

²² Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at pp. 19:7-16; 32:9-33:4.

²³ *Id.* at pp. 61:22-62:5.

²⁴ *Id.* at pp. 24:19-25:2.

²⁵ GR-Appx. at pp. 261-268.

Gauley River communicates with Mt. Olive frequently regarding its water service.²⁶ Gauley River and PSC Staff met with the Division of Corrections and Rehabilitation (“DOC”) following the PSC’s June 1, 2023, evidentiary hearing in the underlying *Distressed Utilities Act* proceeding.²⁷ At that meeting, DOC officials expressed support for the Joint Stipulation and Agreement for Settlement.²⁸

Despite the forgoing, the PSC entered the Distressed Utility Order on August 25, 2023, determining that Gauley River is a distressed utility.²⁹ This determination was contrary to the recommendation of all parties to the proceeding as of the date of hearing. All parties signed the Joint Stipulation urging the Commission to make no finding on the distressed utility issue.³⁰

In the Distressed Utility Order, the PSC stated that it “has concerns regarding Gauley River’s ability to develop and implement the CAP, particularly because Gauley River had a duty to perform items in the CAP prior to the Joint Stipulation and failed to do so.”³¹ The PSC therefore modified the Joint Stipulation by replacing the recommendation that no finding be made on the distressed utility issue with the

²⁶ Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at pp. 54:19-55:4.

²⁷ GR-Appx. at pp. 217-222.

²⁸ *Id.* at pp. 220-221.

²⁹ GR-Appx. at pp. 224-238.

³⁰ *Id.* at pp. 206-207.

³¹ *Id.* at p. 228.

very significant additional requirement directing Gauley River and WVAWC to “negotiate a mutually agreed arm’s length operations and maintenance agreement.”³² Not one party to the Joint Stipulation had recommended that outcome.

In determining that Gauley River is a distressed utility, the first factor the PSC identified in the Distressed Utility Order was Gauley River’s lack of a general manager.³³ The PSC cited to the initial recommendation of the PSC’s Engineering Division in its pre-filed written direct testimony, which incorporated a Final Joint Staff Memorandum, but made no mention of the improvements in Gauley River’s operations which were noted by the same engineer at the evidentiary hearing.³⁴ Gauley River has since hired a general manager in its ongoing efforts to improve operations.

On November 17, 2023, Gauley River and WVAWC filed with the PSC an operations and maintenance agreement that they had negotiated at arm’s length (the “Arm’s Length O&M Agreement”).³⁵

On March 15, 2024, the PSC issued a Commission Order (the “Ides of March Order”) denying approval of the Arm’s Length O&M Agreement and directing

³² *Id.* at p. 235.

³³ *Id.* at p. 233.

³⁴ Hearing Transcript, *In re: Gauley River Pub. Serv. Dist.* at pp. 12:5-34:9.

³⁵ GR-Appx. at pp. 239-253.

Gauley River and WVAWC to execute a “standard operation and maintenance agreement.”³⁶ The PSC faulted the Arm’s Length O&M Agreement for not meeting the “requirements” of the Distressed Utility Order.

On March 25, 2024, Gauley River filed a timely petition for reconsideration with the PSC, asking it to reconsider the Ides of March Order.³⁷

Thereafter, on October 31, 2024, the PSC issued its Halloween Order denying Gauley River’s petition for reconsideration of the Ides of March Order, and directing WVAWC and Gauley River to enter into the PSC Ordered O&M Agreement.³⁸ The PSC appended the PSC Ordered O&M Agreement to the Halloween Order.³⁹

B. The PSC Ordered O&M Agreement

The PSC Ordered O&M Agreement compels what is tantamount to an ordered acquisition. It authorizes WVAWC to operate, maintain, and repair all of Gauley River’s water distribution and treatment facilities.⁴⁰ It provides that all required improvements and replacements to Gauley River’s facilities become the capitalized

³⁶ *Id.* at pp. 254-257.

³⁷ GR-Appx. at pp. 258-283; *see also* W. Va. C.S.R. § 150-1-19.3.

³⁸ GR-Appx. at pp. 1-32.

³⁹ *Id.* at pp. 8-28.

⁴⁰ *Id.* at p. 9.

property of WVAWC, and requires Gauley River to grant all right of ways, easements, and licenses to accommodate WVAWC's capitalized property.⁴¹

The PSC Ordered O&M Agreement commands Gauley River to transfer to WVAWC "all records pertaining to [Gauley River's] employment of its employees, including all personnel and human resources files and records," and it authorizes WVAWC to offer employment to Gauley River personnel.⁴²

Upon implementation of the PSC Ordered O&M Agreement, Gauley River would charge the tariff rates of WVAWC, which would require an approximate 16% increase in the revenue that Gauley River collects from its customers.⁴³ The PSC Ordered O&M Agreement provides that "[i]n the event the Company [WVAWC] determines that it is necessary to add a debt service surcharge or modify an existing surcharge, the Company will prepare a rate modification filing for [sic] District [Gauley River]."⁴⁴ Such a surcharge would increase Gauley River's rates above those that WVAWC charges to most of its customers. Gauley River effectively would become an alter ego of WVAWC. WVAWC would perform all services and charge WVAWC rates.

⁴¹ *Id.* at p. 10.

⁴² *Id.* at pp. 11, 13.

⁴³ *Id.* at pp. 30-32.

⁴⁴ *Id.* at p. 14.

The PSC Ordered O&M Agreement authorizes WVAWC to read all of Gauley River's meters and bill its customers, and to receive all payments for services rendered to Gauley River's customers.⁴⁵ The PSC Ordered O&M Agreement expressly states that:

“[WVAWC] will have control over and maintain full and complete responsibility for the operation and maintenance of [Gauley River's facilities] in accordance with the terms provided [in this O&M Agreement] . . . [T]here will be a limited need for [Gauley River] or its board to hire employees or retain independent contractors or agents to perform any function related to the operation, maintenance, and/or functioning of [Gauley River's facilities] or to provide any incidental or recurring service to [Gauley River] or its board in connection with [Gauley River's facilities].⁴⁶

The PSC Ordered O&M Agreement has a ten-year term.⁴⁷ Upon termination, Gauley River has the “option” to convey its facilities to WVAWC “at a price no greater than the amount required to retire [the] outstanding debt of [Gauley River]” or retain its facilities and pay WVAWC for its “investment.”⁴⁸

⁴⁵ *Id.* at pp. 13-14.

⁴⁶ *Id.* at p. 15.

⁴⁷ *Id.* at p. 9.

⁴⁸ *Id.* at p. 18.

VI. SUMMARY OF ARGUMENT

The PSC Ordered O&M Agreement is not authorized by the *Distressed Utilities Act*, and the PSC has exceeded its statutory jurisdiction and powers by imposing it on Gauley River and WVAWC. The facts show that the PSC Ordered O&M Agreement effectuates a *de facto* ordered acquisition. It strips Gauley River of the authority to operate and manage *its* water utility facilities, properties, and employees, and empowers WVAWC to control these assets and employees for a decade—effectively killing Gauley River as a standalone entity. The PSC takes this radical approach against the views and recommendations of its expert Staff and without even consulting with the Fayette County Commission. There are at least three separate and independent reasons why the O&M Agreement is unlawful.

First, the PSC has not determined that Gauley River is a “failing utility” that may be subject to an ordered acquisition. Section 24-2H-7(a) of the *Distressed Utilities Act* requires the PSC to make a “failing utility” determination as a predicate to imposing an ordered acquisition. No such determination occurred here. To the contrary, the PSC has determined that Gauley River is a “distressed utility.” Under the *Distressed Utilities Act*, the PSC is precluded from subjecting a distressed utility to an ordered acquisition. *See, e.g.*, W. Va. Code § 24-2H-7(b)(6) (authorizing PSC to consider viable alternatives “other than an ordered acquisition by a capable proximate utility.”).

Second, Gauley River and WVAWC did not mutually agree at arm's length to the provisions of the PSC Ordered O&M Agreement. Section 24-2H-7(b)(2) of the *Distressed Utilities Act* authorizes the PSC to consider, as an alternative to an ordered acquisition, "[o]peration of the distressed utility by another public utility or management or service company." This alternative, however, is circumscribed by an important statutory requirement; that is: The resulting O&M Agreement must be "a mutually agreed arm's length contract." *Id.* at § 24-2H-7(b)(2). Gauley River and WVAWC did not mutually agree to the terms of the PSC Ordered O&M Agreement. Gauley River did not agree to substitute WVAWC's rates for its rates, plus possible future surcharges. The PSC Ordered O&M Agreement is a contract of adhesion compelled by the PSC that works a *de facto* ordered acquisition of Gauley River's assets, employees, and control.

Third, the PSC Ordered O&M Agreement is not supported by the evidence. No party in the underlying evidentiary proceeding recommended that Gauley River be designated a "distressed utility," and no such determination was included in the parties' Joint Stipulation and Agreement for Settlement that was agreed-to by PSC Staff. No party to the Joint Stipulation recommended that Gauley River enter into an operations and maintenance agreement with any other utility or believed that Gauley River needed to do so. Apart from the interruptions of service at Mt. Olive,

Gauley River has provided ample, reliable, and safe water service to its customers. Complaints have been minimal. It is not “distressed,” and certainly not “failing.”

Additionally, the PSC Ordered O&M Agreement does not advance the policy goals set forth in § 24-2H-2 of the *Distressed Utilities Act*. Gauley River, among other things, presently maintains reasonable rates, serves its customers adequately, and complies with health and safety regulations. Further, the PSC has failed to recommend the PSC Ordered O&M Agreement to the Fayette County Commission, as required by § 24-2H-8(f) of the *Distressed Utilities Act*. Not only has the PSC exceeded its jurisdiction, it has stripped the county of its statutory right to consider “a recommendation” by the PSC that would in fact void the county’s public service district. W. Va. Code § 24-2H-8(f).

In these circumstances, the PSC has exceeded its statutory jurisdiction and powers by imposing the PSC Ordered O&M Agreement on Gauley River in the Halloween Order. The Halloween Order contravenes the *Distressed Utilities Act*. It should be set aside and annulled by this Court and this matter should be remanded to the PSC with instructions for it to enter an order approving the Joint Stipulation and Agreement for Settlement or, alternatively, approving the Arm’s Length O&M Agreement.

VII. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary because the dispositive issues in this appeal have not been authoritatively decided.⁴⁹ W. Va. R. App. P. 18(a)(3). This appeal should be selected for Rule 20 oral argument because the dispositive issues are ones of first impression (*see* n.49, below) and fundamental public importance (*i.e.*, the fate of a county public service district). W. Va. R. App. P. 20(a). The minimum time for oral argument set forth in W. Va. R. App. P. 20(e) will be sufficient.

VIII. ARGUMENT

THIS COURT SHOULD SET ASIDE AND ANNUL THE PSC'S HALLOWEEN ORDER BECAUSE THE PSC HAS EXCEEDED ITS STATUTORY JURISDICTION AND POWERS IN IMPOSING A *DE FACTO* ACQUISITION ON GAULEY RIVER THAT IS NOT WARRANTED BY THE EVIDENCE OR THE *DISTRESSED UTILITIES ACT*.

A. The *Distressed Utilities Act* does not authorize the PSC to order the acquisition of Gauley River because the PSC has not made the required predicate determination that Gauley River is a “failing utility.”

⁴⁹ Those issues are whether the PSC exceeds its statutory jurisdiction and powers under the *Distressed Utilities Act*, where it (a) orders the acquisition of a utility in an O&M Agreement without making the required predicate determination that the utility is “failing,” (b) compels two utilities to enter into a PSC Ordered O&M Agreement that is not “a mutually agreed arm’s length contract,” and (c) enters a PSC Ordered O&M Agreement that is not supported by the evidence; does not advance the policy goals of the *Distressed Utilities Act*; and has not been recommended to the Fayette County Commission for *its* consideration. W. Va. Code §§ 24-2H-2, -5, -7(a), -7(b)(2), -8(f).

The West Virginia Legislature enacted the *Distressed Utilities Act* in 2020 to confront the financial, organizational, and regulatory challenges faced by water and wastewater utilities in West Virginia. W. Va. Code §§ 24-2H-1, -2. The *Distressed Utilities Act* aims to ensure that all citizens in the state have access to safe drinking water and adequate and safe wastewater treatment. *Id.* at § 24-2H-2(g). It authorizes the PSC to open a formal evidentiary proceeding into whether a utility is a “distressed utility” or a “failing utility,” and to determine “whether a capable proximate utility should acquire the utility.” *Id.* at § 24-2H-6.

The *Distressed Utilities Act* draws an important distinction between a “distressed utility” determination and a “failing utility” determination. According to the *Act*, a “distressed utility is a water or wastewater utility that, for financial, operational, or managerial reasons:

- Is in continual violation of statutory or regulatory standards of the Bureau for Public Health, the Department of Environmental Protection, or the [PSC], which affect the water quality, safety, adequacy, efficiency, or reasonableness of the service provided by the water or wastewater utility;
- Fails to comply within a reasonable period of time with any final, nonappealable order of the Department of Environmental Protection, Bureau for Public Health, or the [PSC] concerning the safety, adequacy, efficiency, or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water, or the provision of water at adequate volume and pressure, and the collection and treatment of wastewater;
- Is no longer able to provide adequate, efficient, safe, and reasonable utility services; or

- Fails to timely pay some or all of its financial obligations, including, but not limited to, its federal and state tax obligations and its bond payments to the West Virginia Water Development Authority, the United States Department of Agriculture, or other bondholders; fails to maintain its debt service reserve; or fails to submit an audit as required by its bond or loan documents or state law.”

W. Va. Code § 24-2H-3(a).

A “failing utility,” by contrast, meets the definition of “distressed utility” and either “[h]as not, after a reasonable time period, been stabilized and improved by corrective measures put in place under § 24-2H-7 . . . or [h]as had the requirements of § 24-2H-7 . . . suspended for good cause shown by an order of the [PSC].” *Id.* at § 24-2H-3(b).

The *Distressed Utilities Act* lists several factors the PSC shall consider “[i]n determining whether a utility is distressed or failing.” *Id.* at § 24-2H-5. This determination is made by the PSC following notice to the utility and an evidentiary hearing. *Id.* at § 24-2H-6.

The statutory remedies and procedures vary depending upon whether a utility is deemed a distressed utility or a failing utility. If the PSC orders an operating agreement for a distressed utility, such an agreement is filed with the PSC under W. Va. Code § 24-2-12. *Id.* at § 24-2H-8(a). That is the only procedure that is provided in that section of the Code for distressed utilities. The remedies and procedures for failing utilities are more extensive, and include authorizing the

acquiring utility to charge rates that are higher than those of the failing utility. *Id.* at § 24-2H-8(c).

Significantly, “[i]f the [PSC] determines that the utility is a failing utility, then the [PSC] may order the acquisition of the failing utility by the most suitable capable proximate water or wastewater utility.” *Id.* at § 24-2H-7(a). However, if the PSC determines “that a utility is a distressed utility, then the [PSC] may make an order consistent with subsection (b)” of § 24-2H-7. *Id.*

Section 24-2H-7(b) provides that, “[b]efore the [PSC] may designate a water or wastewater utility as failing and order acquisition by a capable proximate utility it shall determine whether there are any alternatives to an ordered acquisition.” *Id.* at § 24-2H-7(b). Those alternatives include but are not limited to “[r]eorganization of the utility under new management or a new board, subject to approval of the applicable county commission” and “[o]peration of the distressed utility by another public utility or management or service company under a mutually agreed arm’s length contract.” *Id.* at §§ 24-2H-7(b)(1), -7(b)(2).

The *Distressed Utilities Act* further emphasizes that, following a distressed utility determination, the PSC may consider “[a]ny viable alternative *other than an ordered acquisition* by a capable proximate utility.” *Id.* at § 24-2H-7(b)(6) (emphasis added). An “acquisition of the distressed utility” may only be

accomplished “through a mutual agreement made at arm’s length.” *Id.* at § 24-2H-7(b)(5). Gauley River has not approved any such agreement.

A proceeding under the *Distressed Utilities Act* is “quasi-judicial,” in that it requires the taking and weighing of evidence, determinations of fact based on that evidence, and the “making of an order supported by such findings.” *Appalachian Power Co. v. Pub. Serv. Comm’n of W. Virginia*, No. 24-75, 2024 WL 4763256, *11 (W. Va. Nov. 13, 2024). This Court has recognized that the parties to quasi-judicial proceedings “are entitled to basic constitutional protections, including due process of law” and “fundamental fairness.” *Id.*

Here, the PSC determined that Gauley River is a “distressed utility,” not a “failing utility.” GR-Appx. at p. 254. Gauley River does not concede that the evidence justifies the PSC’s “distressed utility” determination, but will assume for purposes of argument that it is correct. After making the distressed utility determination, the PSC rejected the Arm’s Length O&M Agreement and imposed the PSC Ordered O&M Agreement on Gauley River, citing § 24-2H-7(b)(2) of the *Distressed Utilities Act*. *Id.* at pp. 1-32.

In the Halloween Order, the PSC stated that “Gauley River must file for a tariff modification to adopt the WVAWC tariff rates as district tariff rates.” *Id.* at pp. 4-5. This is a remedy that is only available to the PSC for failing utilities, not distressed utilities. W. Va. Code § 24-2H-8(c). It is not a remedy that is

contemplated for distressed utilities under the *Distressed Utilities Act*. Indeed, none of the four Conclusions of Law in the Halloween Order make any reference to any provision of the *Distressed Utilities Act*. GR-Appx. at p. 6. The PSC was not acting within the parameters of its authority under the *Distressed Utilities Act*, but rather cobbling concepts together. In so doing, it exceeded the limited and specific jurisdiction and authority granted by the Legislature.

The PSC Ordered O&M Agreement is fundamentally unfair and tantamount to an ordered acquisition. It would give WVAMC complete control of Gauley River's operations, assets, and employees for the next decade. Gauley River would cease to play any relevant role in providing water services. For all practical purposes, Gauley River would no longer exist.

The ordered acquisition remedy that the PSC has imposed on Gauley River does not apply to a "distressed utility" determination. Once a utility is deemed distressed, the PSC is obligated to attempt a remedial measure short of acquisition. Gauley River was implementing substantial remedial measures before the evidentiary hearing.⁵⁰ The CAP was consistent with the contemplated remedial measures under the *Distressed Utility Act*. The PSC failed to provide Gauley River

⁵⁰ Hearing Transcript, *In Re: Gauley River Pub. Serv. Dist.* at pp. 11:21-13:6; 13:23-15:17; 17:14-19:6.

with the remedial period contemplated for distressed utilities under the *Distressed Utility Act*.

The *Distressed Utilities Act* is clear that an ordered acquisition may be compelled only after a “failing utility” determination has been made. W. Va. Code §§ 24-2H-7(a), -7(b). Such a determination must be supported by the evidence. That did not occur here. The O&M Agreement effectuates an ordered acquisition without the required predicate determination that Gauley River is a “failing utility.” This *de facto* ordered acquisition by the PSC is fundamentally unfair and violates the *Distressed Utilities Act*. The PSC has exceeded its statutory jurisdiction and powers, and the Halloween Order should be set aside and annulled by this Court.

B. The *Distressed Utilities Act* does not authorize the PSC to impose the PSC Ordered O&M Agreement on Gauley River because it is not “a mutually agreed arm’s length contract.”

To reiterate, where the PSC determines that a utility is a “distressed utility,” the *Distressed Utilities Act* authorizes the PSC to consider, as an alternative to an ordered acquisition, “[o]peration of the distressed utility by another public utility or management or service company.” W. Va. Code § 24-2H-7(b)(2). The resulting operations and maintenance agreement must be mutually agreed at arm’s length. *Id.*

That did not occur here. The facts show that the PSC foisted the unauthorized and fundamentally unfair PSC Ordered O&M Agreement on Gauley River and WVAWC. GR-Appx. at p. 4 (“[T]he Commission will provide the parties with the

Agreement, attached as Appendix A, and require them to enter into it . . . If alternative terminology is preferred by either WVAWC or Gauley River, and the parties can agree to minor modifications to accommodate their terminology preferences, then they may make minor textual changes to the attached Agreement . . . The Parties should not make significant modifications.”). No party to the underlying proceeding—not even PSC Staff—requested, expected, or desired this outcome, because it is not warranted by the facts and is not authorized by law. GR-Appx. p. 202. This is another example of how the PSC has exceeded its statutory jurisdiction and powers, requiring this Court to set aside and annul the Halloween Order.

C. The PSC Ordered O&M Agreement is not supported by the evidence; does not advance the policy goals of the *Distressed Utilities Act*; and has not been recommended to and considered by the Fayette County Commission.

The PSC Ordered O&M Agreement is not supported by the evidence because the facts show that Gauley River is not a distressed or failing utility. It has provided ample, safe, uninterrupted service to Mt. Olive since February 2022. The issues at Mt. Olive, moreover, were not attributable to leaks in Gauley River’s system or any acts or omissions on its part.

Gauley River has continued the pattern of progress which the Staff Engineer testified to at the evidentiary hearing and has remedied its former lack of a general manager by taking corrective action and hiring a general manager. No formal quality

of service complaints have been filed against Gauley River in the PSC in the last 14 years. It has received limited informal complaints from its customers. The Health Department gives Gauley River positive scores. PSC Staff reported at the evidentiary hearing that Gauley River's operations improved considerably and only the CAP was needed, to the exclusion of any O&M Agreement, much less the PSC Ordered O&M Agreement. Further, if the PSC had promptly approved the Joint Stipulation and CAP, Gauley River would be well on its way to completing a project that would provide a redundant source of water to Mt. Olive. Instead, the funding agencies for that project are in a holding pattern, and Gauley River is spending its resources litigating the unauthorized and fundamentally unfair Halloween Order.

The PSC Ordered O&M Agreement does not advance the public policy goals of the *Distressed Utilities Act*. Those goals include: providing safe drinking water; keeping utility rates steady; and addressing infrastructure needs timely to support safety and economic development. W. Va. Code § 24-2H-2. There is no evidence in the underlying proceeding indicating that Gauley River is not fulfilling these public policy goals. Gauley River's proposed projects and CAP were a better path to fulfilling the goals of the *Distressed Utilities Act* than the Commission's *ultra vires* PSC Ordered O&M Agreement. It will, among other things, increase rates to Gauley River's customers above those which Gauley River would charge if it were simply permitted to implement the CAP and advance its proposed projects.

Finally, the PSC failed to recommend the PSC Ordered O&M Agreement to the Fayette County Commission, as it is required to do by § 24-2H-8(f) of the *Distressed Utilities Act*. Section 24-2H-8(f) provides that, “[i]f the distressed or failing utility is a public service district, then the [PSC] shall make a recommendation to the respective county commission(s) with regard to the acquisition of distressed or failing utilities as provided in § 16-13A-2(a)(2) of this code.” W. Va. Code § 24-2H-8(f).

The PSC has made no such recommendation to the Fayette County Commission, but rather has proceeded itself to implement a forced acquisition without consultation or recommendation, exceeding the authority which the Legislature granted to the PSC under the *Distressed Utilities Act*. Not only has the PSC exceeded its jurisdiction, it has stripped the county of its statutory right of involvement in the determination of *its* public service district’s fate. This is fundamentally unfair and in violation of the express provisions of the *Distressed Utilities Act*. This Court should set aside and annul the Halloween Order imposing the PSC Ordered O&M Agreement.

IX. CONCLUSION

Under the *Distressed Utilities Act*, the PSC has a large role, but not one of dictator. Other entities also have roles and utilities are afforded protections under the *Act* that ensure due process and fundamental fairness. Distressed utilities, for

example, are given an opportunity to undertake corrections to stave off a forced acquisition, not sent to a forced acquisition immediately. Distressed utilities are allowed to operate under their own rates, not the rates of an acquiring utility until such acquisition is ordered due to ongoing failures. Distressed utilities and capable proximate utilities are given discretion to enter into arm's length agreements, not contract of adhesion "agreements" written and required by the PSC. The county commissions of the distressed utilities also are expected to have a continuing role with respect to the scope of authority and operation of utilities that those county commissions created.

The *Distressed Utility Act* should be invoked where there are persistent water quality problems or persistent financial failures. Gauley River has no history of persistent failures of water quality or financial performance. The Halloween Order does not comport with the limited authority, procedures, and remedies that the Legislature granted to the Commission. Nor does the Halloween Order respect the roles of other interested parties under that *Act*. Nor does it advance the underlying public policy goals of the *Act*.

WHEREFORE, in view of the foregoing, this Court should set aside and annul the PSC's "clearly unjust" Halloween Order and remand this matter to the PSC with instructions for it to enter an order approving the Joint Stipulation and Agreement

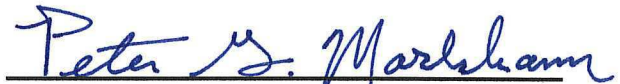
for Settlement or, alternatively, approving the Arm's Length O&M Agreement.

Western Maryland Ry. Co., 144 W. Va. at 114, 106 S.E.2d at 926.

Respectfully submitted by,

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I, Peter G. Markham, Esq., hereby certify that the foregoing
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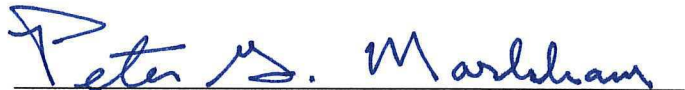
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