

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Gauley River Public Service District,
Petitioner,

v.

The Public Service Commission of West Virginia
Respondent.

STATEMENT OF RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS
REASONS FOR THE ENTRY OF ITS ORDER OF OCTOBER 31, 2024 IN
CASE NO. 22-0456-PWD-DU

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**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

The Respondent, Public Service Commission of West Virginia (“the Commission”), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of October 31, 2024, in Case No. 22-0456-PWD-DU, that is the subject of this appeal.

I. STATEMENT OF THE CASE

In this appeal, Gauley River Public Service District (“Gauley River”) incorrectly argues that a standard operation and maintenance agreement among two utilities is tantamount to an acquisition. *See, e.g.*, Petitioner’s Brief at 13, Commission Record at Bates No. 20 (hereinafter “CR at BN__”). Petitioner’s appeal is predicated on this Court viewing a standard operation and maintenance agreement between two utilities as a *de facto* acquisition. The Commission first ordered Gauley River, a distressed utility, to negotiate at arms’ length, an operation and maintenance agreement with a capable proximate utility (in this case, West Virginia American Water (“WVAWC”)) (together with Gauley River, the “Parties”). After 14 months, when Gauley River repeatedly failed to negotiate an operation and maintenance agreement or file with the Commission the terms in dispute, or present alternative language, the Commission then ordered it to enter into an operation and maintenance agreement that the Commission drafted, pursuant to the explicit authority granted to the Commission in the Distressed and Failing Utilities Improvement Act (the Act), W.Va. Code §24-2H-7(b) and pursuant to its authority under W.Va. Code §24-2-12.

The Petitioner also incorrectly argues that even if this Court rules that the operation and maintenance agreement ordered by the Commission (hereinafter the “Ordered Agreement”) is not equal to a *de facto* acquisition, the Ordered Agreement should still be set aside because it was not

an “arm’s length” transaction. *See, e.g.*, Petitioner’s Brief at 26, CR at BN 33. However, an “arm’s length” operation agreement is only one remedy the Commission is statutorily authorized to implement under W.Va. Code §24-2H-7(b) (specifically §24-2H-7(b)(2)). When the Parties failed/refused to negotiate such an agreement, the Commission then turned to another remedy authorized by the Act, “another viable alternative”, and drafted an agreement for the Parties to enter. Its authority to do so is specifically derived from W.Va. Code §24-2H-7(b)(6) and also W.Va. Code §24-2-12.

The Commission must balance the interests of the utility’s customers with that of the general interests of the state’s economy and the interests of the utility. W.Va. Code §24-1-1(b). Additionally, “the Legislature direct[ed] the Public Service Commission to identify, explore and consider the potential benefits or risks associated with emerging and state-of-the-art concepts in utility *management*, rate design and conservation.” W.Va. Code §24-1-1 [emphasis added].

The issues presented by the underlying case began during the winter of 2021 to 2022, when the Mt. Olive Correctional Complex (“Mt. Olive”) experienced ongoing water outages and shortages. Mt. Olive’s water was supplied by Gauley River. This prompted the Commission to open a general investigation focusing on those outages and shortages at Mt. Olive. *See e.g.* Commission Case No. 22-0205-PWD-GI, Gauley River Public Service District.

During this general investigation, the Commission discovered that aside from, or in addition to, the Mt. Olive problems, Gauley River had serious operating deficiencies, including: 1) it had been operating for years without a general manager, instead relying on a governing Board that lacked water management expertise, 2) apart from the absence of a general manager, it had a long term failure to properly staff operations, and 3) it had, *for years*, failed to do routine tasks, such as emergency planning and adoption of an effective water loss control program, critical for a

water utility to avoid service disruptions. *See* Staff Petition Asking the Commission to Establish a Proceeding to Determine Whether the Gauley River Public Service District is a Distressed or Failing Utility (“Staff Petition”) at 1-2, CR at BN 1521-1522. Thus, on September 29, 2022, the Commission opened a separate proceeding under the Act (the underlying case No. 22-0456-PWD-DU) to consider whether Gauley River was a distressed or failing utility. In the proceeding, the Commission named WVAWC as a potential capable proximate utility respondent.¹

In the distressed utility proceeding, on May 31, 2023, the Parties filed a Joint Stipulation and Agreement for Settlement (“Joint Stipulation”) which included a Corrective Action Plan (“CAP”) to address Gauley River’s deficiencies and the concerns uncovered by the general investigation, and which would prevent, by settlement, Gauley River from being designated as a distressed utility. *See, generally*, Joint Stipulation and Agreement for Settlement (“Joint Stipulation”), CR at BN 683-696. The CAP listed nine (9) areas of focus, each with multiple tasks for Gauley River to perform immediately: (1) Water Loss Control, (2) Long Term Planning, (3) Asset Management, (4) Staffing, (5) Projects, (6) Operations, (7) Mt. Olive, (8) Regulatory, and (9) Financial. Joint Stipulation, CR at BN 692-695.

During the final hearing on June 1, 2023, the Commission thoroughly vetted the Joint Stipulation and interviewed witnesses for Staff, WVAWC, and Gauley River. Staff witness, Jonathan Fowler, stated that from an engineering standpoint, the CAP could address Gauley River’s operational issues, *provided* that Gauley River could obtain funding, staff, and expertise to develop, implement, and maintain each and every item in the CAP. *See, e.g.*, Transcript of June 1, 2023, Evidentiary Hearing (hereinafter “Tr.” at 18-19, CR at BN 628-629; Tr. at 31-32, CR at

¹ Other parties to the proceeding were Commission Staff, Consumer Advocate Division, Kanawha Falls Public Service District and the City of Summersville. Commission Order 9/29/2022

BN 641-642. For example, Mr. Fowler testified that despite Gauley River hiring more people since his original report:

The District doesn't have the ability to do that with their staff because they don't have enough people and they have a lot of tanks ---. So what happens is that sediment builds up in the tanks and it's a breeding ground for microbes to enter these distasteful compounds in the water. This is a health hazard --- probably not, because the water is chlorinated, so you know, if you have any organisms. But we do have some of this tank sludge that is produced.

Tr. at 18, CR at BN 628. Insofar as management and operations, Mr. Fowler stated:

For long-term planning, I can tell you this from various--- a water utility has to look ahead in where they're going to be as their customer base grows or shrinks. As their facilities age, they're required to replace them. And they're told to do that, as a water facility. Some of the better ones [reports] would be the City of Charleston, they have a concise long-term control. These don't have to be --- they need to address certainty assets, customer growth, customer attrition, aging facilities, future staff, rates. And these are generally prepared by a team that would consist of the software engineer, accounting firm. They're not cheap. Even though they may only be 50 pages, they're very expensive. ***But the District has no idea where they're going to be or where they're headed.***

Tr. at 20-21, CR at BN 635 [emphasis added]. Mr. Fowler then testified that it was his opinion that despite the Joint Stipulation, Gauley River should be designated as a distressed utility. Tr. at 34, CR at BN 644.

Importantly, Mr. Fowler also testified that the CAP consisted of items that Gauley River should have been doing historically,² but had continuously refused. Tr. at 45, CR at BN 655. *See also* the pre-filed testimony of Jonathan Fowler ("Fowler Direct"), stating Gauley River "had a long history of inadequate or barely adequate operation and maintenance." Fowler Direct at p. 7,

² CAP Tasks included (but were not limited to) developing a detailed Water Loss Control Plan, seeking funding to pay the expenses of developing a long-term plan that provides a detail plan for main replacements and system upgrades, and mandating that at least one employee shall pursue a water operator license from the Bureau of Public Health. *See generally*, Joint Stipulation at Attachment 1, CR at BN 692-695.

CR at BN 1212. WVAWC witness, Brooks Crislip, testified that while WVAWC had agreed to the Joint Stipulation, it had concerns over the amount of staff expertise and staff numbers needed to perform the CAP, and that Gauley River's deficiencies required them to have a partner that could provide the expertise and staffing needed to get the water utility back to a reliable operational standpoint. Tr. at 66-67, CR at BN 676-677.

Gauley River witness, Board Chairman Ralph Arthur, testified that in order to perform the CAP, Gauley River would "have to have outside help." Tr. at 59, CR at BN 669. Specifically, when asked if Gauley River would be able to follow the CAP, Mr. Arthur stated

Well, I believe that we can. I know we're going to have --- it's going to take a lot of work. But I know that, you know, we can, if we have the right help and we get the right people, that we'd be able to do that.

Tr. at 60, CR at BN 670. When asked if he would agree that the CAP's tasks consist of requirements that Gauley River should have been doing all along, Mr. Arthur stated "I don't know that. *I don't have enough experience in this position to be able to say yes or no.*" Tr. at 61, CR at BN 671 (emphasis added).

The Commission deliberated on the Joint Stipulation by reviewing pre-filed testimony, hearing testimony, and the engineering report, and in its August 25, 2023 Order ("August 2023 Order"), ultimately declined to approve it due to its concerns "regarding Gauley River's ability to develop and implement the CAP, particularly because Gauley River *"had a duty to perform the items in the CAP prior to the advent of the Joint Stipulation and failed to do..."* (August 2023 Order at p. 5, CR at BN 482) (emphasis added), along with concerns that "Gauley River will not have the technical nor institutional knowledge and ability to (1) prepare the CAP and (2) implement the CAP without engaging numerous outside consultants at high costs. The testimony presented at the hearing supports the Commission's concerns." August 25, 2023 Commission Order at p. 4, CR at BN 481. The Commission then ruled that Gauley River was a distressed utility

and ordered Gauley River and WVAWC to negotiate an operation and maintenance agreement that would clearly provide for WVAWC to have oversight and managerial control over operation, maintenance, and administrative functions of Gauley River. Specifically, the agreement was to include terms that provide “[a] level of control [to] authorize [WVAWC] to address and implement remedial actions to correct the financial, operational, managerial, and staffing issues identified by Staff in this proceeding. WVAWC should assist Gauley River with applying for funding to finance the recommended capital improvements.” August 25, 2023, Commission Order at p. 12, CR at BN 489.

On November 17, 2023, Gauley River filed its proposed operation and maintenance Agreement. *See* CR at BN 452-466. This agreement was essentially a consulting contract where WVAWC would make recommendations to Gauley River and provide feedback, but WVAWC would not have operational, managerial, financial, or administrative control of Gauley River, as directed by the Commission in its August 2023 Order. On March 15, 2024, the Commission exercised its jurisdiction under W.Va. Code §24-2-12, and entered an Order denying Gauley River’s request to enter into its proposed operation and maintenance agreement. West Virginia Code §24-2-12 authorizes the Commission to consider an inter-utility agreement and, if the Commission deems the agreement unacceptable, “the commission shall, if the public will be inconvenienced thereby, enter such order as it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper.” The Commission did just that and again clearly restated its conditions that the agreement must give WVAWC operational control. March 15, 2024, Commission Order at p. 3, CR at BN 450.

The Commission further directed that if the Parties were not able to come to a complete arm's length agreement, then by April 12, 2024, WVAVC must file the terms that had been agreed upon and thereafter:

Gauley River and any other party shall respond within ten days of such filing. Gauley River's response must include testimony explaining why it disagrees with the proposed term(s), along with alternative language for those terms, tracked in its proposed agreement. If such competing proposals are filed, the Commission will formulate specific language for those areas still in disagreement, and require that formulated language be incorporated into the Parties' agreement.

March 15, 2024, Commission Order at p. 3, CR at BN 450.

This was now the second order that detailed what the Parties were to do if they could not reach a complete agreement. On March 22, 2024, WVAVC filed a brief letter to the Commission stating that the Parties could not agree on a suitable approach in response to the Commission's directives. WVAVC Correspondence dated March 22, 2024, CR at BN 447. The letter included no agreed terms or any testimony. Gauley River made no subsequent filing of testimony. Instead, on March 25 2024, Gauley River filed a Petition to Reconsider the March 15, 2024 Order ("the Petition") and requested that the Commission either approve the proposed operation and maintenance agreement or go back and approve the original Joint Stipulation from 2023. *See generally*, Petition for Reconsideration of March 15, 2024 Commission Order ("Petition for Reconsideration), CR at BN 422-430.

The Petition did not request a reconsideration of the distressed utility designation, but rather vaguely argued that by allowing another capable proximate utility to have operational control, Gauley River would be at risk of losing funding. Petition to Reconsider, CR at BN 427-428. The Petition included letters to Gauley River from the West Virginia Infrastructure and Jobs Development Council and the West Virginia Department of Health and Human Resources, but

neither of those documents even touched upon the consequences of Gauley River entering into an operation and maintenance agreement.³ Petition to Reconsider, CR at BN 432-433; 436-437. There is no evidence or testimony in the record that supports Gauley River's allegations that it would lose funding if it entered into an operations and management agreement or any explanation as to how the type of assistance an operation and maintenance agreement would provide differs from the acknowledged "outside help" (and the various agreements that would go along with it) that its Board Chairman testified it would need.

Seven months then elapsed without Gauley River filing anything further. With the Parties at an impasse, on October 31, 2024, the Commission entered an Order that required they enter into the Ordered Agreement.⁴ The Ordered Agreement is very similar to many agreements between WVAVC and small water systems, including distressed utilities, that the Commission had approved in the past⁵. The Commission also discussed Gauley River's concerns regarding funding, noting that the Ordered Agreement would not change Gauley River as a legal entity or require WVAVC to be an applicant on any funding applications, grants, etc. October 31, 2024, Commission Order at p. 2, CR at BN 373. This consideration was evident from the first August 2023 Order, when the Commission directed WVAVC to assist Gauley River in applying for and maintaining funding. August 25, 2023, Commission Order at p. 12, CR at BN 489.

³ As a matter of fact, one letter from the W.Va. Bureau of Health indicated that the funding program Gauley River was using was in fact being managed and operated by a third party.

⁴ It should be noted that, on November 4, 2024, the Commission issued an Order correcting certain typos and the omission of footnotes in the Ordered Agreement.

⁵ See generally, Case No. 24-0805-W-PWD-PC Lashmeet Public Service District and West Virginia-American Water Company, Dec. 3, 2024 Comm'n. Final Order; Case No. 24-0803-W-PWD-PC New Haven Public Service District and West Virginia-American Water Company, Nov. 22, 2024 Comm'n Final Order; Case No. 18-1472-W-PC West Virginia-American Water Company; Putnam County Commission; and Putnam County Building Commission, Jan. 28, 2019 Cmm'n Final Order.

II. SUMMARY OF ARGUMENT

Through its general investigation in 2022, the Commission learned that Gauley River had multiple serious deficiencies, including: 1) it had been operating for years without a general manager, instead relying on a governing Board that lacked water management expertise, 2) apart from the absence of a general manager, it had a long term failure to properly staff operations, and 3) it had, *for years*, failed to do routine tasks critical for a water utility to avoid service disruptions and other emergencies. To remedy the deficiencies, the Commission first utilized W.Va. Code §24-2H-7(b), and ordered Gauley River and WVAWC to negotiate an operation and maintenance agreement that would specifically address these deficiencies by giving control of Gauley River's operations to WVAWC. The Commission instructed Gauley River, *twice*, about this particular directive. The Commission also instructed Gauley River, *twice*, to provide disputed terms and alternative language, via testimony, if a complete negotiated agreement could not be reached.

Over the course of 14 months, the Parties failed/refused to provide a negotiated agreement with the specific terms or any testimony with alternative language, etc. And so, on October 31, 2024, with the Parties at an impasse, the Commission then utilized W.Va. Code §24-2H-7(b)(6) and entered the Ordered Agreement that would give WVAWC control over Gauley River's operation and maintenance, and also allow Gauley River to remain a separate legal entity that could continue, among other things, to seek and utilize funding for independent water utilities, keep its Board of Directors, and then return to independent operations upon termination of the agreement, if the Board chose to do so. The Ordered Agreement is a common operation and maintenance agreement utilized within West Virginia's water utility community. It is not "tantamount to an acquisition," as the Petitioner argues, but rather meticulously crafted to avoid acquisition of the distressed utility while allowing WVAWC (or any other capable proximate

utility) to operate, repair, and maintain the system (and correct and stabilize the deficiencies) without depleting its own resources or placing itself in financial peril.

While the Petitioner’s secondary argument rests on the provision of W.Va. Code §24-2H-7(b)(2) that authorizes the Commission to order a “mutually agreed arms-length” operational agreement, Petitioner’s own failure to provide such an agreement (or any alternative terms for the Commission to consider) is what ultimately resulted in the Commission having to next rely upon W.Va. Code §24-2H-7(b)(6), which authorizes the Commission to consider “[a]ny viable alternative other” than an ordered acquisition by a capable proximate utility, which is exactly what the Commission did when the Parties were at an impasse. Gauley River ignores the statutory authority of the Commission to consider viable alternatives other than a mutually agreed arms-length agreement, but the Legislature granted the Commission broad power to require remedies that are workable and that will actually address the deficiencies of a distressed utility, by not limiting the Commission to remedies that require every entity’s approval prior to implementation.

The Petitioner’s appeal should be denied and this Court should uphold the October 31, 2024 Order of the Commission.

III. STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for March 18, 2025.

IV. STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in W.Va. Code §24-5-1. In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981).

As an initial matter, in Syllabus Point 1 of Sexton, this Court held:

[A]n order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.

Syl. Pt. 1, Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) (Citations and quotation marks omitted).

In Monongahela Power Company, this Court established a three-pronged analysis for review of a Commission order:

[i]n reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.

Syl. Pt. 2, Monongahela Power Company, 166 W.Va. 423, 276 S.E.2d 179 (1981) (in relevant part). Furthermore, the Monongahela Power Company Court explained:

[t]he Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Id. (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Company in Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela

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

Syl. Pt. 1, Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993). *See also* Syl. Pt. 1, Mason Cty. Pub. Serv. Dist. v. PSC of W. Va., 247 W. Va. 580, 885 S.E.2d 161 (2022).

In Central West Virginia Refuse, the Court recognized that in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936), the United States Supreme Court held that rate-making authority is a legislative function. In exercising "its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards." Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 420; 438 S.E.2d 596, 600-601 (1993). The Court also stated, "in deference to the Commission's expertise . . . this Court will not substitute our judgment for that of the Commission on controverted evidence." Id. at 190 W.Va. at 421; 438, S.E.2d at 601.

Similarly, in C & P Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), this Court reiterates the three-pronged standard of review established in the Monongahela Power case, *supra*, and went on to hold generally that:

The Court's responsibility is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."

Id. at 611. The C&P case also affirmed the Supreme Court of Appeal's prior holding "that this Court will not substitute our judgment for that of the Commission on controverted evidence." Id. at 611.

In W.Va. Citizens Action Group v. Public Service Commission, the Court recognized the broad legislative power of the Commission to address the interests of each party, citing the Commission’s broad authority found in W.Va. Code § 24-1-1(a) in addition to the Commission’s responsibility under W.Va. Code § 24-1-1(b). W.Va. Citizens Action Group v. Public Service Commission, 233 W.Va. 327; 758 S.E. 2d 254 (2014).

V. ARGUMENT

A. An Operation and Maintenance Agreement Requiring Operational Control of a Distressed Utility is a Statutorily Authorized Remedy Under W.Va. Code §24-2H-7(b)(2) and W.Va. Code §24-2H-7(b)(6).

Once it found Gauley River to be a distressed utility, the Commission, as authorized under W.Va. Code §24-2H-7(b)(1)-(6), then had the following remedial measures available to it: (1) reorganization of the utility under a new board with approval of the relevant local government, (2) operation of the distressed utility by another entity under a mutually agreed arms-length transaction, (3) appointment of a receiver under W.Va. Code §24-2-7(b), (4) merger with another utility subject to local government approval, (5) acquisition by a third-party utility or (6) another viable alternative. Thus, “operation of the distressed utility by another entity under a mutually agreed arms-length transaction” is one available remedy and “another viable alternative” is another available remedy.

In this case, the Commission first utilized W.Va. Code §24-2H-7(b)(2), “operation of the utility by another entity” and on August 25, 2023, ordered the Parties to negotiate an arms-length operation and maintenance agreement that would allow WVAWC to have operational control. August 25, 2023, Commission Order at p. 12, CR at BN 489. Gauley River responded by filing a proposed operation and maintenance agreement that did not meet the Commission’s directive, and instead “[left] Gauley River entirely in control and responsible for the ongoing

operations and maintenance of the water system.” March 15, 2024, Commission Order at p. 2, CR at BN 449.

In its March 15, 2024 Order, the Commission succinctly described its dissatisfaction with the proposed operation and maintenance agreement, stating:

The August 25, 2023 Order was clear, and it is important to note that there is no inconsistency in requiring the Parties to include certain terms and conditions and also giving the Parties flexibility to create a mutually agreeable contract...

The Order also made it clear that if a mutually agreeable contract could not be worked out between the Parties, they each had an opportunity to submit a draft containing language that each party individually believed was reasonable. Nothing in this Order indicated that should the Parties fail to reach an agreement, the Commission would approve of an agreement that eliminated or modified the required terms and conditions ceding management and operational control to WVAWC.

March 15, 2024, Commission Order at pp. 2-3, CR at BN 449-450. The Commission once again specifically directed the Parties to negotiate an agreement that included terms providing that WVAWC have operational control, and further explained to the Parties what to do if negotiations were unsuccessful:

If WVAWC [and Gauley River] are unsuccessful in their negotiations, WVAWC must make a filing no later than April 12, 2024 that provides the terms that have been agreed upon, the terms WVAWC proposed but which were not agreed to, and include either an affidavit or testimony in support of WVAWC’s terms that Gauley River did not agree upon. Gauley River and any other party shall respond within ten days of such filing. Gauley River’s response must include testimony explaining why it disagrees with the proposed term(s), along with alternative language for those terms, tracked in its proposed agreement. If such competing proposals are filed, the Commission will formulate specific language for those areas still in disagreement, and require that formulated language be incorporated into the Parties’ agreement.

Id. at p. 3, CR at BN 450.

The Commission is authorized to review, modify, approve or decline to approve inter-utility contracts under the authority of W.Va. Code §24-2-12. Thus, while this agreement stemmed from the designation of a distressed utility, the Commission’s authority to review and determine approval of that contract is the same as it is for any other agreement that falls under W.Va. Code §24-2-12, and includes the Commission’s overall responsibility to balance the interests of the ratepayers, the utility and the state economy, per W.Va. Code §24-1-1(b).

On March 22, 2024, WVAWC filed a short letter to the Commission indicating that no agreement could be reached between the Parties. *See* Correspondence from WVAWC dated March 22, 2024, CR at BN 446-447. Despite the Commission’s previous directives and its repeated explanation of what should transpire if the Parties did not negotiate a mutually acceptable agreement with the required terms for WVAWC to have operational control, on March 25, 2024, Gauley River filed a Petition for Reconsideration. The Petition alleged vague concerns about funding qualifications if WVAWC were to take over operational control, but did not provide any concrete evidence supporting that claim. *See, e.g.,* Petition to Reconsider, CR at BN 427-428. Gauley River’s own witness, Board Chairman Ralph Arthur, had already testified that the utility would need to seek out and rely on outside help to perform the CAP that Gauley River had previously championed. Tr. at 59, CR at BN 669. There was no evidence or testimony submitted that supported Gauley River’s allegations that it would lose funding if it entered into an operation and management agreement, nor had Gauley River explained how this type of assistance from WVAWC (via an operation and maintenance agreement) would differ, in terms of funding qualifications, from the “outside help” Gauley River admitted it would need. Once again Gauley River rejected its opportunity to negotiate an “arms-length” operation and maintenance agreement

and its opportunity to explain why disagreed terms should be excluded and/or alternative terms should be implemented. After its Petition for Reconsideration, Gauley River filed nothing further.

On October 31, 2024, 14 months after its August 2023 Order, with the Parties failing to negotiate an arms-length agreement and also failing to provide the Commission with testimony regarding the disputed terms or any alternative language, the Commission then exercised its authority under W.Va. Code §24-2H-7(b)(6) to implement “another viable alternative” and ordered the Parties to enter into the Ordered Agreement. This change was necessary to prevent the requirement of an “arms-length transaction” from being weaponized by Gauley River to avoid the Commission’s directives.

The Petitioner implies the Commission exceeded its authority by ordering it to enter into an operation and maintenance agreement with terms that were provided by the Commission. *See generally*, Petitioner’s Brief at 26, CR at BN 33. This is simply untrue. Under W.Va. Code §24-2-12 the Commission is authorized to approve inter-utility contracts. Thus, the Commission was well within its authority to reject the Joint Stipulation (and attached CAP) and Gauley River’s proposed operation and maintenance agreement. Furthermore, in City of South Charleston v. West Virginia PSC, this Court affirmed the Commission’s authority to not only approve of - but also modify utility contracts:

As part of its review of a utility contract, the Commission may modify or void any clause in the contract that the Commission determines is adverse to public interest.

Id., 204 W. Va. 566, 571, 514 S.E.2d 622, 627 (1999). See also City of Charleston v. Public Service Commission, 57 F.3d 385 (4th Cir. 1995) (the Commission may alter rates that are set forth in a contract); Preston County Light and Power Company v. Renick, 145 W. Va. 115,

113 S.E.2d 378 (1960) (the Commission has the authority to supervise, regulate, modify or approve a contract between utilities).

The Commission is authorized to not only approve contracts between utilities but also modify or void any term within a contract that it deems to be against the public's interest. That is exactly what the Commission did by rejecting the Joint Stipulation and the proposed operation and maintenance agreement. The Commission ruled that Gauley River's deficiencies require operational control by another capable proximate utility to provide reliable water service to the public. The Joint Stipulation and the proposed operation and maintenance agreement failed to provide that control and therefore were against the public interest and rightfully rejected by the Commission. Insofar as the Ordered Agreement contained terms that were not provided or agreed to by Gauley River, it was and is within the Commission's authority to modify terms in a utility contract and it did so to provide a reasonable alternative to an acquisition, as authorized in W.Va. Code §24-2H-7(b)(6).

B. The Ordered Agreement Does Not Amount to an Acquisition

Petitioner argued that the Ordered Agreement is "tantamount to an ordered acquisition." Petitioner's Brief at 14, CR at BN 21. The Petitioner then details why the October 31, 2024 Commission Order should be remanded based on the statutory requirements for an acquisition of a failing utility.⁶ See Petitioner's Brief at subsection VIIIA., CR at BN 27. If the Commission had ordered an acquisition, the Petitioner would be correct because the requirements to order an acquisition of a failing utility are different from the Commission's actions in this case. This is because the Commission did NOT

⁶ Because the Commission did not order an acquisition, the requirement of W.Va. Code 24-2H-8(f) to recommend an acquisition to the county commission does not apply. Likewise, there is no requirement in West Virginia law that a utility must have the approval of a county commission to enter into an operation and maintenance agreement.

designate Gauley River as a failing utility, but rather a distressed utility and under its authority for distressed utilities ordered it to enter into an operation and maintenance agreement. The Ordered Agreement is not tantamount to an acquisition but is explicitly to avoid an acquisition while also ensuring that the capable proximate utility ordered to operate the distressed utility does not suffer financially during the term of the agreement.

1. The Ordered Agreement Addresses Potential Facility and Capital Investments Required to Correct the Gauley River's Deficiencies

Gauley River mischaracterizes the Ordered Agreement when it states "It [the Agreement] provides that all required improvements and replacements to Gauley River's facilities become the capitalized property of WVAWC, and requires Gauley River to grant all right of ways, easements, and licenses to accommodate WVAWC's capitalized property." Petitioner's Brief at 14-15, CR at BN 21-22. This is a misstatement because improvements and replacements of property are properly accounted for as maintenance expenses. Ordinary maintenance often involves replacements of minor units of property and those replacements will be paid for by WVAWC as an operating expense, rather than a capital expenditure. Those improvements and replacements become and remain part of the Gauley River system. However, the Ordered Agreement provides that, to the extent that WVAWC constructs additions of new property or replaces major units of property, that are properly capitalized under the accounting system required by the Commission, that WVAWC will add or replace such major units of property at its own expense. Having replaced capitalized property at its expense, it is reasonable for WVAWC to own that property so that it can earn a return and depreciate the property as part of its costs of service when the Commission determines

WVAWC rates.⁷ This provision is reasonable and also required by long-established regulatory law which provides that a utility is entitled to earn a return on prudent and reasonable investment it has made on property that is dedicated to public service. *See Bluefield Water Works v. Public Serv. Comm'n*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944).

The provision is also beneficial to the relatively small customer base of Gauley River, because by requiring WVAWC to install such capitalized property at its own expense, the investment becomes part of the capital costs that are spread across the entire WVAWC customer base. For example, if the Gauley River system required a new \$1 million pumping/booster station, the capital cost to Gauley River customers, assuming that Gauley River could finance such an investment, would amount to a total capital cost of approximately \$820 per customer.⁸ Such an investment, even if financed over twenty years at a favorable 2% interest rate, would cost Gauley River customers approximately \$4.00 per month. By contrast, under the Ordered Agreement, that \$1 million investment would instead be spread over all WVAWC customers and would amount to a total capital cost of approximately \$6 per customer (six cents per month). That average investment and monthly cost of six cents would be included in the WVAWC rates and Gauley River customers would share in those costs by paying a rate equal to the WVAWC rate.

⁷ The exact language in the agreement which Gauley River is referring to specifies: “In the event the Company, under the terms of this Agreement, is required to install, relocate, or replace any property associated with or attached to District Facilities, which, under the accounting system used by the Company and approved by the Commission is a capitalized unit of property (“Capitalized Property”), the Company shall make such installation, relocation or replacement at its own cost; Provided, that Capitalized Property shall then be, and remain, the property of the Company (unless purchased by District from the Company after termination of this Agreement as provided in Section VI hereof) and shall be properly included in the utility plant accounts of the Company when calculating its cost of service, including depreciation where applicable. *See* Ordered Agreement, at Sec. II.B., Appendix A, November 4, 2024, Commission Order, CR at BN 352.

⁸ Based on 1,222 customers, as last reported in Gauley River’s Annual Report for the Fiscal Year Ended June 30, 2023.

It is important to note that even though WVAWC will own the capitalized facilities that it installs at its own cost, it only does so during the term of the Ordered Agreement. Any customers attached to lines owned by WVAWC will be customers of Gauley River. Once the Ordered Agreement terminates, Gauley River may purchase those facilities at the decreased depreciated costs. Also, any new customers that are added on those capitalized facilities will be customers of Gauley River. Gauley River retains its historic customer base and can grow its customer base even if the growth takes place on lines from capitalized facilities that are initially owned by WVAWC.

Lastly, the requirement that Gauley River grant necessary rights of way for WVAWC installed capitalized facilities is just the opposite of what would happen if WVAWC was acquiring Gauley River. In an acquisition, WVAWC would own the rights of way formerly held by Gauley River. Under the Ordered Agreement, Gauley River remains a separate legal entity that continues to own property, including private rights of way.

2. The Ordered Agreement Balances the Employment Concerns of Gauley River and the Employment Needs of WVAWC.

Gauley River next cites the Ordered Agreement's provision that "all records pertaining to [Gauley River's] employment of its employees, including all personnel and human resources files and records," so that WVAWC can offer employment to Gauley River personnel, as evidence that the Commission ordered an acquisition. Petitioner's Brief at 15, CR at BN 22. If WVAWC is to provide full service to Gauley River under the Ordered Agreement, it must have employees to perform those services. The Commission is cognizant of the local benefits that derive from localized employment by publicly owned utilities. In structuring a balanced, cost effective agreement that considers the interests of Gauley River employees, as well as the interests of customers of both Gauley River and WVAWC, the

Ordered Agreement recognizes this local benefit by requiring that WVAWC have discretion to hire the existing Gauley River employees, subject to certain conditions specified in the Ordered Agreement. As part of this provision, WVAWC “shall provide each transferred Personnel with compensation and benefits that are substantially comparable in the aggregate to the compensation and benefits provided to similarly situated employees of the Company.” Ordered Agreement, attached as Appendix A to the October 31, 2024, Commission Order, CR at BN 382.

In addition, WVAWC, with certain exclusions, “shall recognize and attribute each Personnel's length of service with Gauley River as if such service was completed with the Company for eligibility and vesting under the Company's employee benefit plans and programs.” Id., CR at BN 383. Given these obligations placed on WVAWC to protect the interests of Gauley River employees, the Commission requires that Gauley River cooperate by providing WVAWC with a copy of all records pertaining to the employment of its employees. This is a common provision in operation and management agreements where one utility is providing full operating and maintenance services to another utility and will provide those services, to the extent possible, by continuing the employment of the personnel of the utility receiving the service. Making employment records available to WVAWC is not tantamount to an acquisition of Gauley River, but is simply a common-sense requirement to protect the interests of employees that WVAWC must hire to provide the full range of services to Gauley River.

3. The Ordered Agreement Reasonably Compensates WVAWC for Its Work on the Gauley River Facilities During the Term of the Agreement.

a. It is Reasonable for the Gauley River Tariff to Mirror the WVAWC Tariff.

Gauley River objects that “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.”⁹ Petitioner’s Brief at 15, CR at BN 22. However, most operation and maintenance agreements require the distressed utility to match the rates of the utility providing the services. WVAWC will have the responsibility to provide all normal operation and maintenance services at its own expense and will be compensated for this work through the net collections for water service from Gauley River customers (at the tariff rate of Gauley River), after it pays any debt service of Gauley River. Thus, it is necessary that the Ordered Agreement include a provision to reflect a reasonable share of WVAWC costs in the rates to be paid by Gauley River customers. This is necessary so that WVAWC can be reasonably compensated for the work it performs at a rate equal to the net revenues generated by Gauley River’s customers under Gauley River’s tariff, after WVAWC pays the debt service of Gauley River.

Unlike an acquisition, under the Ordered Agreement, Gauley River remains a separate legal utility entity, with a separate tariff rate that applies to its customers. WVAWC will have

⁹ Gauley River incorrectly stated that the adoption of WVAWC rates will “require an approximate 16% increase in the revenue that Gauley River collects from its customers.” Petitioner’s Brief at 15, CR at BN 22. In fact, the net impact on all Gauley River customers will be a decrease. Because of the different rate structures of WVAWC and Gauley River, the WVAWC tariff will impact Gauley River customers differently, depending on their individual usage level. Some customers will receive increases in the range of 10% to 18%, but the majority of customers, including customers at lower usage levels, will receive decreases ranging from 1% to 29%. Overall, for all Gauley River customers, there will be a decrease of approximately 16%. October 31, 2024 Commission Order, Appendix B, CR at BN 401-403.

This overall decrease of 16% is calculated with rates in effect for Gauley River on March 2024. In September 2024, Gauley River filed an application for a rate increase, stating that it is “presently experiencing increased operation and maintenances expenses that render it unable to fully fund its cash working capital reserve account.” See Gauley River Public Service District, Case No. 24-0762-PWD-19A, September 17, 2024. That

the responsibility to provide all normal operation and maintenance services at its own expense, and will be compensated for this work through the net collections for water service from Gauley River customers (at the tariff rate of Gauley River), after it pays any debt service of Gauley River. Thus, it is necessary that the Ordered Agreement include a provision to reflect a reasonable share of WVAWC costs in the rates to be paid by Gauley River customers. Rather than requiring separate tariff rates for different Gauley River customers, the Commission has determined that this can be accomplished by requiring the utility receiving operation and maintenance services from WVAWC to charge its customers the same rates as WVAWC rates. This is often referred to as mirroring the WVAWC rates.

b. The Surcharge is Reasonable

In relation to the surcharge that Gauley River cites (*see, e.g.*, Petitioner's Brief at 15, CR at BN22), this requirement is a very limited and specific requirement to cover debt service costs incurred due to the decisions of the Gauley River Board.¹⁰

The Commission generally prefers that the customers of any separate utility receiving full operation and maintenance services from WVAWC, and normal capital investment from WVAWC, pay a tariff that mirrors the WVAWC tariff. The exception to that preference occurs if the separate utility, Gauley River in this instance, decides during the term of the agreement, to extend service to new customers and decides that the full cost of that extension project will be the responsibility of Gauley River.¹¹

case is under review by Commission Staff and the dollar amount and percentage of any increase for Gauley River customers is currently unknown.

¹⁰ This ability to make expansion and financing decisions demonstrates that that Gauley River remains a separate legal entity, is not operating under an agreement that is tantamount to an acquisition and can continue to make decisions regarding extensions of its system to serve new customers.

¹¹ Normally, if the Commission approves a project, it restricts the amount of investment made to serve new customers to a calculated amount which is justified by the incremental new revenue that will be received from the added customers. Thus, the utility must weigh the benefits of the project against the increase to its customers. However, it is possible that at some point in the future, Gauley River may decide to extend service at a cost that

In the absence of an operation and maintenance agreement, Gauley River would have to cover those costs in its tariff and spread the costs over all of its customers. An operation and maintenance agreement without a surcharge changes that impact on Gauley River customers if the Gauley River tariff mirrors the WVAWC tariff. Because WVAWC would have the responsibility to pay Gauley River's debt service costs, Gauley River would have an incentive to uneconomically expand its system because the cost of new debt service would be spread over all WVAWC customers instead of the Gauley River customers. The Commission generally prefers not to approve uneconomical expansion of utilities, but if the benefits of extended service are substantial such uneconomic extension may be approved. The surcharge provision in the Ordered Agreement directs the Parties in that situation.

The Commission wrestled with the surcharge issue in recent cases involving public service districts served under an operation and management agreement¹², and ultimately ruled that because WVAWC will be responsible to pay all debt service costs of the served district, it was reasonable to provide that if the District seeks and receives approval from the Commission for a debt-service surcharge, WVAWC shall be responsible for billing and collecting the surcharge and paying the debt service. The surcharge is not automatic. The surcharge provision applies only when the Commission decides that an investment made by Gauley River cannot be reasonably amortized without a surcharge on Gauley River customers.

is uneconomical. In such case, the utility may require a rate increase from all of its customers to finance the cost of the uneconomical portion of the investment in facilities needed to serve the new customers.

¹² See, *supra*, fn.5.

4. The Ordered Agreement Allows Gauley River to Remain a Separate Legal Entity and Return to Independent Operations

Perhaps the most obvious and important distinction of the Ordered Agreement, is that unlike an acquisition, Gauley River remains a separate legal entity with its own Board of Directors that can continue on, independently, after the term of the Ordered Agreement and make financial decisions during the term of the Order Agreement¹³. *See, e.g.*, October 31, 2024, Commission Order at p. 2-3, CR at BN 373-374.

a. By Remaining a Separate Legal Entity, Gauley River Does Not Risk its Funding

By remaining a separate legal entity, Gauley River will not lose any funding nor will it be prevented from seeking additional or future funding, as it is still an eligible independent utility. Gauley River (via its Board of Directors) may complete grant or loan applications in its own name, thus WVAVC will not be an applicant. In its Petition for Reconsideration, the Petitioner cited the testimony of Ralph Arthur who discussed a conversation he had with an unnamed USDA Community Programs Director, who apparently advised that “the water company is not an eligible applicant for our funding....” Gauley River Petition for Reconsideration at p. 5-6, CR at BN 425-426. However, that vague statement nonetheless clearly contemplates WVAVC *being the applicant*, which would never be the case. Gauley River remains its own, separate legal entity with its own separate board of directors, etc., and it will just have WVAVC managing its operation and maintenance for a set term.

¹³ This is also evidence that the Ordered Agreement is not tantamount to an acquisition, as the Gauley River Board retains its independent authority to make such investment and financing decisions.

b. Gauley River May Choose to Return to Independent Operations at the End of the Ordered Agreement's Term

The Ordered Agreement is not indefinite and upon its termination Gauley River may resume independent operational control and, if so desired, purchase, *at the decreased depreciated rate*, any facilities that were constructed during the Ordered Agreement's term. Ordered Agreement, attached as Appendix A to the October 31, 2024, Commission Order, CR at BN 360. This is the quintessential opposite of an acquisition, which is permanent and provides no way for the acquired utility to operate independently again. While the Petitioner implies that a term of 10 years is essentially permanent, given the serious deficiencies found and the responsibility of WVAWC to get Gauley River's operations to a place where they are no longer distressed, this term is reasonable.

VI. CONCLUSION

The West Virginia Legislature has delegated responsibility to the Commission to address water and wastewater infrastructure deficiencies, based on the Legislature's findings that allowing operational issues linger can lead to the inability of water and wastewater utilities to adequately serve customers and maintain regulatory compliance, thereby threatening human health and hindering economic growth. W.Va. Code §24-2H-2(f). The Commission found that Gauley River was a distressed utility and ordered it to negotiate an operation and maintenance agreement with WVAWC at arms-length that would provide WVAWC with the operational control needed to address the managerial, financial, and technical deficiencies that resulted in it being designated as a distressed utility. Under W.Va. Code §24-2H-7(b)(2), operation of the distressed utility by another entity under a mutually agreed arms-length transaction is a remedy available to the Commission for a distressed utility. If a utility refuses to negotiate an operation and maintenance

agreement as ordered, the Commission has jurisdiction under W.Va. Code §24-2-7 to find that the utility is acting unreasonably and to “fix” the unreasonable action:

- (b) Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or service to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, or shall find that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurement, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

That is what the Commission did in this case. The Commission fully complied with W.Va. Code §24-2H-7 of the Act when it adopted the alternative that Gauley River negotiate an agreement with WVAWC at arms-length. Gauley River’s failure to do so, however, did not terminate the Commission’s authority under the Act or under W.Va. Code §24-2-7. The Act’s contemplation of an arms-length contract must not be used as a sword to excuse a distressed utility from acting reasonably or complying with the Commission’s orders. Gauley River was instructed by the Commission, *twice*, on the terms required for an arms-length agreement and then also instructed on what to provide the Commission if it could not negotiate a complete agreement with the required terms. Gauley River failed to provide either. Fourteen months after the August 2023 Order directing the Parties to negotiate an arms-length agreement, the Commission acted consistent with its W.Va. Code § 24-2-7 authority to order reasonable remedies in lieu of unreasonable utility acts, and provided an operation and maintenance agreement for Gauley River and WVAWC to enter. The Ordered Agreement allows Gauley River to remain a separate legal entity that will have the opportunity to resume independent operations at the end of the term, should it choose to do so.

The Commission must balance the interests of the utility's customers with that of the general interests of the state's economy and the interests of the utility. W.Va. Code §24-1-1(b). Additionally, "the Legislature direct[ed] the Public Service Commission to identify, explore and consider the potential benefits or risks associated with emerging and state-of-the-art concepts in utility *management*, rate design and conservation." W.Va. Code §24-1-1 (emphasis added).

After finding Gauley River to be a distressed utility, the Commission concluded that it was in the interest of Gauley River customers, Gauley River itself, and the state economy to order remedial measures that would cure the deficiencies which caused it to be distressed. The Commission gave Gauley River over 14 months and multiple chances to negotiate its own arms-length operation agreement with WVAWC, but Gauley River continuously failed to provide the Commission with a negotiated agreement or with explanations and alternative language for disagreed terms. After 14 months it was clear that Gauley River was not going to be to be proactive and follow the Commission's directives.

With the Parties at an impasse, the Commission provided an operation and maintenance agreement for the Parties to enter that would ensure WVAWC the time and control needed to cure Gauley River's deficiencies. The Commission did not order an acquisition. The Ordered Agreement was not hastily forced upon Gauley River, but rather was another viable alternative from the Commission after Gauley River continuously failed to follow its directives. Petitioner's Appeal should be denied and the Commission's Final Order of October 31, 2024, as corrected by Order issued on November 4, 2024 (CR at BN 347-371) should be affirmed.

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CERTIFICATE OF SERVICE

I, Jessica Carter, Esq., hereby certify that the foregoing Statement of Respondent Public Service Commission of West Virginia of its Reasons for the Entry of its Order of October 31, 2024 in Case No. 22-0456-PWD-DU was electronically filed with the Court on January 16, 2025, via File and ServeXpress, and served via File and ServeXpress or U.S. Mail on the following:

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