IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-637

HUNTINGTON SANITARY BOARD,

Petitioner,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF THE WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION IN SUPPORT OF PETITIONER

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I. Interests of the *Amicus Curiae*

The West Virginia Municipal Water Quality Association (WVMWQA) is an association of 28 local governments, public service districts, and utility/sanitary boards that operate public water and sewer utilities regulated by the Public Service Commission (the "Commission").[1] WVMWQA is dedicated to protecting West Virginia's water resources based on sound science and good public policy. The association develops and supports sensible policies that will effectively and efficiently provide safe water and wastewater services to the citizens of West Virginia while ensuring clean water goals.

The citizens served by WVMWQA's members expect clean water to flow when they turn on their faucets and wastewater to be carried away through their drains and toilets. Few understand the challenges public utilities face to provide these essential services. Water and wastewater utilities are complex and costly systems subject to a wide array of federal and state regulations. Nevertheless, citizens expect to receive no more than modest monthly bills for these essential services. Balancing these conflicting demands—providing seamless and essential water and sewer services on limited budgets—is a daunting challenge.

Maintaining this balance is becoming harder due to the simultaneous and unprecedented challenges facing public utilities in the United States. Our members are forced to address, and fund, stormwater and wastewater improvements to improve water quality through expensive technological upgrades or best management practices, to find and remove lead service lines, and to monitor and remove emerging contaminants like,

[1] WVMWQA's membership also includes local governments operating stormwater utilities and engineering firms that support WVMWQA's member utilities. Counsel for the parties authored no part of this amicus brief. Likewise, no party other than the WVMWQA has made any monetary contribution to fund the preparation or submission of this brief. Although Huntington Sanitary Board is a WVMWQA member, it has not directly contributed to or funded the preparation or submission of this brief.

per- and polyfluoroalkyl substances (PFAS), in drinking water and/or wastewater discharges, often through the implementation and construction of novel treatment technologies that can drive capital costs in the hundreds of millions of dollars. These circumstances are a significant contributor to the recent spate of failing utilities, and many West Virginia utilities are operating perilously close to the breaking point.

Commission orders directing a "proximate" public utility to acquire and operate failing systems outside their service areas without sufficiently assessing its authority to issue such orders or the capabilities and costs associated with such an acquisition—like the order issued to Huntington Sanitary Board—create significant operational and financial risks for WVMWQA's already stressed public utility members.

The Commission's decisions to force public utilities to commandeer the operation of failing water and sewer systems outside a public utility's service area and without reasonable diligence on its part to accurately estimate the costs of improving and maintaining the failing system, if one exists, can dramatically increase our members costs and upset years of planning. The Commission's ultra vires and inadequately considered orders could force WVMWQA members and other public utilities to adopt struggling sister utilities across the state without sufficient notice or investigation to adequately assess the costs associated with doing so. This process will irresponsibly and arbitrarily increase rates for essential services for our members' existing ratepayers, and, most concerningly, will add further burdens to functioning public utilities.

WVMWQA agrees that every citizen of West Virginia should have access to safe, effective, and affordable drinking water and sewer services. Our members have an interest in ensuring that the Commission, however, does not arbitrarily jeopardize affordable access to its existing ratepayers without first gathering the necessary information and

data to make the informed and reasonable decision the Legislature required. Failing utilities are a statewide problem, and every WVMWQA member is at risk of receiving an order from the Commission to take over such utilities. More generally, WVMWQA's members have a strong interest in ensuring that the Commission does not intrude upon public utility decisions entrusted by the Legislature to local governments, public service districts, and utility/sanitary boards.

For these reasons, the WVMWQA has an interest in Huntington Sanitary Board's (HSB) petition of the Commission's order and requests the Court to hold the Commission's order as invalid.

II. **Argument**

This Court has previously held that the Commission's orders "based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." *Boggs v. Pub. Serv. Comm'n of W. Va.*, 154 W. Va. 146, 156 (1970).

The Legislature granted the Commission authority over public utilities. W. Va. Code § 24-2-1. The Commission's authority over sewer systems was specifically limited to those that serve more than 25 persons or firms. *Id.* § 24-2-1(a)(8).

In the Distressed and Failing Utilities Improvement Act (the "Act"), W. Va. Code § 24-2H-1 *et seq.*, the Legislature authorized the Commission to declare a public utility a "failing utility," W. Va. Code § 24-2H-7(a), and provided factors to consider before doing so. *Id.* § 24-2H-5(a). After making such a finding, the Legislature empowered the Commission to order a proximate utility to acquire the failing utility but required it to first assess whether the proximate utility was capable of acquiring and operating the failing utility. *Id.* §§ 24-2H-5(b); 24-2H-7(a). The plain language of the statute thus

contemplates that the Commission has authority to declare that sewer utilities that meet specified factors are failing and that a proximate utility is capable of operating the failing utility and only then may order the proximate utility to acquire the failing utility.

Here, the Commission openly accepted the existence of the Hubbard Heights Subdivision Association, Inc. ("the HOA") and the number of persons living within its "service area" as unresolved factual questions but nonetheless exercised its jurisdiction and authority to order the Huntington Sanitary Board ("HSB") to acquire the HOA. In doing so, the Commission exceeded its authority and neglected to satisfy the conditions the Legislature placed on its authority. As a result, the Commission first failed its obligation to ensure it retains authority and jurisdiction before exercising its authority and, second, exceeded the authority the Legislature conferred on to it.

A. The Commission lacked authority to order HSB to acquire the HOA because the HOA is not a public utility and has insufficient persons within its former service area.

This Court has noted that "[t]he Public Service Commission of West Virginia has no jurisdiction and no power or authority except as conferred on it by statute and necessary implications therefrom, and its power is confined to the regulation of public utilities. It has no inherent power or authority." *Equitrans, L.P. v. Pub. Serv. Comm'n of W. Va.*, 247 W. Va. 646, 651 (2022) (citing Syl. Pt. 2, *Wilhite v. Pub. Serv. Comm'n of W. Va.*, 150 W. Va. 747 (1966)). It has also noted "that the PSC 'would transcend its statutory jurisdiction, power and authority if it should undertake to exercise control over business enterprises not falling within the classification of public utilities.'" *Id.* (citing *Eureka Pipe Line Co v. Pub. Serv. Comm'n of W. Va.*, 148 W. Va. 674, 683 (1964)). The Commission may terminate its own jurisdiction if its actions and "the circumstances surrounding the case demonstrate clearly and unequivocally its intent to relinquish such jurisdiction."

Boggs, 154 W. Va. at 154. In this case, the Commission failed to recognize, or even analyze whether, the HOA was no longer a public utility or to sufficiently investigate whether the HOA met the statutory requirements for the Commission to assume jurisdiction over it. As such, the Commission's order exceeded the power the Legislature granted to it.

1. The Commission lacks jurisdiction over the HOA because the HOA is not a public utility.

The Legislature specifically granted the Commission authority over public utilities and defined public utilities to be, "any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service." W. Va. Code § 24-1-2. The plain language of the Act thus only grants the Commission jurisdiction over: (1) a person or association of persons (2) that engage in any business that provides a public service. The Commission failed to confirm that the HOA remains an association of persons or that it provides a public service.

a) The HOA is not a "person…or association of persons."

The Commission did not and cannot identify either a person or group of persons actually constituting the HOA. *See* Public Service Commission Order (the Order) at 3, Case no. 23-0010-S-DU (Oct. 7, 2024). As a formal organizational entity, i.e. a non-profit corporation, the HOA has ceased to exist. In 2014 the West Virginia Secretary of State revoked its articles of incorporation for failing to file an annual report. ALJ Decision at 25; *see also* W. Va. Code § 31E-13-1320(b) (authorizing the Secretary of State to dissolve a corporation). The opportunity for the HOA to appeal for reinstatement has long passed. *Id*. § 31E-13-1322(a)(authorizing the Secretary of State to reinstate corporations within two years of their dissolution if conditions have been corrected).

The HOA has also not informally continued in effect or operation. Commission staff reported to the ALJ that the HOA maintains no governing board or records. Hubbard Heights Subdivision Homeowners Association, Public Service Commission Recommended Decision ("ALJ decision") at 7, Case No. 23-0010-S-DU (Apr. 12, 2024). Staff testified that no one is currently operating or maintaining the HOA system and that no operating agreement exists with a third party to do so. *Id.* The ALJ accepted these findings and concluded that the HOA "has no active governing board, manager or employees to operate its collection system or lagoons." *Id.* at 25.

The letter initiating this action stems from Tom Dillon, a resident of Hubbard Heights and former President of the HOA, who expressly disavowed any continuing role at or responsibility for the HOA. ALJ Decision at 1, 5, 21. Mr. Dillon informed Commission Staff and the ALJ that the HOA no longer has a Board or conducts regular meetings. *Id.* The Commission's Staff nonetheless assumed that Mr. Dillon was an in-fact representative of the HOA and served discovery letters on him rather than confronting the status of the HOA. *Id.* at 1. When Mr. Dillon filed responses, he expressly disclaimed any existing role with the HOA. *Id.*

As a result, the record before the ALJ and Commission reflects that the HOA no longer exists as a corporate entity and does not have a Board, conduct meetings, respond to pleadings, or in any way act as an "association of persons." W. Va. Code § 24-1-2. The Commission failed to address how it maintained jurisdiction over the HOA in light of this record. Likewise, because the HOA is no longer an association of persons, the Commission lacks jurisdiction to order HSB to provide sewer service to the homeowners in Hubbard Heights.

b) No public services have been provided for over a decade.

Commission staff reported to the ALJ that the "Hubbard [HOA] is not a functioning utility from a technical, financial or managerial perspective." ALJ Order at 6. Staff acknowledged that the HOA "has no current operations or staff to maintain its system. The governing board has been inactive for several years and it does not render bills to its customers. There are no utility records and Hubbard has failed to submit Annual Reports to the Commission since 2011." *Id*. At 22.

Commission staff even suggested to the ALJ that the HOA "has no assets to transfer to a third party, requiring all repairs [by a subsequent service provider] to be done through grants or loan financing." *Id*. at 6. Staff conceded that whatever entity is ordered to provide service to the former HOA area would "need to apply for a Certificate for the modifications and essentially start over." *Id*.

The record before the ALJ and Commission therefore demonstrated that for years the HOA has had no organizational staff or assets, and the HOA has not and is not providing sewer services to Hubbard Heights. Even though the HOA has not provided public services for years, the ALJ and Commission nonetheless assumed that because it at one time issued a certificate to the HOA, a non-profit corporation that is no longer incorporated, that is without assets, personnel, or a mailing address, and that has not provided a public service in at least a decade, that the HOA must continue to exist and therefore it could exercise jurisdiction. Without first assessing whether a utility existed and provided public services *at this time* or even in the last decade, the Commission could not have sufficiently assessed whether it retained jurisdiction over the HOA or whether it could order HSB to "acquire" the non-existent HOA.

On the record before the Commission, neither the HOA nor any other party is engaged in the provision of a public service at Hubbard Heights. In actuality, the Commission order does not direct HSB to *acquire* a public utility; the order effectively compels HSB to *create* a public utility. The Commission has no authority to do so.

2. The Commission never confirmed its jurisdiction by counting the persons within the HOA's "service area" and therefore lacked authority for its order.

Assuming for the sake of the argument that the HOA is an existent entity with the potential to be classified as a public utility, that assumption is not sufficient to bring it within the Commission's jurisdiction. The Legislature limited the Commission's jurisdiction to sewer systems servicing *more than 25 persons or firms*. W. Va. Code § 24-2-1(a)(8). Before issuing any determination or order regarding the HOA, the Commission has an obligation to ensure it retains jurisdiction over it. W. Va. Code § 24-2-1(a)(8); *Equitrans*, 247 W. Va. at 651.

The Commission openly accepted in its Order that it did not know how many persons remained in the former HOA service area. Order at 3. Commission staff admitted that they "cannot determine the number of collection system connections," ALJ Decision at 7, and that fewer than 25 persons may remain within the HOA's former service area. *Id*. at 6. Despite this uncertainty, the ALJ concluded that the HOA "*had* approximately 29" persons served by the HOA, ALJ Decision at 25 (emphasis added). Likewise, the Commission concluded that, because the HOA served 27 residents in 2002 when it last issued a certificate, it had no need to assess the current persons the HOA serves. Order at 3.

The Legislature placed the burden of assuring jurisdiction on the Commission, and it failed to meet it here. W. Va. Code § 24-2-1(a)(8); *Equitrans*, 247 W. Va. at 651. The

Commission improperly argues that because it once had jurisdiction over the HOA as a public utility that it will *always* have jurisdiction over the HOA as public utility so long as it retains a certificate for such entity. The plain language of section 24-2-1, however, clearly limits the Commission's authority over sewer systems to those "servicing 25 or more persons or firms other than the owner of the sewer systems." The verb chosen by the Legislature, "servicing," is written in the present tense, and this unambiguous language should be afforded its plain meaning. *See State v. Ward*, 245 W. Va. 157, 161 (2021) (citing Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va 714 (1970)). Clearly, the Commission cannot exercise jurisdiction over a sewer system that may, in the future, service 25 or more persons. Conversely, due to mergers, acquisitions, or abandonment, there are numerous defunct utilities in the state that once served 25 or more persons but do so no longer. The Commission has no greater power to regulate former utilities than it does potential future utilities. The only reasonable reading of section 24-2-1 is that the Commission's regulatory authority extends solely to entities that are "servicing" 25 or more persons *at the time of the Commission's action*.

Because the Commission did not determine the number of persons or firms in the HOA's former service area, it failed to establish its jurisdiction to order HSB to "acquire" the HOA or provide service to Hubbard Heights. Commission Order at 3-4.

B. The Commission exceeded its authority under the Act as the Legislature only intended acquiring utilities to adopt existing but failing utilities and did not contemplate forcing the acquiring utility to build new sewer systems.

Under W. Va. Code § 24-2H-7, the Legislature authorized the Commission to order a proximate, capable utility to acquire a neighboring, failing utility. Throughout this authorization, however, the Legislature expressly contemplated the existence of a failing

utility which must cooperate with the acquiring utility and which the acquiring utility must purchase. For example, the failing utility and acquiring utility "*shall* file a petition with the Commission…to approve the purchase price." *Id.* § 24-2H-8(a). In addition, the failing utility "shall cooperate with the acquiring utility in negotiating agreements with state and federal agencies, including, but not limited to, negotiation of hold harmless agreements, consent orders or enforcement moratoria during any period of remediation." *Id.* § 24-2H-8(d). Likewise, it "shall cooperate with the acquiring utility in obtaining the consent of the failing utility's and the acquiring utility's bondholder(s) to the acquisition." *Id.* All of these provisions demonstrate that when the Legislature authorized the Commission to order the acquisition of a failing utility, it was authorizing the Commission to order the acquisition of an *existing* but failing utility and not authorizing the Commission to order another utility to provide service to an otherwise unserved area.

As Commission Staff informed the ALJ, the HOA is "not a functioning utility from a technical, financial or managerial perspective." ALJ Decision at 6. In the Recommended Decision adopted by the Commission, the ALJ found that the HOA "has no active governing board, manager or employees to operate its collection system or lagoons." *Id.* at 25. Likewise, the ALJ concluded that "existing [HOA] infrastructure is not salvageable and must be entirely replaced." *Id.* at 26; *see also id.* at 22 ("there is not one operational component of the [HOA] system").

The Legislature authorized the Commission to order a neighboring utility to acquire a failing, *but existing*, utility. *See* W. Va. Code §§ 24-2H-7(a); 24-2H-8. Commission staff, the ALJ, and the Commission all concluded that the HOA has no employees or board and had not maintained or operated the sewer system for years. In fact, all three accepted the Commission staffs' assessment that the system is "essentially

failed and will require starting from scratch." *See* ALJ Decision at 7. While the Legislature surely contemplated substantial investments from acquiring utilities under the Act to repair failing utilities, the numerous actions imposed on the failing utility throughout the statute demonstrate the Legislature clearly contemplated that a failing utility must exist for the Commission to order a neighboring utility to acquire it. *See* W. Va. Code § 24-2H-7. As a result, the Commission exceeded its authority under the statute when it ordered HSB to in fact build a new sewer system for the residents of Hubbard Heights, rather than rehabilitate and repair an existing one.

The distinction between a failing and a non-existent utility is not merely semantic. The burden on a "proximate utility" to create a new utility is substantially greater than rehabilitating a failing utility that has usable assets and staff. The Legislature determined that a proximate utility may be ordered to acquire a failing utility, but it did not contemplate that a utility would be ordered to create an entirely new utility. The burden on the proximate utility is even greater in situations like the one at issue here where the purportedly "failing utility" is not contiguous to the proximate utility. The plain language of W. Va. Code § 24-2H-7 indicates that the Legislature did not intend to authorize the Commission to order an existing utility to create a new sewer utility for residents outside of its existing service area.

C. The Commission failed, as the Legislature instructed, to evaluate whether any utility was in-fact capable of acquiring and operating the HOA and instead determined which was most "suitable" for doing so.

The Legislature authorized the Commission to order "the acquisition of the failing utility by the most suitable *capable* proximate water or wastewater utility." W. Va. Code § 24-2H-7(a) (emphasis added). It provided factors which the Commission must use to

assess whether the utility is *capable* of acquiring and operating the failing system. *Id.* § 24-2H-5(b). Those factors include:

> (1) The financial, managerial, and technical ability of all proximate public utilities providing the same type of service;
> (2) Expansion of the franchise or operating area of the acquiring utility to include the service area of the distressed utility;
> (3) The financial, managerial, operational, and rate demands that may result from the current proceeding and the cumulative impact of other demands where the utility has been identified as a capable proximate utility; and
> (4) Eligibility of the capable proximate utility to receive state grant funding and federal grant funding in a similar manner as the distressed utility; and
> (5) Any other relevant matter.

Id.

Here, the Commission failed to reasonably consider if *any* utility was "capable" of providing sewer service to the few, isolated remaining residents of Hubbard Heights and instead jumped to compare which utility neighboring Hubbard was best positioned to, regardless of whether they could *in fact*, address the situation.

The Order contains no analysis of whether any of the potential utilities are in fact capable of providing adequate service to Hubbard Heights beyond assertions that HSB can raise rates and apply for an indeterminate, and by no means certain, amount of public money to fund the $4–5 million in capital costs and unknown but substantial staffing and operating costs.[2] For example, the Commission did not even consider the cost per existing ratepayer for HSB to provide sewer service to an unknown number of, but no more than

[2] We note that, although the Commission should consider the impact of its order on a utility's existing ratepayers, the Commission has no authority over many public water and sewer rates. W. Va. Code § 24-2-3(a) ("The commission may… promulgate tariffs, rates …and schedules for all public utilities except for … water and/or sewer utilities that are political subdivisions of this state providing a separate or combined services and having at least 4,500 customers and annual combined gross revenues of $3 million or more[.]"). The Commission therefore has no power to instruct or assume that a municipal government not subject to its ratemaking authority must raise rates to satisfy its orders, and the Commission has an obligation to consider whether a municipal utility is able and willing to raise its rates in response to one of its orders.

27, persons in Hubbard Heights. Likewise, the Commission failed to consider that as a result of the rate increases it contemplated that some percentage of HSB's existing customers will no longer be able to afford their water and sewer rates.

Conversely, the Commission acknowledged that whatever utility is ordered to take over the system, will essentially start from scratch and must construct an entire sewer collection and/or treatment system. *See* ALJ Decision at 7, 22, 25. Commission staff also openly stated that they were pushing the investigation of basic information on the number of customers in Hubbard Heights, potential service methods, and, most importantly, the cost of constructing sewer service in the area onto the proximate utility. ALJ Decision at 7-8.

The ALJ's Recommended Decision likewise acknowledged evidence Huntington presented which showed that HSB lacked the operational experience, field resources, and financing to take over sewer services in the Hubbard Heights area and would require City approval, which it was unlikely to receive, before it could operate a system for Hubbard Heights. *Id*. at 12–13. The ALJ nonetheless determined that HSB was best-positioned, not that it is was capable, of providing sewer service to Hubbard Heights.

The statute clearly contemplates that the Commission estimate the "financial, managerial, operational, and rate demands that may result from the current proceeding and the cumulative impact of other demands where the utility has been identified as a capable proximate utility" and the vague assertions of the Commission fail to adequately do so here.

Considering the extraordinary burdens that a proximate utility must bear to acquire a failing utility (or, in this case, create a new utility), it is imperative that the Commission make a fact-based capability determination as required by W. Va. Code § 24-

2H-3. By failing to make such a determination, the Commission creates the unreasonable risk of pushing functioning utilities toward becoming distressed or failing utilities and worsening the problem the Legislature attempted to address through the Distressed and Failing Utilities Improvement Act.

III. Conclusion

This Court held that the jurisdiction and authority of the Commission is limited to the extent the Legislature has conferred it and no further. *Equitrans*, 247 W. Va. at 651. For the reasons stated above, the Commission has acted outside its jurisdiction and exceeded the Legislature's grant of authority to the Commission under the Act, W. Va. Code § 24-2H-1 *et seq*. WVMWQA accordingly requests the Court to reverse the Commission's Order or to remand the Order with instructions that the Commission must follow the provisions of the Act.

Respectfully submitted,

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Certificate of Service

I, F. Paul Calamita, counsel for West Virginia Municipal Water Quality Association certify that on January 24, 2025, I served the foregoing ***Amicus Curiae Brief of the West Virginia Municipal Water Quality Association*** on all counsel of record and parties listed below via the Court's E-Filing system or via email.

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