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

REPLY BRIEF OF THE PETITIONER

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I. STATEMENT OF THE CASE

The Respondent, Public Service Commission ["PSC"], does not contest the Huntington Sanitary Board's Statement of the Case. The PSC does not dispute that when resident Tim Dillon filed a petition relative to Hubbard Heights Subdivision Homeowners Association, Inc. ["Hubbard Heights"], it had been *administratively terminated as a legal entity almost a decade earlier*[1] and *had not filed an annual report with the PSC since 2011*.[2] PSC offers that Hubbard Heights "has not filed a request for dissolution,"[3] but it had not existed to request dissolution for almost a decade before Mr. Dillon filed his petition. Indeed, the PSC concedes that Mr. Dillon reported that (1) "Hubbard Heights does not have a functioning board or operations,"[4] and (2) it "lack[ed] … a board of directors ..., employees, assets, or records."[5] Finally, the PSC does not contest the Huntington Sanitary Board's description of the procedural history and rulings made.

First, the PSC concluded that it could exercise jurisdiction over Mr. Dillon's petition[6] even

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[1] App. 466.

[2] Statement of Respondent at 1.

[3] *Id.*

[4] *Id.* at 2-3.

[5] *Id.* at 3.

[6] The PSC's brief contains an extended discussion of the 2020 Distressed and Failing Utilities Improvement Act. Respondent's Brief at 1-2. It ignores the difference between a "distressed" or "failing" utility and a non-existing former utility. The term "distressed utility" is defined as "a water or wastewater utility that, for financial, operational, or managerial reasons …" W. Va. Code § 24-2H-3(a). The term "Failing water or wastewater utility" is defined as "a public utility that … Meets the definition of a distressed water or wastewater utility, and either … (A) Has not, after a reasonable time period, been stabilized and improved by corrective measures put in place under §24-2H-7 of this code; or (B) Has had the requirements of §24-2H-7 of this code suspended for good cause shown by an order of the commission." W. Va. Code § 24-2H-3(b). On the effective date of this statute, June 5, 2020, there was no wastewater utility operated by the Hubbard Heights Subdivision Homeowners Association, Inc., as both a legal and factual matter as (1) the Secretary of State had administratively dissolved it; (2) it was conducting no operations; and (3) it could not meet the statutory definitions as it was neither "distressed" nor "failing" as it had already failed. The purpose of the statute was to address existing water and wastewater utilities that "face[d] substantial capital investment needs to maintain and replace aging infrastructure with limited financial recourses" with "needs [that] may adversely affect their ability to maintain reasonable rates and

though (1) the PSC's last involvement occurred in 2002, *more than two decades ago*, and (2) the statute under which the PSC was exercising jurisdiction *was not enacted until 2020*.[7]

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

Third, although acknowledging that the Board has no present ability to finance the extension of services to a small handful of residents in a dissolved subdivision association, the PSC suggested that the City of Huntington, a non-party, can do so in the future and implies that it has the power to direct Huntington's "City Council" to "appreciate the interests of the public and the local economy" and raise rates to finance the capital improvements.[10] Alternatively, the PSC suggests it has the jurisdiction to order Huntington to apply to the Distressed Utilities Account.[11]

Fourth, the PSC has ordered the Board to work with its Staff "to develop and implement a plan to acquire Hubbard assets and resume operations"[12] which may be difficult when the Board *has no available funding*. Moreover, no legal entity exists to convey the "Hubbard assets"[13] nor can the Board compel the owners of the property on which the system rests to permit it access.

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ability to borrow funds to address such needs," including those which had "experienced a loss of customers resulting from decline in populations served which has created an additional burden on the remaining population." W. Va. Code §§ 24-2H-2(c), (d), and (e). The purpose was not to resurrect long-dead utilities and foist their forgotten and neglected burdens on other ratepayers, jeopardizing their water and wastewater treatment systems and the bond financing of those systems.

[7] App. 977-978.

[8] Other utilities have estimated the total project cost at $4.2 million. App. 164, 166, 284, 286.

[9] App. 978.

[10] App. 979.

[11] App. 980.

[12] App. 980-981.

[13] *Supra* Note 1.

Finally, the PSC rejected having a handful of residents install home aeration units. Although the PSC did not dispute that home aeration units are an acceptable alternative,[14] it concluded, without citing any legal authority, that *each homeowner would need a separate NPDES permit*,[15] and *a utility would be required to monitor compliance*.[16]

The PSC's arguments can best be summarized as (1) the PSC can apply the Act not only to utilities that were "distressed" or "failing" when the Act became effective but to those that failed and ceased operations decades *before the law existed*; (2) the PSC can order utilities to assume the operations of failed utilities even if the utilities lack the financial ability to do so; and (3) the PSC, which capably resolves rate cases with more complex financial and funding issues in other contexts, is somehow incapable of performing the same type of financial analyses in these cases. These arguments should be rejected, and this case should be remanded to the PSC to either (1) dismiss the case or (2) conduct an appropriate financial analysis before imposing burdens on the Huntington Utility Board without sufficient financial and other resources.

II. ARGUMENT

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

Although noticeably absent from the PSC's discussion of the standard of review,[17] the law

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

[15] The Statement of the Respondent ignores this issue because the finding was erroneous.

[16] App. 981. The Statement of the Respondent also ignores this finding because it was erroneous.

[17] Statement of the Respondent at 6-7.

clearly states that a challenge to an agency's jurisdiction is a threshold matter that must be addressed before reaching the substance of any appeal and presenting a question of law that is reviewed *de novo*.[18] Here, the PSC's order states, "In 2020, the West Virginia Legislature enacted W. Va. Code § 24-2H-1, et seq. (the Act) and thereby authorized the Commission to protect the consumers of distressed and failing water and wastewater utilities by ordering various corrective measures up to and including [the] acquisition of a failing utility …"[19] But before 2020, *the PSC had no such jurisdiction*. Moreover, setting aside that Hubbard Heights was not an operational utility when the Act became effective in 2020, as it has been non-functioning for decades and billed no customers,[20] the Legislature has limited the PSC's jurisdiction over sewer systems.

W. Va. Code § 24-2-1(a)(8) provides, "The jurisdiction of the commission extends to all public utilities in this state and includes any utility engaged in any of the following public services … *Sewer systems servicing 25 or more persons* or firms other than the owner of the sewer systems."[21] This Court has noted that "According to W.Va. Code § 24-2-1 (2003), the PSC's jurisdiction

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

[19] App. 976.

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

[21] (Emphasis supplied).

extends to sewer systems servicing 25 or more persons or firms other than the owner of the sewer systems."[22] Although the PSC makes a "perpetual jurisdiction" argument,[23] the law is clear that it must exist *when the PSC exercises jurisdiction* to satisfy that jurisdictional prerequisite.[24]

Again, noticeably absent from the PSC's discussion of the applicable review standards, "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."[25] "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."[26] This statute could not be more unambiguous – "The jurisdiction of the commission extends to … Sewer systems servicing 25 or more persons or firms."

This Court needs to look no further than *Pool v. Greater Harrison Cty. Pub. Serv. Dist.*, 241 W. Va. 233, 821 S.E.2d 14 (2018), *which the PSC ignores in its Statement of Respondent*,[27] to determine that the PSC lacked jurisdiction in this case. In *Pool*, this Court addressed a similar jurisdictional limitation on the PSC's authority:

Prior to 2015, when any public service district wanted to change the rates it charged

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

[23] Statement of the Respondent at 7-8.

[24] *See, e.g., Broadmoor/Timberline Apartments v. Public Serv. Comm'n*, 180 W. Va. 387, 389, 376 S.E.2d 593, 595 (1998) ("W. Va. Code, 24-2-1, states, in part, as follows: 'The jurisdiction of the [public service] commission shall extend to all public utilities in this state, and shall include any utility engaged in any of the following public services: … sewer systems servicing *twenty-five or more persons or firms* other than the owner of the sewer systems[.]' The record shows that, in addition to Broadmoor tenants, two local businesses were permitted to tap onto Broadmoor's lines. These businesses, a tavern and a laundromat, paid a consideration to Broadmoor for the tap.") (emphasis supplied). After ignoring this Court's decision in *Pool* in its Response, the PSC dismisses *Broadmoor* with a wave of its hand: "The present case is different." Statement of the Respondent. On the contrary, because jurisdiction must be determined at the initiation of a proceeding, the present case is no different than *Broadmoor*.

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

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

[27] Statement of Respondent.

> for water or sewer service, state law required the public service district to obtain approval from the PSC. In 2015, the Legislature adopted deregulation measures to limit the PSC's jurisdiction and to exempt larger public service districts from this requirement. After 2015, "larger" public service districts are statutorily defined as having at least 4,500 customers and are only required to obtain approval of a rate change from a local elected body, such as a county commission.[28]

A resident of a public service district filed a complaint with the PSC challenging a rate increase approved not by the PSC but by a county commission, arguing that there were only 4,010 customers.[29] The district opposed the resident's complaint, noting that it had 5,547 customers, combining its water and sewer customers, and the PSC agreed.[30] Affirming the PSC's decision to decline jurisdiction under a customer threshold similar to the one in this case, this Court held, "The Legislature plainly intended to limit the PSC's jurisdiction … *These statutes limited the PSC to regulating only the rates charged by smaller public service districts*."[31]

Conversely, in this case, W. Va. Code § 24-2-1(a)(8) limits the PSC to regulating only sewer systems servicing "25 or more persons or firms."[32] Indeed, the PSC's Staff conceded at the hearing if there are fewer than 25 sewer customers, the PSC lacks jurisdiction.[33] The record evidence is that, in 2002, Hubbard Heights had 27 homeowners,[34] but as of January 2023, when the subject petition was filed, "a portion of those customers [had] switched to home aeration

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

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

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

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

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

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

[34] *Id.*

systems,"[35] a portion of Hubbard Heights was no longer connected to the sewer system,[36] and approximately five or six homeowners had state and local regulatory approval to use home aeration systems.[37] Notably, the PSC's Staff testified, "There is no evidence that's been provided to staff to find out exactly how many people actually are still in the Hubbard Heights Association,"[38] and it "was unable to determine the customer count … because Hubbard [Heights] has no billing."[39] As in *Pool*, the PSC has previously declined jurisdiction over a residential sewer system with 23 customers because it did not have 25 "billed entities."[40] However, the PSC distinguished that case by reasoning, "County Home Park was already below the necessary twenty-five billed entities when the complaints were filed."[41] Of course, in this case, the number of "billed entities" was zero when the petition was filed. The PSC reasoned that because it had exercised jurisdiction over Hubbard Heights in 2002, *eighteen years before the Act existed*, it somehow had jurisdiction in a wholly unrelated matter.

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[35] App. 939.

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

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

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

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

[40] *Bruce Schoolcraft v. Tyrone Tuel*, Case No. 13-0140-S-C, at 2 (Comm'n Order, March 19, 2013); *see also* App. 977. Again, like it did with *Broadmoor*, the PSC brushes *Schoolcraft* aside again, ignoring that jurisdiction must be determined at the outset of a discrete proceeding, stating, "Unlike Schoolcraft, Hubbard Heights was … a utility regulated by the Commission." Statement of Respondent at 9.

[41] App. 977.

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

Second, applying the PSC's rationale to the statutory limitation in the *Pool* case, the PSC could have exercised jurisdiction over the public service district with more than 4,500 customers as it had previously issued a certificate of convenience and necessity for that district. Noticeably absent from the PSC's order is a single authority for the proposition that a regulatory agency has continuing jurisdiction to entertain unrelated requests for relief under statutes not enacted almost two decades later. It is a straightforward concept that an agency's limited jurisdiction may exist in one context, such as granting a certificate of convenience and necessity, but does not exist in another context, involuntarily compelling a local sanitary board to spend over $4 million to assume the operations of the utility granted a certificate two decades earlier.

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

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

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

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

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

"Courts have long recognized that 'the jurisdiction of the [c]ourt depends upon *the state of things at the time of the action brought*.'"[44] A tribunal's "jurisdiction … depends on the state of facts existing *at the time it is invoked*" and "continues [only] *until the final disposition or determination of the case* in the manner prescribed by law."[45] Once the PSC granted Hubbard Heights a certificate in 2002, its jurisdiction ended with that final disposition other than relative to matters involving the certificate.[46] The proposition that two decades later, the PSC had jurisdiction in a completely separate matter under a statute that did not exist in 2002 is like arguing that a court has jurisdiction

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

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

[46] *See, e.g., State ex rel. Rodriguez v. Industrial Comm'n of Ohio*, 67 Ohio St. 3d 210, 213, 616 N.E.2d 929, 1993-Ohio-89 (1993) ("We routinely have held that the filing of an appeal terminates an administrative agency's continuing jurisdiction.") (citations omitted); *Floyd v. Bd. of Comm'rs*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002) ("When the jurisdiction of an administrative agency has terminated, there is no longer any power to reconsider or change the determination, and even a statutory provision for continuing jurisdiction may be held to end when the matter is no longer pending before the agency.") (citation omitted). The PSC discounts these cases by noting that the narrow issue presented was whether an administrative agency has continuing jurisdiction after issuing a final decision. Statement of the Respondent at 11-12. This argument misses the point that the issue presented in this case is whether – at the time Mr. Dillon filed his petition – Hubbard Heights had 25 or more sewer customers for a proceeding unrelated to the certificate issued by the PSC in 2002.

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

"[A]dministrative agencies do not have [the] power to retain jurisdiction by merely declaring it."[47] For example, in the single syllabus of *State ex rel. Hopkins v. Atchison, T. & S. F. R. Co.*,[48] the Supreme Court of Kansas held, "The public utilities commission cannot, by declaring that it retains jurisdiction of a matter in which it makes a complete order fixing railroad freight rates in response to an application pending before it, defeat the necessity of giving the thirty days notice required by section 8341 of the General Statutes of 1915, in a subsequent proceeding …"[49]

To sustain its exercise of jurisdiction, the PSC states, "Hubbard Heights continued to act as a sewer utility with customers connected to its system, filing annual reports and seeking approval of a water termination agreement for non-payment of sewer services"[50] but the Court will notice that there is no appendix reference supporting this statement because the record evidence, as noted, contradicts it. The PSC also now references, for the first time but found nowhere in the appellate record, the levying of fines against Hubbard Heights for failing to file annual reports,[51] but (1) matters outside the record should not be considered on appeal[52] and (2) those alleged jurisdictional exercises speak loudly. For example, the 2021 "Recommended Decision" states:

> The Hubbard Heights Subdivision Homeowners is now nine years behind in filing its Annual Reports … Commission records also show that the Respondent has also

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

[48] 108 Kan. 847, 197 P. 192 (1921).

[49] The PSC dismisses *Hopkins* by arguing that it does not establish that "the Commission should lose the ability to regulate Hubbard Heights just because its initial certificate case is a closed case." Statement of the Respondent at 12. Again, the Huntington Sanitary Board's reliance on *Hopkins* is for the proposition that jurisdiction must be determined at the time a new case is instituted.

[50] Statement of Respondent at 7.

[51] *Id.* at 9, n. 4.

[52] *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991).

> not filed its Annual Report for 2012 or any year after 2012. The Utility has been fined each year for failing to file its reports. The fines for each year have been increasing. (Case Nos. 13-1079-S-SC; 14-1189-S-SC; 15-1183-S-SC; 16-0960-S-SC; 17-0972-S-SC; 18-1052-S-SC; 19-0667-S-SC; and 20-0499-S-SC). … The August 2, 2021 Procedural Order was sent to the Respondent by United States Certified Mail, Return Receipt Requested, but returned marked "Unclaimed." … It is quite disturbing that the Hubbard Heights Subdivision Homeowners is now delinquent on filing nine years of Annual Reports, 2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013 and 2012. … Hubbard Heights Subdivision Homeowners is warned that even if Staff does not petition the Commission to initiate a general investigation that the Commission may do so sua sponte. …[53]

Issuing unenforced decisions levying fines for over a decade undermines rather than supports any legitimate contention that the PSC had jurisdiction over Hubbard Heights under a statute enacted twenty (20) years after it issue the certificate.

The PSC relies on the cases of *Equitrans, L.P. v. Pub. Serv. Comm'n of W. Va.*, 247 W. Va. 646, 885 S.E.2d 584 (2022) and *Boggs v. Public Serv. Comm'n*, 154 W. Va. 146, 174 S.E.2d 331 (1970).[54] Both cases undermine rather than support its assertion of jurisdiction in this case.

In *Equitrans*, the issue was whether – at the time of the initiation of the PSC proceedings involving Equitrans – it was a "public utility." Noting record evidence that Equitrans' "gathering line is a mixed-use line performing both gathering and distribution of natural gas,"[55] this Court concluded that it met the statutory definition – at the time of the initiation of the PSC proceedings – of a "public utility" subject to the PSC's jurisdiction.

In *Boggs*, the issue was also whether the PSC had jurisdiction over rates *at the time of the initiation of the PSC proceedings involving Boggs*. In Syllabus Point 1 of Boggs, this Court held, "Jurisdiction of the Public Service Commission over a public utility will not be considered to be

[53] 2021 W. VA. PUC LEXIS 1431.

[54] Statement of Respondent at 9-10.

[55] *Equitrans, supra* at 651, 885 S.E.2d at 589.

terminated unless the action of the Commission and the *circumstances surrounding the case* demonstrate clearly and unequivocally its intent to relinquish such jurisdiction."[56] The "case" involved in *Boggs* was a 1935 PSC order approving the sale of a gas utility to Boggs' predecessor-in-interest. "From 1935 to 1964 Ohio Valley Gas and its successors, all affiliates of Commonwealth Gas Corporation, complied with the 1935 order of the Public Service Commission and adhered to the terms of the contract referred to therein."[57] As part of Boggs' purchase of the system, he "agreed that he would 'keep and perform all of the covenants and agreements required to be kept and performed by the party of the first part,'"[58] which included subjecting Boggs' to the jurisdiction of the PSC under its 1935 order approving the sale of the system to Boggs' predecessor. As in *Equitrans*, this Court held that because Boggs system was a "public utility" in 1968 when a challenge to Boggs' proposal to increase rates was challenged before the PSC, the PSC had jurisdiction over Boggs: "It readily acknowledged that rural customers will continue to be served from those lines. … [The PSC's] jurisdiction is based on … the transmission and gathering lines of … Boggs … continue to be devoted to the public service."[59] Although this Court rejected Boggs's argument that the Commission had somehow abandoned its jurisdiction between 1935 to 1968, its holding was predicated upon the finding that – as of 1968, when the PSC proceedings were initiated – it still met the definition of a "public utility."

Finally, the PSC makes a slippery slope argument that if a residential vacancy negates its jurisdiction over a 25-customer system, it could lose the power to hold an unscrupulous operator

[56] [Emphasis supplied].

[57] *Boggs, supra* at 149, 174 S.E.2d at 334.

[58] *Id.* at 150, 174 S.E.2d at 334.

[59] *Id.* at 153, 174 S.E.2d at 336.

accountable.[60] Here, the PSC did nothing for over a decade but issue unenforced fines, even though Hubbard Heights had been dissolved and was non-operational. Unlike *Boggs*, no one is involved who had assumed the operation of the Hubbard Heights system subject to the PSC's continuing jurisdiction, and the PSC is not enforcing any of its prior orders.

In this case, the PSC cannot, by declaring that it retained jurisdiction, exercise jurisdiction in a completely separate matter in 2023 under a statute that did not exist until 2020. Accordingly, the PSC's order should be set aside and the case remanded for dismissal of Mr. Dillon's petition.

B. THE PUBLIC SERVICE COMMISSION ERRED AS A MATTER OF LAW BY COMPELLING THE HUNTINGTON SANITARY BOARD TO ACQUIRE THE ASSETS AND RESUME THE OPERATIONS OF A DEFUNCT HOMEOWNER ASSOCIATION WITHOUT COMPLYING WITH THE DISTRESSED AND FAILING UTILITIES IMPROVEMENT ACT.

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

PSC Staff described lagoon ponds that had been completely abandoned and were non-functional.[61] Staff conceded that anyone assuming responsibility would start from scratch[62] and

[60] Statement of Respondent at 11.

[61] App. 491-495.

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

acknowledged "that the cost" of constructing a new sewage treatment system "has not been established at this time."[63] Likewise, regarding operation and management costs, Staff testified, "We are unable … to determine what the actual O&M costs associated with the system are."[64] Finally, regarding environmental compliance, Staff testified, "[T]hey're operating without a permit … *as there is no one to fine*."[65] Staff presented two alternatives to the PSC: (1) "a possible decentralized or packaged plant" constructed and operated by "Northern Wayne, Kenova, Spring Valley, Ceredo, or Huntington"[66] or (2) "a new collection system" operated by Northern Wayne or Ceredo" with "Northern Wayne appear[ing] to be the closest tie-in point."[67] Additionally, Staff conceded that "individual or private aeration units located on each parcel may be an option."[68]

> I believe it's an option that should be weighed. I think one thing that's very important with this specific DU is that the question that engineering staff or staff has imposed in a distressed utility case is name approximate capable utility. In a situation like this, there needs to be a full blown study of the area to verify how many homes there are, how many services there would be, how many connections there would be. And that would be in the neighborhood of 6 to 12 months of a professional engineering firm evaluating all of that information. And engineering staff just does not have those tools in their tool belt, as well as the resources to be able to do a full blown --- basically a preliminary engineering report is what typically is attributed to disclosing all of these details.[69]

In other words, Staff conceded it had been unable to conduct a sufficient investigation to make an informed recommendation regarding the best method of addressing sewage treatment for Hubbard Heights, which caused the ALJ to remark, "[A]ren't you setting up a catch-22 situation here? I

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[63] App. 481.

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

[65] *Id*. (emphasis supplied). Of course, this undermines the PSC's continuing jurisdiction based on levying fines.

[66] App. 496.

[67] *Id*.

[68] App. 497.

[69] App. 498.

don't know … who is the best until I know which method's going forward," to which Staff agreed: "we do not have the resources to be able to say which direction to jump."[70]

Additionally, a Staff witness testified, "We don't --- engineering staff does not have enough information from every utility or this utility to be able to determine if a utility can even handle the flow or what the flow is from Hubbard, because we don't even know the number of customers. … We don't even know how far the lines need to go. We don't have any cost analysis. We have no --- we don't know which way it's going to go."[71] As to why Huntington should even be considered when Northern Wayne and Ceredo are closer and obtained a $4.2 million estimate, the testimony was only because it is the "[m]ost financially capable … And getting the financing for a $4,000,000 project, give or take, would have a lesser impact …"[72] Candidly, the witness testified, "[I]t is indeed a question of which utility is going to get stuck. And I don't think there's anything better to describe that."[73]

As the Huntington Sanitary Board's witness testified, (1) it currently has no one licensed to operate a decentralized system;[74] (2) there was "[n]o chance whatsoever" it had the staffing to operate and maintain a system at Hubbard Heights,[75] (3) "Huntington does not have the funds available to make any improvements or to operate a system like Hubbard Heights,"[76] (4) "It would break our bond covenants and our ability to bond currently,"[77] and (5) not only would bondholder

[70] App. 500.
[71] App. 774.
[72] App. 532-533.
[73] App. 533.
[74] App. 558.
[75] *Id.*
[76] *Id.*
[77] *Id.*

consent be required for additional funding, but the approval of City Council.[78] Understandably, the witness testified that spending over $4 million to provide sewer service to less than 20 customers, or over $200,000 per customer, was not likely to be approved by the City Council.[79]

The Distressed and Failing Utilities Improvement Act provides as follows:

> In determining whether a utility is a capable proximate utility, the commission *shall consider the following factors*:
>
> (1) *The financial, managerial, and technical ability of all proximate public utilities providing the same type of service*
>
> (2) Expansion of the franchise or operating area of the acquiring utility to include the service area of the distressed utility
>
> (3) *The financial, managerial, operational, and rate demands that may result from the current proceeding and the cumulative impact of other demands where the utility has been identified as a capable proximate utility* and
>
> (4) Eligibility of the capable proximate utility to receive state grant funding and federal grant funding in a similar manner as the distressed utility and
>
> (5) Any other relevant matter.[80]

In other words, the Legislature has carefully guarded against unfairly and inappropriately foisting the financial and other burdens of distressed and failed utilities on existing utilities and their customers by predicating the PSC's power to so order until the PSC considers the financial, managerial, and technical abilities of those existing utilities and the financial, managerial, operational, and rate demands that might flow from such order.

Here, there is no dispute in the record that there has been *no determination* of (1) the type of sewage treatment system to be constructed, (2) the cost of constructing the sewage treatment

[78] App. 558-559.

[79] App. 564.

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

system, (3) the cost of financing, operating, and managing the sewage treatment system, (4) the cost of operating the sewage treatment system, (5) whether personnel with the necessary licensure can be found to operate the sewage treatment system, (6) the impact of other rate demands, or (7) the identifiable source(s) of the funding required to construct a sewage treatment system for perhaps fewer than 20 customers estimated to cost over $4 million. Moreover, many of the Hubbard Heights residents have already implemented home aeration systems; there was no evidence that any of those systems were in non-compliance with applicable health, safety, and environmental regulations; and there was no evidence that the other residents could not install home aeration systems.[81] Finally, the PSC's acquisition order ignores other substantial practical impediments to the Huntington Sanitary Board's "acquisition" of the sewer system. The PSC's "shoot first, aim later" approach is wholly inconsistent with the Act.

The Act's purposes are beneficial, but the PSC has exceeded its authority where (1) other utilities have much greater geographic proximity, (2) the Huntington Sanitary Board has no capacity to finance the over $4 million required, (3) the City Council, whose acts are necessary to take private property by eminent domain, must improve the capital investment, and enact a

[81] The PSC's dismissal of this alternative is illogical. *First*, the PSC complained that "Huntington is not willing to help convert the remaining customers," App. 981, but (1) Huntington has no duty to provide that assistance, (2) these residents live outside Huntington's corporate limits, and (3) there are other closer utilities that could provide that assistance. *Second*, the PSC noted, "each homeowner would need to obtain a … NPDES … permit would be liable for all sewage," *id.*, but there was no evidence that those requirements, which apply to residents throughout West Virginia who manage to comply, renders home aeration units an inappropriate alternative. *Finally*, the PSC claims, "a utility would still have to monitor the system to ensure compliance, *id.*, but (1) that was not the witness's testimony referenced in the PSC's order, and (2) it is simply wrong. The witness's testimony referenced monitoring a sewer treatment facility, not individual aeration systems. App. 797-798. Individual home aeration systems, common in West Virginia, are permitted by the DEP. https://dep.wv.gov/WWE/permit/general/Pages/default.aspx.

revenue bond ordinance, is not a party,[82] and (4) an acceptable alternative of home aeration systems exists that many of the residents have already implemented.

Relative to the financial issues, the PSC admits that (1) the "amount of the investment necessary … has not been established;"[83] (2) "the best manner in which to correct the … remediation … has not been determined;"[84] and (3) "Huntington's financial argument ignores the availability of funding through public avenues including grants,"[85] but (i) not a single source of grant or other funding is identified, and (ii) the PSC ignores the readily apparent problem if no funding source is ever identified. Not only does the PSC admit that no financing alternative has been identified, but it also concedes that "eminent domain" may be necessary as the HOA utility does not own the real estate needed to operate it.[86] Of course, the Huntington Sanitary Board has no power of eminent domain, the Huntington City Council is not a public utility, and the PSC has no jurisdiction to order the Huntington City Council to exercise its power of eminent domain. The PSC's statement, "Availability of options surrounding the acquisition [is] why the Commission directed that Huntington should consider options before formulating a plan to acquire the Hubbard Heights sewer system"[87] is all the Court needs to hear to reverse the PSC's acquisition order.

How exactly is the Huntington Sanitary Board supposed to acquire a sewage treatment

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

[83] Statement of Respondent at 20.

[84] *Id.*

[85] *Id.* at 21.

[86] *Id.* at 22.

[87] *Id.*

system that (1) has no legal entity in existence to negotiate or execute an acquisition agreement;[88] (2) is located on property owned by third parties not subject to PSC jurisdiction; (3) requires licensure the Board does not possess; (4) may require the exercise of eminent domain that the Board does not possess by a municipality over which the PSC has no jurisdiction; (5) may be opposed by residents who have purchased, installed, and are operating lawful and effective home aeration systems, and (6) will require financial resources that the Board does not have? "The ultimate cost of eliminating a public health problem caused by a failed utility must be paid by somebody" is the PSC's answer.[89] Again, going outside the record, the PSC offers a table supporting the argument that it should be able to hand the check to Huntington as the biggest diner at the table.[90] But that table demonstrates the absurdity of the PSC's position and why amicus briefs have been filed by similar utilities to which the PSC wants to hand the check and say nothing more than, "You go figure it out." Using 27 customers – even though the record evidence is there are far fewer – the investment cost per customer merely to get the system operational is $148,148. Can the Huntington Sanitary Board charge those phantom 27 customers sufficient rates to amortize an investment of nearly $150,000 per customer, which, for the first time, without the benefit of any record evidence, the PSC says would be over $700 per month? Or will Huntington's existing customers' rates increase by $1 per month for the benefit of these phantom 27 customers? Moreover, will bondholders accept the risks of layering multi-million bailout plans for every failed private sewage system bordering the City of Huntington? Of course, these questions are answered

[88] See W. Va. Code § 24-2H-8(a) ("After an order has been entered pursuant to §24-2H-7 of this code, the failing utility and acquiring utility shall file a petition with the commission under §24-2-12 of this code, to approve the purchase price of the acquisition.").

[89] *Id.* at 21.

[90] *Id.*

by the PSC with, "It is your problem, not ours. Go figure it out."

The PSC's argument, "How are we supposed to determine how much it will take to resurrect and operate a failed utility?" should be rejected when (1) the Act requires those determinations before ordering the acquisition of a failed utility and (2) when it is in the business of analyzing complicated and detailed financial information in performing its rate-making function. Indeed, it affirmatively relies on its ability to sort through complex issues failing within its unique expertise of public utility regulation when it serves its purposes.[91] Accordingly, its effective claim that it lacks sufficient expertise and resources to comply with the provisions of the Act *before* ordering a utility like the Huntington Sanitary Board to acquire a distressed or failed utility should be rejected.

III. CONCLUSION

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

HUNTINGTON SANITATION BOARD

By Counsel

[91] *See Mason Cnty.,* supra at 580, 583, 885 S.E.2d at 164 ("We give deference to orders of the Commission, recognizing that most cases involve complex issues that fall within its special expertise of public utility regulation.") (footnote omitted).

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2025, I caused to mail the Reply Brief of the Petitioner to the parties and counsel indicated below by email, where available, and by first-class mail, postage prepaid delivery:

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