Docket No. 24-637

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Huntington Sanitary Board,
Petitioners,

v.

The Public Service Commission of West Virginia and
Hubbard Heights Subdivision Association, et al.,
Respondent.

STATEMENT OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF OCTOBER 7, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

ADMINISTRATIVE PROCEEDINGS

RULES

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPLEALS OF WEST VIRGINIA:

The Respondent, Public Service Commission of West Virginia (Commission), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of October 7, 2024, in Case No. 23-0010-S-DU that is the subject of this appeal.

I. STATEMENT OF THE CASE

The Commission has jurisdiction over the Hubbard Heights Subdivision Association (Hubbard Heights) sewer utility. Furthermore, the Commission correctly determined that Hubbard Heights is a failing utility and Huntington Sanitary Board (Huntington) is the appropriate capable proximate wastewater utility to take over Hubbard Heights.

In 2002, Hubbard Heights became a sewer utility regulated by the Commission. Hubbard Heights Subdivision Homeowners Assoc., Case No. 01-1108-S-CN, Recommended Decision (RD) at 3, May 15, 2002; 2002 W. Va. PUC LEXIS 1914, *9. Hubbard Heights is not a traditional sewerage collection, transmission, and treatment system. It consists of septic tanks at each residence that feed into a main sewer line that then feeds into one of three treatment lagoons. Id. at 2. Hubbard Heights filed annual reports with the Commission through 2011. In 2013, Hubbard Heights filed a joint petition with West Virginia-American Water Company (WVAWC) seeking approval of a water service termination agreement for non-payment of sewer bills. West Virginia-American Water Co. and Hubbard Heights Subdivision Homeowners Assoc. Inc., Case No. 13-0285-W-S-PC, final order approving agreement, Apr. 19, 2013; 2013 W. Va. PUC LEXIS 826. To date, Hubbard Heights has not filed a request for dissolution with the Commission.

In 2020, the West Virginia Legislature enacted the Distressed and Failing Utilities Improvement Act, W. Va. Code § 24-2H-1, *et seq.* (the Act) to address challenges faced by water

and wastewater utilities in the state resulting in threats to human health and negative impacts on the economy. W. Va. Code § 24-2H-2(f). The Legislature found that "the provision of safe drinking water and the collection and treatment of wastewater has resulted in a drastic reduction in the incidence of disease, increase in life expectancy, and other major public health advancements." W. Va. Code § 24-2H-2(a).

The Legislature further found that many water and wastewater utilities operating in the state have suffered "a loss of customers resulting from decline in populations served." W. Va. Code § 24-2H-2(e).The failure to maintain water and wastewater systems has resulted in utilities which are unable "to adequately serve customers and maintain regulatory compliance, thereby threatening human health and hindering economic growth." W. Va. Code § 24-2H-2(f).

The Act delegates to the Commission the authority to ensure water and wastewater utilities adequately serve customers and maintain regulatory compliance, and to ensure all citizens of the state have access to safe drinking water and adequate and safe wastewater treatment. W. Va. Code § 24-2H-2(g). The Act authorizes the Commission to order various corrective measures up to and including acquisition of a failing utility by a capable water or wastewater utility to ensure safe drinking water and adequate and safe wastewater treatment. W. Va. Code §§ 24-2H-7, 24-2H-8, and 24-2H-9.

On January 5, 2023, Mr. Tim Dillon, a homeowner in and former president of Hubbard Heights, filed a request with the Commission to declare the sewer utility a distressed or failing utility pursuant to W. Va. Code § 24-2H-6(a). Commission Record[1] at Bates No. 2118 (hereinafter CR at BN ___). Mr. Dillon reported that Hubbard Heights does not have a functioning board or

[1] The Commission electronically submitted the Commission Record of Case No. 23-0010-S-DU to the Court on Dec. 3, 2024.

operations. Mr. Dillon has acted as a point of contact for the Commission Staff in this case. Petition, Jan. 5, 2023; CR at BN 2118.

The Administrative Law Judge (ALJ) set a procedural schedule to take evidence on whether Hubbard Heights was distressed or failing. Procedural Orders, Apr. 14, 2023, and Jan. 8, 2024; CR at BN 1950-56 and 1405-09. The ALJ also named the Town of Ceredo (Ceredo), Northern Wayne County Public Service District (Northern Wayne), Kenova Municipal Sewer (Kenova), Spring Valley Public Service District (Spring Valley), the Sanitary Board of the City of Huntington (Huntington), and WVAWC respondents to the case to consider which utility, in the event Hubbard Heights was found to be distressed or failing, could serve as a capable proximate wastewater utility. Procedural Orders, Mar. 8 and 9, 2023, and Sept. 25, 2023; CR at BN 2054-56, 2051-53, and 1438-44.

Commission Staff filed its Final Joint Staff Memorandum on April 5, 2023, recommending that Hubbard Heights sewer utility collection and treatment system "appears to be in a failed and non-functioning condition." Final Joint Staff Memorandum Apr. 5, 2023 at BN 2 and 4; CR at BN 1977 and 1979.

The ALJ held an evidentiary hearing on July 25, 2023, and a supplemental evidentiary hearing on February 22, 2024.[2] After receiving compelling evidence of the (1) failure of system equipment, including untreated, inoperable lagoons with blocked access to those lagoons and broken, disconnected, and exposed pipes, and (2) lack of a board of directors of the homeowners association, employees, assets, or records for the sewer utility, the ALJ issued a Recommended Decision concluding that Hubbard Heights was a failing sewer utility and the appropriate capable

[2] References to the transcript of the evidentiary hearing on July 25, 2023 filed Aug. 1 ,2023 will be cited as Tr. I at ____, CR at BN ____, references to the transcript of the evidentiary hearing on February 22, 2024 filed Feb. 28, 2024 will be cited as Tr. II at _____, CR at BN _____.

proximate utility (CPU) to takeover Hubbard Heights is Huntington. RD, Apr. 12, 2024 at 23, 24, 27 (Conclusions of Law 6 and 7), and 28; CR at BN 1133, 1134, 1137, and 1138.

Huntington filed exceptions to the Recommended Decision that were substantially the same as this appeal to the Court. Exceptions, Apr. 26, 2024; CR at BN 1066-1108. Huntington alleged that the Commission does not have jurisdiction over Hubbard Heights sewer utility and the ALJ failed to consider factors required by the Act that are relevant to a CPU. Finally, Huntington argued that some customers already have home aerator units (HAU) permitted by the West Virginia Department of Environmental Protection (DEP) and the best solution would be to require the remaining customers to disconnect from the sewer utility and work with DEP to obtain permission to use HAUs. Id., generally.

On review from the exceptions filed by Huntington, the Commission affirmed its jurisdiction over Hubbard Heights and that the ALJ properly considered the statutory factors for determining the best CPU. Commission Order, Oct. 7, 2024; CR at BN 1034-43. With regard to the private, individual homeowner HAUs, the Commission determined, as had the ALJ, that this was not an appropriate solution for the customers of Hubbard Heights because each individual customer would need a National Pollutant Discharge Elimination System permit and each private homeowner would be liable for all sewage. Commission Order, Oct. 7, 2024 at 7 (citing Tr. II at 99, 132-33), CR at BN 1040.

II. SUMMARY OF ARGUMENT

Commission jurisdiction over Hubbard Heights, a publicly regulated sewer utility, is neither intermittent nor ended. See generally, Equitrans L. P. v. Public Serv. Comm'n. of W. Va., 247 W. Va. 646, 885 S.E.2d 584 (2022). Further, the Commission, when petitioned under the Act,

properly considered all potential CPUs and, after careful consideration of the evidence, determined that Huntington is the most suitable CPU in this case. The Act does not contemplate, as a part of the analysis, that the Commission develop a comprehensive remediation plan including cost and secure financing for the project. Rather, the Act requires the Commission to consider "the financial, managerial, operational, and rate demands that may result from the current proceeding." W. Va. Code § 24-2H-5(b)(3). The Commission has considered these factors, as set forth in the Recommended Decision and the Commission Order upholding the Recommended Decision. The Commission recognizes that assisting a failing wastewater utility is not easy even for a CPU. The West Virginia Legislature, however, determined that the state

> needs a comprehensive plan to confront the financial, organizational, and regulatory challenges faced by water and wastewater utilities in the state to ensure that all citizens of West Virginia have access to safe drinking water and adequate and safe wastewater treatment.

W. Va. Code § 24-2H-5(g). As one of the five largest sewer utilities in the state and in close proximity to Hubbard Heights, Huntington has the capability to provide adequate and safe wastewater treatment to Hubbard Heights. Allowing CPUs to decide if they wish to accept the responsibility to assist in remedying deficiencies of a failed system would turn the administration of the law over to the utility instead of the Commission and would thwart the clear intent of the Act.

III. STATEMENT REGARDING ORAL ARGUMENT

The Court scheduled oral argument for March 18, 2025.

IV. STANDARD OF REVIEW

When reviewing a Commission order, the Court considers:

> (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.

Central West Virginia Refuse, Inc. v. Public Serv. Comm'n, 190 W. Va. 416, 420; 438 S.E.2d 596, 600-601 (1993)(citing Syl. pt. 2, Monongahela Power Co. v. Public Serv. Comm'n, 166 W. Va. 423, 276 S.E.2d 179 (1981)). When reviewing orders of the Commission,

> our Court is guided by three central principles: first, that the primary purpose of the PSC is to "serve the interest of the public"; second "[t]hat an order of the Public Service Commission 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"; and, third, that the Legislature has empowered the PSC to regulate and control the public utilities in this State in a manner that is just and reasonable and not contrary to the law.

Lumberport-Shinnston Gas Co. v. Public Serv. Comm'n, 165 W. Va. 762, 765, 271 S.E.2d 438, 440 (1980) (further citations omitted).

Concerning this Court's review of Commission decisions, this Court has also previously held:

> The principle is well established by the decisions of this Court that an order of the public service commission 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. United Fuel Gas Company v. Public Service Commission, 143 W. Va. 33, 99 S.E.2d 1 (1957); Syl. Pt. 5, Boggs v. Pub. Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970); Syl. pt. 1, Sierra Club v. Pub. Serv. Comm'n of W. Va., 241 W. Va. 600, 827 S.E.2d 224 (2019).

Trulargo, LLC v. Public Serv. Comm'n, 242 W. Va. 482, 483, 836 S.E.2d 449, 450 (2019). The Court has also recognized that its "responsibility is not to supplant the Commission's balance of these interests [public's and utility's 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." Syl. pt. 1, Monongahela Power Co. v. Public Serv. Comm'n, 166 W. Va. 423, 276 S.E.2d 179 (1981).

V. ARGUMENT

A. THE PUBLIC SERVICE COMMISSION PROPERLY MAINTAINS JURISDICTION OVER HUBBARD HEIGHTS SEWER UTILITY.

1. Hubbard Heights is a Public Sewer Utility.

The Commission gained jurisdiction over Hubbard Heights sewer utility when it was built and operated as a community system, providing service to the public. The Commission granted Hubbard Heights a certificate of convenience and necessity to operate and maintain a sewer system as a sewer utility in 2002. At that time, Hubbard Heights had 27 sewer customers. Hubbard Heights Subdivision Homeowners Association, Case No. 01-1108-S-CN, RD at 3, May 15, 2002; 2002 W. Va. PUC LEXIS 1914, *9. The Commission had proper jurisdiction when the certificate was granted, and that jurisdiction has not been terminated.

> Jurisdiction of the Public Service Commission over a public utility will not be considered to be terminated unless the action of the Commission and the circumstances surrounding the case demonstrate clearly and unequivocally its intent to relinquish such jurisdiction.

Syl. pt. 5, Equitrans, L.P. v. Public Serv. Comm'n, 247 W. Va. 646, 885 S.E.2d 584 (2022) (citing Syl. pt. 1, Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970)). 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.

At no time did Hubbard Heights seek Commission approval to abandon its sewer utility.[3] Hubbard Heights remains a public utility, albeit a failing utility, and the Commission continues to have jurisdiction over it.

2. Hubbard Height's Public Utility Status Does Not Change Based on Fluctuation in the Number of Users.

Hubbard Heights applied for a certificate of convenience and necessity in 2001 with 27 customers, filed a tariff of rates to be charged to its customers, and has been regulated as a sewer utility since that time. Huntington believes that today Hubbard Heights may have fewer than 25 customers, although the evidence in the case did not establish that as fact. Petitioner's Br. at 9; RD at 5; CR at BN 1084. Huntington cites two cases involving the Court's analysis of whether an entity was providing sewer service to 25 customers and should be regulated by the Commission. Petitioner misapplies Broadmoor/Timberline Apartments v. Public Serv. Comm'n, 180 W. Va. 387, 389, 376 S.E.2d 593, 595 (1998). Petitioner's Brief at 7. In Broadmoor, the Commission found that an apartment complex owner was not a sewer utility for a variety of reasons including the fact that it: (1) had less than 25 customers (with the property owner/landlord being considered the customer); (2) did not charge tenants for sewer services; and (3) connected its lines to the City of Morgantown's sewer utility and the City provided sewer services to the tenants at Broadmoor and charged those tenants for the services. The issue in the case was whether the apartment landlord was effectively preventing an adjacent landowner from connecting to Morgantown sewer utility. The present case is different. Hubbard Heights applied for a certificate of convenience and necessity in 2001 with 27 customers, filed a tariff, and has been regulated as a sewer utility since that time including review of filed annual reports by Commission Staff and investigations

[3] Public utilities may not legally abandon their public service responsibilities without the consent of the Commission. W. Va. Code § 24-3-7.

seeking why the utility did not file annual reports in recent years culminating in the levying of fines by the Commission for the failure to file annual reports.[4]

Petitioner also inapplicably cites to Bruce Schoolcraft v. Tyrone Tuel, Owner, Country Lane Mobile Home Park, Case No. 13-0140-S-C, Comm'n Order, March 29, 2013, 2013 W. Va. PUC LEXIS 650, to support its argument that the Commission does not have jurisdiction over Hubbard Heights because of the number of customers Hubbard Heights may have. In Schoolcraft, a resident of a mobile home park filed a complaint against the owner of the mobile home park alleging an improper increase in sewer fees. At the time of the complaint, the mobile home park was not regulated by the Commission. The Commission dismissed the complaint because the mobile home park had a potential for only twenty-four customers and an actual twenty-three customers and, therefore, the Commission did not have jurisdiction over the mobile home park pursuant to W. Va. Code § 24-2-1(a)(8). Unlike Schoolcraft, Hubbard Heights was, and is, a utility regulated by the Commission.

Even if the evidence in the record had confirmed that Hubbard Heights now serves less than 25 customers, which it did not confirm, this Court's rulings in Equitrans and Boggs, as well as the definition of "public utility" under W. Va. Code § 24-1-2,[5] establish that Hubbard Heights'

[4] A review of the Commission docket includes the following formal cases granting Hubbard Heights its certificate of convenience and necessity and regularity of it. Hubbard Heights Subdivision Homeowners Assoc., Case Nos. 01-1108-S-CN (2002 W. Va. PUC LEXIS 1914), 03-1292-S-SC (2004 W. Va. PUC LEXIS 402), 04-1394-S-SC (2004 W. Va. PUC LEXIS 4479), 10-1062-S-SC (2010 W. Va. PUC LEXIS 2759), 11-1061-S-SC (2011 W. Va. PUC LEXIS 2089), 13-1079-S-SC (2014 W. Va. PUC LEXIS 46), 14-1189-S-SC (2014 W. Va. PUC LEXIS 2471), 15-1183-S-SC (2016 W. Va. PUC LEXIS 67), 16-0960-S-SC (2016 W. Va. PUC LEXIS 2139), 17-0972-S-SC (2018 W. Va. PUC LEXIS 17), 18-1052-S-SC (2019 W. Va. PUC LEXIS 154), 19-0667-S-SC (2019 W. Va. PUC LEXIS 2701), 20-0499-S-SC (2020 W. Va. PUC LEXIS 2708), 21-0544-S-SC (2021 W. Va. PUC LEXIS 1431), 22-0661-S-SC (2022 W. Va. PUC LEXIS 1248), 23-0601-S-SC (2023 W. Va. PUC LEXIS 1451), and 24-0637-S-SC (2024 W. Va. PUC LEXIS 1667).

[5] "'Public utility' means 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. To the extent that Huntington would argue that Hubbard Heights is not engaged in any business, we respond that the sewer utility was engaged in business for many

public utility status would not terminate unless the Commission concluded that it was no longer conducting a public service. See, Equitrans, L.P. v. Public Serv. Comm'n, 247 W. Va. 646, 885 S.E.2d 584 (2022); Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970). Any arguments that because the system is in disrepair it is no longer in public service should be rejected as in direct contravention of the legislative purpose of the Act. Moreover, this Court has explained that a public service function and public utility status is not terminated by inactive operations or regulation.[6]

Huntington makes another attempt to negate Commission jurisdiction over Hubbard Heights based on the potential number of customers by citing State ex rel. Hinkle v. Skeen, 138 W. Va. 116, 128-29, 75 S.E.2d 223, 229 (1953) which held that a court's jurisdiction is limited to a specific point in time. Petitioner's Br. at 12. Huntington is correct that a 25 customer count was relevant at the specific point in time that the Commission identified Hubbard Heights as a public utility. But nothing in the West Virginia Code indicates that once utility status is established, the Commission's statutory jurisdiction over a public utility may be intermittent. Just the opposite is true. Numerous sections of Chapter 24 of the West Virginia Code establish the Commission's continuing supervision and jurisdiction over public utilities. W. Va. Code §§ 24-1-1, 24-2-1, 24-2-2, 24-2-3, 24-2-7, 24-2-8, 24-2-9, 24-2-12, and 24-2-12a. There are exceptions that are specifically described in Code, including exceptions from rate regulation cited by the Petitioner.

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years, including billing customers until approximately a decade ago. Transcript of Evidentiary Hearing held Feb. 22, 2024, filed Feb. 28, 2024, at 118 (hereinafter Tr. II at ___); CR at BN 1371.

[6] "[T]he mere failure of the coke company to comply with the foregoing requirement or to invoke the jurisdiction or the regulatory power of the commission for a long period of time, or the mere failure of the commission affirmatively to assert in any manner its jurisdiction with respect to the public service rendered by the coke company did not, and could not, divest the coke company of its original status as a public utility." Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 155, 174 S.E.2d 331, 337 (1970) (quoting Preston County Light and Power Company v. Renick, 145 W. Va. 115, 124, 113 S.E.2d 378, 384 (1960)).

However, the Act does not exempt any sewer utility from its provisions and Hubbard Heights is a sewer utility.

If this Court accepts Huntington's interpretation of W. Va. Code § 24-2-1(a)(8), then a sewer utility could be regulated by the Commission when it has 27 customers, but if three homes sit vacant for a period of time, jurisdiction would terminate, and presumably, the system operator could raise rates discriminatorily, disconnect some or all customers' collection lines , and engage in unreasonable practices or discriminatory conduct, all without any recourse to the Commission. Then, when vacant homes are re-occupied a few months later, the Commission could regain jurisdiction and require the utility to change its unreasonable or discriminatory conduct and practices. To the extent those practices resulted in ongoing illegal or discriminatory activity for a public utility, the Commission would also have to unscramble the egg until the next time the customer count dropped below 25. This situation would cause confusion, hardship, and instability for customers and be nearly impossible to track. Huntington's position that Commission jurisdiction over Hubbard Heights should be considered intermittent or to have ended is wrong.[7]

3. Petitioner's Case Law Is Too Far Removed from the Current Case to Provide Meaningful Comparisons.

Huntington also cites several inapplicable decisions that would be relevant only if we were back in 2002 in Hubbard Height's original certificate proceeding. In State ex rel. Rodriguez v. Industrial Comm'n of Ohio, 616 N.E.2d 929 (Ohio 1993), a regulatory commission issued an order in a workers' compensation claim that was appealed to an intermediate court which issued a

[7] To the extent that Huntington is arguing that the Commission did not regulate Hubbard Heights enough (Petitioner's Br. at 10), Huntington is ignoring Staff Exhibit 5 - a list of Commission cases involving Hubbard Heights clearly shows that after 2002, the Commission investigated Hubbard Heights for several years for failure to file an annual report. In some of those years, Hubbard Heights subsequently filed its annual report and in other years the Commission ordered Hubbard Heights to file the report and occasionally fined Hubbard Heights for failure to file the annual report. Petitioner's Appendix at 430-431; CR at BN 1655.

decision that was then appealed to the Supreme Court of Ohio. While the case was pending before that supreme court, the regulatory commission issued an order in response to the intermediate court's decision. The Supreme Court of Ohio held that the commission did not have jurisdiction to enter the second order while the case was pending before the Supreme Court of Ohio. In Floyd v. Bd. Of Comm'rs., 52 P.3d 863, 868 (Idaho 2002) the issue was whether a regulatory body could reconsider its order at the request of a party to the case and, further, whether that reconsideration stayed the time to appeal the regulatory body's decision. In each of these cases, the commission's jurisdiction over one specific case was affected while a superior court decided the case on appeal. Neither of these cases is applicable to Hubbard Heights.

Likewise, Huntington's citing of State ex rel. Hopkins v. Atchison, T. & S.F.R. Co., 197 P. 192 (Kan. 1921), is inapplicable. In Hopkins, a public utilities commission set rates in a case, then later set new rates without following statutory procedure to provide thirty days' notice of those rates. The Supreme Court of Kansas held that "the commission does not have power, after a proceeding to fix railroad freight rates has been disposed of on an application pending before it, to retain jurisdiction and thereby defeat statutory requirements concerning notice." Id. at 193

The Rodriguez, Floyd, and Hopkins decisions only speak to the Commission's jurisdiction with regard to granting or denying the certificate of convenience and necessity in 2002, and whether the Commission could arbitrarily revoke the certificate of convenience and necessity after the final order was issued in the certificate case. These cases do not in any way indicate that the Commission should lose the ability to regulate Hubbard Heights sewer utility just because its initial certificate case is a closed case.

Finally, the Commission's jurisdiction in this case does not rest on the Commission "declaring" continuing jurisdiction as Huntington implies. Petitioner's Br. at 13. Jurisdiction rests squarely on the statutory authority in Chapter 24 of the Code as discussed in this brief.[8]

Public policy and this Court's jurisprudence dictate that unless the Commission takes specific action to relinquish jurisdiction over a public utility, that utility remains a regulated utility. See, Equitrans, L.P. v. Public Serv. Comm'n, 247 W. Va. 646, 885 S.E.2d 584 (2022); Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970). The Commission obtained jurisdiction over Hubbard Heights when it sought to become a regulated utility in 2001. West Virginia law establishes that once an entity is held to provide a public service it continues to be a public utility, until the Commission relinquishes jurisdiction over it. W. Va. Code § 24-1-2 (definition of public utility); Syl. pt. 5, Equitrans, L.P. v. Public Serv. Comm'n, 247 W. Va. 646, 885 S.E.2d 584 (2022) (citing Syl. pt. 1, Boggs v. Public Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970)). At no time did Hubbard Heights file a request pursuant to W. Va. Code § 24-3-7 with the Commission to abandon its sewer utility. At no time did the Commission "demonstrate clearly and unequivocally its intent to relinquish such jurisdiction." Boggs, 154 W. Va. at 154, 174 S.E.2d at 336. Rather, the Commission continued to maintain jurisdiction over the sewer utility.

The fact that a utility slowly falls into increasing disregard of Commission rules, disrepair, poor management, lack of management, and ultimately an inability to provide safe and adequate utility service may make it a distressed or failing utility, but it is still a utility. To find otherwise would render the Act, which requires the Commission to step in and rectify the situation through various alternatives, including an acquisition by a CPU, a nullity. Notwithstanding the wishes of

[8] Also see Boggs, citing Preston County, as cited above.

Huntington, or any potential CPU that would prefer to see the statute just go away, when a petition was filed with the Commission seeking a determination that Hubbard Heights is a distressed or failing utility, the Commission had jurisdiction and the responsibility to consider that request and act to protect the public interest under the Act.

B. THE PUBLIC SERVICE COMMISSION COMPLIED WITH THE DISTRESSED AND FAILING UTILITIES IMPROVEMENT ACT WHEN IT PROPERLY DETERMINED THAT HUBBARD HEIGHTS SEWER UTILITY IS A FAILING UTILITY AND THE HUNTINGTON SANITARY BOARD IS THE BEST CAPABLE PROXIMATE UTILITY TO TAKE OVER THE FAILING SYSTEM.

Hubbard Heights is the type of utility for which the Act was created and the Commission complied with the Act when determining that Huntington was the most suitable CPU to take over Hubbard Heights.

Staff witness Brandon Crace visually inspected the Hubbard Heights sewer system. Mr. Crace observed customer service laterals above ground, broken or separated lines, and dry manholes (sometimes without lids and containing vegetation that obstructed the flow of sewage). Tr. I at 56-57, 73, CR at BN 1716-1717, 1733; RD at Finding of Fact (FoF) 13-14, 15, CR at BN 1092-93. The access roads to the sewer lagoons are overgrown and eroded. Tr. I at 69, 77, 118-119, CR at BN 1729, 1737, 1778-79; Staff Exh. 1, CR at BN 1620; Recommended Decision at FoF 17, CR at BN 1096. The system is intended to employ chlorine treatment, but no treatment is occurring. The treatment structures are broken and rusted with pipes separated at the outfall. Tr. I at 57, CR at BN 1717; RD FoF 16, CR at BN 1095. The treatment lagoons contain fallen trees and their embankments are beginning to fail. Staff Exh. 1, CR at BN 1620; RD FoF 18-19, CR at BN 1097-98; Tr. 1 at 75-76, CR at BN 1735-36. Mr. Crace observed erosion of the lagoon embankments and overflowing occurring but not through the proper outlet. Tr. 1 at 56-57, CR at

BN 1716-17. No one is operating or maintaining the Hubbard Heights system. RD at 7, CR at BN 1086.

Frederick Hypes, employed by the Thrasher Group and testifying for Northern Wayne stated that the failing of the Hubbard Heights sewer system must be addressed because the septic systems are essentially draining over the bank. Tr. I at 95, CR at BN 1755; RD at 10, CR at BN 1089. The DEP considers Hubbard Heights to be operating without a permit because it failed to renew several permits. Tr. I at 59-60, CR at BN 1719-20. Additionally, as of 2011, eight compliance violations existed. Tr. I at 54, CR at BN 1714.

The Act was enacted to address exactly the type of system that is Hubbard Heights, and to protect customers such as those of Hubbard Heights as well to protect local and downstream citizens served by other sewer systems but who may be affected by the neglected and improperly functioning collection lines, lagoons and effluent outfalls of a sewer system such as Hubbard Heights. The Act was enacted to promote the overall public interest of the state economy in the existence of responsible public wastewater utilities and avoidance of health hazards and negative economic impacts posed by untreated sewage. West Virginia Code § 24-2H-5(b) requires:

> (b) 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.

The ALJ analyzed the evidence as it related to each of the considerations enumerated in W. Va. Code § 24-2H-5(b) and properly determined that Huntington was the most suitable CPU:

1. The ALJ Considered the Financial, Managerial, and Technical Ability of All Proximate Public Utilities Providing the Same Type of Service.

- Northern Wayne called Frederick Hypes of the Thrasher Group to testify regarding the most suitable CPU and the needs of Hubbard Heights. Mr. Hypes recommended Huntington as the most suitable CPU. RD at 10, CR at BN 1089; Tr. I at 90-92, CR at BN 1750-52.
- Huntington is larger than the other respondents being considered, including Northern Wayne. RD at 10, CR at BN 1089.
- The cost to restore Hubbard Heights may depend on the remediation plan but will not be affected by which utility assumes control. Tr. I at 97-98, CR at BN 1757-58; RD at 10, CR at BN 1089.
- The likely solution will be installation of a force main that delivers sewer flow to Huntington regardless of the utility designated to take control. Tr. I at 97-98, CR at BN 1757-58; RD at 10, CR at BN 1089.
- Huntington has a larger number of customers to spread the cost over compared to Northern Wayne. Tr. I at 97-98, CR at BN 1757-58; RD at 10, CR at BN 1089.
- Huntington can obtain the necessary funding more easily than Northern Wayne. Tr. I at 97-98, CR at BN1757-58; RD at 10, CR at BN 1089.
- Three proximate utilities, Northern Wayne, Ceredo, and Huntington maintained that they had neither the money, nor the employees to take over Hubbard Heights. Tr. I at 105, 110-112, and 123, CR at BN 1358, 1363-65, and 1376; RD at 10-11, CR at BN 1089-90.

- Ceredo has two employees. Tr. I at 110-112, CR at BN 1363-65; RD at 11, CR at BN 1090.
- Kenova has three employees. Tr. I at 133-34, CR at BN 1386-87; RD at 13, CR at BN 1092.
- Huntington serves just over 20,000 customers and five resale customers. It has 75 employees including approximately 44 field workers. Tr. I at 118, CR at BN 1371; RD at 11, CR at BN 1090.
- Huntington has annual revenue of $16 million compared to $4.6 million for Ceredo, Kenova, Spring Valley, and Northern Wayne combined. Huntington has more cash flow available to absorb a utility providing service to approximately 30 customers and the ability to spread cost over its resale customers. RD at 19, CR at BN 1098; Tr. II at 123, CR at BN 1376.

The Commission considered all of this evidence when determining which proximate utility would be the most suitable CPU without serious disruption of service to existing customers.

2. The ALJ Considered Expansion of the Franchise or Operating Area of the Acquiring Utility to Include the Service Area of the Distressed Utility.

- Kenova is farther away than other respondent utilities (WVAWC was not a respondent at the time of the first hearing). Tr. I at 137-38, CR at BN 1797-98; RD at 13, CR at BN 1092.
- The closest WVAWC sewer systems are Fayetteville and Boone-Raleigh. Each of those systems is approximately eighty miles or a two-hour drive from Hubbard Heights. Tr. II at 39, 48, CR at BN 1292, 1301; RD at 15, CR at BN 1094.

- WVAWC recommended naming Huntington as the suitable CPU based on its size as the largest sewer utility in the State and its proximity to Hubbard Heights. Tr. II at 40, 51-53, CR at BN 1293, 1304-06; RD at 15-16, CR at BN 1094-95.
- Huntington's treatment plant is visible from Hubbard Heights. Tr. II at 123, CR at BN 1376; RD at 19, CR at BN 1098.
- Each of the Respondents in the case below is geographically proximate to Hubbard Heights. RD at 8, CR at BN 1087; Tr. I at 66, CR at BN 1726.

3. The ALJ Considered 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.

- Any of the named potential CPUs would incur a substantial burden from an engineering perspective. RD at 8, CR at BN 1087; Tr. I at 68, CR at BN 1728.
- $5 million in public funding annually, plus funds for eligible critical needs, exists for public utilities and is not available for investor owned utilities. RD at 9, 18, CR at BN 1088, 1097; Tr. I at 87-88, CR at BN 1747-48.
- Staff witness Crace felt that rate impact is the most important factor at this point. Tr. II at 106-109, CR at BN 1359-62; RD at 18, CR at BN 1097.

Staff witness Cadle recommended Huntington as the best suited CPU because: (1) it provides treatment and collection; (2) is much larger than the other four local collection systems combined; and (3) would be able to spread the cost among a larger customer base, including its resale customers, which encompass four other utilities in the distressed utility proceeding. Tr. II at 116-117, CR at BN 1369-70; RD at 19, CR at 1098.

4. The ALJ Considered the Eligibility of the Potential CPUs to Receive State Grant Funding and Federal Grant Funding in a Similar Manner as the Distressed Utility.

- The potential CPUs that are eligible to apply for and receive state and federal grant funding include Huntington, Ceredo, Kenova, Spring Valley, and Northern Wayne. WVAWC and Hubbard Heights are private and would not be eligible to receive federal and state funding limited to public utilities. See e.g. W. Va. Const. art. X §6 (prohibition on state funds for private corporations); W. Va. Code § 31-15A-9(f) (distressed or failing water or waste water funds); 7 C.F.R. §1780.7(a) (USDA grants for public entities).

The ALJ provided thorough analysis on all points of consideration present in W. Va. Code § 24-2H-5(b), taking into account all evidence presented in the case including testimony from a variety of witnesses and exhibits admitted into the record. The ALJ recognized that none of the potential CPUs were willing to serve the customers of Hubbard Heights. RD at 23, CR at BN 1102. This is not uncommon and perhaps one important reason that the West Virginia Legislature passed the Act – so that the Commission would have the ability to ensure that all citizens of West Virginia have access to safe drinking water and adequate and safe wastewater treatment. W. Va. Code § 24-2H-2(g).

> Considering the relative merits of the available choices, Huntington is the most suitable capable proximate utility available. It serves considerably more sewer customers than any other surrounding utility and has more available administrative and sewer field personnel than any other respondent in the area. Huntington also has the ability to spread the costs it incurs over a relatively large customer base. Further . . . Huntington has access to public funding.

RD at 23, CR at BN 1102. Additionally, the ALJ found that Hubbard Heights is surrounded by sewer utilities and that Huntington operates the regional wastewater treatment plant that treats

sewage from each of the other area collection systems. RD at FoF 23 and 24, CR at BN 1105-06. The ALJ considered the size of each potential CPU.

Huntington first argued that the Commission should not have ordered it to take over the Hubbard Heights sewer utility because other utilities have greater geographic proximity. While geographic proximity is one consideration, under W. Va. Code § 24-2H-5(b)(2), it is certainly not the only consideration. Weighing the totality of the evidence, the Commission correctly determined that Huntington was the most suitable CPU. The Commission addressed this issue in its final order. Commission Order, Oct. 7, 2024, at 4, CR at BN 1037. In addition to discussing that proximity is not the sole determinate of a CPU, the Commission noted that the Act does not require that the CPU be the closest geographically, and, in fact, W. Va. Code § 24-2H-3(c) provides that the CPU be "close enough to the facilities of a distressed utility that operational management is reasonable, financially viable, and nonadverse to the interests of the current customers of the nondistressed utility."

Next, Huntington argued that it had no financial capacity to make the required $4 million capital investment. The amount of the investment necessary to solve the problems of Hubbard Heights has not yet been established. Northern Wayne and Ceredo estimated that the takeover would cost $4 million, but until the acquiring utility develops a plan to correct the failing utility, the cost of the project is unknown. Likewise, the best manner in which to correct the raw sewage remediation at Hubbard Heights has not yet been determined. The Commission ordered Huntington to work with Commission Staff to formulate a remediation plan. Huntington has suggested HAUs at each home. Other possible solutions could include repairing and reactivating the existing collection system; interconnecting the Hubbard Heights residences to the Huntington collection system; installing a package treatment plant; and there may be other viable solutions.

Furthermore, Huntington's financial argument ignores the availability of funding through public avenues including grants. In the final Commission Order, the Commission specifically stated that a part of Staff's assistance to Huntington would be assisting Huntington in identifying and pursuing public funding. Commission Order, Oct. 7, 2024, at 4-5, CR at BN 1037-38.

The ultimate cost of eliminating a public health problem caused by a failed wastewater utility must be paid by somebody. Understandably, Huntington does not want the responsibility and the same is true of the much smaller proximate wastewater utilities. A statutory scheme of wastewater utility remediation that depends on willing CPU volunteers would obviously be meaningless. From a purely cost-based perspective, the reasonableness of naming Huntington as the most suitable CPU in this case becomes obvious when considering a hypothetical remediation cost of $4 million without grant funding, principal forgiveness, principal only, or low cost debt. As shown in the following table, cost on a per customer basis would be much more reasonable when spread over Huntington's larger customer base as compared to the customer base of Hubbard Heights or the other potential CPUs.

Utility	Customers	Average Investment Per Customer For a $4 Million Investment	Per Month Cost Per Customer Based On Amortization Of $4 Million Over 30 Years at 4% Annual Interest
Hubbard Heights	27	$148,148	$707.41
Spring Valley (1)	545	$7,339	$35.05
Ceredo (1)	799	$5,006	$23.90
Kenova (1)	1,321	$3,028	$14.46
Northern Wayne (1)	2,862	$1,398	$6.67
Huntington (1) (2)	20,627	$194	$0.93
(1) Customers based on 2023 PSC Statistical Report (2) The average cost to Huntington customers would be lower if a portion of the cost was recovered in Huntington's wholesale rates.			

Huntington also argued that the City of Huntington, in addition to the Huntington Sanitary Board, should have been made a party to the case below and, therefore, the Commission erred in

finding Huntington to be the most suitable CPU. The Act does not require that the City be made a party to this case.

Huntington argued that it cannot obtain the necessary property to run the facility because said property is held by either a defunct sewer utility or individuals not parties to this case and, therefore, the Commission erred. This is not an insurmountable issue but is a reason why the Act is necessary. When a utility has failed, the customers should be able to rely on an experienced, capable utility to assist customers in obtaining basic necessities such as sewage treatment. Ideally, Huntington would work with property owners to sort through these issues, but eminent domain is, of course, an available option. Availability of options surrounding the acquisition are why the Commission directed that Huntington should consider options before formulating a plan to acquire the Hubbard Heights sewer system.

Finally, Huntington argued that the Commission erred in ordering it to take over Hubbard Heights because there is an acceptable alternative of using individual HAUs. Petitioner's Br. at 14. Suggesting the customers go to individual septic system with HAU's is nothing more than suggesting the customers of Hubbard Heights be abandoned and be left to their own devices for a replacement to public utility service. That could be said of any failed utility. Water customers can be abandoned and told to dig wells. Sewer customers can be abandoned and told to put in septic systems. Gas customers can be abandoned and told to provide their own alternative such as propane, fuel oil, or electricity. Electric customers can be abandoned and told to install their own solar, wind, or fossil fuel-fired generators. That is clearly not what the Legislature contemplated when it passed the Act, requiring a range of options for remediating deficiencies of a failed utility and maintaining utility service by a CPU.

Once a utility has been found to be failing, "the commission may order the acquisition of the failing utility by the most suitable capable proximate water or wastewater utility." W. Va. Code § 24-2H-7(a). The Recommended Decision weighed all evidence presented, took each of the W. Va. Code § 24-2H-5(b) factors into consideration, and selected Huntington as the most suitable CPU to work with Staff on a plan to acquire and remediate the Hubbard Heights sewer system.

The ordered acquisition resulted from the Commission properly exercising its legislative powers by appraising and balancing the interests of current and future customers of Hubbard Heights and of Huntington, the general interests of the state economy and the interests of Hubbard Heights and all of the potential CPUs in deliberating and issuing its decision in this case. W. Va. Code § 24-1-1(b).

C. THE COURT SHOULD REJECT THE AMICI'S ATTEMPT TO APPEAL PRIOR PROCEEDINGS OUT OF TIME AS WELL AS THEIR MISUNDERSTANDING OR MISREPRESENTATION OF THE REQUIREMENTS OF THE ACT.

In two past proceedings under the Act, the Commission found each of the City of Elkins (Elkins) and the Town of Harman (Harman) to be a CPU and ordered each utility to take over a water system. Whitmer Water Assoc. Inc., Case No. 22-0993-W-DU, 2023 W. Va. PUC LEXIS 573 (Elkins named CPU); Craig F. Bessinger, dba Bessinger Rental Management, Case No. 20-0707-W-DU, 2022 W. Va. PUC LEXIS 951 (Harman named CPU). Neither Elkins nor Harman appealed the respective Commission decision to this Court. Elkins and Harman each complain that, like Huntington, the Commission ordered them to take over a failed utility without the Commission first (1) determining exactly what projects or actions the CPU should undertake to fix the failed utility, (2) calculating the actual cost of compliance, and (3) knowing in advance, and informing the CPU, where the CPU will obtain the needed funding. See, Amicus Curiae Br.

at 8-13. The Act does not require the Commission to do any of those things. Nor could the Commission meet those demands without itself taking over the management of the CPU. The Commission is not a water or wastewater utility, does not have the resources to design projects, and is not a funding agency. Instead, the Commission is to consider the factors listed in W. Va. Code § 24-2H-5(b) and then make a decision. While the Commission is not in a position to provide the CPU with a step by step playbook, the Commission Staff will assist a CPU to develop acquisition plans, seek funding, and, for a CPU that qualifies for staff-assisted rate filings, Staff will perform a rate audit to enable a CPU to recover its acquisition-related costs from the acquired customers, and if necessary its existing customers. See e.g., Rules for the Construction and Filing of Tariffs, W. Va. Code R. § 150-2-8.2; W. Va. Code § 24-2-4h.

Hubbard Heights took years to become a failing utility. The problem will not be corrected quickly. Accordingly, the final order did not require Huntington to instantly take over Hubbard Heights and begin improvements to the system. The Commission instead ordered Huntington to "work with Staff to develop and implement a plan to acquire Hubbard Heights assets and resume operations." RD at 28, CR at BN 1107. The Commission did not order the plan, or any work necessary, to be completed in a specific timeframe.

Elkins and Harman also complain of the numerous steps that a distressed or failing utility as well as a CPU must take to comply with a Commission order under the Act. Amicus Curiae Br. at 8-13. The Commission recognizes that being found to be the most suitable CPU to acquire a failed utility creates new responsibilities and will involve difficult tasks. The Act does not require the Commission to somehow ensure that there will be no consequences for the CPU if it takes over a distressed or failing system. Instead, the Legislature found that the public interest requires the Commission to take action to ensure remediation of failing utilities after considering

the financial, managerial, operational, and rate demands of taking over the distressed or failing utility. The fact that performing as a CPU will impose burdens does not invalidate a Commission final order issued in full compliance with the Act.

The amici argue that by ordering the CPU to make a plan for acquisition of Hubbard Heights, the Commission final order violated the definition of CPU in W. Va. Code § 24-2H-3(c), because the amici believe that an acquisition will not be "nonadverse to the interest of the current customers" of Huntington.[9] Amicus Curiae Br. at 6-7, 13. It is too soon to know whether an acquisition will impact the rates to Huntington's existing customers. Huntington and Commission Staff need to meet, make a plan for acquisition, and explore remediation options and potential funding. However, as shown in the chart above, the rate impact on existing Huntington customers could be de minimis and many magnitudes less than the impact on Hubbard Heights customers. Because it is too soon to know the future impact of the acquisition, if any, on existing Huntington customers, the Court should reject this argument of Elkins and Harman.

Elkins and Harman spend several pages of their brief rearguing the facts in their distressed utility cases, cases which are final and are well beyond the deadline to appeal those cases. Amicus Curiae Br. at 8-13. The Court should not permit Elkins and Harman, acting as amicus curiae, to take another bite at the litigation apple by arguing their cases in front of this Court without having an action before this Court. The Court should recognize sour grapes, which is an expected response of an unwilling CPU that does not like the law passed by the Legislature. However, dislike of the law, particularly by an amicus, should not influence the Court. The Hubbard Heights case presently before the Court has its own set of facts for the Court's consideration.

[9] The Act does not prohibit some rate impact on existing customers of a CPU. In fact, it does contemplate maintaining affordable and possibly increased rates for the customers of the failed utility as well as possible rate increases for the existing customers of the CPU. W. Va. Code §§ 24-2H-2(c),(d), 24-2H-8(c), and 24-2H-9.

VI. CONCLUSION

This Honorable Court should uphold the decision of the Commission that it has jurisdiction over Hubbard Heights and that Huntington is the most suitable CPU to take over the failed Hubbard Heights sewer utility.

Respectfully submitted this 24th day of January 2025.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
By Counsel,

/s/*Susan M. Stewart*
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CERTIFICATE OF SERVICE

I, Susan M. Stewart, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of Its Reasons for the Entry of its Order of October 7, 2024" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 24th day of January, 2025:

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