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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**GAULEY RIVER PUBLIC SERVICE DISTRICT,**

**Petitioner,**

**v.**

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,**

**Respondent.**

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

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**REPLY BRIEF OF PETITIONER GAULEY RIVER  
PUBLIC SERVICE DISTRICT**

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**GAULEY RIVER PUBLIC SERVICE  
DISTRICT,**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT.....	3
A.	The PSC’s Statement of Reasons Further Establishes that the PSC Exceeded its Limited Statutory Jurisdiction Under the <i>Distressed Utilities Act</i> and W. Va. Code § 24-2-12.....	3
1.	The <i>Distressed Utilities Act</i> .....	3
2.	W. Va. Code § 24-2-12. ....	8
B.	The PSC Ordered O&M Agreement Effectuates a Forced Acquisition that is Not Permitted by the <i>Distressed Utilities Act</i> . ....	10
C.	The PSC Ordered O&M Agreement is not supported by the evidence; does not advance the policy goals of the <i>Distressed Utilities Act</i> ; and has not been recommended to and considered by the Fayette County Commission. ....	13
D.	The PSC Misstates the Standard of Review. ....	15
III.	CONCLUSION.....	16

## TABLE OF AUTHORITIES

### **Cases**

<i>Bradford v. W. Va. Solid Waste Mgmt. Bd.</i> , 246 W. Va. 17, 866 S.E.2d 82 (W. Va. 2021).....	6
<i>Casey v. Pub. Serv. Comm'n of W. Va.</i> , 193 W. Va. 606, 457 S.E.2d 543 (1995) .....	16
<i>Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n</i> , 190 W.Va. 416, 420, 438 S.E.2d 596, 600-601 (1993).....	15
<i>Eureka Pipe Line Co. v. Pub. Serv. Comm'n</i> , 148 W. Va. 674, 137 S.E.2d 200 (1964) .....	16
<i>West Virginia-American Water Co. et al</i> , Case No. 18-1472-W-PC (January 28, 2019 Commission Order) .....	12
<i>Wilhite v. Pub. Serv. Comm'n</i> , 150 W. Va. 747, 149 S.E.2d 273 (1966) .....	16

### **Statutes**

W. Va. Code § 2-2-10(b)(12) .....	6
W. Va. Code §16-13A-2.....	15
W. Va. Code § 24-2-12 .....	passim
W. Va. Code § 24-2H-1.....	1
W. Va. Code §§ 24-2H-3(a) .....	3
W. Va. Code § 24-2H-3(b).....	3
W. Va. Code § 24-2H-7.....	3, 6
W. Va. Code § 24-2H-7(b).....	8
W. Va. Code § 24-2H-7(b)(1) through (5).....	7
W. Va Code § 24-2H-7(b)(2) .....	3, 6, 7
W. Va. Code § 24-2H-7(b)(6) .....	2, 5, 7
W. Va. Code § 24-2H-8.....	3, 8
W. Va. Code § 24-2H-8(a) .....	7
W. Va. Code § 24-2H-8(c) .....	8
W. Va. Code § 24-2H-8(f).....	15

### **Other Authorities**

<i>Black's Law Dictionary</i> 19 (Abridged 7th ed. 2000).....	11
<i>Distressed and Failing Utilities Improvement Act</i> .....	passim

## I. INTRODUCTION

This appeal illustrates the overreach of the Public Service Commission of West Virginia (“PSC”). This Court must check this overreach and require the PSC to act within the authority granted to it by the West Virginia Legislature.

Petitioner Gauley River Public Service District (“Gauley River”) appealed the PSC’s Halloween Order (GR-Appx. at pp. 1-32) on three grounds: 1) the PSC exceeded the authority granted to it by the Legislature under the *Distressed and Failing Utilities Improvement Act*<sup>1</sup> (the “*Distressed Utilities Act*” or the “*Act*”); 2) the Halloween Order imposed a forced acquisition on Gauley River, in violation of the *Act*; and 3) the Halloween Order is not supported by the evidence and does not advance the policy goals of the *Act*.

In its January 16, 2025, Statement of Reasons in support of the Halloween Order, the PSC advances the most expansive interpretations conceivable of its authority under both the *Distressed Utilities Act* and W. Va. Code § 24-2-12. These interpretations are not supported by the *Act*’s structure, the Legislature’s fair expectations of the PSC in implementing the *Act* and § 24-2-12, or governing principals of statutory construction.

The PSC, for example, construes the Legislature’s license to the PSC in § 24-2-12 to review agreements between two utilities and to “enter such order as

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<sup>1</sup> The *Distressed Utilities Act* is at W. Va. Code § 24-2H-1, *et seq.*



it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper” as including within the statute’s scope striking the entirety of an arm’s length agreement submitted by two utilities and replacing all terms with ones drafted wholly by the PSC.

To circumvent the *Distressed Utilities Act*’s prohibition on distressed utilities being subject to forced acquisition (*see* W. Va. Code § 24-2H-7(b)(6)), the PSC states in this appeal that it “meticulously crafted [the PSC Ordered O&M Agreement that is appended to the Halloween Order] to avoid acquisition.” PSC Statement of Reasons at p. 9. This is a ruse. The PSC Ordered O&M Agreement is an operation agreement in name only; its provisions effectuate a forced acquisition of Gauley River. No utility that has entered into such an agreement has ever re-emerged as an independent utility with its own staff, facilities, and rates. The PSC did not respect the structure of the *Distressed Utilities Act*. It applied the *Act*’s provisions in an unfairly expansive manner, as an aggressive tax attorney might. That is not how the Legislature reasonably expected the PSC to apply the *Act* nor § 24-2-12.

In compliance with the letter and intent of the *Distressed Utilities Act* and § 24-2-12, this Honorable Court should vacate the Halloween Order and direct the PSC to either approve the Arm’s Length O&M Agreement submitted to it by Gauley River and West Virginia-American Water Company (“WVAWC”), or

alternatively approve the Joint Stipulation that was agreed to by all parties to the underlying *Distressed Utilities Act* proceeding.

## II. ARGUMENT

### A. The PSC's Statement of Reasons Further Establishes that the PSC Exceeded its Limited Statutory Jurisdiction Under the *Distressed Utilities Act* and W. Va. Code § 24-2-12.

#### 1. The *Distressed Utilities Act*.

The structure of the *Distressed Utilities Act* is significant. The *Act* classifies troubled utilities in two different ways—"distressed" utilities and "failing" utilities. W. Va. Code §§ 24-2H-3(a), -3(b). The remedies available to the PSC are different for a distressed utility than those it may order for a failing utility. *Id.* at § 24-2H-7(b). The *Distressed Utilities Act* does not permit the PSC to order the forced acquisition of a distressed utility; rather, the *Act* requires the PSC to consider alternatives listed in the *Act* and to "work with" the utility to implement the alternative selected. *Id.* A utility can be subject to a forced acquisition only after it has been designated as "failing" and alternatives have been exhausted. *Id.* at §§ 24-2H-7, -8. The Legislature intended to give distressed utilities an opportunity to cure problems and then be restored to independent operation.

The PSC's Distressed Utility Order of August 23, 2023 (GR-Appx. at pp. 224-238) directed Gauley River and WVAWC to enter into a "mutually agreed arms-length contract," pursuant to the alternative listed in the *Act's* § 24-2H-7(b)(2).

Gauley River and WVAWC submitted their Arm's Length O&M Agreement to the PSC on November 17, 2023. GR-Appx. at pp. 239-253. The PSC rejected the Arm's Length O&M Agreement four months later in its Ides of March Order. *Id.* at pp. 254-257. On March 25, 2024, Gauley River filed a timely petition for reconsideration of the Ides of March Order. *Id.* at pp. 258-283. The PSC did not rule on the petition until 220 days later with the Halloween Order. *Id.* at pp. 1-7. Gauley River had no reason to believe a *de facto* ordered acquisition was imminent, because it had *not* been designated as a "failing" utility, was undertaking corrective actions, and had collaborated in good faith with WVAWC to propose the Arm's Length O&M Agreement. *Id.* at pp. 202-216, 239-253.

Without citation to any provision of the *Distressed Utilities Act*, the Halloween Order expresses a staggering Conclusion of Law:

Because the parties have been unable to negotiate the terms and conditions of a functional agreement that allows WVAWC to provide for the operation and maintenance of the Gauley River water system, it is reasonable and necessary for the [PSC] to create the [PSC Ordered O&M Agreement] . . . and to order Gauley River and WVAWC to enter into this agreement posthaste.

GR-Appx. at p. 6.

This Conclusion and the other Conclusions of Law in the Halloween Order do not reference, quote from, or discuss any provision of the *Distressed*



*Utilities Act* or any decision under that *Act*.<sup>2</sup> *Id.* They reference only one statute, W. Va. Code § 24-2-12. *Id.* at p. 6, n.4.

In stark contrast, the PSC's Statement of Reasons cites to twelve different statutes in an attempt to prop up the Halloween Order. *Compare* PSC Statement of Reasons (pp. ii-iii) *with* Halloween Order (GR-Appx. at pp. 1-7). The PSC did not believe any of the tangential statutes to which it now refers in its Statement of Reasons warranted mention as a legal basis for the Halloween Order or the Ides of March Order. This Court should not give these statutes weight now and allow the PSC to revise history on appeal.

The PSC's Statement of Reasons attempts to justify the Halloween Order under the *Distressed Utilities Act* by relying on W. Va. Code § 24-2H-7(b)(6). Again, the PSC did not cite to or rely on § 24-2H-7(b)(6) below. Section 24-2H-7(b)(6) is a general catch-all provision that permits the PSC to consider "[a]ny viable alternative *other than an ordered acquisition by a capable proximate utility*." *Id.* at § 24-2H-7(b)(6) (emphasis added).

The PSC contends that this subsection gives it "explicit authority" to write and impose an operation and management contract on a distressed utility and

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<sup>2</sup> When the PSC exercises its power to make conclusions of law that "take" a public service district from the county that created it, those conclusions ought to, at the very least, specify the legal authority supporting the taking. The Halloween Order's deficiency in this regard, standing alone, justifies this Court setting the Order aside and annulling it.



a capable proximate utility, in lieu of the mutually agreeable arms-length contract described in the W. Va. Code § 24-2H-7(b)(2) alternative. PSC's Statement of Reasons at p. 1. The PSC's perspective is inconsistent with the structure of the *Distressed Utilities Act* and accepted canons of statutory interpretation.

Section 24-2H-7(b)(6) is not “explicit” but general. However, § 24-2H-7(b)(2) is explicit – an operation and management contract between two utilities must be “a mutually agreed arm’s length contract.” W. Va. Code § 24-2H-7(b)(2). This Court has recognized that, “[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. Pt. 4, *Bradford v. W. Va. Solid Waste Mgmt. Bd.*, 246 W. Va. 17, 866 S.E.2d 82 (2021). The fundamental rule of statutory construction known as *noscitur a sociis* provides that “the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, although apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.” *Id.* at Syl Pt. 3. This Court must read the provisions of § 24-2H-7 “as a whole, in context, and . . . give effect to every word of the statute.” W. Va. Code § 2-2-10(b)(12).

Therefore, any operation and management contract between utilities which the PSC may approve for a “distressed” utility in a *Distress Utilities Act* proceeding must be a mutually agreed arm’s length contract. An alternative relied upon under § 24-2H-7(b)(6) must be an alternative of a different type from those alternatives explicitly set forth in § 24-2H-7(b)(1) through (5).

If the Legislature had intended to give the PSC authority to do whatever it saw fit with distressed utilities, the Legislature would not have bothered to have included subsection (b)(1) through (5), but rather would have granted the PSC broad and unrestricted authority to make whatever order it deems appropriate in the circumstances.

In the *Distressed Utilities Act*, the Legislature has roles for entities other than the PSC, including the distressed utility and the capable proximate utility. The Legislature believed the purposes of the *Distressed Utilities Act* would be best advanced by preserving their rights to negotiate mutually acceptable operating contracts. In the *Act*, the Legislature gave the PSC authority to resolve disagreements between a “failing” utility and its acquiring entity with respect to the price to be paid in a forced acquisition, but the Legislature gave the PSC no such authority when a “distressed” utility and a capable proximate utility are unable to agree to terms on an operating contract. *Compare* W. Va. Code § 24-2H-8(a) *with* § 24-2H-7(b)(2). An involuntary contract is no contract at all and can impose

intolerable burdens on a party to such an arrangement. The parties to an operation and management agreement need to be given some measure of control and discretion to protect their respective interests.

The *Distressed Utilities Act* prohibits the PSC from ordering the forced acquisition of a distressed utility, whereas it may order the forced acquisition of a failing utility. Compare W. Va. Code § 24-2H-7(b) with § 24-2H-8. When the PSC orders the forced acquisition of a failing utility, it can change the rates of the failing utility. W. Va. Code § 24-2H-8(c). This authority is not available to the PSC in the context of distressed utilities. Notably, the Halloween Order directs WVAWC to calculate the bill impact of switching Gauley River customers to WVAWC rates. GR-Appx. at p. 6. Here, the PSC is caught red handed violating the *Distressed Utilities Act*. It imposes a remedy on a distressed utility that only can be imposed on a failing utility in a forced acquisition.

## **2. W.Va. Code § 24-2-12.**

The PSC's hubris is most clearly apparent in its argument that it has unlimited authority under W. Va. Code § 24-2-12. PSC Statement of Reasons at pp. 15-16. This statute generally provides that certain agreements between utilities must be submitted to the PSC for its review and approval. Implicit in this arrangement is that the utilities have entered into arm's length negotiations regarding terms, have achieved consensus on those terms, and only seek the PSC's approval, which it



provides in a great majority of cases. Gauley River does not dispute that § 24-2-12 gives the PSC the authority to “enter such order as it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper.” But this authority must be exercised reasonably and in the context of agreements negotiated by utilities at arm’s length.

Gauley River and WVAWC submitted their unsigned but mutually approved Arm’s Length O&M Agreement to the PSC on November 17, 2023. GR-Appx. at pp. 239-253. It includes the following provision:

Commission Changes. If the [PSC] should exercise its authority to alter, amend, or modify this Proposed Agreement, or should the [PSC] deem the Proposed Agreement to be applicable to situations not contemplated by the parties, either as a result of its initial review of the Proposed Agreement or in any subsequent case or proceeding, Company and District shall not be required to perform under the Proposed Agreement as so altered, amended, modified or expanded unless company and District each specifically agree, by a written instrument signed by an authorized representative of each party, to be bound by the Proposed Agreement as altered, amended, modified or expanded by the [PSC].

*Id.* at p. 249. Similar provisions frequently are included in inter-utility agreements that are submitted to the PSC. This provision preserves the role of the utilities implicit in the structure of W. Va. Code § 24-2-12.

In the Halloween Order, the PSC writes from scratch an entirely new agreement. *Compare* PSC Ordered O&M Agreement (GR-Appx. at pp. 8-32) *with*



Arm's Length O&M Agreement (GR-Appx. at pp. 239-253). Nothing above the signature line in the Arm's Length O&M Agreement is included in the PSC Ordered O&M Agreement.

No provision of W. Va. Code § 24-2-12 authorizes the PSC to re-write inter-utility agreements in their entirety or requires utilities to follow them. Where exactly the PSC's authority to "attach[] such conditions [to inter-utility agreements] as it may deem proper" ends is a question for another case. When a pig becomes a hog it is slaughtered. Here, the PSC has far exceeded the authority the Legislature intended to convey to it under W. Va. Code § 24-2-12.

If this Court affirms the PSC's conduct, no rational utility would ever submit another inter-utility agreement to the PSC for approval. It would be too much of an open-ended risk. Such a development would be contrary to the public interest, as many inter-utility agreements enhance the efficiency and quality of utility service.

**B. The PSC Ordered O&M Agreement Effectuates a Forced Acquisition that is Not Permitted by the *Distressed Utilities Act*.**

In the Statement of Reasons, the PSC contends that the PSC Ordered O&M Agreement "is not 'tantamount to an acquisition,' as the Petitioner argues, but rather meticulously crafted to avoid acquisition." PSC Statement of Reasons at p. 9. This observation is, in and of itself, evidence of the PSC's bad faith implementation of the *Distressed Utilities Act*. The Legislature adopted the *Act* and entrusted the PSC to enforce it in a fair and impartial manner, respecting its overall structure,

which includes a prohibition on forced acquisitions of distressed utilities. The PSC examined its authority under the *Distressed Utilities Act* and interpreted it in an unfairly expansive manner, as an aggressive tax attorney might.

The word “acquisition” is a noun that means “[t]he gaining of possession or control over something.” *Black’s Law Dictionary* 19 (Abridged 7th ed. 2000). “[A]cquisition of the target company’s assets” is the contextual illustration cited in *Black’s Law Dictionary*. *Id.* The PSC Ordered O&M Agreement would result in WVAWC gaining possession and control of Gauley River’s operations, assets, and employees for a term of ten years. GR-Appx. at pp. 8-32.

In the Statement of Reasons, the PSC frequently refers to the PSC Ordered O&M Agreement as a “standard” O&M Agreement. *See, e.g.,* PSC Statement of Reasons at p. 1. It may be a standard O&M Agreement for WVAWC, but not for any other water or sewer utility in the state. WVAWC’s standard O&M Agreements are public-private partnership agreements. As an investor-owned utility, WVAWC generally is prohibited from receiving grants and government subsidized loans. Resultingly, WVAWC generally has a higher cost of capital than governmentally owned utilities. To gain the advantages of a governmental utility’s lower cost of capital while also capturing the benefits of WVAWC proficient operational skills, WVAWC and governmental utilities frequently enter into these public-private partnership agreements. While styled as an operation and

management agreement, the agreements effectively make the governmental utility an alter ego of WVAWC, with the governmental utility charging the same tariff rates as WVAWC charges to its direct customers and relying upon WVAWC personnel to provide all services.

In its Statement of Reasons, the PSC contends that Gauley River will have the option of resuming independent operations after ten years. PSC Statement of Reasons at p. 20. This is a red-herring. Like admitting oneself to hospice, no governmental utility that has entered into one of WVAWC's "standard" operations and management agreements has ever re-emerged as an independent utility, rehiring its own personnel and charging its own rates.<sup>3</sup> The PSC knows this. "Meticulously crafted" indeed.

After having WVAWC operate Gauley River's 90 mile long water distribution system with WVAWC personnel for a decade as the PSC Ordered O&M Agreement would require, Gauley River would have no licensed water operator or other personnel, no trucks, tools, equipment, billing software, customer account information, other materials, or skills necessary to take over the complex business of operating and maintaining a water utility. Gauley River would have no choice

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<sup>3</sup> The cases cited in the PSC's Statement of Reasons demonstrate this. *West Virginia-American Water Co. et al*, Case No. 18-1472-W-PC (January 28, 2019 Commission Order) involved PSC approval of a revised O&M Agreement to replace a year 2000 O&M Agreement.



but to continue under an extension of the PSC Ordered O&M Agreement or to sell its water utility assets to WVAWC. The PSC's Halloween Order effectively kills Gauley River as a standalone entity. The *Distressed Utilities Act* does not authorize this fate for a distressed utility.

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

In its Statement of Reasons, the PSC made no substantive response to Gauley River's third basis for appeal, captioned above.

The PSC's Statement of the Case reports that the Mt. Olive Correctional Complex ("Mt. Olive"), which is a Gauley River customer, experienced an interruption of service during the winter of 2021 to 2022. PSC Statement of Reasons at p. 2. However, it neglects to inform this Court that Gauley River purchases its water from Kanawha Falls Public Service District ("Kanawha Falls"), and that the master meter between Kanawha Falls and Gauley River was inoperable at the time of the interruption of service. Pet.'s Br. at pp. 6-8. From February 2022 to the present, a period just shy of three full years, Mt. Olive has not experienced another interruption of service. Gauley River has experienced no flurry of boil water advisories and no formal quality of service complaints have been filed at the PSC. Gauley River is and can continue to provide quality water service to its customers. This is why *all* parties to the underlying proceeding entered into a Joint Stipulation



urging the PSC not to find that Gauley River was a distressed utility, but instead to order it to undertake a corrective action plan. GR-Appx. at pp. 202-216. If the Halloween Order is set aside and annulled, Gauley River can proceed to bring a redundant source of water to serve Mt. Olive.

In the PSC's Statement of Reasons, it asserts that "the Petitioner cited the testimony of Ralph Arthur [Gauley River chairman] who discussed a conversation he had with an unnamed USDA Community Programs Director, who apparently advised that 'the water company is not an eligible applicant for our funding.'" PSC Statement of Reasons at p. 25. This is a misrepresentation of the record. Gauley River submitted as an exhibit to Mr. Arthur's direct testimony an e-mail from Janna Lowery, the state Community Programs Director for USDA. GR-Appx. at p. 64 ("The short answer is [WVAWC] is not an eligible applicant for our funding so they would have to pay off the outstanding balance on the loans and also will be subject to potential grant repayment. We have invested a significant amount of grant funds in Gauley River's water system, so I think the amount of grant repayment would be high.").

Finally, the Halloween Order, if affirmed, would divest the Fayette County Commission of any influence over a public service district that it created to enhance the delivery of water in Fayette and other counties. Despite the PSC's protestations to the contrary, the *Distressed Utilities Act* requires forced acquisitions

to be *recommended* by the PSC to the county commission that created the public service district that is deemed to be failing. W. Va. Code § 24-2H-8(f). The county commission then decides whether to implement the sale of the distressed utility. The “meticulously crafted” PSC Ordered O&M Agreement would deprive the Fayette County Commission of its rights under W. Va. Code §16-13A-2 to control the effective sale and loss of control of a public service district of its own creation.

**D. The PSC Misstates the Standard of Review.**

The PSC’s Statement of Reasons cites to *Central West Virginia Refuse, Inc. v. Pub. Serv. Comm’n*, 190 W.Va. 416, 420, 438 S.E.2d 596, 600-601 (1993) in asserting that, “in deference to the [PSC’s] expertise . . . this Court will not substitute our judgment for that of the [PSC] on controverted evidence.” PSC Statement of Reasons at p. 12. The Court made that statement in the context of a rate case. This Court owes the PSC no deference with respect to issues involving the extent of the PSC’s jurisdiction. This appeal and the Halloween Order do not turn on any issue of controverted evidence. The evidence is clear. Gauley River and WVAWC submitted an Arm’s Length O&M Agreement for PSC approval, and the the PSC ordered Gauley River and WVAWC to enter into a totally different PSC Ordered O&M Agreement that effectuates a forced acquisition of Gauley River.

## CONCLUSION

WHEREFORE, in view of the foregoing, this Court should set aside and annul the PSC's clearly unjust and *ultra vires* Halloween Order and remand this matter to the PSC with instructions for it to enter an order approving the Joint Stipulation and Agreement for Settlement or, alternatively, approving the Arm's Length O&M Agreement between Gauley River and WVAWC.

The PSC is a creature of statute and may act only to the extent authorized by statute. Syl. Pt. 1, *Eureka Pipe Line Co. v. Pub. Serv. Comm'n*, 148 W. Va. 674, 137 S.E.2d 200 (1964); Syl. Pt. 2, *Wilhite v. Pub. Serv. Comm'n*, 150 W. Va. 747, 149 S.E.2d 273 (1966); Syl. Pt. 2, *Casey v. Pub. Serv. Comm'n of W. Va.*, 193 W. Va. 606, 457 S.E.2d 543 (1995).

Respectfully submitted by,

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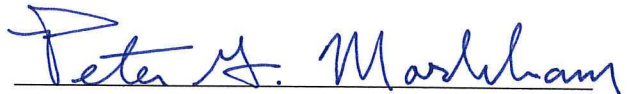
THE PUBLIC SERVICE COMMISSION OF  
WEST VIRGINIA,

Respondent.

**CERTIFICATE OF SERVICE**

I, Peter G. Markham, hereby certify that the foregoing Reply Brief of the Gauley River Public Service District filed was electronically filed with the Court on February 5, 2025, via File and ServeXpress, and served via File and ServeXpress and U.S. Mail on the following:

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