

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
in the City of Charleston on the 20th day of February 2025.

CASE NO. 23-0807-W-C

BECKLEY WATER COMPANY,
Beckley, Fayette and Raleigh Counties,

Complainant,

v.

CITY OF MOUNT HOPE WATER DEPARTMENT,
a municipal utility,

Defendant.

COMMISSION ORDER

The Commission grants the exceptions filed by the City of Mount Hope Water Department (Mount Hope or the City).

BACKGROUND¹

On October 12, 2023, Beckley Water Company (BWC) filed a Formal Complaint against Mount Hope requesting the Commission issue a cease and desist order to Mount Hope concerning the proximity of its water utility service to an area of new development (Appalachian Heights or Site).²

By Recommended Decision, entered April 19, 2024, final on May 9, 2024, the Administrative Law Judge (ALJ) held that Appalachian Heights is within BWC's

¹ The background section of this order is abbreviated. For a full procedural history of this case, please visit the Commission's web docket.

² The area of new development is a 108-acre site located in Bradley, WV commonly known as Appalachian Heights.

exclusive serviced territory.³ The ALJ further found that it was unnecessary and would be premature to issue a cease and desist order.⁴

On May 15, 2024, BWC filed a Petition to Reopen and alleged that Mount Hope was proposing to annex the Site. The Commission reopened the matter on September 25, 2024, and remanded the matter to the ALJ for further proceedings.

By Order dated September 30, 2024, the ALJ directed the parties to file responses regarding the alleged annexation. The parties filed responses and agreed that Mount Hope annexed the Site on June 18, 2024.⁵ Staff and Mount Hope requested that the ALJ hold an additional hearing in the matter.

In the November 15, 2024, Recommended Decision, the ALJ explained his decision that the Site was the exclusive territory of BWC:

The Commission, by Final Order issued May 9, 2024, determined that the Appalachian Heights Site was the exclusive service territory of BWC. The conclusion was made after a hearing held on March 4, 2024, which demonstrated that BWC had extensive 2, 3, 4, 6, 8, 10 and 12 inch lines near to and abutting the site. BWC had lines on three sides of the Site. BWC had numerous customers in the immediate area of the Site. No other utility had customers within the vicinity of the Site. BWC had excess production capacity of 2.5 million gallons a day which could be dedicated to serving the Site. The nearest City facilities are 2.5 miles away from the Site. The nearest Raleigh County Public Service District facilities are 5.9 miles away from the Site. The BWC lines spaghetti around the currently unoccupied Site.⁶

The ALJ concluded that an additional hearing in this matter was not necessary and stated that Mount Hope offered no persuasive legal argument that its annexation of the Site impacted the Commission's earlier Order. The ALJ further concluded that Mount Hope should be prohibited from serving customers directly or indirectly

³ April 19, 2024 Recommended Decision (final on May 9, 2024), at p. 9.

⁴ Id. at p. 7.

⁵ See City of Mount Hope Water Department's Filing in Response to Procedural Order Dated September 30, 2024, filed on October 3, 2024 (a second copy was filed on October 7, 2024); Staff Response to the September 30, 2024, Procedural Order filed on October 11, 2024; and City of Mount Hope Response to September 30, 2024, Procedural Order filed on October 15, 2024.

⁶ November 15, 2024 Recommended Decision at p. 4.

on the Site given that the Site is BWC's exclusive service territory. The ALJ found that Mount Hope's annexation of the Site did not deprive the Commission of its jurisdiction or obligation to fulfil its duties under W. Va. Code § 24-1-1(a).

Exceptions to the November 15, 2024, Recommended Decision

On December 2, 2024, Mount Hope filed exceptions to the November 15, 2024, Recommended Decision (Mount Hope Exceptions). Specifically, Mount Hope filed exceptions to the following finding of fact and conclusions of law:

Finding of Fact:

1. On May 9, 2024, the Commission determined that the Site is the exclusive service territory of BWC. (See Final Order of May 9, 2024.).

Conclusions of Law:

1. The City's annexation of the Site does not impact the ruling that the Site is the exclusive territory of BWC.
6. The City has no power to prevent a utility that is not a public service district from serving customers within that utility's exclusive territory by withholding the City's consent.
7. The City should be prohibited from serving customers directly or indirectly on the Site given that the Site is BWC's exclusive service territory.
8. An additional hearing is unwarranted given that the question of whether the Site was the exclusive service territory of BWC was fully litigated at the hearing of March 4, 2024.⁷

Mount Hope requested that the Commission reject the November 15, 2024, Recommended Decision in its entirety, issue an order finding that the Site is in a "gray and overlapping territory" and authorizing the customer to choose its water utility.⁸

In its brief in support of its exceptions, Mount Hope argued that the annexation of the Site creates a utility territory dispute. Mount Hope argued that

⁷ Mount Hope Exceptions at Bates 2-3.

⁸ Id. at Bates 10.

under the isolation test established by Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 04-1937-E-C and Monongahela Power Co v. Harrison Rural Electrification Assoc., Inc., Case No. 04-1062-E-C, the Site is in a gray and overlapping territory.⁹ Mount Hope further argued that, because of the annexation and creation of a gray and overlapping service territory, the developer of the Site should be given the choice of utility provider.¹⁰

Next, Mount Hope argued that the Recommended Decision is inconsistent with the Commission's authority and duty to enforce and regulate the practices of public utilities and the Commission's responsibility to balance interests.¹¹ Mount Hope asserts that, "[i]n the twenty or more years since BWC has discussed water service with potential developers at the Site, no progress has been made. BWC Witness Wooten stated at the hearing, 'Well, we would like to serve this area.' Transcript at 29."¹² Mr. Wooten went on to testify at the hearing that BWC has had several potential Site developers asking for water service at the Site for the past 23-24 years. Mount Hope argued that BWC cannot provide adequate, economic, or reliable water service to an industrial customer at the Site.¹³ According to Mount Hope, the developer has contributed to the water extension, initiated the annexation request, and was found by the Raleigh County Commission to have "consent[ed] to the minor boundary adjustment" in the Mount Hope annexation application.¹⁴ Mount Hope argued that it is not trying to steal an existing customer from BWC or "circumvent the Commission's authority" as stated in the Recommended Decision.¹⁵ Instead, Mount Hope stated that it is attempting to develop its utility consistent with the needs of a future industrial customer and strengthening the economy of the state.¹⁶

⁹ Id. at Bates 6.

¹⁰ See Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas Co., Case No. 86-749-G-C (Commission Order, September 29, 1987) at Conclusion of Law 8; Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 03-0915-E-C (Commission Order, April 11, 2005) at 11; Monongahela Power Co. v. Harrison Rural Electrification Assoc., Inc., Case No. 04-1062-E-C (Commission Order, August 24, 2005) at Conclusion of Law 7; and Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 04-1937-E-C (Commission Order, June 9, 2008) at Conclusion of Law 5.

¹¹ Id. at Bates 7.

¹² Id.

¹³ Id. at Bates 8.

¹⁴ Id. at Bates 9.

¹⁵ Id.

¹⁶ Id.

Responses to Exceptions

BWC filed its response to Mount Hope's exceptions on December 12, 2024 (BWC Response). In response, BWC argued that the annexation of the Site does not create a gray and overlapping service territory issue.¹⁷ According to BWC, Mount Hope's assertion that the annexation creates a gray and overlapping service territory issue is not supported by law or fact. BWC further argued that there is no gray and overlapping service territory in this case because Mount Hope does not have water distribution facilities anywhere near the Site. Mount Hope's closest water facilities are approximately two-and-a-half miles from the Site.¹⁸ Additionally, BWC argued that there is nothing in the record to show that the City's water treatment plant has the capacity to supply water to the Site. Mount Hope had an opportunity to present evidence at the March 4, 2024, evidentiary hearing and chose not to present a witness.¹⁹

Next, BWC argued that Mount Hope incorrectly asserted that it does not have the ability to serve the Site. BWC presented evidence at the March 4, 2024, hearing to show that BWC has a 12-inch water main line that serves the southern portion of the Site and a six-inch main line that serves the northern portion of the site.²⁰ BWC can provide 600 gallons per minute at 50 PSI to the Site, or approximately one million gallons per day.²¹ Currently, BWC provides water to several customers located at the Site, including a gas station, restaurant, car dealership, and equipment facility.²² In response to Mount Hope's assertions regarding delays to developing the Site, BWC responded that it is because developers do not want to pay for the installation of water distribution infrastructure behind the point of service. According to BWC, it has advised potential developers that it can extend water service to the property line, but the developer is responsible for the installation of water distribution infrastructure beyond the property line. BWC believes that developers do not want to incur the costs associated with installation of water distribution infrastructure.²³

¹⁷ BWC Response at Bates 4.

¹⁸ Id. at Bates 5.

¹⁹ Id.

²⁰ BWC Response at Bates 6, See also March 4, 2024 Hearing Tr. at 10.

²¹ BWC Response at Bates 6, See also Company Ex. 2.

²² BWC Response at Bates 6, See also Company Ex. 2 at 10-11.

²³ BWC Response at Bates 6.

BWC further argued that Mount Hope refers to a “developer” or “customer” needing service, but no such developer or customer exists. Instead, BWC believes the landowner wants to make its property more attractive for development by having Mount Hope finance the cost associated with planning, designing, and constructing the water distribution infrastructure that is typically the responsibility of the developer.²⁴

Finally, BWC argued that because Mount Hope takes exception to the determination that the Site is in the exclusive territory of BWC, (Conclusion of Law No. 1 in the May 9, 2024, Final Order) Mount Hope should have filed exceptions to the May 9, 2024, Final Order (April 19, 2024, Recommended Decision) and not the November 15, 2024, Recommended Decision.²⁵

Staff filed a response to the exceptions on December 12, 2024 (Staff Response). Staff argued that the Site in question does not present a gray and overlapping situation. According to Staff, BWC established in its October 15, 2024, filing that it has facilities constructed and located at the Site. Staff argued that “the key to resolving territorial disputes between utilities is examining the location of each utilities’ facilities as those facilities currently exist.”²⁶ Staff stated that the record and evidence established that BWC clearly has facilities ready to serve the site, which is in line with the policy of the orderly development of utilities.²⁷

Staff further argued that W. Va. Code § 24-2-1(a) is controlling in this case. Staff argued that Mount Hope’s position fails to consider the impact of W. Va. Code § 24-1-1(a)(3), which states that the Commission has a duty to “encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state’s energy resources.”²⁸

Staff recommended that the Commission issue an Order affirming the November 15, 2024, Recommended Decision and deny Mount Hope’s exceptions.

²⁴ Id. at Bates 7.

²⁵ Id. at Bates 8.

²⁶ Harrison Rural Electrification Assoc., Inc. v. Public Service Comm'n of WV, 438 S.E.2d 782, 190 W. Va. 439 (1993); Staff Response at Bates 6.

²⁷ Id.

²⁸ Id. at Bates 7.

DISCUSSION

In their responses to the September 30, 2024, Order, the parties agreed that Mount Hope annexed the Site on June 18, 2024.²⁹ Under W. Va. Code § 8-19-1, any municipality may extend a waterworks system, “maintain and operate additions, betterments and improvements to an existing waterworks system,” provided that the municipality shall not serve or supply water facilities within the corporate limits of any other municipality. Under W. Va. Code § 8-12-5, a municipality has authority to “erect, establish, construct, acquire, improve, maintain and operate a … waterworks system … within or without the corporate limits of the municipality.” Considering the authority of a municipality to provide water utility service both within and outside its corporate limits, and the nearby operations and location of another water utility, BWC, the area in question could be gray and overlapping even if Mount Hope had not annexed the area into its corporate limits. With the annexation, there is further reason to conclude that the area in question may be gray and overlapping as to service areas of BWC and Mount Hope. Therefore, the Commission must determine whether the Site is in a gray and overlapping service area.

Gray and Overlapping Service Area

The Commission decision in this case is driven by a historical body of contested utility service area cases historically addressed by the Commission. In Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 03-0915-E-C, the Commission described the criteria it considers in utility territory disputes:

When more than one electric or gas utility wants to serve the same area, the Commission has considered the following criteria in determining which utility may provide service:

- (1) Is the proposed customer a new user of the utility services in the area?
- (2) Is there evidence of prior service to the customer by either utility in the area?

²⁹ See City of Mount Hope Water Department’s Filing in Response to Procedural Order Dated September 30, 2024, filed on October 3, 2024 (a second copy was filed on October 7, 2024); Staff Response to the September 30, 2024, Procedural Order filed on October 11, 2024; and City of Mount Hope Response to September 30, 2024, Procedural Order filed on October 15, 2024.

(3) Is the customer located in an overlapping service territory of the two utilities?³⁰

If the answer to the first criterion listed above is yes, the answer to the second criterion is no, and there is a determination that a customer is located within a gray and overlapping service territory, then the customer may choose from which utility to receive service.³¹ Additionally, the Supreme Court of Appeals of West Virginia, in Harrison Rural Electrification Assoc., Inc. v. Public Service Comm'n of WV,³² agreed that the key to resolving territorial disputes between utilities is examining the location of each utilities' facilities as those facilities currently exist.³³

In this case, the future customer or developer would be a new user of the utility services on the Site because the Site has not been developed yet. The potential customer or customers have not been served by either Mount Hope or BWC. Therefore, the answer to criterion one is yes, and the answer to the second criterion is no. What remains, is whether the area in dispute is within an overlapping service territory of BWC and Mount Hope.

Before annexation, the area could have been considered gray and overlapping because a municipality has statutory authority to serve outside its municipal limits. After the annexation, the area in dispute is clearly within the service territory of both Mount Hope and BWC. The key to resolving territorial disputes is to examine the current location of the utilities' facilities and both BWC and Mount Hope have existing facilities in the area that could be used to provide service to the Site. BWC has facilities next to three sides of the Site and Mount Hope has facilities two-and-a-half miles from the Site.³⁴

The Commission provided further guidance for the third Lumberport-Shinnston criteria in Monongahela Power Co. v. Harrison Rural Electrification Assoc., Inc., Case No. 04-1062-E-C, and Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 04-1937-E-C. In those cases, the Commission established an isolation test:

³⁰ See generally, Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas, Case Nos. 86-749-G-C and 87-115-G-GI (Commission Order, September 29, 1987).

³¹ Id. 11-12 and Conclusion of Law No. 8.

³² 438 S.E.2d 782, 190 W. Va. 439 (1993).

³³ Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 03-0915-E-C, Commission Order, April 11, 2005, at 7.

³⁴ November 15, 2024, Recommended Decision at p. 6.

One simple way to look at disputes such as this one is to isolate each utility's (A's and B's) service territory as if the other utility did not exist. If we assume only utility A exists, and assume the service location in question requested service from utility A, would the Commission's *Rules and Regulations for the Government of Electric Utilities*, 150 C.S.R. 3, (*Electric Rules*) and relevant case law, require utility A to provide service? In the alternative, if only utility B existed, would the *Electric Rules* and relevant case law require utility B to serve if requested? If the answer to both questions is yes, then the service location is in a gray and overlapping service territory.³⁵

In the instant case, if we assume that only BWC existed, it would be required to provide service to the Site. Likewise, if we assume that only Mount Hope existed, it too would be required to provide service to the Site, if requested. Therefore, the Site satisfies the isolation test for a gray and overlapping service area.

When the Commission determines that a customer is in a gray and overlapping area, the choice of utility provider should be left to the customer.³⁶ In the instant case, the future customer or developer should be able to choose its water service provider.

Statutory Duties of the Commission

While the primary determination of the Commission in this case is whether the Site is in a gray and overlapping area for water service, the Commission must also carefully consider its legislative mandates and its duty to appraise and balance the interests of current and future utility customers, including the potential customer, the general interests of the state's economy, and the interests of the utilities subject to its jurisdiction.³⁷

The state has an interest in the development of land that will have a positive economic impact. The Commission must always consider the interests of the utilities subject to its jurisdiction. There is no evidence in the record of this case

³⁵ Case No. 04-1062-E-C, Commission Order, August 24, 2005, at 6 and Conclusion of Law No. 6.

³⁶ Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas Co., Case No. 86-749-G-C (Commission Order, September 29, 1987) at Conclusion of Law 8; Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 03-0915-E-C (Commission Order, April 11, 2005) at 11; Monongahela Power Co. v. Harrison Rural Electrification Assoc., Inc., Case No. 04-1062-E-C (Commission Order, August 24, 2005) at Conclusion of Law 7; and Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 04-1937-E-C (Commission Order, June 9, 2008) at Conclusion of Law 5.

³⁷ W. Va. Code § 24-1-1(a) and (b).

showing that one water utility would benefit more or less than the other by gaining a potential customer at the Site. There was also no evidence presented in this case to suggest that either utility would be harmed if the potential customer became a customer of the other utility.

Because the Site is in a gray and overlapping service territory, the Commission will grant Mount Hope's exceptions, and will not adopt the November 15, 2024 Recommended Decision.

FINDINGS OF FACT

1. The parties filed responses to the ALJ's September 30, 2024, Order and agreed that Mount Hope annexed the Site on June 18, 2024.³⁸
2. The Site is now part of Mount Hope's corporate limits.³⁹
3. The developer or future customer will be a new user of water service at the Site.⁴⁰
4. Neither BWC nor Mount Hope have served any customers at the Site because the Site is not developed.⁴¹
5. BWC and Mount Hope have existing facilities in the area that could be used to provide service to the Site.⁴²

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code §§ 8-19-1 and 8-19-5, Mount Hope may extend its waterworks system, provided that it shall not serve or supply water facilities within the corporate limits of any other municipality.

³⁸ See City of Mount Hope Water Department's Filing in Response to Procedural Order Dated September 30, 2024, filed on October 3, 2024 (a second copy was filed on October 7, 2024); Staff Response to the September 30, 2024, Procedural Order filed on October 11, 2024; and City of Mount Hope Response to September 30, 2024, Procedural Order filed on October 15, 2024.

³⁹ Id.

⁴⁰ See case file, generally.

⁴¹ Id.

⁴² November 15, 2024, Recommended Decision at p. 6.

2. Because (i) a future customer or developer would be a new user of the utility services on the Site, (ii) the Site has not been served by Mount Hope or BWC, and (iii) both BWC and Mount Hope have existing facilities in the area that could be used to provide service to the Site, the Site is in a gray and overlapping service area and the future customer or developer may choose either BWC or Mount Hope as its water service provider.

3. The Site satisfies the isolation test because if we assume that only BWC existed, it would be required to provide service to the Site. Likewise, if we assume that only Mount Hope existed, it would be required to provide service to the Site, if requested.⁴³

4. If a customer requests and receives service from a utility in a gray and overlapping service territory, that customer location becomes the exclusive service territory of the selected utility for future comparable service.⁴⁴

5. The Commission has a statutory duty to appraise and balance the interests of current and future utility customers including the potential customer, the general interests of the state's economy, and the interests of the utilities subject to its jurisdiction.⁴⁵

6. The State has an interest in development of land that will have a positive economic impact.

7. There is no evidence in the record of this case showing that one water utility would benefit more or less than the other by gaining a potential customer at the Site. Also, there was no evidence presented in this case to suggest that either utility would be harmed if the potential customer became a customer of the other utility.

8. The Commission should not adopt the November 15, 2024, Recommended Decision.

⁴³ Conclusion of Law No. 6, in part, Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 04-1937-E-C, Commission Order, August 24, 2005.

⁴⁴ Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas Co., Case No. 86-749-G-C (Commission Order, September 29, 1987) at Conclusion of Law 8.

⁴⁵ W. Va. Code § 24-1-1(a) and (b).

ORDER

IT IS THEREFORE ORDERED that the Appalachian Heights Site is designated as gray and overlapping and either Beckley Water Company or Mount Hope would be able to provide water service, if requested. Therefore, the developer or future customer may choose either Beckley Water Company or Mount Hope as its water service provider.

IT IS FURTHER ORDERED that the City of Mount Hope's Exceptions to the November 15, 2024 Recommended Decision are granted.

IT IS FURTHER ORDERED that the November 15, 2024 Recommended Decision is not adopted.

IT IS FURTHER ORDERED that upon entry of this Order this case shall be dismissed from the Commission docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

A True Copy, Teste,



Karen Buckley, Executive Secretary

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