IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-_____

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(Public Service Commission of West Virginia Case No. 23-0807-W-C)

BECKLEY WATER COMPANY

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and CITY OF MOUNT HOPE

Respondents.

BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

1. Because Mount Hope failed to file exceptions or timely appeal the underlying decision, the Public Service Commission exceeded its statutory authority to consider only the enforcement remedy sought in BWC's Petition to Reopen, and instead improperly reconsidered the underlying decision that Appalachian Heights was within Beckley Water Company's ("BWC's") exclusive water service territory.

2. The Commission erred as a matter of law in its reconsideration of BWC's exclusive territory by examining whether the City of Mount Hope ("Mount Hope") is "willing and able to serve" the service territory at issue, instead of applying precedent that the Commission must examine the facilities as they "currently exist," and where a service territory more than one mile away is too far to be gray and overlapping.

3. The Commission erred as a matter of law by considering Mount Hope's annexation of the area at issue as a factor for whether the water service territory was gray and overlapping between BWC and Mount Hope's service territories.

4. Finally, the Commission erred in concluding that the area at issue would have been in a gray and overlapping territory even before Mount Hope's annexation because municipal authority to construct extraterritorial waterworks generally are limited to one mile in distance, and Mount Hope's facilities are 2.5 miles away.

STATEMENT OF THE CASE

I. BWC's facilities serving customers around the Site in Raleigh County.

BWC is a privately owned public utility company engaged in the business of providing water service subject to the provisions of Chapter 24 of the Code of West Virginia, and subject to regulation by the West Virginia Public Service Commission ("Commission").[1] BWC provides direct service to approximately 22,500 customers in Raleigh and Fayette Counties, West Virginia, and resale service to four water utilities, with two water treatment plants, thirteen storage tanks, and a workforce of approximately two hundred sixty-five employees for an overall service capacity of 14 million gallons daily.[2]

BWC serves multiple Raleigh County customers near an undeveloped property of approximately 108 acres located between Bradley, West Virginia and the Crossroads Mall, known as Appalachian Heights (the "Site").[3] U.S. Route 19 divides the Site into a north and south side, with the northern section accessible from Appalachian Heights Road and the southern section via Cross Roads Drive.[4] BWC's current customers around the Site include a Buffalo Wild Wings, Crossroads Chevrolet, and Anderson Equipment along Cross Road Drive, served by a twelve inch mainline bordering the Site south of Route 19 along Cross Road Drive.[5] BWC also has a four inch line in the area along Appalachian Heights Road abutting the Site north of Route 19, which can be seen on a map of BWC's service area portraying service lines on three sides of the Site.[6] These

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1 A.R. 409.

2 A.R. 208, 223–24, 409.

3 A.R. 202–203, 224, 409.

4 A.R. 410.

5 A.R. 207–209, 226.

6 A.R. 204, 209, 214, 287, 414.

facilities are serviced by a nearby tank labeled "Prosperity Tank" approximately one mile from the Site.[7] No other water utility has customers in the vicinity of the Site.[8]

BWC has excess capacity of approximately two and one-half million gallons per day and is capable of delivering approximately six hundred gallons per minute at 50psi to the Site.[9] Because of BWC's service capacity, BWC's superintendent Lewis Edmund Wooten has received calls and inquiries about obtaining water service for the Site since early 2000, including inquiries from Bill Dugger, James Walkman, Bob Rosnowski, and Jeff Williams.[10] Indeed, a New River Gorge Regional Development Authority ("NRGRDA") brochure for Appalachian Heights clearly identifies "Beckley Water Company" as the water provider to the Site.[11]

It is thus common knowledge that BWC is positioned to provide water service to the Site.[12] And while BWC has been able meet all capacity requirements for potential water service inquires, BWC is also in a position to upgrade its system to provide an additional one and one-half million gallons per day simply by upgrading its lines, according to estimates from Croy Engineering, or up to eight million gallons per day with upgrades to its treatment plants.[13]

The most recent inquiry for water service came in 2022 by correspondence from E. L. Robinson Engineering, for which BWC provided an estimate along with correspondence to the Secretary of the West Virginia Department of Economic Development indicating that the Site was

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7 A.R. 224.

8 A.R. 204, 208–209, 249.

9 A.R. 209, 227–28, 409.

10 A.R. 204, 209, 228–29.

11 A.R. 416.

12 A.R. 410.

13 A.R. 204, 209, 229.

within BWC's service territory.[14] BWC received no response.[15] BWC also reached out to the NRGRDA indicating a desire and capacity to serve the Site and requesting additional information to develop a cost estimate.[16] The NRGRDA has not identified a specific customer or provided any information about who might be developing the property or what their needs are for water service,[17] but BWC believes the developer will require high volumes of water.[18]

II. Mount Hope's facilities 2.5 miles from the Site in Fayette County.

Mount Hope is a municipal corporation under West Virginia Code Chapter 8, which also provides waterworks as a public utility subject to regulation by the Commission.[19] As a municipal corporation operating waterworks, Mount Hope provides water service to customers within its municipal boundaries and, by statute, up to but not to exceed *one mile* in distance from its nearest boundaries.[20] The Site, however, is *two and one-half miles* away from the nearest existing Mount Hope water lines.[21]

III. Mount Hope's "Appalachian Heights Water Extension" project.

Despite Mount Hope's two and one-half mile distance from the Site, and BWC's abutment with capacity, on April 18, 2023, Mount Hope Mayor Mike Kessinger reported to the Fayette

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14 A.R. 205, 209, 290–91.

15 A.R. 210, 233, 292.

16 A.R. 233–34.

17 A.R. 234.

18 A.R. 235.

19 W. VA. CODE §§ 8-12-5(31) (2023), 8-19-1(a) (1990).

20 W. VA. CODE § 8-12-19 (2023) ("[T]he powers and authority of the municipality shall extend beyond the corporate limits to the extent necessary to the reasonably efficient exercise of such powers and authority within the corporate limits. **Such powers and authority, unless otherwise provided in this code or elsewhere in law, shall not, however, extend more than one mile beyond the corporate limits**, and such powers and authority shall not extend into the corporate limits of another municipality without the consent of the governing body thereof.") (emphasis added).

21 A.R. 205, 209, 231.

County Commission on what was described as the "Appalachian Heights Water Extension" project.[22] Mr. Kessinger explained that Mount Hope had received $2 million from the West Virginia Legislature, $2 million from Raleigh County, a developer contribution of $250,000, and required an additional $250,000 from the Fayette County Commission because Mount Hope has "explored and exhausted all other funding avenues for this project which will secure the utility."[23] Mr. Kessinger also agreed with Fayette County Commissioner Taylor that the project may encourage development on Route 19 by a rate decrease, offsetting costs to the customers.[24]

Due to Mount Hope's efforts to secure project funding at the Site, BWC filed a Complaint with the Commission alleging that Mount Hope has violated the laws of the State of West Virginia and rules of the Commission by pursuing a water project that will encroach on BWC's exclusive service territory.[25] BWC requested an order that Mount Hope cease and desist from planning and/or constructing a project that involves providing water service to the Site.[26]

Mount Hope filed an answer admitting that it is planning a proposed project, adding that it would provide water to the Raleigh County Public Service District ("RCPSD") for resale to RCPSD customers.[27] The nearest RCPSD water line, however, is even further from the Site than Mount Hope's—5.9 miles.[28] Moreover, BWC's service area map shows that any water line

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22 A.R. 295.

23 *Id.*

24 *Id.*; A.R. 210.

25 A.R. 411.

26 *Id.*

27 A.R. 404.

28 A.R. 209, 231.

constructed without a cross from the south to north of Route 19 would require the line to cross BWC's existing lines in order to service the Site.[29]

The Commission referred the matter to Chief Administrative Law Judge Keith A. George ("Chief ALJ") for decision, upon which the Chief ALJ held a hearing on March 4, 2024.[30] BWC presented witness testimony from BWC superintendent Wooten and introduced eight exhibits.[31] The Commission Legal Staff ("Staff") argued that the requested remedy was premature because there is not a customer of record ready to take service. However, the Staff's witness Lisa Bailey, a Technical Analyst for the Commission's Engineering Division, agreed that the Commission does not allow utility-on-utility competition.[32]

Mount Hope did not call any witnesses or introduce evidence at the hearing.[33]

IV. Chief ALJ's Recommended Decision in BWC's Favor and Mount Hope's Failure to File Exceptions.

Based on twenty-four findings of fact, the Chief ALJ, issued a recommended decision on April 19, 2024 ("Recommended Decision") finding that the Site is in the exclusive territory of BWC.[34] Although concluding it was "premature to issue a cease and desist order,"[35] the Recommended Decision found that the Site was BWC's exclusive territory because,

> It has long been an important task for the Public Service Commission to help direct the orderly development of utility infrastructure in West Virginia to prevent duplicative facilities that may increase overall costs to customers and taxpayers. W.Va. Code §24-1-1(a)(3). It makes little economic sense to invest in expensive

29 A.R. 230.

30 A.R. 216.

31 A.R. 216–84, 285-346.

32 A.R. 206, 258.

33 A.R. 206, 208, 250.

34 A.R. 210.

35 *Id.*

> water pipes that parallel identical water pipes from an alternative provider.[36]

While the Commission has allowed customer choice in very limited and "rare" circumstances where there is a gray and overlapping service territory, the Recommended Decision concludes that "[t]he facts in this case are not indicative of gray and overlapping service territory," due to the two and 2.5-mile distance from Mount Hope's facilities, 5.9-mile distance from RCPSD's facilities, and BWC's lines that "spaghetti around the parcel" with "excess capacity to provide at least two-and-a-half million gallons a day without any modification to the plants by merely modifying certain line sizes."[37]

The Recommended Decision further finds that Mount Hope engaged in mapping its system, "which is indicative of a project being underway," and that "the project is more concrete than Mount Hope would have the Commission believe."[38] Thus, the Recommended Decision observes that "[i]t seems odd to suggest that the Commission ignore the matter until after facilities are constructed and then determine that the service area is gray and overlapping or to then require that an expensive new project not be actually utilized to serve the Appalachian Heights site."[39]

Mount Hope did not file exceptions to the Recommended Decision. Thus, it became "Final" on May 9, 2024.[40]

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36 A.R. 206.

37 A.R. 207.

38 *Id.*

39 A.R. 208.

40 A.R. 202; W. VA. CODE § 24-1-9(g) ("When no exceptions are filed within the time specified, the recommended order shall become the order of the commission five days following the expiration of the period for filing exceptions"); W. VA. CODE ST. R. § 150-1-19.1 (2019) (deadline of fifteen (15) days for the date of a recommended decision to file exceptions).

V. Petition to Reopen Due to Mount Hope's Annexation of the Site.

The day after the Recommended Decision became final, the *Register-Herald* ran a front-page article detailing a new proposal for Mount Hope to "annex" the Site, to be taken up at a Raleigh County Commission at a public hearing on May 21, 2024 for public comment. In the article, the Executive Director of the NRGRDA, was quoted saying, "The goal of the annexation of the property is it will now be within Mount Hope's municipal boundaries, *so Mount Hope will be the water provider for an industrial tenant*."[41]

All parties agree that on June 18, 2024, Mount Hope followed through and annexed the Site via a minor boundary adjustment—gerrymandering territory tracing Route 19 South to Raleigh County to join the Site to Mount Hope's existing city limits in Fayette County.[42] By statute, a municipality may increase its corporate limits by "a minor boundary adjustment" by application to the county commission of the county wherein the municipality is located.[43] The statute does not, however, provide that territories subject to annexation give the municipality superseding rights to a *private* utility company's exclusive service territory.

While West Virginia law does grant municipalities superior rights to serve unserved territory within their municipal boundaries over public service districts, the statute's requirements for *public service districts* do not apply to *private utility companies*.[44] And to be clear, BWC is

41 A.R. 199–200 (emphasis added).

42 A.R. 74.

43 W. VA. CODE § 8-6-5(a) (2021).

44 W. VA. CODE § 16-13A-8 (2017). Indeed, as explained below, municipalities are specifically prohibited from acquiring property to construct utilities in competition with private utility companies. *See* W. VA. CODE § 8-19-3 (1990).

not a public service district subject to laws governing the relationship between a municipality and a public service district.[45]

Based on Mount Hope's proposal to annex the Site and media statements concerning plans to extend water service, BWC filed a Petition to Reopen on May 15, 2024, asking the Commission to order Mount Hope to cease and desist from planning and/or constructing a project to provide water service to the Site.[46]

BWC contends that the Commission's errors commenced with its September 25, 2024 "Commission Order" of referral of BWC's petition to the Chief ALJ.[47] The Commission directed the Chief ALJ to "rule on which entity has superior service rights pursuant to W. Va. Code § 16-13A-8."[48] In BWC's Response to the October 23, 2024 Procedural Order, BWC noted that "[s]ince BWC and the City are not public service districts, W. Va. Code § 16-13A-8 has no bearing on this dispute."[49]

Upon referral, the Chief ALJ again agreed with BWC, noting that

> [t]he City now argues that the annexation reverses the Commission's determination that the Site was the exclusive service territory of BWC. The City relies on a misreading of W. Va. Code §16-13A-8, which grants municipalities superior rights to serve unserved territory within their municipal boundaries over Public Service Districts. However, BWC is not a Public Service District. It is a for-profit utility. . . . If the Legislature intended to give superior rights to a municipal utility over private utilities, it could have done so. It has not done so. The City has no ability to prevent

45 By contrast to private utility companies, public service districts are political subdivisions created by counties commission. W. VA. CODE §§ 16-13A-2, -3 (2005).

46 A.R. 197.

47 A.R. 158–61.

48 A.R. 160.

49 A.R. 89.

> BWC from serving customers within BWC's exclusive service territory in or out of the City's municipal boundaries.[50]

Based on the new evidence presented concerning Mount Hope's development project, the Chief ALJ recommended a cessation order to prohibit Mount Hope from serving the Site with water service or providing bulk water to any entity for the purpose of serving the Site.[51]

VI. Mount Hope's Exceptions and the Commission Orders at Issue.

This time, Mount Hope filed timely exceptions, arguing for the first time that "[t]he Site is not within the 'exclusive service territory' of BWC but is in a 'gray and overlapping' service territory."[52]

BWC responded that Mount Hope failed to file timely exceptions to the original Recommended Decision finding that the Site was within BWC's exclusive territory, noting, "[t]he City had ample opportunity to present evidence at the March 4, 2024, evidentiary hearing of its ability to provide water service to the Site but chose not to present a witness," and further that Chief ALJ's Recommended Decision correctly reasoned that annexation has no legal significance for a territory dispute with a private utility company.[53]

Staff also filed a reply to Mount Hope's exceptions agreeing that the Site does not present a gray and overlapping territory and recommending the Commission affirm the Chief ALJ's Recommended Decision.[54]

Despite the Chief ALJ's recommendations, and contrary to the arguments of Staff and BWC, the Commission reached the "rare" conclusion that the Site is in a gray and overlapping

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50 A.R. 76.

51 A.R. 78.

52 A.R. 68.

53 A.R. 43–44.

54 A.R. 39.

service territory in its February 20, 2025, Order, granting Mount Hope's exceptions and declining to adopt the Chief ALJ's decision.[55] The Commission reasoned that it had authority to consider Mount Hope's annexation of the Site as a "factor" in the gray and overlapping territory analysis, but that even "[b]efore annexation, the area could have been considered gray and overlapping because a municipality has statutory authority to serve outside its municipal limits."[56]

BWC filed a Petition for Reconsideration, highlighting facts that were presented to the Chief ALJ at the hearing, discussing additional authority from the Commission's prior decisions, noting that there is not a new customer to serve at the Site, and arguing that the order diminishes the authority of the Commission to determine utility service territories by allowing municipalities to resolve disputes by annexation.[57]

The Commission then issued a further Commission Order on April 16, 2025, which is the order at issue in this Petition ("Order").[58] In it, the Commission dismissed BWC's arguments, reasoning that the Site is a gray and overlapping service territory because "the Commission does not regard two-and-a-half miles as too far a distance to extend lines to serve the Site under the isolation test, particularly when both utilities have asserted an ability and readiness to extend service. It is clear from the evidence and filings in this case that BWC and Mount Hope are willing and able to serve the Site."[59] The Commission also concluded that "[w]hether there is currently a

55 A.R. 39.

56 A.R. 35.

57 A.R. 20–26.

58 A.R. 5–11.

59 A.R. 6–7.

customer at the Site is not a deciding factor,"[60] and that "annexation was a factor to be considered in the analysis, but was not a determinative factor."[61]

BWC respectfully disagrees that the Commission had jurisdiction to reconsider its earlier decision that the Site was within BWC's exclusive territory without a timely appeal. Mount Hope failed to file exceptions. The sole question presented upon BWC's Petition to Reopen was whether Mount Hope's annexation presented a new basis for a cessation order. Instead, the Commission reconsidered its prior ruling on BWC's exclusivity without jurisdiction to do so, applied the wrong standard, ignored its own legal precedent, and arrived at conclusions that were not based on substantial evidence. The Commission erred by reconsidering BWC's exclusive territory when exceptions were not timely filed, by concluding that annexation was a factor it could consider to determine if the territory was gray and overlapping, and by concluding that the territory would have been gray and overlapping even without annexation—ignoring West Virginia law that imposes an extraterritorial limit of one mile for constructing municipal water facilities.

SUMMARY OF ARGUMENT

Chief Administrative Law Judge Keith George determined that the Site was within the exclusive territory of BWC in a Recommended Decision. Because Mount Hope did not timely file exceptions to that decision, BWC's exclusivity became the "Final Order" of the Commission on May 9, 2024. Rather than file exceptions or appeal to this Court, Mount Hope commenced proceedings with the Raleigh County Commission to annex the Site just days after the Commission's Final Order.

60 A.R. 8.

61 A.R. 9.

The Chief ALJ correctly reasoned that a municipal boundary adjustment does not supersede a private utility company's exclusive territory, which is subject to the same analysis whether or not the territory has been annexed. Indeed, upon reopening the matter, the Commission did not dispute that annexation does not supersede a utility's exclusive territory, but, instead, concluded that the area could have been considered gray and overlapping *before* its annexation.

The Commission's decision was procedurally misplaced because the issue of gray and overlapping was already decided and final without timely exceptions or an appeal. Upon reopening, the Commission's review was limited to the new factual development of Mount Hope's annexation, to determine whether annexation legally changes the result from the Chief ALJ's factual findings. Again, the Chief ALJ agreed that annexation has no legal effect.

The Commission's decision to reject the Chief ALJ's Recommended Decision simply relitigates issues where BWC prevailed and from which exceptions were not timely filed. The Commission thus exceeded its statutory jurisdiction and powers by, in effect, hearing an untimely appeal from a Chief ALJ decision.

Moreover, the Commission's decision was wrong because the Commission misapplied the isolation test, and its conclusions were not supported with substantial evidence. To decide if the Site was in a gray and overlapping service territory, the Commission correctly noted that "the key to resolving territorial disputes" is "examining the location of each utilities' facilities as those facilities *currently* exist."[62] However, the Commission decided that the Site is gray and

62 *Harrison Rural Elec. Ass'n, Inc. v. Monongahela Power Co.*("*HREA v. MPC*"), Case No. 03-0915-E-C, at 7 (Comm'n Order, April 11, 2005) (emphasis added), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=159860, last accessed May 15, 2025.

overlapping because Mount Hope is "*willing and able to serve the Site*," and has an "ability and readiness to *extend service*."[63] Willingness and ability to extend service is not the standard.

The Commission then improperly weighed Mount Hope's decision to annex the Site as a factor in performing the gray and overlapping analysis. Annexation is a factor that has never been—and for good policy reasons, should not be —part of the analysis of whether a private utility has exclusive rights to a service territory. But the fact of annexation is legally insufficient to alter the Chief ALJ's decision that the site is BWC's exclusive territory for a water utility, and thus there was not substantial evidence to support the Commission's conclusion to vacate the underlying Recommended Decision.

The Commission also ignored its prior decision that extending electrical lines even one mile is too far to create a gray and overlapping service territory, and that the proposed line extension would require crossing facilities to extend service.[64] The analogy is compelling.

Mount Hope also would not be required to extend service under the main line service rule and thus fails to satisfy the test Commission's test that it evaluate whether, in isolation, Mount Hope would be required to serve the Site for a customer in the absence of BWC. In summary, Mount Hope's "potential" to service customers is not a valid rationale under the isolation test, and the Chief ALJ was correct in deciding that annexation should not be a factor in the analysis.

STATEMENT REGARDING ORAL ARGUMENT

R. App. P. 19 disposition is warranted because this appeal involves assignments of error in the application of settled law that the Commission must evaluate Mount Hope's "currently

63 A.R. 6–7 (emphasis added).

64 *See HREA v. MPC*, Case No. 96-0747-E-C, at 1 (Comm'n Order, Sept. 18, 1997) (https://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=76164&Source=Archive).

existing" facilities, not Mount Hope's "willingness" to construct them, resulting in the Commission's unsustainable exercise of discretion, insufficient evidence and a result against the weight of the evidence, and because oral argument is warranted by R. App. P. 14(g), under which the Court will provide a scheduling order containing a date for oral argument pursuant to West Virginia Code § 24-5-1.

ARGUMENT

I. Standard of Review

This Court applies a three-pronged standard of review to orders of the Commission:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (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.[65]

The Commission's Order fails on all three prongs. Further,

> 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.[66]

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65 Syl. Pt. 1, *Cent. W. Va. Refuse v. Pub. Serv. Comm'n*, 190 W. Va. 416, 417, 438 S.E.2d 596, 597 (1993).

66 Syl. Pt. 5, *id.* (quoting *United Fuel Gas Co. v. Pub. Serv. Comm'n*, 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)).

In assessing the findings of the Commission, "'[f]indings of fact made by the Public Service Commission will be overturned as clearly wrong when there is no substantial evidence to support them.'"[67]

II. The Chief ALJ's determination that the Site was within BWC's exclusive service territory was not appealed by Mount Hope, making that conclusion final and, thus, the Commission lacked jurisdiction to overturn it.

The Commission first erred in its February 20, 2025, because the Commission addressed questions that were not properly before it. The Chief ALJ's April 2024 Recommended Decision became final on May 9, 2024, and Mount Hope failed to file exceptions or a timely appeal to this Court. The Commission lacked jurisdiction to relitigate BWC's exclusivity at the Site and could decide only whether the new development of Mount Hope's annexation created a basis for a cessation order to enforce BWC's exclusivity in the Site. By deciding to reexamine that issue anyway, the Commission acted beyond its authority.

The Chief ALJ's April 19, 2024, Recommended Decision concluded that Appalachian Heights was BWC's exclusive service territory.[68] Mount Hope did not appeal that determination, nor did the Commission opt for *sua sponte* reconsideration. Accordingly, on May 9, 2024, the Chief ALJ's Recommended Decision became a Final Order of the Commission.[69] As a result, BWC's territorial exclusivity was resolved with finality, and the Commission lacked jurisdiction to reconsider that issue. Further, BWC's reopening of the matter—which the Order on appeal later followed from—was limited to enforcing BWC's newly-won exclusivity, seeking to enjoin Mount

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67 Syl. Pt. 3, *Harrison Rural Elec. Ass'n v. Pub. Serv. Comm'n*, 190 W. Va. 439, 440, 438 S.E.2d 782, 783 (1993) (quoting Syl. Pt. 3, *Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n*, ___ W. Va. ___, 300 S.E.2d 607, 609 (1982)). The Court considers questions of law *de novo*. *See City of Wheeling v. Pub. Serv. Comm'n of W. Va.*, 248 W. Va. 59, 64, 887 S.E.2d 44, 49 (2023).

68 A.R. 210.

69 *See* W. VA. CODE § 24-1-9(g) (2022).

Hope from expanding water service to the Site.[70] Instead of addressing that narrow issue, the Commission improperly decided to relitigate BWC's exclusivity.[71]

A. The Commission lacked jurisdiction to reconsider BWC's exclusivity because that issue was never appealed or reconsidered within the time frame set forth in West Virginia Code § 24-1-9(g).

The Chief ALJ's April 19, 2024, Recommended Decision determined that the Appalachian Heights area was within BWC's exclusive service territory.[72] That order was never challenged and became a final order of the Commission by operation of West Virginia Code § 24-1-9(g), which provides:

> When no exceptions are filed within the time specified, the recommended order **shall become the order of the commission five days following the expiration of the period for filing exceptions** unless the order is stayed or postponed by the commission: Provided, **That the commission may, on its own motion before the order becomes the order of the commission, review any matter and take action as if exceptions had been filed**.

(Emphasis added). The Commission's *Rules of Practice and Procedure* set forth a fifteen-day time frame for a party to file exceptions to a recommended order.[73] Mount Hope failed to do so.

Furthermore, by statute, the Commission may re-litigate matters only if exceptions are filed, or if the Commission decides to review the matter as if exceptions had been filed "on its own motion *before the order becomes the order of the commission* . . . ."[74] Here, the Commission did not exercise its *sua sponte* reconsideration power before the Recommended Decision became final.

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70 A.R. 197.

71 A.R. 160.

72 A.R. 207.

73 *See* W. VA. CODE ST. R. § 150-1-19.1.

74 W. VA. CODE § 24-1-9(g) (2022).

Accordingly, when the Commission stamped the word "final" on the Recommended Decision, BWC's exclusivity became a settled issue in this matter and the Commission could not freely reverse that determination. Nevertheless, the Commission improperly exceeded its limited reopening authority, in effect, using BWC's Petition to Reopen to allow an untimely reconsideration of that issue, as though exceptions had been filed.[75]

That decision was error. Final means final. This Court has emphasized that "[i]f an agency has authority to reconsider its own final order under an administrative rule (as opposed to a statute), the scope of the agency's authority is strictly limited to what is contained in the rule."[76] In other words, the Commission's ability to reconsider its own orders is limited by the language of the applicable administrative rule.

Here, Rule 19.5 governs applications to reopen a matter before the Commission, which provides:

> An application for reopening of a proceeding more than ten (10) days after the entry of a Commission order must be made by petition of a party to the proceeding at the time of entry of the Commission order, duly verified, accompanied by a certificate showing service upon the attorneys of the other parties. If thereby any Commission order is sought to be vacated, reversed, or modified, **by reason of matters which have arisen since the hearing, or by reason of facts not in possession of the petitioner at the time of the hearing**, the matter so relied upon by the petitioner must be fully set forth in the petition.[77]

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75 A.R. 160.

76 *Reed v. Thompson*, 235 W. Va. 211, 215, 772 S.E.2d 617, 621 (2015). This Court has discussed the Commission's ability to review its own orders, concluding that, "while no statutory provision, in express terms, confers authority upon the commission to grant a rehearing … the commission may prescribe rules of practice and procedure … authoriz[ing] rehearing upon petition…." *Atl. Greyhound Corp. v. Pub. Serv. Comm'n*, 132 W. Va. 650, 661, 54 S.E.2d 169, 175 (1949); *see also* W. VA. CODE § 24-1-7 (1979) (authorizing the Commission to promulgate its own rules of practice and procedure).

77 W. VA. CODE ST. R. § 150-1-19.5 (emphasis added).

Unlike a petition for reconsideration,[78] the scope of an application for reopening is limited to "matters which have arisen since the hearing."[79] Nowhere in Rule 19.5 is the Commission permitted to generally relitigate settled issues outside the scope of the reopening petition.

Furthermore, a petition to reopen might not seek to "vacate[], reverse[], or modif[y]" a Commission order. That is the case here, where BWC's petition to reopen did not seek to vacate, reverse, or modify the Chief ALJ's opinion but, instead, sought the additional enforcement remedy of an "order directing [Mount Hope] to cease and desist from planning and/or constructing a project to provide water service to the Site."[80]

To be clear, BWC did not seek reconsideration or modification of any part of the April 19, 2024, Recommended Decision or raise any new legal issues. Notably, Mount Hope's Response to the Petition to Reopen supports that notion: "[Mount Hope] affirmatively states that there has been no change of any of the facts or circumstances of the parties herein since the April 19, 2024, entry of the Chief Administrative Law Judge's Recommended Decision that would justify reopening that decision."[81] At bottom, the reopening was aimed only to address Mount Hope's undeterred efforts to encroach upon BWC's exclusivity.

Even so, in its Order dated September 25, 2024, the Commission, *sua sponte*, invited Mount Hope to relitigate BWC's exclusivity by improperly expanding the scope of BWC's

78 *See* W. VA. CODE ST. R. § 150-1-19.3.

79 W. VA. CODE ST. R. § 150-1-19.5.

80 A.R. 197.

81 A. R. 189.

Petition for Reopening.[82] Specifically, the Commission identified Mount Hope's annexation and West Virginia Code § 16-13A-8 as affecting the territorial rights of the parties.[83]

Because Rule 19.5 does not permit the Commission to raise or relitigate issues outside the Petition to Reopen, *sua sponte*, the Commission acted beyond its authority in reconsidering BWC's exclusive service territory. Furthermore, even if the Commission *could* raise new issues in response to a Petition to Reopen, the issues identified by the Commission are irrelevant to assessing BWC's exclusivity, and as a result, cannot serve as a basis to reconsider that settled issue.

Finally, by improperly relitigating the underlying question already decided in BWC's favor—in response to BWC's own petition to reopen for enforcement purposes—the Commission discourages public utilities from enforcing their rights by petitions to reopen. Otherwise, they risk losing a favorable ruling on the merits. To be clear, this is not a case in which BWC prevailed by default. BWC litigated its claims through an evidentiary hearing with witnesses and exhibits where Mount Hope was represented by counsel and had an opportunity to participate. The decision was based on the Chief ALJ's review of the evidence and witness testimony, but the Commission vacated that Recommended Decision despite the deadline for exceptions or reconsideration having well expired. The Rules cited here, however, do not allow a litigant that sat on its rights an end-run around the Commission's Rules and statutory deadlines by relitigating the same issues the prevailing party is seeking to enforce.

B. Mount Hope's annexation was irrelevant to BWC's exclusivity and could not justify relitigating the issue.

The Commission's September 25, 2024, Procedural Order, reopening the matter, reasoned that "[t]he Commission must first determine if annexation occurred and what properties were

82 A.R. 160.

83 *Id.*

annexed before it can rule on which entity has superior service rights pursuant to W. Va. Code § 16-13A-8."[84] That directive for reopening the matter is flawed.

First, the statute—applicable only to *public service districts*—is inapplicable to *private utility companies*. While § 16-13A-8 gives municipal water systems superior rights to unserved territory over *public service districts*,[85] importantly, *neither party here is a public service district*.[86] Accordingly, the Commission's reliance on § 16-13A-8 to expand the scope of BWC's Petition to Reopen was rooted in error.

Second, answering those questions is unnecessary to resolve the only issue the Commission was presented with: Mount Hope's apparent intention to provide water service to the Site despite it being BWC's exclusive service territory. As the Chief ALJ found, Mount Hope's annexation is irrelevant to the exclusivity analysis, as the underlying considerations supporting BWC's exclusivity remain unchanged—BWC has existing facilities in the area while Mount Hope does not.[87] More specifically, the question raised was whether Mount Hope's annexation and related media comments were sufficient evidence of Mount Hope's intent to construct waterworks in BWC's exclusive territory to justify a cessation order. The issue was not whether annexation creates superior rights—because, legally, it does not.

In sum, none of the issues identified by the Commission on reopening were relevant to its reassessment of BWC's exclusivity. As a result, the Commission's reversal was not based upon

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84 A.R. 160.

85 A.R. 74–76.

86 *Id.*

87 A.R. 74–75, 117–18; *see also Harrison Rural Elec. Ass'n*, 190 W. Va. at 441, 438 S.E.2d at 784; *Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas Co.*, Case No. 86-749-G-C (Comm'n Order, Sept. 29, 1987) at Conclusion of Law 8 (https://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=29286&Source=Archive).

"matters which have arisen since" the Chief ALJ's Recommended Decision, placing it outside the scope of Rule 19.5.[88] Instead, the Commission performed a standard gray and overlapping service territory analysis, assessing the water facilities of BWC and Mount Hope upon the same facts considered by the Chief ALJ, but reaching the opposite conclusion.[89] In doing so, the Commission ignored its statutory limitations set forth in West Virginia Code § 24-1-9(g) and improperly reconsidered its May 9, 2024, Final Order.[90] Accordingly, the Commission lacked jurisdiction to revisit its conclusion that the Site was within BWC's exclusive service territory during BWC's Petition for Reopening.

III. The Commission applied the wrong standard in concluding that Site is located in a gray and overlapping zone.

The Commission's second error lies in its conclusion that the Site is located in a gray and overlapping zone. This conclusion stems from its reasoning that "the Commission does not regard two-and-a-half miles as too far a distance to extend lines to serve the Site under the isolation test, particularly when both utilities have asserted an ability and readiness to extend service."[91]

This rationale, however, is flawed on its face because "ability and readiness to extend service" is not the standard. Instead, the Commission should have considered the location of each utilities' facilities as those facilities *currently exist*—i.e., not as they are *proposed* to exist—based

88 W. VA. CODE ST. R. § 150-1-19.5; *see also Reed*, 235 W. Va. at 215, 772 S.E.2d at 621 ("An administrative agency, by rule based upon a statute which empowers it to prescribe rules of practice and procedure and the method and the manner of holding hearings, has the authority to grant, *within the time and in the manner provided by such rule*, a rehearing of a final order entered by the commission in a proceeding of which it has jurisdiction.") (emphasis in original) (cleaned up).

89 A.R. 11, 207.

90 A.R. 207.

91 A.R. 6–7.

on a well-established analysis following what this Court has called the "gray and overlapping" territory analysis[92] and the "isolation test," described below.

A public utility "is a unique business, imbued with the public interest and afforded a monopoly that is protected from direct competition. In return for this protected status, [public utility] rates and other aspects of its operations are subject to the jurisdiction of the Commission and the strictures of state law."[93] "[A]n incident to the regulation of a public monopoly is the protection of a certificate holder against unnecessary duplication or competition."[94]

The Commission's authority derives from its legislative mandate to "[e]ncourage the well-planned development of utility resources in a manner consistent with state needs," and to "[e]nsure that rates and charges for utility services are just, reasonable," and charging the Commission with "the responsibility for appraising and balancing the interests of current and future utility service customers, the general interest of the state's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions."[95]

While competition is generally discouraged, where public utilities stake competing claims to a service area, the Commission is charged with deciding whether the area in dispute is located within the "exclusive territory" of one utility, or within a "gray and overlapping" territory.[96] Public utilities may not provide service within the exclusive territory of another public utility. "When the

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92 *Harrison Rural Elec. Ass'n*, 190 W. Va. at 441, 438 S.E.2d at 784.

93 *W. Va.-Am. Water Co.*, Case No. 11-0740-W-GI, at 7 (Comm'n Order, Feb. 2, 2012), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=338304, last accessed May 15, 2025.

94 *Charleston Transit Co. v. Pub. Serv. Comm'n*, 142 W. Va. 750, 759, 98 S.E.2d 437, 443 (1957).

95 W. VA. CODE § 24-1-1(a)–(b) (2015).

96 *Lumberport-Shinnston Gas Co., Inc.*, *supra*, at Conclusion of Law 8,.

disputed territories are overlapping, the Commission has resolved disputes by following the customers' expressed preferences for service."[97]

For example, in *Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas Co.*, the Commission concluded that Equitable Gas Company ("Equitable") could extend its natural gas main line 120 feet via three-inch line to service a new health club customer that had moved into a facility previously served by Lumberport-Shinnston Gas Company ("L-S") because the service area was "overlapping."[98] Commission Staff argued that the new customer was located in an overlapping service territory operated by both L-S and Equitable, noting that Equitable served twenty-nine residential customers and two commercial customers near the disputed area, compared to nineteen residential customers and three commercial customers served by L-S.[99] The new customer also specifically requested service from Equitable.[100] Thus, the Commission concluded that "[a]ny new customer requesting service within the overlapping service area may request service from either L-S or Equitable.[101]

Following *Lumberport-Shinnston*, the Commission adopted the following criteria to resolve territorial disputes:

(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?

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97 *City of Hurricane v. Putnam Pub. Serv. Dist.*, Case No. 07-1419-WS-PC, at 9 (Comm'n Order, May 7, 2008) (citing *Harrison Rural Elec. Ass'n*, , *supra*), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=237613, last accessed May 15, 2025.

98 *Lumberport-Shinnston Gas Co.*, *supra*, at 3.

99 *Id.* at 4.

100 *Id.* at 13, Finding of Fact 4.

101 *Id.* at 15, Conclusion of Law 8.

(3) Is the customer located in an overlapping service territory of the two utilities?[102]

"[T]he key to resolving territorial disputes between utilities is examining the location of each utilities' facilities as those facilities currently exist."[103]

Although the proposed customer would be a new user of utility services in Site, and there is no evidence of prior service, there is simply no evidence to supply a rational basis for the Commission to have concluded that Site is in an overlapping service territory between BWC and Mount Hope.

A. Mount Hope fails under the isolation test.

First, the Commission cited—but misapplied—the "isolation test" to determine if the Site was located in an overlapping service territory. The test requires the Commission to "isolate each utility's (A's and B's) service territory as if the other utility did not exist," and evaluate the legal responsibilities of each respective utility as follows:

> 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.[104]

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102 *HREA v. MPC*, Case No. 03-0915-E-C, at 7 (Comm'n Order, April 11, 2005) (citing *Harrison Rural Elec. Assoc., Inc. v. Pub. Serv. Comm'n of W. Va.*, 190 W. Va. 439, 438 S.E.2d 782 (1993)), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=159860, last accessed May 15, 2025.

103 *Id.*

104 *HREA v. MPC*, Case No. 04-1062-E-C, at 6 (Comm'n Order, Aug. 24, 2005) (https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=166690).

Here, there is no question that BWC would be required to service a customer in Site.[105] BWC does not challenge the Commission's conclusion in that respect.

Mount Hope, however, would not. Under the Commission's *Rules for the Government of Water Utilities* (the "Water Rules"), a water utility, whether public or private, "is under a public service obligation to extend its mains, and its plant and facilities to serve new customers within its service area who may apply for service."[106] When extending its main lines, the water utility is required to contribute an amount equal to its "estimated total net revenue" (as defined by the Water Rules) and the customer(s) is required to contribute the remaining amount.[107] It is also possible for the water utility and customer(s) to enter into an alternate main extension agreement, which agreement typically involves the customer(s) agreeing to finance the entire cost of the main line extension.[108]

The Commission's finding that Mount Hope would be required to provide water service to the Site wholly fails to consider the Water Rules when performing the isolation analysis. Indeed, the Commission foreshadows this oversight in its citation to the "Electric Rules" applied in *HREA*—regulations that were applied in *HREA*, but not the analogue Water Rules in this case.

Specifically, the Commission did not endeavor to determine whether the estimated total net revenue from any prospective customers, plus contributions from the customer, would sum to the $4.5 million projected cost of extending service. It is more than merely doubtful that it could. The Commission's Order acknowledges that "*there is not currently a customer* ready to take

105 A.R. 7, 36.

106 W. VA. CODE ST. R. § 150-7-7.5.1 (2025).

107 *Id.* § 150-7-7.5.5.e.

108 *Id.* § 150-7-7.5.8.g.

service."[109] Thus, there is no customer to make the contribution required by Water Rule 7.5. And if there is no customer ready to take service, then the required contribution cannot occur.

It is, of course, possible for Mount Hope to voluntarily provide water line extension through development funds and developer contributions. But the Commission was incorrect in concluding that Mount Hope would be *required* to do so in the absence of a customer ready to take service, compromising its isolation test analysis.

The key misapplication lies in the Commission's response to BWC's argument that Mount Hope does not have existing facilities in the area of the Site. The Commission responded that it "does not regard two-and-a-half miles as too far a distance *to extend lines* to serve the Site under the isolation test, particularly when both utilities have asserted an *ability and readiness to extend service*."[110] The Commission repeats this rationale in the next sentence, "It is clear from the evidence and filings in this case that both BWC and Mount Hope are *willing and able to serve the Site*."[111]

But "the key to resolving territorial disputes between utilities is examining the location of each utilities' facilities *as those facilities currently exist*."[112] The standard is not whether Mount Hope is "willing and able," or has an "ability and readiness" to serve the Site. Previously, in L-S, the Commission correctly rejected this same premise: "Equitable's willingness to provide full service to certain existing L-S customers does not fall within the exceptions to General Order No.

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109 A.R. 7 (emphasis added).

110 A.R. 182, 188, 199–200, 295.

111 A.R. 6–7 (emphasis added).

112 *HREA v. MPC*, Case No. 03-0915-E-C, at 7 (Comm'n Order, April 11, 2005) (emphasis added) (citing *Harrison Rural Elec. Assoc., Inc.*, *supra*).

228[113] permitting utility to utility competition; thus, Equitable is prohibited from providing such service to customers located in L-S's service area."[114]

Instead, as articulated by this Court, the issue for the Commission to consider was whether the facilities *as they current exist* require Mount Hope to serve the site. There is no question that Mount Hope, currently, cannot serve the Site without expending significant sums to extend its service lines. With no customer offering to pay any part of the cost of the extension, the Commission simply misapplied the isolation test. The substantial evidence of record points to only one rational conclusion that Mount Hope would not be required to service the Site, and thus the Commission should have concluded that the area was not gray and overlapping.

B. The Commission ignores its prior decision that even one mile is too far to create a gray and overlapping territory.

The Commission's decision also ignores a prior decision where it concluded that a one mile distance was too far away to create an overlapping territory. The Commission's Order wholly fails to address its own authority, and there is no rational basis for distinction.

A proximity of 120-feet is a far cry from distances measured in miles. Thus, the Commission determined that a one-mile proximity was too far to create an "gray and overlapping" service area in a case involving the extension of electrical service.[115] In *Harrison Rural Electrification Association, Inc. v. Monongahela Power Company* ("*HREA v. MPC*"), Harrison Rural Electrification Association ("HREA") filed a complaint against Monongahela Power

113 General Order No. 228, now W. VA. CODE ST. R. § 150-16-7 (2021), applying to natural gas transporters, provides exceptions to the general prohibition on service competition in another utility's territory.

114 *Lumberport-Shinnston Gas Co.*, *supra*, at Conclusion of Law 7.

115 *HREA v. MPC*, Case No. 96-0747-E-C, at 1, 4 (Comm'n Order, Sept. 18, 1997), https://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=76164&Source=Archive, last accessed May 15, 2025.

Company ("MPC") alleging MPC infringed on HREA's exclusive service territory by providing electric service to Robert E. Davis and Sandra M. Davis.[116] The "nearest Mon Power customers to the home at issue are located outside a one-mile radius of the [Davis] home."[117] The ALJ found for HREA, and MPC filed timely exceptions. The Commission concluded the ALJ's recommended decision was right, noting:

> We agree with the ALJ's conclusion that when a new customer is located in an area *where all surrounding customers within the immediate vicinity are served by the same utility*, that customer is not located in a gray and overlapping service territory and cannot chose to take service from a competing utility. Although Mon Power has distribution facilities in the immediate vicinity of the home to be served, *it has no customers within a one-mile radius of the site*. HREA, on the other hand, has both distribution and service facilities located within the immediate vicinity of the site and serves all the homes in the immediate neighborhood and on the same road as the site in question.[118]

The facts in this case are identical to the HREA case. Indeed, BWC provides water service to customers abutting the Site, and the Company has significance water distribution facilities abutting the Site.[119] Mount Hope, however, has no customers in the immediate vicinity, and its nearest water distribution facilities are about 2.5 miles from the Site.[120] Given the similarities in the two cases, it is difficult to understand how the Commission found that Mount Hope has "existing facilities in the area" of the Site. Simply put, considering the Commission's prior

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116 *HREA v. MPC*, Case No. 96-0747-E-C, at 1, 4 (Comm'n Order, Sept. 18, 1997), https://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=76164&Source=Archive, last accessed May 15, 2025.

117 *Id.* at 2.

118 *Id.* at 4 (emphasis added).

119 A.R. 214.

120 A.R. 231.

decision and the facts of this case, there is no logical reason for the Commission to conclude that the Site is within a gray and overlapping service territory.

C. The Commission also ignores its prior decision that there is not an overlapping territory where the proposed extension requires one utility to cross another.

The Commission also failed to address BWC's citation to a prior decision that a proposed extension that would require *crossing* facilities militates against finding that the service area is gray and overlapping:

> In cases where the Commission has held that the customer is located within an exclusive service territory of one utility ('A'), the facilities of utility A were the only distribution facilities located on or near the subject property, and the other utility ('B') would have had to construct a power line across the existing distribution facilities of utility A in order to serve the property, or utility B would have had to extend its existing distribution facilities a great distance or around a circuitous route in order to provide the requested service.[121]

Again, the facts of the foregoing HREA case aligns with the facts of this case. BWC has water distribution facilities that abut the Site, while Mount Hope would have to construct approximately 2.5 miles of water main line (at a cost of approximately $4.5 million) to reach the Site. What is more, since BWC has the Site surrounded with water main lines, Mount Hope would certainly have to cross the Company's facilities to reach the Site.

D. The Commission's decision lacks substantial evidence to support its conclusion when these legal precedents are properly applied.

While this Court defers to Commission findings that are supported by substantial evidence, "'Substantial evidence' requires more than a mere scintilla. It is such relevant evidence that a

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121 *HREA v. MPC*, Case No. 04-1937-E-C, at 4 (Comm'n Order, June 9, 2008) (citing *HREA v. MPC*, Case No. 92-0687-E-C (Comm'n Order, Apr. 26, 1993), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=241795, last accessed May 15, 2025.

reasonable mind might accept as adequate to support a conclusion."[122] And "reviewing courts are not required to 'rubber stamp' agency determinations, 'even when credibility assessments are at issue.'"[123] Thus, "courts must determine not just whether the decision is supported by 'substantial evidence,' but 'whether its findings and conclusions were adequately explained.'"[124]

The Commission here failed to address, even upon reopening, authorities cited by BWC that are wholly dispositive. The Site is located more than one mile away from Mount Hope's *current* facilities, and the proposed extension would require Mount Hope to cross BWC's line. These facts were established during the original hearing via the undisputed testimony of BWC's qualified witness, who reviewed a map of BWC's service lines.[125] The Commission Staff presented testimony from a witness who also agreed that Mount Hope could "potentially" serve a customer, but not by its facilities in their current existing condition.[126] Importantly, Mount Hope did not present *any* rebutting evidence, which the ALJ observed in his initial Recommended Decision.[127]

There is simply not substantial evidence for the Commission to find that Mount Hope's facility could currently provide water service to customers at the Site—the conclusion it must be able to draw to find that the service territory is gray and overlapping. For BWC, by contrast, the evidence shows that it already services multiple businesses around the Site, can offer service to the edge of the property today, has greater capacity to service the site than Mount Hope, and could

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122 *Frazier v. S.P.*, 242 W. Va. 657, 667, 838 S.E.2d 741, 750 (2020).

123 *W. Va. Dep't of Health & Hum. Res. Off. of Health Facility Licensure v. Heart 2 Heart Volunteers, Inc.*, 249 W. Va. 464, 468, 896 S.E.2d 102, 106 (W. Va. Ct. App. 2023) (citing *In re Queen*, 196 W. Va. 442, 447, 473 S.E.2d 483, 488 (1996)).

124 *Id.* at 468, 896 S.E.2d at 106.

125 A.R. 287.

126 A.R. 263, 336, 355.

127 A.R. 206, 210.

expand its capacity to service customers if additional capacity is needed. Mount Hope presented no evidence that it can compete with BWC to service customers at the Site. The "potential" or "willingness" to do so is not the standard.

E. The Commission improperly relies on Mount Hope's annexation of the Site as a factor for the gray and overlapping analysis.

Finally, the Commission improperly considered Mount Hope's annexation of the Site as a factor in the gray and overlapping analysis. Annexation is not listed as a factor in any authority, and to be sure, the Commission is charged with regulating municipal utilities as well.[128] Thus the same public policy considerations to "protect[ ] a certificate holder against unnecessary duplication or competition[,]" and "[e]ncourage the well-planned development of utility resources in a manner consistent with state needs[,]"[129] pertain in the same ways to competition between private utility companies and municipal public utilities.

By applying a new "factor" under the gray and overlapping analysis, however, the Order invites municipalities to bypass the Commission's authority simply by annexing a disputed territory. And while a municipality does have statutory authority to supersede public service district territories,[130] municipalities are not conferred with similar authority over private utility companies.

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128 "The policy of the law of this State is that all public utilities, whether publicly or privately owned, shall be subject to the supervision of the public service commission. The possession and the exercise of jurisdiction by the commission to regulate and control the public utilities in this State, including the sewer system constructed, owned and operated by the City of Wheeling, is in furtherance of the policy of the law of this State." *State ex rel. Wheeling v. Renick*, 145 W. Va. 640, 651, 116 S.E.2d 763, 770 (1960) (internal citations omitted) (citing *Company of W. Va. v. City of Morgantown*, 144 W. Va. 149, 107 S.E.2d 489 (1959)).

129 *Charleston Transit Co.*, 142 W. Va. at 759, 98 S.E.2d at 443; W. VA. CODE § 24-1-1(a)(3).

130 *See* W. VA. CODE § 16-13A-8 (2017).

To the contrary, municipalities are specifically prohibited from using the right of eminent domain to acquire property to construct waterworks beyond their corporate limits "to supply service in competition with an existing privately . . . owned waterworks . . . in such municipality or county or within the proposed extension of such system, unless a certificate of public convenience and necessity . . . [has] been issued by the Public Service Commission[.]"[131] Thus, Mount Hope could not use condemnation authority to construct waterworks outside its borders—e.g., lines connecting with the RCPSD—to supply service within Mount Hope's new or proposed borders in competition with BWC.

This statute evidences the Legislature's intent particularly to discourage competition between municipal water utilities and private utilities, without conferring superior rights to municipalities as they have over public service districts. It is apparent from the record, however, that Mount Hope initially believed that annexation would supersede the Commission's initial decision granting BWC exclusivity over the Site. But annexation is not a bypass to the Commission's authority, and it should not have been given any consideration as a factor in weighing whether the Site was in a gray and overlapping service area.

IV. The Commission also erred in concluding that the Site would have been in gray and overlapping territory even before Mount Hope's annexation.

As an alternate justification, the Commission concluded—again, erroneously—that "the Site could have been a gray and overlapping service area before the annexation."[132] Again relying on the isolation test, the Commission reasoned, "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."

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131 W. VA. CODE § 8-19-3.

132 A.R. 9.

However, a municipal corporation's authority to construct waterworks does not extend more than one mile past its corporate limits:

> Wherever the powers and authority granted in this chapter cannot be reasonably and efficiently exercised by confining the exercise thereof within the corporate limits of the municipality, the powers and authority of the municipality shall extend beyond the corporate limits to the extent necessary to the reasonably efficient exercise of such powers and authority within the corporate limits. **Such powers and authority, unless otherwise provided in this code or elsewhere in law, shall not, however, extend more than one mile beyond the corporate limits**, and such powers and authority shall not extend into the corporate limits of another municipality without the consent of the governing body thereof.[133]

The Commission's decision in that respect was simply legal error.

V. Alternatively, if the Court is inclined to conclude that the territory dispute is not ripe for a cessation order, the Court should vacate the Commission's Order and reinstate the ALJ's original Recommended Decision.

BWC does not seek an order to prevent Mount Hope from pursuing development funds and constructing facilities to service customers within its newly annexed boundaries. BWC requested an order to prevent Mount Hope only from connecting water customers in BWC's exclusive territory, and from constructing facilities to compete at the Site.

The Commission's concerns with the West Virginia Business Ready Sites Program[134] are unfounded. The statute nowhere authorizes public utilities to construct competing facilities in the exclusive territory of private utility companies, nor does it purport to overrule the Commission's well-established precedent concerning utilities. The program allows development fund grants for the extension of existing facilities for construction within a utility's service territory—i.e., BWC's exclusive territory in the Site. And Mount Hope may construct other utility facilities to make the

133 W. VA. CODE § 8-12-19 (emphasis added).

134 W. VA. CODE § 24-2-1n (2023).

Site ready for industrial development, short of constructing facilities in direct competition with BWC for water service at the Site. But the statute does not change the legislative imperative to "protect[ ] a certificate holder against unnecessary duplication or competition," and "[e]ncourage the well-planned development of utility resources in a manner consistent with state needs[.]"[135]

The Chief ALJ rightly determined that the territorial dispute was ripe for decision. Although there is not yet a specific identified water customer, the area for construction is adequately defined by the site developer who has pledged $250,000 in funding to the project. With funding secured, and with the Commission's charge to "encourage the well-planned *development* of utility resources," the controversy is ripe for decision and should not await until *after* such developments are constructed to decide whether customers can be hooked up.

The record is replete with evidence that Mount Hope intends to install facilities at the Site in competition with BWC, including Fayette County Commission meeting minutes and confirming media reports with statements attributed to the Executive Director of the New River Gorge Regional Development Authority.[136] Indeed, the Commission traditionally hears complaints regarding planned construction of utility works. For example, the Commission decided a question concerning a territorial dispute premised on MPC having "placed stakes on the Goff property for the construction of new infrastructure and install[ing] a new pad mount for a transformer on the property . . . ."[137] And it is prudent for the parties to have clarity on the Commission's position

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135 *Charleston Transit Co.*, 142 W. Va. at 759, 98 S.E.2d at 443; W. VA. CODE § 24-1-1(a)(3).

136 A.R. 195 ("The goal of the annexation of the property is it will now be within Mount Hope's municipal boundaries, so Mount Hope will be the water provider for an industrial tenant.").

137 *HREA v. MPC*, Case No. 18-1450-E-C, at 1 (Comm'n Order, March 26, 2019), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=516072, last accessed May 15, 2025.

about what facilities development funds can be used to construct at the Site, and the extent to which a developer would need to coordinate with BWC with respect to waterworks.

In summary, the Chief ALJ was right to decide this issue now. As he noted, "It makes little economic sense to invest in expensive water pipes that parallel identical water pipes for an alternative provider."[138] Nevertheless, to the extent this Court is inclined to rule that this matter is not ripe for the determination of a cessation order, BWC asks the Court to vacate the Commission's Order and reinstate the underlying ALJ decision concluding that the Site is BWC's exclusive territory.

CONCLUSION

For all the foregoing reasons, the Court should reverse the Commission's April 16, 2025, Order and remand this matter with instructions to enter as final the Chief ALJ's November 15, 2024, Recommended Decision. Alternatively, the Court should reverse the Commission's Order and remand with directions to reinstate the April 19, 2024, Recommended Decision as final.

Respectfully submitted on May 16, 2025.

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138 A.R. 206.

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2024, I served the foregoing "Brief of Petitioner" by filing with File&Serve Express, which will send electronic notification in accordance with R. App. P. 38A(d), and by email, where available, and by first-class mail, postage prepaid delivery, to the following counsel of record:

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Additionally, on May 16, 2024, I served the foregoing "Brief of the Petitioner" by depositing a copy of the same in the U.S. Mail and hand delivering a copy of the to the following:

Karen Buckley, *Executive Secretary*
Jessica Lane, *General Counsel*
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25323

s/Devon J. Stewart
Devon J. Stewart (WVSB No. 11712)