Docket No. 25-315

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Beckley Water Company,
Petitioner,

v.

The Public Service Commission of West Virginia
and City of Mount Hope Water Department,
Respondents.

STATEMENT OF RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF APRIL 16, 2025 IN CASE NO. 23-0807-W-C

Jordan Martin Blatt, Esq. (WVSB #12773)
Robert M. Adkins, Esq. (WVSB #79)
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
201 Brooks Street
Charleston, WV 25301
(304) 340-0300 - main
(304) 340-0840 - facsimile
jmartin@psc.state.wv.us
radkins@psc.state.wv.us
Counsel for Public Service Commission of West Virginia

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TO THE HONORABLE JUSTICES OF THE
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The Respondent, Public Service Commission of West Virginia (hereinafter "the Commission"), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its April 16, 2025 Order, in Case No. 23-0807-W-C, that is the subject of this appeal.

I. STATEMENT OF THE CASE

This case was initiated by Beckley Water Company (hereinafter "BWC" or "Petitioner" when it filed a complaint against City of Mount Hope Water Department (hereinafter "Mount Hope") and requested the Commission order Mount Hope to cease and desist from planning and/or constructing a project to provide water to a future development area located in Bradley, West Virginia near the Crossroads Mall (hereinafter "Site"). Complaint, Oct. 12, 2023; Commission Record at Bates No. 596-616 (hereinafter "CR at BN_"). BWC alleged that Mount Hope was attempting to encroach on BWC's service territory, thus creating utility-on-utility competition for water service which is prohibited by the Commission. BWC currently provides water service to approximately 22,500 customers in Raleigh and Fayette Counties in West Virginia and also provides resale service to four water utilities. Petitioner's Brief, May 19, 2025 at 2; CR at BN 10. Mount Hope is located in Fayette County, West Virginia and provides water service to approximately 626 customers. City of Mount Hope Water Department's Initial Brief, Apr. 4, 2024 at 3, CR at BN 346. The ALJ held a hearing on the matter on March 4, 2024.

The Site is located in Bradley, West Virginia near the Crossroads Mall. According to a description of the Site from the New River Gorge Regional Development Authority, the Site

> demonstrates favorable potential for data center development. It offers strong utility and fiber infrastructure. The Beckley area offers a temperate climate which is conducive for "free cooling." This site contains a total of 108.5 acres; 82.37 of which is developable and has been split out into Phase 1 (66.32 ac.) and Phase II (16.05 ac.). Construction could be completed within 18 months. AEP DATA

> CENTER QUALIFIED SITE- The pre-qualification analysis modeled a data center with 100[,]000 square feet of white space. It has been deemed appropriate for colocation and enterprise users. Mt. Hope[,] WV is six miles due north of Beckley[,] WV. There are several small neighboring communities near Mt. Hope.

Mar. 4, 2024 Hearing Exhibit, Co. Cross 2; CR at BN 375.

Further, a May 10, 2024, *Register-Herald* article stated that,

> [p]aired with its location along a main highway, [Jina Belcher, executive director of the New River Gorge Regional Development Authority] said the property was deemed an industrial-capable site. 'We get inquiries on this site frequently, at least four or five times a year, from industrial tenants because it's just such an attractive location and has attractive site attributes,' she said. 'We started working with the new owner a couple of years ago to identify how could we recruit an industrial tenant.' Belcher said this led them to look for a way to get infrastructure to the site, which no one has been able to accomplish successfully for several decades.

BWC Petition to Reopen, Exh. A, May 15, 2024; CR at BN 297.

In over twenty years of discussions between BWC and potential developers at the Site, there was no progress in the development of the Site. Mar. 4, 2024 Hearing Transcript (Tr.) at 11; CR at BN 424. BWC witness Wooten stated at the hearing, "[w]ell, we would like to serve this area." Id. at 29; CR at BN 442. The extent of the extensions or upgrades to BWC's current system that would be needed to serve the Site is not known. The Commission cannot speculate as to the reasons the Site has not been developed or why, after twenty or more years of inquiries, a developer has not formally requested service from BWC. However, now, the State Legislature, Raleigh County Commission, Fayette County Commission, and a developer have contributed $4.5 million to finance the expansion of Mount Hope's facilities to provide water to the Site. Mar. 4, 2024 Hearing Exhibit; Co. 6 at 3; CR at BN 362.

The ALJ issued a Recommended Decision and concluded that the Site was in BWC's exclusive territory but that BWC's request for a cease and desist order was premature. The Recommended Decision became the final order of the Commission without the filing of exceptions

or further order of the Commission. Recommended Decision, Apr. 19, 2024 (Final on May 9, 2024); CR at BN 299-308.

BWC filed a petition to reopen the case based on information it received that Mount Hope planned to annex the Site. BWC argued that it was no longer premature to order Mount Hope to cease and desist from planning and/or constructing a project to provide water service to the Site. BWC Petition to Reopen, May 15, 2024 at 2; CR at BN 292. BWC further argued that by annexing the Site, Mount Hope was attempting to "thwart the Commission's prior conclusion of law that the Site is within the exclusive service territory of [BWC]." Id. at 2; CR at BN 292. The Commission reopened the case and directed the ALJ to hold further proceedings in the matter. Comm'n Procedural Order, Sept. 25, 2024; CR at BN 250-253. On November 15, 2024, the ALJ issued a Recommended Decision and concluded that Mount Hope should be prohibited from serving customers directly or indirectly on the Site because the Site is BWC's exclusive territory. Recommended Decision, Nov. 15, 2024 at 7; CR at BN 145.

Mount Hope filed exceptions to the November 15, 2024 Recommended Decision. Mount Hope Exceptions, Dec. 2, 2024; CR at BN 120-130. In support of its exceptions, Mount Hope argued that annexation of the Site created a utility territorial dispute in a gray and overlapping territory. Mount Hope further argued that BWC "cannot provide the adequate, economical, or reliable water service to the Site that an industrial customer would need prompting the developer to seek an alternate source of water." Id. at 5; CR at BN 127. Mount Hope also stated that the developer "clearly wants City [Mount Hope] water to the Site and has taken steps toward achieving that goal." Id. at 5; CR at BN 127. Mount Hope asserted that it was not attempting to steal existing customers from BWC or to "circumvent the Commission's authority," as the November 15, 2024 Recommended Decision stated. Instead, Mount Hope stated that it was attempting to develop its

utility "consistent with the needs of a future industrial customer and strengthening the economy of the state in so doing." Id. at 6; BN 128. Therefore, Mount Hope argued that the developer of the Site should be able to choose the utility provider.

BWC filed a response opposing Mount Hope's Exceptions and supporting the ALJ's November 15, 2024 Recommended Decision. In support, BWC argued that the annexation did not create a gray and overlapping service territory. BWC Response to Exceptions, Dec. 12, 2024 at 3; CR at BN 102. Further, BWC argued that the annexation did not change the fact that Mount Hope's nearest water facilities are approximately 2.5 miles from the Site. Id. at 4; CR at BN 103. BWC alleged that the reason development has not occurred at the Site is because developers did not want to incur costs associated with installation of water distribution infrastructure beyond the point of service. Id. at 5; CR at BN 104. Finally, BWC argued that if Mount Hope disagreed with the ALJ's conclusion in the May 9, 2024 Final Order that the Site is in the exclusive territory of BWC, Mount Hope should have filed exceptions to the ALJ's April 19, 2024 Recommended Decision. Id. at 7; CR at BN 106.

On review from the exceptions filed by Mount Hope, the Commission disagreed with the ALJ and determined the Site to be in a gray and overlapping area because (1) a future customer or developer would be a new user of the utility services on the Site, (2) the Site has not been served by Mount Hope or BWC, and (3) both BWC and Mount Hope have existing facilities in the area that could be used to provide service to the Site. Therefore, the Commission held that a future customer or developer may choose either BWC or Mount Hope as its water service provider. Comm'n Order, Feb. 20, 2025 at 11; CR at BN 97. The Commission further concluded that the Site satisfied an analysis it has used consistently for years to determine if an area is within the service territory of more than one similar utility (water, sewer, electric, natural gas) and therefore

the utility would have an obligation to serve under Commission service extension rules. This analysis has come to be known as the isolation test.[1] This test of a service territory obligation views each utility service obligation in isolation of the other. In this case, the Commission determined that if BWC existed and Mt. Hope did not, BWC would be required to provide service to the Site if requested. Likewise, if Mount Hope existed and BWC did not, Mount Hope would be required to provide service to the Site if requested. Comm'n Order Feb. 20, 2025 at 11; CR at BN 97. When both utilities would be required to serve the Site, if requested, the Commission has historically adopted a customer preference tie-breaker. 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, May 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. This Court has noted that the Commission's "tie-breaking mechanism to avoid duplication of service is to follow the customer's preference, a policy that has been consistently applied by the PSC." Harrison Rural Electrification Ass'n. v. Public Serv. Comm'n. 190 W. Va. 439, 438 S.E.2d 782 (1993).

[1] The isolation test provides that

> 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.

Monongahela Power Co. v. Harrison Rural Electrification Assoc., Inc., Case No. 04-1062-E-C, Comm'n. Order, Aug. 24, 2005, at 6 and Conclusion of Law No. 6.

With respect to Mount Hope's annexation of the Site, the Commission noted that the Site could have been considered gray and overlapping before and after the annexation. Comm'n Order, Feb. 20, 2025 at 8; CR at BN 94.

The Commission concluded that it has a statutory duty to balance the interests of utility customers including the potential customer, the general interests of the state's economy, and the interests of the utilities subject to its jurisdiction. Id. at 11; CR at BN 97. The record did not show evidence that one water utility would benefit more or less than the other by gaining a potential customer at the Site nor did the record suggest that either utility would be harmed if the potential customer became a customer of the other utility. Id. The Commission granted Mount Hope's exceptions and declined to adopt the ALJ's November 15, 2024 Recommended Decision.

BWC filed a petition for reconsideration of the Commission's February 20, 2025 Order.

The Commission denied BWC's petition for reconsideration and vacated the ALJ's Recommended Decision. Comm'n Order, Apr. 16, 2025; CR at BN 64-70. The Commission stated that under the isolation test, 2.5 miles is not too far a distance to extend lines, particularly when two utilities have asserted an ability and willingness to extend service and a potential economic development project is in the works. The Commission acknowledged that because the future customer or customers had not formally requested service, the instant case was not a typical gray and overlapping case and is distinguished from historical gray and overlapping cases.[2] The Commission explained in the April 16, 2025 Order that the presence of a customer at the Site is a

[2] When the Commission refers to a historical body of gray and overlapping cases or contested service area cases herein, we are referring, generally, to the following cases we look to for guidance in territory dispute matters: Lumberport-Shinnston Gas Co. Inc. v. Equitable Gas, Case Nos. 86-749-G-C and 87-115-G-GI, Sept. 29, 1987 Comm'n Order; Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Company, Case Nos. 92-0319-E-C, 92-0640-E-C, and 92-0687-E-C, April 26, 1993 Comm'n Order; Harrison Rural Electrification Assoc. Inc. v. Monongahela Power Co., Case No. 03-0915-E-C, May 11, 2005 Comm'n Order.

consideration but not a determining factor in a gray and overlapping analysis; therefore, the Site would have satisfied the isolation test before and after Mount Hope's annexation of the Site. Id. at 6-7; CR at BN 69-70. The Commission recognized the positive economic impact of a potential line extension project that could bring an industrial customer and did not want to delay a potential project. Id. Thus, the Commission denied BWC's petition for reconsideration on grounds that BWC presented no additional facts for Commission consideration and because BWC's argument that the Commission misapplied precedent was not persuasive. It is the April 16, 2025, Final Order that is the subject of this appeal.

The Commission decided this case based on the evidence and pleadings before it while considering its legislative mandates under W. Va. Code § 24-1-1. Petitioner incorrectly argued that the Commission did not have jurisdiction to redecide the case after the petition to reopen. Petitioner also argued that the Commission incorrectly applied the isolation test in its gray and overlapping zone analysis by (1) not regarding 2.5 miles as too far a distance to extend lines to serve the Site and (2) considering the annexation of the Site in the analysis. The Commission acknowledged that, in the historical contested gray and overlapping cases, customers were often ready to take utility service, but the instant case is not a typical gray and overlapping case. When a potential extension project that will have a positive economic impact is in the planning stage and a territorial dispute arises, the Commission should not wait until there is a customer ready to take service to issue a decision. Comm'n Order, Apr. 16, 2025 at 4, CR at BN 67.

To be clear, the Commission did not approve any extension project in this case. To do so would be premature and inappropriate in a complaint matter. Commission approval of any extension project would occur in certificate of public convenience and necessity proceedings under

W. Va. Code § 24-2-11, unless the project is exempt from certificate requirements.[3] Rather, based on the evidence and pleadings before it, the Commission correctly concluded that the Site is in a gray and overlapping area and that the future customer may choose its water service provider.

II. SUMMARY OF ARGUMENT

The Legislature delegated broad jurisdiction to the Commission to regulate public utilities while balancing the interests of customers, the utilities, and the state's economy. The Legislature charges the Commission to "encourage the well-planned development of utility resources in a manner consistent with state needs." W. Va. Code § 24-1-1. In this case, the Commission faced a territory dispute because two utilities with facilities near the Site desired to serve a future customer or customers. The Site is in a highly desirable location for a non-residential business customer and Site development is likely to have positive economic impacts for Raleigh County, Fayette County, and the entire state of West Virginia. BWC has facilities that located near three sides of the Site and has existing customers near the Site. Recommended Decision, Nov. 15, 2024 at 4; CR at BN 134. The exact distance of BWC's current customers to the Site is unknown. However, the distance of the Site from the nearest utility line capable of providing service is not a restricting factor because either utility is subject to line extension rules which establish the requirement to extend service while requiring the customer(s) to be served to provide a financial contribution to the construction of a line extension if the cost to the utility exceeds certain Commission prescribed limits.[4]

[3] House Bill 2742 enacted during the 2025 Regular Session of the West Virginia Legislature revised W.Va. Code §24-2-11, effective April 11, 2025, to exempt from Commission certificate requirements water and sewer projects that have been reviewed and determined to be technically feasible by the West Virginia Infrastructure and Jobs Development Council.

[4] In this case, the net cost of a 2.5 mile line from Mount Hope is largely grant funded so the net cost to Mount Hope of the line extension will not require a customer contribution.

For reasons also unknown to the Commission, the Site developer did not request service from BWC. Instead, the developer took steps to have Mount Hope provide water to the Site. Mount Hope has existing facilities approximately 2.5 miles from the Site. There is no evidence in the record showing that extension of either utility's lines would result in one utility's line crossing the others.[5] The evidence of record indicated that the Legislature contributed $2 million, Raleigh County contributed $2 million, Fayette County contributed $250,000, and a developer contributed $250,000 to a project to extend Mount Hope's lines to the Site. March 4, 2024 Hearing Exhibit, Co. 6 at 3; CR at BN 362.

While the ALJ recommended that the Commission grant BWC's request to order Mount Hope to cease and desist on planning or beginning a project that would provide water service to the Site, the Commission vacated that order after reopening the case and concluded that the Site is in a gray and overlapping service area. The Commission has broad statutory authority to regulate utilities and it also has statutory authority to reconsider its orders. W. Va. Code §§ 24-1-1 and 24-2-2(a). The Commission is not restricted to consideration of limited issues upon reopening a case.

In the instant case, the Commission was guided by a historical body of territory dispute cases taking the specific circumstances presented in the case at hand into consideration. Territorial dispute cases must be decided on a case by case basis. HREA v. MPA, Case Nos. 92-0319-E-C, 92-0640-E-C, and 92-0687-E-C, April 26, 1993 Comm'n Order at 2 (HREA 1993). While it is true that Mount Hope annexed the Site and the Site is now within Mount Hope's corporate boundaries, the annexation was not a deciding factor in the Commission's gray and overlapping analysis. In fact, the Commission found that the Site could have been a gray and overlapping service area before and after the annexation. Comm'n Order, Feb. 20, 2025 at 8; CR at BN 94.

[5] Crossing of water mains would not be a restricting factor or require the technical engineering that might occur to cross water and sewer over high-pressure gas lines.

The Court has previously recognized the Commission's expertise in utility regulation and should also defer to the Commission's determinations regarding utility territorial disputes. Mason Cnty. Pub. Serv. Dist. v. PSC of W. Va., 247 W. Va. 580, 885 S.E.2d 161 (2022); Lumberport-Shinnston Gas Co. Inc. v. Equitable Gas, Case Nos. 86-749-G-C and 87-115-G-GI, Sept. 29, 1987 Comm'n Order; HREA 1993; Harrison Rural Electrification Assoc. Inc. v. Monongahela Power Co., Case No. 03-0915-E-C, May 11, 2005 Comm'n Order.

Petitioner's appeal should be denied and this Court should uphold the April 16, 2025 Order of the Commission.

III. STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for March 24, 2026.

IV. STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in W.Va. Code § 24-5-1. In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981).

As an initial matter, in Syllabus Point 1 of Sexton, this Court held:

> [A]n order of the public service commission based upon its findings 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.

Syl. Pt. 1, Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) (Citations and quotation marks omitted).

This Court summarized its three-pronged analysis in Monongahela Power Company in Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

> 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.

Syl. Pt. 1, Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416, 438 S.E.2d 596 (1993). *See also* Syl. Pt. 1, Mason Cty. Pub. Serv. Dist. v. PSC of W. Va., 247 W. Va. 580, 885 S.E.2d 161 (2022). Similarly, in C & P Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), this Court reiterated the three-pronged standard of review established in the Monongahela Power case, *supra*, and went on to hold generally that:

> The Court's responsibility is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."

Id. at 611. The C&P case also affirmed this Court's prior holding "that this Court will not substitute our judgment for that of the Commission on controverted evidence." Id. at 611 (citing, Central West Virginia Refuse, 190 W.Va. at 421; 438 S.E.2d at 601).

In W.Va. Citizens Action Group v. Pub. Serv. Comm'n, the Court recognized the broad legislative power of the Commission to address the interests of each party, citing the Commission's broad authority found in W.Va. Code § 24-1-1(a) in addition to the Commission's responsibility under W.Va. Code § 24-1-1(b). W.Va. Citizens Action Group v. Public Service Commission, 233 W.Va. 327; 758 S.E. 2d 254 (2014).

V. ARGUMENT

A. The Commission Order was a Proper Exercise of its Broad Power to Regulate Public Utilities in a Manner that Balances the Interests of Customers, Utilities, and the State's Economy.

The Legislature created the Commission to exercise legislative powers delegated to it to regulate public utilities in the state. The Commission has the duty to enforce and regulate utility practices, services and rates, and is "charged with the responsibility for appraising and balancing the interests of current and future utility customers, the general interests of the state's economy, and the interests of the utilities subject to its jurisdiction in its deliberations and decisions." W. Va. Code § 24-1-1(a) and (b). This Court has held that:

> The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and utilities. Its primary purpose is to serve the interests of the public. Boggs v. Public Service Commission, 154 W. Va. 146, 174 S.E.2d 331 (1970). Syllabus Point 1, West Virginia-Citizen Action Group v. Public Service Commission, 175 W. Va. 39, 330 S.E.2d 849 (1985).

Syllabus Point 1, City of S. Charleston v. West Virginia PSC, 204 W. Va. 566, 567, 514 S.E.2d 622, 623 (1999). Thus, the Legislature's directive to the Commission to exercise the legislative powers delegated to it by appraising and balancing the interests of the public, the utilities, and the state's economy is clear by the applicable statutes and rules.

In the case on appeal, the Commission had a duty to consider its legislative mandates under W. Va. Code § 24-1-1(a) and (b) as part of its determination whether the Site is in a gray and overlapping area. In balancing the interests of the state's economy with the interests of the utilities and customers, the Commission was not confronted with evidence that one water utility would benefit more or less than the other by gaining a potential customer at the Site and no evidence that existing operations of either utility would be harmed if the potential customer became a customer

of the other utility. Likewise, there is no evidence in the record to show that one utility's customers would be harmed if the potential customer became a customer of the other utility.

The evidence of record shows that development of this Site will have a positive economic impact for the state. BWC Petition to Reopen, Ex. A., May 15, 2024; CR at BN 275-276. The Site is in a desirable location along Route 19 in Raleigh County near the Crossroads Mall. The state has an interest in the development of land that will have a positive impact on the economy. The $4.5 million in project funding from the Legislature, Raleigh County Commission, Fayette County Commission, and a developer reflect that the Legislature, the Fayette County Commission, and the Raleigh County Commission believe that the extension project will have a positive economic impact in Raleigh and Fayette counties and in the State. Comm'n Order, Feb. 20, 2025 at 11; CR at BN 97. The record contains no evidence indicating that a future customer's choice to receive service from Mount Hope would conflict with the state's interests. Therefore, the Commission properly weighed the interests of customers, utilities, and the economy as part of its determination that the Site is in a gray and overlapping area.

1. The Commission Order is Consistent with its Authority and Duty to Encourage the Well-Planned Development of Utility Resources in a Matter Consistent with State Needs.

Mount Hope's planned project to extend its lines to serve the Site has received $4.5 million in funding for the project including $2 million from the State Legislature. The Legislative appropriation indicates that the Legislature believes the project and the Site development will have a positive economic impact on the State. The Commission agrees.

In W. Va. Code § 24-1-1(a)(3), the Legislature placed upon the Commission the "authority and duty" to encourage the "well-planned development of utility resources in a matter consistent with state needs." The Site is a desirable location for an industrial customer

between Bradley and the Crossroads Mall. Development of the Site could lead to further economic developments in the area, which will have a positive economic impact on the state.

According to Mount Hope's Brief in Support of Exceptions, it asserted that a "developer clearly wants City water to the Site and has taken steps toward achieving that goal." Mount Hope Brief in Support of Exceptions to the November 15, 2024 Recommended Decision, Dec. 2, 2024 at 5; CR at BN 127.

No evidence in the case supported a conclusion that a future customer choice to receive service from Mount Hope would be contrary to state needs. While BWC lines exist near the Site, the record shows that upgrades and expansion to the BWC would still be necessary. Recommended Decision, April 19, 2024 (Final on May 9, 2024) at 8; CR at BN 306.

While Petitioner argued that if Mount Hope extends its lines to provide service to the Site, the lines would cross BWC lines, there is no evidence to support this assertion. Petitioner's Brief at 30; CR at BN 38. Moreover, there is no evidence that a crossing of two water lines is a difficult engineering project. The Commission found that both BWC and Mount Hope would be capable of serving the Site. Based on the entirety of the record and the Commission's analysis of the gray and overlapping issue, the Commission ultimately determined the Site to be a gray and overlapping area, allowing for the future customer to choose its service provider. This Court has noted that W. Va. Code § 24-2-1(a) "directs in the clearest terms that the Commission is the agency vested with power and jurisdiction to supervise the business of every public utility in this State" and that "the decisions of this Court establish that we afford deference to policy determinations that fall within the Commission's jurisdiction and special expertise." Mason Cnty. Pub. Serv. Dist. v. PSC of W. Va., 247 W. Va. 580, 585, 885 S.E.2d 161, 166 (2022). This Court also recognized the Commission's exclusive legislative powers

to regulate public utilities when it stated,

> Indeed, this Court has long recognized 'the paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the Public Service Commission.' *Chesapeake & Potomac Telephone Co. v. City of Morgantown,* 144 W. Va. 149, 160, 107 S.E.2d 489, 496 (1959); *see also Delardas v. Morgantown Water Comm'n,* 148 W. Va. 776, 784-85, 137 S.E.2d 426, 433 (1964) ("In vesting the public service commission with the jurisdiction and the power to regulate and control the public utilities in this State, the Legislature has authorized it to exercise the predominant power of the State with respect to such utilities . . . .")

Berkeley County Pub. Serv. Sewer Dist. v. West Virginia PSC, 204 W. Va. 279, 285-286 (1998). Consistent with its statutory duty to encourage well-planned utilities in line with the state's needs, the Commission considered the totality of the facts and circumstances in this case in light of applicable law. W. Va. Code § 24-1-1. The Court should defer to the Commission's expertise and affirm the Commission's decision that the Site is in a gray and overlapping area, leaving the choice of provider up to the future customer.

2. The Commission has Statutory Authority to Reconsider a Final Order.

Petitioner argued that the Commission exceeded its statutory jurisdiction and powers by reexamining the ALJ's determination that BWC had exclusive rights to serve the Site. Petitioner's Brief at 16; CR at BN 24. Contrary to Petitioner's argument, the Commission has statutory authority to reconsider a final order. W. Va. Code § 24-2-2(a) provides that "[e]very order entered by the commission shall continue until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, modified, or revoked by order or decree of a court of competent jurisdiction." Additionally, in exercising its legislative function, the Commission is not bound by the technical rules of pleading and evidence and "may exercise such discretion as will facilitate its efforts to understand and learn all the facts bearing upon the right and justice to the matters before it." W. Va. Code § 24-1-7.

Furthermore, there is no legislation, rule, or case law that prevents the Commission from reconsidering or vacating a final order.

Petitioner's reference to Reed v. Thompson, 235 W. Va. 211, 215, 772 S.E.2d 617 (2015) to argue that the Commission is bound by the timeframes set by its rules to reconsider a Recommended Decision is misguided. The Commission's authority to review its orders is not prescribed by the Commission Rules of Practice and Procedure, § 150 CSR 1 ("Procedural Rules"). This Court has stated that "[t]he power of administrative authorities to reconsider or modify their own determinations may exist by reason of express provision of statute, or its existence may be inferred from a statutory provision." Atlantic Greyhound Corp. 132 W. Va. at 659-660. The Court adopted a two-part inquiry in Reed v. Thompson, 235 W. Va. at 215, Atl. Greyhound Corp., 132 W. Va. at 659-61, 54 S.E.2d at 175. "The first question is whether an agency's power to reconsider its own final order is expressly or impliedly granted by statute." Reed, 235 W. Va. at 215, 772 S.E.2d at 621, citing Atl. Greyhound Corp., 132 W.Va. at 659-660, 54 S.E.2d at 175. There is no need to continue to the second inquiry because the Commission does, in fact, have statutory authority to reconsider a final order under W. Va. Code § 24-2-2(a).

Thus, the Petitioner's argument that the Commission lacked jurisdiction to overturn the ALJ's exclusivity determination fails.

3. The Commission Properly Considered Mount Hope's Annexation of the Site Upon Reopening the Matter.

Petitioner erroneously relies on Procedural Rule 19.5 to argue that the Commission did not have jurisdiction to reconsider the ALJ's April 19, 2024 Recommended Decision that became the Final Order of the Commission on May 9, 2024. Petitioner is correct that Procedural Rule 19.5 governs applications to reopen as follows:

> 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 petition must be fully set forth in the petition.

Petitioner argues that its Petition to Reopen did not seek to vacate, reverse, or modify a Commission order, but sought to enforce a remedy for an order directing Mount Hope to cease and desist from planning and/or constructing a project to provide water service to the Site to address Mount Hope's "undeterred efforts to encroach upon BWC's exclusivity." Petitioner's Brief at 19; CR at BN 27. It is undisputed, however, that Mount Hope's annexation of the Site happened after the April 19, 2024 Recommended Decision became a Final Order of the Commission, and the Commission reopened and referred the matter to the ALJ for further proceedings and determination whether the annexation would impact the exclusivity determination.

The Commission's September 25, 2024 Order provided the following discussion as a basis for reopening:

> The Commission is aware of reports that Mount Hope has annexed Appalachian Heights in Raleigh County [citation omitted]. However, the reported annexation and the specific properties annexed are not part of the evidence currently before the Commission. The Commission must first determine if annexation occurred and what properties were annexed before it can rule on which entity has superior service rights pursuant to W. Va. Code § 16-13A-8.
>
> The Commission will reopen this case to determine if Mount Hope annexed properties into its boundaries, the extent of annexation, and whether any superior service rights were affected. The Commission will refer this matter to the ALJ for further proceedings.

Comm'n Order, Sept. 25, 2024 at 2; CR at BN 251.

Contrary to Petitioner's arguments, the Commission was not limited to considering only the question raised in Petitioner's Petition to Reopen - whether the Commission should order Mount Hope to cease and desist from planning and/or constructing a project to provide water service to the Site. BWC Petition to Reopen, May 15, 2024 at 4; CR at BN 294. The Commission properly referred the matter to the ALJ for further proceedings and the ALJ determined that W. Va. Code § 16-13A-8 did not apply because BWC is a privately-owned utility not a public service district and a municipality does not have superior rights over a privately-owned public utility. Recommended Decision, November 15, 2024 at 6; CR at BN 136. The Commission agreed with the ALJ that the annexation did not create superior rights for Mount Hope over BWC under W. Va. Code § 16-13A-8. While Petitioner argues that "none of the issues identified by the Commission on reopening were relevant to its reassessment of BWC's exclusivity," the Commission disagrees. Petitioner's Brief at 21; CR at BN 29. While the Commission ultimately concluded that Mount Hope's annexation of the Site was not a deciding factor in its gray and overlapping determination, the annexation was a relevant factor that arose after the ALJ's exclusivity determination and justified reopening for further proceedings.

Contrary to Petitioner's argument that Procedural Rule 19.5 does not permit the Commission to generally relitigate settled issues outside the scope of the petition to reopen, Procedural Rule 19.5 does not govern the Commission's jurisdiction and it does not limit the Commission to considering only the issues raised by a petition to reopen.

Likewise, Commission review of final orders is not limited by W. Va. Code § 24-1-9(g) which addresses Commission review of a recommended decision as if exceptions had been filed. The Commission acted within its broad discretion to consider all facts and legal

issues in this reopened case, including Mount Hope's annexation of the Site, which occurred after the ALJ's exclusivity determination.

B. The Commission Correctly Concluded that the Site is in a Gray and Overlapping Service Territory.

1. The Commission Properly Decides Utility Territory Disputes on a Case by Case Basis.

The Commission has jurisdiction to resolve territory disputes between utilities. W. Va. Code § 24-1-1; State ex. rel. Wheeling v. Renick, 145 W. Va. 640, 651, 116 S.E.2d 763, (1960) (internal citations omitted) ("all public utilities, whether publicly or privately owned, shall be subject to the supervision of the public service commission."). The historical body of contested utility service area decisions guide the Commission in resolving these disputes, and the Commission must also consider its legislative mandates to balance the interests of utilities, customers, and the economy and to promote the orderly development of utilities. W. Va. Code § 24-1-1(a) and (b). The circumstances in this case were unique in that the Commission addressed a territorial dispute involving municipal annexation and significant public funding for extension of service, and there is no statute specifically addressing those circumstances.

The Commission has found that the "determination of service territory must be done on a case by case basis." HREA 1993, April 26, 1993 Comm'n Order at 2. The historic territorial dispute cases that guide the Commission are gas and electric cases that involved customers much closer in proximity to the utilities' facilities than are any current utility customers to the Site in this case. In the historic cases where the Commission held that a gray and overlapping service area existed, gas or electric distribution lines of both utilities were located within the immediate area of the potential customer, usually on the property to be served and sometimes the property was located at or near the intersection of the distribution lines of the two utilities. Harrison Rural

Electrification Assoc., Inc. v. Monongahela Power Co. dba Allegheny Power, Case No. 04-1937-E-C. The case at hand is not a typical gray and overlapping case because this case

- involves extension of water service, not gas or electric service;
- involves a 108-acre, undeveloped parcel of land with zero existing customers;
- considers the impact of municipal annexation on a gray and overlapping territorial analysis
- involves significant public (state and county) funding for one utility's planned extension; and
- Chapter 8 of the West Virginia Code sets forth specific set forth specific statutory authority for municipal utilities to provide and extend water service.

The Commission based its conclusion that the Site is located in a gray and overlapping service area on the unique facts, circumstances, and legal issues presented and on a gray and overlapping territory analysis consistent with precedent. The Commission followed its precedent by considering the location of the existing facilities of BWC and Mount Hope. BWC currently has approximately three customers near the Site with exact distances unknown. Petitioner's Brief at 2; CR at BN 10. Mount Hope has facilities 2.5 miles from the Site. Tr., March 4, 2024 at 16; CR at BN 429. The Commission determined that both had facilities in the area. The Commission decided, however, that proximity of existing customers was not the sole factor in its analysis. It was also relevant that both utilities want to serve the Site. Id. at 29; CR at BN 442 and Mount Hope Exceptions, Dec. 2, 2024 at 8; CR at BN 127.

In addition, the instant case is distinguished from the Commission's historic body of gas and electric utility territory dispute cases because of the specific statutory authority under Chapter 8 of the West Virginia Code for municipal utilities to provide water and sewer service and to

extend lines. 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." W. Va. Code § 8-19-1 allows municipalities to extend a waterworks system, "maintain and operate additions, betterments and improvements to an existing waterworks system." Mount Hope provides water and sewer service pursuant to W. Va. Code § 8-20-1 which provides, in part:

> Notwithstanding the provisions of any other law or charter to the contrary, any such municipality may serve and supply the area included within **twenty** miles outside its corporate limits with the water or sewer services and facilities, or both, of its combined waterworks and sewerage system: Provided, That such water or sewer services and facilities shall not be served or supplied within the corporate limits of any other municipality without the consent of the governing body of such other municipality. (Emphasis added).

Because this case presented unique facts and legal issues, including the statutory authority for Mount Hope to provide service under Chapter 8 of the West Virginia Code, it differs from the historic body of gray and overlapping cases, and the Commission should have the leeway to consider its precedential decisions along with the facts and circumstances of the instant proceeding.

2. The Commission Gave Proper Weight and Consideration to the Lumberport-Shinnston Factors.

In the February 20, 2025 Order, the Commission discussed the three criteria established in Lumberport-Shinnston Gas Co., Inc. v. Equitable Gas, Case Nos. 86-749-G-C and 87-115-G-GI (Comm'n Order, Sept. 29, 1987) and Harrison Rural Electrification Assoc., Inc. v. Monongahela Power Co., Case No. 03-0915-E-C (Comm'n Order, May 11, 2005) and considered the criteria in light of the unique circumstances of this case:

(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?

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

CR at BN 93-94 (hereinafter "Lumberport-Shinnston factors").

In its Petition for Reconsideration, BWC took issue with the Commission's consideration of whether a proposed customer is a new user of utility service. Petition for Reconsideration, Mar. 3, 2025 at 5; CR at BN 82. The Commission explained that because the Site is not developed, any future customer at the Site would be a new customer. Comm'n Order, Feb. 20, 2025 at 8, CR at BN 94. With respect to the second criterium under the Lumberport-Shinnston factors, there is no evidence of prior service to any customer on the Site, again, because it is not developed. Furthermore, the Commission clarified in the Order denying BWC's Petition for Reconsideration that whether there is currently a customer at the Site is not a deciding factor in the gray and overlapping territory analysis. The Commission noted that the isolation test provides further guidance on whether an area is gray and overlapping. Comm'n. Order, April 16, 2025 at 4; CR at BN 67.

3. Examining the Location of Each Utility's Facilities as Those Facilities Currently Exist Should Not be the Determinative Factor in the Instant Territory Dispute because this Case is not a Typical Gray and Overlapping Case.

The Commission's consideration of a utility's "facilities as they currently exist" in territory dispute cases stems from a 1993 Commission Order wherein the Commission addressed three contested service territory cases on exceptions from the ALJ's Recommended Decision. HREA 1993. In HREA 1993, the Commission found that the ALJ erroneously gave "considerable weight" to a 1938 map which purported to define the territories of the two utilities. Id. at 2. The Commission regarded the map to be of no value due to nearly 55 years of expansion by the utilities. Id. Instead, the Commission relied on testimony presented by the parties regarding the systems as

they currently exist as well as the service histories. Id. at 4. This Court affirmed the Commission's Order noting that the Court agreed with the Commission that the "key to resolving *the present disputes* is the utilities' facilities as they exist now and not an antiquated map." Harrison Rural Elec. Assoc., Inc. v. Pub. Serv. Comm'n of W. Va., 190 W. Va. at 444 (emphasis added). In 2005, the Commission took the examination a step further and noted that the key to resolving territorial disputes between utilities is examining the location of each utility's facilities "as those facilities currently exist." Harrison Rural Elec. Assoc. v. MPC, Case No. 03-0915-E-C, at 7 (Comm'n Order, May 11, 2005) (hereafter "HREA 2005").

While the location of existing facilities has been the key factor in past cases, the case at hand presents factors that did not exist in the prior HREA cases and that the Commission reasonably considered in its analysis. As noted above, those factors include 1) provision of municipal water service under W. Va. Code Chapter 8, while the HREA cases were electric cases;[6] 2) the Site is a 108-acre, undeveloped parcel of land with zero existing customers; 3) significant public funding has been pledged to finance one utility's extension; and 4) annexation. The instant case is also distinguishable from the prior HREA cases because the customers involved in the HREA cases were close in vicinity to both utilities' facilities and in the instant case, there are no customers.

In support of its position that BWC has the exclusive rights to serve the Site because its facilities are closer in proximity to the Site, Petitioner emphasized the Commission's statement in HREA 2005, the key to resolving territorial disputes between utilities is examining the location of each utility's facilities "as those facilities currently exist." HREA 2005, PSC Case No. 03-0915-

[6] Electric extension cases involving extension of overhead lines along limited public rights of way are significantly different from the standpoint of orderly development and engineering issues than buried water lines.

E-C at 7. The Commission's statement in HREA 2005, however, went beyond this Court's consideration of the location of facilities in HREA v. PSC, where this Court stated "we agree with the PSC that the key to resolving *the present disputes* is the utilities' facilities as they exist now and not an antiquated map." 190 W.Va. at 444, 438 S.E.2d at 787 (emphasis added). The Commission, did not intend to establish the location of the utilities' facilities as the determinative factor for every territorial dispute proceeding. Additionally, the Commission's consideration of a utility's facilities as they currently exist does not mean that a utility must serve a new customer without any new construction. With respect to the isolation test, the Commission must look at a utility's facilities as they currently exist and determine if a new customer must be served by the utility under the Commission rules, even if a line extension is required, as it most always is. In the historical gray and overlapping cases, no customer could be served by only existing facilities. The starting point, however, for the isolation test is where the current facilities can be appended to new facilities to get to the new customer. In this case, the Commission determined that, as Mount Hope's facilities currently exist, a 2.5-mile extension is not so extreme as to conclude that Mount Hope is not required to serve a new customer in the area in question.

The case at hand can also be distinguished from HREA v. Mon Power, Case No. 96-0747-E-C, Comm'n Order Sept. 18, 1997, because of the unique circumstances of this case including the significant funding, the extension of municipal water service, and the annexation. Petitioner argues that the Commission ignored its decision in HREA v. Mon Power that a one-mile proximity was too far to create a gray and overlapping service area in a case involving the extension of electrical service. Petitioner's Brief at 28; CR at BN 36. The decision in HREA v. Mon Power was specific to the circumstances in that case and involved the extension of overhead power lines, not buried water lines. Moreover, the Commission has recently approved an alternate mainline water

agreement for a mainline extension of 13,750 feet, or approximately 2.6 miles in the Eastern Panhandle. Charles Town Utility Board, Case No. 24-0720-W-PC, Comm'n Order Oct. 15, 2024. This is just one example of a longer mainline extension that the Commission has approved, which clearly demonstrates that 2.5 miles is not too far a distance to extend water lines, when economically feasible.

While prior gray and overlapping cases provide guidance to the Commission, the Commission has the flexibility and authority to depart from those cases in necessary circumstances. This Court has recognized that the doctrine of *stare decisis* does not normally apply to administrative decisions. The Commission is not bound by its previous decisions and "must at all times be free to take such steps as may be proper in the circumstances, irrespective of the past decisions." Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 300 S.E.2d 607, 614 (1982 W. Va.) (citations omitted).

As the Commission has made clear in its Orders in this case and in this Statement of Reasons, there are important factors to consider in the present case in addition to the location of the utilities' facilities. The Commission is not bound by its prior gray and overlapping territory determinations because each territory dispute must be decided on a case by case basis.

4. The Commission Properly Considered BWC's and Mount Hope's Willingness and Ability to Provide Water Service to the Site.

When the instant dispute arose, the ALJ found the Site to be in BWC's exclusive territory based on its facilities' proximity to the Site. In the reopened case, the Commission took additional factors into consideration, including the competing utilities' "ability and readiness to extend service." Comm'n Order, April 16, 2025 at 3; CR at BN 59. The Commission did not, however, establish ability and readiness to extend service as solely determinative of a gray and overlapping service territory. Likewise, the Commission did not intend willingness to serve to be the factor that

establishes a gray and overlapping service area in this or any future service territory dispute matters. Indeed, a utility may be unwilling to serve a new customer, but that would not relieve it of its public utility obligation to serve new customers. The Commission allows utilities to escape uneconomic line extensions to serve new customers by requiring customer contributions to pay for uneconomic line extensions. However, if line extensions are made economical either through alternative low cost or zero-cost financing, alternative line extension agreements funded by the new customers or customer contributions-in-aid-of-construction, the obligation to serve is paramount. When two or more utilities can economically serve, the Commission then considers other factors, including customer choice. In the present case, those factors properly include the location of existing facilities, the potential for industrial development, the $4.5 million in funding for a Mount Hope extension project, and Mount Hope's annexation. No single factor is dispositive and the Commission considers the totality of the evidence to determine if one or both competing utilities have an obligation to serve new customers in an area. Clearly, when either utility, viewed on its own, would have an obligation to serve, and there is not a clear public interest factor favoring one utility over the other, the Commission decision to allow the new customer to choose the utility is a reasonable exercise of the Commission's responsibilities.

Similar to the case at hand, the Commission has determined an area to be gray and overlapping when two water utilities could provide service to an area in question. Jefferson Utilities, Inc., Case No. 22-0213-W-PC, Comm'n Order, Aug. 10, 2022. In this case, Charles Town Utility Board (hereinafter "CTUB") asserted that it owned and maintained a water distribution main on the property sought to be developed. Id. at 2. Jefferson Utilities, Inc. (hereinafter "JUI") argued that it has long provided service exclusively within the city of Ranson and the surrounding area and admitted that, while the property at issue is within CTUB's 20-mile service territory, JUI

did not believe CTUB had exclusive rights within that territory. JUI further argued that it now had a 16-inch main on the developer's property and believed that the development could be served by either CTUB or JUI, making it a gray and overlapping area. Id. at 2-3. In its Final Order, the Commission acknowledged that CTUB could have provided service to the area and JUI could also provide service to the area, making it a gray and overlapping area insofar as service areas of the two utilities were concerned. Id. at 3. This case demonstrates that the Commission has considered willingness and ability to serve when two utilities desire to serve the same area.

5. The Commission Correctly Found that the Site was in a Gray and Overlapping Territory Before and After Annexation, and Properly Regarded Annexation as a Relevant, but not Determinative, Factor in its Gray and Overlapping Analysis.

Petitioner argued, incorrectly, that the Site could not have been in gray and overlapping service area prior to annexation because Mount Hope would have been in violation of law if it extended its waterworks system more than one mile past its corporate limits. W. Va. Code § 8-12-19. The municipal corporation of Mount Hope operates both a water and sewer facility under W. Va. Code § 8-20-1a(c) which provides,

> [n]otwithstanding the provisions of any other law or charter to the contrary, any such municipality may serve and supply the area included within twenty miles outside its corporate limits with either the water, sewer or stormwater services, any combination of such services or all such services, of its combined waterworks, sewerage and stormwater system; provided that such water, sewer or stormwater services and facilities shall not be served or supplied within the corporate limits of any municipality without the consent of the governing body of such municipality[.][7]

We note that Petitioner did not question Mount Hope's authority to extend its waterworks system under Chapter 8 of the West Virginia Code when the case was pending below. Even if

[7] W. Va. Code § 8-19-1 also authorizes a municipality to extend utility service outside its corporate limits as long as it does not serve or supply water facilities within the corporate limits of any other municipality or county commission without the consent of the governing body of such other municipality or county commission.

properly plead at this juncture, the argument is now moot because the Site is within Mount Hope's corporate limits.

After annexation of the Site, the Commission regarded the annexation as another relevant, but not solely determinative, factor for consideration in the territory dispute. In considering Mount Hope's Exceptions to the ALJ's Order of November 15, 2024, which concluded that the annexation did not impact the ruling that the Site was in BWC's exclusive territory, the Commission agreed that the annexation did not bring the Site into the exclusive territory of Mount Hope, but stated that the annexation was another appropriate factor for consideration in the question whether the Site is a gray and overlapping service area.

> 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.

Comm'n Order, Feb. 20, 2025 at 7; CR at BN 93. The Petitioner further ignores the language in the Commission's April 16, 2025 Order clarifying that "the annexation was a factor to be considered in the analysis, but was not a determinative factor" and "annexation should not be a deciding factor in determining or enlarging a utility's service area." Comm'n Order, April 16, 2025 at 5; CR at BN 68. The Commission's treatment of annexation as a factor for consideration in the case was proper and correct.

6. The Commission Properly Applied the Isolation Test.

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, the Commission established an isolation test:

> 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.

In the instant case, the Commission determined that, if it is assumed that only BWC is in existence, it would be required to provide service to the Site, if requested. Likewise, if it is assumed that only Mount Hope is in existence, it would be required to provide service to the Site, if requested. Therefore, the Commission concluded that the Site satisfied the isolation test making it a gray and overlapping service area. Comm'n Order Conclusion of Law 3, Feb. 20, 2025 at 11; CR at BN 97.

Petitioner argued that the Commission failed to consider the Commission's Rules for the Government of Water Utilities, 150 C.S.R. 7 (hereinafter "Water Rules") when performing the isolation test. Specifically, Petitioner attempts to connect the issue of overlapping service territories to Water Rule 7.5 pertaining to extension of facilities to serve new customers. Petitioner's argument is flawed because the isolation test is independent of the process and procedure for extending mains to serve new customers. Water Rule 7.5 governs extension of mains when potential new customers request an extension to provide new service, and the rule requires calculation of total expected future net revenues from the potential new customer in order to

determine cost sharing between the utility and the potential new customer. Water Rule 7.5 assumes, however, that a customer exists and is ready or will be ready in short order to take service.

Water Rule 7.5 is inapplicable to the circumstances presented in this case; namely, the Site is the subject of economic development and significant economic development funds have been devoted to pay for extension of water service to the Site. As a result, the amount of the future total net revenues that the utility will receive from a future customer, which is important to the application of Water Rule 7.5, is outside the scope of this case. Moreover, the mechanism, rules, and procedures for determining what new lines are required or how those lines will be financed have no bearing on this case. This case involves the issue of an area that is within the service territory of two water utilities. The Commission invoked an isolation analysis in this case to determine if each utility has an obligation to serve a new, unserved customer at the Site. The analysis established that BWC and Mount Hope have an overlapping obligation to provide water service.

Based on Mount Hope's representation to the Commission that it desires to provide service to the Site and has taken steps to do so, extension of its service is feasible. The evidence shows that there is $4.5 million in funding, or zero-cost capital, allocated for Mount Hope to extend its lines into the Site. The Commission did not receive any evidence of cost predictions from Mount Hope or BWC. However, if the $4.5 million in available funding covers the cost of the extension, the Water Rules regarding extensions will not apply. In the May 22, 2024 *Register-Herald* article,

> [Belcher] said that the annexation allows Mount Hope to use public funding to extend its water infrastructure toward the site and make it more desirable for future development. Belcher said that the projected cost of Mount Hope's water line extension project is roughly $4 million, which could be covered by state and federal funding as well as local funds for matching.

BWC Petition to Reopen, Exh. A, May 15, 2024; CR at BN 275-276.

The Commission's application of the isolation test was proper given the posture of this territorial dispute.

C. The Court Should Not Reinstate the May 9, 2024 Commission Order.

As an alternative argument, BWC argues that if the Court is inclined to conclude that the territory dispute is not ripe for a cessation order, then the Court should vacate the Commission's Order and reinstate the ALJ's April 19, 2024 Recommended Decision which became final on May 9, 2024. Vacating the Commission's Order and reinstating the ALJ's April 19, 2024 Recommended Decision (Final on May 9, 2024) would cause further delay in the potential development of the Site and affect the economic interests of the region and state. This Court should not reinstate the May 9, 2024 Commission Order. Instead, the Court should affirm the Commission's determination that the Site is in a gray and overlapping area which allows the future customer to choose its water service provider.

VI. CONCLUSION

The West Virginia Legislature has delegated responsibility to the Commission to balance the interests of the utility's customers with that of the general interests of the state's economy and the interests of the utility and to encourage the "well-planned development of utility resources in a matter consistent with state needs" consistent with the orderly expansion of utilities. W.Va. Code § 24-1-1. The Commission has statutory jurisdiction to reconsider a final order. W. Va. Code § 24-2-2(a). While considering its Legislative mandates as well as the evidence and pleadings in this case, the Commission correctly concluded that the Site is in a gray and overlapping area and therefore, the future customer may choose its water service provider. The evidence and pleadings demonstrate development of the Site will have a positive economic impact for Raleigh County, Fayette County, and the entire State. This Court should uphold the Commission Order on grounds

"that the PSC has balanced the competing interests and has given reasoned consideration to the pertinent factors" as the Court held in HREA v. PSC, 190 W. Va. 439, 445, 438 S.E.2d 782, 788. Petitioner's Appeal should be denied and the Commission's Final Order of April 16, 2025, should be affirmed.

/s/ Jordan Martin Blatt
Jordan Martin Blatt, Esq. (WVSB # 12776)
Robert M. Adkins, Esq. (WVSB # 7040)
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301
(304) 340-0495
jmartin@psc.state.wv.us
radkins@psc.state.wv.us

CERTIFICATE OF SERVICE

I, Jordan Martin Blatt, Esq., hereby certify that the foregoing Statement of Respondent Public Service Commission of West Virginia of its Reasons for the Entry of its Order of April 16, 2025 in Case No. 23-0807-W-C was electronically filed with the Court on January 14, 2026, via File and ServeXpress, and served via File and ServeXpress or U.S. Mail on the following:

Devon J. Stewart, Esq.
Steptoe & Johnson
P.O. Box 1588
Charleston, WV 25362

Todd M. Swanson, Esq.
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326

Christopher G. Robinson, Esq.
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25362

Christopher L. Howard, Esq.
Legal Division
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25314

James V. Kelsh, Esq.
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25314

Corey Bonasso, Esq.
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25301

/s/ Jordan Martin Blatt
Jordan Martin Blatt, Esq. (WVSB # 12773)
Robert M. Adkins, Esq. (WVSB # 79)
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301
(304) 340-0351
jmartin@psc.state.wv.us
radkins@psc.state.wv.us