IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-315

(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.

REPLY OF PETITIONER

Todd M. Swanson (WVSB #10509)
Devon J. Stewart (WVSB #11712)
Christopher G. Robinson (WVSB #14290)
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, West Virginia 25326
(304) 353-8000
todd.swanson@steptoe-johnson.com
devon.stewart@steptoe-johnson.com
chris.robinson@steptoe-johnson.com

Counsel for Petitioner Beckley Water Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules:

Regulatory Authority:

STATEMENT REGARDING ORAL ARGUMENT

On November 25, 2025 this Court issued a Scheduling Order setting oral argument on March 24, 2026 at 1:00 p.m. pursuant to R. App. P. 19.

ARGUMENT

Petitioner Beckley Water Company ("BWC") offers the following arguments in Reply to the Respondent City of Mount Hope's Brief in Opposition to BWC's Petition for Appeal and Statement of Respondent Public Service Commission of West Virginia (the "Commission") of its Reasons for the Entry of its Order of April 16, 2025.

I. Respondents ignore the Commission's statutory deadline to reconsider at W. Va. Code § 24-1-9(g).

In arguing that "there is no legislation, rule or case law that prevents the Commission from reconsidering or vacating a final order,"[1] and similar arguments from the Respondent City of Mount Hope ("Mount Hope"),[2] the Respondents overlook—*and fail to even cite*—the statute that limits the Commission's power to reconsider its orders:

> 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**.

W. Va. Code § 24-1-9(g) (emphasis added). Because the deadline to file exceptions is "not less than fifteen days" after a recommended decision, *id.* § 24-1-9(e), and orders become final within five days, section 9(g) creates a fifteen-day deadline for Mount Hope to file exceptions, or a twenty-day deadline for reconsideration *sua sponte*.

---

[1] Comm'n Statement of Reasons ("Comm'n Resp.") at 16.

[2] Mount Hope's Brief in Opposition to Petitioner's Appeal ("Mount Hope's Resp.") at 9.

Respondents' omission of this statute is material because there is no dispute that Respondent City of Mount Hope ("Mount Hope") failed to file exceptions or seek reconsideration of the Chief Administrative Law Judge's ("Chief ALJ's") decision in BWC's favor. Specifically, the Chief ALJ concluded the Site[3] at issue was BWC's exclusive territory, and that Recommended Decision became the Final Order of the Commission on May 9, 2024.[4] Indeed, the Commission itself stamped the Recommended Decision as "Final 5/9/2024,"[5] and created separate docket entries noting "Fifteen Days expire on Recommended Decision - No Exceptions,"[6] and, "Twenty Days expire on Recommended Decision. Removing from open docket."[7] Further, it is also undisputed that Mount Hope never sought reconsideration of the Recommended Decision once it became the Final Order of the Commission. *See* W. Va. Code St. R. § 150-1-19.3 (requiring a petition for reconsideration to be filed within 10 days from the date of mailing of the respective Commission order or within the time specified by the Commission).

The Respondents assert, however, that these fifteen-day and twenty-day deadlines are not jurisdictional because, although agencies generally lose the power to reconsider upon rendering a final decision, there is an exception where the agency's "power to reconsider its own final order is expressly or impliedly granted by statute." *Reed v. Thompson*, 235 W. Va. 211, 215, 772 S.E.2d 617, 621 (2015).

---

[3] References to the "Site" in this Reply consistently refer to the Site described in the Brief of Petitioner at Page 2, being "an undeveloped property of approximately 108 acres located between Bradley, West Virginia and the Crossroads Mall, known as Appalachian Heights (the "Site")."

[4] A.R. 202–11.

[5] A.R. 202.

[6] A.R. 3.

[7] A.R. 3.

Without elaboration or qualification, Respondents flatly claim the Commission possesses statutory authority to reconsider its final orders pursuant to West Virginia Code § 24-2-2(a), which states that Commission orders continue in force until "expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission[.]" But Respondents overextend this provision—the purpose of which is merely to define the *duration* of Commission orders—into something else entirely. From the fact that orders persist until revoked, Respondents infer that the Legislature delegated the Commission power to reconsider at any time.

The statutes, however, cannot bear that weight. Respondents fail to cite West Virginia Code § 24-1-9(g). The deadline for Mount Hope to file exceptions arises from this statute, not merely the Commission's procedural Rules. But more importantly, in this statute, the Legislature imposed a specific deadline for the Commission to review an order: "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." *Id.* (emphasis added).

The text speaks for itself and leaves no room for the Respondents' argument. Applying this plain language, had the Commission imposed a stay or exercised its power of reconsideration, the Commission could have taken up the matter as if exceptions had been filed, but only *before* the order became the order of the Commission on May 9, 2024.

Furthermore, there is no discontinuity between one statute that confers revocation authority, and another that imposes a deadline by which to do so. The two provisions are not in conflict: the Commission could have revoked or modified its order, but only by acting within the statutory period. The Respondents' re-interpretation, however, would render the time limitations in West Virginia Code § 24-1-9(g) null and void. Even if there were some tension between these provisions, it is a well-established that "a specific statute be given precedence over a general statute

relating to the same subject matter[.]" *Stepp v. Cottrell*, 246 W. Va. 588, 594, 874 S.E.2d 700, 706 (2022) (quoting Syl. Pt. 1, in part, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984)). The specific deadlines must be given precedence over the general rule governing the duration of orders.

The remainder of Respondents' arguments ignore how the Commission and Mount Hope's actions also violate the plain language of the Commission's self-promulgated Rules of Practice and Procedure.[8] However, merely disavowing the jurisdictional force of the Procedural Rules' deadlines falls short of establishing the express or implied *statutory* authority *Reed* demands for an agency to reconsider a final order.

II. Mount Hope asks this Court to affirm the Commission's order based on evidence that is not in the record.

Contrary to the Commission's conclusion, the Site could not have been gray and overlapping before annexation because Mount Hope was not legally authorized to extend its water service more than one mile beyond its corporate limits. W. Va. Code § 8-12-19 (municipality's "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**") (emphasis added).

Respondents do not disagree that the Site is located further than one mile beyond its corporate boundaries but, instead, argue that the one-mile limit does not apply because Mount Hope is regulated as a "combined" waterworks and sewerage system under W. Va. Code §§ 8-20-1, *et seq.*,[9] which has a separate twenty-mile limit.

However, the Commission specifically concluded, in Conclusion of Law 1, "Pursuant to **W. Va. Code §§ 8-19-1 and 8-19-5**, Mount Hope may extend its waterworks system, provided that

---

[8] Comm'n Resp at 16; Mount Hope's Resp at 9.

[9] Mount Hope Resp. at 11.

it shall not serve or supply water facilities within the corporate limits of any other municipality."[10] To be clear, Article 19 governs "municipal and county waterworks and electric power systems," not combined waterworks and sewerage systems. *See* W. Va. Code §§ 8-19-1, *et seq.* Mount Hope did not assign errors associated with that conclusion.

The Commission did *not* conclude that Mount Hope's facilities are governed by W. Va. Code §§ 8-20-1, *et seq.*, as Respondents now contend, and the document it relies on to purport otherwise is not in the record. Specifically, Mount Hope quotes a 2018 recommended decision from another matter—not in the record before the Commission below—where the Commission purportedly stated that Mount Hope had sought approval of a proposed bond ordinance for "combined waterworks and sewerage system revenue bonds to fund [a] project."[11]

However, to qualify for such combined regulation under Article 20, the municipality must first pass an ordinance combining waterworks and sewerage systems into a single undertaking. *See* W. Va. Code § 8-20-1. Such an ordinance is not in the record. Consequently, Mount Hope's doubts concerning the Commission's decision that Article 19 applies—not Article 20—cannot be examined because the operative documents are not available for review.

Mount Hope also relies on an Alternate Main Line Extension Agreement ("AMLEA").[12] This AMLEA, and the Commission's consideration of it, are not in the record below. And it would

---

[10] A.R. 37 (emphasis added).

[11] The Commission's decision at issue here appears to contradict the isolated quote, produced without context, from its 2018 "Recommended Decision" in *City of Mount Hope*, Case No. 17-1389-S-CN (Comm'n Order Aug. 2, 2018), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=499747&NotType=WebDocket, last accessed February 4, 2026. However, upon reviewing the cited Recommended Decision, the Commission did not, in fact, make a finding that the systems were combined but had, instead, merely cited Mount Hope's assertion as a recital of background in the "Procedure" section on page 2.

[12] W. Va. Code St. R. 15-7-5.5.7 ("This rule shall not be construed as prohibiting the utility from entering into an agreement with a customer that complies with the Commission approved checklist attached hereto as Water Form No. 6, providing an alternate plan for a main extension. . . . The agreement shall be

have been important for the Commission to consider the AMLEA proceedings because it is questionable whether the Commission's review and approval of such AMLEAs is truly a "finding" or "conclusion," or simply an approval of the form of the agreement.[13] The Commission could have weighed these questions before, contrarily, deciding that Mount Hope's proposed extension of water service to the Site should be governed under Article 19 instead of Article 20.

Based on the record before the Commission, Mount Hope lacked statutory authority to extend its waterworks more than one mile beyond its pre-annexation boundaries, and thus it was error for the Commission to hold that it would have been "required" to do so under the *Lumberport-Shinnston* test even before its annexation of the Site. Inasmuch as the Respondents rely on documents outside the record in order to affirm the Commission's order, this Court should disregard those documents.

Thus, even if the Commission had jurisdiction to reconsider its May 9, 2024 Final Order weighing the *Lumberport-Shinnston* factors, its analysis was flawed because it overlooked this one-mile statutory limitation on Mount Hope's extraterritorial authority.

---

filed with and approved by the Commission prior to implementation or execution of the agreement by any of the parties.").

[13] In reviewing a proposed AMLEA, the Commission considers whether the utility is "discriminat[ing] between customers whose service requirements are similar," and other information required by Water Form No. 6 which includes names, addresses, phone numbers, a statement signed by the customer that he has reviewed and understands that he or she is waiving the right to a refund under Rule 5.5.g. *Id.* Water Form No. 6 at Water Rule 5.5.e.2, itself, is a "Form of cost estimate to be provided to applicants for service" in the form of a letter to the customer showing the total estimated extension construction cost with estimated cost to be paid by customers. It does not include information concerning the nature of the utility's services and whether it is a service governed by Article 19 or Article 20. It is not clear, therefore, that the Commission would have reviewed Mount Hope's purported application to determine if it is operating a "combined" utility system subject to regulation by Article 20.

III. The Commission's "new factors" conflict with the existing historical gray and overlapping service territory test.

Even if the Commission had jurisdiction to reconsider the May 9, 2024 Final Order, the Commission's Statement of Reasons confirms that its conclusion depends on factors that are outside—and incompatible with—the existing gray and overlapping territory test. The Commission's new "factors" are, in reality, tailored to manipulate the result just for this case, which exposes the Commission's decision as arbitrary.

Under this Court's three-pronged standard of review, the Court "first determine[s] whether the Commission's order, viewed in light of the relevant facts and the Commission's broad regulatory duties, abused or exceeded its authority." Syl. Pt. 1, in part, *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 300 S.E.2d 607 (W. Va. 1982). To perform that analysis, this Court reviews the order to determine if it "employed the methods of regulation which it has itself selected" and then to "decide whether each of the order's essential elements is supported by substantial evidence." *Id.*

The first prong is necessary because an agency may not manipulate an existing standard to alter the outcome just for one case. Such *ad hoc* reasoning is the hallmark of an "arbitrary" decision—that is, a decision which is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, **is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards**." *Painter v. Ballard*, 237 W. Va. 502, 510, 788 S.E.2d 30, 38 (2016) (emphasis added) (quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 332 S.E.2d 539, 541 (S.C. Ct. App. 1985)).

In this case, the Court's review stops with the first prong because the Commission admits that it failed to apply the "essential elements" that it "has itself selected," and thus this Court cannot "assure itself that the Commission has given reasoned consideration to each of the **pertinent**

factors." *See id.* (emphasis added). This error was implicit to the written decision that is the subject of this appeal, and now it has been made explicit in the Commission's Statement of Reasons. The Commission candidly admits that it believes it is "**not bound by its previous decisions**," and had "authority **to depart from those cases in necessary circumstances**[.]"[14]

This doubtful proposition is not supported by principles of agency law, and the Statement of Reasons make it clear that the Commission's decision was determined by factors inconsistent with its well-established analysis of the *Lumberport-Shinnston* factors.

A. The additional factors are not "adequate determining principles" but, instead, are tailored to manipulate the outcome arbitrarily just for this case.

First, the additional factors at issue here are so closely tailored to the issues of this case that they are not rationally related to utility regulation but, instead, are designed to dictate the outcome just for this Site.

The crux of the analysis, as explained in case law, is whether this Court believes the agency's decision is a product of the way it *applied* its rule (permissible), or an *arbitrary change in the rule itself* (not permissible). An agency has discretion but only in the way it applies the facts of record to its fixed rules and standards. It cannot *change* those rules from case to case in an arbitrary way: "A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, **without giving consideration to principles**, circumstances, or significance." *Painter v. Ballard*, 237 W. Va. 502, 510, 788 S.E.2d 30, 38 (2016) (emphasis added) (quoting *Blank v. Dep't of Corr.*, 222 Mich. App. 385, 564 N.W.2d 130, 140 (Mich. Ct. App. 1997)).

"Discretion" does not mean that the Commission need not show fidelity to its own principles. And a "deferential standard of review" does not mean that this Court is unable to

---

[14] Comm'n Resp. at 25 (emphasis added).

reverse the Commission when it departs from those principles. It means only that the Commission may reach opposite conclusions in different cases presenting similar facts in different contexts, as long as it applies the same standard. Here, it did not.

What the Commission misunderstands in its citation to *Chesapeake & Potomac Telephone Co. v. Public Service Commission* is that the Commission may decide what is "reasonable" in one case may not be "reasonable" in a later case in a different context, as long as the Commission applies its "fixed rules or standards" to reach that conclusion. But it cannot disregard those rules and standards because that would make the decision arbitrary. In *Chesapeake*, the Commission disallowed, for rate-making purposes, expenditures on equipment that resulted in profit exceeding 10.25% on equipment purchased from an affiliate, and disallowed the cost of providing its employees telephone services free of charge or at reduced rates. *Id.* at 610. These disallowances departed from the Commission's "long-standing approval" of such expenditures in determining whether a "reasonable rate of return" for purposes of rate setting. *Id.* The Commission had warned in previous rate cases, with respect to those allowances, that the utility should "provide substantial evidence with regard to the reasonableness" of pricing policies, operating efficiencies, and rate of return in each case and could not rely on precedent to carry such allowance categorically. *Id.* at 613. On review, this Court concluded that the agency's determination of what was "reasonable" in prior cases was not controlling because *stare decisis* does not normally apply to administrative decisions. Syl. Pt. 5, *id.*

But this case is not about whether the Commission reached different conclusions applying similar facts to law (although it did). The primary issue is that, here, the Commission *changed the standard* to manipulate the outcome arbitrarily after the Chief ALJ had already concluded that the Commission's existing test weighed in BWC's favor. While this Court acknowledged that what

may be "reasonable" in one case may not be "reasonable" in another, it did not hold, as the Commission now suggests, that the Commission is not bound to weigh the same factors in one case to another.

On the contrary, this Court reaffirmed in Syllabus Point 1 that its review requires it to determine whether "the Commission has **employed the methods of regulation which it has itself selected**, and **must decide whether each of the order's essential elements is supported by substantial evidence**." Syl. Pt. 1, *id.* (emphasis added). So where this Court stated that the Commission is "not bound by its previous decisions," what it meant, as later explained, was that the Commission is not bound to follow a particular factual conclusion where, in another context, the same facts may lend to a different conclusion. Thus, it recognized that agency discretion to determine *facts* may lead to inconsistent results, but it did not overturn decades of blackletter law that the Commission—or any agency—may not exercise discretion to alter the "fixed rules or standards" in a way that makes them "apt to change suddenly."

That is to say that an administrative agency may exercise sound discretion in the way it applies *facts*, but it does not have discretion to apply different "*rules or standards*" specific to each case. By tailoring their analysis to consider facts that are specifically unique to this case—but calling them "factors" as laid out on page 20 of its Statement of Reasons (many of which were not articulated in the Commission's order)—the Commission's reasons now only artfully veil that, in reality, the Commission simply wishes to avoid following its own rules and standards in this case.

Indeed, the distinguishing factors, listed by in the Commission's Response on page 20, show that they are not merely "supplemental" but plainly tailored just for this case. As the Commission explains, it changed its mind after ruling in BWC 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 statutory authority for municipal utilities to provide and extend water service.[15]

To what other utility territorial dispute could these factors genuinely apply but this one? Furthermore, the Commission's do not reveal any indication that the Commission was announcing a modification to the gray and overlapping service territory test,[16] nor does the Commission now take the position that it is doing so now in its Statement of Reasons. On the contrary, the Commission attempted to frame its rationale within the boundaries of the existing test.[17] This is further reinforced in the Commission's Response which emphasizes that it "gave proper weight and consideration to the *Lumberport-Shinnston* Factors" but, nevertheless, went on to apply new factors because this matter was "not a typical gray and overlapping case."[18]

An agency's claim that its decision turns on "new factors" that are too specific to a particular case should be regarded with high skepticism. The agency may be placing its thumb on the scale to change the balance, rather than applying its "rules or principles." And as explained below, upon consideration of the substance of these "new factors," it is clear that they are internally inconsistent with the purposes of the *Lumberport-Shinnston* test and the legislation policies the Commission is empowered to administer. It was only when the Commission introduced these "new" considerations that the outcome changed—exposing the decision as arbitrary.

---

15 *Id.* at 20.
16 A.R. 5–11, 28–39.
17 A.R. 2–7, 34–37.
18 Comm'n Resp. at 21.

B. The potential availability of alternate funding should not be a factor.

Second, the Commission wrongly adds a "willingness and ability" factor to the *Lumberport-Shinnston* analysis. If this were the rule, no public utility could enjoy exclusivity in any service area within the State of West Virginia if a competitor is willing to fund the extension.

As the Commission explained in *Lumberport-Shinnston*, "Equitable's willingness to provide full service to certain existing L-S customers does not fall within the exceptions to General Order No. 228 permitting utility to utility competition; thus, Equitable is prohibited from providing such service to customers located in L-S's service area." Concl. of Law ¶ 7.

In other words, the Commission's position for years has been that mere willingness to serve an area cannot overcome the general prohibition on permitting utility-on-utility competition. And this Court the rationale of the Commission's *Lumberport-Shinnston* factors as "a reasonable and fair way to resolve territorial disputes" between utilities. *Harrison Rural Electrification Ass'n v. Public Serv. Comm'n*, 190 W. Va. 439, 445, 438 S.E.2d 782, 788 (1993).

This same consideration announced in *Lumberport-Shinnston* remains codified in the Commission's Rules at W. Va. Code St. R. § 150-16-7 ("Utility to Utility Competition"), providing, "A public utility shall not provide sales or transportation service to end-users located within the service area of another utility unless the proposed sales or transportation service meets one (1) of the following exceptions: 7.1.1 the facilities of the utility whose service area is involved will be used and compensated for transportation; or, 7.1.2 the end user has requested transportation services from the utility whose service area is involved and has bee refused the requested service

due to capacity restraints. Prior to service under this exception, the transporting utility must petition for and obtain the approval of the Commission."[19]

Furthermore, the Commission's Order in *Jefferson Utilities, Inc.*[20] does not alter *Lumberport-Shinnston*. Jefferson Utilities, Inc. ("JUI") sought approval of an Alternate Water Mainline Extension Agreement with the developer of 750 residential lots in Huntwell West Subdivision (the "Huntwell Property"). The Charles Town Utility Board ("CTUB") owned and operated a water distribution main on the Huntwell Property. It was undisputed, however, that JUI "has an active 16-inch main on the developer's property" as well and, thus, the parties did not dispute that "the development in question can be served by either CTUB or JUI."[21] For that reason, the Commission concluded the Huntwell Property was in a gray and overlapping service area. But it did not consider, as the Commission now contends, that mere "willingness and ability" to serve the same area is sufficient. That phrase appears nowhere in the final order.[22]

What the Commission now advocates in its Statement of Reasons is a complete about-face. The Commission argues that "willingness and ability to provide water service to the Site" *should*

---

[19] Although the bar on utility-to-utility competition appears within the "Rules Governing the Transportation of Natural Gas," the applicable definition of "utility" at *id.* § 150-16-2 incorporates the definition at W. Va. Code § 24-2-1, which includes "[t]ransportation of . . . water by pipeline" at subdivision (a)(2) and "[s]upplying water" at subdivision (a)(7).

[20] *Jefferson Utils., Inc.*, Case No. 22-0213-W-PC (Comm'n Order Aug. 10, 2022), https://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=588863&NotType=WebDocket, last accessed Feb. 3, 2026.

[21] *Id.* at 2.

[22] Far from supporting the Commission's position, the Commission's opinion reinforces BWC's procedural point that Mount Hope's challenge is untimely. In affirming the ALJ's findings of facts and conclusions of law in *JUI*, the Commission concluded that it "is reasonable to deny CTUB's Motion to Reopen and Petition to Intervene" because "[n]o party or non-party filed exceptions to the Recommended Decision" but, instead, "[a]pproximately eighty days after the Recommended Decision became final, CTUB filed its motion to reopen and intervene in this matter." *Id.* at 4. In this case, Mount Hope never filed a motion to reopen this matter.

be considered.[23] If the Commission were to extend the reach of a utility's service area to any location where it has a "willingness and ability" to serve—particularly before a customer even exists and simply for the purposes of *preparing* to offer a competing service option to potential customers—the Commission opens the floodgates for any service area to a utility's competitors. This is irreconcilable with the Commission's imperative under the West Virginia Code of State Regulations to prohibit utility-to-utility competition.

The Commission's position is also irreconcilable with its previous announcement that "the key to resolving territorial disputes" is "examining the location of each utilities' facilities as those facilities *currently* exist."[24] In that regard, the Commission's distinction of *Harrison Rural Electrification Association, Inc. v. Monongahela Power Company* ("*HREA*")[25] appears nowhere in the Commission's order below or in any authority cited by Respondents. In *HREA*, the Commission concluded,

> [W]hen 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.[26]

---

[23] Comm'n Resp. at 25.

[24] *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.

[25] *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 Feb. 3, 2026.

[26] *Id.* at 4 (emphasis added).

The Commission asserts that this case differs from *HREA* because it is a waterworks case instead of an electric case.[27] But this is simply an assertion *ipse dixit* without any clear rationale, and certainly none supported by the record or in the underlying opinion. By finding such new justifications for the first time on appeal, the Commission underscores that the underlying decision was not based on a developed rationale and, instead, was arbitrary.

C. A utility cannot be deemed to be "required" to provide a service by virtue of their "agreement" to do so.

Third, to sustain its decision, the Commission must show that it correctly applied the necessary "isolation test" conclusion that the Commission's rules "require utility B [here, Mount Hope] to serve if requested[.]"[28] This element cannot be satisfied because Mount Hope did not produce evidence to show that it would be so "required" to service the Site under the Commission's main line service rule.[29]

In an attempt to circumvent this legal obstacle, the Commission argues that where 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."[30]

This uncited legal proposition is unsupported by West Virginia law. How can a public utility be "required" to do something, if its obligation arises only if it first "agrees" to do it voluntarily? For example, an Alternate Main Extension *Agreement*, as defined by W. Va. Code St.

---

[27] Comm'n Resp. at 19–20.

[28] *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, last accessed Feb. 3, 2026.

[29] W. Va. Code St. R. § 150-7-7.5.5.e.

[30] Comm'n Resp. at 26.

R. § 150-7-7.5.8.g, is premised upon "enter[ing] into an agreement with an applicant" before its submission for approval to the Commission to extend service.

Similarly, economic development funding for public utility infrastructure under the West Virginia Business Ready Sites Program is available only after the utility files an application to serve the site. Importantly, utilities are not *required* to do so—for the avoidance of doubt, the statute specifically provides that the "public utilities that are able to meet the required criteria, if any, **may file** with the Public Service Commission an application"—not "must file." *See* W. Va. Code § 24-2-1n(f).

D. Development funds do not weigh in favor of Mount Hope because the Site is *not actually an "Industrial Development Site"* governed by the statute.

Fourth, although the Commission relies on the business-ready infrastructure development statute as an important factor in its analysis, Respondents wholly ignore that the Site has not been designated an "Industrial Development Site" by the Secretary of the Department of Commerce.[31] Even when a site is so designated, the West Virginia Business Ready Sites Program requires that an Industrial Development Agency identify criteria for utility service to a designated site, after which public utilities may file applications for comprehensive infrastructure development plans. *See* W. Va. Code § 24-2-1n(d)–(f). Under this statute, a public utility may construct electric, natural gas, water, or sewage facilities in lieu of seeking a certificate of need only when the Commission reviews and approves an infrastructure development plan. *See id.* § 24-2-1n(g).

The Commission cannot simply identify a location with no infrastructure development plans or customers, without any designation by the Secretary of Commerce, and permit a public utility to construct facilities without a certificate of need.

---

[31] A.R. 4.

This latter point underscores a critical distinction between the situation of BWC and Mount Hope. The parties do not dispute that BWC's facilities "surround" the Site at issue, or that BWC would be required to service water customers to the site under the Commission's main line service rule. BWC introduced testimony and exhibits, including maps of its existing facilities, and the Chief ALJ concluded that the Site was indisputably within BWC's service area. BWC and the Chief ALJ, however, both disagreed that the Site was within Mount Hope's service area under the *Lumberport-Shinnston* factors and isolation test.

In that regard, the lack of customers in the record presents a one-sided problem for Mount Hope: there is no genuine dispute that BWC would have to service any customer at the Site, but it is highly unlikely that Mount Hope would. The main line service rule[32] requires cost recovery from estimated total net revenue from customer payments. It would require an uncommon and uniquely high paying customer for Mount Hope to demonstrate that it would be required to spend approximately $4.5 million[33] to service the connection. BWC's critique of the Commissioner's order on that point is not inconsistent[34] because it is only Mount Hope that needs to convince the Commission that there is an extraordinary customer need that would justify the outlay required to service the Site.

In a related way, the Commission's assertion that "the exact distance of BWC's current customers to the Site is unknown"[35] ignores the fact that BWC introduced multiple maps showing

---

[32] Pet'r's Br. at 26 (citing W. Va. Code St. R. § 150-7-7.5.5.e).

[33] Comm'n Resp. at 2.

[34] Mount Hope Resp. at 15–16.

[35] Comm'n Resp. at 8. The Commission downplays the extent of information about BWC's customers in the record. As explained in the Brief of the Petitioner, "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. BWC also has a four inch line in the area along Appalachian Heights Road abutting the Site north of Route

its service lines surrounding the Site. Those maps show both that BWC's lines surround the Site, and that consequently, serving the Site necessarily will require Mount Hope to cross one of those service lines. It is thus untrue that "[t]here is no evidence in the record showing that extension of either utility's lines would result in one utility's line crossing the others,"[36] and the Commission's misunderstanding of this fact is another reason why its decision below was flawed.

E. Annexation is not properly considered as a factor under West Virginia law.

Fifth, annexation cannot be a factor under West Virginia law. As explained in BWC's Brief of the Petitioner, the statute creating annexation authority does not automatically confer a right to supersede a private utility company's exclusive territory.[37] The Chief ALJ agreed and ruled that Mount Hope's attempts to annex the Site, after his ruling that the site was within BWC's exclusive service area, does not change the analysis or the conclusion because annexation is irrelevant.[38]

Mount Hope takes issue with BWC's analysis in this respect because, it argues, the Commission did not conclude that annexation "supersedes" BWC's exclusivity but, instead, found they were gray and overlapping.[39] But Mount Hope's argument ignores that the Site still *was administratively within BWC's exclusive service area* by operation of the Commission's May 9,

---

19, which can be seen on a map of BWC's service area portraying service lines on three sides of the Site. These facilities are serviced by a nearby tank labeled "Prosperity Tank" approximately one mile from the Site.[35] No other water utility has customers in the vicinity of the Site. 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. 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. 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." Pet'r's Br. at 2–3 (footnotes omitted).

36 Comm'n Resp. at 9.

37 Pet'r's Br. at 20–22.

38 A.R. 72–85.

39 Mount Hope Resp. at 5.

2024 Final Order at the time the Commission reached this conclusion. Thus, the effect of the order at issue in this appeal was to take away BWC's exclusivity—that is, to supersede it. The fact the Commission now believes its May 9, 2024 order was in error does not change the fact that BWC enjoyed exclusivity there from May 9, 2024 to February 20, 2025.[40]

IV. The new additional factors the Commission weighed should not apply retroactively.

Finally, even if this Court concludes that the Commission had jurisdiction to reconsider its opinion and that its new contradictory "factors" are not arbitrary and capricious additions to its test, the Commission should not be permitted to apply them retroactively.

Under West Virginia law, when a judicial decision is overruled, this Court examines various factors to determine if its new rules have retroactive effect.[41] Similar considerations apply to administrative decisions. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 1580–81 (1947) ("[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of

---

[40] *Compare* A.R. 202–211 *with* A.R. 28–39.

[41] Under Syl. Pt. 5, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979), this Court considers:

> First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

retroactivity which is condemned by the law."). *See also State ex rel. Mountaineer Park v. Polan*, 190 W. Va. 276, 280, 438 S.E.2d 308, 312 (1993); *Brookline v. Commissioner of Dep't of Environmental Quality Engineering*, 387 Mass. 372, 379, 439 N.E.2d 792, 799 (Mass. 1982) ("We recognize, of course, that the application of new principles or standards announced in a decision may be so unfair as to amount to an abuse of discretion.").

In this case, the Commission's new factors represent a clear and unforeseen departure concerning the application of the statutes and regulations governing Commission decisions in a way that was not predictable to BWC. The issues relate to substantive policy considerations, outlined above, with respect to the nature of permissible utility-to-utility competition at the heart of the Commission's policies in regulating utility practices in West Virginia. The Commission has already resolved this issue in BWC's favor.

Allowing the Commission to alter its criteria after the fact, solely to retract a ruling in favor of a prevailing party when that party seeks enforcement, invites significant mischief. In reopening the case and applying an entirely new set of factors, the Commission disincentivizes prevailing parties from rightfully seeking enforcement by creating concern that the Commission might reverse course. Fundamental principles of fairness demand consistency, predictability, and assurance that administrative decisions—like judicial ones—will be honored and enforced.

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 February 4, 2026.

s/Devon J. Stewart
Todd M. Swanson (WVSB #10509)
Devon J. Stewart (WVSB #11712)
Christopher G. Robinson (WVSB #14290)
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, West Virginia 25326
(304) 353-8000
todd.swanson@steptoe-johnson.com
devon.stewart@steptoe-johnson.com
chris.robinson@steptoe-johnson.com

Counsel for Petitioner Beckley Water Company

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2026, I served the foregoing "Reply 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:

Christopher L. Howard, Esq.
Legal Division
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

Jordan Martin Blatt, Esq.
Robert M. Adkins, Esq.
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

Counsel for Public Service Commission

John H. Shumate, Esq.
P.O. Drawer 231
Mount Hope, West Virginia 25880

James V. Kelsh, Esq.
Corey Bonasso, Esq.
Bowles Rice LLP
P.O. Box 1386
Charleston, West Virginia 25325

Counsel for Respondent Mount Hope

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