No. 23-728

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Apr 01 2024
02:29PM EDT
Transaction ID 72648132

TIMBERLINE FOUR SEASONS UTILITIES, INC.,
and CANAAN VALLEY PUBLIC SERVICE DISTRICT,

RESPONDENTS BELOW, PETITIONERS,

vs.

KAPITUS SERVICING, INC.,

PETITIONER BELOW, RESPONDENT.

AMICUS CURIAE BRIEF OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IN SUPPORT OF PETITIONERS TIMBERLINE FOUR SEASONS UTILITIES, INC. AND CANAAN VALLEY PUBLIC SERVICE DISTRICT URGING A REVERSAL OF THE INTERMEDIATE COURT OF APPEALS OPINION

Ann Starcher (W. Va. Bar No. 6672)
Spencer D. Elliott (W. Va. Bar No. 8064)
Webster J. Arceneaux, III (W. Va. Bar No. 155)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
(304) 345-2000 – telephone
(304) 343-7999 – facsimile
astarcher@lewisgianola.com
selliott@lewisgianola.com
wjarceneaux@lewisgianola.com
Counsel for Public Service Commission of West Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

NOW COME Ann Starcher, Spencer D. Elliott and Webster J. Arceneaux, III, with the law firm Lewis Gianola PLLC, on behalf of the Public Service Commission of West Virginia ("PSC"), and they file its *Amicus Curiae* Brief.[1] This Brief is filed in support of the position of Petitioners Canaan Valley Public Service District and Timberline Four Seasons Utilities, Inc. (collectively the "Petitioners"), seeking a reversal of the Intermediate Court of Appeals opinion dated October 30, 2023, and captioned *Kapitus Service, Inc. v. Timberline Four Seasons Utilities, Inc. and Canaan Valley Public Service District*, No. 23-ICA-22, 2023 W.Va. App. LEXIS 261 ("ICA Opinion") (JA 000570-89). The ICA Opinion concluded that the Circuit Court Order of Tucker County, Business Court Division, dated December 20, 2022 ("Business Court Order") (JA 000490-98), was in error when it followed the PSC's April 10, 2022 Order in Case No. 21-0858-WS-GI (JA 000300-11), finding that the agreements between Timberline and Kapitus were void and contrary to public interest in violation of W.Va. Code § 24-2-12. Rather, the ICA Opinion determined that *res judicata* applied to a prior order of the Bankruptcy Court in *In re Timberline Four Seasons Utilities, Inc.,* No. 2:21-BK-00125, 2021 WL 4952613 (Bankr. N.D.W.Va. Oct. 25, 2021) ("Bankruptcy Court Order") (JA 000171-84), concluding that the agreements between Timberline and Kapitus were not void. The PSC contends the Bankruptcy Court lacked subject matter jurisdiction to purport to exercise a police power specifically reserved to the States under the 10th Amendment and that the PSC reached the correct decision in this matter, as a proper exercise of the State's police powers, and this Court must reverse the ICA Opinion.

---

[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make a monetary contribution towards the preparation or submission of this brief. No other person or entity made any monetary contribution towards the preparation of this brief. Counsel for the PSC authored the brief solely for its interests.

At the heart of the instant appeal is one of the most fundamental and sacrosanct protections of the powers that are reserved to the States under the concepts of federalism embodied in the 10th Amendment to the US Constitution.

As set forth below, the Bankruptcy Court impermissibly waded into the waters of the exercise of a police power reserved to the state of West Virginia and delegated to the PSC. Determination of whether, and the extent to which, a public utility contract is adverse to the interests of the public is not a matter our federal constitution places in the hands of federal courts for adjudication. It is a police power reserved to the States under the 10th Amendment. This is further evidenced by the Congressional mandate that bankruptcy courts may not impair the States' exercise of a police power as set forth in 11 U.S.C. § 362(b)(4).

Under *de novo* review, this Court sees all prior proceedings with fresh eyes. As set forth below, the Bankruptcy Court lacked subject matter jurisdiction to exercise the State's police power. The Fourth Circuit discussed the fact that subject matter jurisdiction cannot be waived and courts should, *sua sponte*, assess subject matter jurisdiction issues even if not raised by the parties:

> Subject matter jurisdiction defines a court's power to adjudicate cases or controversies—its adjudicatory authority—and without it, a court can only decide that it does not have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Because jurisdictional limits define the very foundation of judicial authority, subject matter jurisdiction must, when questioned, be decided before any other matter. *See id*. at 93-95. Indeed, "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented." *Gonzalez*, 132 S. Ct. at 648. For these reasons, a lack of subject matter jurisdiction cannot be waived or forfeited, and no other matter can be decided without subject matter jurisdiction. These principles are fundamental and important.

United States v. Wilson, 699 F.3d 789, 793 (4th Cir. 2012).

The same is true in West Virginia:

> In cases dealing with subject matter jurisdiction, the rule against raising a new issue or argument in oral argument—premised as it is on principles of waiver—does not apply because "[w]e have stated categorically that '[s]ubject matter jurisdiction may never be waived.'" *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (quoting *Dishman v. Jarrell*, 165 W. Va. 709, 712, 271 S.E.2d 348, 350 (1980)). Consequently, a question of subject matter jurisdiction may be raised for the first time on appeal.

Argus Energy, LLC v. Marenko, 248 W. Va. 98, 104, 887 S.E.2d 223, 229 (2023). As such, this Court should first assess the Bankruptcy Court's subject matter jurisdiction to supplant the PSC in the exercise of a police power reserved to the States under the 10th Amendment.

Moreover, the sheer fact that the Bankruptcy Court sent the matter back to the PSC for subsequent investigation is an example of constitutional federalism under the 10th Amendment playing out in real time. After the Bankruptcy Court waded into the realm of exercising the State's police power, it yielded to the State's sovereign right to exercise police powers in granting the PSC stay relief and authorizing the PSC to conduct an investigation, all with the understanding that the PSC's exercise of a police power might well contradict the Bankruptcy Court's ruling. It did and it does. Because the State's exercise of police power is sovereign under the Constitution, not only did the Bankruptcy Court lack subject matter jurisdiction, but the PSC's subsequent ruling on a reserved police power prevails over the Bankruptcy Court's Order.

The Business Court Order correctly decided the matter below and its Order is consistent with the primacy of West Virginia exercising West Virginia's police powers. The ICA's Opinion is in error by (i) assuming the Bankruptcy Court had subject matter jurisdiction in the first place, and (ii) failing to acknowledge that the PSC has the last word (subject to this Court's oversight in regulatory proceedings) on the *actual* exercise of a reserved police power.

The ICA's Opinion grounded its reversal of the Business Court Order on questions of *res judicata* and the general continuing validity of a Bankruptcy Court Order. However, upholding the ICA Opinion would require two assumptions: (i) the Bankruptcy Court had subject matter jurisdiction to exercise the State's police power, and (ii) that the Bankruptcy Court Order is enforceable in the face of the PSC's subsequent exercise of a sovereign police power reserved to the States. The PSC contends that both assumptions are incorrect and therefore, this Court must reverse the ICA Opinion.[2]

STATEMENT OF INTEREST

The Public Service Commission of West Virginia was created by an Act of the West Virginia Legislature in 1913, primarily to regulate railroads and other public utilities. It has jurisdiction over Public Service Districts in West Virginia pursuant to W. Va. Code § 24-1-1(a) and W. Va. Code § 24-2-1(a)(7), (8), and(9). W. Va. Code § 24-2-12 provides in pertinent part that a public utility subject to regulation by the Public Service Commission may sell its assets or enter into any financial transactions related to those assets:

> Unless the consent and approval of the Public Service Commission of West Virginia is first obtained: . . . (c) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may assign, transfer, lease, sell, or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof; . . . (f) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, engineering, supply or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest. . . .

In this case, this Court is called upon to rule whether (i) certain financial agreements entered into by Petitioner Timberline and Kapitus were lawful, when approval from the PSC under W. Va. Code § 24-2-12 was not obtained in advance and/or (ii) the PSC's ultimate adjudication that the subject financial agreements were void is the superior ruling on the issue. The PSC, on

[2] The PSC otherwise incorporates by reference the Petitioners' arguments, including the argument that the PSC's *in rem* proceeding was *res judicata* as to Kapitus.

December 21, 2021, Case No. 21-0858-WS-GI (JA 000163-69), issued a Commission Order declaring that it would conduct a general investigation into "whether the interests of the public in this State are adversely affected by the Kapitus agreement." (JA 000168). Thereafter, on March 21, 2022, a Recommended Decision was issued as a result of the Commission's investigation that was subsequently issued as a Final Decision on April 10, 2022. (JA 000300-11). That Order, in pertinent part, concluded:

> IT IS, THEREFORE, ORDERED that the contract dated April 28, 2017, between First US Funding, Timberline Four Seasons Utilities, Inc. and Timberline Four Seasons Resort Management Company, Inc. be, and hereby is, found to be void as it relates to Timberline Four Seasons Utilities, Inc. as contrary to the public interest of the State of West Virginia pursuant to West Virginia Code §24-2-12.
>
> IT IS FURTHER ORDERED that the Security Agreement and Guaranty between First US Funding, Timberline Four Seasons Resort Management Company, Inc. and Timberline Four Seasons Utilities, Inc. be, and hereby is, declared void as it relates to Timberline Four Seasons Utilities, Inc. as it violates the public interest of the State of West Virginia pursuant to West Virginia Code §24-2-12. The related "Financing Statement" filed with the West Virginia Secretary of State is also void as contrary to the public interest.

The Business Court afforded deference to the PSC Final Decision consistent with the constitutional reservation of police powers as discussed herein. (JA 000496). The ICA Opinion rejects this PSC Final Decision finding that the Kapitus agreement was void, concluding instead that the Bankruptcy Court Order, under principles of *res judicata,* controls. The PSC respectfully submits that the ICA Opinion is in error, as more fully discussed herein, and therefore it has a direct interest in the outcome of this case.

The PSC is charged by statute with ensuring that rates for utility services are just and reasonable. W. Va. Code §24-1-1(a)(1)(4). If the ICA decision is upheld, a potential consequence is that approximately 435 customers of Timberline will be unjustly burdened with repayment through utility rates of prior management's improper debt incurred for purposes that had nothing to do with the provision of public utility service. Count I of the Complaint filed on March 7, 2022, alleged a debt of $325,784.16, plus continuing accrual of attorneys' fees, costs and interest. (JA 00033).

ARGUMENT

I. THE BANKRUTPCY COURT LACKED SUBJECT MATTER JURISDICTION TO EXERCISE THE POLICE POWERS BELONGING TO THE PSC.

It is a fundamental constitutional proposition that the State's exercise of police powers is a power reserved to the States under the 10th Amendment to the US Constitution:

> States retain their residual police power by virtue of the Constitution, 10th Amendment:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States v. Cruz, 1995 U.S. Dist. LEXIS 20774, *9-10 (D. Guam 1995).

Importantly, West Virginia has also addressed the sovereign nature of the State's ability to exercise its police power:

> In *United Fuel Gas Company v. Public Service Commission*, 73 W. Va. 571, 80 S.E. 931, in considering contracts of a natural gas company with consumers of natural gas for exclusive service for a term of years in consideration of reduced rates, this Court used this pertinent language: "As all such contracts are subject to the superior authority of the State, through its legislature, in the exercise of its police power, and are presumed to be entered into with knowledge of this superior authority of the State, and whatever effect lawful legislation may have upon such contracts, they are not within the protecting aegis of the federal Constitution, or thereby unlawfully impaired."

Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 132 (1960). As a result, and as set forth in detail below, as long as we have a system of federalism as embodied in the 10th Amendment, there can never be a Bankruptcy Court Order that (i) usurps the State's right to exercise a police power reserved to the States, or (ii) impairs the State's ability to subsequently exercise that police power.

Federal case law is replete with discussion that a Bankruptcy Court lacks subject matter jurisdiction to venture into the realm of exercising the State's police powers. The Third Circuit Court of Appeals discussed the fact that Congress did not usurp State police power by enactment of the Bankruptcy Code:

> *That Congress did not intend the bankruptcy scheme generally to abrogate the enforcement of state police power regulations is evidenced by, first, the express exception to the automatic stay otherwise imposed on all actions against the debtor, 11 U.S.C. § 362(a)*, for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *Id*. § 362(b)(4). The exception applies "where a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection . . . laws, or attempting to fix damages for violation of such a law." S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Ad. News 5838. See Penn Terra, supra, 733 F.2d 267, slip op. at 274-78 (injunction to enforce compliance with state environmental protection laws is not money judgment, is not subject to § 362 stay); [string cite omitted]
>
> A second indication that the bankruptcy scheme is not intended to abrogate relevant state laws is found in 28 U.S.C. [**22] § 959(b) (1982):
>
> > (b) Except as provided in section 1166, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same

> manner that the owner or possessor thereof would be bound to do if in possession thereof.
>
> * * *
>
> *Implicit in Section 959(b) is the notion that the goals of the federal bankruptcy laws, including rehabilitation of the debtor, do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws*.

In re Quanta Resources Corp., 739 F.2d 912, 918-919 (3rd Cir. 1984) (emphasis supplied).

As stated by the United States District Court for the Southern District of New York:

> It is long recognized that a state's exercise of regulatory or "police" power is not divested of jurisdiction or authority by the fact that the subject is under exclusive jurisdiction of a federal bankruptcy court. *See Smith v. New York State Liquor Authority, Inc*. (In re Bay Ridge Inn, Inc.), 94 F.2d 555 (2 Cir. 1938); *In re National Hospital and Institutional Builders Co*., 80 Civ. 6073 (PNL) (S.D.N.Y. February 26, 1981); *Colonial Tavern Inc. v. Byrne* (In re Colonial Tavern, Inc.), 420 F. Supp. 44 (D.Mass.1976).

In re Application of Lewis, 512 F. Supp. 1146, 1149-1150 (S.D.N.Y. 1981).

The case of *In re Bay Ridge Inn, Inc.* 94 F.2d 555, 556 (2nd Cir. 1938) is also highly instructive. There, Bay Ridge had a restaurant liquor license, and the license required the posting of a bond in order to guarantee faithful observance of applicable law. *Id*. Bay Ridge filed for bankruptcy and sought to assign the liquor license to a third party. The New York State Liquor Authority ("NY Authority") initiated proceedings to cancel the license. The bankruptcy trustee sought to have the district court annul the NY Authority decision and direct that the surrender value of the liquor license be paid to the Trustee. The district court sided with the bankruptcy trustee annulling the NY authority decision. The Second Circuit reversed. *Id*.

First, the Second Circuit cited the applicable Alcohol and Beverage Control laws in New York regarding issuance and maintenance of a liquor license. *Id* at 556. The Second Circuit held that:

> While a refund, if obtained pursuant to that law, might become assets of the bankrupt estate if the trustee after a proper application became entitled to have the license continued, he could not obtain such a license or secure any status that would entitle him to a refund through an application to the District Court. The deposit out of which he sought a refund was in the hands of the Liquor Authority. *To have the license reinstated and to secure the refund he was obliged to avail himself of the means afforded by the act and seek his remedy by an application to the Authority and, if unsuccessful, by means of a review in the state court.* The refund is not an asset in the hands of the bankrupt unless and until the Authority, subject to review by the New York court, shall award it to the trustee in accordance with the terms of the act. *The right to reinstatement or to a refund depends wholly upon the action of the state tribunals and is in no way within the control of the bankruptcy court*.

Id. at 557 (emphasis supplied).

As stated by the United States District Court for the District of New Jersey:

> [T]he bankruptcy court lacked subject matter jurisdiction to preside over an adversary proceeding where the debtor is seeking to enjoin the municipality's exercise of its police and regulatory power. *See United States v. Wheeling-Pittsburgh Steel Corp*., 818 F.2d 1077, 1086 (3d Cir. 1987) ("Congress expressly provided that the automatic stay provisions do not apply when the government is seeking to enforce its police or regulatory power." (citation omitted)); *The Briarcliff v. Briar Tenants Assoc.* (In re The Briarcliff), 15 Bankr. 864, 867 (D.N.J. 1981) ("It's not the province of the bankruptcy court to undertake the role of local government agencies. The bankruptcy court is only empowered to preserve the assets of a bankruptcy estate and cannot authorize noncompliance with local law." (citation omitted)).

Hansen v. Borough of Seaside Park (in Re Hansen), 164 B.R. 482, 487 (D.N.J. 1994).

Next, the exercise of federal police power in the face of a bankruptcy was addressed by the United States Supreme Court in *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin*., 502 U.S. 32, 40 (1991). In *MCorp*, the debtor sought to enjoin administrative proceedings by the Federal Reserve Board. The proceedings were enjoined and the Supreme Court reversed, finding that the bankruptcy court had no authority to enjoin the regulatory proceedings. *Id*. at 35. As stated by the Supreme Court:

> MCorp contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the Board's actions and to enjoin those actions. We disagree. MCorp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts.

Id. at 40.

Additionally, in *In re Cabrini Med Ctr,* 440 B.R. 54, 57-58 (Bankr. S.D.N.Y. 2010), the United States Bankruptcy Court for the Southern District of New York dealt with a case remarkably similar to the case here. There, the debtor had a certificate for the operation of ambulances in New York. The certificate expired before the debtor's bankruptcy and the debtor sought to sell its ambulance license through bankruptcy, along with the ability to seek reinstatement. *Id*. As stated in the opinion: "There is a long line of precedent delineating the boundary between the jurisdiction of a bankruptcy court and that of a state seeking to enforce its regulatory powers." *Id* at 56.

Importantly, the *Cabrini* court discussed the Supreme Court's opinion in *MCorp,* discussed above:

> *MCorp* supports the proposition that bankruptcy courts cannot look at whether an exercise of police power is legitimate. 502 U.S. at 40. Since *MCorp*, however, bankruptcy courts have analyzed whether the police or regulatory power is actually being invoked. *See, e.g., Safety-Kleen, Inc. v. Wyche*, et al, (In re Pinewood), 274 F. 3d 846 (4th Cir. 2001); *Enron Corp. v. California ex rel. Lockyer* (In re Enron Corp.), 314 B.R. 524 (Bankr. S.D.N.Y. 2004). In order to do so, they distinguish between "situations in which the state acts pursuant to its 'police and regulatory power' and situations in which the state acts merely to protect its status as a creditor." *Safety-Klee*n,

> 274 F. 3d at 865. If the purpose of the law is to effectuate public policy or promote "public safety and welfare," then the exception applies. *Id*. (internal citations omitted). But, "if the purpose of the law relates 'to the protection of the government's pecuniary interest in the debtor's "property,' or to 'adjudicate private rights,' then the exception is inapplicable" (the "pecuniary test"). *Id*. (internal citations omitted).

Id. at 57-58.[3]

The *Cabrini* Court's discussion of *Bay Ridge*, supra*,* is also highly instructive.

> The Debtor is attempting to assign its expired AOA to a third-party buyer, SCLM. SCLM is seeking to obtain from this Court a determination that it is entitled to reinstatement of the license in lieu of a full review by the Department under New York Public Health Law section 3008. Granting such a determination would be similar to the district court's voiding the New York State Liquor Authority's revocation of a liquor license in *Bay Ridge* because here, like in *Bay Ridge*, there are state laws that unambiguously require applications to the relevant state agencies for such a determination.

Id. at 59 (citing *Bay Ridge*, *supra.*). The New York Bankruptcy Court ultimately concluded:

> The long line of precedent discussed *supra* clearly limits the scope of permissible inquiries by a bankruptcy court into matters related to an exercise of police power. Any proceeding addressing whether the AOA can be reinstated would involve a "matter of vital concern affecting the public health, safety and welfare." N.Y. Pub. Health Law § 3000 (2010). The Court, accordingly, finds that it lacks jurisdiction to adjudicate this issue.

Id. at 60.

All of the foregoing leads to one inescapable conclusion: Only the PSC has the ability to determine whether the Kapitus agreement at issue is void as against the interest of the public. The Bankruptcy Court is simply not authorized to make that determination. To the extent the Bankruptcy Court waded into the exercise of a police power reserved to the States, the Bankruptcy

---

[3] As set forth below, there is no suggestion that the PSC is acting in the capacity as a creditor and the PSC itself has confirmed it is acting to protect public interests. (JA 000305-306). Moreover, if the ICA's Opinion approving the Bankruptcy Court's impairment of the PSC's exercise of police power is upheld, public interests are harmed as the utility's rate payers will necessarily absorb the debt. (JA 00228-29).

Court Order was unenforceable for lack of subject matter jurisdiction. Indeed, even the Bankruptcy Court's Order acknowledges that: "A judgment without proper jurisdiction is entitled to no enforcement mechanism . . . ." (JA 000177).

Clearly, the PSC's role under W. Va. Code § 24-2-12 in approving contracts that lease, sell, assign or pledge public utility assets in no way makes the PSC's actions that of a creditor in the debtor's bankruptcy. Indeed, the Bankruptcy Court's Order acknowledged this is a regulatory function[4] and the Bankruptcy Court's Order makes no effort to treat the PSC's interests as that of a creditor in the bankruptcy.

Rather than defer to the PSC's ability to exercise the police power, the Bankruptcy Court took a guess, based largely on a dissenting opinion, on how the PSC and/or West Virginia would exercise that police power. It was at that point, when the Bankruptcy Court usurped the State's exercise of a police power and purported to impair the sovereign right of the State to address a reserved power, that it stepped beyond its jurisdiction.

As set forth above, under the foregoing principles of constitutional federalism and the sovereign power of the States regarding reserved police powers, the Bankruptcy Court lacked subject matter jurisdiction to determine a matter reserved for PSC determination. The Business Court Order was correct to defer to the PSC's ruling under state law. As set forth below, not only did the Bankruptcy Court lack subject matter jurisdiction to exercise a State police power, but the PSC's subsequent exercise thereof prevails in West Virginia to the extent it countermands the Bankruptcy Court's attempts to exercise the same right that is exclusively reserved to the State. As such, the Bankruptcy Court's Order is unenforceable in West Virginia to the extent it (i) lacked

[4] The Bankruptcy Order states: "The Supreme Court of Appeals of West Virginia elaborated in 1919 that when a business entity "becomes so closely and intimately related to the public . . . as to make welfare of the public . . . dependent upon the proper conduct of such business, it becomes subject for the exercise of the regulatory power of the state." *Clarksburg Light & Heat Co. v. Public Serv. Comm'n*, 84 W. Va. 638, 646 (1919). (JA 000178-179).

subject matter jurisdiction to exercise the State's police power, and/or (ii) is inconsistent with the PSC's subsequent and proper exercise of that reserved police power.

II. BECAUSE THE BANKRUPTCY COURT FAILED TO APPLY EXISTING WEST VIRGINIA PRECEDENT, THIS COURT IS UNDER NO OBLIGATION TO AFFORD ANY DEFERENCE TO THE BANKRUPTCY COURT'S ORDER.

In the Bankruptcy Court Order (JA 000179-80), the Court conducted an analysis of *Lockard v. Salem*, 127 W. Va. 237, 32 S.E.2d 568 (1944). However, as set forth below, the Bankruptcy Court purported to effectively overturn (or disregard) a binding pronouncement by this Court and essentially attempted to create new substantive law for West Virginia, in the realm of police power, by reliance upon the *Lockard dissent*.[5]

A review of the majority opinion in *Lockard* is the appropriate starting point for this Court's analysis. In *Lockard*, the City of Salem undertook to lease its water system to the plaintiff for a period of ten years. *Id* at 238. As stated by the Court:

> the controlling question in this case is whether the contract was legal and enforceable, or whether it was void because it was not initially submitted to the Public Service Commission of West Virginia for approval, or, to state it another way, the proposed lease not having received the consent and approval of the Public Service Commission, was there at any time a legal and valid contract of lease?

Id. at 242.

After citing the applicable provisions of W. Va. Code § 24-2-12, this Court stated:

> "The jurisdiction of the commission shall extend to all public utilities in this State, except vehicles operated upon streets and roads, and shall include any utility engaged in any of the following public services: * * * supplying water, gas or electricity, by municipalities or others; * * *". It should be noted that said Section

[5] Indeed, "The majority holding in a state's highest court's decision is that state's law. The dissenting opinions are not. A federal court is bound to follow the court's holding." *Entrekin v. Internal Med. Assocs. of Dothan*, 689 F.3d 1248, 1249, HN 11, (11th Cir. 2012).

> 12 of Article 2 at its very beginning provides: "*Unless the consent and approval of the public service commission of West Virginia is first obtained: * * * (c) no public utility subject to the provisions of this chapter * * * may * * * lease * * * its franchises, licenses, permits, plants, equipment, business or other property or any part thereof. * * *"*

Id. at 244 (emphasis supplied).

Lastly, this Court confirmed that the Legislature's statutory language, read *in para materia*, compels the conclusion that consent and approval of the undertakings set forth in the statute is mandatory:

> our attention is invited to the wording contained in the last paragraph of said Section 12, which provides that "Every * * * lease * * * of the franchises, licenses, permits, plant, equipment, business or other property of any public utility * * * shall be void to the extent that the interests of the public in this state are adversely affected, but this shall not be construed to relieve any utility from any duty required by this section". Under this wording it may be suggested that as Section 12 of the statute under consideration, unlike Code, 8-12-9, states a measure or degree to which a lease may be void where the consent and approval of the commission, or the waiver thereof, are not first obtained, a question is presented for court determination. But Section 12 specifically provides that the provision thereof that a contract shall be void to the extent that the interests of the public are adversely affected "shall not be construed to relieve any utility from any duty required by this section." The only duty required of any public utility by Section 12 is that application be made to the Public Service Commission for its consent and approval of the undertakings embraced in the statute. In order to give any meaning to the last-mentioned provision of the statute, we think the Legislature meant to make mandatory the duty of a public utility, before proceeding to acquire the rights or perform the undertakings permitted by the statute, to obtain from the Public Service Commission its consent and approval, or the waiver thereof.

Id. at 245. This opinion is still the law of West Virginia.

Essentially, the dissenting opinion in *Lockard* would have carved out an exception to mandatory PSC approval and that such a transaction would only be void if it adversely affected the interests of the public: "In my view the limit to which the statute should be applied is plainly set forth by the provisions thereof following: '* * * and every contract, * * * made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this state are adversely affected, * * *' (Italics supplied.)" *Id*. at 248 (dissent).[6]

The Bankruptcy Court followed the dissent, which is not the prevailing law in West Virginia as announced by the majority opinion in *Lockard*. Additionally, the Bankruptcy Court cited to *Preston County Light & Power Co. v. Renick*, 145 W. Va. 115, 132, 113 S.E.2d 378, 388 (1960) for the proposition that an "otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority." *Id*. However, there, that case has nothing to do with the pledge of a utility's assets. Rather, the entire case revolved around a publicly regulated utility's continuing obligation to continue to provide services, in that case, electricity. *Id*. Indeed, the operative language under W. Va. Code §24-2-12 states:

> Every assignment, transfer, lease, sale or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stock, arrangement, transfer or acquisition of control or other transaction referred to in this section made otherwise than as hereinbefore provided shall be void to the extent that the interests of the public in this state are adversely affected, ***<u>but this shall not be construed to relieve any utility from any duty required by this section</u>***.

(emphasis supplied). In that case, this Court was discussing the utility's general continuing obligation to provide utility service under a contract even if it had not yet obtained approval of such contract:

> Though as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control

[6] As set forth above, even if this exception were to exist, it is not the province of a Bankruptcy Court to make the determination of whether the interests of the public are adversely affected, or to act upon such a determination. Moreover, it does not appear that the *Lockard* dissent intended that the determination of a reserved police power be made by anyone other than the State.

> or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, the principle is firmly established that all contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a public utility except as provided by law, although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority. 73 C.J.S., Public Utilities, Section 5; 43 Am. Jur., Public Utilities and Services, Section 98.

Id. at 129. This Court also stated:

> The well established general rule is that when a public utility has undertaken the rendition of public service it cannot discontinue such service at will but is under a duty to continue its service to the public.

Id. at 124-125.

As such, there is no inconsistency between the mandate in *Lockard* for preapproval of a contract pledging public utility assets and the mandate in *Renick* that a utility continue providing electricity even if the contract had not yet been approved. As such, the Bankruptcy Court's citation to the isolated language in *Renick* offers no support for the Bankruptcy Court's Order relying on the dissenting opinion in *Lockard.*

Accordingly, and notwithstanding that the Bankruptcy Court lacked subject matter jurisdiction to exercise the State's reserved police power, the error was compounded by refusing to follow existing precedent as set forth in this Court's majority opinion in *Lockard*. Indeed, if the Bankruptcy Court was going to say, "this is what I find to be the law of West Virginia regarding its pronouncement of exercise of a police power," the *Lockard* dissent is not a statement of binding precedent in West Virginia. Moreover, the ICA Opinion erred in finding that there were "exceptions" to preapproval. (JA 000575). The only potential exception to this Court's decision in *Lockard* that the PSC can locate is this Court's decision in *Renick* addressing the wholly unrelated concept of the continuing duty of a utility to provide utility service even without preapproval. As discussed herein, that is not an exception to *Lockard*.

III. THE PSC'S SUBSEQUENT EXERCISE OF ITS POLICE POWERS SUPERSEDES THE BANKRUPTCY COURT'S ORDER IN WEST VIRGINIA.

In addition to the foregoing, the PSC's subsequent exercise of its police power on the matter at hand necessarily supersedes the Bankruptcy Court's Order under principles of federalism and powers reserved to the States, to the extent the Bankruptcy Court's Order is inconsistent. The case law discussed above regarding a Bankruptcy Court's lack of subject matter jurisdiction over exercise of a police power applies with equal force to this argument and is incorporated herein. In the cases cited above, the Courts determined that the federal courts' efforts to wade into the exercise of police power was improper as the State has the final say on police powers. *See Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., supra; In re Cabrini Med. Ctr., supra; Hansen v. Borough of Seaside Park, supra; In re Bay Ridge Inn, Inc., supra.*

First, the Bankruptcy Court Order itself acknowledged that the State's regulatory exercise of police powers was at issue: "As a public utility, the entity is subject to the regulations of the West Virginia PSC and cannot enter into certain agreements without PSC approval under W. Va. Code § 24-2-12." (JA 172).

Additionally, the Bankruptcy Court continued, essentially discussing the exercise of police powers:

> The Supreme Court of Appeals of West Virginia elaborated in 1919 that when a business entity "becomes so closely and intimately related to the public . . . as to make welfare of the public . . . dependent upon the proper conduct of such business, it becomes subject for the exercise of the regulatory power of the state." *Clarksburg Light & Heat Co. v. Public Serv. Comm'n*, 84 W. Va. 638, 646 (1919). Further, private contract rights may yield to the powers of the state to regulate matters of public welfare when the contract involves a public utility. *Manigault v. Springs*, 199 U.S. 473

> (1905); *Atl. C. L. R. Co. v. Goldsboro*, 232 U.S. 548 (1914). Although originally privately owned and managed, the Debtor is nevertheless subject to state regulation as the provider of a public utility.

JA 178-179.

Perhaps most importantly, the Bankruptcy Court Order itself contains the statement: "[N]either party has alleged on the record that the PSC stated a position as to the extant agreement's enforceability." (JA 000180). Although the Bankruptcy Court did not elaborate, this statement appears to acknowledge that a PSC pronouncement on the agreement's validity would be binding on the Bankruptcy Court. Nevertheless, the Bankruptcy Court determined to exercise the State's police power in the absence of previous guidance from the PSC. *Id*., generally.

After entry of the Bankruptcy Order and upon the PSC's filing of its lift stay motion, the Bankruptcy Court realized it would have to authorize the PSC's right to exercise the police power itself.[7] Indeed, the transcript of the lift stay hearing establishes that the Bankruptcy Court was authorizing the subsequent PSC investigation and the Court inquired into the process with the understanding that the PSC might reach a different conclusion than the Bankruptcy Court:

Judge Bissett:

> Certainly, the rate implications now, but in hindsight, is the Court recognizing its decision that certainly there is precedent that the PSC has approved contracts on a review process that have been entered into several years before the investigation, so the Court is just curious and has concerns with regard to what record the PSC would be able to review, and certainly having the benefit of these several years past *that it would reach any other conclusion but the conclusion I think that has kind of been offered, that perhaps it's a*

[7] The PSC filed a "Motion for Ruling that Regulatory Action is Exempt from Automatic Stay," which we refer to generically as a lift stay motion. That motion does not appear in the Joint Appendix in this case, but is available through Pacer in Case No. 2:21-BK-00125, Doc. 120. That motion was filed so that the PSC could conduct a review of the Kapitus agreement as contemplated under 11 U.S.C. § 362(b)(4), which states in pertinent part: "The filing of a petition . . . does not operate as a stay - of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power." *Id.*

> *violation of public policy at this point, but if you could expand on that, I would appreciate it*.

(JA 230-231) (emphasis supplied).

Additionally, Jessica Lane, on behalf of the PSC, advised the Bankruptcy Court that, although she had no specific authority to state a position for the PSC, she anticipated that if the PSC determined that the funds under the Kapitus agreement did not even reach the utility, the PSC would likely find it void and Judge Bissett responded, inquiring into the PSC's process to undertake such a ruling:

Ms. Lane:

> Well I can't speak for the Commission, but we would do the best we could to take evidence and understand the positions of the parties in this case and come to a conclusion. It stands to reason that if these funds were used by the utility for public utility purposes, then the Commission would not void the contract. Alternatively, if the evidence indicates that the funds never came into the utility coffers at all, but were instead diverted for inappropriate purposes, I would expect the Commission, although I can't speak for it, to determine that the contract should be void. (JA 231).

Judge Bissett:

> Any idea of the timeline that that investigation would occur and so the Court understands whether ultimately the full Commission, Public Service Commission, would vote on that, whether it was voidable, or how that process works. (JA 00230-231).

Thus, there can be no question that (i) the Bankruptcy Court's Order noted that the PSC had not yet spoken on the issue, and (ii) that the Bankruptcy Court, during the lift stay hearing, appeared to understand that the PSC's subsequent exercise of its police power was not impaired by bankruptcy law and could very well contradict the Bankruptcy Court's Order.

Indeed, the Judge seemed to acknowledge the State's domain regarding a regulatory police power:

Judge Bissett:

> With regard to the motion to lift stay filed by the Public Service Commission, the Court will grant that motion. In essence, the Court finds that perhaps it is a regulatory power within the power of the Public Service Commission certainly under state code, and this Court would find that likely the stay does not apply, and if it does, this is within the authority of the State to conduct an investigation.

(JA 00244).

Although the Judge states that the subsequent investigation would not be new evidence to the Bankruptcy Court, the Judge likewise made no representation that the Bankruptcy Court's Order would withstand the PSC's legitimate exercise of a police power:

> "Even if the PSC makes a decision post outcome or post opinion in this case, it's not really construed as new evidence, but the record was closed at the time this Court made a decision." (JA 000245).

In fact, as set forth below, the PSC, as a part of the subsequent investigation that the Bankruptcy Court authorized, specifically and expressly exercised its police powers and determined the Kapitus agreement was void.

The PSC decision first acknowledged that "The Legislature of West Virginia has determined that the provision of utility services in the State are imbued with public interest given that utilities provide services that are essential for public health safety and economic vitality." (JA 000305). The PSC next discussed the pair of subsections found in W. Va. Code § 24-2-12(c) and (f) and found that all of the contracts under review, including the Kapitus agreement, "on their face are clearly contracts against public interest even without any improper transfers of the proceeds to affiliates." (JA 000305). The PSC further confirmed that "West Virginia Code §24-2-12 indicates that when prior consent and approval is not obtained for transactions in these circumstances from the Public Service Commission, that such contracts 'shall be void to the extent that the interest of the public in this State are adversely affected.'" (JA 000306). The PSC ultimately ruled that the subject contract was void as contrary to the public interest. *Id*.

As a result, the PSC did subsequently take a stance on the very issue the Bankruptcy Court acknowledged to be absent from the Bankruptcy Court's record. "[N]either party has alleged on the record that the PSC stated a position as to the extant agreement's enforceability." (JA 000180). Indeed, it begs the question, why would the Bankruptcy Court confirm that the PSC's regulatory oversight was not impaired by the automatic stay in bankruptcy and grant the PSC's subsequent investigation, unless the Bankruptcy Court understood that the PSC ultimately has the last word on exercise of a police power exercise? The Bankruptcy Court approved the subsequent PSC investigation because it is mandated under 11 U.S.C. § 362(b)(4) for exercise of police powers, which embodies the fundamental concept of the 10th Amendment.

To the extent it was unclear to the Bankruptcy Court, prior to the entry of the Bankruptcy Court's Order, that the PSC would ultimately deem the unapproved Kapitus agreement, pledging public utility income to a third-party, void as being contrary to public policy, the Bankruptcy Court nevertheless acknowledged that an exercise of police power was not stayed by the automatic stay provisions under the Bankruptcy Code. The PSC has now, in fact, exercised that police power that is exclusively reserved to the State and which is not impaired by the Bankruptcy Code. Accordingly, because of the sovereign nature of State decisions regarding the exercise of a police power reserved to the States (*In United Fuel Gas Company v. Public Service Commission*, 73 W. Va. 571, 80 S.E. 931, *supra*), the Bankruptcy Court's Order must yield to the PSC's exercise of its police power to the extent it is inconsistent therewith.

IV. THE BUSINESS COURT'S ORDER WAS CORRECT AND THIS COURT SHOULD UPHOLD IT BY REVERSING THE ICA OPINION.

The Business Court Order found that Timberline and Kapitus:

> voluntarily entered into a Revenue Based Factoring Agreement where Kapitus purchased Timberline Utilities' "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" and was granted a security interest in Timberline Utilities' personal property from Timberline Utilities' customers and/or third party payors . . . ." (JA 000490).

Kapitus argued that the Bankruptcy Court's Order was binding and enforceable on the parties. However, the Business Court Order notes, as is argued herein, that the Bankruptcy Court was using a dissenting opinion in *Lockard* to wade into the waters of ruling on a state's regulatory power:

> Here, Plaintiff argues that the PSC order should not be followed by this Court due to the competing prior order of the Bankruptcy Court of the Northern District of West Virginia. *See* Pl's Resp. p.1. The Bankruptcy Court considered West Virginia Code §24-2-12 and *Lockard v. Salem*, and, distinguishing *Lockard*, decided specifically not to follow *Lockard*, finding that the Agreement was voidable and not void as West Virginia Code §24-2-12 directs.

(JA 00495).

The Business Court continued:

> But it is this Court's duty to follow the law and directives of the West Virginia Supreme Court of Appeals, which outlined above, as clearly and in plain language stated that pursuant to West Virginia Code §24-2-12, prior approval must be given before the sale of property of the utility and/or entering into any financial transaction with the affiliate of a utility, PSC orders are to be given deference in West Virginia Courts . . . .

(JA 000496). Accordingly, although the Business Court did not go into detail regarding the underlying principles of deference that arise from the reservation of police power to the States, the Business Court's analysis was nevertheless consistent with those principles. *Id*. Indeed, it is worth re-stating that this Court has specifically acknowledged the sovereign nature of the State's exercise of police power:

> *In United Fuel Gas Company v. Public Service Commission*, 73 W. Va. 571, 80 S.E. 931, in considering contracts of a natural gas company with consumers of natural gas for exclusive service for a

> term of years in consideration of reduced rates, this Court used this pertinent language: "As all such contracts are subject to the superior authority of the State, through its legislature, in the exercise of its police power, and are presumed to be entered into with knowledge of this superior authority of the State, and whatever effect lawful legislation may have upon such contracts, they are not within the protecting aegis of the federal Constitution, or thereby unlawfully impaired."

Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 132 (1960). As such, the decision of the Business Court should be upheld based not only on the sovereign nature of a State exercise of a police power but upon the thoughtful analysis provided by the Business Court consistent with that exercise by the PSC of the State's police power.

V. THE ICA OPINION ERRED IN (I) ASSUMING THE BANKRUPTCY COURT HAD SUBJECT MATTER JURISDICTION, AND/OR (II) IN FAILING TO ACKNOWLEDGE THE PSC'S SUBSEQUENT EXERCISE OF A POLICE POWER.

The ICA effectively rooted its opinion in principles of the general finality of a Bankruptcy Order (JA 000579-584) and principles of *res judicata* (JA 000584-588). While this analysis might apply to pure bankruptcy claim resolution issues, as set forth above,[8] it does not apply when the Bankruptcy Court lacked subject matter jurisdiction to exercise the State's police power. Moreover, given that the PSC did, in fact, subsequently enunciate public policy concerns in the exercise of the State's police power, the ICA Opinion erred in failing to hold that the PSC's exercise of that police power prevails in West Virginia against a contrary Bankruptcy Court Order.

In discussing the statutory obligation for PSC approval of a contract that sells or disposes of utility assets (i.e. a pledge of utility income), the ICA Opinion stated:

> The October 25, 2021, bankruptcy order determined that while West Virginia Code § 24-2-12 (1984) generally requires contracts entered into by a public utility to sell or otherwise dispose of "franchises, licenses, permits, plants, equipment, business, or other property"

[8] *See In re Cabrini Med. Ctr.*, 440 B.R. 54, 57-58 (Bankr. S.D.N.Y. 2010)*, supra* (discussing distinction between public policy actions and actions merely as a creditor in a bankruptcy case).

> require PSC approval, *there are recognized exceptions to this requirement*. Through those limited exceptions, it was concluded that the Agreement was valid notwithstanding a lack of PSC approval.

(JA 000581) (emphasis supplied). As discussed above, review of this Court's majority opinion in *Lockard* reveals that there are no exceptions. Indeed, the chief "exception" articulated by the Bankruptcy Court was the *dissenting* opinion in *Lockard.* This Court in *Lockard* read the applicable statutory provisions *in para materia* and determined that there are no exceptions. *Id*.

Next, to the extent this Court has articulated anything that the Bankruptcy Court or the ICA construed as an exception in *Renick*, it is not an exception to *Lockard*. *Renick* applies to a separate provision in W. Va. Code § 24-2-12 regarding a utility's continuing obligation to provide service. *See discussion, supra*.

Importantly, the ICA's discussion of principles of *res judicata* and general finality of a Bankruptcy Court Order after dismissal of the bankruptcy, all necessarily assume that the Bankruptcy Court had subject matter jurisdiction to exercise the State's police power, and/or that the Bankruptcy Court's Order would somehow be binding upon the PSC and further that it would impair the PSC's future exercise of that police power. Indeed, the ICA Opinion quotes *Bison Ints., LLC v. Antero Res. Corp.* 244 W. Va. 391, 398, 854 S.E. 2d 211, 218 (2020) for the proposition that "An adjudication by a court ***having jurisdiction of the subject m*****atter** and the parties is final and conclusive . . .") (JA 000588) (emphasis supplied).

Because review of this appeal is under a *de novo* standard, this Court can, and must, review the implications of constitutional federalism and the sovereign nature of the State's exercise of police powers that are reserved to the States. Under *de novo* review, the PSC submits that the ICA Opinion erred in (i) assuming the bankruptcy court had subject matter jurisdiction to exercise a police power, and (ii) failing to acknowledge that the Bankruptcy Court's Order must necessarily yield to the PSC's subsequent exercise of that police power.

The PSC is the competent authority to address the police powers reserved to the State as articulated in W. Va. Code §24-2-12. As set forth above, the Bankruptcy Court lacked subject matter jurisdiction to opine on the State's exercise of a police power and further failed to use applicable West Virginia precedent in doing so. Once the Bankruptcy Court acknowledged that this exercise of police power was not impaired by the automatic stay and sent it to the PSC for investigation, the matter was necessarily determined by the competent authority – the PSC. Accordingly, the Business Court was correct to defer to the PSC's subsequent ruling and the ICA Opinion should be reversed.[9]

CONCLUSION

WHEREFORE, based on the foregoing reasons and all those apparent to this Honorable Court, the Public Service Commission of West Virginia respectfully requests that this Honorable Court enter an order reversing the Intermediate Court of Appeals' opinion dated October 30, 2023, and captioned *Kapitus Service, Inc. v. Timberline Four Seasons Utilities, Inc. and Canaan Valley Public Service District*, No. 23-ICA-22, 2023 W.Va. App. LEXIS 261, finding that *res judicata* applied to the Bankruptcy Court's Order and on that basis reversed the Business Court's Order, and that it award such further relief as this Court deems just and proper.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

By counsel,

[9] This Court may determine, as has been advanced by Petitioners, that the subsequent PSC Final Decision was *res judicata* as to Kapitus. However, whether that PSC Final Decision is, in fact, *res judicata*, as to Kapitus, has no bearing on the constitutional implications of (i) the bankruptcy court's lack of subject matter jurisdiction to exercise a police power in substitute of competent authority, or (ii) the sovereign nature of the PSC's subsequent exercise of that police power, irrespective of whether it is *res judicata* as to Kapitus.

LEWIS GIANOLA PLLC

/s/ Webster J. Arceneaux, III
Ann R. Starcher (WVSB No. 6672)
Spencer D. Elliott (WVSB No. 8064)
Webster J. Arceneaux, III (WVSB No. 155)
300 Summers Street, Suite 700
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
astarcher@lewisgianola.com
selliott@lewisgianola.com
wjarceneaux@lewisgianola.com

No. 23-728

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBERLINE FOUR SEASONS UTILITIES, INC.,
CANAAN VALLEY PUBLIC SERVICE DISTRICT,

RESPONDENTS BELOW, PETITIONERS,

vs.

KAPITUS SERVICING, INC.,

PETITIONER BELOW, RESPONDENT.

CERTIFICATE OF SERVICE

I, Webster J. Arceneaux, III, do hereby certify that on April 1, 2024, I have caused service of the foregoing *Amicus Curiae Brief of the Public Service Commission of West Virginia in Support of Petitioners Timberline Four Seasons Utilities, Inc. and Canaan Valley Public Service District Urging a Reversal of the Intermediate Court of Appeals Opinion* to be made electronically upon the following counsel of record:

Ancil G. Ramey
Sarah C. Ellis
Benjamin McFarland
Colton C. Parsons
Steptoe & Johnson PLLC
707 Virginia Street East
P.O. Box 1588
Charleston, WV 25326-1588
Counsel for Kapitus Servicing, Inc.

John W. Cooper
Cooper & Preston, PLLC
P.O. Box 167
Davis, WV 26260

and

Jeffrey S. Zurbuch
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, WV 26241
Counsel for Canaan Valley Public Service District

Martin P. Sheehan
Sheehan & Associates, PLLC
1140 Main St., Suite 333
Wheeling, WV 26003
Counsel for Timberline Four Seasons Utilities, Inc.

/s/ Webster J. Arceneaux, III
Ann Starcher (W. Va. Bar No. 6672)
Spencer D. Elliott (W. Va. Bar No. 8064)
Webster J. Arceneaux, III (W. Va. Bar No. 155)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
(304) 345-2000 – telephone
(304) 343-7999 – facsimile
astarcher@lewisgianola.com
selliott@lewisgianola.com
wjarceneaux@lewisgianola.com
Counsel for Public Service Commission of West Virginia