IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-728

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

V.

**KAPITUS SERVICING, INC.,
Respondent.**

REPLY BRIEF OF PETITIONERS

Martin P. Sheehan, Esq.
Counsel for Timberline Four Seasons Utilities, Inc.

W.Va. Bar No. 4812
Sheehan & Associates, PLLC
1140 Market St., Suite 333
Wheeling, WV 26003
(304) 232-1064
(304) 232-1066 fax
Martin@MSheehanLaw.net

John W. Cooper, Esq.
Counsel for Canaan Valley Public Service District Receiver for Timberline Four Seasons Utilities, Inc.

W.Va. Bar No. 822
Coopers & Preston, PLLC
P.O. Box 167
Davis, WV 26260
(304) 478-4600
jcooper@mountain.net

Jeffrey S. Zurbuch, Esq.
Counsel for Canaan Valley Public Service District Receiver for Timberline Four Seasons Utilities, Inc.

W.Va. Bar No. 7384
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, WV 26241
(304) 636-3560
jzurbuch@bztlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Supreme Court of Appeals of West Virginia Cases

West Virginia Statutes, Regulation and Rules of Procedure

Other Federal Cases

Federal Statute and Rule

ARGUMENT

Introduction

It is not the purpose of a reply brief to restate the arguments made in a party's opening brief. Instead, the purpose is to reply to assertions newly made in a response. With this thought in mind, Respondent Kapitus Servicing, Inc. ("Kapitus") has made some arguments to which a significant reply is warranted from Petitioners Timberline Four Seasons Utilities, Inc. ("Timberline") and Canaan Valley Public Service District ("CVPSD"). These matters are identified as set forth below.

On page 4, and again on page 6 of its brief, Kapitus emphasizes a sentence contained in the Bankruptcy Court order of October 25, 2021. Kapitus notes that the Bankruptcy Court upheld the proof of claim filed by Kapitus based on the existence of what Timberline and CVPSD have described as the purported contract. Then, Kapitus emphasizes the additional language in that order declaring that would be the outcome "regardless of the Public Service Commission's investigation into the validity of the Agreement." For convenience, this component of the arguments made by Kapitus will be referred to as the "regardless" argument and will be addressed below as such.

Different ideas appear on page 13 of the brief filed by Kapitus. There Kapitus acknowledges that despite receiving adequate notice, Kapitus did not appear in the proceedings held before the Public Service Commission. Kapitus claims it was not required to appear. Kapitus asserts that without being required to appear, Kapitus was not a "party." The conclusion of this argument is that the Public Service Commission ruling could have had no impact on Kapitus. In tandem with this assertion, Kapitus also claims that by not appearing before the Public Service Commission, Kapitus did not waive the benefits of the Bankruptcy Court order of October 25,

2021. These notions will hereinafter be referred to as the "not a party" and the "non-waiver" arguments of Kapitus. They will be addressed below.

The "Not a Party" and the "Non-Waiver" Arguments

Kapitus has acknowledged as follows: "While Kapitus knew about the Public Service Commission proceedings, the mere opportunity to intervene in a proceeding does not make that entity [Kapitus] a party." (Brief of Respondent at page 13.) This is concession that Kapitus had actual knowledge of the Public Service Commission proceedings. The detailed analysis of the requirements of due process in the opening brief of Timberline and CVPSD are rendered moot by this concession. The purpose of that material was to demonstrate unequivocally that constitutionally adequate notice had been given to Kapitus of the Public Service Commission proceedings. The acknowledgment of an awareness by Kapitus of the Public Service Commission proceedings is conclusive on this point.

Kapitus also contends that it never made an appearance before the Public Service Commission. Timberline and CVPSD agree that is also true.

Kapitus claims however that the consequence of not making an appearance was not a waiver the opportunity to claim the Bankruptcy Court order was res judicata before the Public Service Commission. Kapitus relies on Rule 8 of the West Virginia Rules of Civil Procedure for authority to claim it was not a party to the Public Service Commission proceedings.

Of course, the provisions of rules promulgated by Courts have no application to proceedings before an agency such as the Public Service Commission. W.Va. Code § 24-1-7. See also W.Va. R. Civ. P. 81. In Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834 (1931), and again in Sims v. Fisher, 125 W.Va. 512, 25 S.E.2d 216 (1943), this Court held that legislation that purported to confer administrative tasks on the judiciary violated separation of powers principles. It is unlikely that use of Rules of Civil Procedure adopted for use in court could constitutionally be used to govern procedures before administrative agencies where the legislation limits such use.

The provisions of 150 CSR § 150-1-4 and § 150-1-5 define who is a party to a matter before the Public Service Commission. Section 150-1-4.1.4.a (1) simply defines a "party or entity seeking party status. . . ." as an individual, partnership, association, cooperative, limited liability company, including foreign entities, and a corporation. Clearly Kapitus was such an entity.

By not appearing, Kapitus may claim it never sought party status. So be it. But is there a difference between a "party" to a Public Service Commission matter and a person or entity bound by a decision of the Public Service Commission. In other words does the label, "party," matter? Timberline and CVPSD do not believe so.

Timberline and CVPSD have characterized the proceedings before the Public Service Commission as being "in rem." Aside from the statutory arguments made in Petitioners' opening brief, this is the only real way to characterize a proceeding where the right of multiple persons may be affected. When addressing rate making decisions of the Public Service Commission, this Court has said,

> 'Private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict.' The opinion in that case [Mill Creek Coal and Coke Co. v. Public Service Commission, 84 W.Va. 662, 100 S.E. 557 (1919)]contains these statements: 'Surely it is in the interest of public convenience and of the general welfare that rates of public utilities be subject to regulation, both as a protection against extortionate charges and at the same time for the purpose of safeguarding to a utility so restricted a reasonable return upon its investment. It must of course be recognized that a peculiar sanctity inheres in contracts entered into between parties competent to contract, and that the obligations thereby imposed will not lightly be disturbed. But the same policy that

> forbids to a utility total freedom of action likewise limits the extent to which contracts with a utility will be recognized when the public need necessitates a partial or total annulment. The duty of the utility to subordinate its right of control over rates in the interest of the public welfare is balanced by a corresponding duty on the part of individuals contracting with such utility to subordinate their rights of contract to the same public welfare. The police power of the state is impartial between utility and contractors, requiring both to surrender rights for the general weal. The public need to preserve the utility in strong financial condition in order that it may better serve is frequently as important as the need to guard the public against extortion. The right of the utility to protection must not be permitted to grow dim in the presence of that other and more popular right of exercising a control over its functions. Both subserve the same public purpose.'

Preston County Light & Power Co. v. Renick, 145 W.Va. 115, 131-132, 113 S.E.2d 378, 388 (1960).

Kapitus claims that being made aware of the Public Service Commission proceedings involving the contractual relationships between Timberline and Kapitus, did not technically require Kapitus to appear before the Public Service Commission. That is correct. But Kapitus had notice and an "opportunity to be heard.[1]" It is among the list of persons who would have been able to seek status as a party.

Kapitus quibbles over its status as a party so that it can argue that the Public Service Commission was rendered powerless to act in a way that could or would have impacted Kapitus. This is the root of the error of this position.

The lack of a formal appearance by Kapitus did not render the Public Service Commission powerless to act in a manner that might affect Kapitus' rights. As noted in Preston County Light, the Public Service Commission regulates utilities such as Timberline in a manner designed to protect the public interest. Preston County Light specifically noted that limitations exist on the

[1] This has become the classic formulation of the meaning of due process. See, e.g., Jones v. Flowers, 547 U.S. 220 (2006).

ability of a utility to contract, as a general matter. Here, there were also statutory limits in W.Va. Code § 24-2-12 on the ability of Timberline to contract. Timberline, a regulated utility, was required by a Commission order to report on the contract issue with Kapitus to the Commission. The Commission clearly had jurisdiction over that issue.

In making this claim, some review of how proceedings before the Public Service Commission is warranted. Generally, the public is represented at Public Service Commission hearings by Staff of the Public Service Commission. Staff consists of a separate group of lawyers and other professionals who present evidence and contest evidence offered by others before judges employed by the Public Service Commission. Staff can, and do, file legal memoranda related thereto.

The judges who preside at such hearing make final recommendations to the members of the Public Service Commission. The Commissioners then make a final decision, subject to review in this Court by timely appeal. In the Public Service Commission hearings held in the underlying matter, Timberline and Staff of the Public Service Commission were active advocates before the assigned Public Service Commission Judge. Kapitus, despite having received notice, was nowhere to be found. An order was entered. It was not appealed. It has become final.

As is now known, the Public Service Commission ruled that the purported contract between Timberline and Kapitus was not in the public interest. Somehow, Kapitus says that ruling does not apply to it. That is baffling when considered broadly.

Is Kapitus really claiming that an order of the Public Service Commission would be ineffective against an entity that has not made a formal appearance? If so, would Kapitus argue that no rate increase awarded to a utility by the Public Service Commission could be used to bill customers unless the individual customer had become a formal party to a rate increase proceeding? To ask the question is to recognize the absurdity of that position.

Decisions made about what action a utility can take are constrained by the need for approval of the Public Service Commission that acts, in part, on behalf of all members of the public. Now, Kapitus wants to enforce a contract, which has been determined to not have been in the public interest. Timberline, as the regulated utility, is bound by the decision of the Public Service Commission to assert there is no valid contract. The general freedom to contract of most persons is constrained in a public utility. The contract here required approval, and approval will never be forthcoming. The contract was disapproved.

The law may work oddly sometimes, but the law never requires an entity to both do, and not do, the very same thing at the same time. Kapitus either has no contract which it can enforce, or it does. The Public Service Commission said Kapitus does not.

Had it appeared at the Public Service Commission, Kapitus might have influenced the decision of the Public Service Commission. Kapitus might have asserted the claim it now seeks was the subject of a ruling by the Bankruptcy Court which was entitled to res judicata. But it did not attempt to do so.

What we do know, as set forth in the opening brief of Timberline and CVPSD, is that generally res judicata is considered an affirmative defense. If not raised, an affirmative defense is waived. Kapitus does not challenge this view of the law, it simply claims it was not "required" to appear and assert its claim. Notice and an opportunity to appear were given.

However, Kapitus did not appear. The Public Service Commission proceedings have concluded. There is a resolution, and a resolution that binds Timberline. It binds Kapitus too.

Kapitus was a party. Even if it is was not a technical party, Kapitus had notice and an opportunity to be heard. Kapitus is bound by the decision of the Public Service Commission. Binding Kapitus to an outcome where Kapitus enjoyed the benefits of due process is not unfair. That is the essence of the holding in Nevada v. United States, 463 U.S. 110 (1983). There the Supreme Court held that res judicata applied to what appears to have been an in rem proceeding involving scores of interested persons.

Resolution of this issue is a basis on which to affirm the ruling of the Business Court without consideration of any other issue.

The "Regardless" Argument

Neither the Bankruptcy Court Order, nor any argument ever made by Kapitus, cite to any authority of any Court to limit what another tribunal acting subsequently might do. The source of such a vast claim of authority remains a wonder.

In contrast to that spectacular claim, the familiar principle of res judicata, when raised, finds its application not in the first tribunal to rule, but in any subsequent tribunal considering the issue. It is in the subsequent adjudication, that an order previously entered elsewhere, will or will not be given res judicata effect. Such evaluations can include consideration of whether the earlier order was entered by a tribunal of competent jurisdiction.[2]

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[2] In Mellon-Stuart Co. v. Hall, 178 W.Va. 291, 298, 359 S.E.2d 124, 131 (1987), the Supreme Court said:

> Very broadly, res judicata is a doctrine which bars the subsequent litigation of any cause of action which has been previously tried on the merits by a court of competent jurisdiction, and includes within its bar issues which might have been tried.

(footnote omitted.) This summary requires the earlier disposition to have occurred in a tribunal of **competent jurisdiction**. Id. at 299, 359 S.E.2d at 132.

If the prior order being so considered becomes a review of the merits of the prior order, then that consideration will focus first, on what was previously determined, and if necessary progress to whether that determination is controlling.[3] Sometimes, assessment of a prior order requires analysis of whether an issue actually not addressed could have been previously raised, and if so, whether that the prior order controls resolution of that issue also. But whether done a) on the basis of an issue previously raised and specifically adjudicated, or b) on the basis that an issue could have been raised and was resolved by a prior order, the decision is one committed to adjudication in the subsequent tribunal. This is the familiar pattern of the law, not an order that says no future tribunal considering this issue can address the controversy.

Examples abound.

With some frequency, default judgments are entered in litigation. Routinely, courts granting default judgment conclude that jurisdiction in the defaulting court was proper, and service was effectively made. Yet, that is not always true. Defendants in such circumstances sometimes have legitimate issues that personal jurisdiction was lacking. While the existence of jurisdiction of the defaulting court can be, and often is, part of an order granting a default, a challenge to such a finding remains available in other forums. A challenge to jurisdiction might be made in a subsequent tribunal by challenging the judgment there for jurisdictional problems.

Similarly, in habeas corpus relief is granted in criminal cases by a subsequent tribunal

[3] In Mellon-Stuart Co., v. Hall, 178 W.Va. 291, 359 S.E.2d 124 (1987), the West Virginia Supreme Court held that determinations made by the Court of Claims could be given res judicata effect. Of significance here, the Court recognized that although the Court of Claims had been given jurisdiction to resolve a counter-claim brought by the State, such a counter-claim was not the subject of a mandatory counter-claim. As such the prior adjudication of the Court of Claims did not resolve the potential counter-claim of the State.

where fundamental defects in a criminal prosecution are discovered. Here, subsequent tribunals can, and do, order that a person previously convicted be released unless promptly afforded the relief ordered. No plea of res judicata is made in these circumstances.

Interestingly, in the same order upon which Kapitus relies herein, the Bankruptcy Court concluded, in reliance on Penn General Casualty Co., v. Pennsylvania, 294 U.S. 189 (1935), that a default judgment obtained in Virginia by Kapitus, then known as Colonial Network Funding, LLC, against Timberline was jurisdictionally defective because: a) the Virginia Courts had no jurisdiction to enter any ruling against Timberline because the Circuit Court of Tucker County, West Virginia had placed Timberline in a receivership, a proceeding in rem; and b) service of process had been made on an ousted corporate officer and receipt of notice by him did not constitute notice to Timberline.

That result would have occurred even if the Virginia Court had said, "no court may find this Court lacks jurisdiction over this matter." Imagine the mischief that recognition of the "principle" being advocated by Kapitus that the Bankruptcy Court could validly emasculate any consideration of the relationship between Kapitus and Timberline by the Public Service Commission. There would be a new wave of requests for default judgment orders to make them "bullet proof" from future challenges. This claim is inherently absurd.

Non-interference with Another Tribunal

In State ex rel Small v. Clawges, 231 W.Va. 301, 745 S.E.2d 192 (2013), modified, in part, on other grounds by Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W.Va. 549, 803 S.E.2d 549 (2017), the Supreme Court of Appeals of West Virginia recognized that state and federal courts have adopted a policy of non-interference with each other where jurisdiction is in personam. Clawges establishes this principle as a binding principle of West Virginia law. Clearly, no West Virginia Court can interfere with action in a federal forum.

Federal cases likewise establish that no federal court with in personam jurisdiction may interfere with state proceedings. St. Paul Fire and Marine Ins. Co. v. Lack, 443 F.2d 404 (4th Cir. 1971). See also Kline v. Burke Constr. Co.. 260 U.S. 226 (1922).

This rule is limited to courts exercising in personam jurisdiction. This is a consequence of the rule, that the first Court to acquire jurisdiction in rem may exclude all other decision making concerning the res. See Penn General Casualty Co., v. Pennsylvania, 294 U.S. 189 (1935). The notion that the Bankruptcy Court could limit subsequent action by the West Virginia Public Service Commission would seem to challenge this principle too.

Blake v. Charleston Area Medical Center

In the opening brief, Timberline and CVPSD noted that res judicata is not a doctrine to be mechanically applied. While recognizing that Judge Lorenson did not rely on Blake v. Charleston Area Medical Center, 201 W.Va. 469 498 S.E.2d 41 (1997), in his decision, Timberline perceives his approach to this case represents decision-making consistent with that case. In Blake, this Court recognized an interesting exception to the mechanical application of res judicata. That exception permits departure from strict application of res judicata where (1) an earlier decision has departed from clear statutory principles, and (2) other extraordinary reasons exist to overcome the policy of preclusion that is part of res judicata.

In the view of Timberline, the resolution of the instant appeal is governed by the Public Service Commission order. In the view of Timberline, the claim of Kapitus that the Public Service Commission order is a nullity as to it, and that the Bankruptcy Court order is of significance is made of gossamer. But, if this Court finds it necessary to address that issue, then Timberline would still assert that res judicata does not work as claimed by Kapitus.

Judge Lorensen noted that the Bankruptcy Court, in its application of West Virginia law, did not rely on the majority opinion in Lockard v. Salem, 127 W.Va. 237, 32 S.E.2d 568 (1944). Instead, the Bankruptcy Judge found the dissenting opinion more applicable. Judge Lorensen was disturbed by that approach. Instead Judge Lorensen remained faithful to the majority holding, the simple idea that a contract requiring Public Service Commission approval, and which was not approved by the Public Service Commission, was void. He found that the Public Service Commission's consideration of the public interest was sound and should provide the rule of decision.

In looking at the "regardless" argument made by Kapitus, any attempt to short circuit the authority of the Public Service Commission is an "extraordinary reason" to overcome the policy of preclusion.

Thoughts on Subject Matter Jurisdiction

The Public Service Commission has filed an Amicus Brief asserting that the Bankruptcy Court did not have "subject matter jurisdiction" to determine the claim of Kapitus. The idea behind this claim has significant merit.

The merit derives from a statutory scheme that assigns specific responsibility to the Public Service Commission. The statutory scheme requires that a contract subject to Public Service Commission review is the sole responsibility of the Public Service Commission. This responsibility cannot be re-delegated. Similarly, the responsibility cannot be assumed by another judicial entity. At some level, the decision requiring abstention in Burford v. Sun Oil Co., 319 U.S.

315 (1943), supplies this note of caution to all federal courts.

As Kapitus has pressed its "regardless" argument, and if the Bankruptcy Court truly intended that any decision of the Public Service Commission would be immaterial, then the Public Service Commission position is genuinely meritorious for the reasons articulated herein.

As the Public Service Commission noted, subject matter jurisdiction can generally be raised at any time, including on appeal for the first time. In the abstract, such a claim is timely.

That said, in the bankruptcy context, prompt adjudication of claims is a responsibility of a Bankruptcy Court. It would be hard to move forward in a bankruptcy case without adjudicating disputed claims. While it is preferable, that a claim be determined in bankruptcy proceedings, there are alternatives. For some purposes a claim can be estimated in bankruptcy proceedings. See Fed. R. Bank. P. 3018.

A process for deferring to the Public Service Commission may have been available. For example in In re: Cole, 202 B.R. 356 (Bankr. S.D. N.Y. 1996), a Bankruptcy Court allowed a Family Court to find what an equitable division of property would look like in Family Court, but limited enforcement of any such order pending a separate consideration by the Bankruptcy Court of the propriety of any such division under bankruptcy principles. Some variation on that idea might have been possible here.

In the abstract, these various alternatives could have preserved primary decision making to the Public Service Commission. At the same time these alternatives would have allowed the Bankruptcy Court to consider the ultimate resolution of the case pending before it. In short, Timberline perceives there was some jurisdiction in the Bankruptcy Court to address the proof of claim filed by Kapitus, but that decision should never have served to wholly displace the Public

Service Commission as a decision maker. The claim that the Bankruptcy Court did so, whether or not that was its true intent, violates a number of important principles of restraint. This too is an extraordinary circumstance as described in Blake. This Court had steadfastly refused to substitute the judgment of the Court for Public Service Commission decision-making. Chesapeake and Potomac Telephone Co. of West Virginia v. Public Service Commission of West Virginia, 171 W.Va. 494, 300 S.E.2d 607, Syl. pt. 2 (1982) (This Court will not substitute our judgment for that of the Public Service Commission on controverted evidence).

As noted in the Amicus Brief, the test for whether a bankruptcy court may exercise subject matter jurisdiction over an asserted police power is whether the governmental entity is acting out of a pecuniary interest or public policy interest. See discussion of In re: Cabrini Med. Ctr., 440 B.R. 54, 57-58 (Bankr. S.D.N.Y. 2010) in Amicus Brief at pp. 10-11. It is undisputed that if the ICA's Opinion is upheld, public interests are harmed as the utility's rate payers will necessarily absorb the debt. (JA 00228-29). It is further undisputed that the Public Service Commission determined that the subject contract was void under grounds of public policy/police power. (JA 000306). As such, Kapitus' citation to authority acknowledging a bankruptcy court's subject matter jurisdiction to determine a pecuniary claim[4] is not relevant to a situation where a bankruptcy court reaches beyond pecuniary claim resolution and purports to usurp the state's exercise of a reserved police power. Kapitus presents no authority that would acknowledge a

4 *See* Kapitus brief at pp. 9-10 discussing allowance and disallowance of a pecuniary claim and citing Sampson v. Chase Home Fin., 667 F. Supp. 2d 692, 696 (S.D. W.Va. 2009). Indeed, the Southern District of West Virginia was specifically discussing a pecuniary claim as opposed to a public policy police power claim: "The court recognized that 11 U.S.C. § 502(a) authorizes a creditor to submit a proof of claim in a bankruptcy proceeding to establish the amount it is owed by the debtor. When the bankruptcy court formally allows that claim, the court explained, 'there can be little doubt about the ultimate res judicata effect of that allowance.'" Id. at 696.

bankruptcy court's ability to impair the state's ability to subsequently exercise a reserved police power. To the contrary, as set forth in the Amicus Brief, the West Virginia Supreme Court acknowledged the sovereign nature of the state's ability to exercise its police power. See discussion of United Fuel Gas Company v. Public Service Commission, 73 W. Va. 571, 80 S.E. 931 (1914) in Amicus Brief at pp. 5-6. The Business Court properly deferred to the Public Service Commission and the majority opinion in Lockard v. Salem, 127 W. Va. 237, 32 S.E.2d 568 (1944).

Did the Decision of the Bankruptcy Court Survive Dismissal?

Kapitus has argued that the decision of the Bankruptcy Court survived dismissal. It has cited one case from a bankruptcy court in the Eastern District of Texas that suggests Kapitus is correct. See In re: Eads, 417 B.R. 728 (Bankr. E.D. Tex. 2009). Timberline cited other cases to the Business Court that said dismissal revived the status quo before filing. Shaw v. Ehrilich, 294 B.R. 260, 274 (W.D. Va. 2003) aff'd 99 Fed. Appx. 466 (4th Cir. 2004); Crump v. TitleMax, 467 B.R. 532 (Bankr. M.D. Ga. 2010); In re: Derrick, 190 B.R. 346 (Bankr. W.D. Wis. 1995); In re: Irons, 173 B.R. 910 (Bankr. E.D. Ark. 1994); In re: Lewis & Coulter, 159 B.R. 188 (Bankr. W.D. Pa 1993); In re: Lawson, 1993 U.S. App. LEXIS 18329 (9th Cir. BAP July 13, 1993); and In re: Newton, 64 B.R. 790 (Bankr. C.D. Ill. 1986). The proper resolution of this issue legal issue is unclear.

In the judgment of Timberline, resolution of this issue is unnecessary. Timberline contends that a proper analysis starts with the proceedings before the Public Service Commission. It is the res judicata effect of that order which must be determined. Timberline does not perceive any legal importance to the Bankruptcy Court order in light of the Public Service Commission ruling.

The Intermediate Court of Appeals disagreed. At oral argument before the Intermediate

Court of Appeals, Timberline's counsel was asked if he had any such cases. He said he did, but could not cite them off hand. After the argument, a list of such cases was submitted. Shortly thereafter, the Intermediate Court of Appeals ruled. In a footnote, that Court found that a party could not rely on undisclosed cases. Timberline agrees with the principle of law.

Timberline does not agree that principle has any applicability here. The cases were all disclosed to the Business Court and, after argument, to the Intermediate Court of Appeals.

CONCLUSION

Kapitus sued Timberline for breach of contract in a case ultimately pending before the Business Court of Tucker County. The contract on which Kapitus relied was, at the time suit was filed, the subject of an in rem proceeding before the Public Service Commission.

Kapitus had notice and an opportunity to be heard before the Public Service Commission. Kapitus did not appear. Kapitus waived its right to be heard. The Public Service Commission ruled that the contract was void. That decision bound Timberline and the rest of the world, including Kapitus.

Kapitus could not, by failing to appear, avoid being bound by that decision. The Public Service Commission had in rem jurisdiction over Timberline, a regulated utility, and all of its contracts. The non-appearance of Kapitus was an ineffective ploy to evade the jurisdiction of the Public Service Commission.

Timberline, along with CVPSD, consistent with precedent of this Court, moved to dismiss the claim for breach of contract on grounds of res judicata as a result of the decision of the Commission. Judge Lorensen of the Business Court of Tucker County granted dismissal finding that he, like this Court, should defer to the decision of the Public Service Commission. That ruling was correct. It was consistent with the ruling of this Court in Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E.2d 41 (1997).

An order of the Bankruptcy Court which concerned the contract, and on which Kapitus has relied, need not be credited because the superior adjudicatory forum was the Public Service Commission. It had the primary duty to protect the public interest. That duty was not subject to delegation. That duty could not be assumed by any other tribunal.

Judge Lorensen should be AFFIRMED. The contrary decision of the Intermediate Court of Appeals should be reversed. This case should be REMANDED to the Business Court for further proceedings[5] consistent with this opinion.

Respectfully submitted,

s/ *Martin P. Sheehan*
Martin P. Sheehan, Esq.
W.Va. Bar No. 4812
Sheehan & Associates, PLLC
1140 Market St., Suite 333
Wheeling, WV 26003
(304) 232-1064
(304) 232-1066 fax
Martin@MSheehanLaw.net
Counsel for Timberline Four Seasons Utilities, Inc.

s/ *John W. Cooper*
John W. Cooper, Esq.
W.Va. Bar No. 822
Coopers & Preston, PLLC
P.O. Box 167
Davis, WV 26260
(304) 478-4600
jcooper@mountain.net
Counsel for Canaan Valley Public Service District Receiver for Timberline Four Seasons Utilities, Inc.

s/ *Jeffrey S. Zurbuch*
Jeffrey S. Zurbuch, Esq.
W.Va. Bar No. 7384
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, WV 26241
(304) 636-3560
jzurbuch@bztlaw.com
Counsel for Canaan Valley Public Service District Receiver for Timberline Four Seasons Utilities, Inc.

[5] The Complaint filed by Kapitus was in several counts. Judge Lorensen only dismissed one count. He certified that decision as final pursuant to W.Va. Rule of Civil Procedure 54(b). At a minimum, those counts will need to be addressed on remand.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2024, I filed the foregoing ***Reply Brief of Petitioners*** with the Clerk of the Court using the File & Serve Xpress E-filing System which will deliver notice and copies thereof electronically to counsel of record as approved users:

Ancil G. Ramey, Esq.
Sarah C. Ellis, Esq.
Benjamin McFarland, Esq.
Colton C. Parsons, Esq.
Steptoe & Johnson PLLC
707 Virginia Street East
P.O. Box 1588
Charleston, WV 25326-1599
Counsel for Kapitus Servicing, Inc.

s/ *Jeffrey S. Zurbuch*
Jeffrey S. Zurbuch, Esq.
W.Va. Bar No. 7384
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, WV 26241
(304) 636-3560
jzurbuch@bztlaw.com