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OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

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No. 23-728

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

V.

KAPITUS SERVICING, INC.,
Petitioner Below, Respondent.

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Appeal from the Intermediate Court of Appeals
No. 23-ICA-22
(Circuit Court of Tucker County, Civil Action No. CC-47-2022-C-4)

REVERSED AND REMANDED

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Martin P. Sheehan, Esq.
Sheehan & Associates, PLLC
Wheeling, West Virginia
Attorney for Petitioner Timberline Four Seasons Utilities, Inc.

John W. Cooper, Esq.
Cooper & Preston, PLLC
Davis, West Virginia

Ancil G. Ramey, Esq.
Sarah C. Ellis, Esq.
Benjamin McFarland, Esq.
Colton C. Parsons, Esq.
Steptoe & Johnson PLLC
Charleston, West Virginia
Attorneys for the Respondent

Ann Starcher, Esq.

Attorney for Petitioner Canaan Valley Public Service District

Jeffrey S. Zurbuch, Esq.
Busch, Zurbuch & Thompson, PLLC
Elkins, West Virginia
Attorney for Petitioner Canaan Valley Public Service District

Spencer D. Elliott, Esq.
Webster J. Arceneaux, III, Esq.
Lewis Gianola PLLC
Attorneys for Amicus Curiae, the Public Service Commission of West Virginia

CHIEF JUSTICE BUNN delivered the Opinion of the Court.

## SYLLABUS BY THE COURT

1. "In reviewing an Intermediate Court of Appeals' decision from a circuit court's grant of a motion to dismiss, this Court applies a de novo standard of review." Syllabus Point 1, *Folse v. Rollyson*, 251 W. Va. 566, 915 S.E.2d 344 (2025).

2. "'The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).' Syllabus Point 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)." Syllabus Point 2, *Mountaineer Fire & Rescue Equipment, LLC v. City National Bank of West Virginia*, 244 W. Va. 508, 854 S.E.2d 870 (2020).

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

**BUNN, Chief Justice:**

While this case has a complex procedural history, ultimately, we consider the extent of the Public Service Commission's statutory authority to void a contract concerning a public utility. Petitioners Timberline Four Seasons Utilities, Inc. ("Timberline Utilities") and the Canaan Valley Public Service District[1] (collectively "the Timberline defendants") appeal the October 30, 2023 opinion issued by the Intermediate Court of Appeals ("ICA"), which reversed the circuit court's dismissal of a breach of contract claim against them.

In 2017, Timberline Utilities and an affiliated entity entered into a contract with First US Funding, whose servicing agent eventually became respondent Kapitus Servicing, Inc. ("Kapitus"), and pursuant to the contract, Kapitus agreed to provide $130,000 in exchange for future receipts from the entities up to a certain amount. Timberline Utilities and the affiliated corporation did not meet their obligations under the contract, and in a subsequent bankruptcy proceeding, the bankruptcy court overruled Timberline Utilities' objection to Kapitus's claim. The bankruptcy court dismissed the proceeding at Timberline Utilities' request. Kapitus then sued the Timberline defendants for breach of contract, alongside other claims, in the Circuit Court of Tucker County, and the case was referred to the Business Division. Meanwhile, before Timberline filed its

[1] In the underlying suit, Canaan Valley Public Service District was sued both individually and in its capacity as Receiver of Timberline Utilities, in the Circuit Court of Tucker County.

answer, the Public Service Commission ("PSC" or "Commission"), in a detailed order, found that the contract between Kapitus and Timberline Utilities was against the public interest and void. The business court then dismissed Kapitus's breach of contract claim against the Timberline defendants, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, deferring to the PSC's order that declared the contract void.

Kapitus appealed and the ICA reversed the business court's order dismissing the breach of contract claim, ruling that the bankruptcy court's determination regarding Kapitus's claim against Timberline Utilities was res judicata, binding the business court and the PSC. The Timberline defendants appealed to this Court.

We find that the ICA erred by reversing the business court's dismissal of the breach of contract claim. As detailed below, in dismissing the claim, the business court properly took notice of the PSC order voiding the contract. Because the PSC order declared the contract void, there was no contract to breach and Kapitus's complaint against the Timberline defendants alleging breach of contract failed to state a claim upon which relief could be granted.[2] We therefore reverse the ICA and remand the case to the business court for the dismissal of Kapitus's breach of contract claim.

[2] This Court acknowledges the participation in this case of the Public Service Commission of West Virginia, which filed an amicus curiae brief. We appreciate its participation in this appeal and have considered its arguments in deciding the issues.

## I.

## FACTUAL AND PROCEDURAL HISTORY

In April 2017, Timberline Four Seasons Resort Management Company, Inc., and Timberline Utilities, the two companies doing business as Timberline Four Seasons Resort Management Company ("Timberline"), entered into a revenue based factoring agreement (the "contract") with First US Funding.[3] At the time the parties entered the contract, Kapitus's predecessor serviced First US Funding.

In exchange for $130,000, Timberline agreed to pay "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" from "customers' [sic] and/or other third party payors" until Timberline paid $169,000 to Kapitus. Additionally, Kapitus received a security interest in Timberline's property. Kapitus asserts that it paid Timberline the required $130,000 in May 2017, pursuant to the contract, and that Timberline stopped making payments in June 2017, paying only $42,794 toward the indebtedness.

In March 2019, the Circuit Court of Tucker County placed Timberline Utilities in receivership at the request of the PSC, the agency that regulates public utilities

[3] Because this case is ongoing before the lower court, we recite the facts from the record for purposes of addressing the issues raised in this appeal only. We make no further conclusions regarding these facts.

in the State of West Virginia. In support of the receivership, the court explained that on February 21, 2019, the PSC

> concluded as a matter of law that the ownership and management of [Timberline Utilities] is grossly and willfully inefficient; the ownership and management of [Timberline Utilities] has demonstrated that it is unable or unwilling to adequately serve its customers; and that the ownership and management of [Timberline Utilities] is irresponsible and unresponsive to the needs of its customers[.]

The court appointed the Canaan Valley Public Service District as the receiver for Timberline Utilities.

Subsequently, in March 2021, Timberline Utilities filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of West Virginia and Kapitus filed a proof of claim in that proceeding. *In re Timberline Four Seasons Utilities, Inc.*, 2:21-BK-00125, 2021 WL 4952613, at *2 (Bankr. N.D.W. Va. Oct. 25, 2021). Timberline Utilities objected, arguing that the agreement between Kapitus and Timberline Utilities "was unenforceable due to lack of PSC approval[.]" *Id*.[4] The

[4] The United States Court of Appeals for the Fourth Circuit has explained the structure for establishing the valid claim in the context of a Chapter 11 bankruptcy proceeding:

> The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. The creditor's filing of a proof of claim constitutes prima facie evidence of the amount and validity of the claim. 11 U.S.C. § 502(a); Fed. R. Bankr. P. 3001(f). The burden then shifts to the debtor to object to the claim. 11 U.S.C. § 502(b); [*In re*

bankruptcy court initially overruled Timberline Utilities' objection to Kapitus's claim in August 2021. In October 2021, in response to a motion for reconsideration filed by Timberline Utilities,[5] the bankruptcy court again overruled Timberline Utilities' objection to Kapitus's claim after reconsidering the merits and found "that the agreement is voidable in favor of Kapitus and can be enforced at Kapitus's discretion." *Id.* at *10.[6] The bankruptcy court further found that Kapitus had "a valid security interest" in Timberline Utilities' accounts receivable. *Id*. The bankruptcy court determined that the contract was "still binding on the parties so long as it is a valid and enforceable contract notwithstanding

> *Johnson*, 960 F.2d 396, 404 (4th Cir. 1992)]. The debtor must introduce evidence to rebut the claim's presumptive validity. Fed. R. Bankr. P. 9017; Fed. R. Evid. 301; [4 Collier on Bankruptcy ¶ 501.02[3][d] (15th ed. rev. 2004)]. If the debtor carries its burden, the creditor has the ultimate burden of proving the amount and validity of the claim by a preponderance of the evidence. *Id.* at ¶ 502.02[3][f].

*In re Harford Sands Inc.*, 372 F.3d 637, 640 (4th Cir. 2004) (footnote omitted).

[5] Timberline Utilities asked the bankruptcy court first "to reconsider its finding that Kapitus's claim is supported by a judgment entered in the Commonwealth of Virginia on January 28, 2020[,]" and secondly, objected to the proof of claim "on the grounds that the agreement upon which it is based is void for illegality." *In re Timberline Four Seasons Utilities, Inc.*, 2:21-BK-00125, 2021 WL 4952613, at *1 (Bankr. N.D.W. Va. Oct. 25, 2021). The bankruptcy court reconsidered its finding regarding the Virginia judgment and "ultimately set aside the Virginia judgment because the judgment is void as to the Debtor." *Id.* at *6. However, then the court turned to the issue regarding the validity of the contract. *See id.*

[6] A review of the bankruptcy court's memorandum opinion reveals that no party invoked an adversary proceeding regarding the contract before that court. *See* Fed. R. Bankr. P. 7001 (entitled "Types of Adversary Proceedings").

the lack of PSC approval" and, similarly, that "the agreement is valid notwithstanding the lack of PSC authority." *Id.* at *7-8. The bankruptcy court also found that "[n]othing in the record insinuates that . . . the public served by the utility suffered any detriment as a result of the agreement" and that any alleged public detriment "was offset to some degree by the financing provided by Kapitus." *Id*. at *8.

While the bankruptcy proceeding was pending, the PSC filed a motion in the bankruptcy court for a ruling that its actions were exempt from the automatic bankruptcy stay. The bankruptcy court granted the PSC's motion on December 15, 2021. In a later order, the PSC described this motion as seeking "permission from the Bankruptcy Court to take regulatory action related to certain contracts."

In late 2021 to early 2022, several significant developments took place relevant to our analysis: (1) the PSC initiated its investigation of Timberline Utilities' contracts; (2) the bankruptcy court dismissed the bankruptcy matter at Timberline Utilities' request; (3) Kapitus filed its civil suit against Timberline Utilities in the circuit court, which was referred to the business court; (4) the PSC entered an order voiding the contract and security agreement between Timberline Utilities and Kapitus as against the public interest; and (5) the Timberline defendants filed a motion to dismiss with the business court. We discuss these events in more detail below.

On December 17, 2021, the PSC began investigating certain contracts entered into by Timberline Utilities. The investigation originated in part upon the discovery of "significant financial irregularities and improper actions on the part of former management including significant high cost financing type arrangements that were intended to only benefit [Timberline Utilities'] affiliates and not the Utility itself."[7] The PSC directed that Kapitus be given notice of the PSC's investigation and that the notice of investigation be published in Tucker County.

On December 28, 2021, Timberline Utilities requested dismissal of the bankruptcy matter without appealing the bankruptcy court's order regarding Kapitus's claim. The bankruptcy court dismissed the case in January 2022.

On March 7, 2022, Kapitus filed its lawsuit against Timberline Utilities and Canaan Valley Public Service District alleging breach of contract, fraud, unjust enrichment, fraudulent transfer, breach of fiduciary duties, tortious interference, conversion, and civil conspiracy, and also seeking a declaratory judgment. The case was assigned to the business court division.

[7] These quotations are from the PSC's final order approved on April 10, 2022, discussed in detail below.

On March 21, 2022, a PSC administrative law judge submitted a recommended decision to the PSC, which became a final PSC order on April 10, 2022. In that order, the PSC found that the contract between Timberline Utilities and Kapitus was void "as contrary to the public interest of the State of West Virginia pursuant to West Virginia Code §24-2-12."[8] Likewise, the PSC also determined that the corresponding security agreement and guaranty between Timberline Utilities and Kapitus was void because "it violates the public interest of the State of West Virginia pursuant to West Virginia Code §24-2-12."

In reaching these conclusions, the PSC determined that the contract at issue (along with other contracts) "involve[d] a scheme to improperly enrich affiliated corporations" and "impoverish[ed] [Timberline Utilities'] utility assets and burden[ed] the Utility with obligations related to obtaining cash infusions for affiliated corporations." The PSC noted that Timberline Utilities "in all likelihood did not even need an infusion of money" and instead "[t]he real purpose of the transactions was the illegal and improper scheme to use the assets and ratepayers of [Timberline Utilities] to prop up failing affiliates." The PSC heard evidence that the funds from Kapitus never reached the control or accounts of the utility. Still, the PSC found that the contract, on its face, was "clearly

[8] West Virginia Code § 24-2-12, discussed at length below, addresses the PSC's approval of utility contracts, among other matters.

against the public interest even without any improper transfers of the proceeds to affiliates."

The PSC order further noted that had the utility proposed this contract to the PSC, "approval would have certainly been denied." The PSC found that the contract was "contrary to the public interest" because its high costs "would be unnecessary for any utility operating in West Virginia[,]" as utilities can receive emergency interim rate relief from the PSC, and because the contract was "designed to assist the improper disembowelment of financial resources necessary for [Timberline Utilities] to function in order to improperly benefit affiliates." The contract was also contrary to the State's interests because the contract "reduce[d] the capacity of [Timberline Utilities] to continue to provide essential public services to its customers" and the contract was "an effort to circumvent the prohibitions established in the law that prohibit utilities in this State to engage in improper affiliate transactions."

The PSC found that, of the funds disbursed under the contract, "$10,700 of the cash paid by First US Funding for the future receivables of [Timberline Utilities] went to pay something which cannot be determined[,]" $1,200 went to transactional fees, and no evidence in the bank records indicated that the remaining $118,000 "ever reach[ed]" Timberline Utilities. Furthermore, in its findings of fact, the PSC determined that "[t]here

was no evidence in the financial records that any proceeds from the Kapitus (First US) transaction were entered into the control or accounts of [Timberline Utilities]."

On April 11, 2022, the day after the PSC's order became final, the Timberline defendants filed a motion with the business court to dismiss all of the complaint's allegations pursuant to West Virginia Rule of Civil Procedure 12(b)(6). The Timberline defendants claimed that the transactions underlying the complaint were void pursuant to West Virginia Code § 24-2-12 because the transactions required approval from the PSC, which was neither sought nor obtained; the transactions were contrary to the public interest; and, after an investigation, the PSC declared the agreements between Kapitus and Timberline Utilities void. Kapitus opposed the motion to dismiss on various grounds but primarily argued that res judicata applied to the bankruptcy court's earlier findings. Kapitus also argued that even if the business court found that the PSC order controlled as to the breach of contract claim, it would not affect the rest of the claims in Kapitus's complaint.[9]

The business court granted the motion to dismiss, but only as to Kapitus's breach of contract claim. The court reasoned that this Court had interpreted West Virginia Code § 24-2-12 in *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568 (1944), to

[9] Neither party suggested that Timberline defendants' motion was not properly the subject of a Rule 12(b)(6) motion.

require prior PSC approval "before the sale of property of the utility and/or entering into any financial transaction with an affiliate of the utility." The court further recognized that all public utilities are subject to the supervision of the PSC and that the PSC's orders regarding utilities are entitled to deference. The court rejected Kapitus's argument that it was bound by the findings contained in the bankruptcy court's order. As to the other counts in the complaint, the court denied the motion to dismiss.[10]

Kapitus then appealed the business court's dismissal of the breach of contract claim to ICA. The ICA reversed the business court's order, rejecting the business court's determination that the PSC's finding that the contract was void required dismissal of the breach of contract claim. Instead, the ICA determined that the federal bankruptcy court's decision regarding the validity of Kapitus's claim should have had a preclusive effect before the business court as to Kapitus's allegation that Timberline Utilities breached its contract, even after the PSC subsequently found the contract void and against the public interest. *Kapitus Servicing, Inc. v. Timberline Four Seasons Utilities, Inc.*, 249 W. Va. 70, 79, 894 S.E.2d 547, 556 (Ct. App. 2023). The ICA focused its analysis on what it described

[10] The court also certified that its dismissal order regarding the breach of contract claim was a final, appealable order subject to West Virginia Rule of Civil Procedure 54(b) and there was no just reason for delay. No party before this Court challenges this certification, and "the circuit court's certification is entitled to substantial deference, disrupted only when 'clearly unreasonable.'" *Hopkins v. Sutphin*, 253 W. Va. 372, ___, 931 S.E.2d 772, 783 (2026) (quoting *Province v. Province*, 196 W. Va. 473, 479, 473 S.E.2d 894, 900 (1996)). Seeing no indication that the certification is clearly unreasonable, we consider this appeal.

as "one central question[,]" which it found "dispositive of the case[,]" and concluded that the business court erred by "failing to find that the bankruptcy court's October 25, 2021, order was res judicata as to the current dispute between the parties." *Id.* at 76, 894 S.E.2d at 553. The ICA reasoned that, because Timberline Utilities did not appeal the bankruptcy court's order and thus once the "determination became final, the PSC was precluded from making a determination to the contrary." *Id.* at 79, 894 S.E.2d at 556. Timberline Utilities then appealed the ICA's determination to this Court.

## II.

## STANDARD OF REVIEW

"In reviewing an Intermediate Court of Appeals' decision from a circuit court's grant of a motion to dismiss, this Court applies a de novo standard of review." Syl. Pt. 1, *Folse v. Rollyson*, 251 W. Va. 566, 915 S.E.2d 344 (2025).

## III.

## DISCUSSION

On appeal, the Timberline defendants, in essence, argue that the business court properly deferred to the PSC's determination that the contract was void, in recognition of the PSC's statutory authority over utility contracts.[11] Moreover, they

[11] The Timberline defendants also assert, as an assignment of error, that Kapitus waived any argument that the PSC's order was res judicata in the underlying case

essentially assert that the ICA erred by applying res judicata to the bankruptcy court's decision. We agree.

### *A. The Business Court Properly Dismissed the Breach of Contract Claim*

In conducting de novo review, we first discuss the relevant considerations a court must make when determining whether to dismiss a claim pursuant to West Virginia Rule of Civil Procedure 12(b)(6). Under those standards, and in recognition of the State's power to declare a public utility's contract void by delegation to the PSC, we conclude that the business court properly dismissed the breach of contract claim in light of the PSC's declaration that the contract between the parties was void.

As noted above, this case arises from the business court's dismissal of the breach of contract claim in Kapitus's complaint pursuant to Rule 12(b)(6) for failure to state a claim. As we have often stated, "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 2, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020) (quoting Syl. Pt. 3, *Chapman v. Kane*

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because Kapitus had the opportunity to appear before the PSC and could have raised numerous "hypothetical arguments" in that proceeding. Because we review the circuit court's determination de novo, and also find that the circuit court did not err in dismissing the breach of contract claim on other grounds, we need not reach this assignment of error.

*Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977), which cites *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Generally, when a court considers a Rule 12(b)(6) motion, the court "should confine [its] review to the four corners of the complaint or other disputed pleading and may not consider extraneous documents." *Id.* at 526, 854 S.E.2d at 888. Likewise, when considering a motion to dismiss, the court must expressly disregard documents that are not implicitly or explicitly referred to by the pleading. *See* Syl. Pt. 6, *id*. Still, a court may take judicial notice of proceedings in the public record when considering a motion to dismiss, particularly when the opposing party does not dispute their factual accuracy. *See Gulas v. Infocision Mgmt. Corp.*, 215 W. Va. 225, 229 n.4, 599 S.E.2d 648, 652 n.4 (2004) (per curiam); *see also Sturm v. Bd. of Educ. of Kanawha Cnty.*, 223 W. Va. 277, 283 n.9, 672 S.E.2d 606, 612 n.9 (2008) (recognizing that "[a] court may look to matters of public record in deciding a Rule 12(b)(6) motion" and quoting *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000)). And here, while Kapitus disputes whether the PSC could declare the contract void after the bankruptcy court considered the issue, Kapitus does not dispute the authenticity of the PSC's order nor did it argue that this matter could not be considered in a Rule 12(b)(6) motion to dismiss or corresponding order.

To analyze whether the business court erred in deferring to the PSC's order, we must consider the PSC's power to declare utility contracts void. As a foremost principle, public utilities and their contracts are subject to state regulation. In *Preston County Light & Power Co. v. Renick*, the Court explained 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[.]" 145 W. Va. 115, 129, 113 S.E.2d 378, 387 (1960). The state agency with regulatory power over public utilities is, in West Virginia, the PSC. *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 776, 784, 137 S.E.2d 426, 432 (1964) ("This Court has consistently held that the policy of the law of this State is that all public utilities, whether publicly or privately owned, shall be subject to the supervision of the public service commission."). As the Court has long recognized, "[t]he Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public." Syl. Pt. 1, *West Virginia-Citizen Action Group v. Pub. Serv. Comm'n*, 175 W. Va. 39, 330 S.E.2d 849 (1985) (citing *Boggs v. Public Service Commission*, 154 W. Va. 146, 174 S.E.2d 331 (1970)).

In that vein, "all contracts made by a utility are subject to review by the [Public Service] Commission." *City of S. Charleston v. W. Va. Pub. Serv. Comm'n*, 204 W. Va. 566, 570, 514 S.E.2d 622, 626 (1999) (per curiam) (considering the PSC's action on a contract between two utilities). West Virginia Code § 24-2-12 specifically addresses

when a utility must seek the PSC's approval to enter a contract and it provides, in relevant part:[12]

> 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, but this shall not be construed to prevent the sale, lease, assignment or transfer by any public utility of any tangible personal property which is not necessary or useful, nor will become necessary or useful in the future, in the performance of its duties to the public; . . . (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[.]

Applying West Virginia Code § 24-2-12, this Court has held that the failure to obtain the consent and approval of the PSC of a utility contract makes that contract void. *See* Syl. Pt. 2, *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568 (1944).[13] West Virginia Code

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[12] West Virginia Code § 24-2-12 is entitled "What acts may not be done without consent of commission; consent in advance of exemption of transactions; when sale, etc., of franchises, mergers, etc., void."

[13] In relevant part, Syllabus Point 2, *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568 (1944), provides:

> a municipal corporation cannot sell, lease or otherwise dispose of its municipal water system without having first obtained the consent and approval of the Public Service Commission, or the waiver thereof, and a purported contract whereby a municipal corporation undertakes to lease to an individual its water

§ 24-2-12 also recognizes that, if the public interest is adversely affected, transactions including sales, transfers of property, and contracts are void:

> 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, but this shall not be construed to relieve any utility from any duty required by this section.

W. Va. Code § 24-2-12.

In explaining the PSC's regulatory power, the Court has noted that where utilities are a party to a contract, "[p]rivate contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict." Syl. Pt. 9, *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm'n*, 84 W. Va. 662, 100 S.E. 557 (1919).[14]

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> system for a definite term, executed without such consent and approval, or the waiver thereof, is void, and will not ground an action for claimed future profits based upon an alleged breach of contract.

[14] In *Mill Creek Coal & Coke Co. v. Public Service Commission*, the Court considered the regulation of contracts for electricity that were "entered into before the Public Service Commission Act was enacted," with favorable rates lower than the rates approved by the PSC due to war. 84 W. Va. 662, 677, 100 S.E. 557, 564 (1919). The Court found that it would not treat those earlier contracts differently, as that "would be to permit private contracts to dispossess the state of a portion of its police power, where the statute enacted pursuant to that power was subsequent to such contracts." *Id.* at 677-78, 100 S.E. at 564. The Court explained that allowing this preference would have an effect of

Moreover, "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." *Id.* at 676, 100 S.E. at 563. Accordingly, when the PSC reviews a utility's contract, it "may modify or void any clause in the contract that the Commission determines is adverse to public interest." *City of S. Charleston*, 204 W. Va. at 571, 514 S.E.2d at 627 (collecting cases).

Here, the parties do not dispute that Timberline Utilities is subject to PSC regulation and that the PSC's order indicates that the contract is void and not in the public interest. The PSC specifically concluded that the contract should be declared void "as to any application to [Timberline Utilities], as contrary to the public interest pursuant to West Virginia Code §24-2-12[,]" alongside the security agreement. The PSC also found that the contract was not submitted to the PSC by Timberline Utilities before entering into the contract. In its order, the PSC recounted myriad issues with the contract, including the "illegal and improper" scheme behind the contract, how the funds from the contract never

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"recogniz[ing] the contract action of individuals as of superior dignity to the police power of the state, a result tantamount to a denial of sovereignty in the state in the exercise of one of its most sacred and sovereign powers." *Id.* at 678; 100 S.E. at 564. The Court found this argument "untenable." *Id.*; *see also id.* at 676-77, 100 S.E. at 563 ("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.").

reached the utility, how utilities do not need high-cost loans because utilities can receive emergency interim rate relief from the PSC, alongside specific reasons that the contract was against the public and State interests.[15]

Turning to the motion to dismiss before the business court, because the PSC declared the contract and related security agreement between Kapitus and Timberline Utilities void, the business court properly took judicial notice of the PSC's order and found that there was no contract that the Timberline defendants could have breached. *See Gulas*, 215 W. Va. at 229 n.4, 599 S.E.2d at 652 n.4. In West Virginia, a breach of contract claim "requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015) (citing Syl. Pt. 1, *State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)). A void contract, however, means it "is of no legal effect, so that there is really no contract in existence at all." *Ryder v. Ryder*, No. 18-0865, 2020 WL 1674226, at *5 (W. Va. Apr. 6, 2020) (memorandum decision) (quoting *Void Contract*, Black's Law Dictionary (11th ed. 2019)).

[15] Given that the PSC's order listed these many specific reasons for finding that the contract (and related security agreement) were against the public interest, Kapitus's argument that the PSC determined that the contract was void only because of the parties' failure to submit the contract to the PSC for prior approval is inaccurate.

The business court properly considered the allegations in Count One of the complaint alleging breach of contract, recognized the PSC's statutory authority to examine and declare utility contracts void, took judicial notice of the PSC's order declaring the contract void, and finally concluded, in effect, that Kapitus could "prove no set of facts in support of [its] claim which would entitle [it] to relief." Syl. Pt. 2, in part, *Mountaineer Fire & Rescue Equip.*, 244 W. Va. 508, 854 S.E.2d 870 (quoting Syl. Pt. 3, *Chapman*, 160 W. Va. 530, 236 S.E.2d 207). Thus, the business court did not err in dismissing the count alleging the breach of contract.

### *B. The ICA Erred by Determining that the Bankruptcy Court's Decision Was Res Judicata as to the Contract Between the Parties and, in Effect, Stripped the PSC's Statutory Power*

Having found that the business court properly recognized that the PSC voided the contract and appropriately dismissed the breach of contract claim, we now turn to the ICA's erroneous determination that the bankruptcy court's decision was res judicata relating to that contract. In reaching its conclusion, the ICA ignored the PSC's authority over public utilities and discounted the bankruptcy court's willingness to lift the stay to allow the PSC to exercise its investigative powers in relation to these matters. As recited earlier, the bankruptcy court found that Kapitus had a valid claim against Timberline Utilities and cursorily determined that the contract was not against the public interest. Then, upon Timberline Utilities' request, the bankruptcy court dismissed the proceeding—but not before the bankruptcy court granted the PSC's motion asking that the court rule that

the PSC's regulatory action was exempt from the automatic stay.[16] The ICA, reasoning that because the bankruptcy court denied Timberline Utilities' motion for reconsideration of its determination that Kapitus's claim was valid, the bankruptcy court thus implicitly "expressed its intention to have the preclusive effect of the final order . . . remain regardless of any PSC's determination" regarding the contract. *Kapitus Servicing*, 249 W. Va. at 77, 894 S.E.2d at 554. The ICA went further than apparently divining the bankruptcy court's intent; it also found that the bankruptcy determination bound the PSC from finding otherwise regarding the contract, declaring that "[o]nce such determination became final, the PSC was precluded from making a determination to the contrary." *Id.* at 79, 894 S.E.2d at 556. Similarly, Kapitus now also argues that the PSC's order regarding the contract was "legally impotent" because the bankruptcy court had already determined the contract was in the public interest.

These approaches to res judicata regarding utility contracts misapprehend and undercut the PSC's statutory power to investigate and determine whether contracts between utilities and other parties are in the public interest, and we do not endorse such an infringement on the State's police power. *See* W. Va. Code § 24-2-12. While a bankruptcy court may recognize a claim of one party against a bankruptcy estate existing at a snapshot

[16] When granting this motion, the bankruptcy court noted at the hearing that "even 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."

in time, the Legislature purposefully granted the PSC the State's power to evaluate contracts regarding utilities and to determine whether those contracts are in the public interest—and to void them when they are not. *See id.* In this circumstance, with the facts presented here, the bankruptcy court's determination of the validity of a claim, arising from a contract, against a bankruptcy estate, does not later remove the State's power to investigate and void that contract as against the public interest. The PSC regulates and considers more than disputes between two parties to a contract or claims against a debtor's estate, such as in a bankruptcy proceeding, but takes into account the public's interest as well. *See* Syl. Pt. 1, *West Virginia-Citizen Action Group*, 175 W. Va. 39, 330 S.E.2d 849. Despite the invitation from the parties to do so, we need not evaluate whether the bankruptcy court acted first, earlier in time than the PSC, in some sort of dueling res judicata analysis; the bankruptcy court, in the procedural and factual situation presented here, decided whether a valid claim existed against a bankruptcy estate. In making that decision, the bankruptcy court simply lacked the power to later bind the PSC—exercising its State power—from conducting its investigation into the validity of the utility contract at issue and issuing a corresponding order.

## IV.

## CONCLUSION

For the reasons explained above, we reverse the October 30, 2023 opinion of the ICA reversing the business court's order. We also affirm the December 20, 2022 order of the business court dismissing Kapitus's breach of contract claim and remand the case to the business court for further proceedings.

Reversed and remanded.