IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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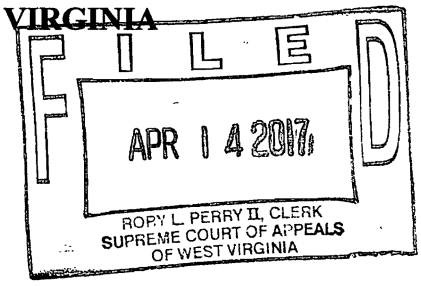

SWVA, INC.,

Petitioner Below/Petitioner,

v.

(CIRCUIT COURT OF CABELL COUNTY CIVIL ACTION NO. 16-C-807)

HUNTINGTON SANITARY BOARD and CITY COUNCIL OF THE CITY OF HUNTINGTON,

Respondents Below/Respondents.

BRIEF OF RESPONDENT HUNTINGTON SANITARY BOARD

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I. STATEMENT OF THE CASE

Respondent Huntington Sanitary Board ("HSB") offers the following statement of the case as necessary to correct inaccuracies and/or omissions provided by Petitioner SWVA, Inc., ("SWVA"). *See* W. Va. R. App. Proc. 10(d). Pursuant to W. Va. R. App. Proc. 10(c)(4), this is a concise account of the history of this case.

On December 5, 2016, the HSB met to consider an increase in rates to cover deficits and necessary operation and maintenance expenses associated with increased operation costs and $75 million in proposed capital projects. Upon being informed by the Board's counsel that the rates necessary to support the $75 million of capital projects could not be approved by council before the new members of City Council took office in January, the Mayor, who serves as chairman of the HSB, instructed the Board's accountant and engineers to return on December 7, 2016, with a revised ordinance which would include funding for operation and maintenance expenses and debt service associated with currently needed improvements.

On December 7, 2016, the HSB considered and approved a revised proposed Ordinance ("Ordinance") to increase its sewer rates to meet operation and maintenance expenses and to cover debt service costs associated with necessary improvements to the Huntington sewer system ("System"). The System had been operating at a deficient under its then current rates and the increase was necessary to address, among other things, rising health care costs, sludge disposal expenses, and to fund $7.5 million in necessary improvements to its municipal waste water sewage system. (A.R. 000063). The nine capital improvements associated with the Ordinance were:

1. Emergency chlorine room scrubber installation;
2. Improved wastewater treatment plant building ventilation;

3. 5th Avenue flood pump station flow shutoff/redirect to sanitary sewer pump station to eliminate overflows;

4. 48-inch interceptor cleanout/4th Street pump station wet well cleanout/sewer collection system model and flow analysis to understand what storm water events cause overflows;

5. Select heater replacement;

6. Secondary sludge thickener drive replacement;

7. New RAS/WAS ultrasonic flow meters installation;

8. Primary clarifier weirs replacement; and

9. Sludge loadout enclosure installation.

(A.R. 000175-176). These improvements involve routine maintenance and repairs that are essential to avoid catastrophic failure, preserve the System, and ensure compliance with federal regulations. (*Id.*). The HSB's certified public accountant prepared a financial cash flow analysis and prepared proposed rates to fund going-level costs and the debt service on improvements to the System. (A.R. 000035-000037).

The City of Huntington currently has one of the lowest billing rates in the State of West Virginia. (A.R. 000038). The proposed Ordinance, proposing the new rates, fees and charges, was sent to the City Council of the City of Huntington ("Council"), which then referred the Ordinance to the Finance Committee for consideration. (A.R. 000039). On December 14, 2016, the Finance Committee unanimously voted to send the Ordinance back to Council for a second reading and consideration, with a positive recommendation, and no changes. (A.R. 000085-000087).

On December 15 and 22, 2016, the entire Ordinance was published in the Huntington *Herald Dispatch*. The Ordinance provides that the purpose of the rate increase is to:

> ...provide revenues sufficient for the Sanitary Board of the City of Huntington to pay the daily expenses associated with the operation of its sewer system, to provide working capital reserves as required by Chapter 24 of the West Virginia Code, and to provide sufficient revenues to cover the costs associated with capital improvements and associated debt service... .

(A.R. 000146-000150). In addition to providing the public with the proposed rates and basis thereof, the public was informed that:

> Any person interested may appear before Council on the 27th day of December, 2016, at 7:30 p.m., which date is not less than 10 days subsequent to the date of the first publication of notice of this Ordinance, and present protests. At such hearing all objections and suggestions shall be heard and the Council shall take such action as it shall deem proper on the premises.

(A.R. 000150).

The public was also given notice of the hearing on the proposed Ordinance on December 16 and 23, 2016, and was again notified the purpose of the Ordinance was to enable the HSB to pay its daily operating expenses and cover costs associated with capital improvements, that all interested parties could appear and be heard at a hearing on December 27, 2016, at 7:30 P.M., and that a copy of the entire Ordinance could be obtained from the Clerk's office or the legal advertisements section of *The Herald Dispatch*. (A.R. 000151-000153).

On December 27, 2016, the Council held the hearing as scheduled and considered the Ordinance.

The Petitioner attended the December 27, 2016 public hearing. (A.R. 000220). At the hearing, the Petitioner expressed its opposition to the Ordinance. After all interested parties were heard at the public hearing, the Council passed the Ordinance by a 7-3 vote. (A.R. 000229).

Also, on December 27, 2016, the Petitioner filed a Complaint and Petition for Writ of Mandamus and Injunctive Relief with the Circuit Court in an effort to prevent passage of the utility rate ordinance. (A.R. 000001). A hearing on the Petitioner's Complaint and Motion was scheduled for January 10, 2017. At the hearing on the motion on January 10, 2017, the Circuit Court denied Petitioner's Motion and dismissed Petitioner's Complaint with Prejudice, finding that "the Capital Improvements proposed by the Board are 'in the ordinary course of business' and are not subject to the notice requirements of *W.Va. Code* §24-2-11(l), and the Petitioner has an adequate remedy at law under *W. Va. Code* §§24-2-1(b)(6) and (7)[.]" (A.R. 000334-000335).

Petitioner now appeals from the January 27, 2017, "Order Denying Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order and Dismissal of Complaint."

II. SUMMARY OF ARGUMENT

The underlying civil action arises from two pleadings brought by SWVA, Inc.: A Motion for Injunctive Relief and a Petition for Writ of Mandamus. Both the Motion and Petition requested that the Circuit Court declare that the capital improvements associated with the rate Ordinance were not in HSB's ordinary course of business; compel compliance with public notice requirements pursuant to *W. Va. Code* ("*Code*") §24-2-11(l) with respect to the Ordinance; enjoin any further consideration of the Ordinance by Council; and void any passage of the Ordinance made in violation of *Code* §24-2-11(l).

On January 27, 2017, the Circuit Court issued its "Order Denying Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order and Dismissal of Complaint." The Circuit Court held that the capital improvements considered by Council are "in the ordinary course of business"; forms of notice provided under *Code* §24-2-11(l) were not required prior to

the passage of the rate Ordinance; sufficient notice pursuant to *Code* §8-11-4 and §16-13-16 was provided to satisfy the only notice requirements for which the Ordinance was subject; and the Petitioner has an adequate remedy at law to contest the Ordinance before the Public Service Commission ("PSC"), which has jurisdiction over large municipal utilities with regard to resolution of disputes involving "rates, fees, and charges." (A.R. 000329-000335). Petitioner now appeals from the January 27, 2017, Order denying its Petition for Mandamus Relief.

Petitioner's appeal must fail on all assignments of error. The Circuit Court committed no error in holding that the Petitioner's case did not meet the legal prerequisites for mandamus or injunctive relief. While Petitioner was clearly entitled to notice of the Ordinance prior to its second reading, Council and HSB provided more than sufficient notice as required under West Virginia law for rate increases by large municipal utilities. Moreover, the Petitioner had an alternative avenue to challenge the rate Ordinance before the PSC. For these reasons, the HSB requests that this Honorable Court affirm the decisions reached by the Circuit Court of Cabell County in its denial of Petitioner's Petition for Writ of Mandamus and Injunctive Relief on January 27, 2017.

III. STATEMENT REGARDING ORAL ARGUMENT

Although the facts of this case were well-presented in the lower court, as reflected in the Appendix Record, the decisional process of this appeal would be aided by oral argument. The legal questions in this appeal present issues of first impression in West Virginia regarding (1) the PSC's jurisdiction under *Code* §24-2-1(b)(6) and (2) the meaning of "ordinary course of business" under *Code* §24-2-11(l).

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court has previously held that a *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus. *See Harrison County Com'n v. Harrison County Assessor*, 222 W. Va. 25, 28, 658 S.E.2d 555, 558 (2008). Under this standard, the Court considers *de novo* whether the legal prerequisites for mandamus relief are present. *Id.* (citing *McComas v. Board of Educ. of Fayette County*, 197 W. Va. 188, 193, 475 S.E.2d 280, 285 (1996)). In addition, to the extent that the Court's resolution of the instant matter requires the resolution of questions of law, the standard of review remains de novo. *Id.* Because Petitioner challenges the circuit court's interpretation of *Code* §24-2-1 and *Code* §24-2-11, a *de novo* standard of review is appropriate.

B. THE CIRCUIT COURT PROPERLY DISMISSED PETITIONER'S PETITION FOR WRIT OF MANDAMUS BECAUSE THE LEGAL PREREQUISITES FOR RELIEF ARE NOT PRESENT.

As the Circuit Court observed, a writ of mandamus is appropriate when the following three elements coexist: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 3, *State ex rel. Kucera v. City of Wheeling,* 153 W.Va. 538, 170 S.E.2d 367 (1969). This Court has traditionally "confined mandamus to 'limited and truly exceptional circumstances.'" *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 262, 524 S.E.2d 179, 183 (1999) (internal citation omitted). "[T]he burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief...a failure to meet any one of them is fatal." *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009) (citation omitted).

"To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded." Syl. Pt. 1, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988) (quoting Syl. Pt. 2, *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 177 S.E.2d 214 (1970)). Further, the Court has held that this legal right "cannot be established in the proceeding itself." *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 542, 170 S.E.2d 367, 369 (1969). Because Petitioner had an adequate legal remedy available which it failed to pursue prior to filing a petition with the Circuit Court to challenge the passage of the rate Ordinance, it is not entitled to relief in mandamus. In addition, mandamus relief is not appropriate because the HSB provided more than sufficient notice as required under the applicable *Code* provisions prior to the passage of the Ordinance.

1. PETITIONER HAS AN ADEQUATE REMEDY AT LAW BEFORE THE PSC.

Petitioner's first assignment of error appears to present two distinct areas of contention regarding the Circuit Court's denial of Petitioner's Petition for Writ of Mandamus. First, Petitioner argues that that the Circuit Court inaccurately characterized its challenge to the Ordinance as a rate dispute. Second, Petitioner denies the PSC's jurisdiction over disputes involving rates, fees and charges of large municipal utilities.

Petitioner's argument is flawed because it is evident from Petitioner's conduct throughout the ordinance process and petition to the lower court that it sufficiently understood the Ordinance and opposed the justifications for the rate increase. Moreover, a plain reading of the relevant provisions of the *Code*, and actions of the PSC itself, establish that the PSC has jurisdiction to resolve notice issues and rate disputes involving large municipal utilities, like the HSB.

Therefore, the Circuit Court correctly held that the Petitioner had an adequate remedy at law before the PSC and is not entitled to extraordinary relief in mandamus.

i. PETITIONER'S DISPUTE WITH THE ORDINANCE INVOLVES THE PASSAGE OF NEW RATES, FEES AND CHARGES FOR THE HSB'S SEWER SERVICES.

The Petitioner has taken issue with the timing and extent of notice prior to the passage of the rate Ordinance. However, it is evident from Petitioner's filing in the lower court and its appeal to this Court that its true dispute with the Ordinance is the increase in rates, fees and charges to Petitioner. As an operator of a large carbon steel mill and a customer of the HSB, Petitioner understandably would have concerns with respect to rate increases for HSB sewer services. At the public hearing on December 27, 2016, Petitioner presented to Council the financial challenges it currently faces as an entity in a "very competitive market with very razor thin margins[,]" increasing electricity and health care costs, and high water rates. (A.R. 000226). The Petitioner unequivocally took a stance in opposition to the rate increase at the hearing and thoroughly expressed to the Council the reasons it objects to the Ordinance.

In its challenge to Council's adoption of the rate increase, Petitioner contends that insufficient notice deprived it of understanding the municipality's intentions through passage of the Ordinance and from participating in the decision making process. (A.R. 000292). However, it is evident from Petitioner's active participation at the hearing and firm declaration in opposition to the rate increase that this is simply untrue.

The Petitioner also argued to the lower court that its true concern with the Ordinance is the increase in rates. Paragraph 1 of Petitioner's Complaint and Petition states that Council "will take up for consideration an ordinance increasing rates, fees and charges of the [HSB]... ." (A.R. 000001). It further argued in Paragraph 2 that Council and the HSB "failed to give proper

public notice of this rate increase in compliance with W.Va. Code §24-2-11(l)" (*Id.*) and that the Ordinance will "result in a significant rate increase of roughly 58% for HSB customers." (A.R. 000007).

The Petitioner has attempted to confine the Court's focus to one section of the *Code*, which section is only one part of the statutory framework applicable to rate ordinances and construction of capital improvements by municipal sewer utilities. In order to understand the process leading up to the passage of the Ordinance on December 27, 2016, it is helpful to follow the statutory scheme related to the ordinance process. Below is a brief summary of several of the provisions of the *Code* that relate to this matter, which, when read together, establish that the HSB and Council have satisfied the statutory requirements related to the Ordinance and that the Petitioner is not entitled to the relief it is seeking.

Prior to the enactment of Senate Bill 234 ("SB 234") in 2015, municipally-owned and operated sewer utilities were required to follow the provisions of three separate sections of the *Code* when adopting a rate ordinance. Those provisions were:

a. §8-11-4(a)(2) which requires a municipality to publish notice one time with publication at least 5 days before the rate ordinance is finally adopted. Said notice is to include notice of time and place of hearing.

b. §16-13-16(h) which requires a municipality providing sewer service to publish notice two times after introduction of the rate ordinance, with the first notice at least 10 days prior to the date of the hearing.

c. §24-2-4b(b) which required all municipalities providing utility service to adopt a rate ordinance and to provide reasonable advance notice of a rate change as would allow the filing of timely objections of the rate change. Such advance notice would either be on the monthly billing statement in the month next preceding the month in which the rate change is to become effective, or the utility could provide **"other reasonable notices as will allow filing of timely objections of the rate change."** Typically, because the billing statement does not contain sufficient room to inform the customers of the rate increase and the opportunity to protest the rate

> change, such alternate form of notice was provided in the form of a press release or the publication of notice of such information.

With the enactment of SB 234, which became effective on June 12, 2015, the Council is still required to comply with the provisions of *Code* §8-11-4 and *Code* §16-13-16 when adopting rate ordinances, but because the HSB is a large municipal utility providing sewer service, the Council was exempted from the provisions of *Code* §24-2-4b. Such exemption stems from the amendment and addition of subsection (j) of that section which states as follows:

> (j) Notwithstanding any other provision of this code to the contrary, the jurisdiction of the commission over water and/or sewer utilities that are political subdivisions of the state and having at least four thousand five hundred customers and annual gross combined revenues of $3 million or more shall be limited to those powers enumerated in subsection (b), section one of this article.

The HSB has more than 4,500 customers and annual gross revenues of more than $3 million. Nothing in *Code* §24-2-1(b) referred to in subsection (j) addresses the actual rate making process. Therefore, prior to the hearing and Council meeting on December 27, 2016, the HSB and Council followed the provisions of *Code* §8-11-4 and §16-13-16 regarding notice that is required for the adoption of municipal sewer rate ordinances. Although not required to do so, the HSB and Council also forwarded a press release to the Huntington Herald Dispatch to give notice to the customers of the fact that a hearing on the rate ordinance would be held at 7:30 P.M. on December 27, 2016 at which interested parties could appear and be heard. (A.R. 000152-000153).

As shown by the notice provided by the Council, and as found by the lower court, Council provided more than the required notice for a rate increase. Petitioner's sole basis in seeking a challenge to the action of the HSB and Council, stems from the fact that the HSB and the Council and the Circuit Court determined that the capital improvements which would be

funded by the rate increase are in the ordinary course of business and thus notice under *Code* §24-2-11(1) was not required.

Petitioner is not seeking additional notice to interpret the rate Ordinance. Given the time Petitioner had to assemble a petition and present its motion to the lower court, Petitioner clearly had sufficient notice to understand the proposal and analyze the impact to its business operations.

Representatives of the Petitioner attended meetings, actively participated in the hearing process with regard to the rate increase, was granted adequate time to be heard by Council to express its concerns, and, did in fact, make a public comment in disfavor of the Ordinance in attempt to persuade the Council to vote to deny its passage. By its own conduct throughout the Ordinance process, Petitioner has demonstrated that it takes issue with the rates, fees and charges promulgated by the Ordinance.

ii. *W. VA. CODE* §24-2-1(b) GRANTS THE PSC JURISDICTION OVER DISPUTES INVOLVING NOTICE AND RATES, FEES AND CHARGES OF LARGE MUNICIPAL UTILITIES.

The 2015 amendments to *Code* §24-2-1, enacted by the passage of SB 234, provide Petitioner with an alternative remedy at law for challenging the rate Ordinance. SB 234 was enacted to reduce the PSC's reach to regulate publicly owned utilities. While SB 234 does exempt large municipal utilities from certain areas of regulation by the PSC, the Legislature has enumerated areas in which the PSC may exercise jurisdiction over large municipal utilities like the HSB. In this regard, *Code* §24-2-1(b) provides, in pertinent part:

> The jurisdiction of the commission over political subdivisions of this state providing separate or combined services and having at least four thousand five hundred customers and annual combined gross revenues of $3 million or more that are political subdivisions of the state is limited to:
> ...
> (2) Regulation of measurements, **practices, acts** or services, as granted and described in section seven of this article;

...

(6) Investigation and resolution of disputes involving political subdivisions of the state regarding inter-utility agreements, **rates, fees and charges**, service areas and contested utility combinations.

(7) Customers of water and sewer utilities operated by a political subdivision of the state and customers of stormwater utilities operated by a public service district may bring formal or informal complaints regarding the commission's exercise of the powers enumerated in this section and the commission shall resolve these complaints.

(emphasis added).

Specifically, *Code* §§24-2-1(b)(2), (6) and (7), when read together, authorize any customer to file a complaint with the PSC, challenging the acts, practices, rates, fees and charges of a large municipal utility. The Petitioner failed to pursue this legal avenue to challenge the extent of notice and the adoption of the Ordinance establishing and increasing rates, fees and charges for the HSB's sewage services. Therefore, the Circuit Court correctly held that mandamus and injunctive relief was not appropriate because the Petitioner had an adequate remedy at law to contest the Ordinance.

Petitioner argues that Subsection (b)(6) of *Code* §24-2-1 limits the PSC's jurisdiction of large municipalities to disputes involving only inter-utility activities. However, a plain reading of that provision and actions of the PSC itself do not support Petitioner's assertion.

Subsection (6) clearly states that the PSC has jurisdiction to investigate and resolve several types of disputes: (1) disputes involving political subdivisions of the state regarding inter--utility agreements; (2) disputes regarding rates fees and charges; (3) disputes regarding service areas and (4) contested utility combinations.

In determining the meaning of a statutory provision, the Court "look[s] first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax*

Dep't, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). *See also* Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."). The Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted). *Code* §24-2-1(b)(6) unambiguously states that the PSC's jurisdiction extends to disputes with respect to "rates, fees and charges." Therefore, the Circuit Court correctly applied the plain meaning of this provision.

At pages 13 and 14 of its Brief, the Petitioner incorrectly argues that in two cases before the PSC that body has addressed the scope of the PSC's jurisdiction under *Code* §24-2-1(b)(1) through (8). In fact, the cases relied upon by the Petitioner do not support its position.

In the case of *Hardy County PSD v. Town of Moorefield,* Case No. 15-1957-W-C, the Commission denied the Town's Motion To Dismiss for lack of jurisdiction in an Order entered May 17, 2016.[1] Contrary to the representation of the Petitioner, neither the May 17, 2016 Order, nor the June 17, 2016[2] Order cited by Petitioner addressed jurisdiction under *Code* §24-2-1(b)(6) or (7). *Code* §24-2-1(b)(6) and (7) apply solely to large municipal utilities like HSB, not small utilities like the Town of Moorefield.[3]

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[1] See http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=450878&NotType='WebDocket'

[2] See, http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=452924&NotType='WebDocket'

[3] See Footnote 1 on page 5 of May 17, 2016 Order referenced in Footnote No. 1 above.

The Petitioner also mistakenly relies upon a Staff Memorandum filed by the Staff of the PSC in the case of *Cooper v. South Charleston Sanitary Board*, Case No. 16-0261-S-C, as establishing that the Commission lacks jurisdiction under *Code* §24-2-1(b). While that case does not support Petitioner's argument here, it and a companion case, are relevant because both cases involve similar claims regarding notice under *Code* §24-2-11(1) and *Code* §24-2-1(b) that are involved in this case.

As the Court is aware, the PSC does not speak through memoranda filed in cases being litigated before the agency by any party including its staff.[4] The PSC speaks only through its Orders. For that reason, it is important to observe just what the PSC actually has said in the two South Charleston cases regarding its jurisdiction in two cases such as this which were filed at the PSC since the passage of SB 234, and were not dismissed on jurisdictional grounds.

On August 15, 2016, the PSC issued a joint Order in *Robb v. South Charleston Sanitary Board*, Case No. 16-0196-S-C, and *Cooper v. South Charleston Sanitary Board*, Case No. 16-0261-S-C.[5] In that Order, the PSC observed that on March 17, 2016, the Staff filed a Memorandum arguing that the PSC lacked jurisdiction in the *Robb* case.[6] On March 28, 2016, the South Charleston Sanitary Board filed a reply in support of the Staff position, raising the same arguments as those raised here by the Petitioner regarding *Code* §24-2-1(b).[7] Regarding

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[4] Nor does it speak through Staff comments to the news media as suggested at Footnote 2 of the Petitioner's Brief.

[5] See, http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=456473&NotType='WebDocket'

[6] See, http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID= 56473&NotType='WebDocket', page 2

[7] *Id.*

the *Cooper* case, the August 15, 2016 order stated that the Staff had filed a Memorandum on March 22, 2016, arguing that the PSC does not have authority to decide complaint cases filed against large municipalities by a customer.[8]

In granting Mr. Cooper's request to dismiss his own case due to health issues, the Commission also clarified that:

> Both Complaints object to the adequacy, accuracy and/or content of the public notices provided with respect to the ordinance, and assert that the rate ordinance is discriminatory.[9]

Rather than dismissing either case on jurisdictional grounds, the PSC permitted the *Robb* case to go forward and established a procedural schedule.

Thereafter, on November 10, 2016, the Commission entered another order in the *Robb* case.[10] In that order, the PSC reviewed the history of the case, addressed outstanding matters, and set a future hearing.

At pages 6 and 7 of the November 10, 2016 order, the PSC repeated the scope of Mr. Robb's complaint concerning the adequacy of the hearing held by South Charleston and whether the rates adopted are discriminatory. In a footnote the PSC observed that, although the complaint alleged an inadequacy of notice, the PSC had determined that the notice that had been provided was proper.[11] Finally, the Commission established the scope of the hearing which it rescheduled for January 18, 2017.

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[8] *Id.* at 3.

[9] *Id.* at 7.

[10] See, http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=461695&NotType='WebDocket'

[11] See Footnote 1 on p. 7.

Thus, rather than finding that it lacked jurisdiction to consider matters of notice and rates regarding large municipalities post SB 234, the Commission has exercised its jurisdiction to review the adequacy of notice and to determine a dispute over rates and charges filed by a single customer in both the *Robb* and *Cooper* cases, and the *Robb* case remains pending following the January 18, 2017 hearing.

2. BECAUSE THE ORDINANCE ESTABLISHES RATES SUFFICIENT TO FUND CAPITAL IMPROVEMENTS THAT ARE IN THE ORDINARY COURSE OF BUSINESS, THE HSB HAD NO LEGAL DUTY TO PROVIDE NOTICE UNDER *W. VA. CODE* § 24-2-11(l) AS ARGUED BY PETITIONER.

The Circuit Court properly found that HSB and Council did not have a legal duty to provide further notice of the proposed Ordinance as Petitioner seeks to compel and, therefore, mandamus relief is improper. *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009) (holding that a failure to meet any one element of mandamus relief is fatal to a party's claim). Petitioner's second assignment of error presents a conclusory argument that the capital improvements approved with passage of the ordinance are not in the HSB's ordinary course of business and, thus, are subject to heightened notice requirements pursuant to *Code* §24-2-11(l). However, the Code does not define what is "in the ordinary course of business" in the context of large municipal utility construction projects. Rather, the Legislature left local governing bodies with discretion to determine what is within the ordinary course of business just as it did previously with the PSC regarding the interpretation of the term "ordinary extensions of existing systems in the usual course of business" in *Code* §24-2-11(a).

On February 24, 1993, after more than four years, the PSC closed a general investigation which it had initiated on February 9, 1989 to consider guidelines for determining whether certain

utility projects to be considered are ordinary extensions of existing systems in the usual course of the utility's business or whether the project in question requires a certificate of convenience and necessity pursuant to *Code* §24-2-11, prior to construction. In General Order 246,[12] the PSC dismissed the proceeding and decided not to initiate a rulemaking proceeding to establish guidelines. Rather, the Commission decided to continue with its interpretation of *Code* §24-2-11:

> . . .which is flexible and allows the Commission and its Staff to work closely with the utilities to determine if a certificate application should be filed prior to construction, on a case by case basis.

The practice discussed in General Order 246 continues to this day.

In passing SB 234, the Legislature passed a sweeping overhaul of the PSC's jurisdiction over publicly-owned water and sewer utilities. One area of deregulation was the exemption of large municipal sewer utilities such as HSB from the requirement of obtaining a certificate of convenience and necessity from the PSC. Instead, such utilities are now left with the responsibility under *Code* §24-2-11(1) to determine whether a construction project is NOT in the "ordinary course of business", and requires additional notice beyond those otherwise required for the adoption of rates for those projects.

In its December 7, 2016 decision to revise the rate Ordinance to present to the Council, the HSB determined that the capital improvements to be funded by the proposed rates are in the ordinary course of business. This issue was discussed and considered by both the Finance Committee of Council on December 14, 2016, (A.R. 000050-58; 000060-61) and the entire Council on December 27, 2016 (A.R. 000211-214). Its vote to adopt the Ordinance was

[12] See, http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=585&Source=Archive

Council's determination that such improvements are in the ordinary course of business and no additional notice was required. The Circuit Court agreed with that determination.

On December 27, 2016, the Council exercised its discretionary power and determined that the capital improvements were in the ordinary course of business. Consistent with its decision, the Council and the HSB did not have a duty to provide public notice beyond those requirements established for rate increases of large municipal utilities. Therefore, the Circuit Court correctly held that the Petitioner is not entitled to relief in mandamus.

i. THE CAPITAL IMPROVEMENTS APPROVED BY THE COUNCIL IN ITS PASSAGE OF THE ORDINANCE ARE IN THE HSB's ORDINARY COURSE OF BUSINESS.

Through passage of the Ordinance on December 27, 2016, the Council exercised its discretionary duty and determined that the nine capital improvements associated with the rate Ordinance are within the HSB's ordinary course of business. The Council is granted this implied authority under *Code* § 24-2-11, which further limits the PSC's oversight of large municipal utilities.

Code §24-2-11 has generally set forth the requirements for public utilities to obtain a certificate of convenience and necessity from the PSC for approval to construct utility facilities unless such constructions are "ordinary extensions in the usual course of business." However, with the passage of SB 234, the Legislature exempted large municipal utilities, such as the HSB, from the requirement of obtaining a certificate of convenience and necessity from the PSC prior to construction. In so doing, the Legislature added a new subsection (l) which sets out the procedure to be followed by large municipal utilities desiring to pursue "construction projects that are NOT in the ordinary course of business." (emphasis added).

Code §24-2-11(a) now states:

> (a) A public utility, person or corporation **other than a political subdivision of the state providing water, sewer and/or stormwater services and having at least four thousand five hundred customers and annual gross combined revenues of $3 million dollars or more** may not begin the construction of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in section one, article two of this chapter, nor apply for, nor obtain any franchise, license or permit from any municipality or other governmental agency, except ordinary extensions of existing systems in the usual course of business, unless and until it shall obtain from the Public Service Commission a certificate of public convenience and necessity authorizing such construction franchise, license or permit.
> (emphasis added).

Moreover, *Code* §24-2-11(l) reads, in pertinent part:

> (l) Water, sewer and/or stormwater utilities that are political subdivisions of the state and having at least four thousand five hundred customers and combined gross revenues of $3 million dollars or more desiring to pursue construction projects **that are not in the ordinary course of business shall provide notice** to both current customers and those citizens who will be affected by the proposed construction…
> (emphasis added).

As discussed above, the term "ordinary course of business" within the meaning of *Code* §24-2-11(l), is not defined in the *Code*. By omitting any such definition, the Legislature entrusted governing bodies, like the Council, with sole discretion to determine what projects are "in the ordinary course of business." The Legislature demonstrated confidence in the governing bodies of large municipalities to fill the role previously held by the PSC in determining when certain construction projects require additional scrutiny.

In limiting the PSC's authority over large municipal utilities, SB 234 demonstrates that the Legislature understands that governing bodies of large municipalities are equipped to make these decisions. Considering the statutory scheme in its entirety, it is clear that the Legislature intended that Council determine which municipal utility construction projects are outside the

ordinary course of business and apply the notice requirements that correspond with such determination.

Petitioner relies on PSC cases considering the need for a certificate to bolster its argument that the nine capital improvements associated with the Ordinance were not in the HSB's ordinary course of business. However, the term "ordinary course of business" as used in *Code* §24-2-11(l) and the term "ordinary **extensions of existing systems in the usual** course of business" as used in *Code* §24-2-11(a) and interpreted in PSC certificate of convenience and necessity cases may be similar, but they are not the same. It would be contrary to the statutory scheme of *Code* §24-2-11 to hold the considerations for a certificate of convenience and necessary applicable to considerations for determining whether a construction project is within the ordinary course of business of a large municipal utility. Thus, these PSC decisions are not binding as to the meaning of "ordinary course of business" under *Code* §24-2-11(l). Further, applying standards used by the PSC in cases involving non-exempt utilities would be inconsistent with the Legislature's action in SB 234 to exempt large municipalities from PSC regulation.

Even though the Council is exempt from the standards required for a certificate of convenience and necessity, the capital improvements considered by the Council in this case still would not have required a certificate of convenience and necessity under prior decisions of the PSC.

As Petitioner correctly cites, the PSC has traditionally considered eight factors to determine the need for a certificate, including:

> (a) the estimated cost of the project as compared with the annual revenues of the applicant; (b) the level of complexity (engineering or otherwise) of the proposed project; (c) the type of funding proposed for the project; (d) the factors driving the

> project; (e) the urgency of the project; (f) the experience and competency of the applicant's staff and/or professional consultants; (g) the regulatory history of the applicant; and (h) the potential benefits and risks of the project.

Town of West Hamlin, W. Va. Pub. Serv. Com'n No. 05-0282-W-PW, at 2-3 (Commission Order April 25, 2005). Nonetheless, application of these factors to determine what construction projects would require a certificate of convenience and necessity under Code §24-2-11(a) or whether they are "in the ordinary course of business" under *Code* §24-2-11(l), would still lead to a finding in favor of the HSB.

Petitioner contends that because the project constructs new facilities, it is not in the ordinary course of business. The capital improvements considered by Council do include new equipment and construction. However, these improvement projects will serve to replace essential parts to the waste water sewage system that are no longer operating or performing efficiently. (A.R.000040-000041). A thorough review of the "Capital Improvements and Associated Debt Service" document, detailing the nine capital improvements, provides that the System requires these improvements for operational, safety, and regulatory reasons.

Specifically, the installation of new ventilation parts (item 2), heaters (item 5), sludge drive (item 6), flow meters (item 7), and weirs (item 8) are crucial replacements for old equipment that is no longer operating due to normal wear and tear. Similarly, the installation of a new pipe (item 3) and concrete curb and drain (item 9) and an analysis of sewage flow (item 4) are necessary improvements and performances to prevent catastrophic failures. Finally, the Environmental Protection Agency has required that the HSB install a new scrubber system (item 1) for regulatory compliance with the Clean Air Act. (A.R 000178). All nine capital improvements are imperative to the continuing operation of the HSB. Further, these

improvements are similar projects where the PSC, in 2009 (A.R. 000155) and 2014 (A.R. 000169), determined that no certificate was required.

It is the HSB's responsibility to operate and maintain its System under the appropriate review of the Council. Through the rate Ordinance and the associated improvements, the HSB is attempting to ensure just that—to protect the health and welfare of the residents of Huntington. At some point, equipment needs to be replaced or emergencies will occur. For the HSB, the time is now to implement these improvements to prevent further overflows, line collapses (A.R. 000046), and sink soles, which are occurring approximately two or three times a week in the City of Huntington. (A.R. 000307).

Petitioner argues that the HSB will take on additional debt to undertake these improvements at a level that exceeds some other pre-SB 234 PSC certificate cases. In addition to the fact that HSB is no longer subject to PSC standards and requirements, failing to make substantial upgrades to the System now will only lead to greater debt down the line as emergencies necessitating temporary fixes will persist. Cost of the project is only one factor the PSC considers to determine whether a construction projects is an "ordinary extension of existing systems in the usual course of business." A decision scales heavily in favor of the HSB when weighing this factor against the basis for the project, the urgency of the project, and the benefits of the project.

Petitioner also goes at length to discuss a prior proposal the HSB considered, which suggested 15 items of capital projects to its waste water sewage system. This proposal that Petitioner mentions was not approved or submitted to the Council for consideration and is not the subject of this appeal. It was specifically rejected at the December 5, 2016 meeting in favor of a proposal which would allow the construction of projects in the "ordinary course of business".

Thus, it is irrelevant whether the initial proposal contained construction projects that are not in the ordinary course of business. Only the nine capital improvements associated with the rate Ordinance are relevant to this appeal. With the approval of the Ordinance, Council determined that the construction projects associated with the Ordinance are in the HSB's ordinary course of business.

ii. PROPER NOTICE FOR A MUNICIPAL ORDINANCE IMPLEMENTING RATE INCREASES WAS PROVIDED PURSUANT TO *W. VA. CODE* §8-11-4(a)(2) AND §16-13-16(h).

Petitioner contends that the adoption of the Ordinance must be void as public notice was not provided pursuant to *Code* §24-2-11(l). Subsection (l) of Section 24-2-11 sets forth the notice requirements for large municipal utilities desiring to construct projects that are *not* in the ordinary course of business. This provision requires, *inter alia*, that notice of a proposed project NOT in the ordinary course of business must "be specified on the monthly billing statement of the customers of the utility for the month next preceding the month in which the contemplated construction is to be before the governing body on first reading." The Council approved rates for the System to satisfy $7.5 million investment towards capital improvements that are in the ordinary course of business. Contrary to Petitioner's assertion, HSB therefore, was not required to comply with the notice requirements of *Code* §24-2-11(l).

Consistent with its determination that the nine capital improvements associated with the rate Ordinance are in the ordinary course of business, Council and the HSB provided more than sufficient notice to its customers, including Petitioner, as required of municipal rate ordinances. The public notice requirements for municipal rate ordinances are codified in *Code* §8-11-4(a)(2) and §16-13-16(h).

Code §8-11-4 established procedures to be followed by a municipality in adopting an ordinance. Subsection (a)(1) requires that the ordinance be read twice. Subsection (a)(2) further requires the municipality to publish a notice one time, at least five days before a hearing on the proposed ordinance. Such notice includes the scope of ordinance; date, time, and place of the public hearing; the place where the proposed ordinance may be inspected by the public; and advising that all interested parties may appear at the hearing and be heard.

Additionally, *Code* §16-13-16 and subsection (g) grants governing bodies with the power and duty to establish rates, fees and charges of utilities after a public hearing, at which HSB customers, including Petitioner, shall have an opportunity to be heard. Subsection (h) sets forth the notice requirements for the adoption of a rate ordinance and states, in pertinent part:

> notice of such hearing, setting forth the proposed schedule of rates, fees or charges, shall be given by publication as a Class II-0 legal advertisement ... and the publication area for such publication shall be the municipality. **The first publication shall be made at least ten days before the date fixed in the notice for the hearing.**
> (emphasis added).

As established earlier, the HSB provided notice beyond what was required of it for consideration of the Ordinance under these two provisions. Twelve days before the hearing, on December 15, 2016, the entire Ordinance was published in the legal advertisement section of the Huntington *Herald Dispatch*. This publication also informed the public that the basis for the Ordinance was to fund capital improvements, set forth the proposed rates, and advised that any person interested in being heard may appear "before Council on the 27th day of December, 2016, at 7:30 p.m., which is not less than 10 days subsequent to the date of the first publication of notice of this Ordinance... ." (A.R. 000150). The same form of notice was again published on December 22, 2016. (A.R. 000146).

While not required to do so, the HSB also published a press release on December 16 and 23, 2016, again informing the public of the proposed Ordinance, the basis thereof, the time and place of the hearing to consider the Ordinance, where copies of the Ordinance can be reviewed, and that all interested parties may appear and be heard at the meeting to consider the Ordinance. (A.R. 000153). The HSB published four notices in total informing the public of the Ordinance, its effective rate increases, the purpose thereof, and when and where to participate in meetings regarding its passage.

Finally, *Code* §24-2-4b also sets forth procedures to be followed for changing rates and charges of municipal utilities. The SB 234 once again limited the jurisdiction of the PSC with the inclusion of Subsection (j), which provides, in pertinent part:

> Notwithstanding any other provision of this code to the contrary, the jurisdiction of the commission over water and/or sewer utilities that are political subdivisions of the state and having at least four thousand five hundred customers and annual gross combined revenues of $3 million or more **shall be limited to those powers enumerated in subsection (b)**, section one of this article.
> (emphasis added).

Nevertheless, *Code* §24-2-1(b) does not impose additional public notice requirements or establish any procedure to be followed when approving a rate. Therefore, once the Council determined that the project improvements were in the ordinary course of business, it was only required to comply with the public notice procedures established for rate approval, *i.e. Code* §8-11-4(a)(2) and §16-13-16(h).

The Petitioner conceded at the hearing on its motion in circuit court that it did not have any issues with the notice for the rate increase. Rather, Petitioner alleged that it has concerns with the notice that was provided for the construction of the capital improvements. The transcript of the hearing reflects:

The Court: If I find that the ordinance is in the ordinary course of business, detailing projects in the ordinary course of business, do you then agree that there was sufficient notice?

Mr. Ward: We do not contest that, that is right, Your Honor, yea.

(A.R. 000310-000311). Counsel for Petitioner later suggests to the circuit court:

The Ordinance, that is the subject of this appeal, approves a rate increase and is subject only to the notice requirements for municipal rate ordinances. The Appendix Record makes clear that more than sufficient notice, pursuant to the applicable provisions, was provided to the public for the approval of a municipal rate ordinance. Therefore, the Circuit Court correctly determined that the HSB did not have a duty to the Petitioner to comply with the notice requirements established in *Code* §24-2-11(1), to which Petitioner seeks to compel.

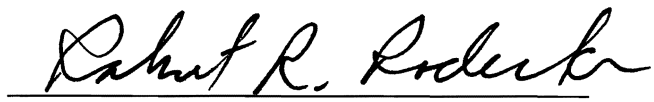
V. CONCLUSION

In conclusion, the Circuit Court correctly held that SWVA, Inc. had an alternative and adequate remedy to pursue and that the Huntington Sanitary Board was not legally required to provide additional public notice prior to the passage of a municipal rate ordinance. Based upon the foregoing, Respondent, Huntington Sanitary Board, asks this Honorable Court to affirm the lawful and justifiable conclusions reached by the Cabell County Circuit Court by denying Petitioners' appeal.

Respectfully submitted,

Huntington Sanitary Board

By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 17-0120

SWVA, INC.,

Petitioner Below/Petitioner,

v. (CIRCUIT COURT OF CABELL COUNTY CIVIL ACTION NO. 16-C-807)

HUNTINGTON SANITARY BOARD and CITY COUNCIL OF THE CITY OF HUNTINGTON,

Respondents Below/Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF RESPONDENT HUNTINGTON SANITARY BOARD** upon the parties on the 14th day of April, 2017, by U.S. First Class Mail, to the following counsel of record:

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