IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____

STATE OF WEST VIRGINIA *ex rel.* WEST VIRGINIA-AMERICAN WATER COMPANY,

Petitioner,

v.

THE HONORABLE CARRIE L. WEBSTER, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, PRESIDING JUDGE; RICHARD JEFFRIES, individually and on behalf of all others similarly situated; and COLOURS BEAUTY SALON, LLC,

Respondents.

AMICI CURIAE BRIEF SUBMITTED BY NATIONAL ASSOCIATION OF WATER COMPANIES, AMERICAN GAS ASSOCIATION, EDISON ELECTRIC INSTITUTE, U.S. CHAMBER OF COMMERCE AND WEST VIRGINIA CHAMBER OF COMMERCE, IN SUPPORT OF PETITIONER WEST VIRGINIA-AMERICAN WATER COMPANY'S PETITION FOR WRIT OF PROHIBITION

Marc E. Williams, Esq. (WV Bar No. 4062)
Jennifer W. Winkler, Esq. (WV Bar No. 13280)
Nathan R. Hamons, Esq. (WV Bar No. 13407)
NELSON MULLINS RILEY &
SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone: (304) 526-3500
Facsimile: (304) 526-3599
Email: marc.williams@nelsonmullins.com
Email: jennifer.winkler@nelsonmullins.com
Email: nathan.hamons@nelsonmullins.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

The National Association of Water Companies ("NAWC") is a trade association that represents private water companies across the nation. NAWC's members provide quality drinking water and wastewater service to 73 million Americans. The Edison Electric Institute ("EEI") is an association that represents all U.S. investor-owned electric companies. EEI's members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. The American Gas Association ("AGA") is a trade association that represents more than 200 local energy companies that deliver clean natural gas throughout the United States. The U.S. Chamber of Commerce is the world's largest business federation and represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The West Virginia Chamber of Commerce is a nonpartisan advocacy group that seeks to facilitate the continued operation and expansion of business in West Virginia. Amici believe they can provide the Court with a distinct perspective because of their industry-wide viewpoint and expertise.

Amici have a strong interest in the proper application of the legal standards governing the liability of utilities and businesses for service interruptions, and the legal standards for certifying any class of customers in connection with an interruption in service. Amici also have a strong interest in this case because the certification of an issues class under West Virginia Rule of Civil Procedure 23(c)(4) is a matter of first impression in West Virginia. The absence of a uniform set

---

[1] Amici have obtained consent to file their Amicus Brief from counsel for Respondents in this action. As required by Rule of Appellate Procedure 30(b), all counsel of record were notified of Amici's intention to file a brief as amici curiae at least five days prior to the filing of the accompanying motion. Pursuant to W. Va. R. App. P. 30(e)(5), counsel for Amici state that no counsel for any party authored this amicus curiae brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this brief.

of standards governing the use of issues classes in West Virginia poses significant risk to utilities and businesses through inconsistent adjudications regarding issues certification. This case also provides the Court an opportunity to issue further guidance on the trial courts' responsibility to analyze the prerequisites for class certification under Rule 23, particularly in light of the Court's decision in *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot,* 242 W. Va. 54, 829 S.E.2d 54 (2019). For these reasons, Amici file this amici curiae brief in support of the Petitioner, West Virginia-American Water Company ("Petitioner" or "WV American").

II. REQUEST FOR ORAL ARGUMENT

The use and certification of an "issues" class under Rule 23(c)(4) of the West Virginia Rules of Civil Procedure is an issue of first impression for this Court. Amici seek to participate in oral argument to discuss the parameters of issues certification under West Virginia law and the policy implications of certifying a liability "issues" class based on an alleged interruption in service, regardless of the impact (if any) on individual customers. Pursuant to West Virginia Rules of Appellate Procedure 20 and 30, Amici request that this Court afford them the opportunity to participate in oral argument.

III. ARGUMENT

A. Under the Circuit Court's ruling, any event resulting in the interruption of a utility service could pose a risk of triggering automatic class certification, exposing the state's utilities to excessive liability, which could increase customer costs.

The circuit court's erroneous class certification order highlights the considerable uncertainty that exists in West Virginia class action jurisprudence. This uncertainty is harmful to all businesses operating in the state, and in particular West Virginia's water, electric and gas utilities. By certifying an issues class of those involved with a potential service interruption, without considering impact, the circuit court undermines the regulatory compact that exists between the state's utilities, their customers, and their regulators. In doing so, the lower court's

decision exposes West Virginia's utilities to excessive liability that could raise costs for all customers and eventually make the provision of utility service untenable.

Utility regulation is premised on a "regulatory compact" in which the state sanctions a utility's monopoly within a defined service area – along with the obligation to serve all customers in that defined area – and subjects the utility to various regulatory restrictions and responsibilities. In exchange for the obligation to provide a particular service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the most efficient service possible to the consumer. *See Preston County Light & Power Co. v. Renick*, 145 W. Va. 115, 126–27, 113 S.E.2d 378, 385–86 (W.Va. 1960) ("Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject for the exercise of the regulatory power of the state.") (citation omitted).

Most states, including West Virginia, regulate utilities through the Public Service Commission ("PSC" or "Commission"), which is authorized to act with technical expertise to administer the regulatory scheme designed by the legislature to ensure that public utilities provide reliable and efficient service to the state's citizens. *See Chesapeake & Potomac Tel. Co. v. Morgantown*, 144 W. Va. 149, 107 S.E.2d 489 (W. Va. 1959) (W. Va. Code § 24-3-1 and related statutes set forth "a clear legislative policy" to place the regulation of public utilities under state control for the public good). When exercising this authority, the PSC balances the public's need for reliable, efficient, and reasonable service with the public utility's need for sufficient revenue to meet the cost of furnishing service and to earn a reasonable rate of return on their investment to serve customers. Proper rates are those which produce a fair and reasonable return that will enable

the utility to maintain its utility system and provide service to the public. *See Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692 (1923); *see also Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (well-established law provides that a utility has the right to recover its reasonable operating expenses and to earn a reasonable rate of return on its invested capital).

Utility rates are set forth in tariffs, which are approved by the PSC. Rates are adjusted through the general ratemaking process whereby the PSC has sole authority to determine the reasonableness of a utility's rates, rules, and practices. *See United Fuel Gas Co. v. Public Serv. Comm'n,* 103 W. Va. 306, 138 S.E. 388 (W. Va. 1927) (W. Va. Code §§ 24-3-1, 24-2-2, and 24-2-5 give the PSC "almost unlimited power to control the facilities, charges and services of public service corporations[.] . . . The only limitation is that the requirements shall not be contrary to law and that they shall be 'just and fair,' 'just and reasonable,' and 'just and proper[.]' "). The ratemaking process is an inclusive process wherein consumer advocates and the public have an opportunity to participate and comment on how utilities run their systems. Although state PSCs have ultimate decision-making authority with respect to rates, these proceedings provide customers with the opportunity to examine, and potentially influence, every aspect of the utility's operations. As in other states, utility rates in West Virginia are determined and ordered by the PSC after extensively studying the costs of construction, maintenance, operation, administration, and financing of the utility.

The goal of the regulatory compact, then, is twofold – both to ensure that customers have access to reliable and affordable service, and that utilities are able to continue to provide that service at a reasonable cost. The goals underpinning the regulatory compact are the reason why utilities' liability for service interruptions are generally limited to gross negligence. *See, e.g., Food*

Pageant, Inc. v. Consol. Edison Co., 54 N.Y.2d 167, 172, 429 N.E.2d 738 (1981) (recognizing that "the liability of a public utility should be limited to damages arising from the utility's willful misconduct or gross negligence") (citation omitted). Placing controllable limits on a utility's liability for service interruptions is necessary because without these protections, utilities would face broad exposure that would inevitably increase their costs and their customers' costs. Courts have long recognized the relationship between the limiting of liability of utilities as it relates to the public interest served by lower utility rates. *Pilot Industries v. Southern Bell Tel. & Tel. Co.*, 495 F. Supp. 356, 361 (D.S.C. 1979) (observing "[t]hat a public utility, through government regulation, may properly limit its liability for certain acts or omissions[.]); *see also Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) ("The limitation of liability was an inherent part of the rate."); *Cole v. Pacific Telephone & Telegraph Co.*, 246 P.2d 686 (1952), ("There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule."). In creating a regulatory compact between utilities, customers and regulators, a policy decision was made to limit the situations in which utilities could be subject to numerous lawsuits possibly resulting in large verdicts and necessitating a large increase in rates. *See S. Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 800, 204 S.E.2d 457, 460 (1974) (If "it is in the public interest to have uninterrupted service at a reasonable price, it necessarily follows that a reasonable limitation of liability for damages for interrupted . . . service may be considered" as part of the ratemaking process.)

Courts and legislatures have determined that the best approach is for a state's PSC to provide oversight as to utility operations and to require utilities to make prudent investments in their system that result in reasonable service. While this approach means that costs remain

affordable for customers, it does not guarantee that service that will never be interrupted. *Good v. Am. Water Works Co.*, No. 2:14-01374, 2015 WL 3506957, at *10 (S.D.W. Va. Jun. 3, 2015) ("Service interruptions occur to segments of a water utility's customers for a variety of reasons, foremost being the rupture of water lines. In those types of situations, a water utility might understandably avail itself of the kinds of arguments the water company defendants make here." One such argument is that a public utility "does not and cannot ensure there will never be a service interruption[.]").

Here, due to the procedural posture of the case at this juncture, any tariff language regarding a limitation of liability is not yet at issue. However, the policy underpinnings of the regulatory compact are still relevant. The circuit court's decision to certify an issues class stemming from a water line break exposes the Petitioner, and potentially every utility in West Virginia, to excessive liability in a way that is inconsistent with the regulatory compact. Under the circuit court's ruling, any event resulting in a service interruption could pose a risk of triggering automatic class certification. More specifically, any circumstance that impacts service could make a utility subject to class wide determination of liability in tort or contract, without any determination of how (or how many) customers are impacted.

By certifying a class solely on the basis of liability, while ignoring significant differences in the impact on customers, the circuit court has significantly amplified the liability risk associated with events that are often considered to be part of utilities' typical business operations. This level of risk – of potentially having to defend against an issues class certification after every service interruption – undermines the regulatory compact and will create a barrier to providing affordable service in the state. As a result, it is important for courts to be precise in identifying the circumstances where an issues class is appropriate. This case presents an opportunity for the Court

to provide much needed guidance on when it is appropriate to certify an issues class. Reducing ambiguity on this issue will benefit West Virginia's utility customers and positively impact any business operating in the state that may be subject to such a class certification.

B. This Court should issue authoritative guidance regarding the parameters for certifying an "issues" class under West Virginia Rule of Civil Procedure 23(c)(4).

Pursuant to Rule 23(c)(4) of the West Virginia Rules of Civil Procedure, "when appropriate . . . an action may be brought or maintained as a class action with respect to particular issues[.]" W. Va. R. Civ. P. 23(a)(4)(A). This Court has never reviewed a certification of a Rule 23(c)(4) class. Because there is an absence of authority in West Virginia law regarding this type of class action, the state's trial courts must rely on non-binding authority in order to determine whether a class should be certified with respect to a particular issue. This case provides an opportunity for this Court to set forth authoritative guidance regarding issue certification under Rule 23(c)(4), which will, in turn, provide for consistent application of the rule by West Virginia's circuit courts.

1. The Court should construe Rule 23(c)(4) to operate in conjunction with Rules 23(a) and 23(b) of the West Virginia Rules of Civil Procedure.

The circuit court's certification of an issues class under W. Va. R. C. P. 23(c)(4)(A) in the context of utility service interruptions is erroneous and improperly subjects utilities to liability without consideration of individual impacts. Moreover, relevant federal precedent also supports that certification of an issues class solely on the basis of liability is improper and cannot stand.

This Court has previously noted that "[b]ecause the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal Rules when discussing [the West Virginia Rules of Civil Procedure]." *See Hardwood Group v. Larocco*, 219 W. Va. 56, 61 n. 6, 631 S.E.2d 614, 619 n. 6 (2006); *State ex. Rel. Paige v. Canady*, 197 W. Va. 154, 160, 475 S.E.2d 154, 160 (1996). Because Rule 23(c)(4)(A) of the

West Virginia Rules of Civil Procedure is nearly identical to its counterpart in the Federal Rules, this Court should look to federal case law for guidance in defining the parameters for issue certification in West Virginia.

The federal courts have consistently construed subsection (c)(4) to operate in conjunction with Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. Notably, the Fifth Circuit has consistently applied Rule 23(b) requirements to the cause of action as a whole in conjunction with Rule 23(c)(4). *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). When construing Rule 23(c)(4), "the proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* Accordingly, where a court considers the certification of an issues class under subsection (c)(4), such certification is proper where the court's rigorous analysis ultimately determines that the entire cause of action satisfies the predominance and superiority requirements under Rule 23(b). *See id.* Failure to apply the requirements of Rule 23(b) necessarily undermines the predominance requirement and opens the gates to class certification where any common issue is present. *Id.* ("[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended."); *see also Gunnells v. Healthplan Services,* 348 F.3d 417, 453 (4th Cir. 2003) (Niemeyer, J., concurring in part and dissenting in part).

The courts of appeal are currently split, however, with respect to the application of the predominance and superiority requirements in certifying issues under Rule 23(c)(4), resulting in three distinct approaches—the broad view, the narrow view, and an efficiency based approach.[2]

---

[2] *See Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405 (6th Cir. 2018) (applying the "broad view" interpretation of Rule 23(c)(4) and holding that predominance and superiority requirements must be applied to common particular issues); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21(5th Cir. 1996) (applying the "narrow view" by requiring that the action as a whole must meet predominance and

The Fourth Circuit has taken a distinct, albeit inaccurate, approach. *See generally Gunnells v. Healthplan Services,* 348 F.3d 417. The majority of the court in *Gunnells* held that Rule "23(c)(4) should be used to separate 'one or more' claims that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met." *Id.* However, even under the Fourth Circuit's approach, the aims of the predominance requirement set forth in Rule 23(b) are substantially undermined, rendering automatic certification probable. Despite the distinctions between the decisions in *Castano* and *Gunnells*,[3] federal courts have construed subsection (c)(4) of the Federal Rules of Civil Procedure as operating in conjunction with other provisions of Rule 23, including the predominance and superiority requirements.

Federal district courts, in interpreting Rule 23(c)(4), have applied the predominance and superiority requirements, attributing greater weight to the latter. In so doing, these courts have recognized that issue certification is not desirable in all cases and, in particular, should not be

---

superiority requirements and stating that Rule 23(c)(4) "is a housekeeping rule that allows courts to sever the common issues for a class trial."); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (refusing to certify issue classes where issue certification would not increase the efficiency of the litigation); *see also Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 374 (D. Colo. 2015) (noting that the majority view taken by the First, Second, Fourth, Seventh, and Ninth Circuits includes isolation of issues for class certification under Rule 23(c)(4) that materially advance the litigation by determining "whether questions of law or fact common to class members predominate over any questions affecting only individual members.").

[3] The test in *Gunnells* is even more problematic considering its ambiguity which has led to inconsistent interpretations within the Fourth Circuit and other courts of appeals. *Compare Farrar & Farrar Dairy, Inc. v. Miller-St Nazianz, Inc.*, 254 F.R.D 68, 77 (E.D.N.C. 2008) ("Although the Fourth Circuit appeared to address this issue in *Gunnells*, its analysis is unclear. Specifically, the *Gunnells* court appeared to hold that a district court may certify individual *causes of action*, not individual *issues*, for class treatment.") (emphasis in original) *with Good v. American Water Works Co., Inc.*, 310 F.R.D. 274, 298–300 (S.D.W. Va. 2015) (certifying an issues class with respect to particular issues of fault and comparative fault as opposed to a particular cause of action as a whole). *See also Gates v. Rohm and Haas Co.,* 655 F.3d 255, 272-73 (3rd Cir. 2011) (citing *Gunnells* for the proposition that common questions need not predominate over the cause of action as a whole). As a result, *Castano*'s approach is not only required by Rule 23, it is also more predictable and clear.

implemented where the common issues are so distilled that class certification would not be the superior method:

> As the common issues are narrowed down to make them sufficiently "common," the desirability of issue certification is diminished because, as indicated above, the relatively simple threshold issues can quickly be disposed of in individual trials. This means that the superiority component of Rule 23(b)(3) frequently comes into play to defeat issue certification.

Parker v. Asbestos Processing, LLC, No. 0:11-cv-01800, 2015 WL 127930, *15 (D.S.C. Jan. 8, 2015).

The breadth of federal law regarding Federal Rule of Civil Procedure 23(c)(4) provides guidance to West Virginia trial courts in the absence of mandatory authority. Yet, federal case law is not wholly consistent with respect to the application of the requirements for issue certification. As a result, West Virginia trial courts stand to benefit from this Court's interpretation of Rule 23(c)(4)(A) of the West Virginia Rules of Civil Procedure.

Here, the circuit court erred in certifying an issues class based solely on broad issues of liability as to the plaintiffs' claims of breach of contract, negligence, and statutory violations without addressing Rule 23(b) requirements. (Order ¶ 15). The circuit court's Order is devoid of any analysis as to whether and how the purportedly common issues will actually be proven class-wide at trial and whether individual issues would predominate. *See Castano*, 84 F.3d at 745. The circuit court's shallow finding that "the fault or liability issue predominates over issues affecting only individual members" is insufficient under *Castano* and seemingly enforces "automatic certification." (*See* Order ¶ 7). Critically, the circuit court's Order glosses over the requirements of Rule 23(b) without conducting any rigorous analysis regarding predominance and superiority. Therefore, under the test set forth in *Castano*, the trial court abused its discretion in failing to first determine whether the predominance and superiority requirements were satisfied as to the cause of action as a whole, prior to severing common issues for class trial.

2. Issues certification under Rule 23(c)(4) is inappropriate where, as here, certification will not materially advance the litigation as a whole and noncommon issues are "inextricably entangled" with common issues.

Aside from the traditional predominance and superiority inquiries, federal courts have generally held that certification of an issues class is improper where the certification would not materially advance the litigation as a whole. *See, e.g.*, *Smith-Brown v. Ulta Beauty Inc.*, No. 18-C-610, 2020 WL 4592793, at *11–12 (N.D. Il. Aug. 8, 2020); *Good* 310 F.R.D. at 296 ("Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.") (citation omitted)); *Morris*, 308 F.R.D. at 379 (holding that certification of an issues class would not advance the litigation because the case involved highly individualized inquiries about the chain of causation, more properly suited for individual trials); *see also Plastic Surgery Associates, S.C. v. Cynosure, Inc.*, 407 F. Supp. 3d 59, 72 –3 (D. Mass. 2019) (holding that the need for 300 to 400 individualized trials regarding issues of causation and damages after the resolutions of class wide issues did not materially advance litigation); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 670–71 (M.D. Fl. 2001) (finding that even the broader issues of whether applicable standards of care were breached or whether the chemical supplied was a defective product would not materially advance the litigation due to the varied circumstances of individual cases). Therefore, courts "should decline to certify issues where there are so many individual issues in the case that certifying the common issues would have a negligible effect on judicial efficiency." *Farrar & Farrar Dairy, Inc. v. Miller-St Nazianz, Inc.*, 254 F.R.D 68, 77 (E.D.N.C. 2008*)* (refusing to certify an issues class where individual issues of causation and affirmative defenses predominated over common issues).

In addition to the determination of whether the certification of an issues class will materially advance the litigation, federal courts also refuse to certify an issues class where noncommon issues are "inextricably entangled" with common issues. *See Caruso v. Celsis*

Insulation Resources Inc., 101 F.R.D 530, 538 (M.D. Pa. 1984); *see also Gresser v. Wells Faro Bank, N.A.*, Civil No. CCB-12-987, 2014 WL 1320092, *9 (D.Md. Mar. 31, 2014) ("Courts typically find bifurcation or the certification of only certain issues helpful where it will materially advance the litigation and where there is a *clear line* between the issues to be certified and those to be dealt with on an individual basis later." (emphasis added)). "Courts should not use [Rule 23(c)(4)] 'if noncommon issues are inextricably entangled with common issues or the noncommon issues are too unwieldly or predominant to be handled adequately on a class action basis.' " *In re Motor Fuel Temperature Sales Practices Litigation*, 292 F.R.D. 652, 665 (D. Kan. 2013) (quoting *Fulghum v. Embarq Corp.*, No. 07-2601-Efm, 2011 WL 13615, at *2 (D. Kan. Jan. 4, 2011)); *see also Caruso*, 101 F.R.D at 538 (holding noncommon issues were "inextricably entangled" with common issues where plaintiffs proof of the harmful nature of the product at issue did not resolve individual issues requiring separate trials on causation and damages); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 241 (S.D. Ind. 1995) (denying issue certification where issues of basic liability were "inextricably entangled" with individual issues of proximate cause).

Here, the circuit court did not provide meaningful analysis as to whether certification of an issues class under Rule 23(c)(4) is appropriate in this case. While the circuit court made cursory findings that the predominance and superiority requirements were satisfied, the circuit court's order failed to consider whether issue certification will materially advance the litigation as a whole and failed to recognize that noncommon issues are "inextricably entangled" with common issues, precluding certification of an issues-based class.

Specifically, the circuit court certified an issues class with respect to the purportedly "overarching common issues of whether Defendant is liable for breach of contract and negligence, and for actionable violation of its statutory duties under the West Virginia Code." (Order at ¶ 15.)

However, the circuit court's order ignores that the impact on customers as a result of WV American's alleged conduct must be considered in order to determine liability. For example, the plaintiffs' breach of contract claim for failure to supply water alleges that "WV [American] failed to perform that contractual obligation in June 2015 when it failed to *supply usable tap water or adequate pressure* to approximately 25,000 customers for a period of three days or more." (Compl. ¶ 24) (emphasis added). The plaintiffs further contend that WV American is liable for breach of contract based on its alleged "failure to construct and maintain its entire plant and system in such condition that it will *furnish safe, adequate, and continuous service*." (Compl. ¶¶ 28–30) (emphasis added). In addition to breach of contract, plaintiffs claim that they are entitled to damages proximately caused by WV American's alleged negligence and violations of statutory duties to provide reasonable and sufficient service. (Compl. ¶¶ 48–54). The plaintiffs' theories of liability are based on separate and distinct events including: (1) a water break resulting in (a) outages and (b) inadequate water pressure; (2) repair attempts that were unsuccessful; and (3) a subsequent interruption in service caused by an additional problem occurring several days after the initial break. (Compl. ¶¶ 6–11). Therefore, in order to prove liability based on alleged interruptions in service, the impact on the customer's service, if any, has to be assessed. The impact is not, as the circuit court found, solely related to the question of damages. Because a regulated utility is not subject to strict liability for service interruptions, the impact of the water main break on the customer is necessary to determine liability.

Further, the circuit court erroneously failed to recognize that the question of the impact of a service interruption is inextricably entangled with liability issues. An issues class is particularly inappropriate for a utility service interruption claim, since the questions of the existence and degree of the interruption, the cause of the interruption and the damages flowing from the interruption, all

require individualized proof. In instances of service interruptions, the courts have recognized that individual questions of causation inherent in the claims overwhelm any potential common issues. It is unsurprising then that "there are few class actions for service disruptions or outages filed against utilities." *Von Nessi v. XM Satellite Radio Holdings, Inc.*, No 07-2820, 2008 WL 4447115, at *1 n.1 (D.N.J. Sept. 26, 2008). Prior to this case, courts have consistently found that service interruption claims are inappropriate for class certification because of the individualized negligence, specific causation, and damages issues. *See id.* ("Generally, such disruptions require a showing of negligence and that the consequential damages are specific to the individual suing.").

For example, in *Abbott v. American Electric Power, Inc.*, the U.S. District Court for the Southern District of West Virginia denied certification of a proposed class alleging that Defendant Appalachian Power Company was "negligent in the maintenance of its transmission and distribution lines," which allegedly lead to more widespread power outages than otherwise would have occurred after a winter storm. *Abbott v. Am. Elec. Power, Inc.*, No. 2:12-CV-00243, 2012 WL 3260406 (S.D.W. Va. Aug. 8, 2012). The district court specifically rejected the plaintiffs' contention that a common question existed as to whether "the Defendant's negligence is the proximate cause of the power outage[.]" *Id.* at *4. The court concluded that this question was "not capable of a class-wide determination" because, "[a]lthough a single snowstorm affected West Virginia on December 18 and 19 of 2009, each plaintiff's claim will require an individualized causation analysis." *Id.* The court further observed that the denial of class certification was consistent with the weight of authority:

> When examining the causation element in class actions against a public utility, courts have generally found that a power outage cannot be viewed as a single event that is the result of a single cause. Outages in customers' homes may be caused by factors other than the power company's alleged negligence. This makes a class-wide causation analysis impossible and requires the court to make individualized causation determinations for each customer's claim.

. . .

> A causation analysis based on specific facts will be required for each putative class member to link the damage he or she allegedly sustained with [Defendant's] alleged negligence. This analysis could not be performed on a class-wide basis because it will require specific evidence based on what occurred at each customer's residence.

Id.

This case closely resembles *Abbott* and other cases brought against utilities for interruptions in service. As succinctly argued by WV American below, "[g]iven the different service impacts alleged by Plaintiffs, and the complexity of the WV American distribution system and the way in which the water main events in 2015 affected individual water users, these impacts cannot be assumed or demonstrated without individualized proof." (Def.'s Mem. in Opp'n p.14). Further, WV American outlined that any inquiry regarding liability for failure to supply adequate water pressure would require, at a minimum, (1) considerations of pressure waivers for each individual customer, (2) determinations of pressure fluctuations with respect to each individual customer's standard pressure which will necessarily encompass individual determinations, and (3) whether each customer frequently experienced pressure valuations outside of limits at issue. (Def.'s Mem. in Opp'n pp.18–19). Pointedly, these are the same kind of individualized issues identified by the Judge Goodwin in denying class certification of the power outage class claims in *Abbott*.

Reversal of the circuit court's class certification determination is fully consistent with the substantial weight of authority in service interruption cases. The plaintiffs' complaint asserts several theories of liability that require consideration of individual impacts to adequately assess liability. The certification of issues regarding liability implicates individual issues and as a result, any asserted common issues are inextricably entangled with noncommon issues. Even assuming that common issues could be cleanly severed, which they cannot, the remaining issues regarding

proximate causation and impact would necessitate individual trials based on each customer's location, requiring re-litigation of liability issues. Therefore, due to the number of causation and damages issues inextricably entangled with liability issues, certification of an issues class in this case does little to materially advance the litigation as a whole and is not in the interests of judicial efficiency. As a result, certification of overarching issues of whether WV American is liable for breach of contract, negligence, and actionable violation of its statutory duties is improper.

C. This Court should reinforce the responsibility of a circuit court to sufficiently analyze the prerequisites for class certification contained in Rule 23.

Before certifying a class under Rule 23 of the West Virginia Rules of Civil Procedure, "a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and has satisfied one of the three subdivisions of Rule 23(b)." Syl. Pt. 8, in part, *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). "If only one prerequisite is not met," therefore, "class certification is not appropriate." *State ex rel. Erie Insurance v. Nibert*, 2017 WL 564160, at *2 (W. Va. Feb. 13, 2017) (citations omitted)).

In West Virginia, the class certification determination rests within the "sound discretion" of the trial court. Syl. Pt. 5, *Rezulin*, 214 W. Va. 52, 585 S.E.2d 52 (citation omitted). "That does not mean, however, that certification determinations are perfunctory" or that a trial court's discretion to certify a class is unlimited. *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 62 (2019). Thus, while trial judges are afforded discretion in determining whether a class should be certified, that discretion must be exercised within the constraints of Rule 23 and the analytical framework governing class certification established by this Court. Accordingly, a circuit court's certification decision is subject to review for adherence to applicable legal principles.

It is well established that a party who seeks certification bears the burden of proving that certification is warranted, and the trial court "must give careful consideration to whether the party has met that burden." Syl. Pt. 4, *Rezulin*, 214 W. Va. 52, 585 S.E.2d 52; *Gaujot*, 242 W. Va. at 62, 829 S.E.2d at 62. This Court has repeatedly held that "[a] class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied." Syl. Pt. 11, *State ex rel. Mun. Water Works v. Swope*, 242 W. Va. 258, 835 S.E.2d 122 (2019); Syl. Pt. 1, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 62; Syl. Pt. 8, in part, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004).

Further, the class certification order "should be detailed and specific" in showing the rule basis for the certification and the relevant facts supporting the legal conclusions. Syl. Pt. 8, in part, *Chemtall*, 216 W. Va. 443, 607 S.E.2d 772; *see also Swope*, 242 W. Va. 258, 835 S.E.2d at 131 (reiterating that a "detailed and specific showing . . . is required"). The "failure to conduct a thorough analysis . . . amounts to clear error" and is also an abuse of discretion. *Chemtall*, 216 W. Va. at 454, 607 S.E.2d at 783; *Gaujot*, 242 W. Va. at 62, 829 S.E.2d at 62 (citing *Brown v. Nucor Corp.*, 785 F.3d 895, 902 (4th Cir. 2015) ("A district court abuses its discretion when it materially misapplies the requirements of Rule 23.")).

1. This Court should adopt a "rigorous analysis" standard for class certification determinations.

Building upon earlier cases, this Court's recent decisions in *Gaujot* and *Swope* articulated and reiterated key principles governing the "thorough analysis" that trial courts must conduct in order to determine whether a proposed class satisfies Rule 23's prerequisites for certification. Syl. Pt. 11, *Swope*, 242 W. Va. 258, 835 S.E.2d 122; Syl. Pt. 1, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54; Syl. Pt. 8, in part, *Chemtall*, 216 W. Va. 443, 607 S.E.2d 772.

In *Gaujot*, the Court affirmed with increased emphasis that "[a] class action may only be certified if the trial court is satisfied, *after a thorough analysis*, that the prerequisites of Rule 23(a) . . . have been satisfied. Syl. Pt. 1, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original) (citation omitted). Further, the Court observed that "[d]etermining whether the requirements of Rule 23 . . . have been met often involves, by necessity, some 'coincidental' consideration of the merits." Syl. Pt. 5, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (citation omitted). Because "[c]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action," the Court affirmed that circuit courts may consider merits questions to the extent "they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Syl Pt. 6, *Gaujot* (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S. Ct. 1426, 1432 (2013)); Syl. Pt. 7, *Gaujot* (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 1195 (2013)). The Court further held, for the first time, that "[w]hen consideration of merit is *essential* to a thorough analysis of whether the prerequisites of Rule 23 . . . are satisfied, failing to undertake such consideration is clear error and an abuse of discretion." Syl. Pt. 8, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original). Finding that the circuit court below had not "addressed the question of commonality with sufficient factual findings and conclusions to allow us to conclude that its certification decision . . . [was] the product of 'a thorough analysis,' " the *Gaujot* Court concluded that the circuit court had exceeded its legitimate powers by certifying the class. The Court urged the circuit court to, upon remand, "determine whether the requirements of Rule 23, particularly as they relate to commonality, have been met[.]" *Id.* at 64.

Just six months after *Gaujot*, this Court issued its decision in *Swope*, in which it reaffirmed these principles and held that, as in *Gaujot*, the circuit court in that case had failed to undertake a

sufficiently thorough analysis of whether the threshold prerequisites for class certification were satisfied. In so holding, the Court noted that, to determine whether class certification is appropriate, the circuit court must "conduct an intense factual investigation":

> A trial court must *rigorously analyze Rule 23's prerequisites* before certifying a class. This requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case. Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Swope, 242 W. Va. at 258, 835 S.E.2d at 131 (emphasis added) (quoting Louis J. Palmer, Jr., and Robin Jean Davis, Litigation Handbook on West Virginia Rules of Civil Procedure, § 23, at 617–18 (5th ed. 2017)). Finding that the circuit court's order did not contain "a *rigorous analysis* of the four Rule 23(a) prerequisites" and that its "general, non-specific review" of the Rule 23(a) prerequisites fell "far short of the detailed and specific showing that is required," the Court vacated the class certification order. *Id.* (emphasis added).

Despite this Court's explicit (and repeated) admonition against insufficient class certification orders, circuit courts continue to disregard or misconstrue this Court's demand for a thorough analysis of the prerequisites for certification under Rule 23, and in so doing, have abridged class action defendants' substantive and due process rights.[4] As in the instant case, West Virginia's lower courts have allowed plaintiffs to obtain and maintain class certification without first conducting sufficiently thorough analyses of the prerequisites for class certification required by Rule 23. In failing to conduct the requisite analysis, trial courts subject utilities to class certification despite the fact that service interruption cases are not well suited for class

[4] One possible explanation for the repeated appeal of class certification orders that fail to conduct a sufficiently rigorous analysis of the requirements of Rule 23 is the consistent reliance by counsel on this Court's decision in *Rezulin,* which unfortunately contains numerous dicta within the opinion which would lead a trial court to believe that the standard for class certification is not high. In *Gaujot, Nibert, Swope* and this case, the plaintiffs' Motions for Class Certification have been replete with references to *Rezulin* and its holding that class certification should normally be granted and that the standard for proof is not high.

determination – circumventing the regulatory compact and diminishing the ability of utilities to provide affordable service in the state. Deficient class certification orders, such as the one in this case, flout fundamental class certification requirements, particularly the need for plaintiffs to demonstrate classwide commonality and the predominance of common issues over individual ones. Through its decisions in *Nibert*, *Gaujot*, and *Swope*, the Court has more closely aligned West Virginia's standard for class certification with the standard of federal courts and other states, and should now take the opportunity to close the gap further by adopting a Syllabus Point identifying a "rigorous analysis" standard for class certification determinations.

2. The Circuit Court failed to sufficiently analyze the ability of the proposed class to generate common answers or whether common issues predominate over individual issues.

Regardless of whether a trial court should conduct a "rigorous" or "thorough" analysis of the prerequisites for class certification, the circuit court in this case failed to conduct a sufficient analysis of Rule 23's commonality and predominance requirements under either standard. The commonality requirement "requires that the party seeking class certification show that 'there are questions of law or fact common to the class.' " Syl. Pt. 7, in part, *Swope*, 242 W. Va. 258, 835 S.E.2d 122 (citation omitted). For purposes of Rule 23(a)(2), "a 'question' 'common to the class' must be a *dispute*, either of fact or of law, *the resolution of which* will advance the determination of the class members' claims." Syl. Pt. 2, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369, 131 S. Ct. 2541, 2562 (2011)). Thus, for commonality to exist under Rule 23(a)(2), "class members' 'claims must depend upon a common contention,' and that contention 'must be of such a nature that it is capable of classwide resolution.' In other words, the issue of law (or fact) in question must be one whose '*determination* . . . will resolve an issue that is central to the validity of each one of the claims in one stroke.' " Syl. Pt. 3, *Gaujot*, 242 W. Va. 54, 829 S.E.2d 54 (emphasis in original) (alterations

omitted) (quoting *Dukes*, 564 U.S. at 350, 131 S. Ct. at 2551); *see also Nibert*, No. 16-0884, 2017 WL 564160, at *6 (W. Va. Feb. 13, 2017) ("What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (citation omitted).

However, service interruption claims do not generate common questions fit for class certification. In fact, most cases, like this one, have generally involved allegations of insufficient preparation by the utility, sought damages related to losses and inconvenience from a service interruption, and sought class action status for very large groups of customers. *See, e.g.*, *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 18 N.E.3d 1050, 1060–62, 1065 (Mass. 2014) (class alleging that power company failed to adequately prepare for winter storms not certified because the issue of whether the company prolonged each plaintiff's outage was an individualized issue); *Entergy Gulf States, Inc. v. Butler*, 25 S.W.3d 359, 361–64 (Tex. App. 2000) (class alleging that electrical utility failed to properly maintain its system, resulting in unreasonably long power outages after a storm, not certified because individualized causation and damages predominated). Thus, courts have recognized that the determination of liability under the plaintiffs' claims requires individualized analysis precluding findings of commonality or predominance.

Here, the plaintiffs contend that WV American failed to perform its contractual and statutory duties "in June 2015 when it failed to supply usable tap water or adequate water pressure to approximately 25,000 customers for a period of three or more days." (Compl. ¶ 24.) Therefore, under the plaintiffs' theory, liability hinges on whether tens of thousands of water service users lost water or "adequate water pressure" over a period of several days. In order to conduct a sufficiently thorough analysis of the Rule 23(a) prerequisites, including commonality, the circuit court was required to analyze whether WV American's liability, as alleged by the plaintiffs, is

appropriate for classwide resolution. *See Swope*, 835 S.E.2d 122, 131 (W. Va. 2019). Further, under *Gaujot*, the circuit court was required to evaluate the merits of the plaintiffs' claims to the extent necessary to assess the prerequisites for certification under Rule 23, including the commonality requirement. Syl. Pt. 8, *Gaujot*, 829 S.E.2d 54 ("When consideration of questions of merit is *essential* to a thorough analysis of whether the prerequisites of Rule 23 . . . . are satisfied, failing to undertake such consideration is clear error and an abuse of discretion.") (emphasis in original). Critically, in this case, the plaintiffs expressly conceded "that individual class plaintiffs may have suffered different consequences from having lost water supply as the result of [WV American's alleged] misconduct – some experienced a complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory." Thus, the plaintiffs themselves expressly tie the question of WV American's alleged violations of the relevant standards to the impact on customers. Contrary to the circuit court's findings, this connection is not only relevant to the determination of ultimate damages; rather, there can be no liability finding to any plaintiff without a demonstration that the plaintiff was impacted in a way that creates liability under the applicable standard. Therefore, under the plaintiffs' theory, individualized fact finding is necessary to determine liability for each individual customer.

In its order granting class certification, the circuit court held, without citing to any authority or the record, that Rule 23(a)(2)'s commonality requirement was "easily satisfied" based on "a considerable number of common issues." (Order at 4.) The circuit court found that "issues of law common to Plaintiffs and all Class members" include 1) "whether [WV American] is liable for breach of contract for failing to maintain its facilities in such condition so as to provide an adequate and continuous water service"; 2) "whether [WV American] violated its statutory duties to maintain adequate and suitable facilities"; and 3) "whether [WV American] failed to exercise

reasonable care in the design, construction, maintenance and management of its water distribution system – an objective inquiry that, by its very nature, will involve the same proof for everyone." (*Id.* at 5.) The circuit court did not discuss the possibility of disparate liability rulings among the class and essentially presupposed damages, stating that "damages suffered by individual class members as the result of [WV American]'s conduct will not defeat commonality." *Id.* The circuit court did not address how the proposed class is capable of generating common answers to the referenced questions of WV American's liability in the face of WV American's evidence (and the plaintiffs' own concession) that the plaintiffs' alleged water service impacts cannot be assumed or demonstrated without individualized proof. Nor did the circuit court address *Gaujot*, one of the two most recent and significant writings by this Court on this issue.

Instead, the circuit court disposed of WV American's arguments on commonality in a single sentence, noting that "[t]he fact that there may have been individual members of the Class that suffered different consequences from having lost water are immaterial for purposes of commonality." Following a cursory statement that "Plaintiffs' theories of liability apply to all members of the Class," the circuit court repeated its conclusion that commonality is "easily met in this case." (Order at 5.) As in *Gaujot*, "the [defendant] repeatedly challenged [plaintiffs'] claim that commonality could be found . . . . Yet the circuit court persisted in finding commonality without ever truly addressing the [defendant's] arguments or indicating with clarity the rationale for such findings." *Gaujot*, 242 W. Va. at 64, 829 S.E.2d at 64. Had the circuit court undertaken the requisite analysis, it could not possibly have reached the conclusion that the proposed class can generate common answers to the plaintiffs' asserted common questions of liability.

Finally, in addition to satisfying the Rule 23(a) requirements, a party seeking certification must also satisfy at least one of the subdivisions of Rule 23(b). *Rezulin*, 214 W. Va. at 64, 585

S.E.2d 52 at 64 ("Rule 23 specifies that the party seeking class certification must meet all four requirements under Rule 23(a) and meet one of the three requirements under Rule 23(b)."). Rule 23(b)(3) requires a showing of "predominance" and "superiority" which means: (1) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W. Va. Rule Civ. P. 23(b)(3). The predominance requirement is similar to but "more stringent" than the commonality requirement of Rule 23(a)(2). *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 n.4 (4th Cir. 2001).

After briefly quoting case law explaining Rule 23(a)'s commonality requirement, the circuit court concluded that Rule 23(b)'s predominance requirement was met because "[t]he fault or liability determination will rely upon common class-wide evidence related to WV American's conduct prior to the June 2015 main break, and what it did or failed to do to maintain an adequate water system that complied with its contractual and statutory duties." (*See* Order at 7.) As explained above, however, no determination of whether WV American is "liable" can occur without evaluating whether (and, if so, how) water service was impacted for individual water users. Therefore, for the same reasons that the circuit court did not sufficiently address commonality, it did not conduct a sufficiently thorough analysis of the predominance requirement.

To the extent the circuit court further discussed the predominance requirement, that discussion was limited to quoting the *Good* case for the general proposition that "[c]ommon liability issues may still predominate even when individualized inquiry is required in other areas. At bottom, the inquiry requires a district court to balance common questions among class members with any dissimilarities between class members." (Order at 8.) The circuit court offered no analysis regarding Rule 23(b)(3)'s predominance prong and, beyond its assumption that "the liability

determination will rely upon class-wide evidence," provided no explanation in support of its conclusion that "the fault or liability issue predominates over issues affecting only individual members." (Order at 7.) Nevertheless, for the same reasons that the plaintiffs cannot satisfy Rule 23's commonality requirement, it cannot possibly satisfy Rule 23(b)(3)'s "more stringent" requirement that questions common to the class "predominate over" other questions.

IV. CONCLUSION

This case presents an opportunity for this Court to provide needed guidance on the use and certification of issues classes under Rule 23(c)(4) of the West Virginia Rules of Civil Procedure. Moreover, this case allows the Court to reinforce the duty of circuit courts to conduct a rigorous analysis of the prerequisites for class certification. Without clarity on these issues, every West Virginia utility and business that experiences a service interruption will continue to face an undue level of risk resulting from inappropriate class certification.

DATED: September 1, 2020

Marc E. Williams (WV Bar No. 4062)
Jennifer W. Winkler (WV Bar No. 13280)
Nathan R. Hamons (WV Bar No. 13407)
NELSON MULLINS RILEY &
SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone: (304) 526-3500
Facsimile: (304) 526-3599
Email: marc.williams@nelsonmullins.com
Email: jennifer.winkler@nelsonmullins.com
Email: nathan.hamons@nelsonmullins.com

Counsel for Amici National Association of Water Companies; Edison Electric Institute; American Gas Association; U.S. Chamber of Commerce; and West Virginia Chamber of Commerce.