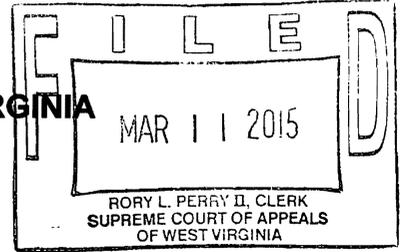


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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No. 14-1059

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**INSURANCE COMMISSIONER OF WEST VIRGINIA; AND  
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,**

*Petitioners,*

v.

**VINCENT J. KING,**

*Respondent.*

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**APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
BY SPECIAL ASSIGNMENT  
Civil Action No. 13-AA-95**

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**REPLY BRIEF OF PETITIONER,  
THE INSURANCE COMMISSIONER OF WEST VIRGINIA**

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## **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred when it engaged in an improper re-examination of an insurance rate and form policy filing previously filed and approved before the West Virginia Offices of the Insurance Commissioner.
2. The Circuit Court erred when it disregarded known precedent by denying the relevance thereof and by unequivocally substituting its own judgment in regards to the referenced rate and form policy filing of Erie Insurance Property and Casualty Insurance Company without providing any deference to the statutory regulator of the company.
3. The Circuit Court erred when it made erroneous findings of fact and conclusions of law and misapplied the record while disregarding the plain record before it despite the fact that that Respondent did not appeal an administrative decision to deny an administrative hearing and thereby conceding the record was complete as to his allegations which did not overcome a presumption of legality and burden of proof.
4. The Circuit Court erred when it violated the Separation of Powers Clause of the West Virginia State Constitution by not giving deference to the duly appointed executive regulator in carrying out its function delegated to it by the West Virginia Legislature and when it substituted its judgment for that of the Executive Branch and withdrew approval of a rate and form policy filing.
5. The Circuit Court erred when it accepted Respondent's proposed findings of fact and conclusions of law *in toto* by misapplying the standard of review for administrative appeals under West Virginia law as well as erring in the factual and legal conclusions made therein.
6. The Circuit Court erred when it invaded the province of the regulator and disapproved of a form filing and fashioned relief that is inconsistent and not clear leaving the regulator unclear as to who has authority to proceed in this matter and under what parameters especially in light of the ramifications of the order.

## **STATEMENT OF THE CASE**

While taken together, the statement of the case by Petitioners and Respondent for the most part fairly and accurately portray the issues before this Court. However, the Insurance Commissioner takes issue with a few of the assertions that Respondent, King makes in his Brief. There is simply no information in the record that Respondent did not

receive the RPE from Erie without absolute knowledge of the same. (See *Respondent's Brief* at page 1 "...That not being true...".) The agent handling the matter discussed the fact that procedure was followed in this matter, Vice President Cook stated that to his knowledge it was offered to Mr. King, the secretary at Mr. Garlow's agency gave a statement to that effect as well and Mr. King himself agreed that he received the IMPORTANT NOTICE when he received his policy. (See A.R. at 517, 1036-1037, and 1259-1260.) Mr. King was offered and failed to remove himself from the RPE after repeated attempts by ERIE to allow him to be reinstated to his former policy. (A.R. 1053, 1057-1058.) No harm came to Mr. King. (See A.R. 1057.) Mr. King received more access than an average consumer to his underwriting information. (A.R. 1052-1053.) He was passionate in his feelings about RPE and sought to substitute his judgment and regulatory authority for that of the Insurance Commissioner. (A.R. 1029-1030.) King was successful in getting the Circuit Judge sitting by temporary assignment to adopt his theory and position on the matter *in toto*. The Circuit Judge ruled that previous precedent of this Court was not relevant to his determination of the rate and form filing issue. (See A.R. 1330, footnote 38.)

King argues within his statement of facts certain points that were found to the contrary by the Commissioner. He states he did not knowingly accept the product endorsement. However, findings to the contrary were ascertained by the Commissioner. (A.R. 1047-1067.) King did not dispute those findings with any evidentiary record, or appeal the denial of a hearing request and as such he should not be allowed to resurrect the same before this Court simply by arguing the same.

Further, King attempts to convert this matter to a pure form filing matter before this Court. The facts couldn't be further from the record as this was an endorsement that clearly affected premium. (See A.R. 1-322.) King complains about components of his premium rising throughout the Appendix in his administrative complaint and appeal. (See *Respondent's Brief* at pages 21, discussion of revenue neutrality and Preferred Tier History; at page 22, discussion of discounts which affect premium; page 24, premium and pricing discussion; at page 25, RPE smoothing of rates discussion; page 26, discussion of auto rates; at page 27, preferred tiering rates for components of premium; at page 34, impact on premium discussion; and at page 35, discussion of rate capping and premium increases.) King meanders between arguing this is a form case while concentrating on rate issues. Factually, his statements are not correct.

### **SUMMARY OF ARGUMENT**

Pursuant to Rule 10 of the Rules for Appellate Procedure further Summary of Argument is not required.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

As previously stated in Petitioner's Brief to this Court.

### **ARGUMENT**

Respondent, King in his Brief continues to attempt to inflame this Court with manufactured controversy that should clearly be ascertained by the Court for the lack of merit that has been exhibited concerning the same. Quite simply, Mr. King was not a harmed consumer in this matter yet seeks special attention from this Court for his perceived illegal treatment from Erie and/or the Commissioner. King posits no valid reason for supporting the Circuit Court's adoption *in toto* of his submitted findings of fact and conclusions of law. King makes known in his Brief that he is merely seeking a test

case from this Court as to applicability of the prior trilogy of decisions to form filings as opposed to rate filings.<sup>1</sup> King fails to understand the two are inextricably linked as will be discussed more fully herein. Further, the clear and express intention of the Legislature was to create a presumption of legality for those wishing to challenge rate and form filings that must be overcome. King seeks to have this Court disregard clear statutory language. Finally, King misstates the Commissioner's citing of technical filings in the record itself.

As for the remainder of his Brief, Respondent disregards known precedent of this Court; fails to acknowledge that he waived his right to contest the findings of the Commissioner; fails to acknowledge that he was unable to produce factual information to overcome his burden and that the Commissioner did not agree with his arguments; or show that any rights or prejudices were exhibited or taken from him in this matter. None of the grounds the Circuit Court relied can be stated as supportive of the arguments that Commissioner was clearly wrong. In the end, proper deference was not given in this matter. King doesn't dispute that a hearing denial was proper. The Insurance Commissioner has never denied that this Court and the Circuit Court clearly has review authority over its administrative actions. However, the Insurance Commissioner, as this Court has stated on many occasions, should be given the benefit of the doubt and deference to his expertise in regards to these matters. Respondent would have this Court deny its own precedent, re-write clear legislative intent and statutory direction while making light of his own duty to prove his case and overcome any burdens to show

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<sup>1</sup> See *State ex.rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008) ("*CitiFinancial I*"); *West Virginia Employers' Mutual Insurance Company v. The Bunch Company*, 231 W.Va. 321, 745 S.E.2d 212 (2013) ("*Bunch*"); and *Lightner v. Riley, et al.*, \_\_\_ W.Va. \_\_\_, 760 S.E.2d 142 (2014) ("*CitiFinancial II*").

the approval of this product and rates were illegal. He has failed in his attempt and this Court should overturn the Circuit Court and reinstate the Commissioner's Order.

**I. RATE AND FORM FILINGS ARE INEXTRICABLY LINKED IN REGARDS TO THE RPE FILING AND SHOULD BE ACCORDED SIMILAR DEFERENCE AS MADE CLEAR BY THE WEST VIRGINIA LEGISLATURE**

The Respondent states in page 6 of his Brief that “[t]his case will present the Court’s first opportunity to say whether its holdings in the trilogy of cases relied upon are also applicable to forms.” Additionally, Respondent states earlier in that same page, “[t]his is a form case (albeit that Erie’s Rate Protection Endorsement has an impact on ultimate premium).” Despite the fact that **this argument is being raised for the first time on this Appeal** and not previously argued to the Circuit Court, the facts and circumstances of the case *sub judice* could not be further from those statements.

The name of the product itself involves a rate filing which allows Erie to hold a rate steady for a list of reasons once it is finally arrived at. Further, the algorithms in the filing clearly deal with computations of the RPE as it applies to various consumers and policyholders. (A.R. 1-322.) King throughout his Brief and earlier administrative complaint argues that components of his premium went up thereby causing him harm. It is preposterous to now argue to this Court that this is not a rate case. (See additional *Statement of Facts, Petitioner’s Reply Brief, supra.*)

Notwithstanding the Respondent’s arguments, the clear intent of the Legislature is that both components, rates and forms, are accorded deference and a statutory presumption as will be discussed in the next section of this *Reply*.

On the point of inextricable linkage between rates and forms, West Virginia Code §33-6-8 expressly requires that all forms be filed with the Commissioner who has exclusive jurisdiction in approving or disapproving the same.

(a) No insurance policy form, no group certificate form, no insurance application form where a written application is required and is to be made a part of the policy and no rider, endorsement or other form to be attached to any policy shall be delivered or issued for delivery in this state by an insurer unless it has been filed with the commissioner and, to the extent required by subdivision (1), subsection (b) of this section, approved by the commissioner...

W.Va. Code §33-6-8(a). More telling is the express direction of the West Virginia Legislature that in one of the subsections allowing for disallowance of the filings, the Commissioner must find that the **benefits of the form filing are unreasonable in relation to the premium charged.** W.Va. Code §33-6-9(e). This analysis that is posited with the Insurance Commissioner must obviously balance the expertise of approving the rate to make sure that the benefits are reasonable in the form filing thereby linking the two matters. It should also be noted that W.Va. Code §33-20-5 which has been used in the trilogy of decisions mentioned in the Commissioner's Brief and this Reply, *supra*, uses the word "filing" throughout which connotes the ability to contest either matter as it does not distinguish between the two. Further, in section (g) of that code section, the Legislature uses "rate or form filing" throughout which would tend to evidence both types of filings being understood as being linked and handled in the same manner as to protests or concerns. W.Va. Code §33-20-5(g).

The Insurance Commissioner is not contesting that this Court nor the Circuit Court didn't have review authority and clearly this Court can review matters of law *de novo*. However, the matters found *sub judice* are essentially factual determinations as to

misrepresentations, misleading clauses, benefits of the product and harm to the consumer which arguably should continue to be accorded deference per *Citi I*, *Bunch* and *Citi II*.<sup>2</sup> “The Legislature finds: (1) [t]hat consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner approve the **forms used** and the **rates charged** by insurance companies in this state; [emphasis added].” W.Va. Code §33-6-30(a)(1). The Legislature further found that “(4) the provisions of this chapter were enacted with the **intent of requiring the filing of all rates and forms** with the Insurance Commissioner to enable the Insurance Commissioner to **review and regulate rates and forms** in a fair and consistent manner; [emphasis added].” W.Va. Code §33-6-30(a)(4).

Respondent cites to a non-binding case of *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So. 2d 368 (2000) for his assertion concerning the difference between rate filing and form filing issues. However, upon review of that case it is not applicable to the instant case *sub judice* in that it was dealing with public policy analysis of an underinsured motorist statute as it applied to filed policy language. In this matter we have a rate protection endorsement that clearly modifies the premium charged for stated conditions and is substantive to the issue. The two cases are not relevant to each other and the case should not even be persuasive to this Court especially with the clear precedent this Court has expounded upon. **Therefore, the rates charged in the RPE are primary to the purpose of the endorsement and not incidental thereto as Respondent would have the Court believe.**

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<sup>2</sup> State ex.rel. CitiFinancial, Inc. v. Madden, 223 W.Va. 229, 672 S.E.2d 365 (2008) (“CitiFinancial I”); West Virginia Employers’ Mutual Insurance Company v. The Bunch Company, 231 W.Va. 321, 745 S.E.2d 212 (2013) (“Bunch”); and Lightner v. Riley, et al., \_\_\_ W.Va. \_\_\_, 760 S.E.2d 142 (2014) (“CitiFinancial II”).

Consequently, when you reduce his own words, Respondent's substantive appellate issues filed with the Circuit Court on page 6 of his Brief to this Court, namely that "[t]he Commissioner was statutorily required to withdraw approval of Erie's RPE" and that the "Commissioner was clearly wrong with respect to certain Findings of Fact", both of those points require **factual determinations** by the Commissioner. The basis of the findings has to be **factually ascertained** to sustain the legal finding.

Nevertheless, not one single finding of the Commissioner was given deference by the Circuit Court.<sup>3</sup> Further, Respondent is not before this Court arguing that he wasn't able to make a record with the Insurance Commissioner and posit his arguments to him. The mere fact that the Commissioner didn't agree with his arguments is supposed to now be in and of itself error. Further, while this should be fatal to his claims, his meandering between rate increases of his liability coverage and discussion of "profit centers" should clearly rule out that this is just a "form" case. But even if the Court would find the same to be true, it has been shown the two are inextricably linked in the Commissioner's authority, the clear mandate by the Legislature and the rulings of this Court.

**II. THE EXPRESS AND CLEAR DIRECTION OF THE WEST VIRGINIA LEGISLATURE IS THAT A STATUTORY PRESUMPTION BE OVERCOME AFTER A FORM AND RATE FILING IS APPROVED BY THE INSURANCE COMMISSIONER**

Respondent King in his Brief states that that statutory presumption is somehow inapplicable to this situation or it is a standard of review for this Court and the Commissioner should have ignored it. Petitioner, Insurance Commissioner does not

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<sup>3</sup> Assignments of Error Nos. 3 & 4 cited by Respondent to the Circuit Court appear to be included as a way to bias or inflame the Court into finding in King's favor as opposed to having any substantive merit.

dispute that this Court and any reviewing Court should ascertain whether the burden has been met. However, the matter came before the Commissioner on an administrative complaint. Consequently, the Insurance Commissioner could not disregard clear legislative intent in coming to its findings of fact and conclusions of law.

Under West Virginia Code §33-6-30, the Legislature clearly and expressly stated the following, "...[w]here any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, **there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter...**[Emphasis added.]" West Virginia Code §33-6-30(c).<sup>4</sup> Therefore, by legislative mandate, King must overcome the presumption of correctness and legality of the filing. After the Commissioner carefully considered all of King's arguments and submissions, he disagreed and found that he did not overcome the burden he was charged by the Legislature with overcoming. The Circuit Court does not provide any analysis as to this burden nor discuss the matter in any great detail which is error and an abuse of discretion in and of itself.

### **III. THE COMMISSIONER MADE SPECIFIC AREAS OF THE TECHNICAL FILING KNOWN TO THE CIRCUIT COURT WHICH FAILED TO CONSIDER THE SAME IN ITS ANALYSIS AND ORDER**

King wrongly states that the Commissioner never referenced specific instances in its Brief or arguments to the Circuit Court. Clearly at the hearing on the appeal, the Commissioner referenced the entire record and the filing itself. In the Appendix to the case *sub judice*, at pages 1378-1387, the Insurance Commissioner provides oral argument to the Circuit Court and does mention pages in the technical filing. The Brief

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<sup>4</sup> Again we further see express linkage by the Legislature of rate approval and form approval.

below included specific references to the Record on Appeal as evidenced by the same. The Circuit Court stated they would be reviewing the entire record on appeal. **The entire filing is relevant.** King fails to point out that much of his argument to the Court was technical in nature and he is not an actuary. Consequently, he was not qualified to make such arguments nor was such arguments foundationally in the record. Further, there is no sworn testimony from King concerning any of his allegations from him personally. Additionally, King spends a great deal of his interview of Mr. Cook dealing with the rating aspects of the RPE despite stating this is a “form” case. (See A.R. at 392-590.) Consequently, King is making arguments to the Court from whom no testimony is in the Appendix record but yet would have this Court assume were true and factually before this Court. In representing himself in this matter, King has not handled the necessary proof elements in his case and seeks to lay blame with the Commissioner when the burden was his.<sup>5</sup>

**IV. NONE OF THE AREAS THE CIRCUIT FOUND IN ERROR CAN BE SAID TO BE CLEARLY WRONG BUT RATHER A SUBSTITUTION OF JUDGMENT FAILING TO GIVE THE COMMISSIONER THE BENEFIT OF DOUBT IN HIS AREA OF EXPERTISE**

King continues to argue that the Circuit Court must not give deference to the Commissioner because **everything** he did in this matter was clearly wrong. (See *Respondent's Brief* at page 17.) As for the violation of Chapter 33, King posits Age 55 discount information. However, King's arguments are moot as he did not attempt to attain the discount, he did not provide the required training certificate and regardless,

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<sup>5</sup> By way of additional reference, the Petitioner would point out to the Court references in the Appendix dealing with specific parts of the RPE filing would include A.R. 4-5 (explanation of product filing); A.R. 8 (content of filing including actuarial memorandum); A.R. 22 (RPE language); A.R. 31 (order of calculation of premium); A.R. 47 (RPE factors); A.R. 98 (premium determinations); A.R. 99 (Age 55 discount); A.R. 123-124 (RPE rules); A.R. 194 (Important Notice); and A.R. 196 (Rate capping conditions for experience of policyholder) among others.

this information was filed with the Insurance Commissioner who was aware of the same. Nevertheless, endorsements modify contracts. It can not be stated that the Commissioner was clearly wrong in approving this condition in the RPE which was clear and transparent. In regards to this matter this Court has clearly stated

**At any rate, it is not up to this Court to identify the component charges that can be included in an insurance premium. That decision has been left to the Commissioner. And the Commissioner, upon its review of the consumer complaint filed by Bunch, found no basis for disturbing the presumption that the approved rates were valid. See W.Va. Code § 33-6-30(c). We find it noteworthy that Judge Kaufman, during the hearing on this matter, was quick to recognize two fundamental concerns presented by this case: encroachment on the regulatory rate making process and separation of powers. Notwithstanding the trial court's appreciation of these issues, it proceeded to breach established precepts pertaining to both of those juridical areas. Specifically failing to heed this Court's recognition in *State ex rel. Crist v. Cline*, 219 W.Va. 202, 632 S.E.2d 358 (2006), "that we . . . give deference to [the Insurance Commissioner's] interpretation, so long as it is consistent with the plain meaning of the governing statute," the trial court substituted its judgment for that of the Commissioner on a matter that clearly fell within the rate making area of the Commissioner's expertise. *Id.* at 211, 632 S.E.2d at 367. As we recognized in *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 466 S.E.2d 424 (1995), "[a]n inquiring court--even a court empowered to conduct de novo review--must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Id.* at 582, 466 S.E.2d at 433. Ignoring the deference that the Commissioner was entitled to in connection with the interpretation of its own regulation, the trial court encroached upon a matter that has been expressly delegated to the executive branch of our state government. See *Citifinancial*, 223 W.Va. at 237, 672 S.E.2d at 373. In doing so, the trial court neglected to regard this Court's admonition in *Citifinancial* that "the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner." *Id.* [Emphasis added.]**

*W. Va. Employers' Mut. Ins. Co. v. Bunch Co.*, 231 W. Va. 321 at 331, 745 S.E.2d 212 at 222 (2013).

Further, King argues the filing contains misleading clauses. The Endorsement has been found to have been utilized as filed. King never stated that Erie deviated from its filing with the Commissioner. The misleading clauses he cites to were clearly spelled out in the filing, discussions with the Commissioner, in notices to the consumer and throughout the filing memoranda and notes. (A.R. 1047-1067.) It cannot be stated that the Commissioner was clearly wrong in approval of this filing. The Commissioner reviews and approves thousands of filings each year. Should the deference be given to the person who has been lawfully given the responsibility to approve the same, has the training and expertise in his office to review the matter and discuss filings with 49 other jurisdictions or should it be determined by others?

The title itself cannot be stated to clearly be a misleading statement. For specified conditions, a person's rate will remain the same once obtained. The RPE provides certainty for many thousands of WV policyholders. The product is used in other states. The rate is protected. The Circuit Court made a highly subjective substitution of the Commissioner's finding in this regard.

The deceptive marketing argument again cannot be stated as proper. There is absolutely no testimony in the record that supports this deceptive advertising claim. Respondent seizes upon a sample brochure in the filing. However, assuming *arguendo* that the brochure has issues which the Commissioner does not concede, King did not present any testimony that the brochure was actually used in the sale to him or other policyholders or if it was ever actually used. It cannot be stated with the disclosure of the Important Notice that this product was deceptively marketed.

The benefits of the product are clearly reasonable in relation to the premium charged and therefore assertions by King are incorrect. The enumerated reasons that protect consumers from rate increases despite loss history, usage, mileage, driver age, insurance score, claims or violations cannot be glossed over. These are tangible substantive benefits for someone who uses the RPE and is therefore in the public interest as well. Further, it is evidenced by the overwhelming purchase of this product by West Virginia consumers.

Consequently, the Circuit Court relied on **factual interpretations** to come to its conclusions in this matter. Therein lays the problem in that it failed to give any deference whatsoever to the Insurance Commissioner in any way, shape or form. The trilogy of cases cited *Citi I*, *Bunch* and *Citi II*, *supra*, are clearly applicable to those findings of the Commissioner and the Circuit Court's failure to accord even a scintilla of deference to the Insurance Commissioner is an abuse of discretion, clearly wrong and clear error.

So in summary, Respondent King would have 38,000 policyholders displaced and re-rated subjecting them to potential rate increases or other issues simply because he believes he was somehow wronged by being placed voluntarily in an endorsement that actually saved him premium dollars and of which he remained in well after being given several chances to remove himself from this optional product. This Court should readily ascertain that it is the insurance consumers of this State and not Mr. King who would be harmed should the Circuit Court's Order be upheld.

## CONCLUSION

The Insurance Commissioner respectfully submits that he has not violated any constitutional or statutory provisions; acted in excess of the statutory authority or jurisdiction of the agency; used unlawful procedures; shown to have committed other error of law; was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion of any constitutional or statutory provision.

Therefore, the Insurance Commissioner respectfully requests that this Court due to clear precedent and the various cited clear errors and abuse of discretion reverse the Circuit Court by special assignment, and reinstate the Commissioner's *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* entered July 10, 2013. Respondent has not sought a remand on this matter nor disputed the denial of an administrative hearing and therefore due to the argument contained herein, the matter should be reinstated to the prior findings by the Insurance Commissioner.

Respectfully submitted,

**OFFICES OF THE INSURANCE COMMISSIONER  
STATE OF WEST VIRGINIA**

**By Counsel**



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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of March, 2015, true and accurate copies of the forgoing REPLY BRIEF OF PETITIONER, THE INSURANCE COMMISSIONER OF WEST VIRGINIA were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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