

# ARGUMENT DOCKET

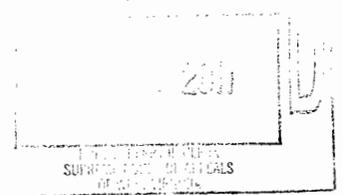
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0505

**JEFFERSON UTILITIES, INC., *Petitioner***

**v.**

**THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA, *Respondent***



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Appeal from a Final Order of the  
Public Service Commission of West Virginia  
Dated February 18, 2011  
Case Nos. 10-0974-W-PC and 10-1329-W-42T

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## REPLY BRIEF

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## **I. STATEMENT OF THE CASE**

This is a reply brief in an appeal by Jefferson Utilities, Inc. (“JUI”) from an order of the Public Service Commission (“PSC”) entered on February 18, 2011, ruling on exceptions to the Recommended Decision by the Administrative Law Judge (“ALJ”) dated January 7, 2011, in Case Nos. 10-0974-W-PC and 10-1329-W-42T (“Order”).

The effect of the PSC’s decision was to reduce an annual rate increase of \$310,946 or 22.4 percent recommended by the ALJ, which was still less than that to which JUI asserts it is entitled, to only 4.4 percent, or \$66,324, Order, at 1, which is manifestly inadequate and unfair.

### **A. Procedural History.**

As discussed in JUI’s initial brief, the issue of approval of its affiliate Operation and Maintenance (“O&M”) agreement with Snyder Environmental Services, Inc. (“SES”) and lease agreement with Lee Snyder (“Mr. Snyder”) and Cynthia Snyder (“Ms. Snyder”) was the subject of proceedings before the PSC.

Rather than deciding those issues, however, based upon an evidentiary record developed in proceedings in which the PSC’s Staff (“Staff”) served as JUI’s adversary, the PSC simply decided not to decide but to order additional proceedings. As the PSC’s brief states, “This petition for appeal challenges . . . the Commission’s refusal to approve, at this time, certain affiliate agreements

between JUI and . . . SES . . . .” Statement of the PSC at 2 (emphasis in original).<sup>1</sup>

Because of the incredible financial burden placed upon JUI by the PSC’s decision not to decide but to order additional proceedings, JUI has filed a Notice of Termination and Operation and Maintenance Agreements, **Exhibit A**, and will not be pursuing its assignment of error related to those agreements. Moreover, JUI will not be leasing space from Mr. and Ms. Snyder, rendering moot JUI’s appeal of the PSC’s refusal to approve the proposed lease agreement.<sup>2</sup>

JUI continues to pursue, however, its appeal of the PSC’s decision to reject the ALJ’s recommendation regarding reasonable rates<sup>3</sup> based upon JUI’s cost structure.<sup>4</sup>

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<sup>1</sup> The PSC’s decision not to decide is particularly vexing as this Court has held that “as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties.” *Preston County Light & Power Co. v. Renick*, 145 W. Va. 115, 129, 113 S.E.2d 378, 387 (1960). Here, there was more than sufficient evidence in the record that the agreements between JUI and SES and/or Mr. and Ms. Snyder were not unconscionable or oppressive and did not impair the obligation of JUI to discharge its public duties.

<sup>2</sup> Rather, JUI will make arrangements to have the services formerly performed by SES performed by personnel JUI will employ using vehicles and equipment obtained by JUI. JUI will also have to obtain office space which will likely cost more than the PSC allowed.

<sup>3</sup> In its brief, the PSC references where JUI’s rates rank relative to other water utilities, Statement of PSC at 2, but the PSC made no reference to such rankings in its decision and because a utility’s rates are a product of its cost structure, such rankings provide no meaningful guidance in this case. Rather, such references in its brief appear to be part of a strategy on the part of the PSC to malign JUI and convince the Court that it should ignore the significant differences between the ALJ’s recommendations and the PSC’s decision which essentially deferred to Staff without independent analysis and/or explanation on several major disputes.

**B. Recommended Decision.**

With respect to JUI's petitions for consent and approval, the ALJ approved the O&M Agreement, App. at 78, but not the Lease Agreements, App. at 77. Again, because JUI has been forced to abandon its long-standing efforts to seek approval of its affiliate agreements with SES, those issues are no longer presented to the Court for its decision.

As for rates, the ALJ's findings, supported by the evidence, are relevant:

1. The ALJ determined, based upon the evidence, that \$54,270 per year or \$4,522.50 per month, was the appropriate annual rental expense, App. at 78;
2. The ALJ determined, based upon the evidence, that \$422,984 per year, or \$35,248 per month, was the appropriate O&M expense for JUI to pay SES under the O&M Agreement flat fee, App. at 78;
3. The ALJ determined, based upon the evidence, that \$18,853 was the appropriate annual insurance premium expense, App. at 43, 71;

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<sup>4</sup> Although JUI acknowledges the filing of a brief by the intervenors in this case, only three cases are cited therein (all involving the standard of review) and only two statutes and one regulation. Essentially, the intervenors' argument is that this Court should affirm the PSC's decision because to do otherwise will result in an increase in their rates. Although JUI appreciates that everyone, including JUI, wants to be able to acquire goods and services at the lowest possible cost, some of these same intervenors are those who complain just as vociferously about the quality of service when the current rate structure inhibits JUI's ability to provide quality services. The record, the ALJ's recommendations, and the PSC's decision speak for themselves and it is upon those three things that JUI prosecutes its appeal. Consequently, as the intervenors' brief predominately restates the ALJ's recommendation and the PSC's decision and merely indicates that the intervenors support the PSC's decision, JUI will limit its discussion in this reply brief to the PSC's defenses of its decision.

4. The ALJ determined, based upon the evidence, that \$11,620 was the appropriate annual utility expense in the Snyder Building, App. at 78;

5. The ALJ determined, based upon the evidence, that \$3,110,524 was the appropriate amount of owners' investment in the Snyder Building, App. at 66-67, 78;

6. The ALJ determined, based upon the evidence, that \$86,926 was the appropriate rate case expense, App. at 79; and,

7. The ALJ determined, based upon the evidence, that JUI was entitled to accumulated depreciation, i.e., the ALJ adjusted JUI's accumulated depreciation balance to reflect straight-line, rather than accelerated tax depreciation, which is in accordance with Generally-Accepted Accounting Principles ("GAAP") and the PSC's method of calculating depreciation expense, resulting in a \$204,334 addition to JUI's rate base, App. at 79, 90.<sup>5</sup>

Thus, JUI substantially prevailed on most of the issues related to the amount of expenses to be applied in calculating its cost of service.

### **C. PSC Order.**

The PSC issued its Order on exceptions to the ALJ's Recommended Decision on February 18, 2011. The PSC ignored virtually all of its ALJ's findings and conclusions and, instead of substituting its own findings and conclusions, it merely adopted Staff's recommendations and made no

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<sup>5</sup> Pursuant to a January 12, 2011, Order, the PSC directed Staff to file a "schedule indicating the revenue requirement, or a reconciliation of the dollar difference, on an issue-by-issue basis, between the recommendations filed by Commission Staff and the Recommended Decision." App. at 93.

independent findings or conclusions of its own,<sup>6</sup> or, even with respect to some issues, offering any explanation whatsoever for its rejection of the ALJ's findings and conclusions.<sup>7</sup>

The PSC adopted Staff positions on every issue except Mr. Snyder's salary, but the Staff's job and the PSC's job are different. The Staff's job is to be an advocate for ratepayers,<sup>8</sup> while the Commission's job is to be more

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<sup>6</sup> In its brief, the PSC attempts to compensate for the absence of any independent findings and conclusions by interjecting new facts and legal arguments not contained in its decision. For example, the PSC discusses where JUI's rates rank in terms of other water utilities, Statement of PSC at 2, but this appears nowhere in its decision. It emphasizes issues regarding prior rate increases, quality of service, and customer protests, *id.* at 5-6, but these issues were not pertinent to its decision in this case. Of course, when quality of service issues arise from the financial inability of a utility, based upon current rates, to address those issues, increased rates and customer opposition to those increased rates, are likely to follow. Quality services cannot be provided, however, when rates do not accurately reflect a utility's cost structure and the PSC's refusal in this case to approve even the rates recommended by the ALJ will only exacerbate service issues.

<sup>7</sup> While the ALJ approved the O&M Agreement, the PSC rejected the O&M Agreement and Lease Agreements, App. at 23, leaving JUI hanging out to dry on its relationship with its landlord and system operator. In rejecting both, the PSC reasoned, in two sentences, that JUI did not make a "proper showing" that the O&M Agreement and the Leases with its affiliates meet the statutory test." App. at 23. Obviously, however, not even the PSC was convinced of this because its Order did not and could not deny approval of the O&M Agreement and Lease Agreements based upon the evidence of record, but rather punted by initiating a general investigation of the proposed O&M Agreement and Leases as well as other issues. App. at 23. The investigation instituted by the PSC was assigned Case No. 11-0235-W-GI. As previously noted, because of cost concerns, SES has decided to terminate its contractual agreements with JUI, thereby negating the need for additional proceedings regarding these agreements.

<sup>8</sup> General Order No. 195, Rule for Reorganization, January 4, 1980, [www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=516&Source=Archive](http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=516&Source=Archive).

balanced between utilities and customers.<sup>9</sup> The PSC lost sight of its balancing duty in this case.

Because the PSC's decision is not supported by the evidence and/or is contrary to law, the PSC's decision to reject the ALJ's recommendations regarding insurance premiums, rent, rate case, and accumulated depreciation expenses should be reversed and the PSC ordered to adopt the ALJ's recommendations; the PSC's decision to reduce the salary for JUI's sole employee should be reversed and the PSC ordered to recalculate JUI's rates based upon the salary actually booked; and either the PSC's decision to reduce the ALJ's recommended rate increase from 22.4 percent to only 4.4 percent should be reversed and the PSC ordered to adopt the ALJ's recommendation or, in the alternative, the PSC should be ordered to recalculate JUI's rates based upon this Court's rulings on the errors alleged by JUI.

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<sup>9</sup> W. Va. Code § 24-1-1(a) ("It is the purpose and policy of the Legislature in enacting this chapter to confer upon the Public Service Commission of this State the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to: (1) Ensure fair and prompt regulation of public utilities in the interest of the using and consuming public; (2) Provide the availability of adequate, economical and reliable utility services throughout the State; (3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the State's energy resources, such as coal; (4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference, applied in a manner consistent with the purposes and policies set forth in article two-a of this chapter, and based primarily on the costs of providing these services. . . .").

## II. ARGUMENT

### A. Standard of Review.

With respect to the standard of review of PSC orders, this Court recently reiterated:

“The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.” Syllabus Point 1, *Central West Virginia Refuse, Inc. v. Public Service Commission*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

Syl. pt. 2, *Mountain Communities for Responsible Energy v. Public Service Comm'n*, 222 W. Va. 481, 665 S.E.2d 315 (2008)(citation omitted).

More specifically, with respect to the scope of review in a rate case, this Court held:

“In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's

balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." Syllabus Point 2, *Monongahela Power Co. v. Public Service Commission*, 166 W. Va. 423, 276 S.E.2d 179 (1981).

Syl. pt. 1, *Mountain Communities, supra* (emphasis supplied).<sup>10</sup>

Indeed, "a utility is entitled to earn a reasonable return upon the whole of its property devoted to public service. . . . Deprivation of the right to earn a reasonable return upon the full fair value of the property of such utility is, to that extent, confiscation of its property." *United Fuel Gas Co. v. Public Service Comm'n*, 143 W. Va. 33, 51, 99 S.E.2d 1, 12 (1957)(citation omitted).

Where the PSC fails to approve rates, as in this case, sufficient to maintain a utility's financial integrity and fairly compensate its investors for the risks they have assumed, its decision should be reversed. *Chesapeake and Potomac Telephone Co. of West Virginia v. Public Service Comm'n*, 171 W. Va. 494, 300 S.E.2d 607 (1982); *Virginia Elec. and Power Co. v. Public Service*

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<sup>10</sup> See also *State ex rel. Water Development Authority v. Northern Wayne County Public Service Dist.*, 195 W. Va. 135, 141, 464 S.E.2d 777, 783 (1995)("The legislature sought to establish in the PSC a governmental entity which would protect the public from unfair rates and practices by public utilities and also ensure that public utilities are given a competitive return for their stockholders.")(emphasis supplied); Syl., *Virginia Elec. & Power Co. v. Public Service Comm'n*, 161 W. Va. 423, 242 S.E.2d 698 (1978)("The Public Service Commission may employ such methods for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia consumers good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia.")(emphasis supplied); *State ex rel. Knight v. Public Service Comm'n*, 161 W. Va. 447, 461-62, 245 S.E.2d 144, 152 (1978)("West Virginia public utilities law, like its federal and state counterparts, recognizes '(b)usiness reality demands' that a utility be permitted by law to increase its rates 'whenever that is the economically necessary means' of balancing revenues and procuring 'the vast sums necessary for the maintenance and expansion' of utility service to customers.")(emphasis supplied and citations omitted).

*Comm'n*, 162 W. Va. 202, 248 S.E.2d 322 (1978); *United Fuel Gas Co. v. Public Service Comm'n*, 154 W. Va. 221, 174 S.E.2d 304 (1969).

Likewise, where the PSC rejects the recommended decision of its ALJ, as it did in this case, application of these standards of review may warrant reversal of the PSC's order and a directive to adopt such recommended decision. *Community Antenna Serv., Inc. v. Public Service Comm'n*, 219 W. Va. 425, 633 S.E.2d 779 (2006); *Stowers and Sons Trucking Co., Inc. v. Public Service Comm'n*, 182 W. Va. 374, 387 S.E.2d 841 (1989).

In the instant case, JUI submits that application of the appropriate standards of review warrants reversal of the PSC's order and adoption of the ALJ's recommendations regarding insurance premiums, rent, rate case expense, and accumulated depreciation, and reversal of the PSC's order reducing JUI's expense for officer salary, in order to strike a balance between maintaining JUI's financial integrity, fairly compensating its investors, and protecting the relevant public interests.

**B. The PSC Erred By Rejecting the Findings of Fact, Conclusions of Law, and Recommended Decision of its ALJ Without Making its Own Independent Findings and Conclusions, Contrary to the Applicable Standard of Review, and Denying the Utility Rate Adjustment Requested by JUI.**

Although the PSC, in its brief, notes, "The ALJ's order is a recommended decision," Statement by PSC at 12, JUI acknowledged in its initial brief that it did "not dispute that an ALJ's order in a rate case is only a recommendation and the PSC may reject such recommendation and render its own findings of fact and conclusions of law." Petition for Appeal at 10.

As JUI further noted, however, “The PSC . . . is not free to merely reject an ALJ’s recommendations and substitute its own decision that is (1) unsupported by substantial evidence; (2) contrary to the applicable law; and (3) an abuse of discretion which does not allow a utility to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed.” Id.

In its brief, the PSC does little more than restate statutory provisions regarding its jurisdiction over utility rates.<sup>11</sup> Statement of PSC at 12-14. In

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<sup>11</sup> In furtherance of its strategy of misdirection, the PSC’s brief states, “Interestingly, JUI is so zealous in support of the ALJ’s recommendations it appears to abandon its own original proposed rate request, seeking almost \$1 million dollars (equivalent to an approximate 72 percent increase to average customers), in favor of the ALJ’s recommendations for an annual revenue increase of \$310,946 or a 22.4 percent increase for average customers.” Statement by PSC at 12. Of course, the conclusion in JUI’s original brief speaks for itself:

JUI respectfully requests the following relief: (1) the PSC’s decision to deny approval of the O&M Agreement, contrary to the ALJ’s recommendation, be reversed and the PSC ordered to adopt the ALJ’s recommendation; (2) the PSC’s decision to reject the ALJ’s recommendations regarding insurance premiums, rent, rate case, and accumulated depreciation expenses be reversed and the PSC ordered to adopt the ALJ’s recommendations; (3) the PSC’s decision to deny approval of the Lease Agreements be reversed and the PSC ordered to recalculate JUI’s rates based upon the expenses incurred by JUI pursuant to such agreements; (4) the PSC’s decision to reduce the salary for JUI’s sole employee be reversed and the PSC ordered to recalculate JUI’s rates based upon the salary actually booked; and (5) either the PSC’s decision to reduce the ALJ’s recommended rate increase from 22.4 percent to only 4.4 percent be reversed and the PSC ordered to adopt the ALJ’s recommendation or, in the alternative, the PSC be ordered to recalculate JUI’s rates based upon this Court’s rulings on the errors alleged by JUI.

Petitioner’s Brief at 30. Although JUI was disappointed by the ALJ’s recommended decision, it decided as was its right to appeal only those aspects of the PSC’s order, with the exception of the salary issue, that departed from the ALJ’s decision. For the PSC to constantly suggest, in its brief, that JUI’s efforts are any broader than that or

discussing this assignment of error, the PSC's only criticism of the ALJ was that she found that "the reasonable amount of rent is somewhere between the Staff and JUI recommendations," *id.* at 13, but such finding, based upon the evidence presented, is well within a fact-finder's discretion.

Ultimately, as with its decision in this case, the PSC merely restates its conclusion that, "The credible evidence supports a \$66,324 annual revenue increase," *id.* at 14, with little independent explanation of why it rejected the findings and conclusions of the ALJ, which is erroneous.<sup>12</sup>

**C. The PSC Erred By Failing to Include in JUI's Rate Calculation the Costs Approved by the ALJ Which Would Allow JUI to Recoup its Legitimate Business Expenses Through its Rate Structure.**

In the rate case, the PSC determined an (inadequate) amount for JUI to pay SES for Operation and Maintenance ("O&M") services (the SES cost to serve JUI) on a going-forward basis and launched an investigation (GI case) into, among other things, whether JUI customers would be better off if JUI performed the O&M work in house instead of using SES.

The Consumer Advocate Division of the Commission ("CAD") intervened in those proceedings and served extensive discovery on JUI and SES, including

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that the implications for JUI's customers are any greater is disingenuous at best and deceptive at worst.

<sup>12</sup> W. Va. Code § 24-1-7 ("All orders of the Commission shall set forth separately findings of fact and conclusions of law which findings shall make specific reference to the evidence in the record which supports such findings."); see also *Syl. pt. 3., Mountain Trucking Co. v. Public Service Comm'n*, 158 W. Va. 958, 216 S.E.2d 566 (1975) (Where an administrative agency is required to find facts or state reasons as a basis for its order, the order must contain findings of facts, rather than conclusory statements, so as to withstand judicial scrutiny).

questions going to SES's cost to serve JUI as well as virtually all of SES's activities, including work performed for JUI and every other of its customers.

Despite JUI's pleas to the PSC that it had just decided SES's cost to serve JUI, and that it was a waste of time and expense to do it again, and that the CAD's discovery was unduly burdensome and a violation of SES's confidential business information, the PSC refused to convene a Rule 26 discovery conference or to define the issues in the case to exclude SES's cost to serve JUI.

Aware of the PSC's decisions allowing broad discovery, SES announced that it was terminating its O&M Agreements with JUI and would no longer provide it services, in part so that its business confidential information would not be made public. **Exhibit A.**

The present appeal challenges the PSC's decisions on SES's cost to serve JUI, including rent. SES's termination of the O&M agreements does not affect the appeal with respect to the rate-making issues, however, because JUI now has to obtain those services and housing elsewhere. Those expenses do not disappear simply because a vendor has decided not to do business with JUI.

Accordingly, although JUI's appeal of the PSC's refusal to approve JUI's affiliate agreements is now moot, its appeal of the PSC's rejection of the ALJ's recommended expenses for JUI's insurance premiums, rent, rate case expense, and accumulated depreciation, as well as the PSC's decision to reduce JUI's expense for officer salary, are not moot.

**D. The PSC Erred By Rejecting the ALJ Recommended Expenses for JUI's Insurance Premiums, Rent, Rate Case Expense, and Accumulated Depreciation, and By Reducing JUI's Expense for Officer Salary.**

The PSC erred by failing to approve ALJ recommended expenses for JUI's insurance premiums, rent, rate case expense, and accumulated depreciation.

**1. Insurance Premiums**

JUI's rate request included an \$18,853 figure for an insurance expense. JUI Ex. 2, Attachment No. 3, at 7. The expense pays to insure various utility assets and activities of the Company. Tr., Dec. 1, 2010, at 69. A breakdown of the utility assets covered by the insurance premium and a copy of the declaration pages were placed into evidence by JUI. JUI Ex. 7.

Staff did not include the \$18,853 insurance premium expense in its recommended cost of service, see Staff Exhibit 2, although at the hearing Mr. Pauley conceded that the amount should be allowed, Tr., Dec. 2, 2010, at 190.

There being no dispute between JUI and Staff regarding the insurance premium expense, the ALJ included an \$18,853 annual expense in JUI's cost of service for insurance premiums. App. at 43. Yet, in the PSC's Order, without discussion, it denied JUI any insurance expense.<sup>13</sup>

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<sup>13</sup> While the PSC's order did not specifically address the insurance premium expense, it clearly denied the expense. The O&M expense approved by the PSC totaled \$959,161, App. at 36, which is the amount Staff recommended, App. at 24. As noted previously, Staff did not include the \$18,853 insurance premium expense in its recommended cost of service. See Staff Ex. 2. So by adopting the \$959,161 operation and maintenance expense recommended by Staff, the PSC clearly did not allow the \$18,853 insurance premium expense.

As the evidence provided by JUI in support of the \$18,853 insurance premium expense was not rebutted and because the PSC failed to make a specific finding regarding the expense, the expense should be allowed in JUI's cost of service.

In its brief, the PSC claims that, "This expense was booked twice by JUI for the purposes of calculating rates," Statement by PSC at 15, but this is incorrect.

JUI originally showed insurance expense twice, once in its Rule 42 exhibit at Adjustment 32, and again in an allocation of SES's indirect costs to JUI. Statement by PSC at 15. The allocation of indirect costs results in 50% of SES's relevant indirect costs being allocated to JUI. As the PSC acknowledges (id. at 15), JUI removed the duplication at the hearing when it presented JUI Exhibit 15.

As the case was presented to the ALJ, JUI asked for the \$18,000 insurance expense it incurred on its property and plant only. Any duplication was removed. Staff recommended recovery of less than half of the insurance expense, the amount that resulted from allocation of a half of a dramatically reduced indirect cost pool. This is what the PSC allowed.

The PSC is clearly wrong when it states that "The Commission's total O&M expense calculation for JUI of \$959,161 properly includes the insurance

expense adjustment requested by JUI of \$18,853.” Statement by PSC at 15. It does not include the insurance premium<sup>14</sup> and should be reversed.

## **2. Rent**

Because JUI and SES both occupy the Snyder Building, it is necessary to calculate and apportion a fair rental. JUI and Staff both followed the same method, which is to calculate a fair annual return on owners’ investment, add building expenses, and then apportion the result between JUI and SES.

In the matter of owners’ investment, JUI presented a detailed list of costs associated with the construction of the Snyder Building, which totaled \$3,118,524. JUI Ex. 4. Staff presented a less detailed list that totaled \$2,411,704. The ALJ considered the evidence of both parties and found the proper amount to be \$3,110,524, which was JUI’s total less a duplicative \$8,000 appraisal. App. at 66-67, 78.

The PSC rejected the ALJ’s finding regarding owners’ investment and adopted Staff’s position, without further discussion, as “reasonable.” App. at 24. There was no discussion as to why Staff’s amount was “reasonable” or why the actual costs incurred by the owners were ignored. The PSC simply noted Staff’s objection to JUI’s proposed number and then summarily found Staff’s

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<sup>14</sup> See *Chesapeake Utilities Corp. v. Delaware Public Service Comm’n*, 705 A.2d 1059, 1068 (Del. Super. 1997)(“Operating expenses are generally defined as those expenses inherent in the cost of producing the utility’s service, required to keep the utility running. In other words, they are the expenses normally incurred in the course of the utility’s ordinary activities. . . . This may include such items as maintenance and repair, payroll, insurance premiums, taxes paid, legal expenses, collection costs, and advertising fees. See 64 Am. Jur. 2d *Public Utilities* §§ 173-89.”)(emphasis supplied).

calculation to be reasonable. Thus, the \$3,110,524 owners' investment amount approved by the ALJ should be reinstated as the evidence supported the finding, and the PSC failed to discuss the findings required to support its decision.

In its brief, all the PSC says to defend its unexplained decision to reject JUI's detailed calculation of an owner's investment of about \$3.1 million, as opposed to Staff's less detailed calculation of an owner's investment of about \$2.4 million is that it "disallowed the attempt by JUI at the hearing to increase the claimed value of the investment by the owner for the building." Statement by PSC at 18. The PSC does not articulate why it "disallowed the attempt" nor does it explain why its disallowance was reasonable.<sup>15</sup>

If any agency, including the PSC, is to reject an ALJ's findings and conclusions, it has a due process obligation to explain its rejection and, because the PSC has failed to do so in this case, its decision on this issue should be reversed and the ALJ's recommendation should be reinstated.

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<sup>15</sup> The PSC also references the allocation of square footage. Statement by PSC at 19. Essentially, the PSC faults the ALJ for "splitting the difference" between JUI's usage calculations and Staff's usage calculations, but the PSC itself has split the difference any number of times where such decision is supported by the evidence. See *Craigsville Public Service District*, Case No. 09-2023-PSD-19A (Aug. 5, 2010)(splitting of difference in dispute over the number of employees); *Investigation of Wrecker Companies' Compliance*, Case No. 06-1915-MC-GI (July 28, 2009)(approving a \$70 rate for tows calculated by splitting the difference between the Staff position and the wreckers); *Jefferson Utilities, Inc.*, Case No. 02-0080-W-42T (allowing only 50% of SES charges). Again, if the PSC wants to make a decision different than that recommended by the ALJ, it is insufficient for it to simply conclude that it disagrees with the ALJ and agrees with Staff. Rather, it should have explained why the Staff's recommendation as to allocation of square footage was more supported by the evidence than the ALJ's recommendation. Because it failed to do so, the ALJ's recommendation should be reinstated.

### **3. Rate Case Expense**

JUI experienced substantial professional services expenses during the test year. Its filing sought to recover these expenses, as well as the expected cost of the rate case, spread over five years at \$81,886 per year. JUI Ex. 10. The ALJ allowed recovery of both of these items. App. at 33, 79. The PSC denied recovery of the outside services expenses, reasoning only that allowance would imply that they were “normal expenses,” App. at 25, and that due to a “lack of clarity” in JUI’s case and the Recommended Decision, the PSC would use the Staff’s allowance, \$30,000. There was no finding by the PSC that JUI’s costs were unreasonable.

In its brief, the PSC defends its rejection of the ALJ’s recommendation by stating, “The ALJ . . . accept[ed] JUI witness’s speculated amount of \$86,962 for rate case expense.” Statement by PSC at 16. A fact-finder’s reliance upon sworn expert testimony,<sup>16</sup> however, is not “speculative” and because the PSC does nothing to explain why it rejected the expert’s testimony, its decision should be reversed and the ALJ’s recommendation be reinstated.

### **4. Depreciation**

Depreciation is an allowance for the consumption of capital. *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151 (1934).

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<sup>16</sup> JUI’s expert is a certified public accountant with eighteen years’ experience in matters before the Public Service Commission. Tr., Dec. 1, 2010, at 56-57.

Per IRS regulations, JUI claims accelerated depreciation for income tax purposes and records depreciation expense and accumulated depreciation on its books using this accelerated method.

For ratemaking purposes, the PSC calculates depreciation expense using the straight line method following the Uniform System of Accounts for Water Utilities. Accelerated depreciation expense is usually larger than straight line expense.

In previous cases, JUI had adjusted its depreciation expense claim to conform to the PSC's mandated straight line method, but mistakenly had not adjusted its reserve, continuing to reflect the reserve accumulated under the accelerated method. This overstated its reserve for depreciation and understated its net plant compared to a calculation based on straight line depreciation. Tr., Dec. 1, 2010, at 75-79.

In essence, the reserve has accumulated or has been funded faster than the deprecation expenses allowed. This means that JUI's plant will be fully depreciated before it has recovered the plant's cost through the depreciation expense allowed by the PSC. Consequently, JUI needs to adjust its depreciation reserve to bring it in line with the PSC's regulations, which are different from those used for tax purposes.

In this case, JUI calculated both depreciation expense and the depreciation reserve based on the straight line method. Id. at 75-76. The Staff and the PSC however, allowed deprecation expense to be calculated on the straight line method, but refused to adjust the reserve to reflect the straight

line method, the PSC reasoning, essentially, that JUI was bound by the mistake it had always made. *Id.* at 78; App. at 26-27.

The PSC's brief does not dispute that the reserve sought by JUI in this case is consistent with the regulations. Indeed, not only did the ALJ recommend that JUI be permitted to correct its reserve to reflect the straight line method, but such recommendation was made in *Megan Oil and Gas Co.*, Case No. 10-0757-G-D. Statement by PSC at 21.

The PSC relies upon *C&P*, *supra*, in support of its argument that JUI should not be permitted to correct its reserve to correct a mistake, but the *C&P* case is inapposite.

In *C&P*, the issue was not whether a utility could correct an erroneous method of calculating depreciation in a prospective application for a rate increase, but whether the PSC could retroactively disallow from a utility's rate base excess profits earned by an affiliate on sales to the utility which had been previously approved:

Technically, the disallowance ordered by the Commission is not retroactive rate making because the order requires the utility only to refund portions of revenues collected since October 2, 1980. However, insofar as the refunds include "excess profits" earned by Western Electric from 1959 onward, a period for which the Commission has thrice determined the prices and profits of Western Electric to be reasonable, the order contains an element of retroactivity which cannot equitably be sustained. In those jurisdictions where Western Electric excess profits have been disallowed, only one commission has disallowed such profits retroactively. See *Pacific Northwest Bell Telephone Company v. Sabin*, *supra*; *contra*, *City of Los Angeles v. California Public Utilities Commission*, *supra*;

*Re New York Telephone Co.*, supra; *Re Michigan Bell Telephone Co.*, supra; *Re Southwestern Bell Telephone Co.*, supra. We conclude that the Commission's order affecting Western Electric profits must be applied in a prospective manner.

Id. at 506, 300 S.E.2d at 619.

Not only does this Court's decision in *C&P* not support the PSC's decision, it actually supports JUI's position. Again, JUI is not seeking to effectuate a retroactive increase in rates based upon its previous miscalculation of depreciation reserve. Rather, it is only seeking to correct such miscalculation for purposes of a prospective increase in rates, which was expressly permitted by the *C&P* decision.

In Syllabus Point 7 of *Clarksburg Light & Heat Co. v. Public Service Comm'n*, 84 W. Va. 638, 100 S.E. 551 (1919), this Court held, "Where the life of a public utility is determined by the exhaustion of the supply of the material which it furnishes to the public, such part of its receipts each year should be allowed for the amortization of the plant as will return to the stockholders their investment within the probable life thereof."

As the PSC concedes in this case that JUI's numbers are correct, it simply erred when it held, without any authority, that JUI is apparently forever bound to its error, even for purposes of a request for the prospective increase in rates. Accordingly, the PSC's decision regarding JUI's depreciation should be reversed in favor of the ALJ's recommendation.

## 5. Officer Salary

Mr. Snyder's salary expense was one of the more contentious matters in these proceedings. JUI booked and claimed \$55,000 salary expense for its president and only employee. JUI Ex. 2, Attachment No. 3, at 7.

Staff, on the other hand, recommended a paltry \$15,000 be allowed for Mr. Snyder's salary. Staff Ex. 2, at 4. In arriving at its salary recommendation, Staff was somewhat confused by how Mr. Snyder's salary was handled in a previous rate case:

I kind of misread from the prior case where they had actually removed the entire \$55,000, but . . . when the case was settled they added back \$15,000 and allowed \$40,000. And I had it turned around different so the \$15,000 doesn't actually match the description.

Tr. Dec. 2, 2010, at 132. Undaunted by his admitted confusion, however, Mr. Pauley did not alter his recommendation: "We're sticking to the \$15,000 even though the descriptions were wrong." Id. at 133. Of course, this makes a mockery of the fact-finding process.

Likewise, the ALJ's recommendation was contrary to the evidence. Indeed, the ALJ recommended that Mr. Snyder receive NO compensation for his work as JUI's president and only employee. App. at 78-79. In reaching her finding, the ALJ found that the record supported a finding that Mr. Snyder should not be considered an employee of the Company. App. at 78-79. Also, the ALJ speculated that because Mr. Snyder may receive profits from JUI, App. at 68, a salary expense was not warranted. It should be noted, however, that JUI has never made a profit. Tr. Dec. 1, 2010, at 244-45.

Other than stating that its decision was “reasonable,” the PSC makes no substantive argument in response to JUI’s argument that the evidence more than supported its request for a \$55,000 salary amount for Mr. Snyder.

Specifically, three witnesses testified regarding the amount of time and effort devoted by Mr. Snyder to JUI.

First, Mr. Womack testified that for the year 2009, Mr. Snyder spend 1,966 hours working on matters related to the management and operation of JUI. Tr., Dec. 1, 2010, at 145. At an annual salary of \$55,000, the amount requested by JUI, this works out to an hourly rate of only \$27.50 for approximately 2,000 working hours, which JUI submits is not excessive for its president and only employee.

Second, Mr. Snyder testified that his daily duties include the following: (1) handling of customer complaints; (2) preparation of alternate extension agreements; (3) attending county water advisory board meetings; and (4) meeting with housing developers. Id. at 252-54. Mr. Snyder also testified that he devotes almost 2,000 hours a year to matters related to JUI. Id. at 234; see also Tr. Dec. 1, 2010, at 279.

Finally, Mr. Griffith testified that Mr. Snyder devotes a considerable amount of time and expertise to the management of the Company. Id. at 68.

As the PSC makes no argument finding the foregoing testimony not to be credible, the PSC’s \$40,000 salary amount, which appears to have been calculated based upon the same method of “splitting the difference” it

condemns with respect to the ALJ, was not supported by substantial evidence, was contrary to the evidence, and should be overturned.

### **III. CONCLUSION**

JUI respectfully requests the following relief: (1) the PSC's decision to reject the ALJ's recommendations regarding insurance premiums, rent, rate case, and accumulated depreciation expenses be reversed and the PSC ordered to adopt the ALJ's recommendations; (2) the PSC's decision to reduce the salary for JUI's sole employee be reversed and the PSC ordered to recalculate JUI's rates based upon the salary actually booked; and (3) either the PSC's decision to reduce the ALJ's recommended rate increase from 22.4 percent to only 4.4 percent be reversed and the PSC ordered to adopt the ALJ's recommendation or, in the alternative, the PSC be ordered to recalculate JUI's rates based upon this Court's rulings on the errors alleged by JUI.

#### **JEFFERSON UTILITIES, INC.**

By Counsel



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# EXHIBIT A

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

**CASE NO. 11-0235-W-GI**

**JEFFERSON UTILITIES, INC.  
Kearneysville, Jefferson County**

General Investigation of utility operations, including proposed O&M Agreement and Leases; whether customers are better off with an affiliate furnishing all required services as opposed to the utility employing its own personnel; a study of long-term plans to operate and rehabilitate its utility facilities; details of current and future use of \$12 surcharge; and future possibilities for private-public agreements.

**NOTIFICATION OF TERMINATION  
OF  
OPERATION AND MAINTENANCE AGREEMENTS**

COMES NOW Jefferson Utilities, Inc. ("Jefferson Utilities") and respectfully advises the Public Service Commission that it has received from Snyder Environmental Services, Inc. ("SES") notice of termination of its Operation and Maintenance Agreements with Jefferson Utilities.

04:32 PM MAY 04 11 PSC EXEC SEC DIV

SES has agreed to continue to provide services to and house Jefferson Utilities through September 30, 2011.

A copy of SES's letter to Jefferson Utilities is attached.

As SES will no longer be providing services to Jefferson Utilities, further efforts to inquire into Jefferson Utilities' relationships with SES and SES's affairs with and excluding Jefferson Utilities, are moot.

Accordingly, Jefferson Utilities respectfully moves the Commission to sustain its objections to the CAD's First Set of Discovery Requests in this docket and to direct the parties to address the issues identified in the Commission's February 18, 2011 order.

Respectfully submitted,

**JEFFERSON UTILITIES, INC.**

By Counsel



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**SNYDER ENVIRONMENTAL SERVICES, INC.**

270 Industrial Boulevard  
Kearneysville, WV 25430  
(304) 725-9140  
FAX 728-7326

Contractors License  
# WV000270

May 4, 2011

Jefferson Utilities, Inc.  
270 Industrial Blvd.  
Kearneysville, WV 25430

Re: Water System O&M Contract

Dear Sir:

As you are aware, Snyder Environmental Services (SES) has worked proudly for fourteen years with Jefferson Utilities (JUI) in support of JUI's mission to improve and expand the water utility service JUI provides in Jefferson County. SES has been forced to carry a very substantial and painfully burdensome debt for those services due to JUI's inability to pay for these services. Unfortunately, JUI's accrued debt with SES now exceeds \$2.7 million and the revenues for ongoing services are such that SES cannot continue those services under the current agreements and without adequate compensation.

Snyder Environmental appreciates the opportunity to have been an indispensable part of the tremendous strides and remarkable accomplishments that Jefferson Utilities has achieved over the past fourteen years in improving and extending the utility service it provides to its customers. Unfortunately, the recent denial of rates to JUI by the Public Service Commission required for JUI and SES to operate at arm's length have made it impossible for SES to continue to provide services to JUI. In fact, the failure of the Public Service Commission to approve rate increases for JUI and contracts with SES makes it clear that the financial position of JUI will not improve (as long as SES is providing services to JUI) and that the contractual arrangement with SES may be inhibiting JUI's ability to obtain the revenue it needs to operate with SES having to carry the overdue account.

Please be advised that effective September 30, 2011, Snyder Environmental Services will terminate all of its agreements with Jefferson Utilities. We will continue to provide services and house Jefferson through September 30 in order to facilitate an orderly transition. SES anticipates that JUI will relocate and assume responsibility for all other services currently provided by SES by that time. SES will cooperate in the transfer or duplication of accounting and other records as appropriate. SES may consider extending the deadline on an agreement by agreement and month to month basis so long as it appears that JUI's transition plan is satisfactorily progressing. However, SES does not intend to extend any deadlines merely to accommodate JUI's going-forward financial condition.

Page 2  
Water System O&M Contract  
5-4-11

Snyder Environmental Services expects to be paid for the work it performs for Jefferson Utilities over the next five or more months. Additionally, SES expects payments on the notes it holds with JUI in accordance with their terms.

In order to provide a personnel resource to Jefferson Utilities, Snyder Environmental will offer to JUI the transfer of employment of many of the SES employees who have operated JUI facilities as well as performed JUI office functions for many years. This should make the operational transfer quite seamless.

Snyder Environmental will provide any information required and assist in all ways possible to assure an orderly transition and maintain the dependable quality water service JUI's customers have come to expect.

Sincerely,

A handwritten signature in cursive script that reads "Lee Snyder".

Lee Snyder, President

**CERTIFICATE OF SERVICE**

I, E. Dandridge McDonald, one of counsel for Jefferson Utilities, Inc., do hereby certify that a copy of Jefferson Utilities' Notification of Termination of Operation and Maintenance Agreements, has been served upon all parties of record and prospective parties this 4<sup>th</sup> day of May, 2011, addressed as follows:

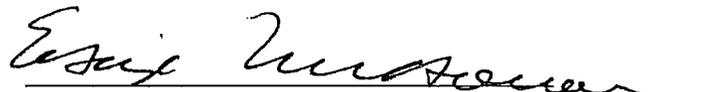
**VIA HAND DELIVERY**

Ron Robertson, Jr., Esquire  
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Public Service Commission of West Virginia  
Post Office Box 812  
Charleston, West Virginia 25323-0812

David Sade, Esquire  
Consumer Advocate Division  
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Charleston, West Virginia 25337-3713

  
E. Dandridge McDonald (WVSB No. 2439)

**CERTIFICATE OF SERVICE**

I, Ancil G. Ramey, hereby certify that on May 10, 2011, I served the foregoing Reply Brief by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

**VIA HAND DELIVERY**

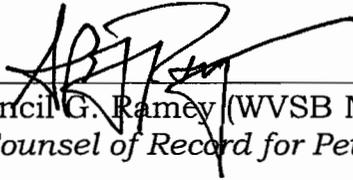
Mrs. Sandra Squire, *Executive Secretary*  
Public Service Commission of West Virginia  
201 Brooks Street  
Charleston, West Virginia 25323

Ronald E. Robertson, Jr., Esquire  
Public Service Commission of West Virginia  
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Charleston, West Virginia 25323

**VIA FIRST-CLASS MAIL**

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