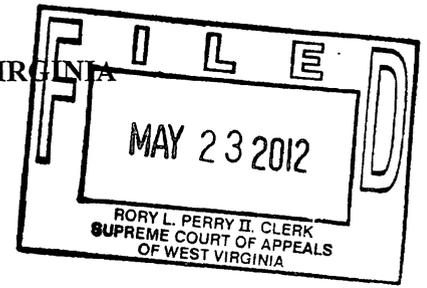


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1750



WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY, and
JANE CLINE, WEST VIRGINIA INSURANCE COMMISSIONER,

Petitioners,

v.

THE BUNCH COMPANY,

Respondent.

REPLY OF PETITIONER, WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE
COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY
TO BRIEF OF RESPONDENT

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INTRODUCTION

The Petitioner, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet"), by counsel, hereby submits the following Reply to the Brief of Petitioner, The Bunch Company ("Bunch"). This case cannot be condensed into a few sentences or easily digestible sound bites, as Bunch has done in its summary of argument. This case has a lengthy history, as it has been litigated in multiple venues since 2007. This case also involves the complex regulation of ratemaking, in what was then the new and evolving matter of private workers' compensation insurance. This case further involves the balance of powers between the administrative agency responsible for examination and approval of such rates, pursuant to the statutory scheme established by the West Virginia Legislature and the corresponding legislative rules, and the judiciary on a challenge to the lawfulness and reasonableness of filed rates, all in light of the pronouncements of this Court in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). In oversimplifying this case, Bunch has misstated the facts on nearly every page of its Brief, and distorted the true issues on appeal, and as a result, BrickStreet finds it necessary to file the present Reply.

ARGUMENT

I. BUNCH HAS REPEATEDLY MISSTATED THE FACTS OF THIS CASE AND THE ISSUES ON APPEAL.

From the very start, Bunch misstates the facts of this case, the contentions of the parties and the applicable law. As a result, the Brief of Respondent is inherently unreliable and the argument by Bunch that the October 31, 2011 Order should be affirmed, so that it can rely upon that same Order to advance the class action against BrickStreet for premium refunds and other damages, simply cannot stand. The decision by the Circuit Court should be reversed, and the July 9, 2010 Order of the Insurance Commissioner affirmed. By way of example, the following assertions made by Bunch are either incorrect or incomplete so as to be misleading:

- The Circuit Court of Kanawha County entered Judgment as a Matter of Law against BrickStreet in Civil Action No. 10-AA-113 on October 31, 2011. *See Brief of Respondent* (pg. 1).

- Bunch purchased workers' compensation insurance from BrickStreet and was charged an agent commission. *See Brief of Respondent* (pg. 1).
- Charging an insured an expense never incurred is a *per se* violation of 85 C.S.R. 8-8.1c. *See Brief of Respondent* (pg. 1).
- 85 C.S.R. 8-8.1c states only that in addition to said loss cost base rates, the premium charged by the Mutual may also include "a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers." *See Brief of Respondent* (pg. 1).
- BrickStreet unlawfully charged an expense never incurred. *See Brief of Respondent* (pg. 1).
- BrickStreet admits that it charged Bunch an agent commission and that Bunch had no agent. *See Brief of Respondent* (pg. 1).
- BrickStreet defends its position to retain the money and the agent commissions charged to thousands of other West Virginia businesses that have no agent because the West Virginia Insurance Commissioner said it was okay. *See Brief of Respondent* (pg. 1).
- The Circuit Court of Cabell County reversed summary judgment and dismissed the case for failure to exhaust administrative remedies pursuant to *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). *See Brief of Respondent* (pg. 9).
- Respondent was denied discovery. Respondent was denied the opportunity to make a proffer for the record. Respondent was denied the opportunity to submit a brief. Respondent was denied a hearing. *See Brief of Respondent* (pg. 9).
- The WVOIC designated the record on August 6, 2010. The record was not made available to Respondent during the pendency of the administrative complaint. In fact, Respondent was unaware a record existed until the WVOIC designated the record to the Circuit Court of Kanawha County. *See Brief of Respondent* (pg. 9).
- Two circuit courts have reviewed this matter on the merits and have found BrickStreet in clear violation of 85 C.S.R. 8-8.1c (2007). *See Brief of Respondent* (pg. 13).
- The WVOIC crafted a nifty "safety net" to its ruling to exculpate BrickStreet despite its clear violation of law. *See Brief of Respondent* (pg. 16).
- The record reveals that an undisclosed number of businesses, who collectively paid \$111 million in annual premiums, were charged an agent commission despite the fact that they had no agent. *See Brief of Respondent* (pg. 16).
- There is absolutely not a scintilla of evidence in the record to support the conclusion that charging an agent commission to businesses in the absence of an agent is justified "due to the fact that certain administrative costs and/or expenses are incurred by BrickStreet in handling direct written business which would otherwise be handled by appointed agents." *See Brief of Respondent* (pg. 16).

- BrickStreet incurred the expense of the initial underwriting of every policy in the State of West Virginia before it opened for business on January 1, 2006. It serviced each of these policies in-house through September 2007 (three policy periods) and there were no agents involved during this period. The premiums charged during this timeframe already encompassed the in-house underwriting expenses. *See Brief of Respondent* (pg. 17).
- BrickStreet never requested a premium hike for additional expenses incurred as a result of insureds remaining in-house (direct written business). To the contrary, BrickStreet requested a premium increase for the added expense of an agent's commission. *See Brief of Respondent* (pg. 17).
- BrickStreet knowingly charged an agent commission to existing customers when it knew those customers did not have an agent. *See Brief of Respondent* (pg. 17-18).
- The crux of Petitioners' argument is that only the WVOIC is qualified to judge whether insurance companies comply with the law with respect to rate filings. *See Brief of Respondent* (pg. 18).
- The issue was not whether the charge for an agent's commission was unreasonable or excessive; rather, the issue was whether BrickStreet's conduct was permitted by law. *See Brief of Respondent* (pg. 18).
- Two circuit judgments have already determined as a matter of law that the conduct was unlawful. *See Brief of Respondent* (pg. 18).

This Reply will address a number of these misrepresentations in as succinct a manner as possible.

Starting in the very first paragraph of its Brief, Bunch asks this Court to uphold the Circuit Court of Kanawha County's Judgment as a Matter of Law against BrickStreet. In Case No. 10-AA-113, the Circuit Court of Kanawha County considered an administrative appeal by Bunch, and by Order of October 31, 2011, reversed and vacated the July 9, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant entered by the West Virginia Offices of the Insurance Commissioner. Bunch mischaracterizes this decision as a judgment against BrickStreet, instead of a determination that the Insurance Commissioner erred in approving and later reaffirming a premium rate, in order to argue in a new class action case, pending but stayed in the Circuit Court of Kanawha County, Civil Action No. 11-C-2265, that it has obtained a final adjudication on the merits against BrickStreet regarding liability for charging an unlawful excessive rate.

Also on the first page of its Brief, Bunch states that it purchased workers' compensation insurance from BrickStreet and was charged an agent commission. As has been repeatedly stated and

substantiated, BrickStreet did not charge Bunch or any other insured, with or without an agent, any commission. The undisputed facts of this case are that one component of the premium charged to all BrickStreet insureds is the loss cost multiplier (“LCM”), which is combined with the loss cost base rate established by the National Council on Compensation Insurers (“NCCI”), designated by the Insurance Commissioner to be the rate making entity in West Virginia. The LCM is specifically authorized by legislative rule at 85 C.S.R. 8-8.1c, and later at 85 C.S.R. 8-11.2, and allows the insurer to recover administration costs, including underwriting expenses, such as commissions to agents and brokers, as well as other policy acquisition or servicing expenses. The LCM approved by the Insurance Commissioner for BrickStreet took into account that about eighty to ninety percent (80 - 90%) of its premium was written through an agent and the remaining was written direct. For the policies without an agent, that portion of the premium collected is retained by BrickStreet and attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services. (App. 66, ¶¶ 15-17).

Bunch further states on the first page of its Brief that charging an expense never incurred is a *per se* violation of 85 C.S.R. 8-8.1c. Bunch cites to the legislative rule as follows: “In addition to said loss cost base rates, the premium charged by [BrickStreet] may also include . . . *a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers* [. . .]” (emphasis by Bunch). However, the regulation does not end there. Bunch consistently omits that part of the rule which specifically states that the premium rates charged by BrickStreet may include a reasonable provision for expenses related to administration costs, including not only underwriting expenses, *but also other policy acquisition and servicing expenses*. Bunch would have it appear that BrickStreet was not permitted to request, nor was the Insurance Commissioner authorized to approve, an LCM that included not only commissions to agents and brokers, for policies written through an agent, but also other policy acquisition or servicing expenses, for policies written direct.

Moreover, Bunch misinterprets the regulation by requiring that for BrickStreet to request a certain component of the LCM, the insurer must have already incurred that expense. At the time an insurer submits a rate filing and the Insurance Commissioner approves a prospective premium, the insurer has not yet incurred any such expense. It would not be possible for the Insurance Commissioner to approve a different LCM for each insured depending on whether the insurer will actually incur each and every administrative cost or underwriting expense included in the LCM in writing or renewing a particular policy. Moreover, reading the entire legislative rule in the context of the ratemaking statutes, it is apparent that the term “expense” as used in the regulation means reasonably anticipated, rather than already incurred costs.

The misstatements on the first page of the Brief of Respondent continue when Bunch states that “BrickStreet admits that it charged The Bunch Company an agent commission and admits that The Bunch Company had no agent.” BrickStreet has never admitted that it charged Bunch or any other insured an agent commission. Bunch does not cite to any page in the appendix in making this statement because it cannot be substantiated. The Circuit Court was misled by this statement when it concluded in the October 31, 2011 Order that “BrickStreet charged and received payment for an agent commission from insureds that did not use an agent” and that “BrickStreet stipulated to this fact that it charged some insureds for an expense (the agent commission) that it did not incur.” (App. 357). As already stated in the Brief of Petitioner, BrickStreet did not stipulate that it charged insureds an expense for an agent commission. Likewise, BrickStreet did not stipulate that it did not incur expenses for insureds which did not use an agent. The salient facts to which BrickStreet actually stipulated are as follows:

- On December 27, 2005, BrickStreet requested an LCM of 1.288, to be effective January 1, 2006. An agent commission was not included in the calculation. The OIC approved an LCM of 1.105.
- On April 7, 2006, BrickStreet requested an LCM of 1.254, to be effective July 1, 2006. An agent commission was included in the LCM calculation. The commission appears in the rate filing as an acquisition expense.
- In the July 1, 2006 rate filing, BrickStreet requested an acquisition expense of 3.0% of premium effective July 1, 2006 and an acquisition expense of 6.5% effective January 1, 2007.

- By letter of April 26, 2006, the OIC selected an acquisition expense of 1%. The OIC approved an LCM of 1.17.
- Not all BrickStreet insureds have an agent.
- For policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct, that portion of the premium collected is retained by BrickStreet. According to BrickStreet, for policies written direct, that portion of the premium collected is attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services.

(App. 66). None of these stipulated facts can reasonably be construed as an admission that BrickStreet charged Bunch an agent commission.

Still on the first page of its Brief, Bunch contends that BrickStreet defends its position to retain the money, as well as the agent commissions charged to thousands of other West Virginia business that have no agent, because the West Virginia Insurance Commissioner said it was okay. This contention completely misstates the argument made by BrickStreet from the inception of this litigation. When Bunch first asserted a claim against BrickStreet in October 2007 in the Cabell County action, BrickStreet answered that the rates utilized as part of the premium calculation are established by the West Virginia Offices of the Insurance Commissioner, that the claims are barred by the filed rate doctrine and that the exclusive remedy lies with the Insurance Commissioner. (App. 51-62). In its summary judgment motion in the Cabell County action, BrickStreet argued that the filed rate doctrine precluded the plaintiffs from challenging the premium rates because those rates, including the LCM portion of the rate which contains a component for agent commission, were properly filed with and approved by the Insurance Commissioner, the regulatory agency with the exclusive jurisdiction as to insurance premiums in this State.

In the appeal in the present case, BrickStreet argues that by granting the relief requested by Bunch and reversing and vacating the July 9, 2010 Order of the Insurance Commissioner, the Circuit Court effectively reexamined the rates previously approved by the Commissioner, which is directly contrary to the holding of this Court in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008), which held as follows:

It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction. A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this manner then, the uniformity of regulation that the Legislature has established by delegating all matters involved 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. at 237.

Thus, BrickStreet does not assert that it is permitted to charge an agent commission to West Virginia insureds that have no agent because the Insurance Commissioner said it was acceptable. Rather, BrickStreet does not charge any insured an agent commission, and the LCM included in the rate charged to all insureds, which includes underwriting expenses as well as other acquisition and servicing expenses, was duly filed with and approved by the Insurance Commissioner and is entirely consistent with the governing legislative rule. Moreover, Bunch cannot challenge that approved rate in a civil action for premium refunds or other damages before the Circuit Court, nor can the Circuit Court in an appeal from the Insurance Commissioner, under the guise of the Administrative Procedures Act, reexamine whether the insurance rate approved is reasonable or excessive, substitute its determination as to permissible insurance rates for those previously determined by the Insurance Commissioner, or supplant its opinion in matters expressly delegated to the expertise and jurisdiction of the Insurance Commissioner. Yet this is exactly what Bunch advocated and what the Circuit Court did in the present case.

All of the foregoing misstatements are found in the opening page of the Brief of Respondent. For the next seven pages of the Brief, Bunch recites each of the Findings of Fact and Conclusions of Law contained in the November 3, 2008 Order from Judge Cummings in the Cabell County action, which has since been dismissed in favor of BrickStreet. This Order was reversed and vacated by the Circuit Court of Cabell County and would be wholly irrelevant to the appeal in this case except that Bunch argued to Judge Kaufman in Case No. 10-AA-113 that the administrative appeal in the Circuit Court of Kanawha

County came down to two orders, the first dated November 3, 2008 from Judge Cummings in the Cabell County action which granted summary judgment in favor of Bunch, the second dated July 9, 2010 from the Insurance Commissioner which upheld the approved rate and the use of that filed rate by BrickStreet. Bunch further argued that the Judge should pick the first order. (App. 306-308). Bunch is now asking this Court to likewise follow the November 3, 2008 Order from the Cabell County action, which it cites at length in this appeal.

Bunch states on page nine that the Circuit Court of Cabell County thereafter reversed summary judgment in Civil Action No. 07-C-0852 and “dismissed the case for failure to exhaust administrative remedies pursuant to *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).” However, nowhere in the February 27, 2009 Order Granting Motion for Relief from Judgment in the Cabell County action is exhaustion of administrative remedies even mentioned. The Order states in pertinent part as follows:

10. The West Virginia Supreme Court issued a clear expression of the filed rate doctrine in the *CitiFinancial* case. Although the Supreme Court did not explicitly address the doctrine in the *CitiFinancial* case, it implicitly embraced the principles of the doctrine, and in doing so, rejected the reasoning contained in the November 3, 2008 Order. In *CitiFinancial*, the Court held as follows . . .

11. The *CitiFinancial* case is directly on point for BrickStreet and could not be any clearer in its holding that courts cannot become involved in issues concerning insurance rates that have been filed with and approved by the Insurance Commissioner. Although the Supreme Court does not specifically address the filed rate doctrine in the *CitiFinancial* case, that is just a term of art, and the holding in that case embodies the fundamental principles of the doctrine based on the language and intent of W.Va. Code § 33-6-30(c).

12. The plaintiffs are challenging a “rate” in the present case, as the administrative expense for agent commissions is a component of the Workers Compensation premium rate that has been filed with and approved by the Insurance Commissioner.

13. The plaintiffs must bring the present claim before the Insurance Commissioner pursuant to W.Va. Code §33-20-5(d). The Commissioner has exclusive jurisdiction over their challenge to the allegedly excessive or unlawful charge at issue.

14. Accordingly, the November 3, 2008 Order Granting Plaintiffs’ Motion for Summary Judgment and Denying BrickStreet’s Motion for Summary Judgment must be vacated and judgment entered in favor of BrickStreet.

(App. 22-24). In addition, the *CitiFinancial* case was decided on jurisdictional grounds, not on the doctrine of exhaustion of administrative remedies, which is not even mentioned much less discussed in the opinion. Bunch does not cite to any portion of the February 27, 2009 Order in the Cabell County action, or to any language in the *CitiFinancial* decision, in support of its assertion that summary judgment was reversed and the case dismissed for failure to exhaust administrative remedies.

Also on page 9 of the Brief of Respondent, Bunch states that after it filed an administrative complaint with the Insurance Commissioner, it was denied discovery, denied the opportunity to make a proffer for the record, denied the opportunity to submit a brief, and denied a hearing. Bunch does not state that in the Consumer Complaint Form filed with the Insurance Commissioner, it reported only that “BrickStreet is charging The Bunch Company for an agent commission. The Bunch Company does not have an agent. This is a clear violation of law. Amended Complaint attached hereto.” (App. 27). Bunch did not request in its Consumer Complaint the opportunity to engage in discovery, to make a proffer, to submit a brief or to have a hearing. Nor did Bunch file anything further with the Insurance Commissioner requesting such relief after BrickStreet filed the Answer to Consumer Complaint on March 30, 2010 and before the Insurance Commissioner issued its Order on July 9, 2010.

In addition, on page 9 of the Brief, Bunch states that the record designated by the Insurance Commissioner on appeal was not made available during the pendency of the administrative proceeding, and that it was unaware a record existed. Yet the items listed in the record by the Insurance Commissioner are the six (6) BrickStreet filings (pp. 1-1745, 1842-1866), the pleadings and orders in the Cabell County action (pp. 1746-1841), the Petition and Order Refusing Petition from this Court on appeal of the February 27, 2009 Order in the Cabell County action (pp. 1867-1914), the Consumer Complaint and the Answer to Consumer Complaint (pp. 1951-1973), and the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant, as well as the letter transmitting that July 9, 2010 Order to counsel and to the Secretary of State (pp. 1974-1988). (App. 151-154). Bunch already had all of the filings in the Cabell County action, the Consumer Complaint and the Answer, as it was a party

to those proceedings. Moreover, Bunch already had the rate and form filings by BrickStreet with the Insurance Commissioner, as BrickStreet served the filings as Exhibit A to the “Response of Defendant, West Virginia Employers’ Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company to Plaintiff’s First Combined Set of Discovery” in the Cabell County action on January 31, 2008.

With respect to the legal arguments advanced by Bunch in its Brief, it is not entirely accurate to state that two circuit courts have reviewed this matter on the merits and found BrickStreet in violation of 85 C.S.R. 8-8.1c (2007). First, in the Cabell County action, BrickStreet only briefed the legal question of whether the filed rate doctrine applied to preclude the plaintiffs from challenging the rate approved by the Insurance Commissioner in an action for damages. The Order entered by Judge Cummings on November 3, 2008, granting the plaintiff’s motion for summary judgment and denying BrickStreet’s motion on that question was reversed and vacated by the Circuit Court of Cabell County by Order of February 27, 2009. (App. 17-25). Second, the October 31, 2011 Order from Judge Kaufman concluded that “[t]he WVIC erred as a matter of law by allowing BrickStreet to charge for an agent commission when no such expense was incurred. Thus, the WVIC failed to enforce its legislative rule.” (App. 356). The Order also concluded that “[t]he WVIC was clearly wrong when it concluded that charging an agent commission to the Petitioner, even though it did not have an agent, was justified due to additional expenses incurred. The record on appeal simply does not support such a contention.” (App. 358). The administrative appeal before the Circuit Court of Kanawha County concerned the rate approved and later affirmed by the Insurance Commissioner, not the conduct of BrickStreet.

II. THE OCTOBER 31, 2011 ORDER FROM THE CIRCUIT COURT OF KANAWHA COUNTY SHOULD BE REVERSED.

A. The Circuit Court Erred In Concluding That The Insurance Commissioner Should Not Have Allowed BrickStreet To Charge For An Agent Commission When No Such Expense Was Actually Incurred.

Bunch contends in its Brief that the Insurance Commissioner was clearly wrong in concluding that the BrickStreet rate filings complied with West Virginia law. This contention appears to be based on the claim that allowing BrickStreet to charge Bunch for an agent commission when no agent was used

violates the applicable legislative rules. The initial legislative rule filed with the West Virginia Secretary of State on December 20, 2005 provides at § 85-8-8.1c for the fiscal year beginning July 1, 2006 as follows:

In addition to said loss cost base rates, the premium rates charged by the Mutual may also include include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, *other policy acquisition or servicing expenses*, premium taxes, assessments, surcharges and fees, catastrophe reinsurance expenses, expenses associated with rating organizations, loss adjustment expenses not included in the loss costs, such as claims defense expenses, claim administration expenses and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.

The same rule applies to the Mutual for the fiscal year beginning July 1, 2007. See W.Va. C.S.R. § 85-8-8.2c. The legislative rule filed October 31, 2007 at § 85-8-11.2 is nearly identical.

These provisions do not just relate to “charging an insured for an agent commission” as asserted by Bunch. Rather, a reading of the entire rule, and not just the limited excerpt cited by Bunch, shows that a workers’ compensation insurer may charge a rate that includes expenses related to the administration costs of the insurer. These include underwriting expenses, such as commissions to agents and brokers, as well as other policy acquisition or servicing expenses, such as the costs of handling direct written business.

Furthermore, nothing in either version of the rule states or even implies that in order for BrickStreet or any other private carrier to file for a loss cost multiplier, the expenses related to the administration costs of that carrier must have already been incurred for each policy to be written after the filing becomes effective. Yet the Circuit Court of Kanawha County concluded in its Order of October 31, 2011 that “West Virginia law clearly permits BrickStreet to charge an appropriate premium for certain administrative expenses. However, the term ‘expenses’ infers BrickStreet has actually incurred that expense.” (App. 356-357). The Circuit Court erred in reaching this conclusion, and its interpretation of this rule is subject to *de novo* review. See Syl. Pt. 1, *Sims v. Miller*, 227 W.Va. 395, 709 S.E.2d 750

(2011) (on appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*).

Although BrickStreet does incur acquisition and servicing expenses for every policy issued, for some insureds that may be an agent commission, while for others it may be the increased cost of performing services the agent normally handles. At the time an insurer submits a rate filing and the Insurance Commissioner approves a rate for a prospective insurance premium, the insurer has not yet incurred any such expense. It would not be possible for the Insurance Commissioner to predict and thereby approve separate LCMs for each insured based on whether the insurer will actually incur every expense for a particular policy. The manner in which the Insurance Commissioner has interpreted and applied this legislative rule to the BrickStreet rates is well within its authority, is consistent with the language of the rule itself, and is not inconsistent with the intent of the Legislature in any controlling statute.

As explained by the Insurance Commissioner in its Petitioner's Brief, advisory loss costs do not include an LCM, which is a factor that increases the loss costs to recover administrative expenses and business operations. The final rate will be the class advisory loss cost multiplied by the carrier LCM. The final rate is used to develop the ultimate premium for each policyholder in a particular year based on underwriting criteria. In its rate filings, BrickStreet and the Insurance Commissioner had substantial discussion concerning the LCM, and it was even conceded and stipulated that BrickStreet had asked for a larger LCM than what was actually approved by the Insurance Commissioner. This variance was due, in part, to the acknowledgment by the Insurance Commissioner that in some instances, an administrative fee was included in lieu of an agent commission on direct written business. The final approval of the LCM by the Insurance Commissioner took into account all of the factors which were required to be considered before any rate could be approved. As stated by this Court in *Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 582, 466 S.E.2d 424, 433 (1995), a court empowered to conduct a *de novo* review must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.

In addition, as explained by the West Virginia Mutual Insurance Company, Inc. as *amicus curiae*, insurance rates are prospectively filed with and approved by the Insurance Commissioner, per W.Va. Code § 33-20-4. As part of the rate, an insurer may charge a reasonable administrative expense, including underwriting costs, per 85 C.S.R. 8-11.2. The LCM structure employed by the Insurance Commissioner was specifically mandated by W.Va. Code § 23-2C-18(b), which provides that “[a]n insurer shall file its rates by filing a multiplier or multipliers to be applied to prospective loss costs that have been filed by the designated advisory organization on behalf of the insurer in accordance with section eighteen-a of this article and may also file carrier specific rating plans” (emphasis added). Because all rates must be filed and approved prospectively, an insurer must anticipate administrative costs in advance, including commissions on policies written through agents and other expenses on direct written business. In addition, the Insurance Commissioner must not only make a determination as to whether a filed rate is excessive, but it must also evaluate whether that rate is inadequate, per W.Va. Code § 33-20-3(b). Moreover, BrickStreet and other insurers that handle any direct written business are not legally able to charge those insureds a different premium rate, per W.Va. Code § 33-20-4(k), which provides that “[n]o insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for that insurer as provided in this article.” Reading these statutory provisions together, the only plausible interpretation of the legislative rule is that “expense” means reasonably anticipated rather than already incurred.

Moreover, as explained by the West Virginia Insurance Federation as *amicus curiae*, upholding the interpretation of the regulation by the Circuit Court of Kanawha County in its October 31, 2011 Order will throw the entire ratemaking process into chaos. In general, insurance is underwritten and rates are approved based on a pool of similarly situated risks. Also, insurance rates are filed prospectively based on past experience and a reasonable expectation of losses and expenses in the future. Yet what Bunch advocates would discard these principles and would instead require each insurance rate to be submitted and approved on an insured-by-insured basis to reflect the expenses “actually incurred” by the insurer in handling the policies and claims for that insured. This would create uncertainty as to the actuarial support

necessary to obtain approval of a rate and unravel the carefully crafted insurance ratemaking framework constructed by the Legislature and implemented by the Insurance Commissioner.

B. The Circuit Court Erred In Concluding That The Insurance Commissioner Was Wrong In Finding That The Rates Charged By BrickStreet Were Reasonable In Relation To The Benefits Provided.

Bunch also argues that the Circuit Court of Kanawha County was correct in holding that the Insurance Commissioner was clearly wrong when it concluded that charging an agent commission to Bunch, even though it did not have an agent, was justified due to additional expenses incurred. The July 9, 2010 Findings of Fact, Conclusions of Law and Final Order states with respect to this issue as follows:

18. The Commissioner does find that BrickStreet disclosed its intentions to the West Virginia Offices of the Insurance Commissioner concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written through it as opposed to acquisition costs incurred through the use of an appointed agent.

6. The Insurance Commissioner finds that the rates charged by BrickStreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs and/or expenses are incurred by BrickStreet in handling direct written business which would otherwise be handled by appointed agents.

Bunch contends that these findings and conclusions are a “safety net” created by the Insurance Commissioner to exculpate BrickStreet despite its clear violation of law. Bunch also contends that the “record reveals that an undisclosed number of businesses, who collectively paid \$111 million in annual premiums, were charged an agent commission despite the fact that they had no agent.” These contentions are fabricated, and there is nothing in the record anywhere in the lengthy history of this case to substantiate either of these allegations, nor does Bunch cite to anything in the Appendix Record, or elsewhere, in support of such allegations. As with all of the unfounded claims in the Brief of Respondent, these contentions should be disregarded.

Bunch also contends that “there is absolutely not a scintilla of evidence in the record to support this conclusion.” To the contrary, there were a number of documents in the record before the Insurance Commissioner to support this finding. At a minimum, the Circuit Court failed to defer to the factual findings of the Commissioner. Because a reviewing court is obligated to give deference to factual

findings rendered by an administrative agency, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. *Wilson v. W. Va. Univ. Sch. of Med.*, 2011 W. Va. LEXIS 545 (W. Va. Oct. 21, 2011), *citing* Syl. Pt. 1, in part, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

The documents in the record before the Insurance Commissioner include the Stipulation of Facts and the Affidavit of Mr. Mahler. The Insurance Commissioner also identified in the brief filed with the Circuit Court those documents in the record which support the claim that BrickStreet previously disclosed its intentions to the Commissioner concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written through it, as opposed to acquisition costs incurred through the use of an appointed agent, citing for example, pages 1205, 1212-1219, 1469, 1561-1578, 1583, 1592, 1626, 1640 and 1671 of the record. (App. 277). In addition, the Insurance Commissioner noted that there were meetings and telephonic communications with BrickStreet regarding these issues, as referenced throughout the record, including at page 1671. (App. 277). Bunch does not address in its Brief any of these documents in the record before the Insurance Commissioner.

It is important to reiterate that the quantity and nature of communications between BrickStreet and the Insurance Commissioner were not typical for an insurance company. As set forth in the Stipulation of Facts, due to the long-term actuarial funding crisis in the state-run monopolistic workers' compensation system, the system became privatized as of January 1, 2006. BrickStreet became licensed with the Insurance Commissioner to transact business in this State and began a collaborative effort to create a rate making system. (App. 63-65). As part of this massive privatization effort, BrickStreet and the Insurance Commissioner exchanged correspondence regarding rates, including communications outside the formal rate filing process. Based on these communications, as well as the institutional knowledge of the Office of the Insurance Commissioner, the Commissioner independently verified that BrickStreet disclosed its intentions concerning the use of its filed rates. Yet the Circuit Court disregarded these facts in the record, as well as the expertise of the Insurance Commissioner, and substituted its own judgment as to whether the insurance rate was reasonable in relation to the benefits provided.

Bunch cites only to one paragraph of the order from Judge Cummings in the Cabell County action in support of its argument. Even if the November 3, 2008 Order had not been reversed and vacated as contrary to the reasoning in the *CitiFinancial* case, it would still be fatally flawed. The order cited states that BrickStreet's argument that the agent commission "offsets" the increased costs of administering direct policies is without merit and is not supported by the record. The only record before Judge Cummings at that time was the Stipulation of Facts filed in the Cabell County action on April 30, 2008, (App. 63-67), and the uncontested Affidavit of Harry E. Mahler, filed by BrickStreet with its Motion for Summary Judgment in that action on June 20, 2008 (App. 68-71). Thus, the record did contain the following undisputed facts which supported the argument made by BrickStreet: that for policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet; for policies written direct, that portion of the premium collected is attributed to acquisition and servicing expenses; on those policies not written through an agent, the acquisition load was intended to offset the increased expenses of BrickStreet in administering direct policies through the performance of a number of services; and these services performed by BrickStreet are the same if not more than what an appointed agent does for an insured. (App. 68-70).

By contrast, neither the Stipulation of Facts nor the Affidavit of Mr. Mahler contained any facts to support the following assumptions made in the November 3, 2008 Order: BrickStreet was internally administering all the policies before the agent commission was added to the premium; the original rates charged by BrickStreet presumably included the underwriting of every policy in the State of West Virginia as well as the rollover of insureds on January 1, 2006; BrickStreet never requested a rate increase for increased internal administrative expenses; and BrickStreet requested a premium increase for the added expense of agent commissions. The rate filings by BrickStreet with the Insurance Commissioner were not before Judge Cummings on the summary judgment motions, and even if they were, they would not support his conjecture. Bunch makes these same unsubstantiated presumptions in the Brief of Respondent. The record

before the Insurance Commissioner on the Consumer Complaint by Bunch, however, contained the pleadings and orders in the Cabell County action as well as all of the rate filings by BrickStreet. Additionally, the Office of the Insurance Commissioner, with its institutional knowledge of BrickStreet and its historical knowledge of when and why BrickStreet requested increases in the LCM portion of the rate, was able to independently verify that BrickStreet disclosed its intentions concerning the use of its filed rates, and especially in incurring certain administrative costs and expenses in directly handling policies written through it as opposed to acquisition costs incurred through the use of an appointed agent. Further, the Insurance Commissioner, rather than Judge Cummings or any Circuit Court, has the jurisdiction and expertise to determine that the rates charged by BrickStreet were reasonable in relation to the benefits provided.

C. The Circuit Court Erred In Reversing And Vacating The July 9, 2010 Order Of The Insurance Commissioner.

Lastly, Bunch responds in its Brief that the crux of the argument by Petitioners is that only the Insurance Commissioner is qualified to determine whether an insurance company complies with the law regarding rate filings, and that to decide otherwise would open the door to various judges and circuit courts ruling on what constitutes an unreasonable or excessive charge. This response misstates the argument by BrickStreet, the Insurance Commissioner and the *amicus curiae* parties that the October 31, 2011 Order from the Circuit Court of Kanawha County is contrary to the holding of this Court in *CitiFinancial*. By granting the relief requested by Bunch in the administrative appeal, the Circuit Court effectively invaded the administrative arena and reexamined the issue of whether the insurance rate approved by the Insurance Commissioner and thus charged by BrickStreet was reasonable or excessive. This Court cautioned against the judiciary substituting its determinations as to permissible insurance rates

for those previously determined by the Insurance Commissioner and supplanting its opinion in matters expressly delegated to the expertise and jurisdiction of the Commissioner. *Id.* at 237.

Following the language of this Court in *CitiFinancial*, BrickStreet argued that a further peril in this case is that judicial intervention in the rate making area by the Circuit Court of Kanawha County opens the door to conflicting decisions amongst various judges and courts regarding what constitutes an unreasonable or excessive charge, or in this instance, loss cost multiplier, for workers' compensation insurance. As a result, the uniformity of regulation that the Legislature has established by delegating all matters involved rate making and rate filings to the Insurance Commissioner will likely be infringed if circuit courts or jurors are permitted to second-guess the reasonableness of rates previously approved by the Commissioner. *Id.* Bunch is only one insured that did not have an agent to procure or renew workers' compensation insurance with BrickStreet when such coverage novated from the State. Since Bunch could not pursue this claim as a class action, any other insured could file a similar challenge, treating a consumer complaint proceeding with the Insurance Commissioner as merely a step toward exhausting its administrative remedies and seeking a reversal of the rate before the Circuit Court on an administrative appeal.

Upon dismissal of the Cabell County action, Bunch did file a Consumer Complaint before the Insurance Commissioner to challenge the rate charged by BrickStreet. However, on the appeal of the July 9, 2010 Order from the Insurance Commissioner, Bunch asked the Circuit Court to supplant that decision by the Insurance Commissioner with the November 3, 2008 Order from Judge Cummings in the Cabell County action. The Circuit Court granted the relief Bunch requested. Although the October 31, 2011 Order is couched in terms of the Administrative Procedures Act ("APA"), in finding that the Insurance Commissioner was clearly

wrong, the Circuit Court necessarily substituted its opinion as to whether the rates charged by BrickStreet were reasonable in relation to the benefits provided. BrickStreet does not contend that a party aggrieved by a decision of the Insurance Commissioner on a consumer complaint cannot have judicial review of that decision pursuant to the APA in the Circuit Court. However, in matters involving insurance rates, the reviewing court must be restrained not only by the APA but also by the parameters established in *CitiFinancial*, so as not to second guess the reasonableness of rates previously approved by the Insurance Commissioner. This is exactly what Bunch advocated and what the Circuit Court of Kanawha County did in the present case.

In doing so, the Circuit Court failed to afford the presumption of the validity of the rate determination by the Insurance Commissioner and made no determination in the October 31, 2011 Order that Bunch produced sufficient evidence into the record to rebut that presumption. As a result, the Circuit Court did not preserve the independent authority of the regulatory agency, did not protect the regulatory scheme for determining insurance rates established by the West Virginia Legislature, did not respect the separation of powers between the judicial and the executive branches of government, did not rely upon the experience and technical expertise of the Insurance Commissioner which is not shared by any judge or jury, and did not allow the regulated entities such as BrickStreet to rely upon filed rates when they have complied with the law as applied by the Insurance Commissioner, all goals implicitly or explicitly recognized by *CitiFinancial*. The consequences of this decision are even more far reaching than this one case, as noted by both the Insurance Commissioner and the *amicus curiae* in their briefs to this Court.

CONCLUSION

For the reasons set forth above and in the Brief of Petitioner, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company prays that this Court

accept this appeal, reverse the October 31, 2011 and November 22, 2011 Orders of the Circuit Court of Kanawha County and affirm the July 9, 2010 Order from the Insurance Commissioner.

WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY d/b/a BRICKSTREET
MUTUAL INSURANCE COMPANY,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1750

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY, and
JANE CLINE, WEST VIRGINIA INSURANCE COMMISSIONER,

Petitioners,

v.

THE BUNCH COMPANY,

Respondent.

CERTIFICATE OF SERVICE

I, Erica M. Baumgras, counsel for the Petitioner, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company, do hereby certify that the "REPLY BRIEF OF PETITIONER, WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY" was served upon the following parties by depositing true copies thereof in the United States Mail, first class, postage prepaid, on this 23rd day of May 2012:

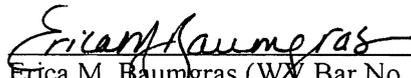
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