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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0744

SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROGER F. HOLT,
Plaintiff/Petitioner,

v.

WEST VIRGINIA-AMERICAN WATER COMPANY,
Defendant/Respondent.

On Appeal from the
Circuit Court of Kanawha County, West Virginia
No. 13-C-656, The Honorable James C. Stuckey

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The West Virginia Consumer Credit and Protection Act's Public Utility Exclusion is Ambiguous, But the Court Applied the Exclusion Without First Determining its Meaning in Accordance With the Act's Liberal, Remedial Objectives.

II. The Trial Court's Order is Inconsistent with the Purpose of the Public Utility Exclusion, Which is to Prevent Consumer Protection Challenges to Public Utility Charges and Fees That Have Been Approved by the Legislature's Designated Rate-Making Agency, the Public Service Commission of West Virginia.

III. The Trial Court's Order Inappropriately Deemphasizes Circuit Courts' Role in Resolving Individual Damages Claims Against Utilities.

IV. The Trial Court's Order Frustrates the West Virginia Consumer Credit and Protection Act's "Gap Filling" Function.

STATEMENT OF THE CASE

In December 2009, Petitioner Roger F. Holt received a $5,136.96 water bill from Respondent West Virginia-American Water Company—a substantial increase from the usual charge of around $28.00. R. at 7. He called WVAW and the West Virginia Public Service Commission regarding the bill, which prompted the PSC to inspect the line. *Id.* The PSC concluded that the most likely cause of the extreme overcharge was a problem with the meter, which is WVAW's responsibility, and in January 2010 WVAW confirmed that the meter box was leaking. R. at 7-8. Although it repaired the leak that same month, WVAW never told Holt about the source of the leak or the repair, and never reimbursed the overcharge. R. at 8. Instead, the company wrongfully continued to seek payment for the full $5,136.91 and assess late fees on the unpaid balance. *Id.* In addition, WVAW's failure to inform Holt of the repair meant Holt associated that leak with excess flows recorded on his water bills throughout winter and early spring 2010, when in reality the flows came from a secondary leak on his line. R. at 8-9.

After receiving water bills in excess of $5,000.00 for four months, Holt finally filed a formal complaint with the PSC on April 15, 2010. R. at 8. WVAW quickly agreed to reimburse charges associated with the meter box leak, but it would not reimburse any further leak-related charges until Holt replaced his entire water line. R. at 9. Having learned of the secondary leak for the first time in May 2010, Holt immediately set about having the leak repaired. *Id.* During this repair process, a third leak was discovered and Holt finally relented to WVAW's requirement that he replace his entire line. Replacement was completed in early November 2010. *Id.*

While Holt's April 15, 2010 complaint was pending with the PSC, an Order Granting Interim Relief was in effect that prevented WVAW from terminating Holt's service for

nonpayment of disputed charges. R. at 9, 14-15. Although Holt dutifully paid $28.00-30.00 each month for his regular usage during the pendency of the PSC complaint, WVAW nevertheless threatened to terminate Holt's service by letter twice in October 2010, and then did terminate his service in October, for nonpayment of disputed charges. R. at 9-10.

On November 30, 2010, an administrative law judge assigned by the Commission heard sworn testimony from the parties and received evidence regarding the three leaks and related matters. R. at 10, 16-27. The resulting written opinion, which was adopted without change by the Commission in 2011, found that WVAW's leak adjustment policy limiting the credits available to Holt's account and requiring him to replace his entire line was "unreasonable," "arbitrarily adopted," and "contrary to and unsupported by the Commission's Water Rules." R. at 10, 28. The Commission also found that the time Holt took to correct the second and third leaks was justified by the fact that WVAW was "slow to accept responsibility for the huge first leak" and was "dragging its feet in granting an adjustment for the second leak." *Id.* The Commission ordered WVAW to reimburse Holt for all leak-related charges from June 2010 through November 2010 (which had not yet been reimbursed) and to remove any leak-related late fees for the entire leak period, December 2009 through November 2010. R. at 10, 30. However, the Commission concluded that it lacked power to award damages for WVAW's wrongdoing. R. at 10, 28.

To characterize WVAW's actions as unreasonable foot-dragging, as the PSC did, was generous. WVAW spent months demanding payment from a consumer for leak-related charges it ***knew*** were not the consumer's responsibility, withheld information that would have allowed the consumer to prevent further leak-related charges, assessed penalties on the consumer's account for nonpayment of these unwarranted charges (which were far too excessive for the

consumer to afford), and then spent months dodging reimbursement and further abusing the consumer through the PSC adjudicative process. *See* R. at 10-11. The entire ordeal lasted nearly a year. *See* R. at 7-10. Consequently, Holt filed suit in April 2013 under W. Va. Code § 46A-6-104, alleging unlawful acts or practices by WVAW. R. at 3-13. Holt does not challenge the rates WVAW applied to the unwarranted charges and penalties, or the manner in which the charges and penalties were calculated on his monthly statements; he is not claiming consumer credit-type violations. Rather, Holt alleges that WVAW's course of conduct—the withholding of material information, the piling on of knowingly unjustified charges and penalties, and the various actions which one could infer were meant to discourage the consumer from vindicating his rights with the PSC—was unfair, abusive, and not reasonable in relation to the development and preservation of business. R. at 11-12. The purpose of Holt's complaint before the PSC was to get reimbursed; his purpose here is to obtain damages (including costs incurred in replacing his water line and substantial annoyance and inconvenience) and to hold WVAW accountable for its abusive conduct. R. at 12-13.

WVAW responded to the Complaint with a motion to dismiss under W. Va. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. WVAW argued, among other things, that the West Virginia Consumer Credit and Protection Act's public utility exclusion categorically bars consumer protection claims against WVAW because it is a regulated public utility. R. at 47-48. The exclusion states: "This chapter does not apply to: . . . Transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the charges for services involved, the charges for delayed payment, and any discount allowed for early payment." W. Va. Code § 46A-1-105(a)(3). After

briefing and oral argument, the trial court agreed that the exclusion barred Mr. Holt's claim and dismissed the Complaint. R. at 1-2, 110-11. This timely appeal followed. *See* R. at 121-32.

SUMMARY OF THE ARGUMENT

The purpose of the West Virginia Consumer Credit and Protection Act's public utility exclusion is to prevent individual consumers from using the Act to collaterally attack lawful utility rates established by West Virginia's designated rate-making agency, the Public Service Commission. This purpose is evident from the language of the exclusion, which speaks narrowly in terms of charges, fees, and discounts; from the federal statues on which the Act is based, which apply a copycat exclusion only regarding consumer credit rules that dictate permissible charges, interest rates, and billing disclosures; and from the Act's general provisions, which reflect the same distinctions embodied in the federal statutes. Allowing a consumer protection claim to proceed against a regulated utility for alleged unfair acts or practices—that is, for its course of conduct toward a consumer under particular circumstances—rather than its rates, poses no serious challenge to the PSC's jurisdiction, which is concurrent with that of circuit courts and possibly subservient in matters that fall outside its area of special expertise, like the Act. On the other hand, interpreting the public utility exclusion broadly, or in blanket fashion as advocated below by Respondent, will subvert the Act's remedial function as a "gap filler" in those areas of law where consumer interests are not fully protected.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary because none of the criteria in W. Va. R. App. P. 18(a) are present. Petitioner does not waive oral argument and has not filed a frivolous appeal; the dispositive issues have not been authoritatively decided and the decisional process likely would be aided by oral argument based on the novel nature of the issues. *See* W. Va. R. App. P. 18(a).

Oral argument under W. Va. R. App. P. 20 is appropriate because this case involves issues of first impression which are of fundamental public importance. Specifically, the appeal asks the Court to interpret an exclusionary provision of West Virginia's consumer protection law for the first time in order to determine the extent to which consumer rights may be vindicated against a regulated public utility in circuit court.

ARGUMENT

I. REVIEW OF THE TRIAL COURT'S DISMISSAL ORDER IS *DE NOVO*, AND THE JUDGMENT AWARDED TO WEST VIRGINIA-AMERICAN WATER COMPANY IS DISFAVORED.

Review of orders to dismiss based on W. Va. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted is *de novo*. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995). As such, this Court is guided by the same rules as the trial court. *See Highmark W. Va., Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) (*per curiam*). The Court must construe the Complaint in the light most favorable to the plaintiff, here the petitioner. *Id.*, 221 W. Va. at 492, 655 S.E.2d at 514. Then the motion should only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, 221 W. Va. at 491, 655 S.E.2d at 744 (quoting Syl. pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)). Motions to dismiss for failure to state a claim are "viewed with disfavor and rarely granted." *Kessel v. Leavitt*, 204 W. Va. 95, 119, 511 S.E.2d 720, 743 (1998) (quoting *John W. Lodge Distrib. Col., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978)). Rather, decision on the merits is greatly preferred. *Id.*

In addition to reviewing the order below *de novo*, the Court conducts a plenary review of the statutory construction issues raised in this appeal. The Court's "interpretive scrutiny is

plenary" when an appeal presents questions that are "strictly a matter of statutory construction." *Scott Runyan*, 194 W. Va. at 776, 461 S.E.2d at 522. This means the Court is entitled to "interpret the statute as we read it, consistent with our exposition of discerned legislative intent and without paying special deference to the court below." *W. Va. Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 123, 468 S.E.2d 733, 738 (1996). This appeal turns on the Court's construction of the West Virginia Consumer Credit and Protection Act's public utility exclusion, W. Va. Code § 46A-1-105(a)(3). Plenary scrutiny of that provision entitles the Court to bring the best available information to bear on its interpretation.

II. THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT'S PUBLIC UTILITY EXCLUSION IS AMBIGUOUS, AND MUST BE CONSTRUED ACCORDING TO THE ACT'S REMEDIAL PURPOSES.

The meaning of the public utility exclusion in the West Virginia Consumer Credit and Protection Act (WVCCPA or "Act") is not clear from the language of the Act, so the exclusion must be interpreted. The trial court failed to make any specific determination regarding the exclusion's meaning, but granted WVAW's motion to dismiss based on WVAW's exclusion-related argument. WVAW had advanced the broadest possible construction of the exclusion by claiming immunity from suit for any public utility that is regulated by the PSC. This construction is contradicted by the language of the exclusion and the law in effect at the time it was enacted. A narrow construction is both more rational and more harmonious with the Act's remedial objectives.

The public utility exclusion purports to exclude the following: "Transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the charges for services involved, the charges for delayed payment, and any discount allowed for early payment." W. Va. Code § 46A-1-105(a)(3). Key parts of this exclusion are

not defined in the Act. The Act fails to explain what a "public utility tariff" is: from the standpoint of the WVCCPA, does "tariff" refer simply to a schedule of rates and charges, or something more? The Act also fails to explain what it means to "transact under" a tariff for consumer protection purposes. Again, the meaning could be narrow or expansive, and reference must be made to sources outside of the Act itself in order to make that determination. When the meaning of a statute is clear from the statute's own text, that plain meaning is applied and no construction is allowed. *Harper v. Jackson Hewitt, Inc.*, 227 W. Va. 142, 151, 706 S.E.2d 63, 72 (2010) (citing cases). But an ambiguous statute requires a court to "venture into extratextual territory in order to distill an appropriate construction." *Scott Runyan*, 194 W. Va. at 777, 461 S.E.2d at 523. The trial court below failed to make any determination about the exclusion's ambiguity or lack thereof, and simply found that "Mr. Holt's pled claims arise from transactions encompassed by W. Va. Code § 46A-1-105(a)(3), and thus are statutorily excluded." *See* R. at 2. This was error. Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992) ("A statute that is ambiguous must be construed before it can be applied.").

The meaning adopted by the Court to dismiss the Complaint is unclear, but the meaning advanced by WVAW in seeking dismissal was breathtaking in scope.[1] According to WVAW, the public utility exclusion forestalls all consumer protection claims against WVAW because its rates and practices are subject to regulation by the PSC. *See* R. at 1-2, 47-48. If this is true, then the public utility exclusion provides blanket immunity to all public utilities in West Virginia, because all public utilities in the state, like WVAW, are subject to regulation by the PSC. *See* Syl. pt. 2, *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 776, 137 S.E.2d 426 (1964) ("The policy and law of this State is that all public utilities, whether publicly or privately owned,

[1] WVAW's position was referenced in the trial court's dismissal order, but not explicitly adopted. *See* R. at 1-2.

shall be subject to the supervision of the public service commission."); *see also* W. Va. Code § 24-2-1(a). *Delardas* had been good law in West Virginia for ten years when the WVCCPA was enacted, so the Legislature in enacting the WVCCPA would have been aware that all public utilities in the state were already subject to PSC regulation. *See Scott Runyan*, 194 W. Va. at 779 n.13, 461 S.E.2d at 525 n.13 (Legislature presumed to know law in effect, including case law, at time of bill's drafting and passage). If the Legislature had truly intended a blanket exemption, it could have written one in a more straightforward manner, and the "if" clause that qualifies when the exclusion will apply (and makes up the bulk of the exclusion's language) would not have been necessary. The Legislature was certainly capable of crafting a broad and straightforward exclusion because it did so in the very same section regarding licensed pawnbrokers. *See* W. Va. Code § 46A-1-105(a)(4) ("This chapter does not apply to: . . . Licensed pawnbrokers."). The fact that the Legislature did something different regarding public utilities by excluding claims against them only when certain criteria are met suggests the Legislature did not intend the blanket immunity advocated by WVAW, and instead had something more narrow and specific in mind.

This Court's construction of the public utility exclusion is guided by the WVCCPA's remedial purpose, which is "to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Scott Runyan*, 194 W. Va. at 777, 461 S.E.2d at 523. The Act is construed liberally in order to accomplish this purpose. *See Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (citing cases). It follows that the meaning of exclusionary language in the Act should be as narrow as the words permit, to avoid "closing the door" on consumer claims. *See* Syl., *State ex rel. McGraw v. Pawn*

Am., 205 W. Va. 431, 518 S.E.2d 859 (1998) (§ 46A-1-105 "licensed pawnbroker" exclusion interpreted not to apply when pawnbroker allegedly acted beyond scope of license). The public utility exclusion is best read only to prevent consumers from using the WVCCPA to challenge PSC-approved rates and charges.

III. THE PUBLIC UTILITY EXCLUSION DOES NOT BAR HOLT'S CLAIM BECAUSE THE CLAIM PERTAINS TO WVAW'S UNFAIR AND DECEPTIVE COURSE OF CONDUCT, NOT ITS RATES.

A. The Language of the Public Utility Exclusion Demonstrates an Overriding Interest in Rates over Practices.

By its own language, the public utility exclusion applies only when certain conditions are met, and those conditions reveal the exclusion's true purpose. Specifically, "transactions under . . . tariffs" are excluded from WVCCPA claims only "if a subdivision or agency of this state or of the United States regulates the *charges for services* involved, the *charges for delayed payment, and any discount* allowed for early payment." W. Va. Code § 46A-1-105(a)(3) (emphasis added). This focus on the regulation of a utility's charges and discounts, without any reference to a utility's practices, is meaningful because the PSC is empowered to regulate both rates *and* practices of utilities. *See, e.g.*, *W. Va.-Citizen Action Group v. Public Serv. Comm'n*, 175 W. Va. 39, 47, 338 S.E.2d 849, 856 (1985). As this Court has long recognized, language that appears to be general in nature may be limited by the language surrounding it. *See* Syl. pt. 4, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975). Based on this "fundamental rule of construction," *id.*, the general exclusion of "transactions under . . . tariffs" in § 46A-1-105(a)(3) should be defined in part by its own qualifying clause, with that clause's specific and narrow focus on the regulation of service charges, late fees, and discounts. Read in this manner, the "transactions under . . . tariffs" contemplated by the exclusion appears confined to the service charges, late fees, and discounts on the customer's bill. If a broader proscription had been

intended, then other, less rate-focused words could have been used. *See State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) ("It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.").

This rate-oriented interpretation of the public utility exclusion makes sense because the PSC's primary function has always been regulation of rates. As this Court has explained, the PSC is the Legislature's "designated rate-making agency." *Columbia Gas of W. Va., Inc. v. Public Serv. Comm'n*, 173 W. Va. 19, 23, 311 S.E.2d 137, 140 (1983). WVAW may argue that the "tariffs" it has filed with the PSC contain rules and regulations in addition to rates, so that the "transactions under . . . tariffs" excluded from the WVCCPA must encompass more than just consumer rate challenges. *See* R. at 73. This argument contradicts the Court's historical understanding that the essential content of a tariff is its "schedule of rates and charges," rather than whatever rules or regulations may be referenced in the tariff.[2] *Delardas*, 148 W. Va. at 787, 137 S.E.2d at 434. The WVCCPA exclusion helps maintain the regulatory status quo by ensuring public concerns about utility rate changes continue to flow directly through the Legislature's designated rate-making agency, rather than being expressed in ad hoc fashion through individualized lawsuits. This serves laudable policy objectives by maintaining

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[2] The PSC's Rules for the Construction and Filing of Tariffs specify that a utility's tariff "*contain*[] schedules of all its rates, charges and tolls and *stat*[*e*] all of its rules and regulations." W. Va. C.S.R. § 150-2-2.1 (emphasis added). The implication being that a tariff establishes rates, while the rules and regulations come from another source. Further, the terms with which the word "tariff" is associated in the PSC's organic statute all pertain to rates and charges. In describing the PSC's general power regarding rates, various words—including "tariff"—are used to describe the same core concept that the PSC is empowered to establish and modify utilities' rates: "The commission shall have power to enforce, originate, establish, change and promulgate *tariffs, rates, joint rates, tolls and schedules*." W. Va. Code § 24-2-3 (emphasis added). "Joint rate" refers to charges made by rail carriers. *See* W. Va. C.S.R. §§ 150-12-1—3. "Toll" refers to charges made by telecommunications companies. *See, e.g.*, *id.* §§ 150-6-2, 150-6-11. A "schedule" is a collection of rates organized by a common theme, such as the political subdivision to which the rates will apply. *See id.* § 150-2-4. The overwhelming focus of a tariff, similarly, is its rates. *See generally id.* § 150-2-1 *et seq.* (rules for construction and filing of tariffs).

predictability and consistency in the utility market for both utilities and consumers in the very day-to-day arena of calculating monthly service charges and expressing those charges in bills to the consumer.[3]

B. The WVCCPA Mirrors Federal Consumer Protection Law, Which Allows Unfair Trade Practices Claims, Like Holt's, Against Public Utilities, While Prohibiting Certain Consumer Credit Claims Against Utilities Whose Charges and Fees are Already Regulated.

i. The Federal Trade Commission Act, Which Prohibits Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce, Does Not Exclude Public Utilities.

The federal law on which West Virginia's unfair trade practices statute is based does not exclude public utilities from coverage; instead, the counterpart to the WVCCPA's public utility exclusion is found only in federal consumer credit law. Holt's claim arises solely under W. Va. Code § 46A-6-104, which prohibits "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." A nearly identical prohibition is found in the Federal Trade Commission Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). The West Virginia provision's purpose is "to *complement* the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public." W. Va. Code § 46A-6-101(1) (emphasis added). Accordingly, it is known for being "among the most broadly drawn provisions contained in the Consumer Credit and Protection Act." *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 529, 295

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[3] The rate-making process itself contains a consumer protection component, further obviating the need for WVCCPA protection regarding utility rates. One of the PSC's obligations in devising public utility rates is to ensure the rates are "just and reasonable," and nondiscriminatory. W. Va. Code § 24-2-2(a) (general power of PSC to regulate utilities); *accord id.* § 24-2-3 (general power of PSC regarding rates). In addition, a consumer advocate division for the PSC was created in the early 1980s, and its purpose is to obtain the lowest possible rates for consumers. *See* W. Va. Code § 24-1-1(f)(2); Consumer Advocate Division Home Page, available at http://www.cad.state.wv.us (last accessed Sept. 20, 2013).

S.E.2d 16, 19 (1982); *accord Harper v. Jackson Hewitt, Inc.*, 227 W. Va. 142, 152 n.13, 706 S.E.2d 63, 73 n.13 (2010); *State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W. Va. 573, 576-77, 618 S.E.2d 582, 585-86 (2005). The Federal Trade Commission Act, which § 46A-6-104 was intended to complement, does contain an exclusionary provision, but that provision makes no mention of public utilities. *See* 15 U.S.C. § 45(a)(2).[4] It would be incongruent for the Court to hold that § 46A-6-104 is more restrictive in scope that the federal law it is intended to complement, yet interpreting the public utility exclusion to bar Holt's § 46A-6-104 claim against WVAW will do just that.

ii. The Federal Truth in Lending Act, Which Only Regulates Credit Transactions with Consumers, Contains a Public Utility Exclusion Identical to the WVCCPA's Exclusion.

The inapplicability of the public utility exclusion to Holt's unfair trade practices claim is further supported by the federal context in which the exclusion does arise, namely federal consumer credit law. The federal counterpart to the WVCCPA's public utility exclusion actually appears in the federal Truth in Lending Act (TILA): "This subchapter does not apply to the following: . . . Transactions under public utility tariffs, if the [Federal Reserve] Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment." 15 U.S.C. §

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[4] The exclusion states in whole:

> The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181, *et seq.*], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45(a)(2).

1603(4). The Truth in Lending Act "has the broad purpose of promoting 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 100 S. Ct. 790, 794 (1980) (quoting 15 U.S.C. § 1601). Generally speaking, TILA governs how certain credit charges are calculated, what must be disclosed to consumers in credit transactions, and how the disclosures must take place. *See, e.g.*, 15 U.S.C. § 1605 (calculation of finance charge); *id.* § 1606 (calculation of annual percentage rate); *id.* § 1632 (form of required disclosures); *id.* § 1637 (disclosure requirements for "open end consumer credit plans"); *id.* § 1666c (specifying when and how payments will be credited to open end consumer credit accounts); *id.* §§ 1666i-1—2 (limiting when open end consumer creditor can increase interest rate, fee, and finance charges). TILA's implementing regulations follow this same theme. They clarify that the public utility exclusion's target transaction is "[a]n extension of credit that involves public utility services." 12 C.F.R. § 226.3(c).[5] However, "[t]he financing of durable goods or home improvements by a public utility is not exempt," *id.*, thus emphasizing the intended narrowness of the exclusion.

iii. The WVCCPA Mirrors the Division in Federal Consumer Law between Consumer Credit Provisions and Unfair Trade Practices Provisions.

This distinction in federal law—between trade practice provisions, which do not exclude public utilities, and consumer credit provisions, which do exclude them—is also reflected (and

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[5] The Federal Reserve Board's interpretation of TILA's public utility exclusion in its entirety:

> This regulation [Federal Reserve Board Regulation Z, implementing TILA] does not apply to the following: . . . An extension of credit that involves public utility services provided through pipe, wire, other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, or any discounts for prompt payment are filed with or regulated by any government unit. The financing of durable goods or home improvements by a public utility is not exempt.

Id.

harmonized) in the general provisions of the WVCCPA where the public utility exclusion is located. Like TILA, the WVCCPA "prescribes maximum charges for all creditors, except . . . those excluded, making consumer credit sales and consumer loans." W. Va. Code § 46A-1-103(1). The WVCCPA's consumer credit provisions were intended to establish a comprehensive scheme regarding charges and discounts, including "maximum interest and charges, minimum charges, additional charges, delinquency charges, deferral charges, allocation of charges and methods of computing rebates upon prepayment." *Id.* (expressing intent to "displace" existing consumer credit law in West Virginia). If this terminology feels eerily familiar, it may be because the same terminology is used in the public utility exclusion, which operates only if "the charges for the services involved, the charges for delayed payment, and any discount allowed for early payment" are already regulated. *Id.* § 46A-1-105(a)(3). This parallel makes clear that the public utility exclusion's purpose is to erect a firewall between the comprehensive regulation of credit charges established by West Virginia's consumer credit law and the equally exclusive power of the PSC to regulate utilities' service charges, late fees, and early payment discounts. However, this same general provision in the WVCCPA also establishes the broader and alternative bent of the WVCCPA's trade practice provisions by making clear that "[t]his chapter *also* prescribes in various articles protective measures for consumers in transactions *not necessarily involving consumer credit*." *Id.* § 46A-1-103(3) (emphasis added). In this way, the WVCCPA's consumer protection law consists of complementary regulatory schemes.

Here, Holt's claim is not an attempt to challenge WVAW's rates, or the manner in which it calculated any penalties or discounts on his bills, and Holt's claim arises under the WVCCPA's trade practices provisions. Holt's claim does necessarily involve charges that appeared on his bill, and the attempted collecting of those charges, but the claim does not

challenge the rates or formulas used to calculate the charges. Rather, WVAW's alleged unlawful act was the withholding of material information related to the charges, namely the critical fact that the excess flows reflected on Holt's massive bill came from a leak on WVAW's side of the line. This unlawful act was compounded when WVAW, knowing Holt was not legally obligated to pay for such flows, attempted to collect on the flows anyway; and when WVAW, realizing it had been found out by the PSC, attempted to cut its losses by invoking a leak adjustment policy that the PSC later held was arbitrary and unreasonable; and when WVAW, realizing Holt intended to pursue his formal complaint with the PSC, attempted to discourage him by piling on additional charges in violation of a PSC order and then shutting off his water for nonpayment of those charges in violation of the order just one month before Holt's PSC complaint was scheduled for hearing. Holt's claim is not about charges per se, interest, or prepayment discounts; his claim is about abusive conduct. As such, the claim is clearly permissible under the WVCCPA.

IV. CONSUMER TRADE PRACTICES CLAIMS AGAINST PUBLIC UTILITIES WILL NOT UNDULY INTERFERE WITH THE PSC'S JURISDICTION OVER UTILITIES, WHICH HAS ALWAYS BEEN SHARED WITH CIRCUIT COURTS.

The notion that WVCCPA claims against utilities will somehow interfere with the PSC's regulatory jurisdiction, as argued below by WVAW, R. at 48, is at odds with the well-established principle that the PSC's jurisdiction is concurrent with circuit courts' jurisdiction, and ignores the fact that statutory and common law damages claims against public utilities are not new. Below, WVAW contended the WVCCPA's public utility exclusion was meant to "forestall redundant, potentially conflicting regulation" and that the exclusion applied to WVAW because WVAW is "subject to regulation by the PSC." *Id.* But cases addressing the PSC's jurisdiction establish that the PSC's authority is limited, and usually not adversely impacted when circuit

courts hear damages claims against utilities. The fact that a public utility happens to be regulated by the PSC also does not save it from such claims. As a result, any policy basis for interpreting the public utility exclusion broadly to bar Holt's claim must come from the WVCCPA, rather than the PSC's regulatory authority.

This Court's approach to the concurrent jurisdiction of circuit courts and the PSC has focused on the nature of the claim being made, and favored circuit court resolution of damages claims when those claims do not require the special expertise of the PSC. In *State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997), consumers filed a class action against a telecommunications utility alleging violations of the WVCCPA, the West Virginia Antitrust Act, and common law arising out of the utility's allegedly fraudulent scheme to sell inside wire maintenance services. *See* 201 W. Va. at 405, 497 S.E.2d at 758. The cost of this service was originally included in customers' base rates, which the PSC controlled through tariffs. *See id.*, 201 W. Va. at 405-06, 497 S.E.2d at 758-59. The PSC later agreed to "unbundle" the cost of inside wire maintenance service from the utility's basic service rates, but reserved the right to otherwise regulate inside wire maintenance service. *See id.*, 201 W. Va. at 406-07, 497 S.E.2d at 759-60. In so doing, the PSC specifically authorized and approved an "opt-out" feature that automatically enrolled consumers in the service, requiring them to take affirmative steps to avoid the service fee, and the PSC further found that "the unbundling of the maintenance service is reasonable and is not detrimental to C & P's [the utility's] customers in any way." *Id.*, 201 W. Va. at 412, 497 S.E.2d at 765 (quoting *AT&T Commc'ns of W. Va. v. C&P Tel. Co. of W. Va.*, 73 ARPSCWV 702, 772 (1985)). A consumer class action followed, with plaintiffs alleging the utility "coerced customers to accept inside wire maintenance" through deceptive bill inserts and maintained a monopoly by charging consumers for inside wire

maintenance services without their knowledge. *Id.*, 201 W. Va. at 408, 497 S.E.2d at 761. At least some of the plaintiffs' claims arose under the same provision of the WVCCPA under which Holt's claim arises, section 46A-6-104. *See id.*

The utility in *Bell Atlantic* sought to have the claims dismissed. It contended first that the PSC's jurisdiction was exclusive and second that, even if the PSC's jurisdiction was not exclusive, deference to the PSC was necessary because it had approved the opt-out feature and continued to retain the right to regulate inside wire maintenance service. *See* 201 W. Va. 408, 412, 497 S.E.2d at 761, 765. These arguments echo the position taken by WVAW below that, again, the policy basis for the WVCCPA's public utility exclusion derives from what should be the jurisdictional primacy of the PSC. R. at 48. The Court in *Bell Atlantic* rejected these arguments.

First, the Court quickly established that "[t]hough the PSC has jurisdiction over matters concerning inside wire maintenance services, its jurisdiction in this case is *not* exclusive." *Bell Atlantic*, 201 W. Va. at 409, 497 S.E.2d at 762. This conclusion was based ***not*** on the fact that inside wire maintenance services had been detariffed,[6] but instead on the fact that the plaintiffs'

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[6] WVAW argued below that *Bell Atlantic* is distinguishable because the services at issue had been detariffed, meaning the "transactions under . . . tariffs" excluded from the WVCCPA were not present in that case. R. at 106-07. This argument has two major problems.

First, the argument misunderstands why *Bell Atlantic* is important. As illustrated throughout Petitioner's discussion of *Bell Atlantic*, the case matters for its treatment of the PSC's jurisdiction. The cornerstone of WVAW's argument below was that the WVCCPA's public utility exclusion reflects a policy choice by the Legislature to defer to the PSC in all consumer protection matters involving utilities. *See* R. at 48. As explained further in Petitioner's discussion of the case, *Bell Atlantic* rejects this argument by finding that consumer protection claims could proceed against a regulated utility ***even though*** the PSC had approved at least part of the practices claimed to be in violation of the WVCCPA. *See* 201 W. Va. at 412-13, 497 S.E.2d at 765-66. The Court concluded that the integrity of the PSC's

(continued...)

regulatory regime was not at risk. *See id.*, 201 W. Va. at 413, 497 S.E.2d at 766.

consumer protection, antitrust, and common law claims "are clearly within the usual province of circuit courts." *Id.*, 201 W. Va. at 410, 497 S.E.2d at 763. The ***claims*** being made against the regulated utility, and not the regulatory status of the activities at issue, dictated that the PSC's jurisdiction was ***nonexclusive***. *Id.*

Next, having determined that the circuit court could hear the case, the Court analyzed whether the PSC nevertheless should have jurisdiction over the claims based on the regulatory issues involved.[7] Pointing out that the PSC had both approved the opt-out feature and found the unbundling plan to be of no detriment to consumers, and further arguing that inside wiring maintenance continued to impact the service rates actively being regulated by the PSC, the utility in *Bell Atlantic* argued that "to allow the circuit court to adjudicate matters concerning inside wire maintenance service rates and practices, without the benefit of the PSC's uniform and expert administration, would upset the carefully-balanced regulatory scheme of which inside wiring is only a part." *Id.*, 201 W. Va. at 412, 497 S.E.2d at 765. The Court questioned, and the plaintiffs challenged, whether the factual basis for the utility's arguments was accurate. *See id.* But the Court assumed that what the utility averred was true, and still flatly rejected the argument:

> We are convinced that the court, without the PSC's assistance, will be well able to determine whether petitioners acted fraudulently or in violation of antitrust and consumer protection laws in the course of offering the inside wire maintenance service plans through a "negative option." . . . We are likewise not persuaded . . .

Second, the holding in *Bell Atlantic* does not appear to have taken detariffing into account. Instead, the Court concluded that the consumer protection claims could proceed in circuit court even though it ***agreed*** with the complaining utility, for the sake of argument, that the PSC continued to exercise at least indirect authority over the challenged service. *See id.*, 201 W. Va. at 413, 497 S.E.2d at 766.

[7] The precise question litigated in *Bell Atlantic* was whether the primary jurisdiction doctrine should apply. *See* 201 W. Va. at 410, 497 S.E.2d at 763. This involved an analysis of "whether there exists a danger of inconsistent rulings," among other factors. *Id.*, 201 W. Va. at 411, 497 S.E.2d at 764. Similarly, WVAW argued below that allowing Holt's claim to proceed would create a danger of inconsistent rulings. *See* R. at 48.

> that the PSC's purported regulation of inside wiring would be disrupted by the circuit court's adjudication of alleged deceptive and fraudulent sales schemes.

Id., 201 W. Va. at 412-13, 497 S.E.2d at 765-66. Thus, allowing a circuit court to adjudicate consumer protection claims against a regulated public utility will not upset the delicately balanced apple cart that WVAW purports is the PSC's regulatory authority.

This notion that individual plaintiffs can litigate damages claims against regulated utilities in circuit court has been reinforced since *Bell Atlantic*. *Hedrick v. Grant County Public Service District*, 209 W. Va. 591, 550 S.E.2d 381 (2001) (*per curiam*) involved a *pro se* plaintiff who sought administrative relief and damages against a public utility using a "two-track approach," by filing complaints both with the PSC and in circuit court. 209 W. Va. at 593, 550 S.E.2d at 383. The circuit court dismissed the complaint pending before it based on the fact that the plaintiff had not exhausted his remedies with the PSC. *See id.* On appeal, the plaintiff argued that his damages claim should still be heard by the circuit court, even if he must seek administrative relief exclusively through the PSC.[8] *See id.*, 209 W. Va. at 594, 550 S.E.2d at 384. This Court took the opportunity to reaffirm its holding in *Bell Atlantic*, stating, "Our concern in [*Bell Atlantic*] was to allow circuit courts to retain jurisdiction over a case, unless resolving the dispute would require the 'special expertise' of an administrative agency." *Id.*, 209 W. Va. at 596, 550 S.E.2d at 387. The Court then concluded that "certain relief, namely

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[8] Plaintiff Hedrick sought compensatory damages for lost revenue incurred when the Grant County Public Service District refused to extend a water line out to property he planned to use for a trailer park. *Hedrick*, 209 W. Va. at 596, 550 S.E.2d at 386. He also sought punitive damages for, "in Mr. Hedrick's words, the GCPSD's 'wilful, or reckless, or negligent non compliance with PSC rules and its breech [sic] of duty.'" *Id.* (modification added).

damages, *should* be pursued before the circuit court."[9] *Id.*, 209 W. Va. at 387, 550 S.E.2d at 597 (emphasis added).

The limited, concurrent nature of the PSC's jurisdiction was again addressed in *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 647 S.E.2d 879 (2007). There, the Court had to decide whether local residents could pursue common law nuisance claims against an electric generating facility to prospectively enjoin the facility's construction near their property, the location of which had already been approved by the PSC. *See id.*, 220 W. Va. at 448, 453, 647 S.E.2d at 884, 889. The Court noted that "the Public Service Commission of West Virginia has no inherent jurisdiction, power or authority and can exercise only such jurisdiction, power or authority as is authorized by statute." Syl. pt. 5, *id.* (quoting Syl. pt. 1, *Eureka Pipe Line Co. v. Public Serv. Comm'n*, 148 W. Va. 674, 137 S.E.2d 200 (1964)). The common law, in particular, must be abrogated expressly. *See* Syl. pts. 6-7, *id.* (quoting Syl. pt. 2, *Smith v. W. Va. State Bd. of Educ.*, 170 W. Va. 593, 295 S.E.2d 680 (1982); Syl. pt. 27, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910)). The plaintiffs' common law nuisance claim centered on the electric generating facility's location, which the PSC was empowered to (and did) approve. *See id.*, 220 W. Va. at 452-53, 647 S.E.2d at 888-89. Although the PSC had approved the facility's location by granting a siting certificate to the utility, the plaintiffs nevertheless challenged the

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[9] Justice MAYNARD dissented to the majority opinion in *Hedrick*, and Justice DAVIS joined in that dissent. *See* 209 W. Va. at 387-88, 550 S.E.2d at 597-98. The dissent felt (1) that the plaintiff should have filed his claim *either* in circuit court or with the PSC, but not both at the same time; and (2) that the plaintiff's claims at the time *Hedrick* was decided were precluded (*res judicata*) based on the fact that the PSC had already resolved all of them. *See id.*, 209 W. Va. at 387, 550 S.E.2d at 597. Neither of these issues is present here. Holt sought administrative remedies before the PSC, ***then*** filed a damages claim with the circuit court. Although Holt did seek some damages with the PSC which are also sought in this suit (namely, the cost of replacing his entire water line in compliance with WVAW's arbitrary and unreasonable leak adjustment policy), the legal basis for those damages is different here—no consumer protection claims were made before the PSC. *See* R. at 27-28. In fact, the PSC declined to consider Holt's claim for damages, stating that it "lacks the jurisdiction to award monetary damages which the Complainant [Holt] must seek in a court of competent jurisdiction." R. at 28.

location for the alleged nuisance it would create near their properties. *See id.*, 220 W. Va. at 453, 647 S.E.2d at 889. The utility argued that this encroached on the PSC's siting authority, but the Court disagreed. The Court reasoned that "[a] siting decision by the PSC involves a different legal analysis, different considerations, and different facts than a nuisance action for a prospective injunction in circuit court." *Id.*, 220 W. Va. at 454, 647 S.E.2d at 890.

Thus, even when utilities act within the bounds of authority granted to them by the PSC, they are not necessarily immune from suit—the PSC's jurisdiction is not as sweeping, and its authority not as sacrosanct, as WVAW would have the Court believe. Nor are WVAW and other utilities special because they happen to be regulated by the PSC. WVAW alone has been sued based on a variety of statutory and common law theories. *See, e.g.*, *W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 WL 8583425 (W. Va. June 5, 2011) (mem. op.) (employee claim under West Virginia Human Rights Act); *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007) (negligence claim by individual consumer); *Pipemasters Inc. v. Putnam Cnty. Comm'n*, 218 W. Va. 512, 625 S.E.2d 274 (2005) (WVAW sued by private contractor for breach of contract); *Taylor v. Culloden Public Serv. Dist.*, 214 W. Va. 639, 591 S.E.2d 197 (2003) (WVAW and public service district sued by private landowner under West Virginia Water Pollution Control Act and federal Clean Water Act, for trespass, and for nuisance). As such, any policy preference embodied by the WVCCPA's public utility exclusion to defer to the PSC must derive not from the purportedly comprehensive nature of the PSC's regulatory regime, but rather from the WVCCPA itself. As argued in Part III above and Part V below, no such legislative intention or policy exists.

V. EXPANSIVE INTERPRETATION OF THE PUBLIC UTILITY EXCLUSION FRUSTRATES THE WVCCPA'S "GAP-FILLING" FUNCTION.

The WVCCPA "is a remedial statute intended to protect consumers from unfair, illegal and deceptive business practices" and "is a comprehensive attempt on the part of the West Virginia Legislature to extend protection to consumers." *Harper*, 227 W. Va. at 151, 706 S.E.2d at 72 (citing cases). In line with these purposes, the WVCCPA was designed to "provid[e] an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Scott Runyan*, 194 W. Va. at 777, 461 S.E.2d at 523. This Court has said that West Virginia's consumer protection laws "were meant to fill a gap." *White v. Wyeth*, 227 W. Va. 131, 141, 705 S.E.2d 828, 838 (2010). Broad interpretation of the public utility exclusion thwarts this purpose by creating a gap, rather than filling it. This is because without the WVCCPA, an individual consumer's only recourse in consumer matters involving a public utility is the PSC. But damages for harm to individual consumers are available under the PSC's organic statute only when a utility has violated a preexisting PSC rule or order. *See* W. Va. Code § 24-4-7. If Holt's reimbursement proceeding is any indication, the PSC is reluctant to adjudicate such claims. The PSC found WVAW had violated PSC rules regarding Holt, and it still specifically directed him to seek damages "in a court of competent jurisdiction," deferring his damages request. R. at 28.

The value of the WVCCPA's unlawful trade practices provision is its flexibility. *See McFoy*, 170 W. Va. at 529, 295 S.E.2d at 19 (describing the provision as "among the most broadly drawn provisions contained in the Consumer Credit and Protection Act and . . . also among the most ambiguous"). The PSC, which must balance competing interests and promulgate concrete rules that utilities can follow in their day-to-day operations, lacks the expertise or practical resources to supplant such a broad and flexible standard. In short, the PSC

specializes in utilities, while the WVCCPA specializes in consumer protection; while the two may at times overlap in pursuit of the consumer's interest, one can never truly supplant the other. The Legislature surely knew this when it crafted an intentionally narrow, focused public utility exclusion for the WVCCPA.

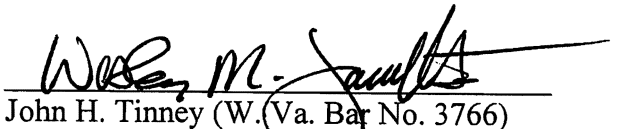
CONCLUSION

For the reasons provided, the trial court's judgment should be vacated and this case remanded for further proceedings.

Respectfully submitted this 25th day of October, 2013.

ROGER F. HOLT

By: THE TINNEY LAW FIRM, PLLC



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CERTIFICATE OF SERVICE

I, Wesley M. Jarrell II, hereby certify that on the 25th day of October, 2013 the foregoing ***"PETITIONER'S BRIEF"*** was served upon Defendant/Respondent by depositing a true copy thereof in the United States first-class mail, postage prepaid, and addressed to counsel as follows:

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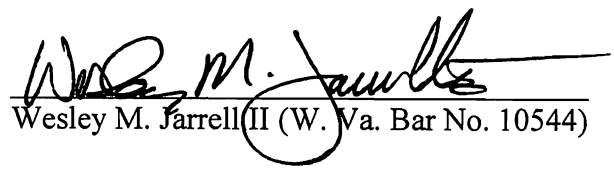

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