



No. 13-0744

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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ROGER F. HOLT,  
*Plaintiff/Petitioner,*

v.

WEST VIRGINIA-AMERICAN WATER COMPANY,  
*Defendant/Respondent.*

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

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**REPLY BRIEF**

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## STATEMENT OF THE CASE

### **I. THE PARTIES AGREE ON KEY FACTS OF THE CASE, WHILE OTHER KEY FACTS ARE NOT DISPUTED.**

West Virginia-American Water Company's Statement of the Case agrees with key parts of Roger F. Holt's version of events, and does not dispute several other parts. WVAW agrees that Holt began receiving excessive water bills in December 2009, and that these excess charges emanated in part from its own facilities. *See* Resp. Br. 1 ("Mr. Holt's high bills were due to several causes (i) a cracked collar at the meter pit where his service line connected to the Water Company's distribution system"). WVAW further admits it did not credit Holt for any of these bills until five months later, in May 2010, after Holt was forced to file a formal complaint with the Public Service Commission of West Virginia. *See id.* at 2 ("Mr. Holt filed in April 2010 a formal complaint with the PSC. *JA-014*. In May 2010, the Water Company credited \$5,110.54 to Mr. Holt's account for the first leak."). The amount of the initial refund, \$5,110.54, confirms Holt's allegation that the large initial leak was WVAW's responsibility (the difference between this refund and the amount of Holt's first large bill was just \$26.27). *See* R. at 7-8 (amount of bill and credit as pled in Complaint). Absent from WVAW's Statement of the Case—not disputed, just absent—is the additional fact that WVAW discovered and repaired the source of the large leak on its side of the line just *one month* after the first large bill, in January 2010. *Compare* Resp. Br. 1-2 *with* Pet'r Br. 2 (citing R. at 7-8). WVAW also does not dispute Holt's claim that it continued to bill him for that large leak for the next several months. *Compare* Resp. Br. 1-2 *with* Pet'r Br. 2 (citing R. at 8).

Other pertinent facts were omitted—not disputed, just omitted—from WVAW's Statement of the Case. WVAW does not mention it continued to charge Holt penalties for nonpayment of leak-related charges even after the PSC ordered it not to. *Compare* Resp. Br. 1-2

with Pet'r Br. 2-3 (citing R. at 9-10, 14-15). It does not mention the PSC found the leak adjustment policy WVAW had applied to Holt was unreasonable and arbitrarily adopted. Compare Resp. Br. 2 with Pet'r Br. 3 (citing R. at 10, 28). It does not mention the PSC concluded WVAW dragged its feet reimbursing the first large leak. Compare Resp. Br. 2 with Pet'r Br. 3 (citing R. at 10, 28). WVAW does admit it shut off Holt's water for nonpayment of disputed charges "for a day," Resp. Br. 2 n.1, but leaves out that the water came back on within such a short time only because Holt, in a fit of frustration, turned the water back on himself. See R. at 21 (paraphrasing Holt's sworn testimony before the PSC).

## **II. HOLT'S CIRCUIT COURT AND PSC CLAIMS ARE DISTINCT, AND HIS ASCERTAINABLE LOSS WAS PROPERLY ALLEGED.**

Holt's consumer protection claim seeking actual damages, statutory penalties, and attorney fees is distinct from his reimbursement claim with the PSC. WVAW states Holt's West Virginia Consumer Credit and Protection Act claim is "alleging 'ascertainable loss'" based on "the same transactions that had been addressed by the PSC."<sup>1</sup> Resp. Br. 3 (quoting R. at 12). The implication is that Holt's consumer protection claim attempts a second bite at the apple, and claims damages for matters that have been resolved.<sup>2</sup> The claims do arise out of the same constellation of facts, but the legal bases for the claims and the relief sought are different. With the PSC, reimbursement was Holt's primary concern and the primary administrative relief that he sought. Indeed, that was the relief awarded by the PSC. See R. at 30. Holt did also seek

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<sup>1</sup> To be clear, Holt pled all elements of a claim for unfair or deceptive acts or practices under W. Va. Code § 46A-6-106(a), not just ascertainable loss. Compare Syl. pt. 5, *White v. Wyeth*, 227 W. Va. 131, 705 S.E.2d 828 (2010) with R. at 10-13 (alleging unlawful conduct, ascertainable loss, and causation).

<sup>2</sup> Yet, WVAW never argued below, and has not argued here, that Holt's claim is precluded (*res judicata*). To the contrary, WVAW recognizes that if a plaintiff raised a consumer protection claim with the PSC, that claim "would likely . . . be[] deemed non-jurisdictional." Resp. Br. 14.

damages incurred in replacing his entire water line, which he now seeks in circuit court, but the PSC concluded it lacked jurisdiction to consider those damages, and the question of whether Holt was entitled to the damages under any particular legal basis went unresolved. *See id.* In the circuit court, Holt seeks monetary damages, statutory penalties, and attorney fees. *See R.* at 13. The legal basis for these damages is the West Virginia Consumer Credit and Protection Act, which is not within the PSC's jurisdiction. Since each claim is peculiarly suited to its own forum, bringing these claims separately was procedurally appropriate. *See Hedrick v. Grant Cnty. Public Serv. Dist.*, 209 W. Va. 591, 596-97, 550 S.E.2d 381, 387 (2001) (*per curiam*); *see also* Pet'r Br. 20-21 & n.9 (discussing *Hedrick*).

It is true that some of the ascertainable losses pled by Holt in the circuit court Complaint were resolved when the PSC ordered full reimbursement. However, "ascertainable loss" is not synonymous with "damages." This Court has held that "[f]or a consumer to make out a *prima facie* case to recover damages for 'any ascertainable loss' under W. Va. Code, 46A-6-106 [1974], the consumer is not required to allege a specific amount of damages." Syl. pt. 16, *In re: W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). This is because damages are "only a species of loss," with loss being a much more flexible term that is "synonymous with deprivation, detriment and injury." *Id.* 214 W. Va. at 75, 585 S.E.2d at 75 (quoting *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810, 814 (1981)). "Ascertainable" is similarly broad, and simply means "capable of being discovered, observed or established." *Id.* (quoting *Hinchliffe*, 184 Conn. at 613, 440 A.2d at 814). As a result, a consumer has established ascertainable loss once the consumer "proves that he or she has purchased an item [or service] that is different from . . . that for which he bargained." Syl. pt. 16, *id.* The ascertainable losses claimed by Holt fit the definition of ascertainable loss, are alleged to have been caused by

WVAW's unlawful conduct, and can be tied to the specific damages sought in the Complaint; but none of the damages being sought were awarded, or even adjudicated, by the PSC. *See R.* at 12-13 (Complaint listing ascertainable loss and separately demanding specific relief).

### **SUMMARY OF THE ARGUMENT**

West Virginia-American Water Company fails to provide a viable alternative to Holt's interpretation of the West Virginia Consumer Credit and Protection Act's public utility exclusion and fails to convincingly explain why Holt's interpretation is wrong. In attempting to avoid a finding that the public utility exclusion is ambiguous, WVAW advances a "technical" meaning of the exclusion's terms that is never clearly defined, contrary to the way "tariff" is used and defined in West Virginia law, and based on a misapplication of this Court's rules of construction. WVAW also repeatedly misconstrues the WVCCPA and interpreting cases in arguing that Holt's construction of the public utility exclusion somehow rewrites the Act, in arguing that government regulation provides a sufficient basis for rejecting Holt's construction of the exclusion, and in arguing that Holt failed to allege any unfair or deceptive act or practice. Finally, WVAW's threat that consumer protection claims will "chill" the PSC's resolution of routine billing disputes is without merit, as demonstrated by the absence of relationship between Holt's claim and WVAW's own tariff document and by the historically concurrent nature of the PSC's jurisdiction.

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

The Court is referred to Petitioner's initial Statement Regarding Oral Argument and Decision. *See Pet'r Br.* 5-6.

## ARGUMENT

### I. **WVAW FAILS TO PROVIDE A VIABLE ALTERNATIVE TO HOLT'S CONSTRUCTION OF THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT'S PUBLIC UTILITY EXCLUSION.**

WVAW contends that the terms “public utility tariff” and “transact under” in the public utility exclusion of the West Virginia Consumer Credit and Protection Act (WVCCPA or “Act”)<sup>3</sup> are unambiguous because they are presumed to have their “technical” meaning. This “technical” meaning is based on the Legislature’s “knowledge of the PSC’s regulation of public utility transactions for the previous 61 years” before the WVCCPA was enacted. Resp. Br. 8. WVAW further claims that “[i]t was not incumbent upon the Legislature to spell out, beyond their own clear meaning in the context of the statute, what it meant.” *Id.* at 9. WVAW never explains precisely what the Legislature had in mind, but appears to assert that the terms are coextensive with the regulatory authority of the Public Service Commission of West Virginia.<sup>4</sup> *See id.* at 11-12. This broad reading of the exclusion lacks support in the PSC’s statutes and regulations, contradicts this Court’s precedent, and confuses the exclusion’s own plain text. WVAW strains

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<sup>3</sup> The Act excludes “[t]ransactions 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).

<sup>4</sup> WVAW presents a shifting target in this regard. Below, WVAW did appear to argue that Holt’s claims were excluded by virtue of the fact that WVAW is regulated by the PSC. This is evident from the dismissal order being appealed, which was drafted by WVAW’s counsel. *See* R. at 117 (describing sole difference between WVAW proposed order and Holt proposed order ultimately entered by trial court). The dismissal order states:

WVAW first asserts that *Mr. Holt’s claims*, on the face of the complaint, arise from “[t]ransactions under public utility or common carrier tariffs” that *are excluded from the WVCCPA because the PSC is “a subdivision or agency of this state or of the United States [that] regulates the charges* for the services involved, the charges for delayed payment, and any discount allowed for early payment.” W. Va. Code § 46A-1-105(a)(3).

R. at 1-2 (emphasis added). Now WVAW appears to have retreated to a more moderate position, acknowledging that “unregulated transactions . . . are outside the statutory exclusion” even if the utility may still be subject to or under PSC regulation in other respects. Resp. Br. 10.

to avoid a finding that the exclusion is ambiguous because such a finding would require a liberal interpretation that favors Holt, *see* Pet'r Br. 9-10, a fact WVAW does not dispute. WVAW's attempt to stick its head in the sand is unavailing.

**A. WVAW Misapplies Rules of Construction in its Attempt to Avoid Ambiguity in the Public Utility Exclusion and Establish a "Technical" Definition of Key Terms in the Exclusion.**

WVAW continues to maintain that the public utility exclusion is unambiguous and should be applied according to its plain terms. In attempting to establish what those "plain terms" are, WVAW misapplies rules of construction pertaining to terms of art and technical language. When the rules are properly applied, they actually support Holt's analysis of the exclusion. WVAW first suggests that "public utility tariff" and "transact under" are "terms of art in which are accumulated the legal tradition and meaning of centuries of practice." *See* Resp. Br. 8 (quoting Syl. pt. 2, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995)). The Legislature is presumed to be aware of "the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind," and therefore such terms of art need no construction. Syl. pt. 2, *Stephen*, 195 W. Va. 384, 465 S.E.2d 841. However, the "terms of art" applied in *Stephen* were common law terms used in judicial review, such as "abuse of discretion" and "unsupported by substantial evidence." *See id.*, 195 W. Va. at 394, 465 S.E.2d at 851. By contrast, the concept of PSC tariffing was developed through a statutory regime, and is not the kind of accumulated knowledge from centuries of practice that would have an instantly recognizable meaning to the judicial mind. But even if the rule is relevant to this case, Holt does rely on past judicial understanding of the word tariff, which would have been available to the Legislature during the drafting and passage of the

WVCCPA. *See* Pet'r Br. 11 (quoting *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 776, 787, 137 S.E.2d 426, 434 (1964)).

WVAW also asserts that “technical words are presumed to have been used in a technical sense and should ordinarily be given their strict meaning.” Resp. Br. 9 (quoting *Lane v. Bd. of Educ. of Lincoln Cnty.*, 147 W. Va. 737, 743, 131 S.E.2d 165, 169 (1963)). This is a partial recitation of the rule. *Lane* went on to acknowledge that “this rule is not absolute and when it appears from the context that another meaning was intended such words will not be applied in their technical sense.” 147 W. Va. at 743, 131 S.E.2d at 169. Thus, the rule makes clear that regardless of any “technical” meaning a term may have, a different meaning should be applied if the context suggests one. Here, Holt has argued that the public utility exclusion’s context does suggest a particular intention and meaning, so the rule in *Lane* can be honored through Holt’s statutory analysis. First, the public utility exclusion is informed by the context of its own language, which is particularly focused on charges and discounts to the exclusion of other potentially regulated activities. *See* Pet'r Br. 10-11. Further, the exclusion is informed by the context of the federal law on which it is based, which makes use of a similar exclusion only for consumer credit transactions. *See id.* at 12-14. The exclusion also is informed by the overall context of the Act in which it appears, which allows consumer claims for non-credit matters. *See id.* at 14-15. And the exclusion is informed by the purposes of the Act, which are remedial in nature. *See id.* at 9-10, 23-24.

Finally, WVAW attempts to bolster its “technical meaning” argument by pointing out that “Congress saw no need to define these terms [“transaction,” “public utility,” and “tariff”] in the TILA exclusion, either.” Resp. Br. 9 n.7. Holt discussed TILA as an analog to the WVCCPA because TILA contains a nearly identical exclusion as the one at issue here. *See* Pet'r

Br. 13-14. While TILA did not define terms contained in its public utility exclusion, the Federal Reserve Board, which implemented TILA, did clarify that the exclusion’s target transaction is “[a]n extension of credit that involves public utility services.” *Id.* at 14 & n.5 (quoting 12 C.F.R. § 226.3(c)). Thus, the Federal Reserve Board did see the need to clarify the exclusion, and narrowly confined it to credit transactions.

**B. The Exact Scope of the Exclusion Sought by WVAW is Unclear, But Plainly Broader Than Any Definition of “Tariff” Found in West Virginia Law.**

The “technical” term that is the focus of the parties’ argument is “tariff.” The broad meaning WVAW gives that term is found nowhere in the PSC’s statute or regulations, is contradicted by this Court’s precedent, and is not supported by the text of the public utility exclusion. WVAW never specifically identifies the built-in technical meaning that “tariff” is supposed to have, so the general meaning WVAW intends must be culled from disparate pieces of WVAW’s argument. For example, WVAW stresses that the PSC is empowered to regulate more than just the prices utilities charge for their services. *See* Resp. Br. 11-12. WVAW also states that the Legislature would have been aware of the meaning of “tariff” based on the PSC’s historical regulation of public utilities, and this Court is urged dismiss Holt’s claim because Holt supposedly seeks to litigate matters found within WVAW’s own tariff document.<sup>5</sup> *See* Resp. Br. 7-8. WVAW appears willing to admit that certain “unregulated transactions” between consumers and utilities could be subject to claims under the WVCCPA, but does not clarify what those transactions are. *See id.* at 10. Whatever “technical” meaning “tariff” is supposed to have in WVAW’s view, that meaning is clearly meant to encompass more than just the tariff’s schedules of rates and charges.

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<sup>5</sup> As explained in Part III below, Holt’s claim in reality would have no impact on WVAW’s tariff document.

Since the PSC’s regulatory regime is the source of WVAW’s “technical” definition, WVAW might have been expected to justify its position by describing how the term is used in the PSC’s statute and regulations. Holt argued that “tariff” is used throughout the PSC’s statute and regulations in reference to rates and charges only, and WVAW fails to address this argument:

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).

Pet’r Br. 11 n.2. As the above demonstrates, WVAW’s interpretation of “tariff” goes beyond the term’s use in the PSC’s own statute and regulations.

WVAW’s interpretation of “tariff” also contradicts this Court’s description of a tariff as a “schedule of rates and charges.” *Delardas*, 148 W. Va. at 787, 137 S.E.2d at 434. WVAW attempts to cast this language as dicta, *see* Resp. Br. 12-13, but the question of whether the schedule of charges at issue in that case constituted a tariff was actually essential to the Court’s holding. *Delardas* decided whether a municipal ordinance establishing rates for sewer service in the City of Morgantown was valid based on the fact that the PSC had approved the rates, even though residents had not been allowed to vote on the ordinance prior to its passage, as required

by law. *See* 148 W. Va. at 430, 434, 137 S.E.2d at 780-81, 787. The fact that the ordinance constituted a tariff was essential to the Court’s holding that the usual municipal process was not required in that instance:

Notwithstanding the refusal of the City of Morgantown to hold an election to enable voters to ratify the ordinance enacted September 20, 1960, *the ordinance constituted a tariff or schedule of rates and charges* which, when filed with the public service commission, enabled the commission, under the provisions of Section 3, Article 2, Chapter 24, Code, 1931, to establish and promulgate valid and effective rates and charges for the service furnished by the sewer system owned and operated by the City of Morgantown.

*Id.*, 148 W. Va. at 434, 137 S.E.2d at 787 (emphasis added). The case was certainly about the PSC’s regulatory primacy over municipalities, as suggested by WVAW (*see* Resp. Br. 12-13), but that primacy came into play because the Court concluded a tariff was at issue.<sup>6</sup> Even if the “schedule of rates and charges” language were dicta, that fact alone would not be enough to disregard the language. This Court has instructed that obiter dicta in its opinions should not be disregarded without a compelling reason. *See W. Va. Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 695 671 S.E.2d 693, 700 (2008). WVAW has not provided a compelling reason for disregarding this language, which is the only binding precedent offered by either party in this case that defines the essential contents of a tariff.

Finally, WVAW’s interpretation of “tariff” is not supported by the plain text of the public utility exclusion. The exclusion’s qualifying clause specifies that the “[t]ransactions under public utility . . . tariffs” are only excluded from claims under the WVCCPA “*if* a subdivision or agency of this state or of the United States regulates the *charges for services* involved, the

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<sup>6</sup> WVAW also argues that the language is dicta because “it predated by a decade the enactment of the WVCCPA.” Resp. Br. 12. The fact that *Delardas* predated the WVCCPA actually supports Holt’s argument that “tariff” in the WVCCPA’s public utility exclusion means “a schedule of rates and charges.” *See* Pet’r Br. 10-11; *see also Scott Runyan*, 194 W. Va. at 779, 461 S.E.2d at 525 n.13 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1958, 60 L. Ed. 2d 560, 576 (1979)) (Legislature presumed to know law in effect at time of new legislation’s enactment).

charges for delayed payment, and any discount allowed for early payment.” W. Va. Code § 46A-1-105(a)(3) (emphasis added). WVAW offers no explanation for why “[t]ransactions under public utility . . . tariffs” should be read broadly when this qualifying language speaks exclusively in terms of charges and discounts. Compare Pet’r Br. 10-11 (applying Syl. pt. 4, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975)) with Resp. Br. 11. WVAW emphasizes the breadth of the PSC’s regulatory power, and Holt also agrees that the PSC is empowered to do more than simply approve utility pricing; but Holt explains how the actual text of the exclusion intersects with the PSC regime, while WVAW does not. Compare Pet’r Br. 11-12 & n.3 with Resp. Br. 11-12. Even the dictionary definition of “tariff” contradicts WVAW’s position. See Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/tariff> (last accessed Dec. 27, 2013) (defining tariff as “a schedule of rates or charges of a business or a public utility”).

C. **The Public Utility Exclusion is Ambiguous and Should be Interpreted Pursuant to the WVCCPA’s Remedial Purposes.**

Ultimately, WVAW strains to find a lack of ambiguity in a clearly ambiguous provision. This may be because WVAW knows that the Court’s construction of an ambiguous provision will skew in Holt’s favor, in accordance with the WVCCPA’s overall remedial objectives.<sup>7</sup> See *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (citing cases); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995). While the mere fact that two parties disagree about the meaning of a statute may not automatically render it ambiguous, the public utility exclusion plainly is “susceptible of two or more constructions.” *Davis Memorial Hosp. v. W. Va. Tax Comm’r*, 222 W. Va. 677, 683 & n.8, 671 S.E.2d 682, 688 & n.8 (2008) (quoting *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va.

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<sup>7</sup> WVAW never disputes this.

591, 596, 505 S.E.2d 654, 659 (1998)). This is the essence of ambiguity. The Court should decline WVAW's invitation to ignore ambiguity where it plainly exists and should interpret the public utility exclusion according to the principles outlined in the petitioner's brief and herein.

**II. WVAW MISCHARACTERIZES HOLT'S ANALYSIS OF THE WVCCPA AND MISREADS THE ACT'S INTERPRETING CASE LAW.**

**A. Holt's Construction of the Public Utility Exclusion Does Apply to the Whole Act.**

In explaining why his construction of the public utility exclusion is correct, Holt discussed federal consumer protection laws that are mirrored in the WVCCPA. *See* Pet'r Br. 12-14. These laws provide insight because the federal law that the WVCCPA's unfair trade practices provisions (under which Holt's claim arises) were meant to complement does *not* contain a public utility exclusion, while the federal law on which the WVCCPA's consumer credit provisions appear to have been based *does* have a public utility exclusion—which is practically identical to the one in the WVCCPA. *See id.* Holt argued this distinction between trade practices provisions and consumer credit provisions is reflected in the WVCCPA. *See id.* at 14-15. Contrary to WVAW's assertion, Holt is not suggesting the Court rewrite the public utility exclusion so it never applies to unfair trade practices claims. *See* Resp. Br. 13-14. WVAW misunderstands the extent to which the WVCCPA's consumer credit provisions and general consumer protection provisions overlap. Because the same set of facts could support a consumer credit claim and an unfair trade practices claim, the public utility exclusion as interpreted by Holt would continue to apply to the whole Act.

The WVCCPA's general provisions make clear that its consumer credit provisions and general consumer protection provisions may overlap. In describing the scope of the Act and its effect on regulated parties, section 46A-1-103 clarifies that in addition to regulating consumer

credit, the Act “also prescribes in various articles protective measures for consumers in transactions *not necessarily* involving consumer credit.” W. Va. Code § 46A-1-103(3) (emphasis added). This reference to the general consumer protection provisions of the Act would not have included the word “necessarily” unless some overlap between consumer credit regulation and general consumer protection had been anticipated. Instead, section 46A-1-103(3) could simply have said, “This chapter also prescribes in various articles protective measures for consumers in transactions *not* involving consumer credit.” This potential for overlap is unsurprising because the general consumer protection provisions’ prohibition against unfair or deceptive acts or practices is “among the most broadly drawn provisions contained in the Consumer Credit and Protection Act.” *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 529, 295 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); Pet’r Br. 12-13 (discussing purpose and scope of prohibition).

Because the same set of facts could potentially give rise to claims under both the consumer credit provisions and general consumer protection provisions of the WVCCPA, an unlawful acts or practices claim brought against a public utility is not automatically safe from exclusion. The facts alleged must be scrutinized to determine whether the claim amounts to a consumer credit-type claim that could encroach on the PSC’s exclusive authority to regulate utilities’ service charges, late fees, and early payment discounts. *See* Pet’r Br. 15 (“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”). If the

allegations amount to such a claim, the claim is excluded. Holt's claim sounds squarely in unfair trade practices, rather than consumer credit, *see id.* at 15-16, so Holt's claim should be allowed to proceed.

**B. WVAW Misconstrues and Misapplies WVCCPA Case Law.**

**i. *Wamsley and White* are Not Relevant to Holt's Claim.**

WVAW not only misconstrues Holt's argument, but also misapplies cases interpreting the WVCCPA. Arguing that the public utility exclusion is unambiguous, WVAW cites *Wamsley v. Lifenet Transplant Services, Inc.*, an unbinding and unpublished federal case, for the proposition that "regulated public utility transactions are expressly exempted by W. Va. Code § 46A-1-105." *See* Resp. Br. 8 (quoting No. 2:10-cv-00990, 2011 WL 5520245, at \*11 (S.D.W. Va. Nov. 10, 2011) (unpublished)). The basis for the district court's decision in *Wamsley* had nothing to do with public utilities or the public utility exclusion, and the exclusion was mentioned in passing and without analysis. *Wamsley* involved a plaintiff medical patient who sued the supplier of an allegedly defective Achilles tendon replacement. *See* 2011 WL 5520245, at \*1. The plaintiff alleged the medical tissue supplier had engaged in unfair or deceptive acts or practices in violation of the WVCCPA. *See id.* The district court disagreed for several reasons: West Virginia law declares that the furnishing of human blood and tissue is not a "sale"; the plaintiff was not a "consumer" because he did not directly purchase the tendon, but instead received it through an intermediary physician; and the procurement of human blood and tissue is such a highly regulated activity that it likely was not intended to be covered by the WVCCPA. *See id.* at \*8, \*10-\*11.

Thus, *Wamsley* did not involve any public utility and was decided based on a variety of issues not before this Court. *Wamsley* mentions the public utility exclusion only once, in

passing, while discussing the fact that tissue procurement is a highly regulated activity. Recognizing that government regulation is a “pertinent factor” in deciding whether a claim falls within the scope of the WVCCPA, the district court noted, without elaboration, that W. Va. Code § 46A-1-105 exempts “[m]ortgage lenders and brokers, pawnbrokers, insurance sales, [and] regulated public utility transactions.” *Id.* at \*11-\*12. While § 46A-1-105 does contain exemptions regarding each category listed by the district court, each of those exemptions takes effect based on specified criteria not examined in *Wamsley*. *See, e.g.*, W. Va. § 46A-1-105(a)(2) (exempting “[t]he sale of insurance by an insurer, *except as otherwise provided in this chapter*) (emphasis added); *Syl., State ex rel. McGraw v. Pawn America*, 205 W. Va. 431, 518 S.E.2d 859 (1998) (recognizing exemption of licensed pawnbrokers only “insofar as they engage in true pawn transactions that are within the scope of a valid pawnbroker’s license”). Thus, *Wamsley* does not stand for the proposition that the public utility exclusion is unambiguous—a single, superficial reference in an unbinding case does not make a rule.

WVAW also argues that it should not be subject to Holt’s claim because it is already regulated by the PSC. *See* Resp. Br. 17-18. WVAW attempts to support this point with *Wamsley* and another case, *White v. Wyeth*, because each case supported a conclusion that the WVCCPA did not apply by pointing out that the industry at issue was already highly regulated. *See id.* While preexisting government regulation did form a basis for each decision, and WVAW is unquestionably subject to government regulation, this case presents a different legal posture than either *White* or *Wamsley*. *White* and *Wamsley* both involved a trade or commerce on which the WVCCPA was entirely silent—pharmaceuticals (*White*) and replacement tissue (*Wamsley*) are not mentioned anywhere in the Act one way or the other. By contrast, Holt’s claim involves an industry that *is* mentioned specifically in the Act: utilities services. Because the Act speaks

directly to how public utilities are meant to be encompassed by its provisions, that language must be construed and honored despite any countermanding policy preference that might otherwise prevail. *Cf. State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 587 N.Y.S.2d 560, 600 N.E.2d 191, 195 (1992)) (“It is not the role of this court, or indeed any, court to second-guess the determinations of the Legislature.”).

In addition, other, more relevant factors that are not present here had a greater impact on the outcomes in *Wamsley* and *White* than government regulation. A core concern expressed in *Wamsley* was the consumer’s attempt to bring a product liability action under the guise of a consumer protection claim. *See* 2011 WL 5520245, at \*9 (“Allowing Plaintiff to morph what is most naturally a products liability or breach of warranty action into a purported statutory consumer protection claim would permit an end-run around the state’s blood shield statute.”); *see also White v. Wyeth*, 227 W. Va. 131, 141, 705 S.E.2d 828, 838 (2010) (citing *State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 647 S.E.2d 899 (2007)). Here, it is unclear what cause of action “most naturally” suits Holt’s claim other than an unfair trade practices claim because Holt’s claim aggregates elements of material omission and abuse of process. *See* R. at 11-12 (alleging specific unfair or deceptive acts or practices). Similarly, *White* turned on the fact that a physician created a causal buffer between the plaintiffs and the defendant pharmaceutical manufacturer. *See* 227 W. Va. at 140-41, 705 S.E.2d at 837-38. The interactions between Holt and WVAW are direct.<sup>8</sup>

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<sup>8</sup> The PSC admittedly acts as a moderating force in consumer-utility interactions, but the claim brought by Holt is beyond its sphere of influence. *See State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 410, 497 S.E.2d 755, 763 (1997) (“All of plaintiffs’ claims, which stem from the allegedly fraudulent and deceptive sale and marketing of inside wire maintenance service plans, are clearly within the usual province of circuit courts.”); Pet’r Br. 17-20 (discussing *Bell Atlantic*); *see also* Pet’r Br. 12 n.3 (discussing creation of Consumer Advocate Division and its role in ratemaking process).

**ii. Holt Properly Alleged Unlawful Acts or Practices Against WVAW.**

WVAW demonstrates its fundamental misunderstanding of the WVCCPA and interpreting case law most colorfully in its assertion that Holt failed to allege an unlawful act or practice “within the meaning of W. Va. Code § 46A-6-102(7).”<sup>9</sup> Resp. Br. 18-19. The unlawful conduct required for an unfair trade practices claim may consist of any “unfair or deceptive acts or practices in the conduct of any trade or commerce.” W. Va. Code § 46A-6-104. This has long been recognized as “among the most broadly drawn provisions contained in the Consumer Credit and Protection Act and . . . also among the most ambiguous.” *McFoy*, 170 W. Va. at 529, 295 S.E.2d at 19; *accord Harper*, 227 W. Va. at 152 n.13, 706 S.E.2d. at 73 n.13; *Bear, Stearns*, 217 W. Va. at 576, 618 S.E.2d at 586; *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 448, 582 S.E.2d 885, 895 (2003). The well-established standard for determining unlawful conduct under the Act is one of reasonableness: “the lawfulness of the challenged practice must be measured by whether that activity was ‘reasonable in relation to the development and preservation of business.’” *McFoy*, 170 W. Va. at 529, 295 S.E.2d at 20; *accord Telecheck*, 213 W. Va. at 448, 582 S.E.2d at 895. In this vein, W. Va. Code § 46A-6-102(7) provides a non-inclusive list of unlawful practices. *See* W. Va. Code § 46A-6-102(7) (“‘Unfair methods of competition and unfair or deceptive acts or practices’ means and includes, *but is not limited to*, any one or more of the following”) (emphasis added). Despite the Act’s flexible standard, WVAW seeks to shoehorn Holt’s claim into § 46A-6-102(7)’s non-inclusive list. Without once again restating the basis for Holt’s claim, it suffices that unfair or deceptive acts or practices have been alleged. *See* R. at 11-12 (Complaint stating basis for claim).

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<sup>9</sup> WVAW tried a variation of this argument with the trial court, in which it attempted to impose a “deceptiveness standard” on unfair trade practices claims. *See* R. at 48-50 (WVAW motion to dismiss), 68-70 (Holt response).

### III. HOLT'S CLAIM WILL NOT ALTER THE PSC'S REGULATORY FRAMEWORK OR "CHILL" THE PSC'S ADJUDICATION OF ROUTINE BILLING DISPUTES.

Holt's claim does not challenge any rules or regulations stated within WVAW's tariff, and allowing consumer protection claims to proceed against regulated utilities, where warranted under the public utility exclusion, will not "chill" the PSC's adjudication of routine billing disputes. WVAW has argued that allowing Holt's claim to proceed would subject WVAW to "potentially conflicting regulation." R. at 48 (motion to dismiss). In this vein, WVAW now seeks to tie Holt's claim to its own tariff document, claiming that various provisions within the document are implicated by Holt's claim. *See* Resp. Br. 7. To paraphrase those provisions: (1) the customer is responsible for his side of the line;<sup>10</sup> (2) service may be terminated for nonpayment of the account when due; (3) the amending or addition of rules shall be governed by the PSC; and (4) WVAW may charge a ten percent delayed payment penalty. *See id.* (quoting the provisions). None of these rules is challenged in Holt's Complaint. First, regarding the consumer's responsibility for leaks on the consumer's side of the line, Holt's claim is based on the fact that WVAW applied a leak adjustment policy to him that the PSC determined to be unreasonable and in violation of its own rules. *See* R. at 10-11 (Compl. ¶¶ 19, 22(f)). Second, regarding termination of service, Holt does not argue that service can be terminated for amounts legitimately due, and instead claims WVAW should not have terminated service for nonpayment of amounts in dispute when the PSC ordered it not to. *See id.* at 9-11 (Compl. ¶¶ 16, 22(g)–(h)). Third, regarding the amending or addition of rules affecting WVAW, the Complaint does not

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<sup>10</sup> This concept appears to be represented twice in the list of provisions quoted by WVAW. The first quoted provision states that "[t]he customer shall extend his service line to an existing main of the company and shall be solely responsible for service beyond the meter." R. at 75. The other provision states, "When a consumer makes application for service, he shall assure himself and the company that the piping and fixtures, which the service will supply, are in order to receive the same, and the company will not be liable for any accident, breaks, or leakage in connection with the supply." R. at 77.

attempt to inject itself into or engage in any way in the PSC’s rulemaking process, just as the various other common law and statutory suits permissible against WVAW do not work changes on the PSC’s regulatory framework. *See* Pet’r Br. 22 (citing cases); Resp. Br. 16 (citing the same cases). Fourth, regarding the ten percent late fee, Holt does not challenge the amount of the fee or WVAW’s entitlement to charge the fee for amounts legitimately owing, but instead challenges WVAW’s charging of the fee for flows it knew were not Holt’s responsibility and for nonpayment of disputed charges, in violation of a PSC order. *See* R. at 9-11 (Compl. ¶¶ 11, 16, 22(a)–(b), 22(d)–(e)). In short, Holt’s claim does nothing to WVAW’s regulatory status quo.

Holt’s claim, and claims like it, also will not alter the PSC’s routine adjudication of billing disputes. WVAW threatens that allowing Holt’s claim to proceed will “chill [the] longstanding practice before the PSC of resolving the many utility billing complaints raised each year” because the utility will be less likely to accept PSC staff recommendations that it perceives to be “contrary to the utility’s legal position” and because the utility will feel compelled to “require the execution of releases, formal settlement agreements, and the other trappings of civil litigation.” Resp. Br. 16-17. This is an idle threat. First, WVAW already acknowledges that it is exposed to civil liability through both the common law and statute,<sup>11</sup> and this civil liability apparently has not squelched the PSC’s consumer dispute process. *See* Resp. Br. 16 & n.13. Second, Holt’s dispute with the PSC is not a billing dispute. The “billing dispute” portion of Holt’s case was resolved by the PSC; as discussed throughout Holt’s briefs to this Court, the current Complaint is about something else. Finally, the purpose of the WVCCPA’s public utility exclusion, as discussed in Part II above, is to insulate the PSC regime from the consumer credit-

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<sup>11</sup> The concurrent jurisdiction of the PSC and circuit courts over public utilities in a variety of areas of law is well established. *See* Pet’r Br. 16-22.

type challenges that would typically arise in routine billing disputes. The exclusion as construed by Holt helps prevent the exact thing WVAW fears.

**CONCLUSION**

WVAW fails to offer a persuasive basis for affirming the judgment below. For the reasons provided herein and in the petitioner's brief, the trial court's judgment should be vacated and this case remanded for further proceedings.

Respectfully submitted this 30<sup>th</sup> day of December, 2013.

**ROGER F. HOLT**

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**CERTIFICATE OF SERVICE**

I, Wesley M. Jarrell II, hereby certify that on the 30th day of December, 2013 the foregoing ***“REPLY 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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