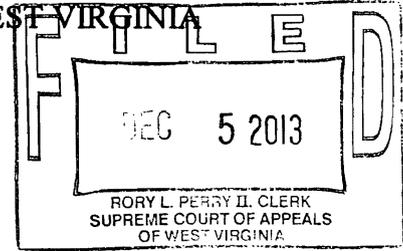


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0744



ROGER F. HOLT, Plaintiff Below,

*Petitioner,*

v.

APPEAL NO. 13-0744  
(Civil Action No. 13-C-656  
Circuit Court of Kanawha County,  
Judge James C. Stucky)

WEST VIRGINIA-AMERICAN  
WATER COMPANY, Defendant Below,

*Respondent.*

RESPONDENT'S BRIEF

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December 5, 2013

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## I. STATEMENT OF THE CASE

The Circuit Court of Kanawha County dismissed the complaint of Roger F. Holt against West Virginia-American Water Company brought under the West Virginia Consumer Credit and Protection Act (“WVCCPA”) because the claims were excluded by W. Va. Code § 46A-1-105(a)(3) (“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 the services involved, the charges for delayed payment, and any discount allowed for early payment[.]”).

### A. **Facts (Including PSC Proceedings)**

The factual background was developed before the Public Service Commission in Case No. 10-0524-W-C, as summarized in the PSC order that Mr. Holt exhibited to his complaint in the Circuit Court. *JA-016-031*. Starting in December 2009, Mr. Holt received very large Water Company bills. (Although the amounts at issue are seldom so great, “high bill” cases arise routinely at the PSC. The question is whether the leak is beyond the metering facilities, and thus the customer’s responsibility.) 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, (ii) a leak in a service line that Mr. Holt had installed on his property, (iii) a second, smaller leak due to a twist in that service line, and (iv) a stuck valve, also on Mr. Holt’s property. The Water Company repaired and replaced its facilities, told Mr. Holt that he was responsible to address leaks on his side of the meter, and refused to provide two months’ leak adjustments until he had done so. Mr. Holt’s water bills finally returned to normal in late 2010, after he had a contractor replace his service line. *JA-029*.

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. *JA-020, 027, 029*. The Water Company later offered another leak adjustment, and a deferred payment arrangement for the balance. *JA-027*. In October 2010, at the recommendation of the PSC staff, the Water Company credited Mr. Holt an additional \$1,643.12 for the second leak. *JA-020, 024, 029*. Because Mr. Holt remained unsatisfied with these adjustments, and also because he sought \$1,885.48 in costs to replace his service line, the case went to hearing before a PSC administrative law judge.<sup>1</sup> In a February 11, 2011 recommended decision, the ALJ denied Mr. Holt's request for money damages as beyond the PSC's jurisdiction<sup>2</sup> and rejected Mr. Holt's position that the Water Company bore full responsibility for the leaks. However, the ALJ also concluded that the Water Company's policy of limiting leak adjustments to two monthly billing periods was not supported by the PSC's Rules and Regulations for the Government of Water Utilities (CSR §§ 150-7-1, *et seq.*) and directed the Water Company to make such adjustments for several more months. Any associated charges for delinquency in payment were also prohibited. *JA-028, 030*.

Neither Mr. Holt nor the Water Company took exception to the recommended decision pursuant to CSR § 150-1-19. Thus, it became a final PSC order 20 days later, on March 3, 2011. *JA-016, 031*.

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<sup>1</sup> On April 19, 2010, another ALJ had directed the Water Company on an interim basis not to terminate Mr. Holt's service for failure to pay outstanding amounts owed, provided that Mr. Holt timely pay for current service. *JA-014-15*. Service was terminated for a day due to a Water Company policy that leak adjustments would not be made until repairs to customer facilities had been documented, which documentation Mr. Holt did not provide until the November 30, 2010 PSC hearing. *JA-024*.

<sup>2</sup> Although the inaccuracy of the statement was noted before the Circuit Court (*JA-085-086*), Mr. Holt continues to say (page 23) that the PSC "specifically directed him to seek damages 'in a court of competent jurisdiction,' deferring his damages request. R. at 28." In fact, the order says, "The Commission lacks the jurisdiction to award monetary damages which the Complainant must seek in a court of competent jurisdiction." *JA-028*.

## B. Procedural History

On April 4, 2013, more than two years after resolution of the PSC proceeding, Mr. Holt sued the Water Company in the Circuit Court of Kanawha County. He did not seek to recover damages for any alleged violation of Chapter 24 of the Code or Commission order.<sup>3</sup> Instead, on the basis of the same transactions that had been addressed by the PSC, he brought claims under the WVCCPA, alleging “ascertainable loss”:

24. Plaintiff suffered an ascertainable loss as a result of these unfair or deceptive acts or practices, including: exorbitant water bills for the months of December 2009 through November 2010; assessment of penalty fees against Plaintiff’s American Water account for the months of December 2009 through November 2010; assessment of artificially inflated penalty fees against Plaintiff’s American Water account for the months of December 2009 through November 2010; costs incurred inspecting and replacing Plaintiff’s water line; costs accrued in prosecuting a formal complaint against American Water before the PSC; and the wrongful deprivation of running water.

*JA-012.* Mr. Holt sought damages, statutory penalties, and payment of his legal fees. *JA-013.*

The Water Company moved to dismiss the complaint because (i) claims may not be brought under the WVCCPA for “[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 the services involved, the charges for delayed payment, and any discount allowed for early payment,” W. Va. Code § 46A-1-105(a)(3), and (ii) the complaint alleged no “unfair or deceptive” act or practice covered by W. Va. Code § 46A-6-102(7). *JA-047-051.*

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<sup>3</sup> *Cf.*, W. Va. Code § 24-4-7: “**Damages recoverable for violations.** Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction. In any such action, the court may compel the attendance of any agent, officer, director or employee of such corporation as a witness and require also the production of all books, papers and documents which may be used as evidence, and in the trial thereof such witnesses may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.”

Mr. Holt responded (*JA-047-051*) to the Water Company's motion, arguing, among other things, that because he was not challenging the Company's rates, the "under public utility or common carrier tariffs" exclusion in W. Va. Code § 46A-1-105(a)(3) did not apply.<sup>4</sup> The Water Company filed a reply (*JA-072-079*), which included portions of its PSC-approved tariff that addressed Mr. Holt's responsibility for his line beyond the meter and the discontinuance of service for failure to pay, and that also adopted by reference the PSC's Water Rules. At the end of a lengthy oral argument (*JA-080-112*), the Circuit Court granted the Water Company's motion on the first ground asserted, i.e., "that the exclusion of the West Virginia Consumer Protection Act is applicable to this cause of action" (*JA-110-111*). In the order of judgment entered on June 24, 2013, the Circuit Court reiterated that "Mr. Holt's pled claims arise from transactions encompassed by W. Va. Code § 46A-1-105(a)(3), and thus are statutorily excluded from the WVCCPA." *JA-001-002*.

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

There is no substantial question of law other than those correctly resolved by the Circuit Court; this case can be resolved by memorandum decision. WVRAP 21(c). If argument is held, then the Water Company requests 20 minutes in which to address the Court. WVRAP 19(e).

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<sup>4</sup> Mr. Holt by this time had abandoned his earlier assertion that W. Va. Code § 46A-1-105(a)(3) was inapplicable because the Water Company's tariff includes charges for water service and delayed payment, but no early payment discount. *JA-042*. The statute encompasses "charges for the services involved, the charges for delayed payment, and *any* discount allowed for early payment..." (emphasis added), which the Water Company noted in pre-suit correspondence. *JA-045*.

### **III. SUMMARY OF ARGUMENT**

Mr. Holt asserts in his brief (page 4) that, “[t]he 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.” However, as the complaint amply documented, (i) the transactions were brought by Mr. Holt before the PSC in a formal complaint against the Company as a public utility, (ii) the charges at issue were subject to the Company’s PSC-approved tariff and the PSC’s Water Rules incorporated in that tariff, and (iii) the PSC resolved Mr. Holt’s claims. The Circuit Court properly applied W. Va. Code § 46A-1-105(a)(3), finding that Mr. Holt’s claims were statutorily excluded from the WVCCPA.

Even in the absence of § 46A-1-105(a)(3), the Water Company was entitled to judgment because the complaint alleged no “unfair or deceptive” act or practice under W. Va. Code § 46A-6-102(7).

### **IV. ARGUMENT**

#### **A. Standard of Review.**

“The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint.” Yoak v. Marshall Univ. Bd. of Governors, 223 W. Va. 55, 59 672 S.E.2d 191, 195 (2008) (citation omitted). Rule 12(b)(6) entitles a defendant to dismissal if the plaintiff’s complaint fails to state a claim under the statute or common law relied upon. See Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 53, 717 S.E.2d 235, 240 (2011) (affirming dismissal of claim under Telephone Consumer Protection Act).

In considering such a motion, a circuit court must take all well-pleaded allegations as true, in the light most favorable to the plaintiff. See Price v. Holstead, 177 W. Va. 592, 355

S.E.2d 380 (1987). However, Rule 12(b)(6) is designed to “weed out unfounded suits,” and to prevent a plaintiff from trying to “fumble around searching for a meritorious claim.” State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (citation omitted). When the rule is invoked, a legal “entitlement to relief must be shown,” and a claim should be dismissed “where the claim is not authorized by the laws of West Virginia.” Id. “[B]ecause only well pleaded facts are taken as true on a motion to dismiss, we will not accept a party’s unsupported conclusions or interpretations of law. Nevertheless, we may affirm a circuit court’s dismissal order under any independently sufficient grounds.” West Virginia Human Rights Com’n v. Garretson, 196 W. Va. 118, 123, 468 S.E.2d 733, 738 (1996). This Court “is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” Forshey v. Jackson, 222 W. Va. 743, 756, 671 S.E.2d 748, 751 (2008) (citation and internal quotations omitted).

The Water Company agrees that the standard of review applicable to the Circuit Court’s application of these principles in its ruling and judgment is *de novo*. State ex rel. McGraw, Syl. Pt. 2, 194 W. Va. 770, 461 S.E.2d 516.

## **B. The WVCCPA Does Not Allow Claims Over Regulated Public Utility Transactions**

### **1. W. Va. Code § 46A-1-105(a)(3) Excluded Mr. Holt’s Claims<sup>5</sup>**

When the Legislature created the PSC in 1913, its “purpose and policy [was] to confer upon the public service commission of this state the authority and duty to enforce and regulate the practices, services and rates of public utilities[.]” W. Va. Code § 24-1-1(a). Under W. Va. Code § 24-2-2,

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<sup>5</sup> Under WVRAP 10(d), “[u]nless otherwise provided by the Court, the argument section of the respondent’s brief must specifically respond to each assignment of error, to the fullest extent possible.” The specific arguments made by Mr. Holt are addressed below, in the several subsequent subarguments.

The commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter; to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications, schedules and timetables in effect and used by the public utility or other person, to be filed with the commission, and all other information desired by the commission relating to the investigation and requirements, including inventories of all property in such form and detail as the commission may prescribe.

The PSC under this statutory charge has for decades regulated the rates and practices of the Water Company, both through the Water Rules and its review and approval of the Water Company's tariff, entitled "West Virginia-American Water Company of Charleston, West Virginia Rates, Rules and Regulations for Furnishing Water at Cities, Towns, Communities, Etc." That tariff states, with respect to Mr. Holt's claims, that

- In regard to private service lines, "[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." *JA-075*.
- "Service may be discontinued and/or disconnected: (a) For non-payment of account when due." *JA-076*.
- "[T]he company will not be liable for any accident, breaks, or leakage arising in connection with the supply." *JA-077*.
- "As to the amending or addition of additional rules and regulations, the company and the consumer shall at all times be governed by the Public Service Commission." *JA-077*.
- "DELAYED PAYMENT PENALTY. The Company's tariffs are net. On all current usage bills not paid within twenty-one (21) days of the date of the bill, ten percent (10%) will be added to the net amount unpaid. This delayed payment penalty is not interest and is to be collected only once for each bill where it is appropriate." *JA-079*.

The Legislature enacted the WVCCPA in 1974 "to protect consumers in the relatively common cash and credit transactions in which they engage on a regular basis." State ex rel. McGraw v. Bear, Stearns & Co., Inc., 217 W. Va. 573, 578, 618 S.E.2d 582, 587 (2005). Several transactions that were already subject to regulatory oversight were specifically

exempted, including “[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 the services involved, the charges for delayed payment, and any discount allowed for early payment...” W. Va. Code § 46A-1-105(a)(3). *See generally, Wamsley v. Lifenet Transplant Services, Inc.*, Civil Action No. 2:10-cv-00990, 2011 WL 5520245, \*11 (S.D. W. Va., Nov. 10, 2011) (“regulated public utility transactions are expressly exempted by W. Va. Code § 46A-1-105”).

## **2. W. Va. Code § 46A-1-105(a)(3) Is Not Ambiguous<sup>6</sup>**

“In deciding the meaning of a statute, this Court begins with the principle that ‘[j]udicial interpretation of a statute is warranted only if the statute is ambiguous[.]’ Syllabus Point 1, in part, *Ohio County Com’n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983).” *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 214, 530 S.E.2d 676, 687 (1999). Mr. Holt argues (pages 7-8) that W. Va. Code § 46A-1-105(a)(3) must be ambiguous because the WVCCPA fails to define “public utility tariff” and “transact under.” But if this were the law, then many statutes would be deemed ambiguous.

The Legislature is not expected to define every word and phrase in a statute.

When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts 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 unless otherwise instructed.

*Stephen L.H. v. Sherry L.H.*, Syl. Pt. 2, in part, 195 W.Va. 384, 465 S.E.2d 841 (1995) (overruled, in part, on other grounds). The Legislature enacted the WVCCPA and, in particular, the exclusion in W. Va. Code § 46A-1-105(a)(3), with the knowledge of the PSC’s regulation of public utility transactions for the previous 61 years. (The Legislature knew how to define

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<sup>6</sup> This portion of our brief addresses pages 7-10 of Mr. Holt’s brief.

WVCCPA terms when necessary; it provided 48 definitions in W. Va. Code § 46A-1-102, and an additional eight definitions in W. Va. Code § 46A-6-102.) “In the construction of written instruments technical words are presumed to have been used in a technical sense and should ordinarily be given their strict meaning[.]” Lane v. Bd. of Ed. of Lincoln County, 147 W. Va. 737, 743, 131 S.E.2d 165, 169 (1963). It was not incumbent upon the Legislature to spell out, beyond their own clear meaning in the context of the statute, what it meant by “transactions” or “public utility ... tariffs.”<sup>7</sup>

Mr. Holt cites no case law over the nearly four decades since the WVCCPA’s enactment suggesting, much less finding, any ambiguity in the exclusion of § 46A-1-105(a)(3). It is not clear why he faults the Circuit Court (page 7) for “failing to make any specific determination regarding the exclusion’s meaning,” but “a statute which is clear and unambiguous should be applied by the courts and not construed or interpreted.” Carper v. Kanawha Banking & Trust Co., 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) (citation omitted). The Circuit Court applied the statute: “Mr. Holt’s pled claims arise from transactions encompassed by W. Va. Code § 46A-1-105(a)(3), and thus are statutorily excluded from the WVCCPA.” *JA-001-002*.

Mr. Holt asserts (page 8) that, “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.*” The Water Company made no such argument, as the cited portion of the record makes clear:

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<sup>7</sup> Later in his brief (page 13), Mr. Holt cites a similar exclusion in the federal Truth in Lending Act. “This subchapter does not apply to the following: ... (4) Transactions under public utility tariffs, if the Bureau 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. § 1603. Notably, Congress saw no need to define these terms in the TILA exclusion, either. *See* 15 U.S.C. § 1602, a list of definitions in which “transaction,” “public utility,” and “tariff” do not appear.

The complaint itself amply documents (i) that plaintiff's transactions with WVAW were brought by him and his counsel before the PSC in a formal complaint against WVAW as a public utility, (ii) that the charges at issue were the subject of WVAW's PSC-approved tariff and the PSC's Water Rules, (iii) that the PSC resolved those claims, and (iv) that the PSC granted plaintiff substantial relief in the form of credits to his bills. Plaintiff can be expected to assert that W. Va. Code § 46A-1-105(a)(3) is inapplicable because WVAW's tariff includes charges for water service and delayed payment, but no early payment discount. But the statute encompasses "charges for the services involved, the charges for delayed payment, and *any* discount allowed for early payment..." (emphasis added). All three charges are certainly subject to regulation by the PSC.

*JA-048*. The Water Company acknowledged to the Circuit Court during the hearing that, in unregulated transactions such as those addressed in State of West Virginia ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson, 201 W. Va. 402, 497 S.E.2d 755 (1997), public utilities are outside the statutory exclusion. *JA-086-087, 102*. In fact, the Water Company disavowed the "breathtaking in scope" assertion now attributed to it (page 8) by Mr. Holt.

If West Virginia-American Water Company's truck is driving through Mr. Holt's neighborhood and knocks over his mailbox, he may bring a claim for negligence against the water company in any court of competent jurisdiction.

There's a suggestion throughout the [Holt] response that we're saying the water company can't be sued in circuit court because it's a regulated utility. That is not our argument.

We are addressing the only claim that has been brought by Mr. Holt against the water company.

It sounds – Under the West Virginia Consumer Credit Protection Act, there is an exemption that has been there for 39 years, and it's not ambiguous, as has been asserted on Mr. Holt's behalf.

*JA-088-089; see also, JA-108, 110* ("If Mr. Holt thinks he has another different claim to bring against the water company, we'll meet that if and when it comes, but this one is statutorily exempt. ... The whole complaint sounds in the Consumer Credit Protection Act. That's all we're asking to have dismissed.")

### 3. W. Va. Code § 46A-1-105(a)(3) Is Not Limited to “Rates”<sup>8</sup>

Mr. Holt argues that “tariffs,” as used in W. Va. Code § 46A-1-105(a)(3), means “rates and charges.” (Such a construction is essential to his argument that, while it arose from a disagreement over his responsibility for the Water Company’s billed “rates and charges,” his WVCCPA claim should have been permitted because (page 16) it was “not about charges per se, interest, or prepayment discounts; his claim is about abusive conduct.”) Mr. Holt characterizes as a “qualifying clause” the words “if a subdivision or agency of this state or of the United States regulates the charges for the services involved, the charges for delayed payment, and any discount allowed for early payment,” and concludes (page 10) that they, in effect, limit “tariff” to “to the service charges, late fees, and discounts on the customer’s bill.”<sup>9</sup>

Mr. Holt’s characterization of the PSC’s “primary function” as “rate-setting” overlooks its broader charge under W. Va. Code §§ 24-1-1(a) and 24-2-2 to “enforce and regulate the *practices, services* and rates of public utilities” and “investigate all rates, *methods and practices* of public utilities subject to the provisions of this chapter [and] require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law.” (emphases added). *See also, Affiliated Const. Trades Foundation v. Public Service Com’n of West Virginia*, Syl. Pt. 9, 211 W.Va. 315, 317, 565 S.E.2d 778, 780 (2002) (“The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests

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<sup>8</sup> This portion of our brief addresses pages 10-12 of Mr. Holt’s brief.

<sup>9</sup> As previously noted, Mr. Holt early on asserted that W. Va. Code § 46A-1-105(a)(3) was inapplicable because the Water Company’s tariff includes charges for water service and delayed payment, but no early payment discount. *JA-042*. The statute encompasses “charges for the services involved, the charges for delayed payment, and *any* discount allowed for early payment...”

of the public.” (citations omitted)); West Virginia-Citizen Action Group v. Public Serv. Com’n of West Virginia, 175 W. Va. 39, 47, 330 S.E.2d 849, 856 (1985) (“We thus conclude that the Public Service Commission of West Virginia has jurisdiction under its authority to safeguard the interests of the public, and regulate, under W.Va.Code, 24-1-1 [1983], the ‘practices, services and rates of public utilities[.]’”); Delardas v. Morgantown Water Com’n, Syl. Pts. 2, 3, 148 W. Va. 776, 137 S.E.2d 426 (1964) (“The policy of the law of this State is that all public utilities, whether publicly or privately owned, shall be subject to the supervision of the public service commission. ... In vesting the public service commission with the jurisdiction and the power to regulate and control the public utilities in this State, the Legislature has authorized it to exercise the predominant power of the State with respect to such utilities, in order that the facilities, charges and services of all public service corporations shall not be contrary to law and that they shall be just and fair, just and reasonable, and just and proper.”).

Citing Delardas, Mr. Holt argued before the Circuit Court (*JA-062*) that, “A tariff is a ‘schedule of rates and charges.’” He continues to rely (page 11) on Delardas as “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.” But Delardas is dictum in this context, especially in light of the fact that it predated by a decade the enactment of the WVCCPA. Moreover, and as was noted to the Circuit Court (*JA-102-103*), the Delardas syllabi quoted above and later discussion do not suggest that “tariff” is synonymous with “rates and charges” – to the contrary, this Court quoted two statutes that use terms as distinct from one another:

Section 3, Article 2, Chapter 24, Code, 1931, provides, in part, that ‘The commission shall have power to enforce, originate, establish, change and promulgate *tariffs*, rates, joint rates, tolls and schedules for all public utilities

except carriers by vehicles over streets and roads, including municipalities supplying gas, electricity or water.’

Section 1, Article 3, Chapter 24, Code, 1931, with respect to every public utility subject to that chapter of the Code, provides that ‘All charges, tolls and rates shall be just and reasonable, and no change shall be made in any *tariffs*, rates, joint rates, tolls, schedules or classifications’ except as provided in the statute.

Delardas, 148 W. Va. at 781-782, 137 S.E.2d at 431 (emphases added).

The dispute before the PSC arose from the Water Company’s fees and charges, which Mr. Holt contested because he disagreed with the Water Company about the parties’ respective responsibility for the leaks that led to high bills. Every aspect of the controversy was subject to and governed by the Water Company’s tariff and the PSC’s Water Rules that it expressly incorporated.

#### **4. W. Va. Code § 46A-1-105(a)(3) Is Effective For All WVCCPA Claims**<sup>10</sup>

Mr. Holt argues at length that this Court should construe the WVCCPA through a comparative analysis of the Federal Trade Commission Act and the Federal Truth in Lending Act. Following a detailed discussion of these laws, he maintains (page 16) that “Holt’s claim is not about charges per se, interest, or prepayment discounts; his claim is about abusive conduct.” His position, in effect, is that W. Va. Code § 46A-1-105(a) does not apply to WVCCPA’s Article 6 (“General Consumer Protection”).

Whether Mr. Holt’s claims were, as he asserts, more analogous to federal consumer protection (FTCA) than to federal consumer credit (TILA) claims is irrelevant -- the exclusions in W. Va. Code § 46A-1-105(a) apply to *all* WVCCPA claims: “This chapter does not apply to: ....” Mr. Holt appears to be arguing in this portion of his brief that the plainly stated, comprehensive exclusion should be disregarded, and that this Court should, in effect, move W.

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<sup>10</sup> This portion of our brief addresses pages 12-16 of Mr. Holt’s brief.

Va. Code § 46A-1-105(a) from the WVCCPA’s Article 1 (“Short Title, Definitions and General Provisions”), and splice narrower versions of it into those WVCCPA provisions analogous to TILA, such as Article 3 (“Finance Charges and Related Provisions”):

§46A-~~13~~-105. Exclusions.

(a) This ~~chapter~~article does not apply to:

- (1) Extensions of credit to government or governmental agencies or instrumentalities;
- (2) The sale of insurance by an insurer, except as otherwise provided in this ~~chapter~~article;
- (3) 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 the services involved, the charges for delayed payment, and any discount allowed for early payment; or
- (4) Licensed pawnbrokers.

(b) Mortgage lender and broker licensees are excluded from the provisions of this ~~chapter~~article to the extent those provisions directly conflict with any section of article seventeen, chapter thirty-one of this code.

This Court should decline the invitation to legislate.

##### **5. Mr. Holt’s WVCCPA Claims Would Unduly Interfere with Public Utility Regulation<sup>11</sup>**

Mr. Holt relies upon Bell Atlantic to argue “that the PSC’s jurisdiction is concurrent” to that of the Circuit Court under the WVCCPA. Bell Atlantic involved an inside wire maintenance service offered by a public utility that the PSC had decided, in its discretion, to “de-tariff” and not otherwise regulate. Instead, the phone company, while subject to the PSC’s regulation of many of its other rates and practices, was competing directly with unregulated businesses in offering inside wire maintenance services without PSC oversight. The plaintiffs, alleging fraud, monopolization, and deception, pursued a class action in circuit court; a complaint before the PSC would likely have been deemed non-jurisdictional. Id., 201 W. Va. at 407-08, 497 S.E.2d at 760-61. This Court found that, due to the services having been deregulated, (i) the PSC’s

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<sup>11</sup> This portion of our brief addresses pages 16-22 of Mr. Holt’s brief.

jurisdiction over its inside wire maintenance services was not exclusive, and, thus, the exhaustion of remedies doctrine did not apply (Id., 201 W. Va. at 408-09, 497 S.E.2d at 761-62), and (ii) the circuit court, having concurrent jurisdiction, properly declined to defer to the PSC before adjudicating the matter (Id., 201 W. Va. at 411-12, 497 S.E.2d at 764-65). Bell Atlantic addressed matters of jurisdiction, and did not even mention the exclusion in W. Va. Code § 46A-1-105(a)(3).

Mr. Holt's claims were, in this respect, the opposite of those in Bell Atlantic. He based his WVCCPA claim on transactions with the Water Company that were regulated by the PSC, through tariff and the Water Rules that it incorporated. Indeed, Mr. Holt brought the dispute before the PSC, where it was adjudicated and where Mr. Holt was granted substantial relief. But the reason his claim was dismissed by the Circuit Court was not "jurisdictional primacy" (page 18).<sup>12</sup> Rather, Mr. Holt's attempt to use the WVCCPA against the PSC-regulated Water Company was barred by the WVCCPA itself, in § 46A-1-105(a)(3).

The other cases cited by Mr. Holt (pages 20-22) likewise address an argument that the Water Company never made:

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.

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<sup>12</sup> At page 18 of his brief, Mr. Holt asserts that the Water Company argued before the Circuit Court that "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 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 has already been noted above, review of the cited page in the record shows that the Water Company made no such argument below.

The Circuit Court granted the Water Company's motion to dismiss pursuant to a statute, not because of the PSC's "sweeping" jurisdiction or "sacrosanct" authority. The Circuit Court's dismissal of Mr. Holt's WVCCPA claim under § 46A-1-105(a)(3) does not threaten future plaintiffs who wish to sue under W. Va. Code § 24-4-7 (Hedrick v. Grant County Public Service District, 209 W. Va. 591, 550 S.E.2d 381 (2001)); to bring common law nuisance claims (Burch v. NedPower Mount Storm, LLC, 220 W. Va. 443, 647 S.E.2d 879 (2007)); to sue employers under the West Virginia Human Rights Act (W. Va. Am. Water Co. v. Nagy, No. 101229, 2011 WL 8583425 (W. Va. June 5, 2011)); to bring claims of negligence (Roberts v. W. Va. Am. Water Co., 221 W. Va. 373, 655 S.E.2d 119 (2007)); to sue on contract (Pipemasters, Inc. v. Putnam County Com'n, 218 W. Va. 512, 625 S.E.2d 274 (2005)); or to bring claims under environmental laws (Taylor v. Culloden PSD, 214 W. Va. 639, 591 S.E.2d 197 (2003)).

There is, however, a "policy" argument that the Court should consider before disregarding the exclusion in § 46A-1-105(a)(3). As the Water Company argued to the Circuit Court (*JA-107-108*), Mr. Holt's construction of § 46A-1-105(a)(3) would chill longstanding practice before the PSC of resolving the many utility billing complaints raised each year.<sup>13</sup> The Water Company and other utilities have traditionally worked with PSC staff to resolve billing

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<sup>13</sup> In the cover letter to its 2012 Management Summary Report to the Legislature, the PSC said that it "handles over two thousand ... Formal Cases each year, many of which garner significant public attention. The Staff of the Commission processed nearly 10,000 Informal Cases in 2012, cases in which a utility problem is fixed; a payment plan is arranged; utility service is restored; a billing problem is addressed; and significant water or sewer leaks are discovered and corrected." At page 59, the Commission said:

The [Consumer Affairs Technicians] assist customers in negotiating payment plans, clearing up communication problems or acting as liaisons between utilities and customers to resolve differences. If the problems of customers are not resolved, customers have the option of filing a Formal Complaint with the Commission; however, Formal Complaint proceedings are time consuming and often require attorney representation by the utility and in some cases by the customer.

The entire report, as of December 5, 2013, is at [www.psc.state.wv.us/Mgmt\\_Sum/MSR2012\\_Report.pdf](http://www.psc.state.wv.us/Mgmt_Sum/MSR2012_Report.pdf)

disputes informally and, just as happened here, to accept staff suggestions even when contrary to the utility's legal position. If Mr. Holt's construction of the statute were to be adopted, then, at best, those processes would require the execution of releases, formal settlement agreements, and the other trappings of civil litigation. More likely, many settlements would never occur, as some customers would be encouraged to turn (or even foment) relatively minor billing disputes into WVCCPA claims, with their attendant penalties and attorney fees.

**6. There Was No "Gap" to be Filled by the WVCCPA<sup>14</sup>**

The Legislature excluded Mr. Holt's claims from the WVCCPA because he had available – and, in this case, availed himself of – regulatory relief from the PSC. The statutory exclusion prevents overlap, as opposed to the "gap" feared by Mr. Holt. White v. Wyeth, 227 W. Va. 131, 705 S.E.2d 828 (2010), and Wamsley involved claims arising from similarly regulated activities. In White, the purchasers of prescription hormone replacement therapy drugs brought a consumer fraud class action under Article 6 of the WVCCPA against the drugs' manufacturer and advertising agency, alleging unfair and deceptive practices in promoting the drugs to doctors and patients. White, 227 W. Va. at 134, 705 S.E.2d at 831. Similarly, in Wamsley, the plaintiff filed suit against the suppliers and distributors of human tissue products under Article 6 of the WVCCPA, alleging unfair methods of competition and unfair or deceptive acts or practices in supplying infected products. 2011 WL 5520245 at \*1. Both courts found that the claims were beyond the WVCCPA, recognizing government regulation as a "pertinent factor" in that determination. Wamsley, 2011 WL 5520245 at \*11; White, 227 W. Va. at 141, 705 S.E.2d at 83 (quoting Victor E. Schwartz, Cary Silverman, Christopher E. Appel, "*That's Unfair!*" Says Who – *The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*,"

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<sup>14</sup> This portion of our brief addresses pages 23-24 of Mr. Holt's brief.

47 Washburn L.J. 93, 119 (2007) (“consumer protection laws were meant to fill a gap by protecting consumers where product safety was not already closely monitored and regulated by the government.”)).

The PSC has the power to enforce a civil penalty against the Water Company should it fail to comply with its regulations or orders. W. Va. Code § 24-4-7; *see also*, Wamsley, 2011 WL 5520245 at \*11 (quoting Schwartz, 47 Washburn L.J. at 102) (“Where regulatory agencies have the power to enforce a range of civil and criminal penalties in order to achieve compliance, these ‘well-developed procedures fall to the wayside when claims falling within the jurisdiction of the agency go straight into the judicial system.”). However, whether Mr. Holt, two years after conclusion of the PSC proceedings, had recourse against the Water Company under W. Va. Code § 24-4-7, common law, or any avenue aside from the WVCCPA were questions not before the Circuit Court. *JA-108, 110* (“If Mr. Holt thinks he has another different claim to bring against the water company, we’ll meet that if and when it comes, but this one is statutorily exempt. ... The whole complaint sounds in the Consumer Credit Protection Act. That’s all we’re asking to have dismissed.”).

**C. The Water Company Was Entitled to Dismissal On Alternative Grounds**

“An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.” Murphy v. Smallridge, 196 W.Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996); *see also*, Howell v. City of Princeton, 210 W. Va. 735, 737, 559 S.E.2d 424, 426 (2001).

Mr. Holt does not address in his brief the alternative basis for dismissal that the Water Company presented (*JA-048-050*) to the Circuit Court: that the complaint failed to allege an

“unfair or deceptive act or practice” within the meaning of W. Va. Code § 46A-6-102(7).<sup>15</sup> That statute lists several examples of “unfair or deceptive” acts or practices, which commonly concern deception of the quality or price of goods or services. Mr. Holt’s allegations most closely relate to

The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others may rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby.

W. Va. Code § 46A-6-102(7)(M).

In ¶ 22.a. of his complaint (*JA-011-012*), Mr. Holt alleged that the Water Company “[failed] to notify” him of its responsibility for one of the several leaks that led to his increased water bills.<sup>16</sup> (The remaining subparagraphs b. through h. in the complaint’s ¶ 22 were even farther removed from an “unfair or deceptive act or practice.”) In McFoy v. Amerigas, Inc., 170 W.Va. 526, 295 S.E.2d 16 (1982), this Court addressed similar claims brought under the WVCCPA:

The thrust of plaintiffs’ complaint is that Amerigas deceived plaintiffs by failing to inform them that there was a minimum usage charge. In response, Amerigas has presented uncontested documentary evidence that plaintiffs signed applications for service that included reference to a minimum usage charge. The problem with Amerigas’ application for service is that the minimum usage charge is open-ended; Amerigas did not explicitly inform its customers on the face of the application of the exact amount of the minimum usage charge. Nonetheless, Amerigas did explain to its customers in the paragraph discussing minimum usage

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<sup>15</sup> Mr. Holt maintained before the Circuit Court that the Water Company’s “pattern of abusive, unreasonable, unfair, and deceptive conduct in an effort to get paid what it was not owed and discourage Plaintiff from seeking recourse with the PSC” was enough to constitute an actionable act or practice under the statute. *JA-068-070*.

<sup>16</sup> Mr. Holt alleged as the factual basis for this claim in ¶¶ 11 and 13 (*JA-008-009*) that the Water Company “withheld” from him its knowledge that it bore responsibility for the first leak and failed to inform him of the basis for and correction of charges.

that the rate would be equal and uniform among all customers and would be “those prevailing at the time of sale within the price territory established by the company in which the installation is located...” Thus Amerigas promised a primitive form of equal protection.\*

\*We would have a different case if Amerigas, without notice, began to exact an outrageous, although uniform, minimum usage charge.

The application for service that is contained in the record in this case has numerous provisions; however, the minimum usage requirement is set forth in exactly the same typeface as provisions on other subjects and is in no way hidden or obscured. Furthermore, Amerigas' case would be compelling if they can prove, as they have offered to do, that all the customers who constitute the plaintiff class had notice that there was a minimum usage requirement and also knew what the requirement was at the time of installation. Certainly, if Amerigas made known to its customers the terms and conditions under which it supplied gas through any reasonable oral or written means, then its charges in this regard could not possibly be characterized as “deceptive.”

Id., 170 W.Va. at 530, 295 S.E.2d at 20. This Court found that “the minimum usage fee is not *per se* unreasonable and may lawfully be exacted from customers if Amerigas gave reasonable notice of its policy concerning minimum usage fees.” Id., 170 W. Va. at 532, 295 S.E.2d at 23.

The District Court in Wamsley rejected similar concealment claims that a plaintiff attempted to bring under § 46A-6-102:

Plaintiff's sole factual allegation concerning Defendants' alleged unlawful conduct is: “That the defendants LifeNet Transplant and/or LifeNet Health concealed from plaintiff, his doctors, and his hospital, that the tendon was infected.” He offers not a single fact in support of his theory that Defendants concealed from surgeons the fact that the human tissue they provided was “infected” and knew that the surgeons would implant the diseased tendon into a human body. Indeed, the serious nature of this allegation makes it more at home in a criminal court than a consumer fraud action. Such an unadorned, conclusory averment leashed to not a single supporting fact fails to meet the basic pleading standards announced in *Iqbal* and *Twombly*. As pleaded, Plaintiff's threadbare allegations are speculative, at best, and fail to permit the Court to infer plausible misconduct by Defendants.

Id., 2011 WL 5520245 at \*6; *see also*, Jones v. Sears, Roebuck and Co., 301 Fed. Appx. 276, 287 (4th Cir. 2008) (“a plaintiff is obliged to plead *with particularity*” a claim under W. Va.

Code § 46A-6-102(7)(M) that the defendant has fraudulently misrepresented or omitted a material fact).

To state a private cause of action under W. Va. Code § 46A-6-104, one must allege: “(1) unlawful conduct by a seller; (2) an ascertainable loss on the part of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer’s ascertainable loss.” White, Syl. Pt. 5; *see also*, Wamsley, 2011 WL 5520245 at \*7. Mr. Holt, like the unsuccessful plaintiffs in McFoy and Wamsley, wanted to turn a disagreement about the complex causes of his high water bills into a case of quasi-fraud. He asserts (pages 3-4) that the Water Company withheld material information from him in order to assess unjustified charges, to avoid reimbursing him for the leaks, and to discourage him from pursuing or attaining relief from the PSC. But he knew from the time of his first high bill what he was being charged, and the metered gallonage on which the bills were based. There was never any charge imposed by the Water Company other than those for water service pursuant to its PSC-approved tariff.

## V. CONCLUSION

This Court should affirm by memorandum decision the judgment of the Circuit Court.

WEST VIRGINIA-AMERICAN WATER COMPANY  
*By Counsel*

  
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CERTIFICATE OF SERVICE

I certify service of RESPONDENT'S BRIEF by U. S. Mail, first class postage prepaid,  
on December 5, 2013, to:

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