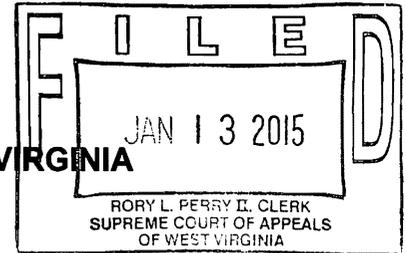


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1059

**INSURANCE COMMISSIONER OF WEST VIRGINIA; AND
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,**

Petitioners,

v.

VINCENT J. KING,

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
BY SPECIAL ASSIGNMENT
Civil Action No. 13-AA-95**

**BRIEF OF PETITIONER,
THE INSURANCE COMMISSIONER OF WEST VIRGINIA**

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it engaged in an improper re-examination of an insurance rate and form policy filing previously filed and approved before the West Virginia Offices of the Insurance Commissioner.
2. The Circuit Court erred when it disregarded known precedent by denying the relevance thereof and by unequivocally substituting its own judgment in regards to the referenced rate and form policy filing of Erie Insurance Property and Casualty Insurance Company without providing any deference to the statutory regulator of the company.
3. The Circuit Court erred when it made erroneous findings of fact and conclusions of law and misapplied the record while disregarding the plain record before it despite the fact that that Respondent did not appeal an administrative decision to deny an administrative hearing and thereby conceding the record was complete as to his allegations which did not overcome a presumption of legality and burden of proof.
4. The Circuit Court erred when it violated the Separation of Powers Clause of the West Virginia State Constitution by not giving deference to the duly appointed executive regulator in carrying out its function delegated to it by the West Virginia Legislature and when it substituted its judgment for that of the Executive Branch and withdrew approval of a rate and form policy filing.
5. The Circuit Court erred when it accepted Respondent's proposed findings of fact and conclusions of law *in toto* by misapplying the standard of review for administrative appeals under West Virginia law as well as erring in the factual and legal conclusions made therein.
6. The Circuit Court erred when it invaded the province of the regulator and disapproved of a form filing and fashioned relief that is inconsistent and not clear leaving the regulator unclear as to who has authority to proceed in this matter and under what parameters especially in light of the ramifications of the order.

STATEMENT OF THE CASE

I. Procedural History

On or about February 28, 2013, as a result of on-going communications between Vincent J. King (hereinafter "Respondent" and/or "Petitioner below" and/or "King") and Erie Insurance Property & Casualty Company (hereinafter "Petitioner" and/or

“Respondent below” and/or “Erie”), Erie filed a Petition for Declaratory Judgment with the West Virginia Offices of the Insurance Commissioner (hereinafter “Petitioner” and/or “Respondent below” and/or “WVOIC”) (A.R. at 1013-1034.) Erie argued that King is not an “aggrieved person” and therefore, does not meet the statutory requirements to be entitled to an administrative hearing regarding Erie’s implementation of an insurance product they had previously filed and had approved by the West Virginia Offices of the Insurance Commissioner. (See A.R. 0001-0322.) Erie also requested additional declaratory rulings from the Offices of the Insurance Commissioner concerning the standing of King to proceed and his “aggrieved” allegations. (A.R. 1012-1034.)

Subsequent to the Petition for Declaratory Judgment, on or about March 11, 2013, King filed a Petition for Hearing and Issuance of Subpoenas with the Offices of the Insurance Commissioner (A.R. at 350-391.) King requested a hearing to “determine whether Respondent below, Petitioner Erie accurately represented the risk with respect to its Rate Protection Endorsement (hereinafter “RPE”) and corresponding Rate and Rule Manual pages and whether prior approvals thereof should be withdrawn.” (A.R. 0351.)

On or about April 8, 2013 the Respondent below, Petitioner, Erie Insurance Property & Casualty Company filed a response to the *Petition for Hearing and Issuance of Subpoenas*, in which they again argued, among other issues, that King was not an “aggrieved person” and therefore, did not meet the statutory requirements to be entitled to an administrative hearing. (A.R. 592-612.)

The Insurance Commissioner, pursuant to his statutory duties under W.Va. Code §33-20-5(c), began a reevaluation of the filing of the RPE product to determine if it was

necessary to withdraw approval of the filing. As a part of the Insurance Commissioner's duty to ascertain the implementation of the product, the Insurance Commissioner further conducted an investigation concerning the same under W.Va. Code §33-2-3a(a) involving the agents who sold the product, the complainant King, the respondent as well as a review of the approved filing. (See Affidavits at A.R. 1035-1037 & A.R. 1038-1040; Letter from OIC at A.R. 1041-1046; and *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* at A.R. 1047-1067.) Additionally, King was permitted to take the recorded statement of Erie management in regards to his concerns pursuant to W.Va. Code §33-20-9 prior to any proceedings being filed before the Insurance Commissioner. (A.R. at 0392-0590.)

The Insurance Commissioner, after reviewing all submitted evidence, including investigative evidence and re-reviewing the rate filings, came to the conclusion that any further hearing would serve no useful purpose, that a factual dispute was not present nor would additional evidence add to King's complaint.

On or about July 10, 2013, the Insurance Commissioner entered his *Findings of Fact, Conclusions of Law, and Final Order Denying Hearing Request of Petitioner* (A.R. 1048-1067). The West Virginia Supreme Court of Appeals in a recent decision from the January 2013 Term of the Court styled, *West Virginia Employers' Mutual Insurance Company d/b/a Brickstreet Mutual Insurance Company, and Michael D. Riley, West Virginia Insurance Commissioner, Petitioners v. The Bunch Company, Respondent*, 231 W.Va. 321, 745 S.E.2d 212 (2013), upheld this methodology of the Insurance Commissioner and finding that there was no administrative hearing as a matter of right in rate and product challenges.

On or about August 9, 2013, King filed a *Petition for Administrative Appeal* with the Circuit Court of Kanawha County. (A.R. 1068-1134.) By Order of the West Virginia Supreme Court of Appeals, the Honorable John L. Cummings was appointed by special assignment. (A.R. 1135.) On or about August 1, 2014, after briefs were filed with the Court, a hearing was held on the Petition. (See *Transcript of Administrative Appeal Hearing* at A.R. 1335-1392.) Afterwards, counsel was requested to provide proposed findings of fact and conclusions of law. (See Petitioner's below, Respondent King's at A.R. 1283-1296 and Respondent below, Petitioner, WVOIC at A.R. 1297-1318.) On or about September 11, 2014, the Circuit Judge, sitting by special assignment, adopted *in toto* the proposal of Petitioner below, Respondent King. (See *Record of Decision* at A.R. 1319-1331.) After an *Agreed Order Staying Decision on Appeal* was entered on September 18, 2014¹, a Notice of Appeal was filed with this Court on or about September 29, 2014. (See *Certified Docket Sheet* at A.R. 1393.)

II. Statement of Facts

On or about February 1, 2010, Erie made a rate filing with the Honorable Jane L. Cline duly appointed Insurance Commissioner of the State of West Virginia on a Rate Protection Endorsement ("RPE"). (A.R. 4.) The endorsement provided a guarantee that the policy owner's rate would not change, once obtained, if three conditions remained static: the car(s), the driver(s) and the garaging address. (A.R. 4.) It was further represented to the Commissioner that this endorsement could be dropped at any time and it was optional. (A.R. 5). The price of the endorsement would vary by coverage based upon an RPE scoring algorithm which is contained and discussed extensively in the Appendix as well as the rate and form filing in general. (A.R. 1-322.) The filing also

¹(See *Agreed Order Staying Decision on Appeal* at A.R. 1332-1334.)

included actuarial calculations and assumptions as well as explanations. (A.R. 0001-0322.)

At the time of the initial filing, the Insurance Commissioner's Office engaged in several questions and sought examples of implementation of the endorsement. (A.R. 196-200.) One feature of the product included the fact that if the conditional factors didn't change, the premium, once obtained, would remain *status quo* even if there were other normally triggering rate increase occurrences.² Further, the filing included a document entitled "IMPORTANT NOTICE" in bold capital letters with a subheading of "RATE PROTECTION ENDORSEMENT" in smaller face than the notice heading. (A.R. 194). The Important Notice explained to consumers of the policy and buyers of the endorsement the process to ultimately implement the RPE.

The Rate Protection Endorsement is designed to smooth out rates over time, and it may initially result in an increase or decrease in your total policy premium depending on a number of factors. The endorsement gives you a level of predictability and control over your auto insurance premium...You may contact your agent at any time to remove the endorsement and receive the current non-smoothed rate. (A.R. 194.)

Draft advertising material was also presented along with selling points for the product. (A.R. 190-193.) Ultimately, the filing was approved by the Offices of the Insurance Commissioner on or about April 15, 2010 to be made effective for use by July 1, 2010. (A.R. 7.)

The Insurance Commissioner upon receiving the above referenced administrative pleadings from the various parties, mentioned *supra*, undertook an investigation and review of the allegations contained in the requests of Erie and the

² See A.R. 196. "The RPE caps all rate changes including those due to: usage, mileage, driver age, insurance score, claims, or violations..."

administrative complaint of King. (A.R. 1041-1046.) After concluding the review, on or about July 10th, 2013, the Insurance Commissioner entered an order entitled *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner*. (A.R.1047-1067.) In the referenced final order, the Insurance Commissioner made approximately thirty-one (31) findings of fact which are respectfully incorporated herein this Brief of Petitioner and reference made thereto. (A.R. 1051-1058.)

The Insurance Commissioner's findings included the fact that Erie had made a rate and form policy filing of a Rate Protection Endorsement, that the Commissioner reviewed the form filing and approved the filing to be effective July 1, 2010, and that the endorsement filed was optional. (A.R. 1047-1067.)

Additionally, the Insurance Commissioner found that Mr. King was provided extensive discovery access to his premium information that was charged to him and was in fact able to question a representative of Erie concerning the same as well as have documents produced respective to his requests and had a copy of the actual rate and form filing of Erie at his disposal. (A.R. 1052-1053.)

The Commissioner further found that the Rate Protection Endorsement was not ambiguous, unclear or in any way misleading nor was the product deceptively marketed. (A.R. 1053.) Further, the Commissioner found that King was given an ability to remove himself from the product and return to his original position prior to being placed in the RPE endorsement and he declined to do so. (A.R. 1053, 1057-1058.) There additionally was provided in the filing and to Mr. King an "Important Notice" that

detailed the implementation of the product.³ (A.R. 1054-1056.) The Commissioner found that Mr. King's premium when being placed in the RPE actually went down. (A.R. 1057.)

The Commissioner did find that Mr. King was asking Erie to perform certain corrective action that normally was posited within the purview of the Insurance Commissioner's Office including sending targeted mailings, conduct continuing educational seminars of all of its agents while offering to teach the seminars, and making new rate filings. (A.R. 1056-1057.) The Insurance Commissioner goes on to further make twenty-five (25) conclusions of law. (A.R. 1058-1067)⁴.

The Circuit Court, by special assignment, upon appeal, reversed the Insurance Commissioner's Order. (A.R. 1319-1331.) The Court held that

having reviewed that same evidence, and having found that Erie's RPE violates Chapter 33; contains misleading clauses; that the title itself is misleading; that it is being solicited by deceptive marketing; that its benefits are unreasonable in relation to the premium charged; and is not in the public's interest; but the Commissioner having failed to withdraw approval as he was statutorily required to do, the Order appealed from is hereby REVERSED and continued approval of the RPE is OVERRULED. The Court leaves to the discretion of the Commissioner an orderly process by which policies currently subject to RPE are otherwise renewed and converted to traditional rating also previously approved. Alternatively, nothing herein precludes Erie from again seeking approval, with proper fiscal disclosure, deletion of the misleading clauses and title, neutral rating, proper consumer advertising and agent training, all as the Commissioner in full compliance with West Virginia law might allow, on a strictly voluntary basis by the consumer.

(A.R. 1331.)

³ Further, while King disputes the timing of affidavits that were placed in the record by the Commissioner discussed *infra*, it should be noted that King did not dispute the Commissioner's order denying an administrative hearing and in essence waived any right to contest the failure to give him an administrative hearing or issue subpoenas and challenge the information contained therein. (A.R. 1346.) Further, it does not appear that King has provided any sworn testimony in the Appendix on behalf of himself.

⁴ Rather than discuss herein this section, the Commissioner will respectfully incorporate each and every conclusion of law herein and may further refer to specifically hereafter.

The Circuit Court in footnote 38 discusses cases recently held by this Court in arriving at its ruling. (A.R. 1330.) The Circuit Court states

[i]n resisting the instant appeal, the Commissioner relies on the trilogy of decisions in *State ex rel CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2009), *West Virginia Employer's Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. 321, 745 S.E.2d 212 (2013) and *Lightner v. Riley*, ___ W.Va. ___, 760 S.E.2d 142 (2014) (see transcript of oral argument beginning at page 35). None of them address the issue here. In *Citi* and *Burch* (sic), the insured failed to exhaust administrative remedies. In *Lightner*, the insured did seek administrative relief but failed to provide evidence requested by the Commissioner. Here, Petitioner pursued administrative remedies, specifically requesting issuance of subpoenas so as to provide additional evidence, but both hearing and subpoenas were denied, and no request by the Commissioner had been refused. This is an appeal of right, pursuant to both W.Va. Code 29A-5-4(a) and 33-2-14, and thus does not intrude on the Commissioner's authority which, in this case, has already been fully exhausted.

(A.R. 1330).

The Circuit Court additionally finds that “[r]emand, therefore, would be an exercise in futility and Petitioner would simply re-file his appeal here.” (A.R. 1330.)⁵

SUMMARY OF ARGUMENT

This matter deals almost exclusively with the Circuit Court unequivocally substituting its judgment for that of the Insurance Commissioner of the State of West Virginia. It is the result of an administrative appeal from the Circuit Court of Kanawha County reversing an administrative order of the duly appointed Insurance Commissioner of the State of West Virginia approving a rate and form policy filing for an optional Rate Protection Endorsement filed by Erie Property and Casualty Insurance Company. In the administrative appeal, the Circuit Judge sitting by special assignment made several

⁵ It should be noted that while not specifically mentioned in the Court's conclusion, Respondent, Petitioner below, King did not request a remand and specifically asked the Court not to do so. (See *Transcript of Administrative Appeal Hearing* at A.R. 1389-1390.)

errors each of which provide sufficient grounds for reversal and reinstatement of the Commissioner's order as all are clearly wrong and an abuse of discretion.

The West Virginia Supreme Court of Appeals has recognized the Legislature's clear disapproval of "judicial intrusion into issue of insurance rate setting" and that "there is a presumption of statutory compliance and validity which applies to approved insurance rates." *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). **"The burden for disapproving the validity of such rates is placed on the entity who seeks to set the rates aside."** [Emphasis added.] *Id.* 223 W.Va. at 239, 672 S.E.2d at 375.

The West Virginia Supreme Court of Appeals has stated that "[t]he Legislature, in no uncertain terms, has reposed the authority for rate making matters with the Commissioner. See W.Va. Code §33-6-20(c). ...the amendments to the insurance statutes enacted in the aftermath of *Broadnax* left no question that rate making was not a matter intended for the courts." *West Virginia Employers' Mutual Insurance Company d/b/a Brickstreet Mutual Insurance Company, and Michael D. Riley, West Virginia Insurance Commissioner, Petitioners v. The Bunch Company, Respondent*, 231 W.Va. at 331, 745 S.E.2d at 222 (2013).

Consequently, two errors that should be pointed out to this Court that should be fatal to the Circuit Court's *Decision on Appeal* and warrant reversal in the first instance would be the Circuit Court's determination that the recent trilogy of cases, *CitiFinancial I*, *Bunch* and *CitiFinancial II*⁶ are irrelevant to this case and should be disregarded as

⁶ *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008) ("*CitiFinancial I*"); *West Virginia Employers' Mutual Insurance Company v. The Bunch Company*, 231 W.Va. 321, 745 S.E.2d 212 (2013) ("*Bunch*"); and *Lightner v. Riley, et al.*, ___ W.Va. ___, 760 S.E.2d 142 (2014) ("*CitiFinancial II*").

well as a substantial body of administrative appellate law posited by the Court. (See *Decision on Appeal*, footnote 38 at A.R.1330.) Secondly, Respondent in this matter failed to appeal the denial of an administrative hearing and in fact readily concedes that the denial of an administrative hearing is not an issue in this appeal. (A.R. 1346.) However, by doing so, Respondent has waived objection to the administrative record in the Circuit Court below. Consequently, since it was his burden to overcome the presumption of filing approval legality, any deficiencies in the record should have been construed against the Respondent thereby evincing a failure to overcome any presumption and not meeting his burden as the Insurance Commissioner had previously found. (A.R. 1059, ¶4.) Either of these two instances should require reversal of the Circuit Court. Further, the Respondent, Petitioner below, King, did not seek nor argue that a deviation from the rate and/or form policy filing occurred, seek a remand of the matter to the Insurance Commissioner, or provide his own sworn testimony.

Moreover, the Circuit Court erred when it reversed the order of the Insurance Commissioner without deferring to the Insurance Commissioner's findings of fact and conclusions of law and by summarily rejecting the same without any expert testimony or opinion supplied by Petitioner below, Respondent King who had the burden to overcome the Commissioner's presumption of legality. The Circuit Court makes findings of fact and conclusions despite overwhelming evidence to the contrary. The only conclusion that can be drawn from such findings is that the Circuit Court reviewed the matter *de novo* and simply made a judgment substitution for that of the duly appointed Insurance Commissioner.

Additional errors include the Circuit Court's intrusion into the Separation of Powers Clause of the West Virginia Constitution. The West Virginia Constitution at Article V, §1 (2014) states:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

Consequently, the extraordinary relief as ordered meanders between the Circuit Court monitoring this situation and somewhat re-positing authority with the Commissioner. This leads to confusing results as to authority in this respect and significant ramifications for the West Virginia insurance consumer and marketplace.

Finally, the findings of the Insurance Commissioner cannot be said to be clearly wrong, materially in violation of constitutional or statutory provisions, materially in excess of the Commissioner's authority, made upon unlawful procedures, materially affected by other error of law or arbitrary and capricious. This Court has clearly spoken on these types of issues on several occasions and therefore reversal of the Circuit Court would comport with the express direction of this Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the case *sub judice* involves assignments of error in the application of well settled law, Petitioner respectfully submits that this case is suitable for oral arguments pursuant to R. App. P. 20 due to the case involving issues of fundamental public importance and involves constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling. Nevertheless, Petitioner would obviously defer if the Court believes R. App. P. 19 would be more appropriate for argument.

However, due to Petitioner's belief that reversal of the Circuit Court is warranted in this case, Petitioner respectfully submits that this case is not an appropriate matter for a memorandum decision.

ARGUMENT

I. STANDARD OF REVIEW.

"Upon judicial review of a contested case under this section, the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *St. Mary's Hosp. v. State Health Planning & Dev. Agency*, 178 W. Va. 792, 364 S.E.2d 805 (1987) *Frank's Shoe Store v. West Virginia Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986) *Gino's Pizza of W. Hamlin, Inc. v. West Virginia Human Rights Comm'n*, 187 W. Va. 312, 418 S.E.2d 758 (1992) *Davis v. West Virginia Dep't of Motor Vehicles*, 187 W. Va. 402, 419 S.E.2d 470 (1992). "On appeal of an administrative order from a circuit court, the Supreme Court is bound by the statutory standards set forth in this section and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763

(1999) *Genesis, Inc. v. Tax Comm'r*, 215 W. Va. 266, 599 S.E.2d 689 (2004) *Williams v. W. Va. Bd. of Exam'rs for Registered Prof'l Nurses*, 215 W. Va. 237, 599 S.E.2d 660 (2004).

Further, “[i]n cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law de novo.” *West Virginia Employers’ Mutual Insurance Company v. The Bunch Company*, 231 W.Va. at 326, 745 S.E.2d at 217 (2013) citing *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

II. THE ORDER OF THE CIRCUIT JUDGE BY SPECIAL ASSIGNMENT IS CLEARLY ERRONEOUS, AN ABUSE OF DISCRETION AND SHOULD BE REVERSED.

Due to clear error and abuse of any discretion posited with the Circuit Court by special assignment, the *Decision on Appeal* should be respectfully reversed. The Circuit Court clearly and erroneously misapplied known precedent that should have guided its decision; disregarded and failed to perform any analysis concerning overcoming a presumption of correctness and lawfulness; failed to consider the voluminous record before it; and seized upon *de minimus* issues in coming to its final order in this matter which should result in a reversal of the *Decision on Appeal* and reinstatement of the Insurance Commissioner’s prior *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner*. (A.R. 1048-1067.)

A. The Order of the Circuit Judge clearly and unequivocally misapplies the law as clearly stated by this Court on many occasions including in *CitiFinancial I, Bunch* and *CitiFinancial II*.

As mentioned *supra*, the Circuit Court by special assignment found that

“[i]n resisting the instant appeal, the Commissioner relies on the trilogy of decisions in *State ex rel CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2009), *West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. 321, 745 S.E.2d 212 (2013) and *Lightner v. Riley*, ___ W.Va. ___, 760 S.E.2d 142 (2014) (see transcript of oral argument beginning at page 35). **None of them address the issue here** [emphasis added].”

(See footnote 38 at A.R. 1330.)

The Circuit Court in this seemingly innocuous footnote with one broad determination summarily erases years of jurisprudential deference that this Court has fashioned in regards to reviewing administrative decisions.

Clearly, this matter deals with an administrative appeal of a rate filing and form filing approval. The entire discussion is about whether a product should have been filed and allowed to remain in its current form since approved in 2010. The entire product including rates charged therefore is required to be filed with the Insurance Commissioner under Chapter 33 of the West Virginia Code. W.Va. Code §33-6-8 & W.Va. Code §33-20-4. The decisions of this Court in the trilogy of cases cited *supra* could not be more on point to the current circumstances. The failure of the Circuit Court to utilize these well enunciated precedents should in and of itself call for reversal.

This Court rendered its decision in *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008), wherein the Court issued a Writ of Prohibition preventing the Circuit Court from enforcing its order of May 6, 2008, through which Petitioner, CitiFinancial, Inc.’s motion for partial summary judgment was denied by failing to dismiss claims asserted against Petitioner, CitiFinancial, Inc. by Respondent, Paul W. Lightner for alleged unreasonable and excessive credit insurance

charges. This Court determined that “the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner. *Id.* at 238, 374. Further, this Court stated, “It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to the permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner’s expertise and jurisdiction.” *Id.* at 237, 373. This Court additionally stated, “In this matter then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.” *Id.*

Nevertheless, the Circuit Court finds each and every component of the RPE deficient as sought by the Petitioner below, Respondent King in this matter which is the exact opposite finding of the Commissioner. There is no discussion in the *Decision on Appeal* about giving any deference to the Insurance Commissioner except for a one paragraph conclusion of law thirteen that states

“Administrative findings are to be accorded deference except where the reviewing Court finds them to be clearly wrong...and such findings will be overturned when there is no substantial evidence to support them...[a]ny other order of an administrative body based upon a findings of fact which is contrary to the evidence or is based upon mistake of law, will be reversed..” [Citations omitted.]

(See *Decision on Appeal* at A.R. 1327.)⁷

“As the Legislature made clear with amendments to the insurance statutes, the Commissioner has been reposed with authority over rate making and form approval. See *Citifinancial*, 223 W.Va. at 236, 672 S.E.2d at 372 (discussing 2002 amendments to W.Va. Code § 33-6-30).” *West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. at 325, 745 S.E.2d at 216, footnote 9 (2013). The Court has stated that

“As we recognized in *Appalachian Power Co. v. State Tax Dep’t*, 195 W.Va. 573, 466 S.E.2d 424 (1995), HN17 “[a]n inquiring court—even a court empowered to conduct de novo review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Id.* at 582, 466 S.E.2d at 433. Ignoring the deference that the Commissioner was entitled to in connection with the interpretation of its own regulation, the trial court encroached upon a matter that has been expressly delegated to the executive branch of our state government. See *Citifinancial*, 223 W.Va. at 237, 672 S.E.2d at 373. In doing so, the trial court neglected to regard this Court’s admonition in *Citifinancial* that ‘the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.’ *Id.*”

West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch, 231 W.Va. at 332, 745 S.E.2d at 223 (2013). Additionally, the final case in the trilogy, *Lightner v. Riley*, ___ W.Va. ___, 760 S.E.2d 142 (2014), reasserted the very concepts contained in *CitiFinacial I* and *Bunch*.

This type of re-examination is problematic as it provides no basis, other than subjective opinion, for rate and form approval filings. This can obviously cause a destabilization of an insurance marketplace and in the end ultimately harm the

⁷ Reference is made to the fact that the Circuit Court is finding the Record deficient but not recognizing it is the Petitioner below, Respondent King’s burden to overcome the presumption of legality as discussed more fully *infra* in the next section B.

consumer that is alleged to have been protected. The inconsistent results can cause market volatility, rate volatility and other factors that could place pressure on rates and stifle competitive avenues of competition redounding to the consumer.

B. The Circuit Judge fails to consider arguments of the Insurance Commissioner; provide any analysis or discussion of the need to overcome a presumption that the product is legal pursuant to W.Va. Code §33-6-30(c); and accepts the allegations of King *in toto* despite King's failure to appeal denial of an administrative hearing.

As previously stated, filing of forms, insurance products as well as rates are required to be filed with the Insurance Commissioner. W.Va. Code §33-6-8 and W.Va. Code §33-20-4. The provisions of W.Va. Code §33-6-9 allow for disapproval of a form or withdraw prior approval thereof if it is

(a) in violation of Chapter 33; (b) if it contains misleading causes; (c) if title or heading is misleading; (d) if purchase procured by deceptive advertising; (e) if benefits are unreasonable in relation to premium charges; and (f) the coverages are not sufficiently broad to be in the public interest.

W.Va. Code §33-6-9. The W.Va. Legislature has further enacted W.Va. Code §33-6-30 which sections that are relevant to this inquiry include the following:

(b) The Legislature finds: (1) That consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner approve the forms used and the rates charged by insurance companies in this state;...(4) That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the Insurance Commissioner to enable the Insurance Commissioner to review and regulate rates and forms in a fair and consistent manner...(5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the Insurance Commissioner;...(6) That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the Insurance Commissioner's approval of the forms

used and the rates charged insureds; and (7) This it is in the best interests of the citizens of this state to ensure a stable insurance market....(c)...Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.”

W.Va. Code §33-6-30.

This Court has reiterated this legislative mandate. “In light of specific legislative amendments to the insurance statutes, we held in *CitiFinancial* that there is a presumption of statutory compliance and validity which applies to approved insurance rates.” *West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. at 325, 745 S.E.2d at 216 (2013).

The Insurance Commissioner completed his statutorily charged duties in due course and approved the rate and form filing by Erie. (A.R. 0001-0322.) The Commissioner then reevaluated the filing, considered the propositions of Petitioner below, Respondent King and that of the Erie and additionally the distribution channel agent of a product that had been approved some four years earlier. (A.R. 1035-1067.) The duly appointed Insurance Commissioner failed to agree with the assertions of Petitioner below, Respondent King and issued his *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner*. (A.R. 1047-1067.)

Moreover, Petitioner below, Respondent King did not appeal the denial of an administrative hearing in this case which is an important consideration. King did not provide sworn testimony in the matter on behalf of himself. Consequently, by essentially tacit admission, he has submitted to the Court that the record before the Commissioner and likewise to this Court was complete. (See *Transcript of Administrative Appeal*

Hearing at A.R. 1389-1390.) The Circuit Court made no mention or findings concerning any presumption required to be overcome in the case *sub judice*. The burden was on Petitioner below, Respondent King to overcome. “The burden for disapproving the validity of such rates is placed on the entity who seeks to set the rates aside.” *CitiFinancial v. Madden*, 223 W.Va. at 239, 672 S.E.2d at 375 (2008). Consequently, any deficiencies in the record would bear upon whether Petitioner below, Respondent King met his burden. By Petitioner below, Respondent King’s failure to even raise the issue on administrative appeal, he has waived any challenge to the Commissioner’s findings which would include information concerning the affidavits that the Commissioner obtained in its investigation, the information concerning what was presented to the Commissioner by Erie, the information presented to the Commissioner from Garlow Insurance Agency and to question others concerning the implementation and distribution of the RPE product. The Insurance Commissioner found that Petitioner below, Respondent King had not met his burden in overcoming the presumption. (See ¶4 at A.R. 1059.) Consequently, it is the position of the Insurance Commissioner that Petitioner below, Respondent King has waived a great deal of his appeal by not appealing his hearing request to dispute the validity of the Commissioner’s findings and he cannot do so now.

In light of the failure of the Circuit Court to acknowledge the presumption, the failure of King to overcome the presumption and the same being a clear statutory requirement makes the finding clear error, an abuse of discretion and warrants a reversal of the *Decision on Appeal*.

C. The Circuit Court failed to consider the Record before it.

In its *Decision on Appeal*, the Circuit Court found the RPE product violated W.Va. Code §33-6-9. (A.R. 1321. See ¶4.)

The Court has reviewed the record, in light of the statutory bases for mandated withdraw of approval (W.Va. Code 33-6-9), and finds that: (a) The RPE violates Chapter 33; (b) The RPE contains misleading clauses; (c) Even the title, itself, “Rate Protection” Endorsement – is misleading; (d) Purchase of the RPE is being solicited by deceptive marketing; (e) The benefits provided by the RPE are unreasonable in relation to the premium charges; (f) The RPE, as it presently exists, is not in the public interest. Any one of those reasons would mandate withdraw of approval but in this instance each and every one of them apply.

(A.R. 1321-1322.)

The Circuit Court adopted the Petitioner below, Respondent King’s administrative appeal in its entirety while not considering the clear and voluminous record before it. As such, the *Decision on Appeal* doesn’t reflect the body of information provided to the Court, the proper deference that should be given to the Commissioner’s approval authority, nor a complete understanding of rate and form filing approvals which consequently is an abuse of discretion and should warrant reversal. The Insurance Commissioner in his Order denying relief to the Petitioner below, Respondent King found that “Erie disclosed its intentions to the West Virginia Offices of the Insurance Commissioner concerning the use of the RPE product.” (A.R. 1055, ¶18). There are clearly ongoing discussions when a particular product is brought to bear in the insurance marketplace. Many discussions were had in the filing and when the product itself is first discussed with the Insurance Commissioner and his staff.⁸ (See *Deposition of Cody Cook* at A.R. 436.)

⁸ It should be reiterated as argued throughout this Brief of Petitioner that Mr. King did not contest the denial of an administrative hearing and has therefore waived his right to question the Commissioner’s staff concerning the information they obtained. King did not place sworn testimony in the record on behalf of himself.

Moreover, W.Va. Code §33-20-3(b) requires that rates may not be “excessive, inadequate or unfairly discriminatory.” Rate and product filings can be complex endeavors that require additional filings by actuaries and other insurance experts. Rate filings are prospective in nature⁹. See W.Va. Code §33-20-3 & 4. Loss experience in other states may or may not be relevant to the West Virginia marketplace. New product implementation can take years before credible data will reveal appropriate pricing for a product. Despite this requirement for the insurance industry to project or estimate their rates for future events, the Circuit Court delved into a discussion concerning “profit centers” and other issues that really focus more on taking a snapshot in time as opposed to loss trending, loss analysis, financial impact of products and whether any product is “revenue neutral” as discussed. (See *Record of Decision* at A.R. 1322-1323, ¶15.) The W.Va. Code does not require a product to be revenue neutral and does allow for a profit to be factored into the filing. W.Va. Code §33-20-3 (a) specifically provides for a “...reasonable margin for underwriting profit and contingencies...” The revenue neutrality that Erie was projecting dealt with the fact that the overall rate for the product would not need to be raised or lowered not to the actual individual premium of each consumer. Some pay more and some pay less for insurance based upon many individual underwriting and risk factors. **Further, a projection in a rate filing is not necessarily a misrepresentation if it does not come to fruition.** There is no difference in the Erie projection of rate neutrality than any other business plan that would for instance seek financing for its operations and project income or receivables.

⁹ “By design, insurance rate setting involves the prospective use of proposed rates which are calculated on cost projections derived from past experience combined with a reasonable expectation of future losses and expenses.” *West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. at 321, 745 S.E.2d at 212, Syl. Pt. 5 (2013).

While some will reach their expected benchmark others will not. It should be noted the Petitioner below, Respondent King offered no evidence that Erie intentionally misrepresented any information in its filing. Regardless, any further rate adjustments would be subject to Commissioner approval. The Circuit Court's findings are misguided as to this point and clearly misstate the record and should therefore be reversed. (A.R. 1322, ¶5.) Further, in regards to rates, Mr. Cook stated for the most part the rates were "flat" and only a slight modest uptick in certain instances. (A.R. 473-476.) Consequently, the discussion of insurance rates is incorrect and clearly wrong.¹⁰

In regards to the other specific findings of the Circuit Court which led it to withdrawal approval of the rate and form, there is evidence that is not reviewed or considered that amply provides justification for the Commissioner's Order¹¹.

(a) RPE violates Chapter 33

The Circuit Court in its *Decision on Appeal* footnotes its finding concerning violating Chapter 33 by mentioning that "according to the testimony of Cody Cook, Erie V.P., RPE trumps any discount, including mandated Age 55 provisions of W.Va. Code 33-20-18." (A.R. 1321, footnote 8.) The Circuit Court is referencing a sworn statement

¹⁰ A further discussion in the findings of the Circuit Court is whether the RPE was added without King's consent. The Circuit Court states that there is no direct evidence to refute Petitioner's contention that it was added without his consent. (A.R. 1322-1323). However, the contrary is readily apparent. Mr. Cook states that he reviewed the diary notes of the agents who sold the product to Mr. King and that the information was provided to Mr. King. (A.R. 517.) This concurs with the Commissioner's investigation wherein Garlow Agency stated the same that standard operating procedure was followed. (A.R. 1036-1037.) Additionally, Garlow stated that the RPE would never have been added without King's consent. (A.R. 1259-1260.) King added no further sworn testimony on this.

¹¹ "At any rate, it is not up to this Court to identify the component charges that can be included in an insurance premium. That decision has been left to the Commissioner. And the Commissioner, upon its review of the consumer complaint filed by **Bunch**, found no basis for disturbing the presumption that the approved rates were valid." *West Virginia Employer's Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch*, 231 W.Va. at 331, 745 S.E.2d at 222 (2013).

that Erie allowed to be taken of its Vice President in response to a request from Petitioner below, Respondent King to obtain information concerning his rate under West Virginia Code §33-20-9. King was given access to Mr. Cook¹² and was able to take a statement of nearly of 200 recorded pages. (A.R. 0392-0590.) The statute requires upon request pertinent information concerning a “rate” be provided to the insured and a process whereby the insured “may be heard” if they are not satisfied. W.Va. Code §33-20-9(a) & (b).

The RPE does not eliminate statutorily mandated discounts and is in full compliance with all provisions of Chapter 33 of the West Virginia Code. King argues that the RPE violates the West Virginia Code because, under the RPE his premium will not **automatically** be reduced upon King reaching the age of fifty-five (55) as allegedly required by W.Va. Code §33-20-18. However, W.Va. Code §33-20-18(a) states:

Any rates, rating schedules or rating manuals for the liability, personal injury protection and collision coverages of a motor vehicle insurance policy submitted to or filed with the Insurance Commissioner shall provide for an appropriate reduction in premium charges as to such coverages when the principal operator and spouse on the covered vehicle is an insured who is fifty-five years of age or older **and who has successfully completed a motor vehicle accident prevention course approved by the division of motor vehicles...**

W.Va. Code §33-20-18(a) (Emphasis added).

It is clear that W.Va. Code §33-20-18(a) was never designed or intended to provide for an automatic reduction in an insured’s automobile insurance premium simply by the insured reaching the age of fifty-five as they must take the additional affirmative

¹² It should be noted that Mr. Cook is not an actuary and did not develop or create the actuarial calculations that determine a rate and ultimate premium applied to a particular policyholder. (A.R. 401.) Mr. King is additionally not an actuary nor did he present any actuarial expert that would support any of his allegations.

step of presenting the certificate of completion and requesting the age fifty-five discount. Further, the rest of the section also states “[s]uch reductions of premium rates shall be made in compliance with the provisions of subsection (a) and (b), section three [§33-20-3] of this article. Any discount used by an insurer shall be presumed appropriate unless credible data demonstrates otherwise.” W.Va. Code §33-20-18(a). Consequently, the Legislature is referring back to the initial ratemaking statute which deals with considerations taken into account in ratemaking as well as rates must be adequate. There are trade-offs to be in compliance with the two sections. Additionally, many of the benefits to age 55 drivers by a discount would be less than the benefits of the RPE and as stated above “any discount” is deemed appropriate unless credible data demonstrates otherwise. The W. Va. Code merely requires a discount be offered and it was in fact and would be available under traditional rating. The consumer has a choice.

King points out in his *Petition for Appeal*, Erie’s Cody Cook testified at his deposition that “the [age fifty-five] discount will show up on the dec [declarations] page, it’s available, but because you’ve optionally chosen to lock in your premium, it will not be reflected in the rate until you make one of the qualifying triggers” (See *Petition for Administrative Appeal*, A.R. 1084-1085.)

Rate filings involve algorithms and other mathematical schemes that either add to or subtract from a final premium. (A.R. 1-322). In the Erie RPE filing, the Age 55 discount is taken into effect in determining premium. (A.R. 99.) There is a complex equation that each individual policyholder’s premium goes through before it is rendered. (A.R. 560.) Endorsements clearly affect policies. The optional endorsement precluded additional discounts on premium as well as increases on premium which the

policyholder was accepting when they voluntarily chose the optional product. If the policyholder wants to return or stay with the traditional rating methodology, they would see it reflected in their premium. (A.R. 551-553.) The filing is consistent when you compare W.Va. Code §33-20-18 and W.Va. Code §33-20-3.

Finally, King is clearly arguing issues that are conjecture, speculation and are not ripe for the Commissioner's determination or this Court. He provided no evidence he was denied the age 55 discount or any evidence anyone else endured the same. The West Virginia Supreme Court has stated "[w]e have traditionally held that 'the courts will not ... adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies.'" *Zaleski v. W. Va. Mutual Insurance Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009), *citing Farley v. Graney*, 147 W. Va. 22, 119 S.E.2d 833 (1960). The Court in *Zaleski* further stated, "Indeed a matter must be ripe for consideration before the Court may review it." *Id* at 552. Consequently, the "Age 55" violation of law finding is erroneous, premature and therefore an abuse of discretion and should cause a reversal of the Circuit Court.

(b) RPE contains misleading clauses

In footnote 9 of the *Decision on Appeal*, the Circuit Court states that the RPE contains misleading clauses because

"Erie's RPE begins: 'Your premium will remain the same unless one or more of the change listed in paragraphs 1. or 2. below occur..' The Record reflects that the RPE actually results in an immediate change in premium regardless of changes that may also be triggered by any of the subsequent events listed."

(A.R. 1321.) The Circuit Court fails however to discuss the "Important Notice" disclosure and other discussions concerning "smoothing" of the rate in regards to the product.

(A.R. 194.) The process of obtaining the new rate for the RPE is needed to adequately price the product. (A.R. 499-508.) Rates cannot be inadequate. W.Va. Code §33-20-3. The fact the premium immediately changes due to addition of an endorsement is required where applicable. Further, this is an optional product that the policyholder chooses to purchase and can remove themselves from and revert to traditional rating at any time. King purchased a new 2012 automobile to substitute for his 2009 vehicle. The rate change reflected the substitution of a three year newer model vehicle and the addition of the RPE. (A.R. 404.) Nevertheless, Mr. King's overall premium **decreased**. (A.R. 407.) This process was detailed and clearly disclosed in the filing, in a meeting with the Commissioner and to King. The allegations of Petitioner below, Respondent King do not allege a deviation from the filing on record with the Commissioner and the filing is not misleading.

(c) The title is misleading

In footnote 10 of the *Decision on Appeal*, the Circuit Court found the title itself as being misleading and states “[t]he Court concurs with Petitioner that the obvious connotation to be taken from the name “Rate Protection” Endorsement is that it shields the insured from rate increases. Less obvious is the fact that it likewise prevents decreases (or that traditional rates are have been trending downward.)” (A.R. 1321.) The Circuit Court fails to review the record. It is essentially a “rate lock.” (A.R. 399). The consumer is made aware that their premium won't change.¹³ Nothing placed in the

¹³ King has admitted to OIC investigators that when the RPE was first placed on his policy, in April 2012, he received a copy of the “Important Notice” and also when he renewed his policy in February 2013. See footnote 13 *infra*. It is well settled law that an insurance consumer has a duty to read his policy and, by extension, all endorsements and “Important Notices” that are made a part of his policy and provided to him. The West Virginia Supreme Court of Appeals has recently reaffirmed this point by holding that “[t]he law of this State is clear in holding that a

record by Petitioner below, Respondent King is to the contrary. Again there has been no evidence of a deviation of the filed product and the product is optional for the consumer. The information is disclosed to the consumer.

(d) Deceptive marketing

In footnote 11 of the *Decision on Appeal*, the Circuit Court finds deceptive marketing and states that “[t]he Court has reviewed the Agent Marketing Aid and compared it to the brochure intended for the consumer, together with the Vice President Cook’s testimony with respect thereto and finds the distinction to be dispositive of this issue. See Conclusion No. 8 *infra*.” (A.R. 1321-1322.). The Circuit Court however, substitutes its own judgment concerning the matter. To the contrary, Mr. Cook states that Erie agents are trained “to provide an overview of the product, specifically describing the triggers that would cause a rate change. We ask them to describe the benefit of being able to lock your rate in past a renewal. And we ask them to offer both the traditional and the rate protection.” (A.R. 490). The marketing materials provided with the initial rate filing were clear as to the product description on file with the Commissioner. King has remained in the RPE despite all of his concerns. Finally, there is testimony that standard operating procedure was followed by Erie and their agents. See *supra*, footnote 10. There simply is no deceptive marketing proof in the record.

(e) Benefits are unreasonable in relation to the premium charges

party to a contract has a duty to read the instrument.” *Am. States Ins. Co. v. Surbaugh*, ___ W.Va. ___, 745 S.E.2d 179 (2013), 33, quoting syl. pt. 5, *Soliva v. Shand, Morahan & Co. Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), overruled on other grounds.

In footnote 12 of the *Decision on Appeal*, the Circuit Court finds the benefits provided by the optional RPE to be unreasonable in relation to the premium charged and states

“Petitioner has pointed out that RPE resulted in a 40% increase in his personal liability rate (compare Annual Continuation Notice and Amended Declarations...The Record also indicates that, overall, RPE has resulted in a net gain to Erie. The Court has not found any cost-benefit analysis or any other entry in the Record to support the Commissioner’s finding that the benefits provided by the RPE are reasonable in relation to the increased liability premium charged.”

(A.R. 1322.)

The Commissioner specifically pointed out the parameters of the program and why it was a reasonable and fair product. (*Transcript of Administrative Appeal Hearing* at A.R. 1384.) The Circuit Court further fails to take notice that the protections provided in the RPE prevent increases for factors including “**usage, mileage, driver age, insurance score, claims, or violations.**” [Emphasis added.] (A.R. 196.) A consumer on the RPE could substantially increase their mileage driven, continue to age, have adverse credit score, have an actual claim or a moving violation and **not receive a premium increase.** Additionally, in the case *sub judice*, the premium actually **decreased** for the consumer. Clearly on its face this product is for certain individuals who do not change automobiles, move from their current address or add drivers. The RPE can be a cost effective alternative and can be a cost certain product which is clearly in the public interest. It cannot be stated that its benefits are not reasonable for the charge.

(f) The RPE is not in the public interest

In footnote 13 in the *Decision on Appeal*, the Circuit Court states that the RPE is not in the public interest and cites as support that we should “[c]ompare with historical

Preferred Tier decreases which would otherwise be applied.” (A.R. 1322). Despite the cited reference as being confusing, out of context and doesn’t provide any specific actuarial analysis concerning this finding, the record is scant as to any evidence Petitioner below, Respondent King put forth on this matter (especially actuarial in nature) and yet the Circuit Court finds regardless. It cannot be stated nor is there any evidence in the record as to how many of those consumers who would have received a tier decrease under traditional rating as referenced, would have conversely received offsetting **increases** in their final premium due to mileage, credit scoring, age, loss experience, moving violations and other underwriting criteria. Therefore, the finding is an oversimplification of a complex rating issue and cannot fairly or accurately be extrapolated in the manner the Circuit Court found. Due to the lack of evidence put forth as grounds for this reversal and for similar arguments made *infra* and *supra*, this finding is clearly an abuse of discretion and appears to be arbitrary and should therefore cause reversal.

D. Some of the findings of the Circuit Court were *de minimus* and should not have risen to a vacation of the Commissioner’s Final Order.

The Circuit Court in its *Decision on Appeal* dedicated several findings of fact and conclusions of law to matters were given great weight by the Circuit Court but in reality should have been given little to *de minimus* weight and therefore disregarded. These would include affidavits created by the Commissioner, *in para materia* analysis, and *ad hominin* disparagement.

In regards to the affidavit issue, the Circuit Court found that the two post-appeal affidavits created by the Commissioner and included in the record on administrative

appeal did not include notes taken by the investigators and states that there is nothing contained in the record to show that the Commissioner reviewed such notes. (A.R. 1320-1321.) However, what is not pointed out is that the affidavits merely encompassed an investigation which included statements made by Petitioner below, Respondent King. These statements included receiving an "Important Notice" about the RPE product, remaining in the product after given chances to remove himself and other findings of fact and conclusions of law which were contained in the Commissioner's Order. The investigations occurred and the investigator would have been able to testify if King wanted to challenge their testimony. Whether the affidavits are accepted or not, there is no dispute that Mr. King gave statements to the Commissioner concerning his actions which are contained in the Commissioner's Order and any hearing denied to contest those actions was not appealed as being in error by Mr. King. Further, there is nothing in the record where Mr. King, who is also an Officer of the Court, has denied making the statements contained in the affidavits or alternatively in the *Findings of Fact, Conclusions of Law, and Final Order Denying Hearing Request of Petitioner*. (A.R. 1035-1040, 1047-1067.)¹⁴ Further, the finding by the Court that the record is devoid of whether the Insurance Commissioner considered the notes and information concerning the investigation is incorrect as contained and referenced in its *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner*.¹⁵

¹⁴ As mentioned *supra*, King has not apparently provided any sworn testimony in this matter for himself.

¹⁵ (See A.R. 1054, footnote 7 references "Interview of Vincent J. King by OIC on May 24, 2013."); (See A.R. 1054, ¶17, "Mr. King admitted to OIC investigators..."); (See A.R. 1055, footnote 8, "Interview of Vincent J. King by OIC on May, 2013".); and (See A.R. 1056, ¶21.) among other information in the Appendix Record.

Further, in the *Decision on Appeal*, the Circuit Court makes significant findings concerning *in para materia* analysis performed by the Insurance Commissioner in his Order. (See *The Court's Findings of Fact* ¶¶9 at A.R. 1325. & See *The Court's Conclusions of Law* ¶¶14 &15 at A.R. 1328.) The Circuit Court states that Insurance Commissioner exceeded his “statutory powers” and “acted as an unconstitutional invasion of the power of the courts.” (A.R. 1328-1329.) While the Commissioner pointed out to the Circuit Court and it is noted at footnote 35 of the *Decision on Appeal* that administrative agencies sometime act as quasi-judicial officers, the Circuit Court rejected the same.¹⁶ However, what is failed to be mentioned in the matter is that under the Administrative Procedures Act, administrative bodies are entitled to issue declaratory rulings¹⁷ and handle contested cases¹⁸. Nevertheless, the Insurance Commissioner was not attempting or would attempt to encroach upon the authority of the Court and was merely trying to follow its guidance in the pursuit of its duties. “A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syllabus Point 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).” *Lightner v. Riley*, ___ W.Va. ___, 760 S.E.2d 142, Syllabus Pt. 5 (2014).¹⁹

¹⁶ “Although the Commissioner views himself as a ‘quasi-judicial officer’..., *Marks* held to the contrary. Moreover, even if authority were to be assumed, it was procedural error to ‘interpret’ a statute which the Commissioner had first determined ‘evinces plain meaning’...” (citations omitted) (A.R. 1329, Footnote 35).

¹⁷ “On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it.” W.Va. Code §29A-4-1.

¹⁸ See W.Va. Code §29A-5-1, et seq.

¹⁹ See also *Joslin v. Mitchell*, 213 W.Va. 771 at 771, 584 S.E.2d 913 at 919 (2003). “In interpreting any statute, this Court looks to the intent of the Legislature. ‘It is a cardinal rule of construction governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent.’ Syllabus Point 4, *State ex rel. Bibb v. Chambers*, 138 W.Va. 701, 77 S.E.2d 297 (1953).” Further,

Finally, another argument below was that the Commissioner's Order contained *ad hominem* attacks against King. The Insurance Commissioner never attempted to personally attack Petitioner below, Respondent King but merely point out that not only was he clearly showing his dislike for the product and the fact that he was attempting to act like a quasi-insurance commissioner, but that he was attempting to substitute his own personal judgment for that of the Commissioner. (See A.R. 1053, ¶10; A.R. 1056, ¶22; A.R. 1059-1060, ¶6 & ¶7)²⁰.

Consequently, due to the importance placed on these *de minimus* issues by the Circuit Court, its actions were an abuse of discretion and should be reversed.

III. VINCENT KING FAILED TO ESTABLISH IN FACT OR LAW THAT HE WAS AN AGGRIEVED PARTY ENTITLED TO RELIEF WHICH MAKES THE ORDER OF THE CIRCUIT COURT ERRONEOUS AND SHOULD THEREFORE BE REVERSED.

The three (3) code sections cited in King's *Petition for Hearing and Issuance of Subpoenas*, which King relies on as a statutory basis for his requested administrative hearing, all require the requestor to be an "aggrieved person." (A.R. 350-381.) Specifically, West Virginia Code §33-20-9 requires "every insurer which makes its own rates" to provide a "reasonable means whereby *any person aggrieved* by the *application* of its rating system may be heard" (Emphasis added). In addition, West Virginia Code §33-20-5(d) states "[a]ny person or organization *aggrieved* with respect

"[w]henver we interpret a statute, it 'should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute [***19] to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." *Id.*

²⁰ King's statements concerning RPE were included in letter to Erie which stated "First, let me thank you for your many courtesies today. Your kindness, even in the face of my passionate feelings regarding RPE, is much appreciated." (A.R. 1029-1030.)

to any filing which is in effect may demand a hearing thereon” (emphasis added) and West Virginia Code §33-2-13 states, in part:

The commissioner may call and hold hearings for any purpose deemed necessary by him for the performance of his duties. He shall hold hearings when required by the provisions of this chapter or upon a written demand therefor **by a person aggrieved** by any act or failure to act by the commissioner . . .” (emphasis added).

W.Va. Code §33-2-13.

King was not “**aggrieved**” by the “**application**” of the RPE to his insurance policy as demonstrated more fully herein and therefore did not provide a basis for the Circuit Court to vacate the Insurance Commissioner’s order and issue further relief. Since “aggrieved” is not defined in the West Virginia Code, its plain and ordinary meaning should be applied. Black’s Law Dictionary defines “aggrieved” as “having suffered loss or injury; damnified; injured.” *Black’s Law Dictionary*, 6th Ed.

Despite King’s attempts to appear as an “aggrieved person” by focusing his application of the RPE to King’s policy resulted in a **decrease** in King’s total premium, even with the same coverage and with a newer automobile. (A.R. 557-559.) Mr. King states to Erie that “I am not ungrateful that net change is in my favor” in discussing the same. (A.R. at 1024-1025.) The application of the RPE to King’s policy did not have any adverse financial impact on King. King also attempts to appear to be an “aggrieved person” by focusing only on certain individual components of his automobile insurance coverage, arguing that the cost of his liability coverage “went up drastically” with the application of the RPE to his policy, as compared to his previous liability costs. This has been further discussed *supra*, but to encapsulate, Mr. King purchased a newer vehicle so his coverage would have most likely increased under a traditional rating plan but the

RPE brought the premium down so taking components of premiums out of context distorts the true effect of the algorithm, the overall effect on the total premium and is incorrectly stated as discussed with Erie representative Cook. (A.R. 407-411.)

Next, King attempts to appear to be an “aggrieved person” by arguing that the RPE was placed on his policy without his knowledge or consent. This argument fails given the clear and undisputed evidence in the record from Cody Cook, Garlow and others in his office. See footnote 10 in this *Brief of Petitioner, supra*. Further, King was provided with the opportunity to remove the RPE from his policy retroactively and convert back to the traditional, non-RPE policy, which King chose not to do on several occasions. (A.R. 1035-1037.)

Although the failure of Petitioner below, Respondent King to show financial or non-financial loss or other detriment, the Circuit Court in its *Decision on Appeal*, found that pursuant to W.Va. Code §29A-5-4 that the rights of the Petitioner below Respondent King were “prejudiced because of the administrative findings...”. (A.R. 1329.) However, the Administrative Procedures Act states that a Circuit Court “shall reverse, vacate or modify the decision of the agency if the **substantial rights** of the petitioner or petitioners have been **prejudiced** because of the administrative findings, inferences, conclusions, decision or order...”. [emphasis added.] W.Va. Code §29A-5-4. Substantial prejudice to any rights was not shown or proven. Therefore, due to the lack of Mr. King being aggrieved, the Insurance Commissioner respectfully requests that this Court find an abuse of discretion and reverse the Circuit Court.

IV. THE ORDER OF THE CIRCUIT COURT ORDER CREATED UNCERTAINTY AND DID NOT PROVIDE A CLEAR DIRECTION ON THE ERIE RATE PROTECTION ENDORSEMENT PRODUCT AND EXCEEDED ITS AUTHORITY IN FASHIONING RELIEF IN THIS

ADMINISTRATIVE APPEAL WHICH IS THEREBY CLEAR ERROR, AN ABUSE OF DISCRETION AND SHOULD BE REVERSED.

The *Decision on Appeal* of the Circuit Court which granted relief to the Petitioner below Respondent King creates confusion and is unclear as to who is the responsible party going forward and what should be implemented regarding the same as well as creating ramifications that have to be considered. (A.R. 1330-1331.)

First and foremost, the rate and form filing which has been in effect for over four years has been disapproved by the Circuit Court. This will clearly affect approximately 38,000 policyholders. (A.R. 471.) This product was filed and used in other states such as Ohio, Indiana, Illinois, Wisconsin and Tennessee and none of those states challenged the filing. (A.R. 446.) Additionally, these policyholders will be forced to choose other coverage and likely incur premium increases if not potential cancellations or non-renewals. The premium impact is not known at this time but policyholders must be converted to traditional rating. These policyholders will be involuntarily removed from a product that they optionally chose as a viable way of managing their resources. Not only has the Circuit Court vacated the Commissioner's order, but it has in fact created an extraordinary remedy which it directs the Insurance Commissioner to comply therewith²¹. The *Decision on Appeal* leaves the matter unclear on a going forward basis, went too far in fashioning its relief and as such should be reversed.

²¹ The Court has decided cases concerning review of administrative proceedings and altering the findings of the administrative body. "Writ of prohibition was issued as a trial court exceeded its authority in reviewing contested cases under W.Va. Code § 29A-5-4 by essentially issuing a writ of mandamus and requiring the Commissioner of the West Virginia Division of Motor Vehicles to replace his procedural rules with new rules that were subject to the trial court's review; just as W.Va. Code § 29A-5-4 did not authorize relief by way of an extraordinary writ, neither did it authorize the trial court to *sua sponte* order what was essentially extraordinary relief in its final order disposing of an administrative appeal." *State Ex Rel. Cicchirillo v. Alsop*, 218 W. Va. 674, 629 S.E.2d 733 (2006).

V. UNDER SEPARATION OF POWERS ANALYSIS, DEFERENCE TO THE ADMINISTRATIVE AGENCY OF PRIMARY JURISDICTION DICTATES THAT INTRUSION BY THE JUDICIARY IN RATE-MAKING MAY CAUSE INCONSISTENCIES AND CONFLICTS CONCERNING THE REGULATION OF THE INSURANCE MARKET IN THE STATE OF WEST VIRGINIA THEREBY MAKING THE ACTIONS OF THE CIRCUIT COURT AN ABUSE OF DISCRETION.

The Circuit Court's Decision on Appeal violates the West Virginia State Constitution Separation of Powers clause. The Legislature has given the Insurance Commissioner rate-making authority, and the West Virginia Supreme Court has recognized and upheld this authority. The Circuit Court ignored the deference to which the Insurance Commissioner is entitled, and in reversing the Insurance Commissioner in its *Decision on Appeal*, the Circuit Court encroached upon a matter that has been expressly delegated to the executive branch of our state government.

W. Va. Const. Art. V, § 1 (2014) states:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

The West Virginia Supreme Court has held that the Insurance Commissioner should be given deference in the rate making process. In *Bunch*, this Court stated:

We find it noteworthy that Judge Kaufman, during the hearing on this matter, was quick to recognize **two fundamental concerns presented by this case: encroachment on the regulatory rate making process and separation of powers.** Notwithstanding the trial court's appreciation of these issues, it proceeded to breach established precepts pertaining to both of those juridical areas. Specifically failing to heed this Court's

Additionally, "W.Va. Code § 29A-5-4 and prior case law unambiguously indicate that W.Va. Code § 29A-5-4 does not vest circuit courts reviewing administrative appeals of contested cases with the authority to order an agency to cease a certain practice or to direct an agency to promulgate new procedural rules that are subject to the circuit court's review; rather, a circuit court's disposition of an administrative appeal is limited to affirming, remanding, reversing, vacating, or modifying the agency's disposition of a contested case." *Id.*

recognition in *State ex rel. Crist v. Cline*, 219 W.Va. 202, 632 S.E.2d 358 (2006), "that we . . . give deference to [the Insurance Commissioner's] interpretation, so long as it is consistent with the plain meaning of the governing statute," the trial court substituted its judgment for that of the Commissioner on a matter that clearly fell within the rate making area of the Commissioner's expertise. *Id.* at 211, 632 S.E.2d at 367. As we recognized in *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 466 S.E.2d 424 (1995), "[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion."

Bunch, supra at 331-332 (Emphasis added).

It is clear from the Appendix that the Commissioner performed his statutory duties in approving Erie's rate, form and product filings. There is no factual dispute regarding the filing and the approval of the rates, forms and products of Erie, and King does not argue any deviation from the filing was applied to him nor does he contest the denial of a hearing, effectively affirming that the record on appeal is complete. Further, King does not seek remand to the Office of the Insurance Commissioner. See footnote 5 in this Brief of Petitioner, *supra*. Consequently, in any analysis, the Court should have reviewed what this Court has stated.

"While it is incumbent upon this Court to refrain from the politics of insurance rate making, this Court encourages persons aggrieved by the regulatory policies and decisions of the Commissioner to rely upon the political process for accountability purposes. See *Appalachian Power*, 195 W.Va. at 588, 466 S.E.2d at 439 ("We are not at liberty to affirm or overturn the [Tax] Commissioner's regulation or decision merely on the basis of our agreement or disagreement with his policy implications"); see also *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 589, 542 S.E.2d 405, 410 (2000) ("While the reasons for separating the judiciary from politics are many and varied, there can be no question that the goal of removing politics and its attendant imbroglios from the judicial process is necessary to the proper functioning of our judicial system.").

West Virginia Employer's Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Bunch, 231 W.Va. at 332, 745 S.E.2d at 223, footnote 38 (2013).

Further, this Court has stated that

[w]hile we find the appellees' contentions appealing, we believe they involve public policy determinations that are best addressed by the Insurance Commissioner or the Legislature. The Insurance Commissioner is better equipped to evaluate policy and rate structures employed by insurance companies, and to determine if an insurance company is failing to apply approved rates in the proper fashion. Further, it is the Legislature's, and not this Court's, province to enact legislation compelling insurance companies to offer insurance consumers more choice"

Joslin v. Mitchell, 213 W.Va. 771 at 778, 584 S.E.2d 913 at 920 (2003).

Consequently, the Circuit Court abused its discretion and should be reversed in arriving at its findings of facts and conclusions of law and with the remedy it chose to impose.

CONCLUSION

The Insurance Commissioner respectfully submits that he has not violated any constitutional or statutory provisions; acted in excess of the statutory authority or jurisdiction of the agency; used unlawful procedures; shown to have committed other error of law; was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion of any constitutional or statutory provision.

Therefore, the Insurance Commissioner respectfully requests that this Court due to clear precedent and the various cited clear errors and abuse of discretion reverse the Circuit Court by special assignment, and reinstate the Commissioner's *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* entered July 10, 2013. Petitioner below, Respondent has not sought a remand on this matter nor disputed the denial of an administrative hearing and therefore due to the argument

contained herein, the matter should be reinstated to the prior findings by the Insurance Commissioner.

Respectfully submitted,

**OFFICES OF THE INSURANCE COMMISSIONER
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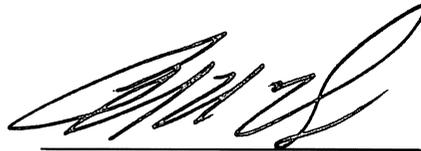
CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2015, true and accurate copies of the forgoing BRIEF OF PETITIONER, THE INSURANCE COMMISSIONER OF WEST VIRGINIA were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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