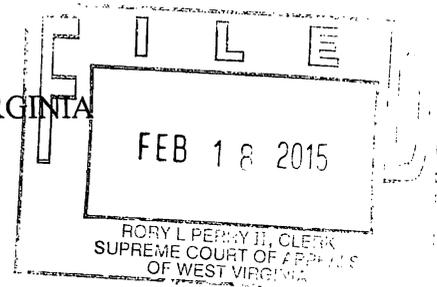


**BRIEF FILED
WITH MOTION**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Erie Insurance Property & Casualty Company
and West Virginia Insurance Commissioner,

Respondents Below, Petitioners,

v.

No.: 14-1059

Vincent J. King,

Petitioner Below, Respondent.

Appeal from the Circuit Court of Kanawha County
Honorable John L. Cummings, Specially Assigned
Kanawha County C.A. No.: 13-AA-95

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This matter had its genesis in a dealer solicitation suggesting that Respondent trade for a newer vehicle. In exploring the same, Respondent also checked with his Erie agent regarding the potential impact on auto insurance premium. Pleasantly, Respondent was advised that going from a 2009 to a 2012 model year would result in less than a \$3.00 annual increase.

Respondent was not then aware that Erie had sought and obtained Insurance Commissioner approval for what Erie calls its Rate Protection Endorsement (“RPE”). RPE was not then discussed and the agent’s Activity Notes accurately reflect that he was quoted “without RPE” consistent with the existing policy on the 2009 model (APP at Page 1009).

Respondent proceeded to make the trade and then notified the agent to substitute vehicles under the Erie policy. Again, the Activity Notes are accurate, reflecting that Respondent asked that he be given the same coverage (APP at Page 1010). But when the policy arrived, the premium was different, (Compare each coverage charge at APP Pages 1003 and 1006) and so Respondent sought a detailed explanation (APP at Page 1024). Ultimately, Erie responded simply that the changes were due to addition of the endorsement which, it stated, had been offered to and elected by Respondent (APP at Page 1026). That not being true, and additional information requested not being supplied, Respondent asked for a hearing pursuant to W.Va. Code 33-20-9 (APP at Page 1028).

The hearing began but was not completed due to Agent Garlow’s request for time to obtain counsel (APP Pages 392-590 - sometimes inaccurately identified in the record as the “Deposition of Cody Cook”). Although the informal understanding was that the hearing would later be resumed, Erie and Garlow instead filed a Petition for Declaratory ruling with the Insurance Commissioner (APP at Pages 1012 - 1034). There, they sought various declarations which would have relieved

them from further obligation under the aforesaid statute. Effectively defeated in the voluntary effort to complete the 33-20-9 hearing, the undersigned then filed his Petition for Hearing and Issuance of Subpoenas with the Insurance Commissioner (APP at Pages 350 - 391). In his Findings of Fact, Conclusions of Law and Final Order Denying Hearing, the Commissioner combined the cross petitions, denying the request of the undersigned, and granting in part the relief requested by Erie (APP at Pages 1047 - 1067). That Order was then appealed to the Circuit Court of Kanawha County (APP at Pages 1068 - 1134), and for reasons which will be discussed below, was later reversed (APP at Pages 1319 - 1331). Erie and the Commissioner appeal.

SUMMARY OF ARGUMENT

The Commissioner is statutorily required to withdraw prior approval of insurance policy forms if any of 6 grounds exist (W.Va. Code 33-6-9 discussed in detail *infra*). Instead of making that determination, the Commissioner presumed, based on prior approval, that Erie's RPE was proper in all respects and therefore concluded that a hearing would serve no useful purpose. The Circuit Court, applying the appropriate standards of review, found several of the Commissioner's Findings of Fact to be clearly wrong, and that the Commissioner had encroached on judicial functions in wrongly reaching several of his Conclusions of Law. Finally, the Circuit Court found one particular "conclusion" to be personal and not a proper Conclusion of Law regardless. Thus, the Circuit Court ordered that the prior approval of Erie's RPE be withdrawn but left to the discretion of the Commissioner the logistics going forward (APP at Page 1331). Erie and the Commissioner each contend that it is the Circuit Judge who encroached, particularly in light of the presumption codified at W.Va. Code 33-6-30(c). They rely on a trilogy of cases dealing exclusively with rate-making and fail to make the distinction as to forms, regarding which this Court has not yet spoken.

Similarly, this Court has never analyzed the statutory presumption or whether it is applicable to the Commissioner's own reviews, or just judicial appeals from the administrative agency. Your Respondent contends the latter. Regardless, and even assuming the presumption, the evidence in the record overwhelmingly established each of the six factors, any one of which mandated withdrawal of approval of Erie's RPE. Thus, the Circuit Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The only substantive things on which Petitioners appear to be divided, as between themselves, is the Rule under which this case should proceed, and thus the type of decision to be rendered. The Commissioner requests oral argument under Rule 20. Certainly this response brief will point to questions of first impression which the Court may decide to address with new syllabi and thus Rule 20 handling would be exactly correct. On the other hand, this Court may simply find that it does not disagree with the decision of the lower tribunal; or, upon consideration of the applicable standard of review and the record presented, there was no prejudicial error; or that other just cause exists for summary affirmance; thus leading to proper disposition by way of a memorandum decision under Rule 21 (though the Commissioner urges otherwise). Erie, instead, requests oral argument under Rule 19, pointing only to the issues involving settled law. Respondent agrees that if the Court decides that it need not reach the issues of first impression and that the ruling should be sustained based solely upon the existing law relied upon by the Circuit Judge, Rule 19 handling would be proper. Having come this far, and recognizing the importance of the issues that continue to divide the entire Bar, Respondent mostly weighs in with the Commissioner.

ARGUMENT

The Circuit Court faced four concise assignments of error and carefully addressed each of them, and only them,¹ resulting in reversal of the administrative decision. Now that it is the other side appealing, Erie largely ignores the four errors addressed by the Circuit Court, and instead argues six of its own. The Commissioner raises seven, some similar to those of Erie, some unique, and several unrelated to the basis for the decision on the original four raised below. Respondent now faces the impossible conundrum of page limitation with so many additional rabbit trails to go down. It's an impossibility by design. The undersigned responds by dedicating the bulk of his allotted pages to the new issues raised here, with full knowledge and confidence that this Court always makes a thorough review of the record wherein Respondent's original assignments of error, and those actually addressed in the order appealed from, were even more thoroughly briefed.

I. ASSIGNMENTS OF ERROR BY ERIE²

It should be noted at the outset that Erie did not appeal any portion of the Commissioner's

¹Purely and simply, the assignments of error asserted below were:

1. The Commissioner was statutorily required to withdraw approval of Erie's RPE;
2. The Commissioner was clearly wrong with respect to certain Findings of Fact;
3. The Commissioner exceeded his authority in determining the "spirit and intent" of the Legislature and in interpreting statutes "in pari materia"; and
4. Portions of "Conclusion No. 7" are ad hominem and not a proper Conclusion of Law.

APP at 1144.

²Petitioners have used three conflicting styles in the pleadings thus far filed with this Court. One of the distinctions suggests procedural challenge between Petitioners as to which of them should be named first, and thus the manner in which this Court's decision will later be referred. Erie having taken the lead in noticing the appeal for all, this Court has consistently named Erie first, and Respondent will therefore address Petitioners' briefs in that order. The other variance is that Erie has sometimes included its agent, Garlow Insurance Agency (see Petitioner Erie Insurance Property & Casualty Company's Renewed Motion for Expedited Relief). It appears, however, that now having learned the intricacies of the RPE and its impact, Garlow chose not to appeal the Circuit Court's withdrawal of approval.

administrative decision to the circuit court. Indeed, even with regard to the undersigned's appeal to the circuit court, Erie largely deferred to the Commissioner³, waiving separate oral argument below (APP at 1388)⁴, and likewise opting not to submit any proposed findings of fact or conclusions of law of its own. Nor did Erie notify the Circuit Court of any objection that it had to those submitted by the Respondent here. That notwithstanding, Erie took the lead in noticing the appeal to this Court, and Respondent will address its asserted assignments of error as follows:

- A. ERIE'S ASSIGNMENT OF ERROR THAT: "THE CIRCUIT COURT IGNORED THIS COURT'S CLEAR DIRECTIVE THAT IT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE INSURANCE COMMISSIONER[]"

Erie first asserts that "the Circuit Court ignored this Court's directive that it cannot substitute

³Erie did file its own Response to Brief In Support of Appeal, APP 1175-1190.

⁴Following oral arguments by the undersigned, and by the Commissioner's General Counsel, the following exchange took place:

THE COURT: Mr. King, you are allowed a brief rebuttal.

MR. KING: Thank you, your Honor. I would be pleased to do that, and I would be pleased to do it now, but I'm not sure if the others wanted to argue and if they should go first.

THE COURT: I don't think they - does anyone else think they have an argument?

MS. RICE: I'm okay. I'm okay, your Honor, thank you.

THE COURT: Okay, You are representing whom?

MS. RICE: I represent Erie.

THE COURT: Do you want to say anything here? This is actually the commissioner's case.

MS RICE: I'll defer to the commissioner. Thank you.

THE COURT: Mr. Summers [counsel for Garlow Insurance Agency]?

MR. SUMMERS: The same here, your Honor.

its judgment for that of the Insurance Commissioner's". It merits noting that the cases upon which Erie relies were exclusively rate cases. This is a form case (albeit that Erie's Rate Protection Endorsement has an impact on ultimate premium). While Erie accurately quotes that "there is no question that the Commissioner is charged with overseeing the **rates charged** for various insurance products" and that "it stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance **rate** is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance **rates** for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction", it nonetheless overlooks the distinction. This case will present the Court's first opportunity to say whether its holdings in the trilogy of cases relied upon are also applicable to **forms**. At first blush, the Commissioner having been charged with the responsibility of approving or disapproving both rates and forms, there would not seem to be any rational distinction, and yet intellectual analysis might prove otherwise. *See, The Filed Rate Doctrine and the Insurance Arena*, 18 Conn. Ins. L.J. 373 (2011-2012), and specifically Section VII: Filed Rates v. Filed Forms, at 391.⁵ It is true that rate-making is both technical and unique and that the Commissioner can employ actuarial staff that the courts cannot, but there is nothing technical or unique about the Commissioner's ability to determine, for example, whether a particular policy form is contrary to statute. *See, e.g., Peachtree Casualty Ins. Co. v. Sharpton*, 768 So.2d 368 (Ala. 2000) (a certified question from the United States District Court for the Middle District of Alabama to the

⁵The undersigned is mindful that, in its exercise of appellate jurisdiction, this Court does not decide non-jurisdictional issues not decided below, but this case presents an anomaly. Not only is this appeal by the opposite party, and therefore the assignments of error are different, but the Commissioner, Erie and two Amici each assert that the new appellate issue is jurisdictional, and specifically that the Circuit Judge exceeded his jurisdiction in not deferring to that of the Commissioner. Erie Brief at § VI.D., Commissioner's Brief at § II.A, Amici AIA and PCI Brief at § III.

Supreme Court of Alabama, wherein the latter court found an uninsured motorists policy form unenforceable as contrary to that State's Motor Vehicle Safety Responsibility Act, despite the insurer's protestations that the form had been duly approved by that state's insurance department and therefore challenge before a court should be precluded under the Filed Rate Doctrine)⁶. Indeed, in form cases, vesting exclusive authority with the Commissioner would necessarily result in invasion by the Commissioner upon judicial powers. Perhaps a new syllabus point, one way or the other, will chart the course not only for proceeding in this case, but for all form cases to come, though it can already be said that this Court has never previously hesitated to strike forms it found to be contrary to law or public policy, including those approved by the Commissioner. *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010) at f.n. 4.⁷

B. ERIE'S ASSIGNMENT OF ERROR THAT: 'THE DECISION ON APPEAL SHOULD BE REVERSED BECAUSE IT IGNORED THE STATUTORY PRESUMPTION THAT THE INSURANCE COMMISSIONER'S APPROVAL OF ERIE'S RPE WAS VALID AND SHIFTED THE BURDEN OF PROVING ITS VALIDITY TO ERIE'

This is also the Court's first opportunity to address the statutory presumption created by W.Va. Code 33-6-30(c) (2002). While the Petitioners assume, without authority, that the Legislature intended for the presumption to apply to the Commissioner's review of his own approvals, as opposed to just judicial review of the Commissioner's approvals, Respondent suggests

⁶ "The filed-rate doctrine is 'designed to insulate from challenge the filed rate deemed reasonable by [a] regulatory agency'. The filed-rate doctrine recognizes that when the legislature has established a scheme for rate-making, the rights of the ratepayer in regard to the rate he pays are defined by that scheme. Peachtree cites *Nantahala Power & Light v. Thornburg*, 476 U.S.953, 106 S.Ct. 2349, 90 L.Ed 943 (1986), to support its contention that the filed-rate doctrine prohibits the Sharptons' counterclaim. However, Peachtree's reliance on this case is misplaced. This is not a rate case; the filed-rate doctrine is inapplicable" [internal Alabama citations omitted]. *Peachtree, supra* at 373.

⁷ Although this case is in the form of an administrative appeal, the Court would also need to reconcile regulatory delegation under W.Va. Code 33-2-3, with the judiciary's own declaratory powers under W.Va. Code 55-13-1, the method by which forms are more frequently challenged.

that premise is in serious question and, again, a new syllabus point determining the applicability of the statute to the Commissioner's own reviews pursuant to W.Va. Code 33-6-9, will not only help to resolve this case but save others from having to struggle with that issue going forward.⁸

The record upon which the Commissioner decided is abominable.⁹ The Commissioner attempted to cover that by applying the presumption under W.Va. Code 33-6-30(c). In other words, The Commissioner ruled that, because Erie's RPE had previously been approved and, having decided not to conduct a hearing to allow new evidence, the statutory presumption mandated that the prior approval stand (Commissioner's Finding No. 20 and Conclusion No. 4, APP at pp 1052 and 1065). Further, Petitioners now jointly argue that the Circuit Court erred in not affirming the Commissioner's application of the statutory presumption.

Subsections (b) and (c) of W.Va. Code 33-6-30 were added in 2002. The Legislature specifically noted that the amendment was in response to this Court's decision in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), a civil action in which this Court initially allowed recovery of monetary damages in situations where an insurer failed to prove that it had made an appropriate adjustment to premium in exchange for exclusions added as required by W.Va. Code 33-6-31(k). After lobbying by industry, the Legislature then indicated that such had not been its intent (33-6-30(b)(5)), and thereafter created a statutory presumption that "where any insurance policy

⁸Although raised below (APP at 1145), the Circuit Court resolved the matter without having to specifically decide that issue. Instead, applying the proper standards of review, the Circuit Court correctly determined both that the Commissioner was clearly wrong and exceeded his powers (Finding of Fact No. 4-8, and Conclusions of Law Nos 12, and 14-16, at APP 1321-1330).

⁹In preparing the Appendix here, Erie built the record to give the appearance of due diligence by the Commissioner, by including hundreds of technical pages from its original 2010 filing but never relied upon below. What does not exist, is any data call by the Commissioner (such as that noted by this Court in *Lightner*) at the time of the 2013 Petition for Hearing and Issuance of Subpoenas, and Findings of Fact, Conclusions of Law and issuance of the Commissioner's Final Order denying the same.

form, including an endorsement thereto, 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(c) The Legislature made no mention of administrative proceedings.

Separate and apart from W.Va. Code 33-6-30 entitled "Construction of Policies" (normally a judicial function), is the Commissioner's statutory duties with respect to administrative review (Commissioner's function in the first instance), found at W.Va. Code 33-6-9:

The Commissioner shall disapprove any such form of policy, application or rider, or endorsement or withdraw any previous approval thereof:

- (a) If it is in any respect in violation of or does not comply with this chapter.
- (b) If it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.
- (c) If it has any title, heading or other indication of its provisions which is misleading.
- (d) If the purchase of such policy is being solicited by deceptive advertising.
- (e) If the benefits provided therein are unreasonable in relation to the premium charged.
- (f) If the coverages provided therein are not sufficiently broad to be in the public interest.

This administrative section, dealing with approval, or withdrawal thereof, makes no mention of any presumption. And, logically, what sense would it make to direct that the Commissioner both presume the propriety of, and to withdraw, previous approval? Respondent suggests that the Legislature did not so direct, the Commissioner erred in his application of the presumption to this administrative proceeding, and the Circuit Court was correct in its reversal.

C. ERIE'S ASSIGNMENT OF ERROR THAT: "THE DECISION ON APPEAL SHOULD BE REVERSED BECAUSE IT IGNORED AND MISAPPLIED EVIDENCE IN THE RECORD AND RELIED ON EVIDENCE THAT DID NOT EXIST"

Erie next points to four specific matters as to which it contends the Circuit Court erred when viewed against the administrative record. The first is the Circuit Judge's Conclusion of Law No. 12 that Erie's RPE violates W.Va. Code 33-20-18. Erie also refers to, without citing specifically, the Circuit Judge's Finding of Fact No. 4(a) and footnote 8 stating that "according to the testimony of Cody Cook, Erie V.P., RPE trumps any discount, including the mandated age 55 provisions of W.Va. Code 33-20-18" which, in turn, cited to record pages 551-553. Erie argues that, because the RPE is optional, the insured can always drop it in order to receive the discount if desired. That assumes a fact not in evidence, i.e., that RPE is indeed optional. The basis for the Petition for Hearing and Issuance of Subpoenas here was that RPE was added to Respondent's policy involuntarily (see Agent Activity Notes at APP Pages 1009-1011). Second, it assumes that the insured is either told of that option or otherwise knows to request such a change. Again, the record is devoid of any such evidence.

The second matter about which Erie says the Circuit Judge misapplied the record is Finding of Fact 4(b) that "the RPE contains misleading clauses". In support, the Circuit Judge added footnote No. 9:

Erie's RPE begins: "Your premium will remain the same unless one or more of the changes listed in paragraphs 1. or 2. below occur: ..." (Record at page 625). 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. (Record at pages 404, 485-487).

On this assignment, Erie points to a separate "Important Notice Regarding Your Rate Protection Endorsement" which adds the following additional language not made a part of the policy:

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. ... (APP at p. 722)

The fact that Erie may arguably have advised of the immediate rate impact elsewhere does not change the fact that the policy form misleadingly states that rates will remain the same unless one of three subsequent changes takes place. The Important Notice is not the subject of challenge here. The RPE is what is challenged here and, as to it, the Circuit Court was exactly correct.

Thirdly, Erie appeals the Circuit Judge's finding that "the benefits provided by the RPE are unreasonable in relation to the premium charged" and the Circuit Judge's corresponding footnote:

Petitioner [Respondent here] has pointed out that RPE resulted in a 40% increase in his personal liability rate (compare Annual Continuation Notice and Amended Declarations at Record pages 1003 and 1006). The Record also indicates that, overall, RPE has resulted in a net gain to Erie (Record pages 453-457). 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 RPE are reasonable in relation to the increased liability premium charged.

On this point Erie relies on an opinion by this Court, in *W.Va, Employer's Mut. Ins. Co., d/b/a BrickStreet Mut. Ins. Co v. The Bunch Co.*, 231 W.Va. 321, 745 S.E.2d 212 (2013), noting that the trial judge in that case had considered only expenses that had actually been incurred and had failed to consider prospective loss. What Erie overlooks is that the data which was prospective at the time of the RPE filing, had become retrospective as of the Commissioner's decision more than three years later, and the Circuit Court correctly noted that the actual experience testified to by Mr. Cook rebutted the prospective loss anticipated in the filing, and therefore the benefits provided by the RPE are unreasonable in relation to the premium charged. Erie would prefer to kick the can down the road, look further into the future when rates may still conceivably go up, and ignore the fact that Respondent has already incurred a 40% increase in liability rates for three years running, without one

dime of the initially perceived prospective expense having come to fruition. Conversely, it turned to profit; not just here but in every state in which RPE was previously implemented. Erie says that is of no moment, indeed it was granted permission by the Commissioner, and Respondent should not be allowed to challenge its continued approval. The Circuit Court correctly found the proof to be in the pudding and that the benefits provided by Erie's RPE are actually unreasonable in relation to the premium charged (APP at Page 1322).

That leads to Erie's last complaint under this assignment, namely, "the Circuit Court's conclusion that the RPE was a 'profit center' for Erie in other states and, therefore, not 'rate neutral' as Erie initially represented in its filing ..." (Brief of Erie at Page 25). It is believed that Erie is referring to the latter portion of the Circuit Court's Finding of Fact No. 5. In support, the Circuit Court referred to fifteen pages of transcript (footnote 19 citing to Record at pages 446-460). In its opening brief here, Erie relies upon just one question and answer from page 459. Although page limitation precludes verbatim recitation of the entire 15 pages of transcript here, Respondent urges a complete reading, following which the Circuit Court's conclusion becomes inevitable.

D. ERIE'S ASSIGNMENT OF ERROR THAT: "THE CIRCUIT COURT'S DECISION ON APPEAL VIOLATES THE WEST VIRGINIA CONSTITUTION'S SEPARATION OF POWERS CLAUSE"

It is sometimes said that "the best defense is a good offense" and Erie obviously subscribes. Previously, Respondent appealed to the Circuit Court, in part, on the ground that the Commissioner exceeded his statutory power by encroaching upon the judicial function of the courts (and the Circuit Judge so determined - see Finding of Fact No. 9 and Conclusions of Law Nos. 14 and 15 at APP Pages 1325 and 1328-1329). Erie now defends the Commissioner by countering that the Circuit Judge encroached upon the Commissioner's power. But here Erie's counter-offense fails. As the Circuit Court correctly noted:

14. An administrative body is vested with only that power specifically granted to it by the Legislature. In other words, “[a]n administrative agency is but a creature of statute, and has no greater authority than [that] conferred under the governing statutes”. *State ex rel Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12 (1997) (citations omitted). Accord Syl. Pt. 3, *Appalachian Reg’l Health Care, Inc. v. West Virginia Human Rights Comm’n*, 180 W.Va. 303, 376 S.E.2d 317 (1988). (“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statute, so they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. Syl. Pt. 3, *Mountaineer Disposal Service, Inc v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).”). Here, the Commissioner’s duty is to **enforce** Chapter 33 (W.Va. Code 33-2-3) whereas determination as to Legislative intent and his reading of statutes *in pari materia*, exceeded his statutory powers. [emphasis in original]
15. “... An agency’s intrusion, however slight and seemingly innocuous, into processes that are regarded as exclusively judicial in nature exceeds the scope of that agency’s legislative grant of authority and violates the separation of powers doctrine. Simply stated, where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1, Article V, of the West Virginia Constitution.” *State of West Virginia ex rel State Farm Mut. Ins. Co., v. Marks*, 230 W.Va. 517, 741 S.E.2d 75 (2012). Here, the Commissioner’s effort to interpret the intent of the Legislature, and to read statutes *in pari materia*, constituted an unconstitutional invasion of the power of the courts.

The Circuit Court also added the following footnote:

Although the Commissioner views himself as a “quasi-judicial officer” (*Response by the West Virginia Offices of the Insurance Commissioner to Brief in Support of Petitioner’s Appeal* at page 38 and transcript of oral argument at page 38), *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” (Commissioner’s Conclusion No. 11). *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W.Va. 73, 726 S.E.2d 41 (2011).

Respondent completely agrees with Petitioners regarding the Constitutional mandate of Separation of Powers, but this Court must now referee who did the exceeding. Respondent respectfully submits that it was the Commissioner.

E. ERIE'S ASSIGNMENT OF ERROR THAT: "THE CIRCUIT COURT'S MISAPPLICATION OF THE STANDARD OF REVIEW CONSTITUTES REVERSIBLE ERROR"

With respect to this assignment, Erie accurately quotes the applicable syllabus by this Court but appears to completely misunderstand the same:

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4 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 of fact to be clearly wrong.

W. Va. Employer's Mutual Ins. Co. v. The Bunch Co., supra. Erie complains that "the Circuit Court failed to apply this deferential standard". But this Court's syllabus is not talking about the standard to be applied by the Circuit Court. This Court's syllabus is talking about the standard it applies and, more substantively, that this Court does not give deference to the administrative findings where, as here, the Circuit Court found them to be clearly wrong. Erie's argument is a complete non-sequitur.

F. ERIE'S ASSIGNMENT OF ERROR THAT: "THE CIRCUIT COURT'S DECISION ON APPEAL CREATES AMBIGUITY FOR ERIE AS TO WHETHER IT CAN USE PRODUCTS APPROVED BY THE COMMISSIONER"

While the undersigned is not certain this purported assignment cites error, the order by the Circuit Judge could not have been clearer. The resulting details are to be properly determined between Erie and the Commissioner. In short, the Circuit Court rightly deferred to the Commissioner the discretion and expertise which is his, and corrected only that which was not:

Accordingly, this Court having reviewed the 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 it is not in the public's best 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 RPE is OVERRULED. The Court leaves to the discretion of the Commissioner an orderly process by which policies currently subject to the 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.

(APP at Page 1331). Feigned confusion notwithstanding, the Circuit Court did not retroactively annul the initial RPE approval. It simply reversed the Commissioner's decision not to withdraw that approval now. The Circuit Court also did not order adjustment of premiums charged to date. It simply directed that Erie and the Commissioner determine an orderly process to convert existing RPE policies to traditional rating going forward or, alternatively, allowed Erie to again seek approval of the RPE correcting the deficiencies presently existing (stayed pending this appeal. APP at 1332).

As for Erie's contrived ambiguity, no, under the Circuit Court's Decision on Appeal, Erie will not be able to use it's current RPE product going forward, albeit previously approved, and should file with the Commissioner its preferred plan for transition, or refile for RPE approval correcting the deficiencies found by the Court.

II. ASSIGNMENTS OF ERROR BY THE COMMISSIONER

- A. THE COMMISSIONER'S ASSIGNMENT OF ERROR THAT: "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*"

This matter is obviously distinguishable from *CitiFinancial I*, because your Respondent *appealed* from an administrative decision. This was not a collateral civil action akin to that filed against Citi. Respondents's action is distinguishable from *Bunch* and *CitiFinancial II (Lightner v. Riley)* because your Respondent acknowledges this Court's holding that a hearing is not guaranteed, and thus did not appeal the denial. The appellate issue here was that there was no basis in the record as it existed to reach certain of the findings and conclusions rendered by the Commissioner. Judge

Cummings was absolutely correct that none of the decisions in the trilogy relied upon by the Commissioner address the issue here.

The Commissioner misapplied the following statement made by this Court in the context of

Bunch:

As we have 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 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 established by delegating all matters involving the 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. [underscoring added here for purposes of discussion which follows]

West Virginia Employers Mut. Ins. Co., *supra* at W.Va. 332, S.E.2d 223.

First there was no interpretive regulation promulgated by the Commissioner at issue here. Second, this appeal is limited to the failure to withdraw approval of the Rate Protection Endorsement, not the rates applicable thereto. Third, administrative appeal does not involve a jury. This was strictly the Circuit Court reviewing the record relied upon by the Commissioner and determining that there was insufficient bases for certain of the findings and conclusions rendered. Such is the province of the Court and the purpose of the statutory right to appeal. Specifically, the Insurance Code provides:

...The Court or judge shall, without a jury, hear and determine the matter upon the record proceedings before the commissioner, except that for good cause shown the court may permit the introduction of additional evidence, and may enter an order revising or reversing the order of the commissioner, or may affirm such or, or remand the action to the commissioner for further proceedings. ...

W.Va. Code 33-2-14. Likewise, the West Virginia Administrative Procedures Act provides:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It 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; or
- (2) In excess of the statutory jurisdiction or authority of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the record as a whole; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code 29A-5-4. Of the foregoing, the Circuit Court concluded that Nos. (1), (2) and (5) were applicable (Conclusion of Law No. 16, APP at Page 1329) and thus acted wholly within both its power and, indeed, its very purpose. Particularly, as to Nos. (1) and (2) it is the Circuit Judge, rather than the non-lawyer Commissioner, who is best trained to determine legality of a statute or whether interpreting the same went beyond the jurisdiction or authority of the Commissioner. With respect to Commissioner's findings of fact, the Circuit Court correctly concluded:

13. Administrative Findings are to be accorded deference **except** where the reviewing Court finds them to be clearly wrong, Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). (emphasis added here), and such findings will be overturned when there is no substantial evidence to support them, Syl. Pt. 3, *Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia*, 171 W.Va. 494, 300 S.E.2d 607 (1982). Any 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. *Billings v. Civil Service Comm'r*, 154 W.Va. 688, 178 S.E.2d 801 (1971). [emphasis in Circuit Judge's Order]

Thus, the Circuit was precisely within its appellate jurisdiction in reversing the Commissioner.

B. THE COMMISSIONER’S ASSIGNMENT OF ERROR THAT: “THE CIRCUIT JUDGE FAIL[ED] 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

The Commissioner’s argument is perplexing (Brief of Petitioner The Insurance Commissioner of West Virginia beginning at page 17). Despite his historical efforts, resulting in this Court’s determination that the Commissioner is not statutorily required to conduct a hearing in every case¹⁰, the Commissioner now complains that Respondent here did not challenge that teaching (*Id* at 19). Even more baffling, having acted within his authority to deny a hearing, the Commissioner is nonetheless critical that Respondent did not provide sworn testimony on his own behalf (*Id* at page 18). Completely inapposite, the Commissioner next quotes this Court’s holding that “the burden for disapproving the validity of such rates is placed on the entity who seeks to set the rates aside” (*Id* at 19)¹¹. The undersigned did **not** challenge the **rates** associated with the RPE.

¹⁰ “With regard to Bunch’s argument that it was never provided the opportunity to have a hearing before the Commissioner, we recognize that the Commissioner has the authority pursuant to legislative rule to refuse a request for a hearing upon the determination that a hearing ‘[w]ould serve no useful purpose’. 114 C.S.R. § 13-3.3.b.” That is exactly what the Commissioner determined in the instant case [Conclusion of Law No.: 25 at APP page 1066]. Hence your Respondent’s forthright decision not to appeal that point.

¹¹That quote comes from *Citifinancial I*, but the Commissioner omits the Court’s internal citation to 33-20-5(d), i.e., the rate filing statute, not 33-6-9, the form filing statute (S.E.2d at 375). Even more recently, Justice Loughry, at first reiterating former Justice McHugh’s scholarly analysis, was similarly attentive to detail, and likewise limited the new *Bunch* syllabus points to rate filings only:

3 “Any challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of West Virginia Code §33-20-5(d) (1967) (Repl. Vol. 2006) in a proceeding before the Commissioner. Syt. Pt. 3, *State ex rel Citifinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

4. “The presumption of statutory compliance for approved rates set forth in West Virginia Code §33-6-30(c) (2003) (Repl. Vol 2006) may only be rebutted in a proceeding

The undersigned filed a Petition for Hearing and Issuance of Subpoenas to determine whether prior approval of the **endorsement** itself should be withdrawn either because it (a) violates Chapter 33; (b) contains misleading clauses; (c) that the title itself is misleading; that it is being solicited by deceptive marketing; (d) that its benefits are unreasonable in relation to the [unchallenged] premium charged; or (e) that it is not sufficiently broad as to be in the public interest (grounds mandating disapproval of forms under W.Va. Code 33-6-9). Simply put, this is not a *Bunch* case.¹²

Of course, having determined that approval of the endorsement should be withdrawn, Erie would not be able to charge the approved premium with respect thereto, and that necessarily means returning to the already approved [and also unchallenged] traditional rate which, it should be recalled, is what the record indicates the undersigned was quoted when he first inquired about substitution of vehicles (APP at Page 1009). In that regard, however, the Circuit Judge properly left the details of the transition entirely between the Commissioner and Erie.¹³ What's wrong with that?

before the Insurance Commissioner". Syl. Pt. 4, State ex rel *Citifinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

5. "By design, insurance rate setting involves the prospective use of proposed rates which are calculated based on cost projections derived from past experience combined with a reasonable expectation of future losses and expenses."

6. "The administrative costs and expenses specifically authorized by the legislative rate making rule to be included in insurance premiums, such as agent commissions and policy acquisitions or servicing expenses, are prospective in nature." See 85 C.S.R. §8-11.2.

¹²In *Bunch*, a policyholder sought to challenge a **rate** which included a charge for an agent commission, which the policyholder asserted was not actually incurred by the carrier.

¹³"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 [footnote omitted]. 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." APP at page 1331.

C. THE COMMISSIONER'S ASSIGNMENT OF ERROR THAT: "THE CIRCUIT COURT FAILED TO CONSIDER THE RECORD BEFORE IT"

In his response brief below, the Commissioner cited to his own Order, the pleadings of the other parties, the 33-20-9 transcript containing the undersigned's adverse questioning of Erie Vice President Cody Cook, the agent's Activity Notes, the applicable Declarations Pages, the "Important Notice" (not challenged here), and the affidavits misrepresented to be a part of the administrative record below but which were actually prepared and added post appeal¹⁴. Never once did the Commissioner's brief cite to any of the technical pages of the Erie filing from which it could ostensibly be gleaned, for example, that RPE properly took into consideration the statutorily mandated age 55 discount, or that the benefits provided by the RPE are reasonable in relation to the premium charged, or were sufficiently broad as to be in the public interest (W.Va. Code 33-6-9). (See Response By the West Virginia Offices Of The Insurance Commissioner To Brief In Support Of Petitioner's Appeal, generally, at APP Pages 1192 - 1234). Likewise, at the oral arguments below (full transcript beginning at APP Page 1335 with argument by the Commissioner's counsel beginning at APP Page 1369), there was no such specific reference. The Commissioner's Counsel did vaguely say:

I think there is clear evidence when you have over 1,000-page record we have provided to the Court. We provided the filings. They are very specific on these matters. (APP Page 1379)

* * *

This is a transparent process. We have provided all this information to you. (APP Pages 1385 - 1386)

Counsel then distanced himself from the adverse 33-20-9 testimony of Erie's Vice President:

¹⁴See the Circuit Court's Finding of Fact No. 3 at APP Page 1320.

I don't believe that witness is necessarily dispositive of the whole company ...

The filings speak for themselves. ... (APP 1386)

To now be critical of the specially assigned judge whom counsel imagines did not pour over those thousand pages, seems wholly blind-siding.

Conversely, Respondent here cited the Circuit Court to Record/APP Pages: 1026-1027 (Erie letter misrepresenting that the undersigned opted for RPE), 625 (the RPE itself), 720 (the misleading Agent Marketing Aid), 728 (portion of the subject filing wherein Erie (mis)represented that its RPE was strictly optional), 740 (portion of the subject filing wherein Erie (mis)represented that adoption of RPE would be revenue-neutral, and 808 (portion of a separate filing demonstrating Erie's Preferred Tier History under traditional rating and indicating a decreasing trend)¹⁵, enlarged each of them on an ELMO machine while referencing them during oral argument, and followed up by e-mail, copied to all counsel, attaching the foregoing for ease of reference by the Court.

Not surprisingly, the Circuit Judge referred to each of those pages specifically brought to his attention in rendering his Decision On Appeal below, but also cited far beyond just those that were argued (APP beginning at Page 1319 - see, in particular, footnotes 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 23, 24, 25, 26, 27, 28, 29, 30 and 31).

Erie nonetheless complains:

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 (Brief Of Petitioner, The Insurance Commissioner Of West Virginia, at page 20).

¹⁵Transcript of oral arguments at APP Pages 1343, 1349-1351, 1355-1356, and 1363.

Erie further complains that:

Respondent King offered no evidence that Erie intentionally misrepresented any information in its filing (Brief of the Petitioner, The Insurance Commissioner Of West Virginia at page 22).

But this wasn't a civil action for fraud, this was an administrative review to determine whether prior approval of Erie's RPE should be withdrawn, as required, for any of the reasons set forth in W.Va. Code 33-6-9, none of which connote intentionality. The Circuit Court addressed each of those statutory reasons, and found every one of them to apply, and every one of them to have been disregarded by the Commissioner.

(a) RPE Violates Chapter 33

The Circuit Court cited to the following 33-20-9 testimony taken prior, but then supplied to the Commissioner with the Petition filed with the agency, where it was subsequently ignored:

- Q. Cody, does the application of the RPE impact any other discount that I might otherwise qualify for, [or] become qualified for?
- A. Can you define impact?
- Q. Cause me to lose.
- N. No.
- Q. I'm fairly close to the 55 mark. Rate Protection is currently on my policy. If that remains the same and I turn 55 will I get the age 55 discount?
- A. Get the age 55 discount? Yes. It will not have an impact on your premium because we've locked in the premium as the coverage defines. Until such time that you change drivers, vehicles, or address and we go back to the algorithm.
- Q. Okay. That sounded inherently inconsistent to me.
- A. It's probably because of how you're defining. So what do you mean by the discount?
- Q. As I understand, Erie offers a discount to people 55 years and older. Under traditional rating, my rate would go down at age 55.

- A. Correct.
- Q. I'm asking you with rate protection is that true? I think you told me yes, but then you also told me the rate would stay the same, where I'm at.
- A. That's because you define these things differently than I am. So the discount will show up on the dec 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've made one of the qualifying triggers.
- Q. All right. So back to the original question; yes, it will cause me to lose that discount unless I take off the rate protection endorsement?
- A. Again, lose the discount is something you're defining differently than what I am. Your premium will not go down at renewal if you've locked in the premium optionally. You will have the opportunity, if you choose, at age 55, to go back to the traditional rating.

Conversely, W.Va. Code 33-20-18 mandates:

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.

Unequivocally, Judge Cummings was correct that the standard operating procedure outlined by Erie does not comply with the statute. The contrary determination by the Commissioner was clearly wrong. Spin by Erie and the Commissioner that an insured could always ask to eliminate RPE and return to traditional rating thereby triggering the discount does not withstand scrutiny because it assumes that RPE was voluntarily added and that the insured knows to ask that it be removed when the time comes. While Petitioners further argue that there's no proof that the undersigned was personally denied the discount, and that no damages were shown, again, this is not a civil action for money damages. This is merely a proceeding to determine the propriety of the RPE form. Clearly, it is not proper, and the Circuit Court's determination should be affirmed.

(b) RPE Contains Misleading Clauses

Page 25 of the Commissioner's brief purports to quote footnote 9 from the Circuit Court's

Decision on Appeal but omits the references to the record actually contained as follows:

Erie's RPE begins: "Your policy premium will remain the same unless one of more of the changes listed in paragraphs 1. or 2. below occur: ...". (Record at page 625). 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. (Record at pages 404, 485-487).

Page 404 of the record below (also APP 404 here) was a portion of the 33-20-9 pre-petition hearing wherein the immediate change triggered by RPE was confirmed by Erie Vice President Cook:

- Q. I want to focus on the changes that took place when I substituted vehicles in 2012 and see if you're in a position to agree with me that that resulted, and I'll go ahead and add the word exclusively, from the rate protection endorsement.
- A. You had a premium change associated both with the exposure change that you made, the vehicle, and the addition of RPE or rate lock.

The Circuit Court's additional citation to Record Pages 485-487 (APP 485-487 here) referred to the following continued testimony:

- Q. ... If I add RPE, but then let's say within a couple years I have an event triggering change. Is the new rate, by that I mean subsequent to the change, the same as it would have been if I had stayed with traditional rating, meaning I never had RPE to begin with, or higher?
- A. The term higher makes this question more complicated to answer. Let's take the word higher out for a second. So the traditional price — we'll try going this direction; you can tell me if this doesn't make sense. But let's take rate protect[ion] out of the conversation just for a moment.

Traditional pricing, we use a 12 - month policy, so in effect we use filed rates for an effective date for 12 months. And we have the opportunity to, in that time frame, make a rate change, and you saw some negatives, we've also filed some positives. And so at the end of that 12 months when you get your renewal, in just the traditional rating, we've had the opportunity to at least consider making a rate change in that time frame.

As we discussed, between 2010 and 2012, until '11 of '12, we didn't make any rate

changes so your rate essentially would stay the same, barring other policy changes, which I don't think you're referring to. So in the traditional rating it's every 12 months. I'll tell you that the vast majority of our competitors do this on a six-month basis, so they have the opportunity to change their rates every six months. And that, again, is through the filing process and whatnot.

So your specific question was in the traditional between those two years would my rate change? Yes, it's possible and probably likely that your rates would have changed over those two years. So, no, you would not have the same rate.

And then I think you added the complexity of rate protection. So if you got rate protection, let's say in 2013, and in 2015 you had a qualifying change, one of those three. We reconsider your rate protection premium based on whatever information you have at that time. And we go through the entire algorithm again. The traditional price, it is un-impacted. It's just the way it would have been had rate protection not been incorporated.

So, in summary, if your policy is endorsed with Rate Protection, but you trade cars, add or delete a driver, or change the address where the insured vehicle is principally garaged, you can then either return to traditional rating and endure whatever changes had otherwise taken place while you were instead under RPE, or you can keep RPE going forward albeit at a new RPE rate.

Nowhere does the Rate Protection Endorsement mention the immediate change upon initial endorsement (APP 625). On the contrary, it specifically, and incorrectly, says “[y]our policy premium will remain the same unless one of more of the changes listed in paragraphs 1. or 2. occur:...” (underscoring added here for emphasis). The Commissioner does not now even attempt to defend the endorsement language itself. Instead, he points to the Important Notice (APP 194), not a part of the policy, and its somewhat more candid verbiage:

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. ... (Id)

The Commissioner does not point out that the very same Important Notice earlier states:

In the case of any conflict between this notice and the endorsement, the endorsement is controlling. (Id)

Moreover, while the Commissioner is critical that “the Circuit Court fail[ed] to discuss the Important Notice disclosure and other discussions concerning ‘smoothing’ of the rate in regards to the product” (Brief at 25) it was not the “Important Notice and other discussions” which were the subject of the appeal below, it was the RPE itself.

Presumably, “other discussions” refers to the slickback brochure provided to agents for use in marketing (APP 191-192) but it, too, wrongly states:

Your premium will not change until you make one of the changes listed above, even if you have a claim. If you have purchased this endorsement and ERIE’s rates increase or decrease, your rates will remain the same.

One of the benefits of this endorsement is that you can add or delete the endorsement when one of the above changes occurs or when your policy renews annually. You are in the driver’s seat - you can lock in your rate when it suits your situation. (APP 192)

The Circuit Judge was exactly correct: “The RPE [and sometimes the “Important Notice and other communications”] contains misleading clauses” (APP 1321).

(c) Even the title, itself, “Rate Protection” Endorsement is misleading

Again, the Commissioner omits the record pages cited by the Circuit Court. In it’s entirety, and complete with bold print and underscoring emphasis supplied by the Court, the footnote stated:

The 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 [] have been trending downward). Record pages 474-476, 478-479 and 808. [bolded text and underscoring in original]

The Court was again citing to the pre-petition 33-20-9 testimony of Vice President Cook (entire colloquy began at the bottom of 472):

Q. Have auto rates generally been trending up or down the last few years?

A. Generally speaking, there were — and were speaking generally here; I hope you can appreciate that. Yea, but over the last decade they’re relatively flat and as of recent,

just generally speaking, we've seen a little bit more rate activity than in the past.

Q. Trending up or trending down?

A. Trending up, increases.

Q. Is that true of preferred?

A. That information's really difficult to get, so I'm not sure that I'm aware of preferred versus non-preferred. So I don't believe I'm in a position to give you that type of detail.

Q. Turn to page [APP 808], if you would.[¹⁶]

A. All right.

Q. Does that help you?

A. This is our rate change history in the State of West Virginia for Erie Insurance Property and Casualty.

Q. And specifically the preferred tier?

A. That's specifically the preferred tier.

Q. Are they trending up or trending down?

¹⁶APP 808 contains the following chart:

ERIE INSURANCE PROPERTY & CASUALTY
WEST VIRGINIA PRIVATE PASSENGER AUTO
Rate Change History - Preferred Tier

	<u>11/1/07</u>	<u>11/1/08</u>	<u>1/1/09</u>	<u>11/1/09</u>
Bodily Injury	0.0%	-2.5%	-1.0%	-8.4%
Property Damage	-0.5%	-2.1%	-1.0%	2.4%
CSL	-0.1%	-2.6%	-1.0%	-4.6%
Medical Payments	-0.6%	-2.2%	-1.0%	-1.7%
UM/IUIM	1.2%	-1.9%	-1.0%	0.0%
Comprehensive	-0.3%	-2.7%	-1.0%	5.7%
Collision	-0.3%	-2.2%	-1.0%	0.1%
Total	0.0%	-2.3%	-1.0%	-1.2%

- Q. Well, as I said earlier, relatively flat. In West Virginia over this time frame we were taking slight rate decreases, but as I said earlier as of recent we're starting to see some rate activity in the other direction, up.
- Q. I see almost all decreases in the preferred for your last four rate change filings.
- A. Maybe we should clarify the question. I thought you were asking rates in general.
- Q. I did initially and then I asked you preferred in particular and you weren't able to answer me either. My question is does this —
- A. Sorry; but you're looking at an Erie Insurance in West Virginia chart for a particular company. I was speaking of the industry in general.
- Q. Oh, fair enough. Okay. I get the distinction. Let me go back.
- A. Okay.
- Q. With respect to Erie, the last several years are auto rates trending up or down.
- A. Since the chart ends in 2009 —
- Q. Well, this chart's preferred. You asked me to start over and I am. We're —
- A. Sorry; I wasn't done saying what I was going to say, so — this chart ends in 2009. You're asking recent, so when I hear recent I think the last couple years. Is that a fair — what's your definition of recent?
- Q. I think I asked last several years, was my question, but —
- A. Okay, what's your definition of several?
- Q. I knew I was going to refer you to this chart [which goes] back as far as 2007, so that's generally the time frame I had in mind.
- A. All right. Well, how about we extend it to recent, because when I think of the last several years, I'm thinking 2012, 2011, 2010. So that was the basis for my answer. And I'll tell you that between 2009 and 2011, we did not take any rate changes in the State of West Virginia preferred company. ...

Given that history, again, the Circuit Court was exactly right, the title Rate **Protection** Endorsement was itself misleading and the Commissioner was statutorily required to withdrawal prior approval accordingly.

(d) Purchase of the RPE is being solicited by deceptive marketing.

In his one paragraph addressing this issue the Commissioner quotes a portion of the Circuit Court's Order but again omits the Court's references to the record (Brief of the Commissioner at page 27). The Marketing Aid (APP at Page 720) referred to by the Circuit Judge (Decision on Appeal, footnote 11, at APP Page 1321-1322) touted the following:

Key Selling Points

- Gives Policyholders control over their auto rates by extending our 12 month rate.
- The premium will not change, even if a claim occurs, until one of the changes listed above is made.
- The endorsement can be added or deleted when one of the three changes occurs or on the policy anniversary date.^[17]
- If the amount or type of coverage is changed, or eligibility for a discount is gained or lost, only the premiums for those affected coverages will be changed. ^[18]
- Our analysis shows that approximately 50% of Erie's preferred auto business does not make any of the three changes described above and could lock their auto rates for at least three years.

How the endorsement benefits you

- It's a competitive advantage that can distinguish the Erie auto policy
- Stable pricing minimizes shopping
- Increased retention
- More stable loss ratio
- Increased referrals

Conversely, while none of the agent benefits was disclosed to the Consumer, the Court duly noted that Consumers were instead lured by the following misleading statements in the separate slickback supplied to agents for delivery to applicants at the time of solicitation (APP 717-718 at 718):

¹⁷Note the discrepancy with counsel's representation here that Respondent could drop RPE upon turning age 55, or at any time, but opted not to do so.

¹⁸Note the discrepancy with Vice President Cook's testimony, previously quoted, wherein he reluctantly admits that RPE causes the insured to forfeit the age 55 discount in its entirety.

It seems that the cost of just about everything is on the rise these days.^[19] We can help you make sure that your auto insurance premium isn't one of them. With Erie's new Rate Protection Endorsement, you can lock in your auto premium so you'll pay the same premium year after year.

The Circuit Court also cited to the following testimony by Vice President Cook (Decision on Appeal, f.n. 11, at APP 1321-1322):

Q. ... With respect to the agent[s], do they participate in any form of bonus system?

A. Any sort of bonus system? Could you be more specific?

Q. Sure. Let me just fast forward several questions and tell you where I'm going. I think the answer to that question is yes; I think part of the consideration is loss ratio and I think you'll agree with me that this favorably impacts the agent's loss ratio. True or false?

A. So ability — it's hard to say true or false, because again, we are targeting the same profitability regardless of product. So we want the same loss ratio, and the goal really is to associate the correct premium with the correct risk.

Q. Do you deny that it favorably impacts an agent's loss ratio?

A. Do I deny it. No, if they get the appropriate premium for every policy, then certainly they'll be profitable.

Q. Turn to page [APP 720], if you would.

A. All right.

Q. That was a draft agent marketing aid that you submitted to the Commissioner, correct?

A. Yep.

Q. And if you go down to the next to the bottom heading where it says how the endorsement benefits you, you asked the Commissioner to approve you telling agents it was going to create for them a more stable loss ratio; correct?

¹⁹No mention that auto rates in Erie Insurance Property and Casualty's preferred tier in West Virginia, the only group to which RPE is offered, is one of the exceptions to rising costs, or that RPE might more likely prevent a rate decrease.

A. Correct.

Q. And are you, in fact, using this marketing aid?

A. Yeah, I'm not sure if actively use[ing] it any more. We certainly were when we rolled this out.

(APP 468-470)

Q. Given all that you've told me about it assisting with getting the costs more accurate and the like, why have two? Why not just go to the RPE system?

A. We recognize that the product won't be preferred by every customer. We recognize that not everybody wants to lock in their premium, and it is not necessarily advantageous to everyone. And again, this is — primary focus behind this product was the customer concern of rate changes at renewal. So because it's unique we wanted our customers to have the option.

Q. Okay. One of the things you just told me is that it's not advantageous to everyone. But I thought earlier I asked you if there was any disadvantage and you told me no, and I asked if there was anyone to whom it should not be recommended and you told me no. Reconcile those statements for me.

A. You did not say that it would not be recommended. Your term was that it should be — and I don't have it written down, but discouraged. My perspective is that it should be offered to everyone, so that would mean that we wouldn't discourage it to anyone. But does it make sense for everyone? Not everybody wants to try a new product with a new approach. Not everybody wants to lock their premium.

(APP 481-483)

Q. Give me an example of an insured for whom the RPE would be particular[ly] beneficial in your opinion.

A. I think it's a perfect product for the type of person who is not changing drivers or vehicles frequently, so they don't have children in the house that are going to be coming under the policy soon. They don't change their cars frequently, you know, let's say two or three years. And especially beneficial for people on fixed incomes who, while their insurance costs may have inflation in them, their salaries may not be inflation adjusted. Think [of the] retired, if someone is retired and has a fixed income, I think it's particularly beneficial for that type person.

Q. Give me an example of an insured for whom you would say not beneficial?

A. If you're making changes every three months to those things, which may sound

unreasonable, Vince, but it does exist. It may not make sense for you to select the product. But again, my preference would be to leave that up to the customer based on the knowledge they have.

Q. Does Erie ask it's agent to explain RPE to the insured?

A. Yes, we do.

Q. What should the agent say or ask?

We expect them 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 protect, rate protection.

Q. Are there any specific questions that you encourage them to ask? For example, you just mentioned, how frequently you change cars, members of the household, those sorts of things.

A. I think we talked about those things, but I wouldn't say that we specifically encourage that they ask any questions per se.

(APP 489-491)

Q. Should the agent ask those questions before endorsing the policy?

A. Should they as a practice ask those questions?

* * *

A. Yeah, so I'm trying to imagine what that conversation might look like, Vince

Q. Generally, do you anticipate moving any time soon, do you anticipate any additions to the household anytime soon, any reason you might be moving where you garage the vehicle anytime soon?

A. It seems like a reasonable byproduct of the explanation of the product, but would I expect it? Agents do a lot of stuff in a day, so yeah, I wouldn't necessarily expect them to investigate each situation.

Q. And did you ask or did Meg [in house counsel] represent to you that she asked anybody at the Garlow Insurance Agency as to whether those kinds of discussions were had?

A. I did not ask if she specifically asked those questions.

Q. Do you know if anybody at the Garlow Agency has ever asked any insured those questions?

A. I do not know. I have not specifically asked the Garlow Agency if they have asked any of those specific questions.

(APP Pages 534-535).

That testimony notwithstanding, the Commissioner concludes this argument by representing to this Court that “there simply is no deceptive marketing proof in the record” (Brief of the Commissioner at page 27). Not only is it in the record, it is unrefuted. RPE is touted as preventing increases that, historically, were not happening, the down-sides are never mentioned, and no questions are to be asked to determine whether it might help or hurt the insured. The Commissioner was clearly wrong and Judge Cummings was correct in determining that the “[p]urchase of RPE is being solicited by deceptive marketing” (Decision on Appeal, APP Page 1321).

(e) The benefits provided by the RPE are unreasonable in relation to the premium charged

Once again, the Commissioner purportedly quotes from the Decision on Appeal but silently omits the Court’s reference to the portions of the record relied upon (Brief of the Commissioner at page 28). The Circuit Court cited APP Pages 454-457:

(Question beginning on page 453, asking about experience in other states wherein RPE had previously been approved)

Q. Did you have anything that would have told you, and I understand perhaps not reliably so because of the insufficiency of time, but nonetheless did you have anything that would have told you whether the trend was additional premiums being earned as a result of the RPE, or less premium being earned as a result of RPE?

A. So that question, while you think and feel that it’s simple, is a little complicated. So I’ll try to break it into its two pieces. Premium can be increased on a per policy basis, so Vince King, his premiums. Or it can be increased on a PVB or a policy volume basis, so lots of Vince Kings. So the question of did the premium per policy increase for this product, the answer is actually, yes, it did, much to our surprise.

But the second question's more complicated and I'm not sure that anyone could with a straight face give you a confident answer of did it increase our policies in force. We did see a bump in policies wherever we brought this product out, but it's very difficult in a marketplace, especially as competitive as auto insurance, to isolate any one particular factor and its influence on production.

So we did see an increase in average premium, which surprised us. We believe we saw an increase in policies in force, though, though I'm not confident in saying that we know for a fact that it did. It's complicated to answer.

Q. Okay.

A. Does that help?

Q. So [upon] approval from West Virginia, given that knowledge that you had, were you thinking that likewise you would see an increase in premiums with respect to the West Virginia business, or for some reason did you expect West Virginia to be different than your experience in any [of the] other states?

A. Vince, to be candid, we weren't sure whether to predict that into the future or not. The expectation, when you roll out new pricing, is that something we call winner's curse, the belief that you're going to win where the price goes down and not where the price goes up.

So at that point I — while you're asking me to go on record with what we believed at the time, I'm only telling you from my best memory I don't believe we expected that to continue. In fact, like I said before, I think we were quite surprised that it was happening at all. But we didn't have any different expectations for the State of West Virginia than our other markets.

Q. Therefore, for what reason did you not expect it to continue?

A. For the same reasons that I had stated before. The theory is that you win where the price goes down. And we were so new to the marketplace that there wasn't enough data to suggest that we should deviate from our original expectations,

Q. Did the initial results that it was causing an increase in premiums suggest to you that there was a flaw in the rates at all?

A. No, for that type of question you would look at the - there's two ways to look at that. One is the percentage of people receiving an increase or decrease in price, and we were targeting around 50%. It certainly wasn't [an] objective to get more or less premium. And the second way to track that is loss experience, and as we talked about before, it takes a little bit of time to get loss experience. So that wouldn't have been included in our discussion at that point.

Q. You had indicated to me that to be statistically accurate you would want to have at least three to five years' worth of data, and now having at least three plus in some of the other states, do you now have data that you believe to be reliable that tells you whether indeed that trend had continued and there is still a net gain in premium as a result of RPE?

A. We believe that there's been a net gain to premium, total premium.

That evidence notwithstanding, the Commissioner makes mention that Erie "specifically pointed out the parameters of the program and why it was a reasonable and fair product" and that "[t]he Circuit Court failed to take notice that the protections provided in the RPE prevent increases for factors including **'usage, mileage, driver age, insurance score, claims or violations'**" (Brief of the Commissioner at Page 28 - emphasis added by the Commissioner). The Commissioner also points out that the overall premium, with respect to the undersigned in particular, decreased.

In summary, according to Mr. Cook, the goal was to win by losing, i.e., decrease individual policy earnings but still increase overall profit because of better retention, increased referrals, etc. But Erie got the rates wrong, and RPE also caused a surprising increase in policy earnings, or a double whammy for the consumer. As the Circuit Court noted, the RPE had become a profit center. Confronted with that evidence, the Commissioner now says but look at the "capping" which has to be worth something.²⁰ The Circuit Court said but nowhere does that analysis appear in your

²⁰APP Page 196 is a written question and answer exchange between the Commission analyst and the company back at the time of the 2010 filing for approval. The analyst was challenging that the existing (traditional) rating manual already contained a renewal capping factor that prevented a change of more than 10% which, the analyst perceived, would make RPE redundant. Erie responded that the traditional rating rule did cap at +/-10%, but RPE capped at +/-0.0% and, moreover, RPE applied not only to renewal but also to rating factor changes such as usage, mileage, driver age, insurance score and claims, and thus it was additionally approved. The retrospective evidence put before the Commissioner in 2013 established that endorsement of RPE upon mere substitution of vehicle in Respondent's case actually resulted in a 40% increase in liability (the coverage everyone has to have) but a slight decrease overall (by "winner's curse" design). The fact that the actual results were in stark contrast to what was represented at the time of approval got a complete pass from the Commissioner at the administrative level. More astutely, the Circuit Court noted both the lack of analysis by the Commissioner in 2013, as well as the unrefuted evidence to the contrary.

administrative record, you are simply articulating that now, and the record shows that it is not correct besides. The Commissioner cites page 196, but this Court will search in vain for any note, interlineation, highlight, dog-ear, memo, or any other indication that APP 196 was juxtaposed with the double whammy recently disclosed. Indeed, APP Page 196 is from the original 2010 pre-approval filing at which time Erie was telling the Commissioner RPE would have 0.0% rate impact (see previous page at APP 195). Later, in 2013, the Commissioner, wrongly applying the 33-6-30 statutory presumption, simply said I presume I was right the first time, without ANY new analysis and the Circuit Court so noted.

(f) The RPE, as it presently exists, is not in the public interest

With regard to this final statutory ground mandating withdrawal of prior approval, the Circuit Court focused on APP Page 808, Erie's West Virginia Private Passenger Auto Rate Change History - Preferred Tier (*supra* at footnote 16). In essence, the Circuit Court said that, given the decreasing trend in rates throughout the three calendar years and four filings next preceding the 2010 request for approval of RPE, intuitively, rate "protection" provided no benefit, at least to the consuming public. Although critical elsewhere based on his perception that the Circuit Court delved into actuarial issues said to have been reserved to the Commissioner, here the Commissioner's criticism is that the Court did not provide actuarial analysis. Curiously, neither did the Commissioner. Except for the Commissioner's decision, and affidavits added subsequent to appeal thereof, there is not one single entry in the entire administrative record to indicate that the Commissioner did any analysis in 2013 when all of the evidence cited above was brought to his attention. Instead, he wrongly applied the 33-6-30 presumption to prior approval, and denied the hearing to determine whether the same should be withdrawn. The Circuit Court correctly determined that, based on the record as it existed, and RPE in its present form, is not in the public interest, but rather Erie's.

D. THE COMMISSIONER'S ASSIGNMENT OF ERROR THAT: "SOME OF THE FINDINGS OF THE CIRCUIT COURT WERE *DE MINIMIS* AND SHOULD NOT HAVE RISEN TO A VACATION OF THE COMMISSIONER'S FINAL ORDER

There are three things as to which the Commissioner perceives that the Judge Cummings gave "great weight" but which, the Commissioner says, "should have been given little to *de minimis* weight and therefore disregarded" (Brief at Page 29). "*De minimis*" is in the eye of the beholder.

The first relates to the Circuit Court's Finding of Fact No. 3 (APP at Pages 1320-1321):

Thereafter, by cover dated the 4th day of September, 2013, the Commissioner tendered "the lower level record."²¹ The affidavits, each signed by Investigator, Larry Rosen, obviously were not a part of the record on the date of the Commissioner's "final" Order, but were instead prepared after the filing of Petitioner's appeal noting that certain of the Commissioner's finding and conclusions were unsupported by the record. Current Associate Counsel, Jeffrey Black, acknowledges that the affidavits were made post-appeal but asserts that they were prepared from "extensive notes", contemporaneous with the events described therein, while the matter was still properly before the Commissioner (OIC Response at f.n. 3. Page 6).²² No such notes appear in the record supplied, nor has the record been supplemented to include the same.²³ Nor is there anything to indicate that the Commissioner reviewed such notes in rendering his decision if, indeed, they exist. Accordingly, the Court finds that the affidavits were not a part of the record appealed from and should properly be disregarded.

This writer is not predicting that you, the Justices, will perceive the initial misrepresentation that the affidavits were part of the "lower level record" as "*de minimis*", and certainly urges otherwise.²⁴

²¹The September 4, 2013 letter was signed by former Associate Counsel, Larry Conrad. [unnumbered page of the Appendix between Table of Contents and APP 0001] (footnote in original).

²²Mr. Black was substituted for Mr. Conrad by Notice filed simultaneous with the Response By the West Virginia Offices of the Insurance Commissioner to Brief In Support of Petitioner's Appeal, on February 14, 2014). [Not made a part of the Appendix filed here] (footnote in original)

²³Petitioner noted at oral argument that, even as of that late date, none had been produced. Likewise, no privilege log or redaction list has been supplied. (Footnote in original)

²⁴Seemingly, the Commissioner's only point here is that "the investigations occurred and the investigator would have been able to testify if King had wanted to challenge their testimony" (Brief of the Commissioner at Page 30). But the Petition for Hearing was denied and King didn't have their

The second ground for the Circuit Court’s reversal which the Commissioner contends was merely “*de minimis*” and should have been disregarded is the Commissioner’s intrusion into the powers of the judiciary.²⁵ Despite first finding that the statute “evinces clear meaning” requiring that the Commissioner apply rather than interpret the statute, the Commissioner nonetheless went on to interpret the same, *in pari materia*, with others in a convoluted but determined effort to deny relief.

While the Commissioner asserts that he is a quasi-judicial officer with authority to so act, this Court has held otherwise. *State ex rel State Farm Mut. Auto. Ins. Co., v Marks*, 230 W.Va. 517, 741 S.E.2d 75 (2012). Although the Commissioner’s counsel also participated in *Marks*, he nonetheless improperly persists.

The third issue which the Commissioner prefers to deem “*de minimis*” is the Circuit Court’s Finding No. 10 (APP at Page 1325):

Petitioner has also appealed the Commissioner’s Conclusion No. 7. It has not been briefed by any of the Respondents. At oral argument, Petitioner made mention of Respondents’ unison silence, but counsel for the Commissioner again declined to address it.²⁶ The Court finds that its content was personal opinion and not the proper basis of a Conclusion of Law.

“testimony” until post-appeal. Neither did the Commissioner. It didn’t exist, there were no notes contained, and the Commissioner could not have considered.

²⁵Here the Commissioner is referring to the Circuit Court’s Conclusion of Law No. 15:

“... An agency’s intrusion, however slight and seemingly innocuous, into processes that are regarded as exclusively judicial in nature exceeds the scope of that agency’s legislative grant of authority and violates the separation of powers doctrine. Simply stated, where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1, Article V, of the West Virginia Constitution.” *State of West Virginia ex rel State Farm Mut. Ins. Co v. Marks*, 230 W.Va. 517, 741 S.E.2d 75 (2012). Here, the Commissioner’s effort to interpret the intent of the Legislature, and to read statutes *in pari materia*, constituted an unconstitutional invasion of the power of the courts. [footnote omitted].

²⁶Transcript of oral argument at pages 33 and 35-54 [APP Pages 1367, 1369 - 1388] (footnote in original).

The Commissioner's Conclusion No. 7 had stated in pertinent part (APP at Page 1060):

... Therefore, the Commissioner finds as a matter of law that Mr. King was clearly attempting to exercise his personal judgment in this matter and his dispute is squarely within the confines of *CitiFinancial* and *Bunch* and as such no genuine issue of material fact exists other than his personal dislike of the RPE program. [Footnote omitted].

Your Respondent argued to the Circuit Court as follows (APP at Pages 1172-1173):

Conclusion No. 7 merits addressing alone. The reader gets the impression that administrative toes felt stepped on by virtue of Petitioner's filing. For that, Petitioner apologizes, but notes that such perception misconstrues the intent. Petitioner's subtlety apparently having previously been missed, this brief will be more blunt: In requesting a hearing pursuant to W.Va. Code 33-20-9, and later under 33-20-5(d), 33-2-13(a) and 33-2-4, Petitioner was not attempting to do the Commissioner's job; Petitioner was hoping the **Commissioner** would do the Commissioners job. Unfortunately, he did not.

The notion of using Conclusions of Law to set forth concise points by which the decision was adjudicated originally comes from our State Constitution. There, with respect to the West Virginia Supreme Court of Appeals, the framers wrote:

When a Judgment or order of another court is reversed, modified or affirmed by the court, every point fairly arising upon the records shall be considered and decided; the reason therefore shall be concisely stated in writing and preserved with the record; and it shall be the duty of the court to prepare a syllabus of the point adjudicated in each case in which an opinion is written and in which the majority of justice thereof concurred, which shall be prefixed to the published report of the case.

In case law, and in some instances statutes and legislative rules, both the Court and the Legislature have since begun requiring that lower tribunals also incorporate Findings of Fact and Conclusions of Law so that fair analysis might be given to the basis upon which their decisions are rendered. Here, the Commissioner's "Conclusion No. 7" ... is not what the framers, or the Court, had in mind. It is *ad hominem*, and while it may well represent the faulty framework on which the Commissioner's decision was rendered, it is not a proper basis in law and should be reversed for that reason alone.

As noted by the Circuit Court, there was absolutely no response in any brief filed by any respondent below, nor did they respond at oral argument. Unrefuted, the Circuit Court correctly concluded that

the Commissioner's Conclusion No. 7 was "personal opinion and not the proper basis of a Conclusion of Law (APP at Page 1325).

III. THE COMMISSIONER'S ADDITIONAL ARGUMENT THAT "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 Commissioner argues that the trigger for entitlement to a hearing under W.Va. Code 33-2-13 is that the petitioner be "a person aggrieved" by an act or failure to act by the Commissioner.²⁷ The Commissioner correctly notes that term is not defined by Code (and that he has not promulgated any rule defining the same) and so "its plain and ordinary meaning should be applied" (Brief of the Commissioner at Page 33). As an initial proposition, your Respondent asks, if not the Named Insured to whose policy RPE was added, who can proceed?

Oddly, for "plain and ordinary meaning", the Commissioner cites to Black's, a specialized law dictionary. Black's, the Commissioner points out, provides the following definition, and thus the Commissioner argues that the undersigned was not "aggrieved":

Aggrieved. Having suffered loss or injury; damnified; injured

The Commissioner does not point out the immediately succeeding terms also defined in Black's (including the one actually used in W.Va. Code 33-2-13):

Aggrieved party. One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment. One whose right of property may be established or divested. The word 'aggrieved' refers to a substantial grievance, a denial or some personal or property right, or the imposition upon a party of a burden or obligation. See, **Party; Standing.**

Aggrieved Person. See **Aggrieved Party.**

²⁷With respect to that particular statute it is actually a moot point since the Commissioner denied a hearing and the undersigned did not appeal the denial anyway.

Note that Black's merely requires that pecuniary interest is directly affected (neutral terminology), not that damages necessarily be incurred.²⁸ Moreover, Black's states that the word "aggrieved" refers to "... the imposition upon a party of a burden or obligation". Since the Commissioner argues that, if the undersigned desires compliance with the statutory age 55 discount, he need only notify Erie to drop RPE (Brief of the Commissioner at Page 25), that certainly constitutes "the imposition upon a party of a burden or obligation". Contrary to the Commissioner's urging, having issued his Final Decision, the undersigned had a statutory right to appeal both under West Virginia Insurance Code 33-2-14²⁹ and under West Virginia Code Administrative Procedures Act 29A-5-4(a)³⁰, and the Circuit Court acted completely within its appellate powers, and should be affirmed, not reversed.

IV. THE COMMISSIONER'S ADDITIONAL ARGUMENT THAT: "THE ORDER OF THE CIRCUIT COURT [] 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 Circuit Court did not fashion the relief and specifically "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 approved".³¹ Judge Cummings merely reversed the

²⁸The Commissioner also does not mention that, when mileage on the substitute vehicle increased, and book value dropped, Collision and Comprehensive Coverages were dropped and at that point the significantly higher RPE rate for Liability Coverage did result in damages to Respondent.

²⁹"An appeal from the commissioner shall be taken only from an order entered after hearing, or an order refusing a hearing. ...".

³⁰"Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law."

³¹Record [APP] at Page 481 (footnote contained in original).

Commissioner's Final Order insofar as it failed to withdraw approval of RPE as it presently exists.

The Commissioner incites fear that "this will clearly affect approximately 38,000 policyholders" who "will be forced to choose other coverage and likely incur premium increase, if not potential cancellations or non-renewals", and that "said policyholders will be removed from a product that they optionally chose as a viable way of managing their resources" (Brief of the Commissioner at Page 35). In actuality, the Circuit Court specifically stated that nothing precludes Erie from again seeking approval of a modified RPE in full compliance with West Virginia law (APP at Page 1331). The Commissioner should be above CALA-type spin. The Circuit Judge should be affirmed.

V. THE COMMISSIONER'S ADDITIONAL ARGUMENT THAT: "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"

With this additional argument the Commissioner gets it partially correct. In reviewing any action or inaction by the Commissioner, the Circuit Court should treat the Commissioner's jurisdiction as primary, but not exclusive. The Commissioner gets it mostly wrong with regard to the standard of review. Despite primary jurisdiction, the Conclusions of Law as to which the Commissioner is mostly aggrieved were to be reviewed by the Circuit Court *de novo*, which it did, and this Court will do the same. Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). This Court would normally give deference to the Findings of Fact by the Commissioner but for the fact that, here, the Circuit Court properly found those at issue to be clearly wrong. *Id.* Only the ultimate disposition, here the withdrawal of approval of RPE as it presently exists, will be

reviewed for abuse of discretion. *Id* at Sy. Pt. 2. It was not abuse.

“Primary” does not equate to infallible. In discussing Justice McHugh’s analysis in CitiFinancial, Justice Loughry recently stated:

Despite this presumption [referring to the statutory provision at W.Va. Code 33-6-30(c) also cited here] we observed that ‘the Commissioner has the continuing authority to disapprove an insurance rate for noncompliance with the requirements of chapter thirty-three, article twenty’ and that ‘an aggrieved person or organization has the right to demand a hearing for the purpose of challenging any insurance filing as being noncompliant with the statutory requirement that govern insurance rate setting. 223 W.Va. at 236, 672 S.E.2d at 372 (citing W.Va. Code 33-20-5(c), (d)).

Bunch, supra, at S.E.2d 218. The problem with the Commissioner’s argument here is that it does not allow an appellate court to reverse under any circumstance. Even in this instance, where the Circuit Court found the Commissioner’s findings to be clearly wrong, the Commissioner would have this Court say that the Circuit Judge “abused his discretion” in so doing. Under what standard would the Commissioner concede he could be reversed? None.

The West Virginia Administrative Procedures Act provides:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inference, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (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

W.Va. Code 29A-5-4(g). The Circuit Court correctly held that (1), (2) and (5) above applied.

Conclusion of Law No. 16 at APP Pages 1329-1330). The Circuit Court added the following footnote 38:

In resisting the instant appeal, the Commissioner relies on the trilogy of decisions in *State ex rel Citifinancial v. Madden*, 223 W.Va. 329, 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*, 233 W.Va. 573, 760 S.E.2d 142 (2014) (see transcript of oral argument at page 35). None of them address this issue here. In *Citi* and *Burch*, 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 refused. This is an appeal of right, pursuant to both W.Va. Code 29A-5-4 and 33-2-14, and thus does not intrude on the Commissioner's authority which, in this case, has been fully exhausted.

(APP at Page 1330). While the Commissioner might prefer to be king, he is not. Both the Circuit Court and this Court have appellate jurisdiction to right the wrongs of the Commissioner.

VII: THE AMICI BRIEFS

Telling is the fact that, while each purport to appear in support of Erie, as well as the Commissioner, neither the American Insurance Association/Property Casualty Association³², nor the West Virginia Insurance Association, say one word in support of Erie's RPE and address only the Commissioner's power. No doubt that's because each silently recognizes that RPE gave Erie an unfair advantage over other member carriers more forthrightly complying with the regulatory process.³³ Still, they would rather have the Commissioner decide any issue that may ever arise, and hence their participation.

³²“Pursuant to West Virginia Rule of Appellate Procedure 30(b), AIA and PCI affirmatively assert that no counsel for a party to this action authored this brief in whole or in part”. Amici Brief at f.n. 1. In truth, Steptoe & Johnson regularly represents Erie. See, inter alia, the recent precedent-setting decision in *Cherrington v. Erie Ins. Prop. and Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013). As a matter of fact, within days of Steptoe & Johnson filing its Amicus brief so stating, it sent a letter to the undersigned advising not only that it was representing Erie, but that it was representing Erie against this writer, in yet another matter.

³³If tendered as a rate filing, rather than under the guise of a form filing, W.Va. Code 33-20-5(1) would have required public notice.

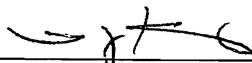
Like the Commissioner and Erie, Amici point the Court only to rate-making authority, and fail to address, or even mention, the distinction between rates and forms. Intuitively, this Court will understand the insurance industry's collective preference for primary jurisdiction in the Commissioner as to all matters, and nothing more need be said on that subject that wasn't said in Response to Erie's Arguments A, B and D, and the Commissioner's Arguments A and B, above.

CONCLUSION

Erie can hardly be blamed; it's a business. But exactly why the regulator turned a blind-eye to these many concerns remains a mystery. Why wouldn't the Commissioner prefer that Erie more accurately call it the Optional Temporary Fixed Rate Endorsement, so as to draw attention to the fact that it is neither required nor permanent, and that it applies regardless of whether loss experience would otherwise dictate either increase or decrease? Why not require that the text be changed to explicitly state that there will be an immediate rate change just to effectuate? Why not require that the necessary trigger questions be asked, and explanation given that trading vehicles and other such changes will defeat its purpose? Why not tell the consumer that endorsement will mean that discounts are suspended unless and until RPE is removed? Why not inquire of other policyholders to ensure that RPE is only added upon request? Why not conduct a data call once it has become actuarially reliable so as to make sure that experience does not necessitate adjustment?

As pursued, the Commissioner was given primary jurisdiction to do all of that, but failed to exercise it. The Circuit Court had appellate jurisdiction and, based on the record, and applying the appropriate standards, it properly reversed. Respondent asks that this Court now affirm accordingly.

Respectfully submitted by Respondent,



Vincent J. King, W.Va. Bar No. 4267

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served copies of the foregoing Respondent's Brief by depositing true copies thereof in the United States Mail, first class postage prepaid, this 18th day of February, 2015, addressed as follows:

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