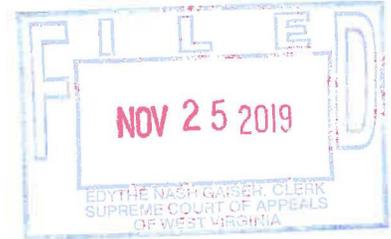


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**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON**



THE CITY OF KENOVA, WEST VIRGINIA

Petitioner,

v.

No. 19-0919

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Respondent.

**STATEMENT OF THE RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
OF ITS REASONS FOR THE ENTRY OF ITS ORDER
OF SEPTEMBER 6, 2019 IN CASE NO. 18-1232-S-C**

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
By Counsel,**

**JOHN R. AUVILLE, ESQ.
STAFF ATTORNEY
WV BAR No. 8057
jauville@psc.state.wv.us**

**JESSICA M. LANE, ESQ.
GENERAL COUNSEL
WV BAR No. 7040
jlane@psc.state.wv.us**

**201 Brooks Street
Charleston, WV 25301
(304)340-0450**

November 25, 2019

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Petitioner,

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No. 19-0919

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Respondent.

**STATEMENT OF THE RESPONDENT
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF
OF SEPTEMBER 6, 2019 IN CASE NO. 18-1232-S-C**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA:**

The Respondent Public Service Commission of West Virginia (Commission) hereby tenders for filing its reasons for the entry of its Order of September 6, 2019 in Case No. 18-1232-S-C that is the subject of this appeal.

STATEMENT OF THE CASE

On August 31, 2018, Rebecca Lynn Florczak (Complainant) filed a formal complaint with the Commission against the City of Kenova (City or Petitioner). Ms. Florczak requested a leak adjustment on her water and sewer bills due to a commode leak, which occurred following the death of her husband and was not obvious or detectable to her.

Ms. Florczak's husband died on June 27, 2018 after suffering from bladder cancer. Ms. Florczak and her daughter testified at an evidentiary hearing that her husband's bladder cancer

required him to use strong chemicals as part of his cancer treatment. (Tr. p. 22). The treatment is called BCG and is a medication injected into the bladder to eat away cancer cells. (Tr. p. 38). Every time Ms. Florczak's husband flushed the commode, he had to add a chemical solution to the commode to dilute the toxicity of the chemicals. (Tr. p. 37). Due to the nature of the cancer treatments, the bathroom was strictly off limits to guests before and after her husband's death. (Tr. p. 37). Ms. Florczak testified that she did not let anyone go into that bathroom. (Tr. p. 22). Ms. Florczak did not enter the bathroom following her husband's death because it had not been properly sanitized. (Tr. p. 38). After the receipt of the high bill, Ms. Florczak's daughter entered the room to investigate the possibility of a leak. Ms. Florczak's daughter, who is a nurse, testified she regretted that she did not get "geared up" before entering that bathroom to check for the leak. (Tr. p.39). The commode in that bathroom was leaking. Promptly upon discovery of the leak, it was fixed. (Tr. p. 38).

The commode at issue is in the master bathroom located off of the master bedroom and through two doorways. One door is the bathroom door shutting off the master bathroom from the bedroom and the other door separates the commode within the bathroom. (Tr., p. 15). Ms. Florczak testified that although she slept in the master bedroom, she did not hear the water running in the bathroom. (Tr. p. 20). Ms. Florczak stated that she exclusively used the guest bathroom instead of the master bathroom. (Tr. p. 21-22). Every item of Ms. Florczak's toiletries was in the guest bathroom and she would not even use the master bathroom in the middle of the night. (Tr. p. 37).

After discovering the running commode, Ms. Florczak contacted the City but the City refused to make any bill adjustment or offer Ms. Florczak a payment arrangement on the high water and sewer bills. The City, instead, required her to immediately pay the bills in full in order to maintain her water service. (Tr. p. 24). Ms. Florczak filed the formal Complaint with the

Commission on August 31, 2018.

The City filed an answer in this case arguing that because the high bills were a result of a running commode, Ms. Florczak did not qualify for a leak adjustment and the Commission should dismiss her complaint. (City Answer 1, September 11, 2018).

Commission Staff conducted an investigation of the complaint and on November 29, 2019, filed its Final Memorandum recommending Ms. Florczak receive a leak adjustment credit in the amount of \$233.12. (Staff Fin. Memo 5, Nov. 29, 2018). Commission Staff stated the high water and sewer bills were most likely caused by a commode but was not obvious or detectable to the customer because that area of her residence was closed off due to the husband's use of toxic chemicals and his subsequent death. The high water usage occurred in the month following her husband's death when Ms. Florczak had not yet sterilized the bathroom to make it safe to use. (Staff Fin. Memo 4, Nov. 29, 2018).

At the December 21, 2018 evidentiary hearing before a Commission Administrative Law Judge (ALJ), counsel for the City stated his objection to the Commission's practice to restrict certain cases from open access on the Commission's website (Tr. p. 113-115). On February 6, 2019, the ALJ issued a Recommended Decision dismissing this matter and denying the request for a leak adjustment. The ALJ also overruled the City's objection to the Commission's website practice. On February 26, 2019, the Complainant filed Exceptions to the Recommended Decision. The Complainant requested the Commission reverse the ALJ's decision and grant her a leak adjustment. Commission Staff filed a Response to the Exceptions, but the City did not. The issue of the web docket practice was not raised in the Exceptions or in the Response to Exceptions; therefore the issue was not addressed by the Commission in its Final Order.

By a Final Order issued on September 6, 2019, the Commission determined that the unique facts of this case supported granting Ms. Florczak a leak adjustment because the leak was

hidden or otherwise undetectable to the customer. Floreczak v. City of Kenova, Case No. 18-1232-S-C, Comm'n Order September 6, 2019. The Petitioner filed this appeal of the Commission's September 6, 2019 order to this Court.

SUMMARY OF ARGUMENT

Rule 4.4.c.1 of the Commission's Rules for the Government of Water Utilities, 150 C.S.R. 7 (Water Rules) does not contain an absolute prohibition to granting a leak adjustment for a leaking commode, dripping faucet or malfunctioning appliance. Water Rule 4.4.c.1 (the Leak Adjustment Rule) instead provides that the utility is not required to grant a leak adjustment for leaks that are normally obvious. Since the adoption of the Leak Adjustment Rule, the Commission has engaged in a case-by-case review of the facts and determined when the specific facts and circumstances of a case warranted an adjustment. The Commission has found particularly compelling instances where the leak was undetectable or was otherwise outside the reasonable control of the customer. By engaging in this review, the Commission fulfills its statutory duties.

In this instance, the Commission found that the evidence established that the leak, which was repaired immediately upon discovery, was not detectable to this particular customer. The Commission therefore correctly did not adopt the Recommended Decision of its ALJ and granted this customer a leak adjustment. The Commission's decision is cost neutral to the City and its other customers because the Leak Adjustment Rule requires a customer to pay the utility's cost to produce the additional leaked water.

The Commission's web docket practice to restrict internet access to information in customer billing complaint cases is reasonable and unrelated to FOIA requirements. FOIA does not require a public body to publish public documents on the internet. FOIA instead requires a public body to provide non-protected information upon request. The Commission has, however,

recently reviewed its website restriction practice and decided to post unredacted versions, if possible, of Orders issued in customer billing complaints on or after October 23, 2019.¹

The City is not entitled to attorneys fees. The Commission exercised its clear legal duty in this matter. The Commission did not behave in an arbitrary manner nor did the Commission act in bad faith. Rather, the Commission appropriately applied the laws and rules to the facts of the case and issued an Order consistent with those facts, laws and rules.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has issued a scheduling order setting this matter for Rule 19 argument on February 11, 2019. The City stated an oral argument is unnecessary in this case. The Commission disagrees and believes that the disposition of this appeal will be aided by oral argument.

STANDARD OF REVIEW

Review of a final order of the Commission by the Supreme Court of Appeals of West Virginia is provided in W.Va. Code §24-5-1. This Court has recognized the broad legislative powers of the Commission to address the interests of each party. W. Va. Citizens Action Group v. Pub. Serv. Comm'n, 233 W. Va. 327, 758 S.E.2d 254 (2014) (quoting W.Va. Code §24-1-1(a)-(b) (1986));

The principle is well established by the decisions of this Court that an order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.

¹ The Commission also made its Orders cited in this Statement of Reasons publicly available. To access Commission orders on the Commission web page, go to www.psc.state.wv.us In the left column under "Formal Case Information," click "Orders." On the "Index of PSC Orders" page, click "Search" On the "Full Text Order Search" page - if the order you are searching for is prior to December 1, 2004, click the "Archive -- Before Dec 1, 2004" button at the top of the page, and Enter the case number in the "Case Number" text field. (For example, for Case No. 09-0769-W-PSC-C, enter only "09-0769" in the text field. For General Order 186.8, enter only "186.8" in the text field.) Click the "Search" button. Please note that the case may be listed by the date of the Recommended Decision.

Syl. Pt. 1, Sierra Club v. Pub. Serv. Comm'n, 827 S.E.2d 224, 2019 W. Va. LEXIS 175, 2019 WL 1890250 (2019) (citing United Fuel Gas Co. v. Pub. Serv. Comm'n, 143 W. Va. 33, 99 S.E.2d 1 (1957); Syl. Pt. 5, Boggs v. Pub. Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970)).

The detailed standard for our review of an order of the Public Service Commission . . . may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

Syl. Pt. 2, Pool v. Greater Harrison Cty. Pub. Serv. Dist., 821 S.E.2d 14, 2018 W. Va. LEXIS 695, 2018 WL 5913873 (2018) (referring to Syl. Pt. 2, Monongahela Power Co. v. Pub. Serv. Comm'n, 166 W. Va. 423, 276 S.E.2d 179 (1981); citing Syl. Pt. 1, Central W. Va. Refuse, Inc. v. Pub. Serv. Comm'n, 190 W. Va. 416, 438 S.E.2d 596 (1993)).

In W.Va. Citizens Action, the Court recognized that “on questions of expediency, or as to what would be best in the interest of the petitioner, or the public served...the Legislature intended that the judgment of the [Public Service] Commission should prevail.” W.Va. Citizens Action, 233 W.Va. at 332, 758 S.E.2d at 259, citing, United Fuel Gas Co. v. Pub. Serv. Comm'n, 73 W.Va. 571, 591, 80 S.E. 931, 939 (1914).

In finding that the Commission carefully explained its decision in an order that contains findings of fact, conclusions of law and a reasoned analysis of the issues the Court stated,

As a result, under this Court's highly deferential standard of review, we find no reason to disturb the Commission's order.

W.Va. Citizens Action, 233 W.Va. at 338, 758 S.E.2d at 265.

In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Pub. Serv. Comm'n, 188 W.Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power

Co. v. Pub. Serv. Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981). Braxton Cnty. Citizens for a Better Env't v. Pub. Serv. Comm'n, 189 W.Va. 249, 429 S.E.2d 899 (1993), Harrison Rural Electrification Ass'n, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 439, 438 S.E.2d 782, (1993) and Mountain Communities for Responsible Energy v. Pub. Serv. Comm'n, 222 W.Va. 481, 665 S.E.2d 315 (2008).

ARGUMENT

I. The Commission Followed Established Policy With Respect to the Leak Adjustment Rule and Did Not Change the Rule in an Administrative Order

The Commission decision in this case applies the Commission Leak Adjustment Rule to the facts with careful consideration of the history of the rule and cases decided there under. The Leak Adjustment Rule provides:

Each utility shall develop and implement a written policy concerning the adjustment of customer bills where the bill reflects unusual usage which can be attributable to leakage on the customer's side of the meter. Leaking commodes, dripping faucets, malfunctioning appliances and similar situations shall not constitute leaks which **entitle** the customer to a recalculated bill. The policy shall be maintained in the utility's office for inspection by the public and shall be applied in a non-discriminatory manner to all customers. **The reasonableness of the utility's policy or practice with respect to a policy shall be subject to Commission review in a formal complaint proceeding** [Emphasis added].

Water Rule 4.4.c.1

The Commission promulgated the Leak Adjustment Rule in its current form in General Order 188.12, *In the Matter of Revised Rules and Regulations For Water Utilities*, Final Order, October 11, 1995. In the General Order, the Commission discussed utility opposition to customer leak adjustments noting, “[s]everal parties generally opposed mandatory leak adjustments. They believe that the adjustments send the wrong message to customers regarding maintaining their lines. We continue to believe leak adjustments are reasonable” G.O. 188.12 at

5.² In the same Order, the Commission noted utilities' requests that the Commission 1) limit leak adjustments to underground leaks only, and 2) purposefully exclude leaking commodes and faucets. Id. at 6. The Commission refused to limit leak adjustments to underground leaks, and instead incorporated the rule language relied on by Petitioner to disallow leaks that are obvious to the customer.

The Rule Leak Adjustment Rule reflects public policy that when unusual usage of water is attributable to a leak, it may be reasonable for a customer to receive a billing adjustment, but the adjustment should not reduce a bill to the extent that a utility and its other customers suffer financial harm. The rule also reflects public policy that a utility customer should bear the full cost of their conscious decision not to timely arrest or repair a leak that the customer is or should be fully aware of. The rule indicates, therefore, that customers will not automatically be entitled to adjustments caused by leaking commodes, dripping faucets or malfunctioning appliances. Id. at 5; Water Rule 4.4.c.2.

The Leak Adjustment Rule reserves two means by which the Commission evaluates leaks to determine eligibility for an adjustment. First, the use of the word "entitle" signals to water utilities and their customers that customers are not automatically entitled to an adjustment for leaks caused by leaking commodes, dripping faucets or malfunctioning appliances. Second, the Leak Adjustment Rule provides that the Commission will review in a formal complaint proceeding the reasonableness of a utility's leak adjustment policy and its application to the circumstances of a particular leak. Because there are an endless number of scenarios that can lead to a customer leak, the Commission provided guidance as to what a leak adjustment policy should look like, while reserving its authority to review individual fact patterns. In subsequent

² Shortly after issuing G.O. 188.12, the Commission finalized corresponding Sewer Rules through General Orders 188.12 In the Matter of Revised Rules and Regulations for Water Utilities and General Order 186.8 In the Matter of Revised Rules and Regulations for Sewer Utilities November 3, 1995.

Orders applying the language of the Leak Adjustment Rule, the Commission affirmed that the rule does not prohibit granting a leak adjustment for a leaking commode, dripping faucet or malfunctioning appliance. The Commission has also consistently engaged in a review of the circumstances.

Two years after promulgation of the Leak Adjustment Rule, in Watkins v. City of Grafton, Case. No. 97-1545-WS-C, Comm'n Order February 11, 1998, a customer requested a leak adjustment after she accidentally left the water running on the water-wash of a furnace air draining system. The Commission engaged in a "review of the facts surrounding the incident" and concluded that the specific facts and circumstances presented in that case, including the fact that the customer was hearing-impaired, justified a leak adjustment. Id. at 6. The Commission also explained in its Order that denial of a billing adjustment would work a hardship on the Complainant and that Water Rule 1.6.2³ provided that a rule may be modified if evidence presented justified a hardship waiver. Id. at 2.

In later cases, the Commission continued to review the individual facts and circumstances presented in billing complaints relating to undetectable water consumption. Collins v. Corp. of Shepardstown, Case No. 01-1430-WS-C, Comm'n Order July 23, 2002 (leak not noticeable because it originated in broken pipe in wall and water did not run into house); Solenberger v. Martinsburg Municipal Water and Sewer Dep'ts, Case No. 05-0645-WS-C, Recommended Decision August 18, 2005, final September 7, 2005 (utility agreed to leak adjustment because faulty bathtub faucet leak was located in vacant house owned by customer); Mayfield, Inc. v. Berkeley County Pub. Serv. Water Dist., Case No. 02-1416-PWD-C Recommended Decision June 5, 2003, final June 25, 2003 (leak in crawl space undetected for a period of time).

³ Numbering of the Water Rules has changed since the issuance of the Watkins decision. The current hardship waiver is found in Water Rule 1.6.b.

As shown by the cases cited above, the Commission has consistently conducted a fact based review scrutinizing whether the facts establish that a leak is undetectable or otherwise outside the control of the customer. The Commission described its application of the rule in McDowell v. Jefferson Utilities, Inc. and Jefferson County Pub. Serv. Dist., Case No. 09-0769-W-PSD-C Comm'n January 11, 2011.

[T]he underlying policy behind the rules is that the customer not the utilities, should be responsible for costs related to leaks on the customers' side of the meter that are obvious to the customer, and, thus are easily repaired by the customer and preventable through routine maintenance. As the Commission has recognized, "[o]ne purpose of the applicable Water Rules and Sewer Rules is to deny leak adjustments is cases where the accrual of a large bill is due to the customer's own failure to notice an obvious leak (like a leaky toilet)." Collins v. Corp. of Shepardstown, Case No. 01-1430-WS-C, (Commission Order dated July 23, 2002) at p. 7.

Id. at 5.

In the same decision, the Commission stated:

[A]pplying the underlying policy of customer responsibility for readily discernible leaks leads to the obvious corollary that if the customer has a leaking toilet, dripping faucet, malfunctioning appliance or similar situation that it is not obvious or detectable to the customer, a leak adjustment is approvable under the rules.

Id.

The Commission reaffirmed those principles in Jenkins v. Berkeley County Pub. Serv. Sewer Dist., Case No. 17-0663-PSD-C, Comm'n Order October 1, 2018 (leak resulted from probable stuck valve in the customer's water softener). In that case the Commission noted the "policy of customer responsibility for readily discernible leaks allows for an alternative outcome if the customer has a leaking toilet, dripping faucet, malfunctioning appliance or similar situation that is not obvious or detectable to the customer." Id. at 6.

Even the cases cited by the Petitioner support the proposition that the Leak Adjustment Rule does not absolutely prohibit a billing adjustment for undetected water consumption relating

to commodes and that the circumstances of a leak matter. For example, the City cited to Sabo v. Morgantown Util. Bd., Case No. 02-0367-WS-C, W. Va. PUC LEXIS 2513, Recommended Decision June 14, 2002, final July 4, 2002, in which the ALJ denied a leak adjustment even though the customer was deceased. Notably however in the Recommended Decision, the ALJ acknowledged the statement in the initial Staff recommendation, “while [Commission Staff] generally agreed that a leaking commode under *most* circumstances did not qualify for a leak adjustment, [Commission Staff] would reserve final judgment until a field investigation was completed.” Id. at 4 (emphasis added). After the Commission Staff completed its field investigation, Staff determined that the leak did not qualify and the ALJ agreed with Staff and the Utility based on the facts. Id. at 7, 8.

The City also cited Currence v. Elkins Mun. Water Dept., Case No. 03-0004-W-C, 2013 W.Va. PUC LEXIS 1533 6, Recommended Decision April 9, 2003, final April 29, 2003, and Moye v. West Virginia-American Water Co., No. 00-1441-W-C, 2001 W. Va. PUC LEXIS 1005, Recommended Decision November 15, 2000, final January 5, 2001, and incorrectly argued that the Commission did not review the circumstances surrounding the leaks at issue. The Commission and Commission Staff engaged in a fact-specific review in both cases. In each case, after the Commission Staff conducted an investigation, the ALJ did not recommend a leak adjustment based on the circumstances surrounding the leak. Specifically in Currence, the ALJ dismissed the case after a “consideration of all of the above,” indicating the facts and background of the case. Currence at 6.

In determining that Ms. Florczak is entitled to a leak adjustment because of the circumstances of this particular leak, the Commission did not ignore the plain language of its own rule. Instead, the Commission reviewed the City’s application of its leak adjustment policy

to these particular facts, consistent with previous Commission decisions and the Leak Adjustment Rule itself.

II. The Substantive Result of the Commission Decision to Allow a Leak Adjustment for Ms. Florczak was Proper

A. The Evidence Presented By Ms. Florczak Justified a Leak Adjustment

Consistent with the Commission's long standing practice, the Commission reviewed the circumstances surrounding Ms. Florczak's leak and determined it was fair and reasonable to require a billing adjustment. At hearing, Ms. Florczak and her daughter testified that:

- Her husband's bladder cancer required him to use strong chemicals as part of his cancer treatment. (Tr. p. 22).
- The treatment is called BCG which is a medication that is injected into the bladder to eat away the cancer cells. (Tr. p. 38).
- Every time Ms. Florczak's husband flushed the commode, he had to add a chemical solution to the commode to dilute the toxicity of the chemicals. (Tr. p. 37).
- Due to the nature of the cancer treatments, the bathroom was strictly off limits to guests before and after her husband's death. (Tr. p. 37).
- Ms. Florczak would not allow anyone to enter the bathroom. (Tr. p. 22).
- Ms. Florczak did not enter the bathroom following her husband's death because it had not been properly sanitized. (Tr. p. 38).
- Upon entering the bathroom after receipt of a high water bill, Ms. Florczak's daughter, who is a nurse, stated she regretted that she did not get "geared up" before going into that bathroom to check for the leak. (Tr. p. 39).
- The commode at issue is in the master bathroom which is located off of the

master bedroom and through two doorways. One door is the bathroom door shutting off the master bathroom from the bedroom and the other door separates the toilet within the bathroom. (Tr. p. 15).

- Ms. Florczak testified that although she slept in the master bedroom, she did not hear the water running in the bathroom. (Tr. p. 20).
- Ms. Florczak testified that she and all family members and guests exclusively used the guest bathroom instead of the master bathroom. (Tr. p. 21-22).
- Every item of Ms. Florczak's toiletries was in the guest bathroom and she would not even use the master bathroom in the middle of the night. (Tr. p. 37).
- Promptly upon discovery of the leak, it was fixed (Tr. p. 38).

Consistent with the Leak Adjustment Rule, the Commission determined the facts of this specific leak qualified for a leak adjustment because it was hidden or otherwise undetectable to this customer in the specific circumstances of this case. (Florczak, Comm'n Order September 6, 2019 at 4-5). In making that determination, the Commission noted that neither the City nor the ALJ refuted the Complainant's testimony the leak was in a non-detectable location. Id. at 5.

B. The Commission Fulfilled its Statutory Duties in Adjudicating This Complaint

The Legislature created the Commission to, among other things, ensure fair regulation in interest of the using and consuming public and ensure that charges for utility services are just and reasonable. W.Va. Code §24-1-1(a)(1),(4). The Commission is charged with investigating any reasonable customer complaint brought before it. W.Va. Code §24-4-6. In addition to considering the specific facts and circumstances presented by the complainant, the Commission is empowered to investigate utility practices and require a utility to adhere to applicable laws and regulations. W.Va. Code §§24-2-2; 24-4-6. When the Commission determines that the acts or

practices of the utility are unreasonable, insufficient or unjust, the Commission may order the utility to correct its practice. W.Va. Code §24-2-7(a). When adopting the Leak Adjustment Rule, the Commission specifically reserved its authority to review the reasonableness of a utility's leak adjustment policy and the application of that policy. Water Rule 4.4.c.1. The City's policy not to consider or review the circumstances surrounding the leak and whether the leak was obvious or hidden, was unreasonable and unjust. Pursuant to its statutory duties, the Commission had this complaint investigated, reviewed the circumstances surrounding this particular leak and determined a billing adjustment was appropriate.

C. A Leak Adjustment for Ms. Florczak Does Not Adversely Impact the City or its Other Customers Financially

The Commission Final Order does not adversely impact the City or its other customers financially. To understand why, it is important to understand how water rates are developed. Many elements go into the development of a water rate including the cost to pump the water into the treatment plant, the cost of chemicals to treat the water, the cost to construct and maintain the treatment plant, the cost to construct and maintain the distribution system that delivers water to customers, the cost to read meters, the cost to bill customers, the labor costs associated with all of those activities and the return on the capital invested in the business. For a municipality like the City, all of those elements add up to the full base rates that customers ultimately pay for water service. The rates customers pay are divided into fixed costs and variable costs.

Fixed costs do not vary based upon the amount of water usage on the system. Variable costs are primarily the operation and maintenance expenses that vary depending on the amount of water actually produced. In a case where a customer is awarded a leak adjustment, the customer account is credited the amount of excess revenue billed net of the actual variable costs attributed to leaked water. In this manner the utility is reimbursed for the actual variable cost of

the water it produced, and therefore is not harmed or deprived of recovering the actual expenses it incurs.

In G.O. 188.12 promulgating the Leak Adjustment Rule, the Commission found the negligible impact of a leak adjustment on a utility as compared to the significant impact on customers (avoidance of a portion of utility bills that could be ten or twenty times higher than average) to be a compelling reason to require utilities to grant adjustments in certain circumstances.

We continue to believe leak adjustments are reasonable. The utilities recover their costs based upon typical usage. When a customer's water line breaks causing a large water loss, the utility should be made whole the cost of treating the water. However, it should not receive a windfall by being allowed to recover its full base rate for the excess lost water.

Id., October 11, 1995 at 5.

The customer paying a leak-adjusted bill bears the burden of paying the utility's actual expenses incurred, but not the full base rate associated with water lost in the leak. Because actual expenses are recovered, the utility is not forced to shift those costs to other ratepayers for recovery.

G.O. 188.12 encouraged utilities to calculate their own actual variable cost and the Water Rules require the utility to include that cost in its tariff as its leak adjustment rate. Id. at 5; Water Rule 4.4.c.4. Under the Petitioner's application of the Leak Adjustment Rule, it refuses to accept a payment that will cover its actual variable cost and instead seeks a windfall payment from Ms. Florczak based on the full base rate cost for water that Ms. Florczak unknowingly consumed but did not actually use. With Ms. Florczak's payment of a leak-adjusted bill, however, the City is made whole for the actual expenses incurred in producing the additional water but does not receive revenues over and above those costs. Ms. Florczak is not burdened with the hardship of having to pay both water and sewer bills that are more than six times higher than her normal bills

and the City does not receive a revenue windfall. This is an equitable outcome. However, in circumstances of an easily discernible leak, the Leak Adjustment Rule requires a customer to bear the full cost of their conscious decision not to timely arrest or repair a leak.

The substantive result of the Commission decision was proper because Ms. Florczak presented evidence justifying a billing adjustment, the Commission fulfilled its statutory duties, and because the City and its customers do not suffer financial harm when a customer pays a leak-adjusted bill.

III. The Commission Web Docket Practices Reflect Sound Stewardship of Personal Information and are Unrelated to FOIA Requirements

The Commission maintains an internet website that contains multiple pieces of information. One of the elements of the website is the Commission's web docket. The web docket includes a short description of every document filed in a proceeding. A link attached to the web docket description allows the public to view over the internet the filings, pleadings and Orders in Commission cases. The Commission practice, however, is to restrict access on its web docket to documents in cases involving customer billing disputes because, in the Commission's experience, those filings typically contain personal and sensitive information such as account numbers, billing histories and medical records. The Commission practice developed out of concern that sensitive information could be easily mined for harmful purposes if it was made readily available over the internet. Upon request, however, the Commission's Executive Secretary provides access to filings and orders in customer billing complaints to requestors in person, by mail, or by email.

The City characterizes the website practice as a violation of the West Virginia Freedom of Information Act, W.Va. Code §29B-1-1 et seq. (FOIA). The City is incorrect. FOIA does not

require a public body to publish information on the internet.⁴ FOIA, instead, requires a public body to provide non-protected information upon request. W.Va. Code §29B-1-3. The Commission fully complies with this directive.

Furthermore, contrary to the assertions of the City, the Commission does not sell any information to third party services such as Lexis and Westlaw. The Commission also does not directly provide any documents to Westlaw or Lexis and can only assume that Westlaw and Lexis mine the Commission's web docket to access Commission orders. The Commission believes that if third-party services publish Commission Orders in billing complaints, those Orders predate implementation, in approximately 2004, of the Commission practice to restrict internet access to filings in customer billing complaints. On information and belief, Westlaw and Lexis have not published Commission billing complaint Orders that are restricted on the Commission web docket.⁵

The Commission believes its administrative practice to restrict internet access to filings in customer billing disputes cases reflects responsible stewardship and is reasonable. The Commission recently reviewed this administrative practice, however, and decided to make Orders issued in customer billing disputes after October 23, 2019 available on the Commission website. The Commission believes it can provide internet access to the Orders without excessive administrative burden and without exposing customer sensitive private information that is often contained in the other case filings to the worldwide web at large. If an Order must contain sensitive private information, the Commission will make a redacted version of the Order

⁴ The only FOIA requirement relating to the internet is the requirement that a public body maintain an electronic data base of FOIA requests received. W.Va. Code §29B-1-3(f).

⁵ The Commission is aware that the Staff Attorney stated her belief at the evidentiary hearing that these restricted cases are available on Lexis (Tr. p. 114). The Commission believes that Staff Attorney was mistaken.

available on the web docket. As time and resources allow, the Commission intends to make prior Orders in these cases viewable on the website as well.

IV. The City is Not Entitled to Attorney's Fees

A. Attorney's Fees are Not Warranted Because the Commission Exercised its Clear Legal Duty

The general rule regarding attorney's fees is "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl. Pt. 2, Sally-Mike Properties v. Yocum, 179 W. Va. 48, 365 S.E.2d 246 (1986); W. Va. Dep't of Transp. v. Newton, 238 W. Va. 615, 618, 797 S.E.2d 592, 595 (2017).

An exception to the general rule is demonstrated "[w]here a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed." Syl. Pt. 3, State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Env'tl. Prot., 193 W. Va 650, 458 S.Ed.2d 88 (1995); W. Va. Dep't of Transp. v. Newton, 238 W. Va. 615, 618, 797 S.E.2d 592, 595 (2017).

In this case, the Commission exercised its legal duty and the City disagreed with the Commission's findings and conclusion when doing so. The City's disagreement with the Commission's Order is not the Commission's deliberate and knowing refusal to exercise a clear legal duty. The Commission considered and weighed evidence and the pleadings in this case to arrive at the findings of fact and conclusions of law in the September 6, 2019 Order. The Commission acted within its statutory authority and concluded that because the leak was hidden from Ms. Florczak it was reasonable to allow her a \$233.12 billing adjustment.

The City argues the Commission ignored its own rule and engaged in "arbitrary actions." In fact, the Commission decision was issued after the parties engaged in pretrial discovery,

presented evidence at hearing, and filed briefs. The Commission acted pursuant to its role outlined in the Leak Adjustment Rule to review "... [t]he reasonableness of the utility's ... practice ... in a formal complaint proceeding." Ms. Florczak filed a formal complaint case with the Commission and the Commission exercised its statutory authority to investigate the City's practices. W.Va. Code §24-4-6. The Commission did not act arbitrarily when it engaged in a review of the allegations in the complaint because the Commission has a responsibility to fully explore and investigate formal complaints, and adjudicate matters complained of. Id.

B. Attorney's Fees are Not Warranted Because the Commission Acted in Good Faith in Adjudicating This Matter.

This Court limits awarded attorney's fees to egregious conduct. "There is authority in equity to award the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatious, wantonly, or for oppressive reasons." Syl. Pt. 3, Sally-Mike Properties v. Yocum, 179 W. Va. 48, 365 S.E.2d 246 (1986); W. Va. Dep't of Transp. v. Newton, 238 W. Va. 615, 618-619, 797 S.E.2d 592, 595-596 (2017). The Commission has not engaged in conduct that would warrant paying the City's attorney's fees.

The Commission did not act in bath faith because the leak adjustment was supported by the evidentiary record, prior Commission decisions and the public policy of the Leak Adjustment Rule. This Court has stated the bad faith exception applies only if there is a claim or defense that "cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Daily Gazette Co., Inc. v. Canady, 175 W. Va. 249, 332 S.E.2d 262 at 266 (W.Va. 1985). See also Murthy v. Karpacs-Brown, 237 W. Va 400, 788 S.E.2d. 18 (W.Va. 2016); Ramezan v. Hough, No. 14-1311, 2015 (W. Va. Sept. 11, 2015); Hinerman v.

Rodriguez, No. 14-0371 (W. Va. June 12, 2015). The Commission provided a reasoned explanation to support its allowance of a leak adjustment in this case.

Also, the Commission did not act in a vexatious manner with regard to the City or in its Final Order. This Court has acknowledged the definition of acting in a vexatious manner, or vexatious, to mean “without reasonable or probable cause or excuse.” Gainer v. Walker, 226 W.Va. 434, 701 S.E. 2d 837 (W. Va. 2009); See also Bryan A. Garner, Black’s Law Dictionary 1796 (10th ed. 2014). The Commission acted reasonably in this case by engaging in a review of the circumstances and the evidence presented in the case. The Commission has a responsibility to fully explore and investigate a utility customer’s formal complaints, which may include gathering information through pretrial discovery and evidentiary hearings. The City’s argument that the Commission engaged in arbitrary actions by investigating a formal complaint filed by the City’s customer is unfounded and is contrary to the statutory requirements of W.Va. Code §24-4-6. Moreover, the Commission’s application of its own rules based on a review of the evidence presented and prior Commission decisions is reasonable, regardless of whether the City agrees with the outcome.

“Wantonly” has been defined as “recklessly making a frivolous claim.” Bryan A. Garner, Black’s Law Dictionary 1815 (10th ed. 2014); See also Stive v. United States, 366 F.3d 520, 522 (7th Circ. 2004). The Commission did not act frivolously in this case. Furthermore, the “wantonly” requirement arguably appears to be directed at the party making a frivolous claim, not the adjudicator of the claim.

The Commission did not act in bad faith, vexatiously, or wantonly when adjudicating this matter. The Commission based its reasoning on evidence presented and case precedent. The Commission’s conduct does not warrant paying the City’s attorneys fees.

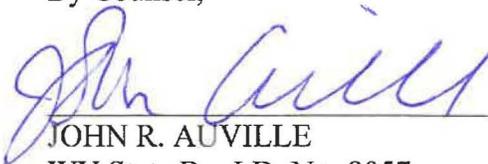
CONCLUSION

The leak adjustment that the Commission ordered for Ms. Florczak is supported by statute, rule, historic application in past cases and the facts of this case. The substantive result of the Commission Order allowing Ms. Florczak a leak adjustment was proper in light of the non-discoverability of the unusual water usage and hardship that would otherwise be borne by Ms. Florczak. The Commission did not exceed its jurisdiction in adjudicating this formal complaint, and the Commission decision is supported by the evidence and the findings of fact and conclusions of law in the Order. The Commission web docket practice to restrict access to information in customer billing cases is responsible and unrelated to FOIA. The Commission did not engage in bad faith nor act in an arbitrary manner in deciding this matter. The City is therefore not entitled to attorney's fees. The Commission requests that this Court affirm its Order.

Respectfully submitted this 25th day of November, 2019.

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel,



JOHN R. AUVILLE
WV State Bar I.D. No. 8057

JESSICA M. LANE
WV State Bar I.D. No. 7040