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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-0351

MASON COUNTY PUBLIC SERVICE
DISTRICT,

Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA and RALPH AND CARLA
HUFF,

FILE COPY

Respondents.

**MASON COUNTY PUBLIC SERVICE DISTRICT'S
PETITION FOR APPEAL FROM THE APRIL 4, 2022 ORDER
OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
IN CASE NO. 21-0730-LRR-C**

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I. ASSIGNMENTS OF ERROR

- A. The Public Service Commission erred in exercising jurisdiction over the disconnection fee of the Mason County Public Service District when the Complainants never complained of the District's disconnection fee, and the Legislature has authorized the board of the Mason County Public Service District and the Mason County Commission to establish rates, fees, and charges.
- B. The Public Service Commission erred in exercising jurisdiction over the Complaint when there was no evidence that the acts complained of occurred within thirty days of the date of filing of the Complaint.
- C. The Public Service Commission erred by concluding that the Mason County Public Service District's disconnect fee is "unreasonable."
- D. The Public Service Commission erred by denying the Mason County Public Service District's Motion to Dismiss when the Complainants failed to appear at hearing.

II. STATEMENT OF THE CASE

This Petition for Appeal is filed by the Mason County Public Service District (the “District”) from a final decision entered on April 4, 2022 (“Final Order”) by the Public Service Commission of West Virginia (the “PSC” or the “Commission”). This Petition is filed pursuant to *West Virginia Code* § 24-5-1 and *West Virginia Rule of Appellate Procedure* 14.

On March 18, 2021, the District’s board and the Mason County Commission (“MCC”) concluded the process for the approval of new water rates for the District. *See* Mason County Public Service District Ex. No. 1 from the December, 30, 2021 hearing. The MCC-approved tariff charges a \$50.00 disconnection fee which applies in the event of a termination of services for non-payment, and a \$50.00 reconnection fee which applies when service is reconnected following disconnection for non-payment. *Id.* Disconnection and reconnection are separate events requiring separate trips by the District’s staff. *See* Transcript of December 30, 2021 hearing, at 10-11 (testimony of Mason County Public Service District General Manager Brent Clark). The District is the largest physical public service district (“PSD”) in the state—with 519 miles of main, serving all of the unincorporated areas of Mason County and reaching into three other counties. *Id.* The average round trip from the District’s home base to terminate water service is 60 miles and takes two hours of personnel time. *Id.* On average, the District incurs expenses of \$116.10 per disconnection or reconnection performed. *Id.* at 15. The disconnect and reconnect fees do not fully recover the District’s expenses in performing these services; however, these fees diminish the extent to which the District’s regular paying customers subsidize those who fail to make arrangements to continue service. These are not new charges in the District’s tariff, but rather are a continuation of charges which had been previously adopted and approved by the District and the MCC.

This case arises from a complaint filed by Respondents Ralph and Carla Huff (the “Complainants”) with the PSC on October 6, 2021. When the Complainants failed to make satisfactory payments in March of 2021 to pay a large delinquency, and following appropriate notice from the District, the District terminated service. Tr., 42-43. The Complainants filed a formal Complaint with the PSC over six months later. The Complainants’ involvement in this case was entirely limited to the filing of the initial complaint (“Complaint”) on October 6, 2021. The Complainants filed no responses to any of the 24 entries on the PSC’s docket of this case which would follow. The Complainants did not appear at the hearing of this matter. The full statement of the matters complained of by the Complainants in the Complaint was the following: “[the Mason County PSD] Turned water off during a pandemic and when we asked to get payments so could turn (we had gone without water all summer) that we could make payment but still won’t turn on till completely paid and my husband is a disabled vet.” The Complaint made no mention whatsoever of the District’s disconnect fee.

On October 8, 2021, the PSC issued an Order Regarding Interim Relief, directing the District to restore services to the Complainants upon a \$75.00 payment. The District has since received payment and restored services to the Complainants pursuant to the Interim Relief Order. The District does not petition to appeal that ruling here.

The Staff of the PSC made numerous filings contesting the ability of the District to impose both a disconnect and a reconnect fee. *See*, Staff Ex. 1 from the December 30, 2021 hearing.

On December 30, 2021, the Administrative Law Judge conducted a telephonic hearing. The Complainants did not appear at the hearing. The District moved to terminate the hearing and dismiss the Complaint due to the Complainants failure to appear based upon the *Rules of Practice*

and Procedure, 150 WVCSR Series 1 (the “*Procedural Rules*”) § 6.2.7. The Administrative Law Judge denied the District’s motion. Final Order, at 10.

At the hearing, and through a number of filings before and after it, the PSC Staff challenged the “reasonableness of the [District’s] disconnect and reconnect fees.” January 19, 2022 Staff Initial Brief, at 2; Staff Ex. 1, at 2. The PSC Staff argued that the *Rules for the Government of Water Utilities*, 150 WVCSR Series 7 (“Water Rules”) provide for reconnect fees, but not disconnect fees. Staff further argued that “typically . . . the costs of disconnection are built into the utility’s cost of service.” Jan. 19, 2022 Staff Initial Brief at 8. The District argued that the disconnect fee is reasonable because it is cost-based and applied in nondiscriminatory fashion. The District likewise maintained its earlier challenge that the Complainants’ Complaint must be dismissed pursuant to the PSC’s *Procedural Rules*.

However, the District primary position was (and remains) that the PSC does not have jurisdiction to entertain a challenge to a rate, fee, or charge that has been duly approved by a county commission following the West Virginia Legislature’s revisions since 2015 to *W. Va. Code* § 16-13A-9(a)(2)(E) and *W. Va. Code* § 24-2-1 unless a customer files a complaint with the Commission challenging a rate, fee, or charge in compliance with the procedural conditions of *W. Va. Code* § 24-2-1(b)(6-7). *West Virginia Code* § 16-13A-9(a)(2)(E) and § 24-2-1 authorize large¹ public service districts (“PSDs”) and county commissions to enact “rates, fees, and charges”—and deprives the

¹The West Virginia Code differentiates PSDs with more than 4,500 customers and \$3 million in **annual** revenue from PSDs with fewer customers or less annual revenue. See *W. Va. Code* § 16-13A-9(a)(2). For simplicity, the District will use the term “Locally Rate Regulated PSD.”

PSC of jurisdiction except under specific circumstances which were not satisfied in the Huff's Complaint.

On January 28, 2022, the Administrative Law Judge issued a Recommended Decision adopting the PSC Staff's position and rejecting the District's. On February 11, 2022, the District filed exceptions to the Recommended Decision. On April 4, 2022, the PSC issued a Final Order denying the District's exceptions. The Final Order reasoned that the PSC retains jurisdiction "whenever . . . the Commission finds an act or practice of a [District] unreasonable," and that the "Commission has authority to determine whether the charging of a disconnect fee is an unreasonable practice." Order at 7. The District petitions to appeal that Final Order pursuant to *W. Va. Code* § 24-5-1 and *W. Va. Rule of Appellate Procedure* 14.

III. SUMMARY OF THE ARGUMENT

A creature of statute, the Commission has only the powers delegated to it by the West Virginia Legislature. *Eureka Pipeline Co. v. Pub. Serv. Comm'n*, 148 W. Va. 674, 137 S.E.2d 200 (1964); *Wilhite v. Pub. Serv. Comm'n*, 150 W. Va. 747, 149 S.E.2d 273 (1966); *Casey v. Pub. Serv. Comm'n*, 193 W. Va. 606, 457 S.E.2d 543 (1995). In 2015, the Legislature transferred the authority to set rates, fees and charges for Locally Rate Regulated PSDs from the Commission to the county commission which created the PSD. *See W. Va. Code* § 16-13A-9(a)(2)(E). The PSC retains jurisdiction over Locally Rate Regulated PSDs only in limited circumstances. *See W. Va. Code* § 24-2-1(b). The Commission erred in its Final Order by expanding the PSC's jurisdiction to encompass powers that the Legislature has expressly transferred to county commissions. *See W. Va. Code* § 16-13A-9(a)(2)(E) (authorizing Locally Rate Regulated PSDs and county commissions the authority to set "[r]ates, fees, and charges").

Moreover, the MCC's approval of the District's \$50.00 disconnect fee is entirely reasonable. The fee itself is cost-based, and only recoups a fraction of the actual costs incurred

disconnecting a delinquent customer's services. This fee is charged in nondiscriminatory fashion to any customer who incurs a discontinuation of water services following delinquent payment, receipt of notice of the delinquency, and an opportunity to cure it. The disconnect fee is designed to diminish the extent to which the District's regular paying customers subsidize those who fail to make arrangements to continue service. This charge falls squarely in the "rates, fees and charges" authorized by Legislature in its 2015 amendments to *W. Va. Code* § 16-13A-9(a)(2)(E).

Finally, the Commission erred procedurally by proceeding to hear the Complaint and address the issue advanced only by the Staff of the Commission notwithstanding the Complainants' failure to file the Complaint within the 30-day jurisdictional time parameter of *W. Va. Code* §24-2-1(b)(7), the Complainants' failure to appear, and the Complaint's failure to raise any issue related to the disconnect fee. Rather than complying with the statutory subject matter limits of the Commission's jurisdiction, or the Commission's *Procedural Rules*—which provide a limitations period and a set procedure when a party fails to appear—the Staff of the Commission and the Commission took the opportunity to prosecute an issue beyond the PSC's jurisdiction. For this reason, too, the Commission erred.

As set forth below, the Commission exceeded its statutory jurisdiction and powers, and the Commission's decision is thus *ultra vires*. The District asks this Court, therefore, to vacate the order entered on April 4, 2022.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate under *W. Va. R. App. Proc.* 20. The issues involved in this matter are of significant importance to locally rate regulated utilities operating in West Virginia. The Commission's action infringes on the statutory authority of local boards, PSDs, and county commissions to establish rates, fees and charges.

V. ARGUMENT

A. Standard of Review

This Court applies the following standard of review of final orders of the Commission:

(1) [W]hether 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. 1, *Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n*, 190 W. Va. 416, 436 S.E.2d 777 (1993).

In this case, the Commission exceeded its power and subject matter jurisdiction by an overly broad interpretation of its reduced jurisdiction contained in *W. Va. Code* § 24-2-1(b)(2) and disregarding the Legislature's specific statutory grant of authority to county commissions and Locally Rate Regulated PSDs.

B. **The Commission erred in exercising subject matter jurisdiction and exceeded its authority in investigating the reasonableness of the District's and the MCC's disconnection charge.**

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 2, *City of Wheeling v. Pub. Serv. Comm'n*, Case No. 21-0372-S-WI (April 23, 2022). In 2015, the Legislature enacted Senate Bill 234, which materially circumscribes the Commission's jurisdiction over Locally Rate Regulated PSDs. The Legislature reached the following finding in its statement of purposes:

The Legislature further finds that that [Locally Rate Regulated PSDs] are most fairly and effectively regulated by the local governing body with respect to rates, borrowing and capital projects. Therefore, notwithstanding any contrary provisions in this section, the jurisdiction of the Public Service Commission over water and sewer utilities that are political subdivisions of the state is limited to that granted specifically in this code.

W. Va. Code § 24-1-1(j) (effective June 12, 2015).

Rate making is a legislative function. *See, Central W. Va. Refuse v. Pub. Serv. Comm'n*, 190 W. Va. 416, 436 S.E.2d 777 (1993). By enacting Senate Bill 234, the Legislature switched the legislative body with jurisdiction over the setting of rates for large PSDs from the PSC to the home county commission of such PSDs. Different legislative bodies can be expected to adopt different policies, procedures, and approaches. It is the PSC's policy to set rates primarily based upon the historical cost to provide service, with some variance for known and measurable departures from historical revenue and expenses. That is not the only manner by which rates can be set. Rates can be set instead based upon a forward-looking budget. The PSC has a policy disfavoring the setting of tap fees at a level which fully matches the utility's cost of setting a tap, on the theory that low tap fees encourage service connections and the utility can recover the excess expenses over time from the customer. *See, SER Water Dev. Auth v. Northern Wayne County Pub. Serv. Dist.*, 195 W. Va. 135, 138; 464 S.E.2d 777, 780 (1995). Many utilities contend that a tap fee should recover the full cost of setting a tap so that the utility's other customers do not subsidize new customers. The Legislature's transfer of legislative authority over the setting of rates, fees, and charges for Locally Rate Regulated PSDs to the home county commission should be respected, upheld, and maintained by allowing those properly adopted rates, fees, and charges to be applied without undue interference from the PSC. This Court should exercise the role it has long acknowledged for itself to determine if the Commission has exceeded its statutorily limited scope of jurisdiction. The Court should not countenance the PSC encroaching on the jurisdiction of county commissions.

To effectuate the transfer of authority over large PSDs to home county commissions, the Legislature amended the Commission's jurisdictional statute. *See W. Va. Code* § 24-2-1(b) ("The jurisdiction of the commission over [Locally Rate Regulated PSDs] is limited to . . ."). The

Legislature has established eight exclusive bases for jurisdiction of the Commission over Locally Rate Regulated PSDs, including the following two jurisdictional grounds which are pertinent to this petition:

(2) Regulation of measurements, practices, acts, or services, as granted and described in § 24-2-7 of this code;

...

(7) Customers of water and sewer utilities operated by a political subdivision of the state may bring a formal or informal complaints regarding the commission's exercise of the powers enumerated in this section and the commission shall resolve those complaints. *Provided*, That any formal complaint filed under this section that is based on the act or omission of the political subdivision shall be filed within 30 days of the act or omission complained of and the commission shall resolve the complaint within 180 days of filing. . . . *Provided further*, That if the matter complained of would affect rates, fees, and charges so fixed by the political subdivision providing separate or combined water and/or sewer services, the rates, fees, or charges shall remain in full force and effect until set aside, altered, or amended by the commission in order to be followed in the future.

W. Va. Code § 24-2-1(b)(1)-(8).

Senate Bill 234 also amended the grants of authority to large PSDs and the home county commission of large PSDs. The Legislature vested Locally Rate Regulated PSDs with authority to “make, enact, and enforce all needful rules in connection with the enactment or amendment of rates, fees, and charges of the district.” *See W. Va. Code* § 16-13A-9(a)(2), subject to the review, approval, rejection, or modification of a county commission. Each of these amendments in Senate Bill 234 and subsequently were in furtherance of the Legislature’s finding that Locally Rate Regulated PSDs are “most fairly and effectively regulated by the local governing body with respect to rates.” *W. Va. Code* § 24-1-1(j).

Despite the Final Order’s finding to the contrary, this dispute does not fall within the jurisdiction which the Commission retained under *W. Va. Code* § 24-2-1(b)(2). Instead, the Final

Order encroaches on Locally Rate Regulated PSD's and the home county commission's statutorily-granted authority to set "rates, fees, and charges."

1. The disconnection fee is not a "measurement, practice, act, or service" to warrant jurisdiction under § 24-2-1(b)(2).

Subsection (b)(2) grants the Commission jurisdiction to regulate a Locally Rate Regulated PSD's "measures, practices, acts, or services granted and described in § 24-2-7." *W. Va. Code* § 24-2-1(b)(2). In turn, Section 24-2-7 authorizes the Commission to "by order fix reasonable measurements, regulations, acts, practices or services" when it finds a utility's existing measurements, regulations, acts, practices, or services to be "unjust, unreasonable, insufficient or otherwise discriminatory, or otherwise in violation of any provisions of this chapter." *W. Va. Code* § 24-2-7(a).

The Legislature's use of the terms "measurements, regulations, acts, practices or services" in the Commission's jurisdictional statute is notable. These terms stand in contrast to the "rates, fees, and charges" expressly allocated to Locally Rate Regulated PSD's and their respective county commissions. *Compare, W. Va. Code* § 24-2-7(a) with *W. Va. Code* § 16-13A-9(a)(2)(E). "Measurements, regulations, acts, practices or services" are not synonymous with "rates, fees, and charges." The two phrases, both used in *W. Va. Code* § 24-2-1(b), have different ambits of meaning and application.

West Virginia Code §24-2-1(b)(6 and 7) provide for the PSC's oversight of rates, fees, and charges of Locally Rate Regulated PSDs under certain circumstances. A common feature of these two subsections is that in order for the PSC to reach a "rates, fees, or charges" issue, a customer must file a complaint within a limited time window. The Huffs' Complaint did not satisfy those circumstances. The PSC's complaint resolution jurisdiction under *W. Va. Code* §24-2-1(b)(7) gives the Commission jurisdiction over formal complaints "regarding the commission's exercise

of the powers enumerated in this section.” If such a timely filed complaint “would affect rates, fees, and charges so fixed by the political subdivision providing separate or combined water and/or sewer services, the rates, fees, or charges shall remain in force and effect until set aside, altered, or amended by the commission in an order to be followed in the future.”

However, such complaints must be filed within 30 days of the act or omission complained of *W. Va. Code* §24-2-1(b)(7). The Huffs’ Complaint was not filed within 30 days of the MCC’s approval of the District’s tariff, nor within 30 days of the District’s termination of service. See Complaint. The Huffs’ Complaint made no allegation concerning the District’s disconnection fee. *Id.*

The Final Order concludes that the Complaint’s failure to have been filed within the 30 day jurisdictional window is of no moment:

On this issue, Staff argues that it may institute an investigation of an alleged unjust or unreasonable act or practice of an LRR *sua sponte* under W. Va. Code § 24-2-7(a). This provision does not arise due to a customer complaint and does not contain the 30-day limitations period.

Again, the Commission agrees with Staff’s position. Under W. Va. Code § 24-2-7(a) a formal complaint is not required for the Commission to exercise its authority to regulate the “measurements, practices, acts or service,” of an LRR when found to be “unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of th[e] [code.]”

Order, at 8.²

² The Final Order plainly asserts that the Commission’s jurisdiction arises solely under subsection (b)(2) to the exclusion of subsection (b)(7), however the Final Order was issued exactly 180 days after the Complaint was filed, the statutory period specified for complaints made pursuant to subsection (b)(7). Subsection (b)(2) has no statutory time period limits.

Here the Commission disregards the hurdle which the Legislature put in place, and which the PSC must surmount before it can reach the issue of a Locally Rate Regulated utility's rates, fees, and charges --- the filing of a timely complaint challenging a rate, fee, or charge by a customer. *W.Va. Code* §24-2-1(b)(6-7). The Staff of the PSC and the PSC were operating under the belief that the Huff Complaint allowed the PSC to get its nose under the tent of the District's rates. That view is at odds with the clear structure of *W.Va. Code* § 24-2-1(b) and with the Huff Complaint, which made no allegation regarding the District's disconnect fee, and was not filed within 30 days of the MCC's approval of that fee.

The Commission denies that the authority for its Order is based upon the subsection of *W. Va. Code* § 24-2-1(b) which does give it authority to adjust rates, fees, and charges of Locally Rate Regulated PSDs—subsection (7)—but rather contends that the Commission's jurisdiction is only based upon subsection (2). The logical consequence of that stance is the PSC must advance a persuasive interpretive theory of statutory interpretation regarding the overlap in Senate Bill 234 of “measurements, practices, acts, or services” with “rates, fees, and charges.” The District believes that the two are distinct notions, and, moreover, the Legislature intended that they be distinct.

The thrust of Senate Bill 234 was a reduction and transfer of a portion of the Commission's jurisdiction. If, in one bill, the Legislature intended to both transfer jurisdiction and have the Commission retain some jurisdiction, one would expect that the Legislature would do so with some particularity. And it did. Subsections (b) (6) and (7) of *W. Va. Code* § 24-2-1 do specify the limited circumstances under which the PSC has jurisdiction over the rates, fees, and charges of Locally Rate Regulated PSDs. The final Order is explicit that its legal basis is not subsection 6 or 7, but rather Subsection 2, the Commission's jurisdiction over “measurement, practices, act or

service.” Final Order, at 8. It is an unreasonable reading of Senate Bill 234 and subsequent legislative amendments to *W.Va. Code* § 24-2-1(b) to infer that the Legislature so amorphously gave back to the PSC that which it had specifically taken away from it elsewhere.

It is concerning that the Commission believes its jurisdiction under 24-2-1(b)(2) includes the authority to reject rates, fees, and charges duly adopted by a county commission, and that its ability to do so has no temporal limitation. Final Order, at 8. *W. Va. Code* §24-2-1(b)(6) and (7) clearly indicate a legislative intent to impose a temporal limit upon when the Commission can set aside rates, fees, and charges.

The Commission did not *sua sponte* initiate a review of the District’s disconnection fee, which had been in its tariff for many years. Rather, the Staff of the Commission and the Commission itself hijacked an ordinary formal complaint case to reclaim jurisdiction which the Legislature had transferred to county commissions. After the filing of the Complaint, the Huffs had no further involvement in the case; the Staff of the Commission drove the proceeding.

The distinction between unreasonable practices and rates fees, and charges is illustrated by a case cited in the Final Order, *SER Pub. Serv. Comm’n v. Town of Fayetteville* 212 W. Va. 427, 573 S.E.2d 427 (2002). In that case, which arose prior to the adoption of Senate Bill 234, this Court affirmed the Commission’s jurisdiction over a municipality’s charge of a disconnection fee when the customer’s sewer service line had not actually been disconnected. *Id.* at 344 (“The PSC found that [the customer’s] sewer service had not been disconnected and it was consequently improper for the Town to charge him a reconnection fee.”). Charging a fee for a service that was not performed is an unreasonable practice. It does not make the underlying fee unreasonable, or subject to the Commission’s jurisdiction as to its existence or amount where no statutory basis exists for the Commission to exercise such jurisdiction. That is an example of a kind of unjust or

unreasonable “practices” which the Legislature entrusted the Commission to regulate. *W. Va. Code* § 24-2-7(a); *see, e.g., SWVA, Inc. v. Huntington Sanitary Board*, 2017 WL 6398009, *5 (Dec. 15, 2017) (sustaining the Commission’s jurisdiction over a challenge to the public notices of a project provided by a sanitary board).

But the District’s disconnect fee at issue is not an unreasonable practice, it is a fee. The Commission takes issue only with the District’s disconnect fee itself—not the District’s practices or acts in applying that fee.

The Final Order construes the Commission’s jurisdiction over the reasonableness of a Locally Rate Regulated PSD’s “measurements, regulations, practices, acts, or services” to encompass the reasonableness of a Locally Rate Regulated PSD’s “rates, fees and charges”—like the disconnection fee at issue. This interpretation renders Senate Bill 234 meaningless. The Legislature *limited* the Commission’s jurisdiction to specific categories. *W. Va. Code* § 24-2-1(b) (“The jurisdiction of the commission over [Locally Rate Regulated PSDs] is limited to”). This amendment to the Commission’s jurisdictional statute was in furtherance of the Legislature’s finding that Locally Rate Regulated PSDs are “most fairly and effectively regulated by the local governing body with respect to rates.” *W. Va. Code* § 24-1-1(j).

The Final Order’s conclusion also effectively overrides *W. Va. Code* § 16-13A-9(a)(2)(E), which expressly authorizes Locally Rate Regulated PSDs and their county commissions to enact their own “rates, fees and charges.” The Commission has no inherent or statutory jurisdiction to assess the reasonableness of those charges. To the extent there is any ambiguity or conflict between *W. Va. Code* § 24-2-1(b)(2) and *W. Va. Code* § 16-13A-9(a)(2)(E), the specific grant of authority to county commissions prevails. *See* Syl. Pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d

885 (1953) (“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter.”).

As such, the Commission exceeded its jurisdiction by *sua sponte* investigating the reasonableness of the District’s disconnect fee. Final Order, at 8.

C. The disconnect fee is reasonable, cost-based, and nondiscriminatory.

The principal basis for this appeal is that the Commission has exceeded the statutory limits placed upon its jurisdiction by *W. Va. Code* §24-2-1(b). Should this Honorable Court find that the Final Order does not exceed the limits of the Commission’s statutory jurisdiction, the District maintains that the Final Order is in error as the District’s disconnection fee is well within the zone of reasonableness.

The District’s general manager testified at hearing that on average, and in the case of the District’s disconnection and reconnection of service to the Complainants, the District incurs expenses of \$116.10 per disconnection or reconnection performed. Tr., 14-15. Of all the large water PSDs, the District is the largest physically in the state, with 519 miles of main, serving all of the unincorporated areas of Mason County, and reaching into three other counties. Tr. 10. The different circumstances between utilities may well have been a motivating factor in the Legislature’s decision to provide greater local government control to Locally Rate Regulated PSDs, rather than the PSC’s one-size-fits all approach. The average trip from the District’s home base to terminate water service is 60 miles round trip, and takes two hours of personnel time. Tr., 11. The District’s disconnection and reconnection fees do not fully recover the District’s expenses in performing these services. However these fees diminish the extent to which the District’s regular paying customers subsidize those who fail to make arrangements to continue service. The disconnect fee at issue is not unreasonable—in fact, it is unreasonable for the District’s regular paying customers to subsidize in full the cost of a service made necessary only by the failure of

other customers to make arrangements to enable service to be provided on a continuous basis. However, because the disconnect fee is at odds with the PSC's policy for those utilities over which it does have full jurisdiction, the PSC deems it unreasonable. Final Order, at 11.

The PSC gave no *de novo* review of whether the District's disconnection fee might be reasonable. The District's disconnection fee was not fully consistent with the PSC's prevailing policy on the issue and therefore it was unreasonable. End of the analysis. The District contends that it is the PSC's policy that it is unreasonable. It is unreasonable for a utility to perform a nearly identical service twice, and to recover a fee one time the utility performs the service, and to be prohibited from recovering a fee the other time the utility performs the service. Charging the same fee for a nearly identical service, with the amount of the fee each time being less than the cost to perform the service, cannot fairly be said to fall outside the zone of reasonableness.

Likewise, the fee is nondiscriminatory. There is no evidence or allegation that the District picks and chooses when to charge the fee when disconnecting services for nonpayment.

In finding that the disconnect fee is unreasonable, the Commission noted that it has "historically looked upon [disconnect fees] with disfavor" and that the Commission's *Water Rules* do not authorize charging separate disconnect fees. This argument overlooks the fundamental structure of the PSC's authority and the limitations placed on it in *W. Va. Code* §24-2-1(b). To the extent a State Rule conflicts with a statute, the statute governs, and the State Rule is of no effect. *See Murray Energy Corp. v. Steager*, 241 W. Va. 629, 640, 827 S.E.2d 417, 428 (2019). In *W. Va. Code* § 16-13A-9(a)(2)(E), the Legislature gave the home county commission of a Locally Rate Regulated PSD plenary authority to set the rates, fees, and charges of Locally Rate Regulated PSDs. The Commission cannot by a State Rule invalidate a statutory provision.

Likewise, the Final Order's (and Staff filings') reliance on the Commission's "historical" and "typical" state-wide "disfavor" of disconnection fees is precisely the kind of uniform approach the Legislature rejected in Senate Bill 234. The Legislature found that Locally Rate Regulated PSDs are "most fairly and effectively regulated by the local governing body with respect to rates." *W. Va. Code* § 24-1-1(j). This District faces unique and regionally-specific challenges with disconnect and reconnect expenses because the District covers the largest geographic area of any PSD in the state. Tr. 10. The Final Order does not mention this—instead relying on the Commission's "historical" and "typical" stances on disconnect fees in a more general sense. This is precisely what the Legislature intended to address by enacting Senate Bill 234 and entrusting localities to decide these questions.

D. The Commission erred by declining to dismiss or postpone adjudication of the Complaint.

Rule 12.10 of the PSC's *Procedural Rules* provides as follows:

When any proceeding has been properly set for a hearing and due notice given and any applicant, petitioner or complainant fails to appear without having obtained a continuance . . . the Commission may dismiss the petition, application, or complaint with or without prejudice or may upon good cause shown, recess a hearing for a further period to be set by the Commission to enable to absent party to attend.

Procedural Rule 12.10.

As such, upon a nonappearance of a complainant, the Commission may entertain either of these two options: dismissal, or a continuance for good cause shown. The Administrative Law Judge applied neither of the two remedies. No good cause was shown to recess the hearing, and the hearing was not recessed. It was held—and the PSC Staff proceeded to prosecute an issue that was unmentioned in the Complaint and beyond the Commission's jurisdiction to entertain. At the hearing and in its briefs, the District cited to a prior decision of the Commission which required it

to dismiss the Huffs' Complaint for the Complainants' failure to appear. *Douglas and Patricia Smallwood and Daniel Johnson v. Gauley River Pub. Serv. Dist.*, Case No. 06-1560-PWD-C (July 15, 2008 Recommended Decision, final August 4, 2008), Conclusion of Law No. 2 ("Mr. Johnson failed to appear at the hearing in this matter held on May 5, 2008, despite being given notice thereof, and, accordingly, his complaint against the District must be dismissed for failure to prosecute.")

In the Final Order, the Commission advances the notion that the discretionary aspect of *Procedural Rule* 12.10 gives the Commission a third option not mentioned or suggested by the Rule: to continue with the hearing despite the absence of good cause shown to do so.

Procedural Rule 12.10 contains permissive (or discretionary), rather than mandatory language. The *Procedural Rule* gives the ALJ discretionary authority to make—or not make—two decisions if a complainant fails to show for a hearing. Specifically, the rule in questions uses the term “may”: the ALJ “may” dismiss the complaint; the ALJ “may” recess the hearing upon good cause shown. It is an axiom of statutory construction that “the word ‘may’ is inherently permissive in nature and signifies that the Legislature meant to make the reference act discretionary, rather than mandatory.” See Syl. Pt. 1, *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016). Indeed, “[t]he word ‘may’ generally should be read as conferring both permission and power[.]” *Pioneer Pipe, Inc.*, 791 S.E.2d at 171.

Here, *Procedural Rule* 12.10 gives the ALJ the permission to dismiss the Complainant should a complainant fail to appear and the power not to dismiss. It also gives the ALJ the permission to recess the hearing for good cause shown, or the power to move forward. Nowhere does the Rule make either choice mandatory. It is not either/or as suggested by the PSD.

Moreover, the issue of the reasonableness of the reconnect fee was not factually dependent on testimony or evidence from the Complainants. Thus, it was within the ALJ's power to move forward with the hearing, and appropriate to do so. In fact, as noted by Staff, Commission precedent allows the Commission to move forward with a case without Complainants' participation at a hearing when it relates to Staffs' investigation into unreasonable practices by a utility.

That is exactly what happened here. It is also irrelevant that the Complaint failed to reference an unreasonable practice or act. Staff indicated its intention to investigate the disconnect/reconnect fee in its Interim Relief Memorandum of October 8, 2021. Staff has the authority to initiate an investigation into an unreasonable practice or act of an LRR of its own accord under *W. Va. Code* §§ 24-2-1 and 24-2-7.

Final Order, at 10.

The fact that the Commission disregarded the plain and limited options of its *Procedural Rules* and its own precedent that is directly on point is indicative of the aggressive intention of the Commission to claw back the jurisdiction which the Legislature transferred to county commissions.

VI. CONCLUSION

As a creature of statute, having jurisdiction and possessing only such authority as the Legislature grants it, the Commission must recognize and act consistent with the Legislature's transfer of authority for the setting of rates, fees, and charges for Locally Rate Regulated PSDs from the PSC to the home county commission of the Locally Rate Regulated PSD. The Legislature did not intend by the retention in Senate Bill 234 of the Commission's jurisdiction over "measurements, acts, or services" to giveth to the Commission that which it had taketh from it elsewhere in the same bill, jurisdiction over the rates fees and charges of Locally Rate Regulated PSDs. The Commission only retains jurisdiction over the rates, fees, and charges of Locally Rate Regulated PSDs under the limited circumstances described in *W. Va. Code* §24-2-1(b)(6-7), which the Commission acknowledges in the Final Order were not satisfied in this case. The Commission must follow the *Procedural Rules* and its prior decisions interpreting and applying those Rules. In light of the Complainants' failure to appear, failure to make any allegation concerning the disconnect fee, and the Complaint's failure to satisfy the prerequisites for the Commission to have jurisdiction to consider modifying a fee of a Locally Rate Regulated PSD under *W. Va. Code* §24-

2-1(b)(7), the Commission was obligated to dismiss the Complaint. This Honorable Court must enforce the Legislature's limitation upon the jurisdiction of the Public Service Commission by vacating the Final Order as *ultra vires*.

MASON COUNTY PUBLIC SERVICE
DISTRICT

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. _____

MASON COUNTY PUBLIC SERVICE
DISTRICT,

Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA and RALPH AND CARLA
HUFF,

Respondents.

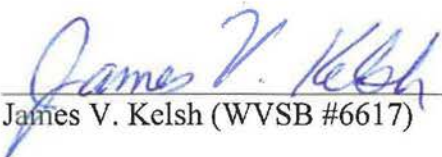
CERTIFICATE OF SERVICE

I, James V. Kelsh, counsel for the Mason County Public Service District, hereby certify that the foregoing Petition for Appeal and Petitioner's Appendix filed with the Court on May 4, 2022 have been served upon the following parties of record in the underlying Public Service Commission of West Virginia proceeding on this 4th day of May, 2022, via first class U.S. Mail.

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