



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE CITY OF KENOVA, WEST VIRGINIA,

Petitioner,

v.

Docket No. 19-0919

**THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,**

Respondent.

PETITIONER, THE CITY OF KENOVA, WEST VIRGINIA'S BRIEF

**ON APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA'S SEPTEMBER 6, 2019 ORDER
IN CASE NO. 18-1232-S-C**

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COMES NOW the City of Kenova, West Virginia (the "City"), and pursuant to Rules 10 and 14 of the West Virginia Rules of Appellate Procedure, hereby submits the following appeal from a September 6, 2019 Order entered by the Public Service Commission of the State of West Virginia (the "Commission"). Kenova appeals the Commission's order to provide a leak adjustment to a customer of the City of Kenova in direct contravention of the Commission's Water and Sewer Rules. The Commission committed error when it ordered a leak adjustment contrary to the command of Water Rule 4.4.c.1, which directs that Kenova "shall not" provide a leak adjustment when the leak is attributable to a "commode"—the undisputed source of the water loss here. Rather than apply the unambiguous Rule as written, the Commission: (1) created out of whole cloth a discoverability exception to the rule, (2) determined that this particular ratepayer was unable to discover her commode leak, and (3) ordered a refund.

This Court should overturn the Commission's Order and award the City attorneys' fees and costs, along with other relief, as appropriate, to prevent any such future abuses of process by the Commission.

I. ASSIGNMENTS OF ERROR

1. The Commission erred in ordering a bill adjustment for water usage attributable to a commode leak in contravention of the express command in the Commission's own Water Rule 4.4.c.1, which states, "Leaking commodes . . . shall not constitute leaks which entitle the customer to a recalculated bill."

2. The Commission erred in grafting a discovery exception into Rule 4.4.c.1 where no such exception exists. The Commission exceeded its authority when it elected to evade the safeguards of public rulemaking by simply interpreting an exception into an unambiguous rule.

3. The Commission also errs in denying the West Virginia public free access to the PSC's electronic complaint database—a database that PSC Staff may use at will and which is made available by the PSC through paid third-party subscription services such as Lexis and Westlaw. The Commission's refusal to make the database available to the public violates the West Virginia's Freedom of Information statute and basic fairness.

II. STATEMENT OF THE CASE

In August 2018, the complainant, Rebecca Florczak, received a high water bill. *Florczak v. City of Kenova*, No. 18-1232-S-C, ALJ Recommended Decision at 3 (Feb. 13, 2019) (Appendix ("App'x") 9.) She immediately realized that a commode in her master bathroom was leaking (the chain was hung up in the flapper valve). She and her daughter fixed the leak by adjusting the chain. (*Id.* at 4, App'x 10.) Ms. Florczak had slept in the master bedroom, adjacent to the master bathroom, during the entire period that the toilet leaked, but never entered the master bathroom because it had been used exclusively by her recently deceased husband. (*Id.* at 3, App'x 9.) After Ms. Florczak received the water bill, she requested a leak adjustment from the City of Kenova. (*Id.*, App'x 9.) City officials informed her that the Public Service Commission's rules prohibit them from granting a leak adjustment. (*Id.*, App'x 9.) *See* Commission's Rules for the Government of Water Utilities, 150 C.S.R. § 150-7-4, Rule 4.4.c.1 (the "Water Rules").

Ms. Florczak then contacted Commission staff and was advised that she should receive a leak adjustment despite the Staff's subsequent admission that "a plain reading of the Water Rules would indicate that a leak adjustment is not warranted." (*Id.* at 7, App'x 13.) On February 13, 2019, following a hearing, the Administrative Law Judge ("ALJ") entered a recommended decision dismissing the case. (*Id.*, App'x 7-19.) The ALJ found that Commission Rule 4.4.1 is unambiguous and prohibits Kenova from granting an adjustment for a commode leak. On

September 6, 2019, the Commission declined to accept the recommended decision and, instead, ordered the City to grant a leak adjustment because, in the Commission's view, the commode leak was not apparent to the ratepayer. *Florczak v. City of Kenova*, No. 18-1232-S-C, Commission Order at 5 (W. Va. P.S.C. Sept. 6, 2019) (App'x 5.)

III. SUMMARY OF ARGUMENT

The Commission's Water Rule 4.4.c.1 is controlling and states in relevant part: "Leaking commodes . . . shall not constitute leaks which entitle the customer to a recalculated bill."

We trust the Court, like the ALJ below, will find this regulatory command to be clear on its face and, yet again, remind the PSC that "fairness requires administrative bodies to abide by their rules until they are lawfully changed by law." *C & P Tel. Co. v. Public Serv. Comm'n*, 171 W. Va. 708, 714, 301 S.E.2d 798, 804 (1983). See *Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n of West Virginia*, 182 W. Va. 152, 156, 386 S.E.2d 650, 654 (1989), wherein the West Virginia Supreme Court stated that interpretation of an existing rule is only proper if an ambiguity in language is present. Moreover, "[a] statute, or administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. pt. 1, *Consumer Advocate*, 182 W. Va. at 156, 386 S.E.2d at 654 (1989).

Because Rule 4.4.c.1 is crystal clear on its face that "leaking commodes" shall not be a basis to provide a bill adjustment, the Court must overturn the decision of the Commission. The Commission plainly exceeded its authority by seeking to modify the rule to include a discoverability exception without following the public safeguards of rulemaking.

Finally, the Commission must make its full database of complaint cases available to the public. While Commission attorneys have access to these cases, the Commission claims that public access to these records is restricted because of privacy concerns. That rationale is a red

herring because the Commission has made such records, in their entirety, available to paying subscribers of third party services such as Lexis and Westlaw. The Court should order the Commission to allow public access to its complaint case database.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, the City does not believe that oral argument is necessary in this case because it involves a simple, narrow, and straightforward legal argument which has been adequately presented in the briefs and the record on appeal. However, the City will participate in oral argument if the Court determines that argument will aid the Court's decision-making process.

V. ARGUMENT

A. Standard of review.

The standard of review of final orders of the Commission is as follows:

In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence....

Syl. Pt. 2, *Monongahela Power Co. v. Public Service Comm'n*, 166 W. Va. 423, 276 S.E.2d 179 (1981).

B. The Commission cannot grant a leak adjustment where expressly prohibited by Water Rule 4.4.c.1.

A leak adjustment for a leaking commode is explicitly prohibited by the Commission's Water Rules.

Leaking commodes, dripping faucets, malfunctioning appliances, and similar situations shall not constitute leaks which entitle the customer to a recalculated bill.

Water Rule 4.4.c.1 (emphasis added).

As if this language is not clear enough on its face, during adoption of this rule, the Commission explained, “[W]e do believe that the rule [allowing leak adjustments] should *not* apply to leaky commodes, dishwashers or other appliances. We have attempted to place an exclusion in the rule *to prevent adjustments in those circumstances*. The adjustment is intended to be applied for major leaks such as pipes which break.” *In Re Revised Rules and Regulations for Water Util.*, Gen. Ord. No. 188.12, 1995 WL 735601 (W. Va. P.S.C. Oct. 11, 1995) (emphasis added).

Not surprisingly, the Commission has consistently denied bill adjustments in accordance with Rule 4.4.c.1, without any consideration as to the discoverability of the leak. *See Currence v. Elkins Mun. Water Dep’t*, No. 03-0004-W-C, 2003 W. Va. PUC LEXIS 1533 at *6 (W. Va. P.S.C. Apr. 9, 2003) (finding leaks associated with a toilet are not entitled to a leak adjustment despite the fact that the house was vacant); *Sabo v. Morgantown Util. Bd.*, No. 02-0367-WS-C, 2002 W. Va. PUC LEXIS 2513 at *3 (W. Va. P.S.C. June 14, 2002) (finding leaks from a toilet are not qualified for leak adjustments even though the resident was deceased); *Moye v. West Virginia-American Water Co.*, No. 00-1441-W-C, 2001 W. Va. PUC LEXIS 1005, at *3 (W. Va. P.S.C. Jan. 5, 2001) (holding that toilet leaks *clearly* do not qualify for a leak adjustment despite the fact that the house was vacant). Notably, in *Sabo*, which involved a commode leak discovered by the deceased resident’s daughter, the Commission denied a leak adjustment. *See Sabo*, 2002 W. Va. PUC LEXIS 2513, at *1, *8. Although the undiscovered leak led to a \$500 water bill, the Commission still dismissed the case for failure to state a claim, reasoning that leaking commodes simply do not qualify for leak adjustments. *Id.* at *7–*8. In all of these cases, despite the fact that the houses were all unoccupied, the Commission never engaged in a

discoverability analysis and, instead, faithfully applied Rule 4.4.c.1 as written. *See id.* at *3; *Currence*, 2003 W. Va. PUC LEXIS 1533 at *6; *Moye*, 2001 W. Va. PUC LEXIS 1005, at *3.

Notwithstanding the unambiguous prohibition against leak adjustments related to commode leaks and the Commission's consistent history of ignoring the discoverability of the leak, the Commission now attempts to read into the rule an exception for "hidden leaks." *Florczak v. City of Kenova*, No. 18-1232-S-C, at 5 (W. Va. P.S.C. Sept. 6, 2019) (App'x 5.) It does so despite the fact the Commission knows how to establish exceptions to its rules and has not done so here. We count approximately three dozen instances where the Commission's Water Rules establish a prohibition followed by an exception. See, for example:

Section 5.2.d. The utility shall not make any charge for furnishing and installing any permanent service connection, unless....

Section 5.2.i. Availability defined. -- Sewer service will be deemed available to a customer when a main is installed and maintained by the utility in such location and at such distance from the user's premises as may be provided by city ordinance or by the rules of the utility: provided, that service shall not be deemed to be available unless....

Section 5.5.h.2. In estimating the cost of an extension, the estimate shall be based on the diameter of the pipe to be used; provided, that the estimated cost to the customer or customers shall not be based on a pipe diameter greater than the diameter of the main from which the extension is to be made, unless....

Section 5.5.h.8. Contract for service. -- The utility shall not be required to make utility-funded extensions or refunds as described in this rule unless....

The Commission clearly knows how to establish exceptions to its regulatory prohibitions. The fact that it did not do so in Section 4.4.c.1 is controlling and precludes the Commission from evading the public safeguards of rulemaking by "interpreting" a discoverability exception into Water Rule 4.4.c.1.

C. The Commission has impermissibly attempted to amend a rule by administrative order instead of the formal rulemaking process.

The granting of a bill adjustment in the instant case amounts to a revised rule through interpretation. This Court has previously explained that “[a] statute, or administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” See *Consumer Advocate*, 182 W. Va. at 156, 386 S.E.2d at 654 (1989). See also W. Va. Code § 29A-3-1 (stating that all rules must be made in accordance with the Administrative Procedures Act); Op. Att’y Gen., Oct. 31, 1980, No. 15. (“[Chapter 29] insures that West Virginia Administrative Agencies are not permitted the luxury of conducting their rule-making activities insulated from public sentiment and views.”). The Court in *Consumer Advocate* also noted that “[i]nterpretation of statutes or rules and regulations is proper *only* when an ambiguity exists.” *Consumer Advocate*, 182 W. Va. at 156, 386 S.E.2d at 654 (1989) (emphasis added). Of course, no ambiguity exists here. The rule precluding comcode-based bill adjustments could not be more clearly stated.

The Commission’s decision creates a new rule for utilities without the public safeguards of rulemaking. Accordingly, it must be overturned. See W. Va. Code § 29A-3-5.

D. The Commission violates West Virginia’s Freedom of Information statute by only allowing paying subscribers access to complaint case records.

By prohibiting full access to the Commission’s electronic complaint database, the Commission is violating West Virginia’s Freedom of Information Statute. See W. Va. Code § 29B-1-1. The Commission claims that it limits access to protect the privacy of complainants. *Florczak v. City of Kenova*, No. 18-1232-S-C, at 9 (Feb. 13, 2019) (App’x 15.) However, the Commission makes those very files electronically available in full to paying subscribers of services such as Lexis and Westlaw. See, e.g., *Mayfield Inc.*, 2003 W. Va. PUC LEXIS 2471;

Collins, 2002 W. Va. PUC LEXIS 2857; *Moye*, 2001 W. Va. PUC LEXIS 1005. The fact that the Commission sells these case files in their entirety to third parties for publication reveals the Commission's assertion of complainant privacy concerns is disingenuous.

Taxpayer dollars fund the Commission's operations, and the Commission should not be able to profit from these electronic records while limiting access for taxpayers. *See* § 29B-1-1. Without access to these records, complainants and courts are at a disadvantage because only the Commission can rely on the full history of decisions. *See, e.g., Florczak v. City of Kenova*, No. 18-1232-S-C, at 5 (Sept. 6, 2019) (App'x 5) (citing *John McDowell v. Jefferson Utilities, Inc. and Jefferson County Public Service District*, Case No.09-0769-W-PSD-C, which is not available on the Commission's website, Lexis, or Westlaw). For example, *Sabo*, a case with facts very similar to the ones before us in the case at bar, is only available to complainants at a cost, through Lexis and Westlaw. *See Sabo*, 2002 W. Va. PUC LEXIS 2513.

The Commission's argument that one can request a paper copy of case files from the Commission is disingenuous because a litigant has to first identify a case as relevant and can do that only through an on-line search. Even if paper copy research were feasible, it adds a significant additional expense for litigants that is completely unwarranted and inappropriate.

If a complainant cannot access relevant precedent, then he cannot adequately protect his interests and ensure fair application of the Commission's rules. *See* § 29B-1-1 ("it is . . . the public policy of the State of West Virginia that all persons are . . . entitled to full and complete information regarding the affairs of government and the official acts of those who represent them."). The Commission's arbitrary practice of precluding public access to its online database violates West Virginia's Freedom of Information Statute and must be overturned.

E. This case presents a flagrant abuse of process and the Commission should pay the City's costs as a deterrent.

“When a public official disregarded a clear, nondiscretionary duty, without a deliberate intent to avoid obeying the law, [the West Virginia Supreme Court of Appeals has] awarded costs and attorney’s fees.” Syl. Pt. 3, *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Env’tl. Prot.*, 193 W. Va. 650, 653, 458 S.E.2d 88, 91 (1995).

The Public Service Commission has deliberately ignored its own rules—rules that municipalities and other utilities are required to follow. Specifically, the Commission has deliberately declined to abide by Rule 4.4.c.1. The Commission’s attempt to rewrite Water Rule 4.4.c.1 through administrative decision-making imposes significant costs on the City and counsel for the City. This included pretrial discovery inappropriately propounded against the City, motions practice, an administrative hearing, and this appeal. The Commission’s arbitrary actions and order penalizes the City for attempting to comply with the Commission Rules as written. Equity to the City, its ratepayers, and legal counsel requires that the Commission pay the City’s legal costs to oppose the Commission’s illegal behavior. The City therefore requests permission to file a fee and cost petition.

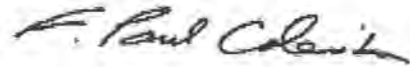
VI. CONCLUSION

For the reasons set forth herein, the City of Kenova, West Virginia, respectfully requests that this Honorable Court:

- (1) overturn the Commission’s Order of September 6, 2019;
- (2) dismiss the Complaint against it filed by Rebecca Florczak;
- (3) allow the City to submit a fee/cost petition; and
- (4) grant such other relief as the Court deems appropriate.

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