

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITY OF KENOVA,

Petitioner,

v.

Docket No. 19-0919

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA, and  
REBECCA LYNN FLORCZAK,

Respondents.

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PETITIONER'S REPLY BRIEF

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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 reply brief to the 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.

### **I. ASSIGNMENTS OF ERROR**

Petitioner advances three assignments of error—that the Commission (or “PSC”): (1) disregarded the plain meaning of Water Rule 4.4.c.1, which states, “Leaking commodes . . . shall not constitute leaks which entitle the customer to a recalculated bill,” in awarding a bill adjustment based on a commode leak, (2) created a discoverability exception to Rule 4.4.c.1 in exceedance of its authority and without following rulemaking procedures, (3) has refused to provide free access to its electronic complaint database in violation of West Virginia’s Freedom of Information statute.

### **II. STATEMENT OF THE CASE**

Petitioner relies upon the Statement of the Case in the Petitioner’s Brief.

### **III. ARGUMENT**

**A. Water Rule 4.4.1.c is an unambiguous regulation that clearly prevents bill adjustments for leaking commodes and the Commission may not add a “discoverability” exception outside of rulemaking.**

Water Rule 4.4.1.c states that “[l]eaking commodes . . . shall not constitute leaks which entitle the customer to a recalculated bill.” There is simply no ambiguity there. Nevertheless, the Commission seeks to inject ambiguity by asserting that the “rule indicates . . . that customers will not automatically be entitled to adjustments . . .” but, implicitly, that adjustments can be made in the discretion of the utility and/or Commission. (Resp. Br. at 8.) This reading is unsupported by the regulation itself as well as the Commission’s practice in providing exceptions in its water rules. As noted in Petitioner’s Brief, in more than 30 places throughout the Commission’s Water

Rules, where the Commission intended to allow exceptions, it used the drafting construct of “shall not ..., unless ...” (Pet. Br. at 6; *see* Water Rules Section 5.2.d., Section 5.2.i., Section 5.5.h.2, Section 5.5.h.8.) Significantly, it has not done so here. Moreover, it makes no sense for the Commission to expressly prohibit any right to a bill adjustment for a commode-based leak while interpreting such an absolute denial as leaving unfettered discretion for the utility/Commission to grant such an adjustment. That is a (mis)reading of the regulation completely unsupported and inconsistent with the preamble discussion in the Commission’s regulations. The Commission’s asserted interpretation is a bridge too far.

This Court has previously rejected a similar attempt by the PSC to “interpret” new requirements/language into an unambiguous rule. *See Consumer Advocate Div. of Pub. Serv. Comm’n v. Public Serv. Comm’n of West Virginia*, 182 W. Va. 152, 156 (1989) (“A statute, or administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”) The PSC cannot interpret one of its unambiguous and well-settled rules to add an exception found nowhere in the rule text. *See State Administrative Procedures Act*, W. Va. Code §§ 29A-1-1 *et seq.*; *id.* at § 29A-3-5.

The Commission never previously discussed a discoverability exception in its cases denying bill adjustments for commode leaks. (Pet. Br. at 5.) Significantly, no discoverability analysis was conducted by the PSC in a case decided during the pendency of this appeal (October 2019). The City was surprised to learn of a recent PSC case—not cited by the PSC in its briefing—from October of this year, relating to a suspected commode leak at an unoccupied rental property. In *Kiser v. Union Williams Pub. Serv. Dist.*, Case No. 19-0537-PWD-C (Oct. 29, 2019), the Commission denied a leak adjustment after Staff concluded that a leaking commode was responsible for an unusually large water/sewer bill. In the final order, there is no

discoverability analysis upon which the denial of the leak adjustment is based. Thus, the Commission denied a leak adjustment for a commode leak in an unoccupied rental property without engaging in any discoverability analysis, while here it engages in a discoverability analysis for a commode leak in the master bathroom to the bedroom where the complainant slept every night during the pendency of the leak. These two 2019 decisions from the Commission cannot be squared legally or factually.

At bottom, the rule is unambiguous. Leaks due to commodes are not eligible for bill adjustments.

**B. The Commission's withholding of its case documents to participants and the public has no basis in West Virginia's Freedom of Information statute exemptions and is patently unfair.**

West Virginia's Freedom of Information statute, codified at W. Va. Code § 29B-1-1 *et seq.*, is meant to ensure that:

all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.

W. Va. Code § 29B-1-1. Although there is an exception to public disclosure for “[i]nformation of a personal nature such as that kept in a personal, medical, or similar file,” the case files and orders at issue here are nothing of the sort. *See* W. Va. Code § 29B-1-4(a)(2). Rather, they are documents relating to public utility billing and service practices to which the public must have access (subject to redaction or protection of information exempted under the FOIA statute). Once since Kenova raised the issue to this Court has the PSC agreed to prospectively make case decisions publicly available,

including the *Kiser* case supra.<sup>1</sup> But for the PSC agreeing in its briefing in this matter to make its decisions electronically available going forward, we would not have known about the commode case in which, contrary to its approach here, the PSC did not perform any discoverability analysis. Kenova continues to believe that the PSC must make all of its complaint database publicly available (subject to authorized FOIA statute redactions).

Going back to the well one too many times, the Commission seeks to justify withholding this public information by asserting a new exemption to the State's FOIA statute—"sound stewardship of personal information." (Resp. Br. at 16.) This purported exemption/justification is yet another example of the Commission reading into the law what it wishes were there. There is no exemption for the Commission to withhold from public review the complaint case database files and this Court should order that the electronic database be made publicly accessible (subject to redactions consistent with the FOIA statute).

**C. An Award of attorney fees and costs is needed to deter the Commission from requiring smaller utilities to litigate when challenging Commission decisions.**

The Commission's briefing in this matter shows it unrepentant for continuing to ignore its own regulations and the rule of law. The Commission contends that its final decision is cost neutral to the City. (Resp. Br. at 4, 14–16.) Such an assertion misses the forest through the trees. Kenova properly denied the request for a bill adjustment. The PSC then forced Kenova through a tortuous process that included (1) discovery, (2) several visits to the complainant's house, (3) having to check the calibration of complainant's meter (even though the complaint admitted it was a commode leak), (4) reviewing and responding to staff memos, (5) having staff and

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<sup>1</sup> This was simple luck as the PSC only began making such decisions available on October 26, 2019 and the *Kiser* case was decided days later.

management participating in a day-long adjudicatory hearing, (6) briefing before the Commission, and (7) this appeal. All over an approximate \$233 bill adjustment—less than most lawyers charge for one hour of work. Kenova should be applauded for following the law and not caving to the PSC's strong-arm tactics to force an illegal bill adjustment in this matter.

If the Court allows the PSC to interpret a discovery exception into the rule, every utility will lose its shirt in conducting a discoverability analysis, never mind going through the PSC process. Any utility facing a complaint for a bill adjustment filed with the PSC will have to promptly surrender because pursuing the matter will cost far more than crediting the leak adjustment.

The PSC should pay some legal fees and costs to chill the Commission in the future from using its process to strong arm utilities into violating the law—here the PSC's own regulations.

#### **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.

**THE CITY OF KENOVA, WEST VIRGINIA**

By AQUALAW, PLC



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