Docket No. 22-0351

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Mason County Public Service District,
Petitioner,

v.

The Public Service Commission of West Virginia and
Ralph and Carla Huff,
Respondents.

STATEMENT OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF WEST VIRGINIA OF ITS REASONS FOR THE ENTRY OF ITS ORDER OF APRIL 4, 2022

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June 21, 2022

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

The Respondent, Public Service Commission of West Virginia (the "Commission"), hereby submits its statement of reasons for the entry of its Order of April 4, 2022, in Case No. 21-0730-LRR-C. Succinctly, the Commission properly exercised jurisdiction in the underlying matter when it correctly ruled that the disconnect fee imposed by the Mason County Public Service District (the "District") was unreasonable.

I. STATEMENT OF THE CASE

The underlying case began on October 6, 2021, when Ralph and Carla Huff ("Complainants") filed a verified formal complaint against the District. Complainants, proceeding *pro se*, asserted that the District violated the laws of West Virginia by terminating water service during a pandemic and requiring that the Complainants pay the balance of their bill in full before the District would restore service. As relief, the Complainants requested that the Commission order the District to restore water service to their residence and require the District to negotiate a reasonable payment agreement regarding any outstanding balance on their bill.

On October 8, 2021, Commission Staff filed an Interim Relief Memorandum recommending interim relief. In the Memorandum, Staff stated that the District had given the Complainants a leak adjustment and a deferred payment agreement ("DPA") on September 9, 2021, before the complaint was filed. The DPA included the following provisos: service would be reconnected upon the payment of $175.00, which included a $50 disconnect fee and a $50 reconnect fee; the Complainants would pay a $75.00 deposit, and the remaining balance of the Complainants' arrearage would be paid on a deferred payment plan.

Staff indicated concerns, however, about the reasonableness of the District's practice of charging both a disconnect fee and a reconnect fee. (Interim Relief Memorandum at pp. 1-2.) By way of background, the District's Board and the Mason County Commission ("MCC") approved new water rates for the District on March 18, 2021. Included in the District's tariff is a disconnect fee of $50 and a reconnect fee of $50. Both apply, and are charged, if the District terminates and reconnects service for non-payment. Specifically, Staff stated that it had "concerns about the reasonableness of the [District] requiring Complainants to pay both a disconnect and a reconnect fee and the amount of each of the fees ... [i]n reviewing the [District's] Tariff, Staff discovered that the above mentioned charges have recently been increased from $25.00 to $50.00." (Interim Staff Memorandum at pp. 1-2.) Staff deferred its recommendation as to the reasonableness of these fees until it had the opportunity to further investigate this matter. (Id.)

Staff recommended that the District restore water service to the Complainants upon payment of the $75.00 deposit and maintain service provided the Complainants remained current on bills during the pendency of their claim. (Interim Relief Memorandum at p. 2.) The disconnect fee permeated the remainder of the case.

To be clear, the District was aware of Staff's concerns and intent to further investigate the reasonableness of the disconnect fee during the early stages of this case. It was stated in the Interim Relief Memorandum filed on October 8, 2021.

On November 3, 2021, Staff filed an Initial Joint Staff Memorandum recommending that the Commission direct the District to file an answer immediately to assist with its investigation.

On November 12, 2021, the District filed a motion to dismiss the complaint arguing that it acted appropriately in disconnecting service for nonpayment in March 2021. In addition, the District asserted that it applied its tariff in a non-discriminatory manner. (*See generally*, Motion

to Dismiss Filed by District, November 12, 2021.) It further argued that the 30-day period for a customer to challenge the rates in the District's March 31, 2021, tariff, including charges for disconnection and reconnection, had lapsed[1]. (*Id.*)

Staff responded to the District's Motion to Dismiss. Staff requested that the Commission deny the Motion to Dismiss and repeated its concerns with the $50 disconnect fee and the $50 reconnect fee. (Staff Response to Motion to Dismiss at p. 2.) Staff noted that it was investigating the reasonableness of the disconnect and reconnect fee. (*Id.* at p. 2.) Staff also argued that the Commission's investigation into whether a utility's practices are reasonable is not limited by the 30 days for a customer to challenge rates. (*Id.* at 3.)

On December 13, 2021, Staff filed its Final Joint Staff Memorandum. Staff recommended that the Complainants make the current bill payment of $100.67 on or before the bill due date, that the District credit the Complainants' account for the $50 disconnect fee, and that the remaining past due balance be placed on a twelve-month deferred payment agreement ("DPA"). Moreover, Staff stated that the disconnect fee here was unreasonable because the Commission's Rules for the Government of Water Utilities, 150 C.S.R. 7 (the "Water Rules") do not provide for a disconnect fee except in specific circumstances. The Water Rules state that "[w]henever the supply of water is turned off for violation of rules, non-payment of bills, or fraudulent use of water, the utility may make a charge as set forth in its tariff for reestablishment of service." (Final Joint Staff Memorandum at 4, *citing* Water Rule 6.8.3.a.)

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[1] W. Va. Code § 24-2-1(b)(7) provides:

> Customers of water and sewer utilities operated by a political subdivision of the state may bring formal or informal complaints regarding the commission's exercise of the powers enumerated in this section and the commission shall resolve these 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.

The Water Rules allow a disconnect fee only when a water utility must disconnect water service to a delinquent sewer customer at the request of a separate wastewater utility. (Final Joint Staff Memorandum at 4, *citing* Water Rule 6.8.6.a.) That was not the case here. And generally, as noted by Staff (Final Joint Staff Memorandum at 4-5), a water utility that disconnects service for nonpayment of a water bill is not allowed to charge a disconnection fee because, typically, the costs of disconnection are built into the utility's cost of service. *See, e.g.*, Jane Lew Public Service District, Case No. 08-1867-PWD-T-PC-CN (Recommended Decision entered March 13, 2009, at p. 12.).

On December 21, 2021, the District filed an objection to Staff's Final Joint Staff Memorandum, disagreeing with the recommendation that the disconnect fee is unreasonable and objecting to the duration of the DPA.

On December 30, 2021, the Administrative Law Judge ("ALJ"), held a telephonic hearing. The Complainants did not appear. (Telephonic Hearing Transcript, December 30, 2021 "Tr.," at 6.) The ALJ stated that the hearing would proceed, given the allegation of the unreasonable practice associated with the disconnect fee. (Tr. at 6.) At the outset of the hearing, counsel for the District moved to terminate the hearing and dismiss the case for failure to prosecute because the Complainants failed to appear. (*Id.* at 6-7.) In response, Staff argued that even without the Complainant's appearance, the Commission has the authority to proceed with the hearing regarding the alleged unreasonable practice of collecting a disconnect fee. (*Id.* at 7.)

The ALJ denied the motion to dismiss. The ALJ ruled that the hearing could move forward in light of the allegation of an unreasonable practice, which, the ALJ noted, "could arise again sometime in the future." (*Id.* at 7.) The hearing went forward as scheduled on the issue of the disconnect fee as an unreasonable utility practice and the District's objection to the DPA.

At the hearing, the District presented evidence regarding its disconnect fee. Specifically, Brent Clark, the District's General Manager, testified that the District's justification for the disconnect fee was that it needed "to recover the cost both ways to and from." (Tr. at 14.) To elaborate, Mr. Clark testified that the direct cost to and from the point of disconnect is "56 cents a mile." (*Id.*). Including labor, he testified that the total disconnect expense to the District is approximately $116.10. (*Id.* at 14-15.) The disconnect fee is, however, $50. (*Id.* at 15.) The District also charges a reconnect fee of $50. (*Id.*). The disconnect and reconnect fees must be paid in full by a customer that was disconnected for nonpayment before service will be reconnected. (*Id.* at 25.)

In response, Staff presented the testimony of Robert Cadle, a Commission utility analyst. Mr. Cadle testified that it is not reasonable for the District to charge a disconnect and reconnect fee. (*Id.* at 40.) A disconnect fee, in the situation presented – when water service (not wastewater service) is terminated for nonpayment, and a reconnect fee is also charged – is, in effect, a double-recovery. (*Id.*) Moreover, utilities include the cost of disconnects for water service only in their operation and management costs. (*Id.* at 39.) Again, the Commission's rules provide only for a reconnect fee, and the Commission has historically seen the disconnect fee presented here as an unreasonable double-recovery. (*Id.* at 39-40.)

Post-hearing, on January 19, 2022, Staff and the District filed their initial briefs. Both parties filed reply briefs on January 24, 2022.

On January 28, 2022, the ALJ issued a Recommended Decision that invalidated the District's disconnect fee; required the filing of an updated tariff; required the District to credit the $50 disconnect fee to the Complainants' account; and adopted the DPA. (*See generally,*

Recommended Decision, January 21, 2022.) The Recommended Decision contained the following Conclusions of Law:

1. Under W. Va. Code §24-2-1(b)(7) the Commission has jurisdictional authority to determine whether an LRR has any regulations, measurements, practices, acts or services that are unjust, unreasonable, insufficient, unjustly discriminating or otherwise contrary to Chapter 24 of the West Virginia Code. If the Commission finds such an unreasonable practice that "affect[s] rates, fees and charges," it may set aside, alter or amend those rates, fees and charges on a going-forward basis.

2. West Virginia Code §24-2-1(b)(7) reinforces the Commission's jurisdictional authority over unreasonable practices under W. Va. Code §24-2-7(a).

3. The Defendant's [District's] use of a disconnect fee is an unreasonable practice under Commission precedent and Rule 6.8.3.a of the Commission's Water Rules.

4. The monies collected from the Huffs should be credited to the Huffs' account by the [District].

5. The Staff recommended DPP [deferred payment plan] is reasonable and appropriate and should be adopted in this case.

(Recommended Decision at p. 11.)

The District filed exceptions on February 11, 2022. The Commission adopted the Recommended Decision of the ALJ and issued its Final Order on April 4, 2022. It is this Final Order that is the subject of this appeal.

II. SUMMARY OF ARGUMENT

The issue presented in this appeal is simple: did the Commission exceed its authority when it ruled that the disconnect fee imposed by the District was unreasonable? The short answer is no; it did not.

To further elucidate, the Legislature did not remove wholesale the Commission's authority/jurisdiction to regulate locally rate regulated utilities ("LRRs") when it enacted W. Va. Code §16-13A-9(a)(2)(E) in 2015. The jurisdiction of the Commission over LRRs starts with W. Va. Code §24-2-1(a), which extends the jurisdiction of the Commission "to all public utilities

in this state." W. Va. Code §24-2-1(a). This includes "[a]ny public service district created under the provisions of §16-13A-1 *et seq.* of this code." W. Va. Code §24-2-1(a)(9). Moreover, the code explicitly authorizes the Commission to act as it did here: to set aside rates, fees, charges, acts, or practices of an LRR if unreasonable. *See, e.g.* W. Va. Code §24-2-7(a).

Second, the disconnect fee at issue here is an unreasonable act or practice. Disconnect fees have been historically looked upon with disfavor (and denied when requested by utilities) by the Commission. Furthermore, the Commission's Water Rules do not allow for a disconnect fee. Water Rule 6.8.3.a. states:

> Whenever the supply of water is turned off for violation of rules, non-payment of bills, or fraudulent use of water, the utility may make a charge as set forth in its tariff for *reestablishment* of service.

(Emphasis added). There is no provision under the rule for a disconnect fee.

Third, the Commission historically has found, as the ALJ did here, that disconnect fees amount to a double-recovery because expenses (as claimed here by the District) associated with disconnecting services are part of its operation and maintenance expenses for which the Commission or the county commission allows recovery when establishing service rates. *See* Case No. 09-0443-PWD-T-PW, Fountain Public Service District, 2009 W. Va. PUC LEXIS 2437, *9-10 (W. Va. P.S.C. September 8, 2009) (denying a utility's request to add a disconnect fee to its tariff and holding that "[a]llowing a water utility to impose a disconnect fee may ostensibly result in double recovery by the utility since normally this cost of service item is recouped in a utility's base rates"), *citing* Case No. 08-1867-PWD-T-PC-CN, Jane Lew Public Service District, March 13, 2009, and Case No. 04-1865-PWD-T, Green Valley-Glenwood Public Service District (2005).

Finally, the Commission was within its authority to rule on the unreasonableness of the District's disconnect fee, even though the Complainants did not include the disconnect fee in their complaint, did not appear at the hearing, and did not file their complaint within the 30-day jurisdictional time limit in W. Va. Code §24-2-1(b)(7). Simply put, the Commission may consider allegations of unreasonable utility practices raised by Staff in a formal complaint proceeding, even if the Complainant has requested dismissal of their original complaint or has not prosecuted their complaint. *See* Case No. 94-0161-E-C, Sheppard v. West Virginia Power (1995), cited by Treuthart v. Kenova Municipal Water Department, Case No. 03-0768-W-C, 2003 W. Va. PUC LEXIS 5783, *17-18 (W. Va. P.S.C. December 12, 2003).

Thus, the District's appeal should be denied, and the Commission's Final Order of April 4, 2022, should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT

In the Scheduling Order entered on May 12, 2022, the Court stated that a hearing on this appeal would be scheduled in accordance with W. Va. Code §24-5-1 and Rule 19 of the Rules of Appellate Procedure during the September 2022 Term of Court. The Scheduling Order further states that the Clerk will, later, provide the parties with a Notice of Argument per Rule 19(b) of the Rules of Appellate Procedure.

IV. STANDARD OF REVIEW

This Court has held, "As a general rule, 'Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.'" Pool v. Greater Harrison Cty. Pub. Serv. Dist., 241 W. Va. 233, 237, 821 S.E.2d 14, 18 (2018); (citing Syllabus Point 1, Appalachian Power Co. v. State Tax Dept of W.Va., 195 W.Va. 573, 466 S.E.2d 424 (1995).

In Monongahela Power Co. v. Pub. Serv. Comm'n, 166 W.Va. 423, 276 S.E.2d 179, 180 (1981), this Court adopted the comprehensive standard of review of Commission decisions as applied by many states and outlined in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

> 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.... The Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Monongahela Power Co., Syllabus Point 2 (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Co. in Syllabus Point 1 of Central West Virginia Refuse. Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416,438 S.E.2d 596 (1993) as follows:

> The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981) 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.

Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416, 420; 438 S.E.2d 596, 600-601 (1993).

V. ARGUMENT

A. The Commission properly exercised jurisdiction over the District's disconnect fee.

The District is an LRR as defined by W. Va. Code §16-13-9. It maintains that because the District is an LRR, the Commission lacks jurisdiction to set the rates, fees, and charges duly adopted by the MCC. This, it argues, would include the disconnect and reconnect fees at issue in this matter. Specifically, W. Va. Code §16-13A-9(a)(2)(E) gives the MCC the authority to establish the District's rates, fees, and charges. That provision provides:

> Rates, fees, and charges approved by resolution of the board shall be forwarded in writing to the county commission with the authority to appoint the members of the board. The county commission shall publish notice of the proposed revised rates, fees, and charges by a Class I legal advertisement in compliance with the provisions of §59-3-1 et seq. of this code. Within 45 days of receipt of the proposed rates, fees, and charges, the county commission shall take action to approve, modify, or reject the proposed rates, fees, and charges, in its sole discretion. If, after 45 days, the county commission has not taken final action to approve, modify, or reject the proposed rates, fees, and charges, as presented to the county commission, shall be effective with no further action by the board or county commission. In any event, this 45-day period shall be mandatory unless extended by the official action of both the board proposing the rates, fees, and charges, and the appointing county commission.

W. Va. Code §16-13A-9(a)(2)(E).

This provision, however, does not remove all of the Commission's jurisdiction to regulate LRRs.

The statutory scheme established by the West Virginia Legislature that bestows regulatory jurisdiction over LRRs is multifaceted. As an initial matter, the Legislature has found that "water and sewer utilities that are political subdivisions of the state providing separate or combined services and having at least four thousand five hundred customers and annual gross revenues of

$3 million or more are most fairly and effectively regulated by the local governing body with respect to rates, borrowing and capital projects." W. Va. Code §24-1-1(j). For that reason, "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 [the] code." Id.

West Virginia Code §24-2-1(a) extends the jurisdiction of the Commission "to all public utilities in this state." W. Va. Code §24-2-1(a). This includes "[a]ny public service district created under the provisions of §16-13A-1 *et seq.* of this code." W. Va. Code §24-2-1(a)(9). That jurisdiction, however, is not without limits:

> Notwithstanding any other provision of this code to the contrary, the jurisdiction of the commission over water and/or sewer utilities that are political subdivisions of the state providing separate or combined services and having at least 4,500 customers and annual combined gross revenues of $3 million or more is limited to those powers enumerated in §24-2-1(b) of this code.

W. Va. Code §24-2-2(c).

The jurisdiction of the Commission over LRRs is outlined in W. Va. Code §24-2-1(b) and includes:

> (1) General supervision of public utilities, as granted and described in §24-2-5 of this code;
>
> (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 formal or informal complaints regarding the commission's exercise of the powers enumerated in this section and the commission shall resolve these 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. The 180-day period for resolution of the dispute may

> be tolled by the commission until the necessary information showing the basis of the matter complained of is filed by the political subdivision: Provided, however, That whenever the commission finds any regulations, measurements, practices, acts, or service to be unjust, unreasonable, insufficient, or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, or finds that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurement, regulations, acts, practices or services, to be furnished, imposed, observed, and followed in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate, or otherwise in violation of this chapter, and shall make an order that is just and reasonable: Provided further, That if the matter complained of would affect rates, fees, and charges 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 an order to be followed in the future.

W. Va. Code §24-2-1(b)(1), (2), and (7).

West Virginia Code §24-2-1(b)(2) gives the Commission the authority to regulate the measurements, practices, acts, or services of an LRR as granted and described in §24-2-7 of the Code. W. Va. Code §24-2-7(a) provides:

> Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or service to be *unjust, unreasonable,* insufficient or unjustly discriminatory, *or otherwise in violation of any provisions of this chapter*, or shall find that any service is inadequate, or that any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurement, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

W. Va. Code §24-2-7(a) (emphasis added).

Note that W. Va. Code §§24-2-7(a) and §24-2-1(b)(7) give the Commission essentially the same authority. Under §24-2-1(b)(7), the jurisdiction arises due to a customer complaint. Under §24-2-7(a), the jurisdiction arises *whenever, under the provisions of this chapter* (emphasis added), the Commission finds an act or practice of an LRR unreasonable. The Commission has the authority to determine whether charging a disconnect fee is an unreasonable practice under both W. Va. Code §24-2-1(b)(7) and W. Va. Code §24-2-7(a), with or without the Complainants' continuing participation in the case. The Commission has the authority to determining whether charging a disconnect fee is an unreasonable practice under W. Va. Code §24-2-7(a) whenever such a fee comes to its attention.

Thus, the Legislature has mandated the Commission to determine whether a practice of an LRR (like the District) is unreasonable under the authority granted by W. Va. Code §24-2-7 and W. Va. Code §§24-2-1(a)(b)(2) and (7). Moreover, contrary to the District's assertions, this determination is not about calculating the disconnect fee. It was the imposition of the fee itself that is under scrutiny here. The Commission correctly exercised its authority to regulate an unjust or unreasonable practice – a practice long-held by the Commission as unreasonable.

The District attempts to avoid this determination by arguing that a disconnect fee is separate from an act or practice. Its attempted distinction is non-determinative. It is the act of charging the disconnect fee that is unreasonable. The District's argument that the charge of a fee to a customer can never be an act or practice is nonplussing.

To be clear, the fee amount is not at issue[2]. The District's practice or act of charging a disconnect fee and a reconnect fee for nonpayment of water service is at issue. This distinction

[2] It was not the numerical amount of the fee charged that was at issue here. What was of concern, and an unreasonable practice, was the act of charging a disconnect fee and reconnect fee for the same nonpayment of service. Historically, a reconnect fee or disconnect fee was never meant to recoup the entire costs associated with the reconnection or disconnection. That is not to say, however, that the amount charged for a reconnect fee, for example, could not rise

and the reasoning behind the determination of unreasonableness is presented in Case No. 08-1867-PWD-T-PC-CN, Jane Lew Public Service District, March 13, 2009, cited by the ALJ and in the Final Order (*See* Final Order at p. 11 and Recommended Decision at p. 12.)

In Jane Lew, provisions of an interim tariff were at issue. Specifically, Jane Lew Public Service District requested that it be allowed to add a disconnection charge to its tariff because "it should be allowed to recover the cost it incurs from the cost-causer when it actually disconnects service." 2009 W. Va. PUC LEXIS 485, *30 (W. Va. P.S.C. March 13, 2009). This is precisely the reason the District offers here for its disconnect fee. The Commission denied the inclusion of the disconnect fee in Jane Lew for the same reasons the disconnect fee was held unreasonable here. 2009 W. Va. PUC LEXIS 485, *30. The Commission ruled

> The disconnection charge proposed by the District in the amount of $ 25.00 is to be charged whenever the supply of water is turned off at the customer's request for seasonal use of the property, or for violations of rules, nonpayment of bills, or fraudulent use of water. The District currently has a reconnection fee which it proposes to increase from $ 20.00 to $ 25.00. The reconnection fee will be charged whenever the supply of water is turned on by the utility following disconnection at the customer's request for seasonal use of property or for violation of rules, non-payment of bills or fraudulent use of water ... It appears to the Administrative Law Judge that the Jane Lew District seeks double recovery of expenses associated with service termination. Already imputed in rates are certain operating expenses regarding billing and collection.

2009 W. Va. PUC LEXIS 485, *30-31 (W. Va. P.S.C. March 13, 2009).

Again, it is the act or practice of imposing a disconnect fee and reconnect fee for termination of services associated with nonpayment that is unreasonable. The reconnect fee is allowed by the Commission's Water Rules; the disconnect fee is not. The disconnect fee is

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to the level of an unreasonable practice. That was not the issue in the underlying case and not the issue of concern here, before this Court.

unreasonable and historically held so by the Commission (which should be no surprise to the District).

Moreover, the District misses the point in the Court's decision in *SER Public Service Commission of West Virginia v. Town of Fayetteville, Municipal Water Works*, 573 S.E.2d 427 (W. Va. 2002). In *Town of Fayetteville*, the West Virginia Supreme Court of Appeals held that the PSC had jurisdiction over the Town of Fayetteville (Town) under W. Va. Code §24-2-7(a) to require the town to refund a reconnection fee to the complainant for a service that had not actually been disconnected. In addition, the Commission invalidated a Town ordinance that authorized the fee in question (a wastewater reconnection fee) where the service had not been disconnected. The Court found authority for the PSC's order notwithstanding the fact that the Town is a municipality, and the PSC's jurisdiction over municipalities is limited by statute, similar to that of LRR's.

In its ruling, the *Town of Fayetteville* Court held:

> The statute merely exempts municipalities from the rate approval sections of 24-2-4 and 24-2-4a; it does not deprive the PSC of jurisdiction over the municipality or eliminate the PSC's authority to otherwise address issues of the municipally operated public utilities. The rate making functions, statutorily limited with regard to municipalities, are not identical to the adjudicatory functions. In exempting municipalities from the extremely detailed rate procedures outlined in sections 24-2-4 and 24-2-4a, the statutory scheme does not remove municipalities from the authority of the PSC to exercise its general powers to require reasonable, non-discriminatory practices based primarily upon the cost of service.

Town of Fayetteville, 573 S.E.2d at 344.

The same can be said here, with respect to LRRs. While exempted from the rate approval sections of the statute, LRRs are not exempted from the remaining regulatory authority of the Commission, namely, to determine whether an act or practice is unjust or unreasonable.

The Commission was within its authority to rule that the District's imposition of a disconnect fee was unreasonable. The Commission's decision should be affirmed.

B. The District's disconnect fee is unreasonable.

The Commission found that the disconnect fee was unreasonable. Disconnect fees have been historically looked upon with disfavor and denied when requested by utilities. First, the Commission's Water Rules do not allow for a disconnect fee. Rule 6.8.3.a. states:

> Whenever the supply of water is turned off for violation of rules, non-payment of bills, or fraudulent use of water, the utility may make a charge as set forth in its tariff for *reestablishment* of service.

(Emphasis added). There is no provision under the rule for a disconnect fee.

Second, the Commission historically has found, as it did here, that disconnect fees amount to a double-recovery because expenses (as claimed here by the District) associated with disconnecting services are part of its operation and maintenance expenses which are recoverable in base rates. Thus, the Commission historically has found disconnect fees unreasonable.

At the hearing held in this matter, Mr. Clark testified that the District charges both the disconnect fee and the reconnect fee when service is terminated for nonpayment and is later reconnected. (*See, e.g.*, Tr. at p. 25.) The purpose is a cost-recovery mechanism. (*See, e.g.*, Tr. at 14.) This is exactly the situation presented in Jane Lew, and exactly why Mr. Cadle testified that the application of the disconnect fee and the reconnect fee is an impermissible double-recovery by the District, and an unreasonable practice.

Again, Mr. Cadle testified that it is not reasonable for the District to charge a disconnect and reconnect fee. (*Id.* at 40.) A disconnect fee in the situation presented – when only water service is terminated for nonpayment, and a reconnect fee is also charged – is, in effect, a double-

recovery. (*Id.*) Moreover, utilities will include the cost of disconnects for water service only in their operation and management costs. (*Id.* at 39.)

The Water Rules do allow a disconnect fee when a water utility must disconnect water service to a delinquent wastewater customer at the request of a separate wastewater utility. (Final Joint Staff Memorandum at 4, *citing* Water Rule 6.8.6.a.) That was not the case here. And generally, as noted by Staff (Final Joint Staff Memorandum at 4-5), a water utility that disconnects service for nonpayment of a water bill is not allowed to charge a disconnection fee because, typically, the costs of disconnection are built into the utility's cost of service. *See, supra,* Jane Lew Public Service District, Case No. 08-1867-PWD-T-PC-CN (Recommended Decision entered March 13, 2009, at p. 12.) *See also* Case No. 09-0443-PWD-T-PW, Fountain Public Service District, 2009 W. Va. PUC LEXIS 2437, *9-10 (W. Va. P.S.C. September 8, 2009) (denying a utility's request to add a disconnect fee to its tariff and holding that "[a]llowing a water utility to impose a disconnect fee may ostensibly result in double recovery by the utility since normally this cost of service item is recouped in a utility's base rates"), *citing* Case No. 08-1867-PWD-T-PC-CN, Jane Lew Public Service District, March 13, 2009, and Case No. 04-1865-PWD-T, Green Valley-Glenwood Public Service District (2005).

Moreover, "[a]lready imputed in rates are certain operating expenses regarding billing and collection." *See,* Jane Lew, 2009 W. Va. PUC LEXIS 485, *31 (W. Va. P.S.C. March 13, 2009). The District's status as an LRR should not constitute a free pass for the District to skirt the application of the Water Rules and implement unreasonable practices without concern simply because it is an LRR. The Commission properly held that the District's imposition of a disconnect fee is an unreasonable practice. The Final Order of April 4, 2022 should be affirmed.

C. The Commission properly denied the District's Motion to Dismiss for failure of the Complainants to appear.

Rule 12.10 of the Commission's Rules of Practice and Procedure (Procedural Rules), 150 C.S.R. 1, (effective January 9, 2019), states as follows:

> When any proceeding has been properly set for hearing and due notice given and any applicant, petitioner or complainant fails to appear without having obtained a continuance in the manner specified above, 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 the absent party to attend. (emphasis added).

The Commission's Procedural Rules do not require that the Commission dismiss a case if the Complainant fails to show up at hearing.

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 question 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* Syllabus, *Pioneer Pipe, Inc. v. Swain*, 791 S.E.2d 168 (W. Va. 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 Complaint 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 District.

Moreover, the issue of the reasonableness of the disconnect 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. The Commission may proceed to consider allegations of unreasonable utility practices raised by Staff in a formal complaint proceeding, even though the Complainant has requested dismissal of his/her original complaint or has not prosecuted his complaint. Treuthart v. Kenova Municipal Water Department, 2003 W. Va. PUC LEXIS 5783, *18 (W. Va. P.S.C. December 12, 2003), *citing* Case No. 94-0161-E-C, Sheppard v. West Virginia Power (1995).

In Sheppard, the Commission held that "[a]llegations of unreasonable utility practices under W. Va. Code Section 24-2-7 may be raised by staff in formal complaint proceedings." Sheppard at 13, Conclusion of Law No. 2. It further held that "[w]hen Staff clearly raises allegations of unreasonable utility practices under Section 24-2-7 of the West Virginia Code in a formal complaint case, [the Commission] will address those allegations even though the formal complainant fails to meet its burden of proof." Id. at 14, Conclusion of Law No. 4. The simple reason is because "[d]ismissing allegations of unreasonable utility practices because they were raised in a formal complaint case instead of a general investigation wastes the time and energy of the Commission and defendant." Id. at 14, Conclusion of Law No.5.

In this case, the ALJ denied the motion to dismiss for failure of the Complainants to appear, stating that "in light of the allegation of an unreasonable practice, which of course could arise again sometime in the future." (Tr. at 7.) Staff clearly raised the issue of the disconnect fee as an unreasonable practice early on in the litigation of this matter. It was raised in the Interim Relief

Memorandum filed on October 8, 2021. It was raised in Staff's Response to Motion to the District's Motion to Dismiss. (*See* Staff response to Motion to Dismiss at p. 2.) Thus, the District had notice of the investigation into the disconnect fee as an unreasonable practice, and presented evidence regarding the same at the hearing in this matter. As such, the Commission properly denied the Motion to Dismiss. Moreover, the ALJ was justified and within his discretion to move forward with the hearing on the allegation of the unreasonable practice. The Final Order of April 4, 2022, should be affirmed.

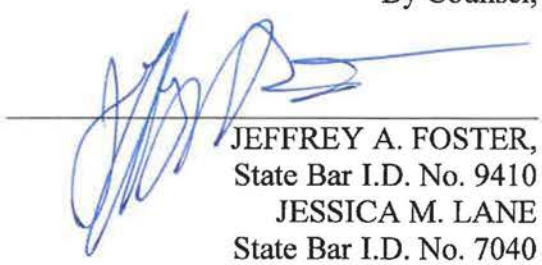
VI. CONCLUSION

The Commission was within its authority when it ruled that the disconnect fee at issue here is an unreasonable practice. When it enacted W. Va. Code § 16-13A-9(a)(2)(E), the Legislature did not wholly remove the Commission's authority to regulate LRRs. The Commission retains and has always retained the jurisdiction to determine whether a utility is committing an unreasonable act or practice, whether the utility attempts to cast it as a "rate" or a "fee." Here, the act or practice of charging a disconnect fee and a reconnect fee for termination of service for nonpayment is unreasonable. The reconnect fee is allowed by the Commission's rules; the disconnect fee is not. Thus, the Commission correctly ruled that the disconnect fee was an unreasonable act or practice and is consistent with prior rulings.

Moreover, Staff was within its authority to initiate the investigation of the disconnect fee even though the Complainants did not reference the disconnect fee in their complaint. For the same reason, dismissal was not warranted because the Complainants failed to appear at the hearing – the ALJ was within his discretion to deny the District's Motion to Dismiss and proceed with the hearing on the unreasonableness of the disconnect fee. This Court should affirm the Commission's Final Order of April 4, 2022.

Respectfully submitted this 21st day of June 2022.

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
By Counsel,



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CERTIFICATE OF SERVICE

I, Jeffrey A. Foster, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Orders of April 4, 2022" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 21st day of June, 2022:

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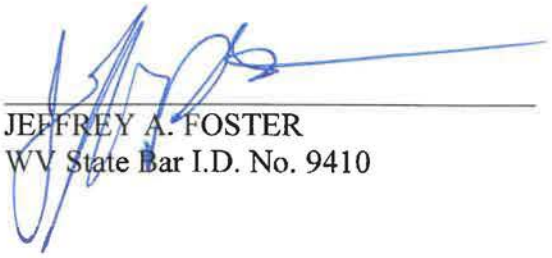

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