

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

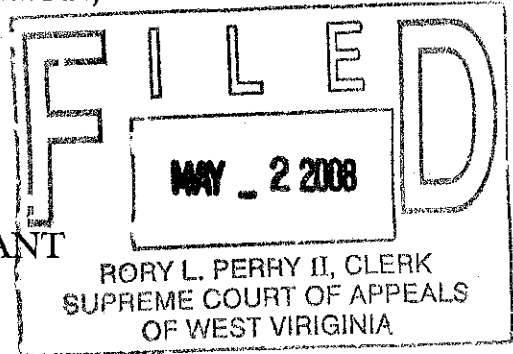
No. 33899

VALLEY WATER & SEWER SERVICES, INC.,
Appellant

v.

PUBLIC SERVICE COMMISSION and DEERWOOD
HOMEOWNERS ASSOCIATION,
Appellees

BRIEF OF THE APPELLANT



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TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF FACTS.....1

 A. The Background Facts of the Case.....1

 B. Administrative Law Judge’s Recommended Decision3

 C. PSC’s Final Order4

 1. The SES Debt4

 2. Accounting and Legal (Rate Case) Expenses5

 D. The Commission Order on Rehearing6

III. STANDARD OF REVIEW7

IV. ARGUMENT7

 A. THE COMMISSION EXCEEDED ITS STATUTORY POWERS IN THAT IT WAS ARBITRARY AND CAPRICIOUS, LACKED ADEQUATE SUPPORT IN THE RECORD, AND WAS SUBSTANTIVELY IMPROPER IN DENYING A SURCHARGE FOR THE DEBT OWED BY VALLEY TO SES AND REFUSING TO AWARD IT ITS RATE CERTIFICATE CASE COSTS7

 1. Stare Decisis.....8

V. CONCLUSION16

TABLE OF AUTHORITIES

CASES

<i>Affiliated Construction Trades Foundation v. PSC</i> , 211 W. Va. 315, 438 S.E.2d 596 (1993)	7
<i>Arbuckle PSD</i> , Case No. 03-0388-PSD-19A (Sept. 16, 2003)	12
<i>Back Creek Valley Utilities, Inc.</i> , Case No. 96 0717 W GI (W. Va. P.S.C. June 12, 1997)	6
<i>Back Creek Valley Utilities, Inc.</i> , Case No. 95 0621 W 19A (W. Va. P.S.C. June 25, 1996)	6, 7-8, 10
<i>Boone Raleigh PSD</i> , Case No. 06-1472-PSWD-PC (W. Va. P.S.C. Jan. 23, 2007)	11
<i>Central West Virginia Refuse, Inc. v. PSC</i> , 190 W. Va. 416, 438 S.E.2d 596 (1993)	9
<i>Chesapeake and Potomac Telephone Co. v. PSC</i> , 171 W. Va. 494, 300 S.E.2d 607 (1982)	8, 9, 10-11
<i>City of Cameron</i> , Case No. 03-0724-W-MA (Oct. 17, 2003)	12
<i>City of Lancaster (Sewer Fund) v. Pennsylvania Public Utility Comm'n</i> , 793 A.2d 978 (Pa. Cmwlth. Ct. 2002)	15
<i>City of Plymouth v. City of Detroit</i> , 377 N.W.2d 689 (Mich. 1985)	12
<i>Colorado Ute Elec. Ass'n, Inc. v. PUC</i> , 602 P.2d 861, 865 (Colo. 1979)	9
<i>Columbia Gas of West Virginia, Inc. v. PSC</i> , 173 W. Va. 19, 311 S.E.2d 137 (1983)	14

<i>Dean v. Town of Addison</i> , 207 W. Va. 538, 534 S.E.2d 403 (2000).....	12
<i>Driscoll v. Edison Light & Power Co.</i> , 307 U.S. 104 (1939).....	15
<i>Duquesne Light Co. v. Barasch</i> , 488 U.S. 299 (1989).....	13
<i>Huntington Sanitary Board</i> , Case No. 05-0624-S-CN (May 5, 2005).....	11
<i>In re Clifford K.</i> , 217 W. Va. 625, 619 S.E.2d 138 (2005).....	15
<i>In re PNM Gas Serv., 1</i> P.3d 383 (N.M. 2000).....	14
<i>Lubeck PSD</i> , Case No. 03-1473-PWD-CN (April 5, 2004).....	12
<i>Putnam Public Service District</i> , Case No. 06-1291-PWD-T (W. Va. P.S.C. Dec. 4, 2006).....	11
<i>Putnam PSD</i> , Case No. 03-0303-PWD-42T (Jan. 27, 2004).....	12
<i>Sherrill v. Union Oil & Gas Co.</i> , Case No. 9153 (W. Va. P.S.C. May 1, 1979).....	15
<i>Snider v. Fox</i> , 218 W. Va. 663, 627 S.E.2d 353 (2006).....	15
<i>South Putnam PSD</i> , Case No. 05-0660-PWD-CN (May 9, 2005).....	11
<i>South Putnam Public Service Dist., Case</i> No. 03-0959-PSWD-PC at 1 (W. Va. P.S.C. Jan. 15, 2004).....	15
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996).....	9

<i>United Fuel Gas Co. v. PSC</i> , 143 W. Va. 33, 99 S.E.2d 1 (1957).....	14
<i>Valley Water & Sewer Services, Inc.</i> , Case No. 03 1127 W 42T (W. Va. P.S.C. Oct. 15, 2003).....	6
<i>Village of Niles v. City of Chicago</i> , 558 N.E.2d 1324 (Ill. Ct. App. 1990).....	12
<i>Virginia Electric & Power Co. v. Public Service Commission</i> , 161 W. Va. 423, 248 S.E.2d 322 (1978).....	13
<i>West Virginia American Water Co.</i> , Case No. 03-0353-W-42T at 27 (W. Va. P.S.C. Jan. 2, 2004).....	13
<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52, 459 S.E.2d 329 (1995).....	10
<i>Willow Spring PSC</i> , Case No. 06-1180-S-CN-PW-PC (W. Va. P.S.C. May 15, 2007).....	12

RULES

W. Va. C.S.R. § 150 2 19 (2002).....	3
--------------------------------------	---

OTHER AUTHORITIES

64 Am. Jur.2d <i>Public Utilities</i> § 127.....	15
Charles C. Wise & Ben K. Baer, <i>Some Comments on Rate Making in West Virginia</i> , 57 W. Va. L. Rev. 33, 35 (1955).....	10

I. INTRODUCTION

The appellant, Valley Water & Sewer Services, Inc. (Valley Water) provides water service to eighty four (84) customers in Berkeley County. Valley sought a rate adjustment from the Public Service Commission (PSC) sufficient to make it profitable while supplying the water needs of its customers and to recover costs associated with litigating the case. The PSC rejected the rates Valley sought and it is from this decision that Valley appeals.

II. STATEMENT OF FACTS

A. **The Background Facts of the Case.** Valley Water is public utility privately owned by B. Lee Snyder that provides water to customers in the Deerwood subdivision.¹ Valley uses Snyder Environmental Services, Inc. (SES), also owned by Mr. Snyder,² to perform services such as operation, maintenance, meter reading, system repair, bookkeeping, and billing, as well as leak detection.³ SES provides similar services to a number of entities including Capacon State Park.⁴

Valley Water has not been able to afford to pay invoices for these services from SES,⁵ but Mr. Snyder testified that SES nonetheless provides these services because no one

¹ July 11, 2007, Tr. at 10, 12.

² *Id.* at 10.

³ *Id.* at 17-18.

⁴ *Id.* at 11.

⁵ *Id.* at 18.

else is available to do so.⁶ Moreover, as President of Valley Water, Mr. Snyder is entitled to a yearly salary of \$6,000, which he has not collected and which now is \$37,000 in arrears,⁷ and SES has written off much of Valley's Water's debt to it under IRS guidelines.⁸

From 2000 to 2007, SES wrote off \$118,650 of Valley's debts to it, and has a current debt owed to it by Valley of \$44,548.⁹ Notwithstanding all of this, with one exception, even PSC Technical Analyst Joseph Markavits testified that the Valley Water system is "operating very well" and "is well maintained by the employees of Snyder Environmental."¹⁰ The one exception is a water tank Valley Water owns and which constitutes the genesis of the rate case from which this petition for appeal is prosecuted.

Valley Water's tank is badly deteriorated and beyond the point of repair.¹¹ It was the subject of two formal PSC complaints filed by the Deerwood Homeowners Association (Association).¹² As a result of these cases, Valley was ordered to file for a certificate of

⁶ *Id.* at 16.

⁷ *Id.* at 23, 27. This amount is not sought to be recovered in this case. See *Initial Br. Valley Water & Sewer Serv., Inc.*, Aug. 1, 2007, at 5 n. 1.

⁸ *Id.* at 19.

⁹ *Id.* at 20.

¹⁰ *Id.* at 131; Rec. Dec. (Aug 16. 2007) at 9.

¹¹ Rec. Dec. (Aug 16. 2007) at 9 (citing Jul. 11, 2007 Tr. at 132).

¹² Jul. 11, 2007, Tr. at 10-11; Rec. Dec. (Aug 16. 2007) at 2.

convenience and necessity to build a replacement tank.¹³ Accordingly, Valley filed the case below, asking for the certificate to construct the new tank.¹⁴ The application included a proposed project-related rate increase.¹⁵ Valley Water also filed a Rule 42T application to increase its rates and charges for providing water service unrelated to the project.¹⁶

Valley Water employed Michael D. Griffith, CPA, to prepare its Rule 42 accounting exhibit. Among other things, Valley sought to recover fees paid to Mr. Griffith and the law firm of Steptoe & Johnson for the second Deerfield complaint case and the rate-certificate case.¹⁷ This total expense was \$40,389 which amortized over three years would be \$13,463.¹⁸ PSC Staff, however, recommended only \$2,000 per year for five years.¹⁹

B. The Administrative Law Judge's Recommended Decision. In his Recommended Decision, the ALJ concluded that the rate case expense recommended by

¹³ Rec. Dec. (Aug 16. 2007) at 2, 9. A Rule 42T application is an application filed with the PSC to change, *inter alia*, the rates a utility charges its customers. See Rules for the Construction and Filing of Tarriffs, W. Va. C.S.R. § 150-2-19 (2002).

¹⁴ Rec. Dec. (Aug 16. 2007) at 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 1. Valley Water also sought to include in its rate base \$79,230 of accounts payable to SES, which amount does not include the total amount owed to SES due to Mr. Griffith factoring out the amounts already contained in the rate base. *Id.* at 4.

PSC Staff was reasonable and should be used in this case.²⁰ The ALJ specifically rejected Valley Water's attempts to collect expenses not incurred for the rate-certificate case and which were not incurred during the test year.²¹

The ALJ then recommended that while the proposal to place into the rate base the debt Valley Water owed to SES for operations & maintenance should be rejected, the ALJ nonetheless found that to ignore this debt is unreasonable and that it would be unfair to SES to expect it to simply donate its services to Valley.²² Finding that the ratepayers benefitted from SES's services, the ALJ recommended that a monthly surcharge be added to the tariff spreading the debt over a twenty-five year period.²³ Finally, the ALJ recommended that Valley explore transferring its system to another utility.²⁴

C. PSC's Final Order. After the ALJ's decision, the PSC staff filed exceptions on the surcharge issue. Valley Water responded, raising certain other issues. Based on these objections, the PSC's final order adopted in part and rejected in part the Recommended Decision.

1. *The SES Debt.* The PSC agreed with Staff's objections to the surcharge, thereby rejecting the ALJ's recommendation that the debt from Valley Water to SES should be

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.* at 11.

²³ *Id.*

²⁴ *Id.* at 12.

surcharged to the customers.²⁵ The PSC concluded that nothing prevented Valley Water from seeking recovery of the SES debt earlier.²⁶ The PSC stated that under its Tariff Rules a utility seeking a rate increase provide financial information regarding a “historical test year,” i.e., the most recent 12-month period ending on a calendar quarter.²⁷ The PSC found that there was no reason to deviate from that policy and allow for adjustments relating to costs outside the test year.²⁸

2. *Accounting and Legal (Rate Case) Expenses.* The PSC rejected Valley Water’s request for repayment of its legal and accounting costs of \$40,389 incurred in the second complaint case and the instant proceeding.²⁹ The PSC rejected Valley’s request for an amortized rate of \$13,463 per year, and adopted the ALJ’s recommendation approving Staff’s position that the expenses should only be allowed to amount to \$10,000 which should be amortized over five years at \$2,000 per year.³⁰ Finally, the PSC directed Staff to file a petition requesting a general investigation of Valley Water addressing, minimally, the

²⁵ Commission Final Ord. (Sept. 28, 2007) at 3.

²⁶ *Id.* at 4.

²⁷ *Id.* at 4.

²⁸ *Id.* at 4.

²⁹ *Id.* at 4.

³⁰ *Id.* at 4.

utility's long-term viability, its relationship with SES, opportunities and alternatives for transfer, and whether receivership is appropriate.³¹

D. The Commission Order on Rehearing. In response to the PSC's order, Valley Water filed a petition for rehearing noting that (1) Valley Water took on the responsibility of supplying the Deerwood subdivision only after the previous utility failed to provide adequate service;³² (2) Valley Water had only one rate increase since its acquisition of Back Creek, that in 2003;³³ (3) that the Commission not only considers the most recent actual year of costs, but also any extraordinary items requiring adjustments to actual costs.³⁴ Valley also pointed out the incongruity of its acquiring Back Creek, bringing it up to operating efficiency, and yet being denied cost recoupment – particularly when the Commission ordered it to make improvements and upgrades to the water system.³⁵

The PSC rejected these arguments. It found that Valley's reliance on Back Creek was misplaced because *stare decisis* does not apply to administrative agencies performing regulatory functions.³⁶ It then distinguished the cases cited by Valley supporting a

³¹ *Id.* at 4.

³² See *Back Creek Valley Utilities, Inc.*, Case No. 96 0717 W GI (W. Va. P.S.C. June 12, 1997) (http://www.psc.state.wv.us/imaged_files/orders/1997/97001956.pdf).

³³ *Valley Water & Sewer Services, Inc.*, Case No. 03 1127 W 42T (W. Va. P.S.C. Oct. 15, 2003) (http://www.psc.state.wv.us/imaged_files/orders/2003_10/ord20031015145153.pdf).

³⁴ *Back Creek Valley Utilities, Inc.*, Case No. 95 0621 W 19A (W. Va. P.S.C. June 25, 1996) (http://www.psc.state.wv.us/imaged_files/orders/1996/96001906.pdf).

³⁵ *Back Creek Valley Utilities, Inc.*, Case No. 96-0717-W-GI, *supra*, at 5.

³⁶ Commission Order on Reconsideration (Oct. 30, 2007) at 2.

surcharge because those cases dealt with publicly-owned, rather than privately-owned, utilities.³⁷ The PSC did, though, drop its demand for a general investigation and concluded that the legal fees and accounting costs issue could be addressed in Jefferson Utilities' pending rate case, which the PSC had dismissed two days earlier.

III. STANDARD OF REVIEW

The standard governing this case is set forth in Syllabus Point 3 of *The Affiliated Construction Trades Foundation v. PSC*:³⁸

“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.” Syl. Pt. 1, *Central West Virginia Refuse, Inc. v. Public Service Commission*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

IV. ARGUMENT

- A. THE COMMISSION EXCEEDED ITS STATUTORY POWERS IN THAT IT WAS ARBITRARY AND CAPRICIOUS, LACKED ADEQUATE SUPPORT IN THE RECORD, AND WAS SUBSTANTIVELY IMPROPER IN DENYING A SURCHARGE FOR THE DEBT OWED BY VALLEY TO SES AND REFUSING TO AWARD IT ITS RATE CERTIFICATE CASE COSTS.

Valley sought a surcharge to cover \$79,230 of accounts payable it owed to SES. The PSC denied this surcharge because (1) it felt it was not bound by its decision in *Back Creek*

³⁷ *Id.* at 2.

³⁸ 211 W. Va. 315, 438 S.E.2d 596 (1993).

Valley Utilities, Inc.,³⁹ and (2) because the other cases where the PSC had permitted surcharges for pre test year debt related only to publicly-owned utilities. Neither of these grounds is viable.

1. *Stare Decisis*. The PSC's Reconsideration order stated that "[t]he Commission does not consider its decision in *Back Creek* to require it to approve the surcharge in this case. Administrative agencies performing regulatory actions are not normally bound by *stare decisis*."⁴⁰ The PSC misunderstands the issue and relies on authority that it does not read in light of more recent authority.

In *Chesapeake and Potomac Telephone Co. v. PSC*,⁴¹ this Court quoted from 2 Kenneth Culp Davis, *Administrative Law* § 18.09 (1958) (footnotes omitted) to explain the basis for not recognizing *stare decisis* in the regulatory realm:

"When the purpose is one of regulatory action, as distinguished from merely applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of the past decisions Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act"

³⁹ Case No. 95-0621-W-19A (W. Va. P.S.C. June 25, 1996) (http://www.psc.state.wv.us/imaged_files/orders/1996/96001906.pdf).

⁴⁰ Commission Order on Reconsideration (Oct. 30, 2007) at 2 (citing, *inter alia*, *Central W. Va. Refuse v. PSC*, 190 W. Va. 416, 438 S.E.2d 596 (1993) and *Chesapeake and Potomac Tel. Co. v. PSC*, 171 W. Va. 494, 300 S.E.2d 607 (1982)).

⁴¹ 171 W. Va. 494, 500, 300 S.E.2d 607, 613 (1982).

Additionally, in Syllabus Point 4 of *Central West Virginia Refuse, Inc. v. PSC*,⁴² this Court held that “[w]hen the Public Service Commission is exercising its rate-making authority under W. Va. Code, 24-2-3 (1983), its decisions are not subject to the doctrines of *stare decisis* or *res judicata* simply because rate making is a legislative function.”

More recently, however, this Court has recognized that:

While a certain amount of asymmetry is lawful, an agency may not “adopt [] significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation.” *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir.1994) (citation and internal quotation marks omitted). The precept counselling [sic] avoidance of inconsistent administrative policies at least demands that when an agency departs significantly from its own precedent, it must confront the issue and explain the reasonableness of its current position.⁴³

The same point Valley makes here is the same point this Court identified in *C & P Telephone Co. v. Public Service Commission*,⁴⁴ “When an administrative agency reverses course from its precedents, it must give reasonable notice and supporting rationale before it changes its standards, or its actions appear arbitrary and capricious.”

⁴² 190 W. Va. 416, 438 S.E.2d 596 (1993).

⁴³ *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996). *See also Colorado Ute Elec. Ass’n, Inc. v. PUC*, 602 P.2d 861, 865 (Colo. 1979) (even though *stare decisis* does not apply to rate making, nevertheless, “consistency in administrative rulings is considered essential, and . . . agency rulings are entitled to great weight in subsequent proceedings . . .”).

⁴⁴ *Supra* at 715, 301 S.E.2d at 804.

It cannot be gainsaid that “[r]ate making . . . is, of course, subject to constitutional restrictions.”⁴⁵ And, it cannot be gainsaid that Valley’s reliance on *Back Creek* has constitutional underpinnings. Valley cited *Back Creek* not for the purpose of *stare decisis*, (that is to show that Valley was entitled to the same rate as Back Creek received), but to show that the PSC disregarded an essential step in reviewing the ALJ’s decision.

In *Back Creek* the PSC observed, “Staff correctly explained that the Commission uses the most recent year of actual costs ‘to reflect the latest trend in the utility’s operations.’ Staff then considers whether there are any extraordinary items which would require adjustments to the actual case.”⁴⁶ It is not a matter of *stare decisis*, but rather of constitutionality, to require a body exercising legislative functions to abide by the very *process* set up to lead to the decision.

Indeed, requiring an administrative agency to abide by its own stated procedures is also a requirement of constitutional due process. “It is . . . a basic notion of due process of law that a governmental agency must abide by its own stated procedures even though it is under no constitutional obligation to provide the procedures in the first place and even though it can change the procedures at any time; so long as the procedures are in place, the agency must follow them.”⁴⁷ And, again, this Court has directly address this issue in *C & P*

⁴⁵ Charles C. Wise & Ben K. Baer, *Some Comments on Rate Making in West Virginia*, 57 W. Va. L. Rev. 33, 35 (1955).

⁴⁶ *Back Creek Valley Util., Inc.*, *supra* at 3.

⁴⁷ *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65, 459 S.E.2d 329, 342 (1995).

Telephone Co. v. Public Service Commission,⁴⁸ recognizing that it is a denial of due process for the PSC to change a method of calculation without notice and that utilities “have a right to application of the current, effective rules to their rate filing, absent reasonable notice . . . that another rule would be contended for by the Commission’s staff.”⁴⁹ In other words, “fairness requires administrative bodies to abide by their rules until they are lawfully changed by law.”⁵⁰

Here, the ALJ properly considered the SES debt to be an extraordinary item requiring a tariff adjustment. The PSC’s decision to disregard that recommendation exceeded the Commission’s authority, was arbitrary, and was substantively wrong.

Additionally, the PSC dismissed Valley’s reliance on a plethora of PSC decisions.⁵¹ The basis for the PSC’s decision was that these rulings all related to publicly-owned utilities and Valley is privately-owned.

⁴⁸ *Supra* at 714, 301 S.E.2d at 803.

⁴⁹ *Id.* at 715, 301 S.E.2d at 804.

⁵⁰ *Id.* at 714, 301 S.E.2d at 804.

⁵¹ *Putnam Public Service District*, Case No. 06-1291-PWD-T (W. Va. P.S.C. Dec. 4, 2006) (http://www.psc.state.wv.us/imaged_files/orders/2006_12/ord20061204150150.pdf);

Boone Raleigh PSD, Case No. 06-1472-PSWD-PC (W. Va. P.S.C. Jan. 23, 2007) (http://www.psc.state.wv.us/imaged_files/orders/2007_01/ord20070123170637.pdf);

Huntington Sanitary Board, Case No. 05-0624-S-CN (May 5, 2005) (http://www.psc.state.wv.us/imaged_files/orders/2005_05/ord20050505161417.pdf);

South Putnam PSD, Case No. 05-0660-PWD-CN (May 9, 2005) (http://www.psc.state.wv.us/imaged_files/orders/2005_05/ord20050509162331.pdf);

With respect to this public/private justification, however, the PSC “is really drawing a distinction without a difference.”⁵² “[T]he basic purposes of rate-making, (1) to provide enough revenue to meet costs, and (2) to structure rates to differing uses, are the same for both publicly and privately owned utilities.”⁵³ Indeed, “a host of economic, technological and demographic changes have complicated the accomplishment of both purposes, and minimized the differences between the rate-making procedures of publicly-owned and privately-owned utilities.”⁵⁴ In fact, the Commission itself recently concluded that privately and publicly owned utilities should be treated identically.⁵⁵

Putnam PSD, Case No. 03-0303-PWD-42T (Jan. 27, 2004)
http://www.psc.state.wv.us/imaged_files/orders/2004_02/ord20040206153426.pdf;

Arbuckle PSD, Case No. 03-0388-PSD-19A (Sept. 16, 2003)
http://www.psc.state.wv.us/imaged_files/orders/2003_09/ord20030916102805.pdf;

Lubeck PSD, Case No. 03-1473-PWD-CN (April 5, 2004)
http://www.psc.state.wv.us/imaged_files/orders/2005_06/ord20050614154840.pdf;

City of Cameron, Case No. 03-0724-W-MA (Oct. 17, 2003)
http://www.psc.state.wv.us/imaged_files/orders/2003_10/ord20031017154753.pdf.

⁵² *Dean v. Town of Addison*, 207 W. Va. 538, 543, 534 S.E.2d 403, 408 (2000).

⁵³ *City of Plymouth v. City of Detroit*, 377 N.W.2d 689, 693 (Mich. 1985).

⁵⁴ *Id.* Cf. *Village of Niles v. City of Chicago*, 558 N.E.2d 1324, 1335 (Ill. Ct. App. 1990) (“Distinctions between privately- and municipally-owned utilities do not, in our opinion, require municipalities to forego a reasonable return for providing service to suburban users.”).

⁵⁵ *Willow Spring PSC*, Case No. 06-1180-S-CN-PW-PC (W. Va. P.S.C. May 15, 2007)
http://www.psc.state.wv.us/imaged_files/orders/2007_05/ord20070515152400.pdf.

And, the Commission completely ignored the holding in Syllabus Point 1 of *Virginia Electric & Power Co. v. Public Service Commission*⁵⁶ - dealing with a privately owned utility - that “the Public Service Commission may modify Tariff rates prospectively to offset past overcharges or undercharges by the utility to ensure an average fair rate of return—neither more nor less.”

Indeed, if the ratemaking process is designed to provide revenue to meet costs, Valley is much at a loss having never turned a profit.⁵⁷ Investors and/or officers should not be required to donate their services to the utility free of charge.

“The highest courts of West Virginia and the United States have made clear that utility investors are constitutionally entitled to a reasonable opportunity to make a fair rate of return on their investments to serve the public.”⁵⁸ “A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.”⁵⁹

Any amount below this is a “deprivation of the right of a public utility ‘to earn a reasonable return upon the full fair value of its property [and] amounts to a confiscation

⁵⁶ 161 W. Va. 423, 248 S.E.2d 322 (1978).

⁵⁷ Jul. 11, 2007 Tr. at 15.

⁵⁸ *West Virginia American Water Co.*, Case No. 03-0353-W-42T at 27 (W. Va. P.S.C. Jan. 2, 2004) (http://www.psc.state.wv.us/imaged_files/orders/2004_01/ord20040102150417.pdf).

⁵⁹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314-15 (1989) (quoting *Bluefield Water Works & Improvement Co. v. PSC*, 262 U.S. 679, 692-93 (1923)).

thereof *pro tanto*.”⁶⁰ The fact that rates may be expensive is not a grounds to deny rate adjustments requested by a utility.⁶¹

The PSC’s decision to reject the ALJ’s recommended surcharge is in violation of the PSC’s standards of procedure, and is unconstitutional. The PSC should be reversed on this point and the recommended decision of the ALJ reinstated.

Additionally, the PSC refused to address the issue of Valley’s recovery of its rate/certificate case costs, including accounting and attorneys fees. It did so finding that the matter could be addressed in the pending rate case—which had, unfortunately, been dismissed two days earlier.

“Because rate proceedings are a part of the normal course of business for a utility and because rate proceedings, by establishing just and reasonable rates, are conducted for the benefit of both ratepayers and shareholders, it is widely accepted that rate case expenses are one aspect of a utility’s operating costs and are recoverable in a general rate proceeding.”⁶² More succinctly, “[g]enerally, costs incurred by a utility to prepare and present a rate case are properly recoverable as ordinary and reasonable costs of doing

⁶⁰ *United Fuel Gas Co. v. PSC*, 143 W. Va. 33, 45, 99 S.E.2d 1, 8 (1957) (quoting Syl. pt. 6, *City of Huntington v. PSC*, 89 W. Va. 703, 110 S.E. 192 (1921)). See also *Columbia Gas of West Virginia, Inc. v. PSC*, 173 W. Va. 19, 23, 311 S.E.2d 137, 141 (1983) (“Deprivation of the right to earn a reasonable rate of return, considering facts and circumstances and economic realities of the times, is governmental confiscation of property.”).

⁶¹ *West Virginia American Water Co.*, *supra*.

⁶² *In re PNM Gas Serv.*, 1 P.3d 383, 406 (N.M. 2000).

business.”⁶³ Indeed, the United States Supreme Court has said it is “of the view that the utility should be allowed its fair and proper expenses for presenting its side to the commission[,]”⁶⁴ whether the rate is upheld or not.⁶⁵ West Virginia law allows for rate case expenses.⁶⁶

In this case, though, the ALJ refused to award rate case expenses relating to the second complaint case because the expenses were not incurred for the filing in the instant case and fell outside the test year. However, the second complaint case and this case are inextricably interlinked because the pending case would not have been brought but for the second complaint case. Treating them differently elevates form over substance and this Court is loath to elevate form over substance.⁶⁷ Additionally, rate cases expenses should not be limited to the concept of a test year.⁶⁸ “Rather than limiting such expenses to the

⁶³ 64 Am. Jur.2d *Public Utilities* § 127 (footnote omitted).

⁶⁴ *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 121 (1939).

⁶⁵ *Id.*

⁶⁶ See, e.g., *Sherrill v. Union Oil & Gas Co.*, Case No. 9153 (W. Va. P.S.C. May 1, 1979) (http://www.psc.state.wv.us/imaged_files/orders/1978/78000009.pdf); *South Putnam Public Service Dist.*, Case No. 03-0959-PSWD-PC at 1 (W. Va. P.S.C. Jan. 15, 2004) (http://www.psc.state.wv.us/imaged_files/orders/2004_01/ord20040115151709.pdf).

⁶⁷ See *Snider v. Fox*, 218 W. Va. 663, 666, 627 S.E.2d 353, 356 (2006); *In re Clifford K.*, 217 W. Va. 625, 640, 619 S.E.2d 138, 153 (2005).

⁶⁸ See *City of Lancaster (Sewer Fund) v. Pennsylvania Public Utility Comm’n*, 793 A.2d 978, 983 (Pa. Cmwlth. Ct. 2002) (emphasis deleted) (“[T]he Commission relied upon the fact that the City’s claimed rate case expense included a request for payment for services associated with years beyond the test-year expenses. Disallowing a rate case expense on these grounds is incongruous. It is well settled that rate case expense is an expense that occurs other than on an annual basis.”).

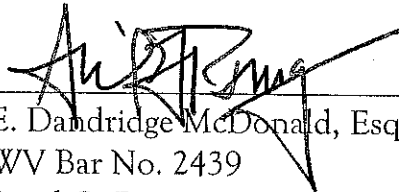
amounts incurred in a year, the proper approach is to calculate the entire expense that the utility incurred in seeking the rate increase and to then normalize that amount to determine the annual expense that can be used as an adjustment in the *pro forma* test year."⁶⁹ The ALJ erred in not awarding the requested rate-certificate case expenses and the Commission compounded the error by failing to even address the error—relegating it to consideration in a none existent case.

V. CONCLUSION

Fort the above reasons, the Final Order of the Public Service Commission should be reversed with directions to order the Recommended Decision of the ALJ reinstated on the matter of the surcharge, and to allow Valley to recover its rate-certificate case costs.

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⁶⁹ *Id.*

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, one of counsel to Valley Water & Sewer Services, Inc., do hereby certify that a true and exact copy of the foregoing Brief of the Appellant has been served upon the following by hand delivery or First Class United States Mail, postage prepaid, on May 2, 2008, addressed as follows:

Mrs. Sandra Squire
Executive Secretary
Public Service Commission
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Charleston, West Virginia 25323
(via Hand Delivery)

The Honorable Keith A. George
Administrative Law Judge
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A handwritten signature in black ink, appearing to read 'Ancil G. Ramey', is written over a horizontal line.