

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT,
a West Virginia Public Corporation,

AND

BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT,
a West Virginia Public Corporation,

Appellants,

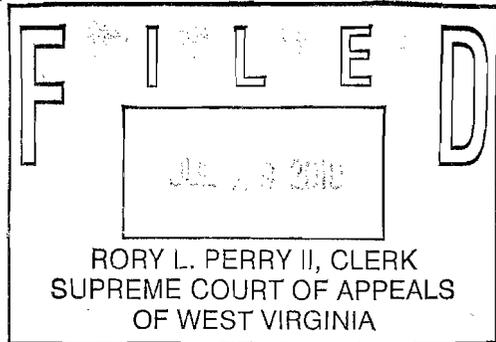
vs.

Nos. 35651 and 35652
(Consolidated)

LARRY V. FAIRCLOTH REALTY, INC.,
a West Virginia Corporation,

Appellee.

**BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT
APPELLANT'S BRIEF**



BERKELEY COUNTY PUBLIC
SERVICE WATER DISTRICT

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July 29, 2010

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW	2
II. STATEMENT OF THE FACTS OF THE CASE	8
A. The Parties	8
B. Population Growth	9
C. The Need For A New Method Of Utility Financing	9
D. PSC Cases Authorizing CIFs In Berkeley County	11
E. CIF Financing	12
F. CIF Collections, Disbursements and Balances.	12
G. Rate Impact of The Elimination of CIFs	13
III. ASSIGNMENTS OF ERROR	13
IV. POINTS AND AUTHORITIES; DISCUSSION OF LAW; RELIEF PRAYED FOR	14
1. POINTS AND AUTHORITIES.	14
2. DISCUSSION OF LAW	16
1. THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION IN THIS MATTER ...	16

TABLE OF CONTENTS
[Continued]

	<u>Page</u>
A. The Circuit Court erred in determining that the Plaintiff and Defendants are not parties to an administrative proceeding involving the issues in this case	16
B. The Circuit Court erred in determining that there is no basis for deferring its jurisdiction to the PSC unless the Plaintiff is seeking a refund of a fee	17
2. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA LACKS THE AUTHORITY TO AUTHORIZE PUBLIC SERVICE DISTRICTS TO COLLECT CAPACITY IMPROVEMENT FEES.	21
3. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DEFENDANTS ARE SUBJECT TO THE PROVISIONS OF THE LOCAL POWERS ACT, <u>WEST VIRGINIA CODE §7-20-1 ET SEQ.</u>	29
A. CIFs are not “impact fees” as that term is used in the Local Powers Act, <u>West Virginia Code §7-20-1 et seq.</u>	29
B. Public Service Districts are not agencies of County Commissions but are separate political subdivisions as clearly set forth in <u>West Virginia Code §16-13A-3</u>	33
C. Capacity Improvement Fees are not related to the Community Infrastructure Investment Project Act, <u>West Virginia Code §22-28-1 et seq.</u>	38
3. RELIEF PRAYED FOR	41

TABLE OF AUTHORITIES

<u>Statutes</u>	Page
<i>West Virginia Code</i> §7-1-3a	31
<i>West Virginia Code</i> §7-1-3g	31
<i>West Virginia Code</i> §7-20-1 <i>et seq.</i>	7, 13, 16 20, 28, 29
<i>West Virginia Code</i> §7-20-3(a).....	30
<i>West Virginia Code</i> §7-20-3(g).....	29
<i>West Virginia Code</i> §16-13A-1.....	22
<i>West Virginia Code</i> §16-13A-2.....	35
<i>West Virginia Code</i> §16-13A-2(g)	35
<i>West Virginia Code</i> §16-13A-3	33, 35
<i>West Virginia Code</i> §16-13A-3a.....	35
<i>West Virginia Code</i> §16-13A-4(f).....	35
<i>West Virginia Code</i> §16-13A-7.....	36
<i>West Virginia Code</i> §16-13A-9.....	22, 37
<i>West Virginia Code</i> §16-13A-13.....	37
<i>West Virginia Code</i> §16-13A-18a.....	35
<i>West Virginia Code</i> §16-13A-25.....	39
<i>West Virginia Code</i> §22-28-1 <i>et seq.</i>	38, 39, 40
<i>West Virginia Code</i> §24-1-1(a).....	22
<i>West Virginia Code</i> §24-2-2	16
<i>West Virginia Code</i> §24-2-3	16, 23
<i>West Virginia Code</i> §24-2-7	16
<i>West Virginia Code</i> §24-2-11	39
<i>West Virginia Code</i> §29-12A-3(c)	34

TABLE OF AUTHORITIES
[Continued]

	<u>Page</u>
 <u>Cases</u>	
<i>Bell Atlantic-West Virginia Inc. v. Ranson</i> , 201 W.Va. 402, 497 S.E.2d 755 (1997)	19, 20
<i>Berkeley County Public Service Sewer District v. The Public Service Commission</i> , 204 W.Va. 279, 286-288; 512 S.E.2d 201, 208-210 (1998)	22, 23
<i>Central West Virginia Refuse, Inc. v. Public Service Commission</i> , 190 W.Va. 416, 438 S.E.2d 596 (1993)	28
<i>Columbia Gas of West Virginia, Inc. v. Public Service Commission</i> , 173 W.Va. 19, 311 S.E.2d 137 (1983)	25
<i>C&P Telephone Co. v. City of Morgantown</i> , 144 W.Va. 149, 107 S.E.2d 489 (1959)	28
<i>Hedrick v. Grant County Public Service</i> , 209 W.Va. 591, 500 S.E.2d 381 (2001)..	18 19, 20
<i>McCloud v. Salt Rock Water Pub. Serv. Dist.</i> , 207 W. Va. 453, 533 S.E.2d 679, 684 (2000)	33
<i>Pingley, et al. v. Huttonsville Public Service District</i> , Supreme Court of Appeals of West Virginia, Case No. 34969, Opinion filed March 4, 2010	33
<i>Public Service Commission v. Town of Fayetteville</i> , 212 W.Va. 427, 573 S.E.2d 338 (2002)	27
<i>State ex rel. The Chesapeake and Potomac Telephone Company of West Virginia v. Ashworth</i> , 190 W.Va. 947, 438 S.E.2d 890 (1993)	18, 19, 20, 21
<i>State ex rel. Water Development Authority v. Northern Wayne County Public District</i> , 195 W.Va. 135, 464 S.E.2d 777 (1995).	26, 27
<i>VEPCO v. Public Service Commission</i> , 161 W.Va. 423, 242 S.E.2d 698 (1978)	28
<i>Zirkle v. Elkins Road Public Service District</i> , 655 S.E.2d 155, 159 (2007)	34

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**BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT
APPELLANT'S BRIEF**

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

PRELIMINARY STATEMENT

This appeal was filed by the Berkeley County Public Service District, doing business as the Berkeley County Public Service Water District (hereinafter referred to as the "Water District") from a Declaratory Judgment Order dated January 29, 2010 and entered by the Circuit Court of Berkeley County, West Virginia on February 16, 2010. The Declaratory Judgment Order was signed by the Honorable Elliot E. Maynard sitting as Special Judge upon appointment by the Supreme Court of Appeals, upon the Complaint of Larry V. Faircloth

Realty, Inc. against both the Water District and the Berkeley County Public Service Sewer District (hereinafter referred to as the “Sewer District”).

While the interests of the Water and Sewer Districts are similar, there are certain significant differences which warranted the filing of separate Petitions for Appeal. Accordingly, the Water District and the Sewer District filed virtually identical Petitions for Appeal which differ only in their Statements of the Facts. This Honorable Court has granted the Water District’s petition for appeal, has granted the Sewer District’s separate petition for appeal in Case 35652, and has consolidated the cases.

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal of a “Declaratory Judgment Order” dated January 29, 2010 (entered February 16, 2010), which was issued by the Circuit Court of Berkeley County, West Virginia. The style of the case below is Larry V. Faircloth Realty, Inc. v. Berkeley County Public Service Water District and Berkeley County Public Service Sewer District, Civil Action No. 09-C-826 (hereinafter referred to as the “Declaratory Judgment Action” or the “case below”). In the Declaratory Judgment Order, the Court ruled, among other things, that “Capacity Improvement Fees” (hereinafter also referred to as “CIFs”) billed for new construction are not authorized by statute, and the Public Service Commission of West Virginia (hereinafter also referred to as the “PSC” or “Public Service Commission”) exceeded its statutory authority in permitting the Water and Sewer Districts to collect CIFs.

Although the Declaratory Judgment Order arises from the Circuit Court of Berkeley County, the Appellee herein, Larry V. Faircloth Realty, Inc. (hereinafter referred to as

“Faircloth”) originally initiated the matter in controversy before the Public Service Commission more than seventeen (17) months ago. On February 27, 2009, Larry V. Faircloth, as an individual, and Larry V. Faircloth Realty, Inc., the Appellee herein, filed a formal complaint with the PSC requesting that the Public Service Commission rescind the Capacity Improvement Fees authorized in PSC Case Nos. 04-0153-PSD-T, 04-1767-PWD-T, 06-0016-PSD-T and 07-0167-PWD-T, on the grounds that the CIFs are not authorized by statute and are not reasonable in light of current economic conditions. The Water and Sewer Districts filed timely answers to the formal complaints, stating that the CIFs are proper utility charges properly authorized by the Public Service Commission, which are pledged for the repayment of certain debt obligations owed by the Districts.

The Commission consolidated the complaint cases into PSC Case No. 09-0192-PSWD-C, and then by a subsequent Order dated June 11, 2009, the Commission: (1) initiated a general investigation of the Water and Sewer Districts’ CIFs, designated as PSC Case No. 09-0961-PSWD-GI (hereinafter referred to as the “PSC Case”); (2) made the complainants, including Appellee Faircloth herein, parties to the general investigation; and (3) dismissed the consolidated complaint cases. Pursuant to other provisions of the Commission Order dated June 11, 2009, and a subsequent Commission Order dated July 10, 2009, the Water and Sewer Districts timely filed responses to seven (7) interrogatories and document requests posed by the Commission regarding the Appellant Districts’ authority to use the collected CIFs. The Districts also responded to interrogatories and document requests served by PSC Staff counsel.

On August 26 and 27, 2009 the Commission held an evidentiary hearing, lasting two full days, during which the Water District, Sewer District, Appellee Faircloth and PSC Staff were represented by counsel and permitted to present exhibits, testimony and conduct cross-examination. Approximately five hundred (500) pages of transcript were generated during the hearing, excluding exhibits. By a Commission Order dated September 4, 2009, the Commission established a briefing schedule with initial briefs due on October 13, 2009 and response briefs due on November 2, 2009.

On or about October 6, 2009, one (1) week prior to the due date for the initial round of briefs before the Public Service Commission, Appellee Faircloth filed the Declaratory Judgment Action below against the Water and Sewer Districts in the Circuit Court of Berkeley County, seeking declaratory relief and again alleging that the CIFs are neither authorized by statute nor reasonable in light of current economic conditions. As previously noted, the Appellee herein, Larry V. Faircloth Realty, Inc., is one of the Respondents in the parallel PSC Case, and the allegations and arguments of Faircloth in the Declaratory Judgment Action below mirror those of the parallel PSC Case.

On October 8, 2009, Complainant Faircloth filed a motion with the Public Service Commission seeking a stay of the PSC Case (or in the alternative, extending the briefing timeframe) on the grounds that “the complaint for declaratory judgment would dispose of all matters now brought by . . . [Faircloth] before this Commission...” and in the interests of “efficiency and judicial economy.” The Water and Sewer Districts filed responses opposing Faircloth’s motion on the grounds that it was an attempt to delay the PSC Case in order to forum shop before the Circuit Court. In a Commission Order dated October 9, 2009, the

Public Service Commission denied the Faircloth motion and kept the briefing schedule unchanged. In discussing its decision to deny the Faircloth motion to stay, the Public Service Commission stated that:

The questions at issue in this case relate to the need for, proper calculation of, and use of Commission approved CIFs by a public utility, all matters within the jurisdiction of the Commission under Chapter 24 of the W. Va. Code. Moreover, Faircloth originated this proceeding before the Commission with a complaint filed against the District. (*See*, the Commission Order issued June 11, 2009, in this case for a brief history of the cases.) While the Commission does not suggest that the Circuit Court cannot go forward on the merits of the complaint, under the discretionary application of the **doctrine of primary jurisdiction** the Circuit Court may want to have the views of the Commission, which will be expressed in the final order in this case. In any event, the filing of this matter with the Circuit Court of Berkeley County does not divest the Commission of its jurisdiction to review these ratemaking issues. [Emphasis added].

Commission Order dated October 9, 2009, in PSC Case No. 09-0961-PSWD-GI, p. 2. All briefing in the PSC Case was completed and the matter matured for decision on November 2, 2009. The PSC Case is still pending before the Public Service Commission.

As noted above, Appellee Faircloth filed the Declaratory Judgment Action in the Circuit Court of Berkeley County on October 6, 2009. All five (5) of the Circuit Judges in the 23rd Judicial Circuit recused themselves from the case and, as a result, the West Virginia Supreme Court of Appeals appointed Senior Status Justice Elliott E. Maynard as a Special Judge to hear the Declaratory Judgment Action.

On December 1, 2010, the Water and Sewer Districts filed motions to dismiss the Appellee's declaratory judgment complaint pursuant to Rule 12 (b)(1) of the *West Virginia Rules of Civil Procedure*. The Districts sought dismissal on the grounds that the Appellee failed to exhaust its remedies before the Public Service Commission; that the Appellee was

bound by its first choice of forum (i.e. the PSC); and, under the doctrine of “primary jurisdiction.”

On December 28, 2009, the Appellee filed a response to the Districts’ motions to dismiss and included a motion for summary judgment arguing that the imposition of CIFs is illegal. In particular, Appellee Faircloth argued that the Appellant Districts are agents of the Berkeley County Commission, CIFs are impact fees and impact fees are not legal in Berkeley County because the county has not complied with all of the requirements of the Local Powers Act. By January 19, 2010, the Water and Sewer Districts filed their replies in support of the motions to dismiss and their responses in opposition to the Appellee’s motion for summary judgment. In their responses, the Appellant Districts showed that public service districts are separate and distinct political subdivisions from county commissions, are not agents of county commissions, and are not bound by the Local Powers Act.

On or about January 26, 2010, Appellee’s counsel, without explanation, and without instructions by the Court, forwarded a proposed “Declaratory Judgment Order” to the Court. On February 16, 2010, Appellee’s counsel filed, and the Circuit Clerk entered, the Declaratory Judgment Order prepared by Appellee’s counsel. According to the Declaratory Judgment Order, it was signed by Special Judge Maynard on January 29, 2010. The following week, the Appellant Districts filed motions seeking a stay of the Declaratory Judgment Order pending an appeal to the West Virginia Supreme Court of Appeals. These motions were opposed by counsel for the Appellee. In their motions for stay, the Appellants proposed that they be permitted to continue to collect CIFs and deposit the same into escrow accounts, subject to refund, pending the outcome of their appeals.

In the process of filing the motions for stay, the Appellants were informed that Special Judge Maynard had recused himself from all active cases, including the one at bar, because he became a candidate for the United States Congress on January 30, 2010; the day after the Declaratory Judgment Order was signed. The Supreme Court of Appeals subsequently appointed Senior Status Judge John L. Henning to replace Justice Maynard. Special Judge Henning granted the Appellants' motions for stay for a thirty (30) day period and ordered the Districts to deposit all CIF's collected during the period of the stay into a separate escrow account. The stays were subsequently extended by this Honorable Supreme Court of Appeals by Order entered April 14, 2010 during the pendency of this appeal.

On April 7, 2010, the Water and Sewer Districts filed separate Petitions for Appeal on the grounds that the Circuit Court: (1) abused its discretion in exercising jurisdiction in this matter when the Appellee had already chosen the Public Service Commission as its forum; (2) erred in concluding that the PSC lacks the statutory authority to authorize public service districts to collect Capacity Improvement Fees; and (3) erred in concluding that the Appellant public service districts are subject to the provisions of the Local Powers Act, West Virginia Code §7-20-1, *et seq.* The Appellee filed a timely brief in opposition to the petitions. On April 30, 2010, the West Virginia Water Development Authority (hereinafter referred to as the "WDA") filed an *Amicus Curiae* brief in support of the assignments of error contained in the Petitions for Appeal. On the same day, the Public Service Commission also filed an *Amicus Curiae* brief in support of the Petitions for Appeal, limited to the issue of the PSC's authority to authorize CIFs. In the alternative, the PSC requested that it be granted intervener status and be made a party should the appeals be accepted. The Appellee objected to the

participation of the PSC and WDA. By separate Orders entered on June 22, 2010, this Honorable Supreme Court of Appeals granted the PSC's motion to intervene and granted both Petitions for Appeal. Under the terms of the Order granting the appeals, the Appellants are required to file their Appellants' briefs within thirty (30) days of receipt of the Order. The Water District received the Order granting appeal on June 29, 2010.

II. STATEMENT OF THE FACTS OF THE CASE

A. The Parties

The Appellant, Berkeley County Public Service District, d/b/a Berkeley County Public Service Water District, is a public corporation and political subdivision of the State of West Virginia operating as a public water utility with an authorized territory which includes the entirety of Berkeley County, including a portion of the City of Martinsburg. The Water District was created on July 1, 2001 and resulted from the merger of Opequon Public Service District and Hedgesville Public Service District with and into the Berkeley County Public Service District, the latter of which had been in existence for almost 50 years. At its inception in July 2001, the Water District had approximately 12,450 customers. As of June 30, 2010, its customer base had increased to approximately 19,670 customers; an increase of approximately 58%.

The Appellee, Larry V. Faircloth Realty Inc. (owned by Larry V. Faircloth), is a Berkeley County real estate developer that developed a 135 acre subdivision in southern Berkeley County named Elizabeth Station Subdivision. At least 170 homes have been built in the subdivision with 105 additional lots planned for sale or development. Appellee

Faircloth initiated the PSC Case and the Declaratory Judgment Action below, because he does not want to pay a fee approved by the Public Service Commission and assessed by the Appellant which is designated as a “Capacity Improvement Fee.”

B. Population Growth

From the 1990 decennial census to the 2000 decennial census, the population of Berkeley County increased 28.1%, from 59,253 persons to 75,905 persons – net gain of 16,652 people. In the nine (9) year period from April 1, 2000 to July 1, 2009, the population of Berkeley County grew another 36.8%, from 75,905 persons to 103,854 persons – a net gain of 27,949 people. Even during the economically troubled year from July 1, 2008 to July 1, 2009 (the most recent data available), the U.S. Census Bureau estimated the population of Berkeley County grew 1.5%, from 102,336 persons to 103,854 persons, a net gain of 1,518 people.

C. The Need for a New Method of Utility Financing

In order to meet the exploding demand for water utility service associated with the unprecedented population and customer growth, the Water District was faced with several unattractive options:

- (a) Continue to raise user rates on existing customers in order to fund increases in capacity;
- (b) Do nothing and face moratoria on new utility connections for portions of its system; or,
- (c) Develop a new system of financing that would shift some of the burden from existing customers to developers and new customers.

Placing moratoria on new connections was clearly not a viable option. Such action by the Water District would not be supported by the PSC and would lead to economic stagnation in Berkeley County.

After researching the various options, the Water District reached the conclusion that implementing some type of fee allowing development to pay its fair share of the future capital needs of the Water District was the most equitable way for addressing the issue.

The Water District commissioned a county-wide Facilities Management Plan which identified projects to be constructed by the Water District to both keep up with growth and to maintain the adequacy of existing systems. The Facilities Management Plan included the implementation of a "Capacity Improvement Fee" as an equitable method for apportioning future capital needs between growth and existing customers. The Water District has implemented the plan by constructing within the last six years capital improvements of \$56,592,067. Of that sum, improvements of \$30,267,305.00 were related solely to growth.

Capacity Improvement Fees are charged to new residential, commercial and industrial customers. The fee, as employed in Berkeley County (and elsewhere in West Virginia), is derived from a formula developed at the Georgia Institute of Technology whereby the costs of planned future capital improvements are allocated between growth and non-growth items. The fees are based upon the size of the water meter connection. A new customer is required to pay the applicable CIF at the time of execution of an application for service. Under the conditions established in the PSC Orders approving the Water District's CIFs, all CIF revenue must be retained in a separate account, the funds are only to be used for

upgrades to or construction of new or expanded utility facilities, and no funds may be expended for any purpose without the specific approval of the PSC.

D. PSC Cases Authorizing CIFs in Berkeley County

The Water District sought authorization to charge a CIF in 2004 and by a Public Service Commission Order entered on August 12, 2005, in Case No. 04-1767-PWD-T, the Water District was granted the right to impose a graduated CIF, based upon meter size, which was made a part of the Water District's tariff. The initial authorized CIF for a 5/8 inch meter connection was \$1,623.00.¹

The Water District subsequently sought permission from the Public Service Commission to modify its CIFs. In Case Number 07-0167-PWD-T, the Water District proposed an increase in the CIF, with the CIF for a 5/8 inch meter connection increasing from \$1,623.00 to \$3,120.00. In support of its request for an increase in the CIF, the Water District provided documentation of actual costs of construction of projects approved and underway as well as updated estimates of projects to be completed prior to the end of 2010. That documentation established that actual costs were significantly greater than originally projected at the time of the adoption of the CIF. By Order entered on August 15, 2007, the Commission approved the revised CIF to be included as part of the Water District's tariff. The CIF charged by the Water District today for a 5/8 inch meter remains \$3,120.00.

¹ The Eastern Panhandle Home Builders Association, representing over 150 members, intervened in the case and was a party to an agreement between the Water District, Commission Staff, and the Home Builders Association which led to the approval of the CIF.

In both of these cases the Water District gave public notice to its customers and the general public of its proposal to include a CIF in its tariff. All notices were given pursuant to the statutes and regulations of the PSC. The Appellee had an opportunity to intervene in both cases but chose not to do so. In testimony before the PSC, Mr. Faircloth testified he was aware of both cases and chose not to intervene or file any objection to the imposition of the CIFs at that time.

E. CIF Financing

In 2006 the Water District filed an Application for a Certificate of Public Convenience and Necessity with the PSC to construct several improvements to its system that had been included in the 2004 Facilities Management Plan. That case was designated Case Number 06-0375-PWD-CN. Funding for the improvements was to be accomplished in part by the issuance of a bond anticipation note (“BAN”) in the amount of \$20,000,000.00. The principal of the BAN was to be repaid from proceeds of CIFs paid by customers pursuant to the Water District’s approved tariff. Interest from the BAN was to be paid from the general operating revenues of the Water District. The maturity date of the BAN was seven years from its date of issuance. The PSC approved the District’s application for a certificate and the District issued the BAN in the amount of 20 million dollars. The current balance owed is 15 million dollars. The BAN matures in 2014.

F. CIF Collections, Disbursements & Balances

Since the CIFs were first approved, the Water District has collected substantial sums in Capacity Improvement Fees. Through June 2009, CIFs in the amount of \$7,185,081.00

have been collected. Moreover, the District has made total disbursements of \$6,009,750.70 for water projects and authorized debt service. As of June 2009, the balance of the Water District's CIF account was \$1,175,330.30.

G. Rate Impact of the Elimination of CIFs

If this Honorable Court upholds the ruling below and prohibits the District from collecting CIFs in the future, the immediate impact upon the District will be substantial. The Water District's accountant, Mr. Fred Hollida, CPA, estimates that the Water District will require a 22% rate increase to replace the lost CIF revenues.

III. ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION IN THIS MATTER.**

2. **THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA LACKS THE AUTHORITY TO AUTHORIZE PUBLIC SERVICE DISTRICTS TO COLLECT CAPACITY IMPROVEMENT FEES.**

3. **THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DEFENDANTS ARE SUBJECT TO THE PROVISIONS OF THE LOCAL POWERS ACT, WEST VIRGINIA CODE §7-20-1 ET SEQ.**

**IV. POINTS AND AUTHORITIES;
DISCUSSION OF LAW;
RELIEF PRAYED FOR**

1. POINTS AND AUTHORITIES

Statutes

West Virginia Code §7-1-3a

West Virginia Code §7-1-3g

West Virginia Code §7-20-1 et seq.

West Virginia Code §7-20-3(a)

West Virginia Code §7-20-3(g)

West Virginia Code §16-13A-1

West Virginia Code §16-13A-2

West Virginia Code §16-13A-2(g)

West Virginia Code §16-13A-3

West Virginia Code §16-13A-3a

West Virginia Code §16-13A-4(f)

West Virginia Code §16-13A-7

West Virginia Code §16-13A-9

West Virginia Code §16-13A-13

West Virginia Code §16-13A-18a

West Virginia Code §16-13A-25

West Virginia Code §22-28-1 et seq.

West Virginia Code §24-1-1(a)

West Virginia Code §24-2-2

West Virginia Code §24-2-3

West Virginia Code §24-2-7

West Virginia Code §24-2-11

West Virginia Code §29-12A-3(c)

Cases

Bell Atlantic-West Virginia Inc. v. Ranson, 201 W.Va. 402, 497 S.E.2d 755 (1997)

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Hedrick v. Grant County Public Service, 209 W.Va. 591, 500 S.E.2d 381 (2001)

McCloud v. Salt Rock Water Pub. Serv. Dist., 207 W. Va. 453, 533 S.E.2d 679 (2000)

Pingley, et al. v. Huttonsville Public Service District, Supreme Court of Appeals of West Virginia Case No. 34969, Opinion filed March 4, 2010

Public Service Commission v. Town of Fayetteville, 212 W.Va. 427, 573 S.E.2d 338 (2002)

State ex rel. The Chesapeake and Potomac Telephone Company of West Virginia v. Ashworth, 190 W.Va. 947, 438 S.E.2d 890 (1993)

State ex rel. Water Development Authority v. Northern Wayne County Public District, 195 W.Va. 135, 464 S.E.2d 777 (1995)

VEPCO v. Public Service Commission, 161 W.Va. 423, 242 S.E.2d 698 (1978)

Zirkle v. Elkins Road Public Service District, 655 S.E.2d 155, 159 (2007)

2. **DISCUSSION OF LAW**

1. **THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION IN THIS MATTER.**

In its Declaratory Judgment Order, the Circuit Court Improperly rejected the Districts' claims that the Court should withhold its exercise of jurisdiction pending the outcome of a case pending before the Public Service Commission of West Virginia ("PSC") prior to the institution of this case in the Circuit Court of Berkeley County. This case should have been dismissed upon the Defendants' Motions to Dismiss.

A. **The Circuit Court erred in determining that the Plaintiff and Defendants are not parties to an administrative proceeding involving the issues in this case.**

The Circuit Court was clearly wrong in its assertion at page 3 of its Declaratory Judgment Order that: "[t]he Court is unable to find in the record where the Plaintiff and the Defendants are parties to any administrative proceeding." In fact, the Water District, in its Motion to Dismiss filed on November 12, 2009, at paragraph 1. (D) on page 2 of such Motion, informed the Circuit Court that the PSC had instituted a general investigation into the matter of CIFs; the PSC had made the Defendants and the Plaintiff parties to such proceeding; and the Plaintiff had participated fully throughout the proceeding. Further, the Water District informed the Court at paragraph 1. (E) of the Motion to Dismiss that the issues raised by the Plaintiff in the Circuit Court, including the authority of the PSC to approve CIFs and the applicability of the Local Powers Act [*West Virginia Code* §7-20-1 *et seq.*], were the same as those pending before the PSC. Finally, the Water District also provided the Circuit Court

with a copy of the June 11, 2009 Order of the PSC in Case No. 09-0961-PSWD-GI. At page 7 of the PSC's June 11, 2009 Order, the Commission stated in part:

Recognizing this discrepancy between the parties the Commission believes it is more reasonable to open a general investigation so that Staff may bring its resources to bear on the pertinent questions. For reasons of administrative efficiency the Commission will (i) docket a general investigation, pursuant to W.Va. Code §§24-2-2,-3, and 7, to review various aspects of the CIFs, (ii) dismiss the complaint (Case No. 09-0192-PSWD-C), (iii) direct the Commission Executive Secretary to copy the contents of the complaint case and make those filings part of the newly docketed general investigation, and (iv) **make the Complainants in Case No. 09-0192-PSWD-C parties to the general investigation.** (Emphasis added)

The Complainants in Case No. 09-0192-PSWD-C were Larry V. Faircloth and Larry V. Faircloth Realty, Inc.; the Plaintiff in the case before the Circuit Court and its President and sole shareholder. The Defendants in Case No. 09-0192-PSWD-C were the two Districts that were the Defendants in the case before the Circuit Court. On page 9 of the June 11, 2009 Order, the PSC made the two Districts and Larry V. Faircloth Realty, Inc. parties to the general investigation in Case No. 09-0961-PSWD-GI. Thus, the Plaintiff and the Defendants in the Circuit Court proceeding are clearly parties to the ongoing General Investigation pending before the PSC.

B. The Circuit Court erred in determining that there is no basis for deferring its jurisdiction to the PSC unless the Plaintiff is seeking a refund of a fee.

The Circuit Court was clearly wrong when it concluded at page 3 of the Declaratory Judgment Order that:

. . . since the only the only [sic] time that the jurisdiction of the West Virginia Public Service Commission and the jurisdiction of a circuit

court are mutually exclusive is when the Plaintiff seeks a refund of a fee (per *Hedrick v. Grant County Public Service*, 500 S.E.2d 381 (W.Va. 2001), there is no basis for this Court to defer its jurisdiction to the West Virginia Public Service Commission.

The *Hedrick* case does not stand for the proposition that the only time the jurisdiction of the PSC and the circuit courts are mutually exclusive is when the Plaintiff seeks a refund of a fee. Nor did the Defendants in this case assert that the PSC had exclusive jurisdiction in this case. Rather, the Defendants recognized that the Circuit Court and the PSC could have concurrent jurisdiction. However, the Defendants did argue that, by virtue of the fact that the General Investigation at the PSC was pending before the institution of the Complaint in the Circuit Court, the PSC had primary jurisdiction.

The issue of primary jurisdiction has been addressed by the Supreme Court of Appeals on numerous occasions. Two particular cases involving the concurrent jurisdiction of the State's Circuit Courts and the Public Service Commission of West Virginia stand out.

In the case of *State ex rel. The Chesapeake and Potomac Telephone Company of West Virginia v. Ashworth*, 190 W.Va. 947, 438 S.E.2d 890 (1993), the Court stated at Syllabus Pt.

No. 12:

Although the general rule is that one must exhaust administrative remedies before going into court to enforce a right, *W.Va. Code 24-4-7* [1923] confers concurrent jurisdiction on the Public Service Commission and the circuit court in a limited number of cases – namely, those cases seeking a refund based on rules and practices of the Public Service Commission that are clear and unambiguous. In these limited cases, a plaintiff can proceed either before the Public Service Commission or the circuit court. **However, these avenues are mutually exclusive: once a Public Service Commission complaint is filed, an appeal to the circuit court is foreclosed until the administrative remedies are exhausted.** (Emphasis added)

A second significant case which addressed the issue of primary jurisdiction was the case of *Bell Atlantic-West Virginia Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997).

There, the Court stated at Syllabus Pt. No. 2:

In determining whether to apply the primary jurisdiction doctrine, courts should consider factors such as whether the question at issue is within the conventional experience of judges; whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; **whether there exists a danger of inconsistent rulings; and whether a prior application to the agency has been made.** (Emphasis added)

In both the *Ashworth* and *Ranson* cases, the Court observed that, where an action has been previously instituted at the PSC involving the same parties and the same issues, and the possibility exists that there is a danger of inconsistent rulings, the Circuit Courts should exercise their discretion to defer consideration of such matters until after the PSC had ruled.

The *Hedrick* case expanded upon the discussion of the doctrine of primary jurisdiction in the rulings of the Supreme Court of Appeals in *Ashworth* and *Ranson*. As the Court stated in *Ranson*, quoting from *Corpus Juris Secundum*, “[t]he primary jurisdiction doctrine is not technically a question of jurisdiction, but rather a matter of judicial self-restraint[.]”² See, *Bell Atlantic-West Virginia Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997) at 411 and 764.

In *Hedrick*, the Court stated:

In determining whether to apply the primary jurisdiction doctrine, courts should consider factors such as whether the question at issue is within the conventional experience of judges; whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; whether there exists a danger of

² 73 C.J.S. Public Administrative Law and Procedure §37 at 437.

inconsistent rulings; and whether a prior application to the agency has been made. Hedrick v. Grant County Public Service, 500 S.E.2d 381, at 386 (2001).

In this case, two of the factors addressed by the Court were squarely involved. Those being: 1) because there was a case pending at the PSC involving the same parties and the same issues, there was a possibility of inconsistent rulings; and, 2) a prior complaint had been made at the PSC which was converted into a General Investigation.

The Plaintiff/Appellee is the party that initially invoked the PSC's jurisdiction on the matter of CIFs by filing a complaint against both Districts. That Complaint was then folded into a General Investigation proceeding by the PSC in order to save the Appellee from having to carry a burden of proof in its complaint case and in order to permit the Staff of the PSC to participate fully as a party. The Circuit Court clearly gave no consideration to the fact that the same issues which the Appellee raised in the Circuit Court; including the claim that the PSC lacked jurisdiction to establish the CIFs under the Local Powers Act; West Virginia Code §7-20-1, *et seq.*, were specifically raised with the PSC in the General Investigation proceeding in which it participated fully as a party.

Applying the principles enunciated in the Ashworth, Ranson, and Hedrick cases to the case at hand, one can see that the doctrine of primary jurisdiction and judicial restraint should have been applied by the Court in this instance and that the Districts' Motions to Dismiss should have been granted. The Appellants are not arguing that the Circuit Court could not have exercised jurisdiction in the Declaratory Judgment Action. Rather, it is the Appellants' position that the Court abused its discretion in failing to exercise judicial restraint by acknowledging the concurrent and ongoing exercise of jurisdiction of the PSC.

Because there had been no oral argument on the Defendants' Motions to Dismiss either scheduled or heard, and there had been no evidentiary hearing scheduled on the matters involved in the Complaint, the Defendants believed that the lack of communication from the Court was Justice Maynard's means of deferring to the PSC until it entered an Order in the General Investigation. The Defendants were unaware of the fact that Justice Maynard intended to rule on the Plaintiff's Motion for Summary Judgment until receiving the Declaratory Judgment Order from counsel for the Plaintiff on February 17, 2010. The failure of Justice Maynard to schedule a hearing on the Motions and to enter the Declaratory Judgment Order without refraining from ruling until after the PSC enters its order in the General Investigation amounts to an abuse of discretion.

In *Ashworth*, the Court found that there were policy issues that "should be considered by the PSC in interest of a uniform and expert administration of the public utilities' regulatory scheme." *Supra* at 438 S.E.2d 894. The same view could have applied here.

2. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA LACKS THE AUTHORITY TO AUTHORIZE PUBLIC SERVICE DISTRICTS TO COLLECT CAPACITY IMPROVEMENT FEES.

The most critical error of the Declaratory Judgment Order appears at page 7 where Justice Maynard stated:

. . . the Court CONCLUDES that the West Virginia Public Service Commission has neither explicit nor implied power to authorize public service districts to impose or assess CIF's.

Accordingly, the West Virginia Public Service Commission exceeded its authority when it authorized the Defendants to impose and assess CIF's in Berkeley County, West Virginia.

This ruling amounts to a rejection of the long held understanding of the statutory scheme for the regulation of public utilities in this state.

This Court has previously recognized that the Public Service Commission was created in order to regulate the practices and rates of all of the public utilities in the state. For example, in the case of *Berkeley County Public Service Sewer District v. The Public Service Commission*, 204 W.Va. 279, 512 S.E.2d 201 (1998), the Supreme Court of Appeals found that the Legislature enacted Chapter 24 of the *Code* for an express legislative purpose: "to confer upon the public service commission of this state the authority and duty to enforce and regulate the practices, services and rates of public utilities." *West Virginia Code* §24-1-1(a) (1986). (204 W.Va. 286, 512 S.E.2d 208)

The Public Service Commission has jurisdiction over all public utilities operating in this state under the statutory scheme established by the Legislature. Both Districts were created under *West Virginia Code* §16-13A-1 *et seq.* and, as such, are public utilities providing water and sewer service in Berkeley County.

As part of the statutory scheme relating to the jurisdiction of the PSC over public service districts, *West Virginia Code* §16-13A-9, states in pertinent part as follows:

The board [of the district] shall establish rates, fees and charges for the services and facilities it furnishes, which shall be sufficient at all times, notwithstanding the provisions of any other law or laws, to pay the cost of maintenance, operation and depreciation of the public service properties and principal of and interest on all bonds issued, other obligations incurred under the provisions of this article and all reserve or other payments provided for in the proceeding which authorize the

issuance of any bonds under this article. The schedule of the rates, fees and charges may be based upon:

* * *

(B) The number and kind of fixtures connected with the facilities located on the various premises;

(C) The number of persons served by the facilities;

(D) Any combination of paragraphs (A) (B) and (C) of this subdivision; or

(E) May be determined on any other basis or classification which the board may determine to be fair and reasonable, taking into consideration the location of the premises served and the nature and extent of the services and facilities furnished.

The above-quoted provision must be read in the context of the overriding authority of the PSC over public utilities under Chapter 24 of the West Virginia Code.³ Through Chapter 24, the PSC has ultimate authority for the rates and charges of all public utilities; including public service districts. To that effect, West Virginia Code §24-2-3 states: [t]he commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities”

It was in the context of this statutory scheme that the PSC approved the CIFs for the Districts. The Districts’ CIFs are charges contained within the tariffs of the Districts which were approved by the Commission under the provisions of Chapter 24 of the West Virginia Code through the Commission’s tariff process.

³ See the Court’s discussion of construing statutory language in Berkeley County Public Service Sewer District v. The Public Service Commission, 204 W.Va. 279, 286 -288; 512 S.E.2d 201, 208-210 (1998).

The Commission approved the Water District's CIFs initially in a tariff application in Case No. 04-1767-PWD-T as a method of ratemaking specifically authorized by West Virginia Code §24-2-3.⁴ That case was properly filed with notice of the opportunity for interested members of the public to intervene having been published as required by law. In approving a stipulated settlement of that case, where the Joint Stipulation was entered into not only by the Water District and the PSC Staff, but also the Eastern Panhandle Homebuilders Association, Inc. which had intervened in the case, the Commission referred to prior CIF proceedings where the Commission had found that:

. . . approval of the CIF was consistent with the Commission's obligations pursuant to *W.Va. Code* §24-1-1, in that the CIF is fair, encourages the well-planned development of utility resources, is just, reasonable, and will be applied without unjust discrimination or preference. (Order entered August 12, 2005 at 5)

The Commission's subsequent approval of an increase in the Water District's CIF was also in the context of a tariff change proceeding which was properly noticed to the public. (Case No. 07-0167-PWD-T, Order entered August 15, 2007)

The Commission similarly approved the Sewer District's CIF in a tariff case designated as PSC Case No. 04-0153-PSD-T. The case was properly filed and noticed pursuant to PSC regulations and the public and developers were afforded the opportunity to participate. The case was even reopened on the specific issue of the timing of payment of the CIF, at the behest of the same Home Builders Association that participated in the Water District's CIF tariff case. The Sewer District subsequently reached an agreement with the Home Builders Association that the CIF would be charged later in the process, at the time a

⁴ Under the PSC's case designation system, the suffix **PWD-T** denotes a Public Service Water District tariff filing, and **PSD-T** denotes a Public Service Sewer District tariff filing.

developer applies for a building permit, over the objection of PSC Staff. The trigger point agreed between the Home Builders Association and Sewer District was approved in a Commission Order dated March 28, 2005, and the Sewer District began collecting the CIF after that date. The Commission's subsequent approval of an increase of the sewer CIF was similarly in the context of a tariff change proceeding which was properly noticed to the public. (PSC Case No. 06-0016-PSD-T, Commission Order entered October 24, 2006).

As stated by Mr. Faircloth in his testimony before the PSC, he was aware of the proposal and adoption of the CIFs from the outset, and he paid such CIF's for four (4) years, but did not seek to challenge the adoption of CIFs until 2009.

Upon approval of the CIFs and their subsequent increase, the CIFs became a part of the Districts' tariffs, together with other rates, fees and charges authorized by the Commission. In both instances, the Commission determined that the implementation of the CIF was a reasonable method to balance the interests of current rate payers with the interests of new customers who were found to be responsible for the need for increased capacity.

This is not the first time that the Supreme Court of Appeals has had to consider the scope of the PSC's rate-making authority and the various forms of rates and charges within its authority.

In the case of *Columbia Gas of West Virginia, Inc. v. Public Service Commission*, 311 S.E.2d 137 (1983), the Court stated:

The Public Service Commission makes rates on a continuous basis from the standards in W.Va. Code, 24-1-1(a) and (b). Specifically, Section (a)(4) requires that "rates and charges for utility services [be] just, reasonable, applied without unjust discrimination or preference and based primarily on the cost of providing these services." **Subsection (b) charges the Public Service Commission with responsibility for "appraising and balancing the interests of current and future utility**

service customers, the general interests of the State's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.” 311 S.E.2d 144 (Emphasis added)

In the case of State ex rel. Water Development Authority v. Northern Wayne County Public District, 195 W.Va. 135, 464 S.E.2d 777 (1995), the Court made it clear that the PSC's rate making authority applied to charges of a public service district which, similar to those that are at issue here, related to the impact of the addition of new customers on the rates and services of public service districts. In the Northern Wayne case, the West Virginia Water Development Authority (“WDA”) sought to protect its investment in the facilities of the public service district by imposing a tap fee for new customers upon that district. The district had, on several occasions, unsuccessfully attempted on its own to increase its tap fee in proceedings before the PSC. The WDA, not being satisfied with the action of the PSC, attempted to cause the public service district to increase its tap fee under the WDA's own statutory authority without regard to the PSC's rulings. In rejecting the attempt by the WDA, the Court, in Syllabus Point No. 4, stated:

W.Va. Code, 24-2-3 (1983), clearly and unambiguously gives the Public Service Commission the power to reduce or increase rates whenever it finds that the existing rate is unjust, unreasonable, or unjustly discriminatory or other wise in violation of any provision of W.Va. Code, 24-1-1 et seq.” Syl. Pt 2, Central West Virginia Refuse, Inc. v. Public Service Commission 190 W.Va. 416, 438 S.E.2d 596 (1993).

Justice Maynard was wrong to conclude that there is no statutory basis for the PSC to authorize CIFs because they do not fit within his definition of rates subject to the PSC's statutory authority. Further, Justice Maynard was incorrect to conclude that CIFs are an assessment in the nature of a tax.

Numerous fees and charges are contained in the PSC-approved tariffs of West Virginia utilities including: tap fees, disconnection and reconnection charges, delayed payment penalties, and administrative fees.

There is no specific statutory reference to tap fees for public service districts in either Chapter 13A or Chapter 24 of the *Code*. Nevertheless, in the *Northern Wayne* case, *supra*, the Court recognized that it was within the PSC's rate making authority to determine the amount of a tap fee that the district would be permitted to charge and such was not under the authority of the WDA nor any other agency of government.

Likewise, there is no specific statutory authority for the imposition of disconnection and reconnection fees. Nevertheless, in the case of *Public Service Commission v. Town of Fayetteville*, 212 W.Va. 427, 573 S.E.2d 338 (2002), the Court recognized the PSC's authority over reconnection fees. (See 212 W.Va 433 and 573 S.E.2d 344)

Both tap fees and reconnection charges are one time fees imposed upon customers who are themselves causing the utilities to incur expenses in order to provide service to them. The use of such fees is authorized by the PSC, not as an assessment in the nature of a tax as found by the Court below, but rather as a means of balancing the rate impact of the cost being caused by the individual customer. In the case of CIFs and tap fees, the cost causer is the new customer. In the case of the reconnection fee, the cost causer is the delinquent customer whose service has been disconnected. In each of these situations, the fee is not intended to recover the entire cost being imposed by the cost causer from that individual, but rather to balance the cost between the cost causer and the remaining customers.

The fact that the PSC is authorized to determine that CIFs are an appropriate way to balance the interests of current and future customers of the Districts is consistent with prior rulings of the Court.

In Syllabus Pt. 1 in *VEPCO v. Public Service Commission*, 161 W.Va. 423, 242 S.E.2d 698 (1978), our Supreme Court of Appeals stated:

The Public Service Commission may employ such methods for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia consumers good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia.

In the case of *Central West Virginia Refuse v. Public Service Commission*, 190 W.Va. 416, 438 S.E.2d 596 (1993), the Court stated at Syllabus Pt. 2:

W.Va. Code, 24-2-3 (1983), clearly and unambiguously gives the Public Service Commission the power to reduce or increase rates whenever it finds that the existing rate is unjust, unreasonable, insufficient, or unjustly discriminatory or otherwise in violation of W.Va. Code, 24-1-1, *et seq.*

In the case of *C&P Telephone Co. v. City of Morgantown*, 144 W.Va. 149, 107 S.E.2d 489 (1959) the Court held:

The paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the Public Service Commission has been recognized by this Court. *Lockard v. City of Salem*, 127 W.Va. 237, 32 S.E.2d 568; *City of Mullens v. Union Power Co.*, 122 W.Va. 179, 7 S.E.2d 870; *Mountain State Water Co. v. Town of Kingwood*, 122 W.Va. 374, 9 S.E.2d 532; *Ex Parte Dickey*, 76 W.Va. 576, pt. 3 syl., 85 S.E. 781; *City of Benwood v. Public Service Commission*, 75 W.Va. 127, pt. 5 syl., 83 S.E. 295, L.R.A.1915C, 261; *City of Wheeling v. Natural Gas Co.*, 74 W.Va. 372, pt. 6 syl., 82 S.E. 345. (at 160, 496)

Justice Maynard was clearly wrong in his conclusion that the PSC exceeded its authority to authorize the Districts to use CIFs.

3. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DEFENDANTS ARE SUBJECT TO THE PROVISIONS OF THE LOCAL POWERS ACT, WEST VIRGINIA CODE §7-20-1 ET SEQ.

At page 4 of the February 16, 2010 Declaratory Judgment Order, Justice Maynard found that CIFs are “substantially the same concept and fee as an ‘impact fee’.” From this finding, Justice Maynard then concluded that, under the Local Powers Act, West Virginia Code §7-20-1 et seq., such fees could not be charged by the Districts because the Districts are agencies of the County Commission, and Berkeley County has not adopted a comprehensive zoning ordinance as required by the Local Powers Act.⁵ The Circuit Court’s findings and conclusions regarding the applicability of the Local Powers Act to the CIFs and the Districts are clearly wrong.

A. CIFs are not “impact fees” as that term is used in the Local Powers Act, West Virginia Code §7-20-1 et seq.

The term “impact fees” is defined in the Local Powers Act at West Virginia Code §7-20-3(g) as follows:

(g) "Impact fees" means any charge, fee, or assessment levied as a condition of the following: (1) Issuance of a subdivision or site plan approval; (2) issuance of a building permit; and (3) approval of a certificate of occupancy, or other development or construction approval when any portion of the revenues collected is intended to fund any portion of the costs of **capital improvements for any public facilities or county services not otherwise permitted by law.** An impact fee

⁵ See, Declaratory Judgment Order at page 6.

does not include charges for remodeling, rehabilitation, or other improvements to an existing structure or rebuilding a damaged structure, provided there is no increase in gross floor area or in the number of dwelling units that result therefrom. (Emphasis added)

From this definition, it is clear that when used in the context of the Local Powers Act, the term “impact fees” is directly related to the term “capital improvements” as defined in that same Act and does not include CIFs which are “otherwise permitted by law”. The term “capital improvements” is defined at *West Virginia Code* §7-20-3(a) in relevant part as follows:

(a) "**Capital improvements**" means the following public facilities or assets that **are owned, supported or established by county government**:

- (1) Water treatment and distribution facilities;
- (2) Wastewater treatment and disposal facilities;
- (3) Sanitary sewers;

* * *

(Emphasis added)

Thus, in order to be considered an “impact fee” for the purposes of the Local Powers Act, CIF revenues would have to be intended to fund the costs of public facilities owned, supported or established by county government.

The Districts fully agree that CIFs are used to fund the construction of water treatment and distribution facilities, wastewater treatment and disposal facilities, and sanitary sewers. However, the Districts disagree with the conclusion reached in the Declaratory Judgment Order in that the facilities being funded by the CIFs are not owned, supported, or established by county government.

County Commissions have specific authority to own and operate water and wastewater systems. West Virginia Code §7-1-3a provides in relevant part:

In addition to all other powers and duties now conferred by law upon county commissions, such commissions are hereby authorized and empowered to install, construct, repair, maintain and operate waterworks, water mains, sewer lines and sewage disposal plants in connection therewith within their respective counties: . . .

And, West Virginia Code §7-1-3g provides:

In addition to all other powers and duties now conferred by law upon county courts, such courts are hereby empowered to acquire, by purchase, right of eminent domain, lease, gift, or otherwise, and to operate and maintain, sewerage systems and sewage treatment plants, and to pay the cost of operation and maintenance thereof out of a special fund to be derived from sewerage service fees paid by the users of such sewerage system or sewage treatment plant: . . .

None of the CIF revenues being collected by the Districts are being applied to facilities owned, supported, or established by the Berkeley County Commission under the County Commission's authority established in Chapter 7 of the West Virginia Code. Rather, all of the facilities being supported by the CIF revenues collected by the Districts are owned, supported and established by the two Districts under their independent statutory authority.

The creation and operation of water systems and sewer systems pursuant to Article 13A, Chapter 16 of the Code is separate and distinct from the authority of a county commission to own and operate a water or sewer system pursuant to Chapter 7, Article 1 of the Code. There simply is no statutory connection between the two.

The statutory scheme concerning public service districts was initially created by an act of the Legislature in 1953. The Berkeley County Public Service District was created in 1954 and is the oldest public service district in West Virginia. Over the years the District, which

began in a very small manner to provide water service to rural residences in southern Berkeley County, has expanded to the point where it is now the largest public service district in West Virginia. Over the last 57 years it has borrowed millions of dollars to locate and develop water sources, to construct water treatment plants, water towers, water mains and other facilities to serve residences and businesses within Berkeley County. At no time has any action of the Water District legally obligated the County Commission of Berkeley County in any manner whatsoever for either the debts of the Water District or for any actions undertaken by the District or its employees.

Likewise, the Sewer District has constructed facilities to serve more than 19,000 customers and has borrowed more than \$120 million to build multiple wastewater treatment facilities and hundreds of miles of collections lines, secured by bonds issued in the name of the District, to construct those facilities. The County Commission of Berkeley County is not obligated under any of the Sewer District's debt obligations, and the Sewer District has never taken any action that has obligated the County Commission in any way.

The CIF revenues of the two districts are being collected for the purpose of paying the indebtedness of the districts for facilities owned, supported and established by the districts, not the county commission. They are fees which have been approved by the Public Service Commission within its statutory authority. Under the statutory definition of "capital improvements", under the Local Powers Act, the CIFs are not "impact fees", and the districts are not subject to the Local Powers Act.

B. Public Service Districts are not agencies of County Commissions but are separate political subdivisions as clearly set forth in West Virginia Code §16-13A-3.

The Circuit Court incorrectly concluded that the Districts are agencies of the Berkeley County Commission and not separate political subdivisions.⁶ Not only is this result clearly at odds with the specific language of the statute under which the Districts were created, it is incompatible with the facts surrounding the operations of public service districts in this state and the law of agency.

The title to West Virginia Code §16-13A-3 reads: “**District to be public corporation and political subdivision; powers thereof; public service boards.**” (Emphasis added) Then, in the very first sentence of that section, it states: “[f]rom and after the date of the adoption of the order creating any public service district, **it is a public corporation and political subdivision of the state . . .**” (Emphasis added) It is hard to imagine a more clear statement of legislative intent than the language that is highlighted above. Nevertheless, Justice Maynard concluded that the Districts are not separate political subdivisions and that they are agencies of the County Commission. He was incorrect in both respects.

In the recent decision of Pingley, et al. v. Huttonsville Public Service District, Case No. 34969, Opinion filed March 4, 2010, this Court observed that, “[l]ike a municipality, a public service district is a public corporation and political subdivision of this State.” McCloud v. Salt Rock Water Pub. Serv. Dist., 207 W. Va. 453, 458, 533 S.E.2d 679, 684 (2000). See West Virginia Code §16-13A-3 (2002) (Repl. Vol. 2006) (“From and after the date of the adoption of the order creating any public service district, it is a public corporation and

⁶ See Declaratory Judgment Order at page 5.

political subdivision of the state, but without any power to levy or collect ad valorem taxes.”
(Slip Opinion at page 9)

In the case of Zirkle v. Elkins Road Public Service District, 655 S.E.2d 155, 159 (2007), the Court recognized that, as political subdivisions as defined West Virginia Code §29-12A-3(c), public service districts are covered by the Governmental Tort Claims and Insurance Reform Act. A review of that statute reveals that public service districts are listed separately from county commissions as political subdivisions.

It is well-settled in West Virginia law that:

One of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent. Syllabus Point 3, Teter v. Old Colony, 190 W.Va. 711, 441 S.E.2d 728 (1944) cited with authority at Syllabus Point 5, Timberline Four Seasons Resort Management Co., Inc., v. Herlan, 223 W.Va. 730, 679 S.E.2d 329 (2009)

Here, the county commission, after the creation of a public service district, and the approval of the creation of the district by the PSC, has virtually no control over the conduct of the district or its board members. The Circuit Court clearly overreached in concluding that “public service districts are under the virtual, if not micro, control of the county commission that establish [sic] them”.⁷

The provisions of the West Virginia Code cited by the Court to support its conclusion fail to establish an indicia of control of public service districts by county commissions to justify a conclusion that they are agencies of county commissions. The sections cited by the Court to justify its conclusion are the following:

⁷ Id.

1. West Virginia Code §16-13A-2 which authorizes county commissions to create, enlarge, reduce, merge, dissolve or consolidate a public service district;
2. West Virginia Code §16-13A-2(g) which prohibits districts from entering into any agreement that infringes upon, impairs, abridges or usurps the powers of the county commission;
3. West Virginia Code §16-13A-3 which authorizes county commissions to appoint board members;
4. West Virginia Code §16-13A-3a which authorizes a county commission to petition the circuit court for the removal of a board member;
5. West Virginia Code §16-13A-4(f) which authorizes a county commission to change the name of a public service district; and
6. West Virginia Code §16-13A-18a⁸ which requires public service districts to obtain the approval of the county commission prior to selling, leasing or renting its system.⁹

A review of those sections discloses that, in the case of West Virginia Code §§16-13A-2, 4(f), and 18a, the actions referred to cannot be undertaken by either the public service district or the county commission without the approval of the PSC. There is no suggestion that the approval authority referred to in those sections causes public service districts or county commissions to be agencies of the PSC.

In the case of West Virginia Code §16-13A-2(g), it is true that public service districts are prohibited from entering into agreements that infringe upon, impair, abridge or usurp the powers of the county commission. But this is a legislative restriction on their authority which

⁸ Incorrectly cited as West Virginia Code §16-13A-18(a) at Declaratory Judgment Order at page 5.

⁹ The Declaratory Judgment Order actually referred to the sale, lease or rental of district facilities. The statute refers to the sale, lease or rental of the district's system.

in no way constitutes an exercise of control of the actions of the districts by the county commission.

It is true that, under West Virginia Code §16-13A-3, the board members of public service districts are appointed by the county commission. However, there is no further control imposed upon the board member after such appointment. In fact, as revealed by West Virginia Code §16-13A-3a, the county commission cannot even remove the board members after they have been appointed. In order to remove the board members, the county commission must petition the circuit court and even then, the board members can only be removed for limited reasons.

These statutory references relied upon by Justice Maynard in his Declaratory Judgment Order fail to establish that public service districts are under the control of, or agencies of, county commissions.

In fact, public service districts are not agencies of county commissions and county commissions do not own, support or establish the facilities that are funded by CIFs, through which the Districts provide service to the public.

As provided by West Virginia Code §16-13A-3, the Districts are public corporations which operate as separate political subdivisions. They own and operate their public service facilities through which they provide service.¹⁰ They establish rates for the payment of the capital costs of the construction of public service facilities and the operation and maintenance

¹⁰ West Virginia Code §16-13A-7 provides in pertinent part as follows:

The board of such districts shall have the supervision and control of all public service properties acquired or constructed by the district, and shall have the power, and it shall be its duty, to maintain, operate, extend and improve the same, including, but not limited to, those activities necessary to comply with all federal and state requirements, including water quality improvement activities.

of such facilities.¹¹ Most importantly for the purposes of this case, the Districts have issued revenue bonds for the construction of such facilities under the authority of West Virginia Code §16-13A-13.¹² It is the CIFs which have been approved by the PSC which form part of the revenue stream which is responsible for the retirement of the bonds issued by the Districts for the benefit of their customers. None of these activities of the Districts are subject to the control of the county commission. The title to all of the property of the Districts is held in the name of the Districts. The rates of the Districts are not subject to the review and approval of the county commission. Finally, the bonds of the Districts which are supported by the CIF revenues are issued in the name of the District without the review or approval of the county commission and the county commission has no rights, obligation or duty with regard to the use of the proceeds of such bonds, or the repayment thereof. There is no agency relationship between the Districts and the county commission.

¹¹ West Virginia Code §16-13A-9 provides in pertinent part as follows:

. . . The board shall establish rates, fees and charges for the services and facilities it furnishes, which shall be sufficient at all times, notwithstanding the provisions of any other law or laws, to pay the cost of maintenance, operation and depreciation of the public service properties and principal of and interest on all bonds issued, other obligations incurred under the provisions of this article and all reserve or other payments provided for in the proceedings which authorized the issuance of any bonds under this article. * * *

¹² West Virginia Code §16-13A-13 provides in pertinent part as follows:

For constructing or acquiring any public service properties for the authorized purposes of the district, or necessary or incidental thereto, and for constructing improvements and extensions thereto, and also for reimbursing or paying the costs and expenses of creating the district, the board of any such district is hereby authorized to borrow money from time to time and in evidence thereof issue the bonds of such district, payable solely from the revenues derived from the operation of the public service properties under control of the district.

C. Capacity Improvement Fees are not related to the Community Infrastructure Investment Project Act, West Virginia Code §22-28-1 et seq.

At pages 7 and 8 of the Declaratory Judgment Order, Justice Maynard incorrectly concluded that West Virginia Code §22-28-1 et seq. (referred to in the February 16, 2010 Order as “the Infrastructure Act”) and the PSC orders approving CIFs are in conflict; and further, that the Legislature has eliminated the imposition of CIFs on developers such as the Appellee, who choose to build and donate the improvements under the Infrastructure Act.

It is apparent that the Circuit Court and the Appellee do not understand either the purpose and function of the so-called Infrastructure Act, and it does not understand the Legislative scheme in which it applies. In short, the Infrastructure Act is unrelated to CIFs in general, and it is unrelated to the Appellee and its activities in particular.

First, the Infrastructure Act relates to the construction and transfer of project facilities as defined in the Act, pursuant to a “community infrastructure agreement”¹³ which has been

¹³ The term community infrastructure investment agreement is defined at West Virginia Code §22-28-2 as follows:

(b) "Community infrastructure investment agreement" shall refer to a written agreement between a municipal utility or public service district and a person that provides for the transfer of legal title to a project facility from the person to the municipal utility or public service district.

approved by the Secretary of the Department of Environmental Protection.”¹⁴ Notwithstanding the fact that the Infrastructure Act was enacted in 2005, there have been no community infrastructure agreements approved by the Secretary, much less one between the Appellee and either of the Districts.

Second, “community infrastructure investment projects” under the Infrastructure Act, are simply one means of building public service district infrastructure. It is not the means by which the Districts in Berkeley County have elected to build their systems. Rather, the District facilities which are subject to CIFs have been certificated by the PSC under the provisions of *West Virginia Code* §§16-13A-25 and 24-2-11.

Projects that are subject to the Infrastructure Act are approved by the Secretary of the Department of Environmental Protection and are exempt from the requirements of *West Virginia Code* §§16-13A-25 and 24-2-11.¹⁵ As stated previously, the Secretary has not approved any community infrastructure projects for the Districts or for the Plaintiff. Thus, there is no basis for the Court to have concluded that the CIFs approved by the PSC are in any way in conflict with the Infrastructure Act.

¹⁴ *West Virginia Code* §22-28-4 states as follows:

(a) Municipal utilities and public service districts have the power and authority to enter into community infrastructure investment agreements with any person for the purpose of constructing new project facilities or substantially improving or expanding project facilities.

(b) Notwithstanding any other provision in this code to the contrary, the Secretary shall have the power and the authority to review and approve all such community infrastructure investment agreements pursuant to this article.

¹⁵ *West Virginia Code* §22-28-2 provides as follows:

(a) "Certificate of appropriateness" shall refer to the document evidencing approval of a project and is issued by the Secretary of the Department of Environmental Protection pursuant to the provisions of this article. The issuance of such a certificate shall exempt the project from the provisions of section eleven, article two, chapter twenty-four of this code and, in the case of a public service district, from the provisions of section twenty-five, article thirteen-a, chapter sixteen of this code.

There having been no community infrastructure agreement approved between the Districts and the Appellee, the Court improperly found that CIFs are not applicable for the facilities constructed by the Plaintiff and transferred to the Districts.

Finally, Justice Maynard was simply wrong in concluding that the Legislature enacted the Infrastructure Act “to modify or ameliorate the burdens of impact fees imposed by the Local Powers Act on developers.”¹⁶ A review of the enabling language of the Infrastructure Act references the need for the extension of water and sewer services; the fact that typically the cost of the infrastructure for such is born by the state and its citizens and constitutes a burden on the state and its political subdivisions and residential customers; that rates for such services have risen in recent years due in large part to the cost of construction and the cost of debt service; and, that there are entities willing to pay the cost associated with constructing such facilities and to dedicate the facilities to the local utility after construction.¹⁷ However,

¹⁶ See Declaratory Judgment Order at page 7.

¹⁷ *West Virginia Code* §22-28-1 provides as follows:

The Legislature finds and declares that:

(a) There is a growing need for the extension of public water and sewer services throughout the state and that the extension of such services and facilities maintains the health and economic vitality of the citizens of West Virginia. In addition, access to such infrastructure facilities is equal essential to development in all regions of the state.

(b) The extension of public water and sewer services promotes public health and safety in that it enables businesses, residences, municipalities and other entities to comply with state and federal water quality standards.

(c) The cost of publicly owned sewer and water facilities are normally born by the state, its subdivisions and the citizens of West Virginia and public indebtedness incurred to construct such facilities constitutes a financial burden on the state and its political subdivisions, as well as residential consumers.

there is no suggestion in the statute that the Infrastructure Act was enacted to “ameliorate the burdens of impact fees imposed by the Local Powers Act on developers.”

3. RELIEF PRAYED FOR

The importance of this case to the regulatory framework applicable to public service districts in the state of West Virginia cannot be overstated.

If the February 16, 2010 Declaratory Judgment Order is permitted to stand, the Berkeley County Public Service Water and Sewer Districts will immediately have to find an alternate source of revenues for funding their outstanding indebtedness to bondholders. The only alternative source of revenues is likely to be the rates charged to users of the District’s facilities. In the case of the Water District, the immediate impact has been stated to be a 22% rate increase. In the case of the Sewer District, its rates will have to be increased an additional 18% on top of a 12.26% increase that was approved by the PSC and became effective April 7, 2010.

(d) The rates for public water and sewer services charged to customers of all service classes have risen in recent years due primarily to the cost of utility construction and the cost of debt service associated with such construction.

(e) There are private business entities that are in need of water and sewer services for various residential, commercial and industrial projects throughout the state and that those entities are willing to pay the cost associated with constructing needed public water and sewer services and to dedicate the facility to the local certificated public utility after construction of such facilities.

(f) Those private business entities need a method by which to enter into agreements with municipal utilities or public service districts that would enable the construction of new infrastructure as well as the expansion of existing facilities.

(g) The dedication of such infrastructure facilities to the local certificated public utility without cost greatly benefits the citizens of the state and promotes industrial, commercial and economic development.

If the decision is permitted to stand, its effect will be to invalidate the CIFs for all utilities in the state and will bring into question the legitimacy of the fees and charges approved by the Public Service Commission for all utilities in the state that are not specifically provided for in statutory language.

If the decision is permitted to stand, its effect will be to establish that county commissions in the state are in control of all public service districts, and the acts of the public service districts without the express approval of the county commissions will be subject to challenge if not automatically deemed *ultra vires*. At the very minimum, the authority for and the security of the bonds for every public service district in the state will be suspect.

In order to preserve the regulatory scheme established by the Legislature, and recognize the primary authority of the Public Service Commission for the regulation of the rates, charges and activities of all public utilities in the state, it is respectfully requested that the Court reverse the February 16, 2010 Declaratory Judgment Order in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert R. Rodecker, co-counsel for Appellant Berkeley County Public Service Water District, do hereby certify that copies of the foregoing Berkeley County Public Service Water District Appellant's Brief have been served upon the following counsel of record via First Class U.S. Mail, postage prepaid, on this 29th day July, 2010:

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