

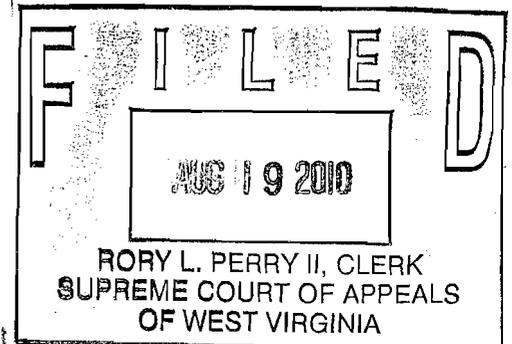
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON**

Larry V. Faircloth Realty, Inc,  
a corporation, Plaintiff below and Appellee

vs.

No's. 35651 and 35652

Berkeley County Public Service Water District, and  
Berkeley County Public Service Sewer District,  
public corporations and Appellants.  
Public Service Commission of West Virginia,  
an Agency of the State of West Virginia, Intervenor.



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**APPELLEE'S RESPONSE BRIEF TO THE  
PUBLIC SERVICE COMMISSION'S BRIEF**

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### COURT DECISIONS

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Chevron U.S.A. v Natural Res. Def. Council, 467 US 837 (1984).  
City of Benwood v Public Service Commission, 75 W. Va. 127, 83 SE 295 (1914).  
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Pioneer Co. v Hutchinson, 159 W. Va. 276, 220 SE2d 894 (1975).  
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State Ex Rel. E.D.S. Fed. Corp. v Ginsberg, 163 W. Va. 647, 259 SE2d 618 (1979).  
State Ex Rel Knight v Public Service Commission, 161 W. Va. 447, 245 SE2d 144 (1978).  
T. Weston, Inc. v Mineral County, 219 W. Va. 564, 638 SE2d 167 (2006).

### STATUTES

#### West Virginia Code:

- §§ 7-20-1, *et seq.*, Local Powers Act.
- §§ 22-28-1, *et seq.*, Community Infrastructure Investment Projects Act.
- §§ 55-13-1, *et seq.*, Uniform Declaratory Judgments Act.

### COURT RULES

#### West Virginia Rules of Appellate Procedure:

- Rule 22, Intervention.

#### West Virginia Rules of Civil Procedure:

- Rule 19, Joinder of persons needed for just adjudication.
- Rule 20, Permissive joinder of parties.
- Rule 24, Intervention.
- Rule 57, Declaratory judgments.

## PREFACE

### **1. Complaint seeks a declaratory judgment.**

The Complaint in the underlying action was filed by the Plaintiff, Larry V. Faircloth Realty, Inc., a corporation, (“Faircloth”) in the Circuit Court of Berkeley County, West Virginia, on October 6, 2009. The Complaint named the Berkeley County Public Service Water District and the Berkeley County Public Service Sewer District, both public corporations, (“Districts”) as Defendants. Faircloth sought declaratory relief from the judiciary when the PSC refused (in August of 2009) to reconsider its own jurisdictional power or authority to allow the Districts to assess and collect CIF’s.

The action was instituted under the provisions of West Virginia Code §§ 55-13-1 *et seq.*, the West Virginia Uniform Declaratory Judgments Act, and Rule 57, of the West Virginia Rules of Civil Procedure.

The declaratory relief prayed for by Faircloth was:

1) To declare that the Districts have no statutory authority to assess capacity improvement fees (CIF’s) against Faircloth; and

2) To declare that the Districts cannot utilize the regulatory processes of the West Virginia Public Service Commission to impose a capacity improvement or impact fee.

A hearing was held on Faircloth’s application for a preliminary injunction on Saturday, November 14, 2009, before the Circuit Court of Berkeley County, at which time a record was made of the proceedings, hereinafter referred to a “Transcript, page xx.” Former West Virginia Supreme Court Justice, Elliott Maynard, presided over the hearing, by special appointment of this Court, when all five circuit judges recused themselves from hearing the case.

### **2. Complaint Requests Prospective Relief Only.**

The Complaint, in ¶ 21, requested that the Court declare that the Districts’ absence of statutory authority to impose capacity improvement fees “be prospective from the date of filing

of this action.”

### **3. Status Of the Public Service Commission’s Position Prior To the Granting Of This Appeal.**

The West Virginia Public Service Commission, (“PSC”) was never made a party defendant to the action below.

The Districts made no effort to join the PSC as a party under West Virginia Rule of Civil Procedure 19, “Joinder of persons needed for a just adjudication,” or Rule 20, “Permissive joinder of parties.”

The PSC, having immediate notice of the filing of the action, never moved to intervene in the action under West Virginia Rule of Civil Procedure 24.

After the Final Judgment Order was entered in the action and when the Districts filed a R.Civ.P. 59 motion, the PSC, again, did not move to intervene.<sup>1</sup> Only after the Appeal had been granted to the Districts did the PSC move for intervention under West Virginia Rule of Appellate Procedure 22.

Significantly, the PSC refused to reconsider its own jurisdiction to approve CIF’s in its “general investigation” of the matter in *Larry V. Faircloth and Larry V. Faircloth Realty, Inc. vs Berkeley County Public Service Sewer District and Berkeley County Public Service District d/b/a Berkeley County Public Service Water District*; Case No. 09-0961-PSWD-GI. In refusing Appellee’s request to stay the PSC’s proceedings until the jurisdictional issue was determined in the underlying action here, the PSC blatantly and arbitrarily said that it was in a better position to make decisions concerning the Appellee’s rights than the Berkeley County Circuit Court. Curiously, the PSC has not yet rendered a final Order regarding its “general investigation” of the need for CIF’s, whether the CIF’s are fair, or how the CIF’s are to be used. Yet, now, it feels compelled to “weight in” on the jurisdictional issue that it refused to address when the parties appeared before it in Charleston on August 26 and 27, 2009. Could it be that the PSC, like the fox guarding the hen house, seeks to justify its unlawful act in approving the Districts’ request for CIF’s in the first place?

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<sup>1</sup> Both *Pioneer Co. v Hutchinson*, 159 W. Va. 276, 220 SE2d 894 (1975) (Overruled on other grounds,) and *State Ex Rel. E.D.S. Fed. Corp. v Ginsberg*, 163 W. Va. 647, 259 SE2d 618 (1975) suggest that post-judgment intervention is permissible.

## STANDARD OF REVIEW

Because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*; however, any determination of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard, *Cox v Amick*, 195 W.Va. 608, 466 SE2d 459 (1995).

## THE ISSUE

The Circuit Court of Berkeley County, in its Order of January 29, 2010, concluded that: (1) the Defendant public service districts do not have authority and exceed their powers when they impose or assess capacity improvement fees ("CIFs") on developers; and (2) the Public Service Commission has exceeded its authority by authorizing public service districts to impose or assess capacity improvements fees.

The issue to be decided by this Court as it relates to the Intervenor PSC is whether the PSC has statutory authority to authorize public service districts to impose capacity improvement fees.

In a succession of decisions, this Court has continuously declared that the PSC has no inherent jurisdiction, power or authority. See *Burch v NedPower Mount Storm, L.L.C.*, 220 W Va 443, 647 SE2d 879, 887 (2007). Its power may not be presumed but, instead, must be directly and clearly given by the West Virginia Legislature.

## ARGUMENT

### **1. The Local Powers Act and the Community Infrastructure Investment Projects Act "Trump" the Jurisdiction Of the Public Service Commission To Authorize the Imposition and Collection of Capacity Improvement/Impact Fees.**

The Local Powers Act, West Virginia Code §§ 7-20-1 *et seq.*, and the Community Infrastructure Investment Projects Act, West Virginia Code §§ 22-28-1 *et seq.*, trump the jurisdiction of the West Virginia Public Service Commission to authorize public service districts to impose or assess a fee to expand or improve water and sewer service capacity.

#### **(a) The Local Powers Act.**

Through the Local Powers Act, enacted in 1990, the West Virginia Legislature granted

authority to our elected fifty-five (55) county commissions, not the appointed Public Service Commission, to collect fees from developers to fund costs of capital improvements for, among other things, public utilities “established by county government” to provide water and wastewater treatment, distribution and disposal facilities.

The Legislature designated and defined these fees as “impact fees.” See Code § 7-20-3(g). In its January 29, 2010, Order, page 4, the Berkeley County Circuit Court made a finding of fact that a capacity improvement fee, as defined and used by the Districts in this case, is substantially the same concept and fee as an “impact fee.”

The Legislature made findings, set out in West Virginia Code §7-20-2, that the increased demand for development is causing a strain on user charges at existing levels and impairing the ability of residents and users to bear the cost of increased demand for county facilities and services.

The Legislature went on to find (at West Virginia Code § 7-20-2(3)) that equitable considerations require that future residents and users of existing county facilities contribute toward the investment already made in those facilities and services. The Legislature, then, prescribed certain requirements and criteria before such fees could be collected. These requirements are specifically, clearly and completely identified at West Virginia Code § 7-20-6. The County Commission of Berkeley County has been and is presently unable to meet the requirement of (a)(4) of section 6—enactment of a zoning ordinance. The circumvention of this requirement by the Districts through the channel of the Public Service Commission is the root basis of this dispute.

In summary, the Legislature, by enacting the Local Powers Act, provided a medium by which the public service districts which are established by the county commissions (see West Virginia Code § 16-13A-2), could lawfully fund the costs to provide and maintain increased capacity to serve new customers of its water and sewer services. This is exactly the basis of the PSC’s Order of 8-31-04, Case No. 04-0153-PSD-T, set out on page 3 of PSC brief.

**(b) The Community Infrastructure Investment Projects Act.**

Fifteen years late, in 2005, the West Virginia Legislature enacted the Community Infrastructure Act. see West Virginia Code §§ 22-28-1 *et seq.*

In Section 22-28-1(c) and (d) of the West Virginia Code, the Legislature recognized that the costs of publicly owned sewer and water facilities are normally born by the state, its subdivisions and citizens. It also noted that the rates for public water and sewer services charged to customers had risen, primarily due to the cost of utility construction and related debt service.

Further, in Section 22-28-1(e) (f) and (g) of the West Virginia Code, the Legislature found that there were private business entities willing to pay the cost associated with constructing needed public water and sewer services and to convey the facility or infrastructure to the local public utility after construction, without cost. Faircloth has been doing this all along and was still paying the subsequently charged capacity improvement fees (CIF's) at issue in this case. See Transcript; page 8. Yes, Faircloth has been entering into cooperative venture agreements with both Districts, and building new infrastructure (free of charge to the Districts) for more than ten (10) years prior to the Legislature's enactment of the Community Infrastructure Investment Projects Act.

The Community Infrastructure Investment Act ties in with the Local Powers Act. The Local Powers Act acknowledges that new developers who have to pay impact fees (but who have contributed to or absorbed the entire cost of those new capital improvements like Faircloth) are entitled to a credit or offset. See West Virginia Code § 7-20-7(5) and (7). Faircloth beseeches this Court: "Where's the offset?"

In summary, the Local Powers Act, as early as 1990, combined with the Community Infrastructure Investment Project Act in 2005, provided the exclusive authority to county commissions to impose capacity improvement or impact fees and to further account for the situation where a developer may have the alternative to paying a CIF or an impact fee by constructing its own water and sewer capacity improvements and dedicating (or donating) them to the public utility. That is exactly what Faircloth has done in this case. Yet, the PSC urges this Court to allow it (the PSC) to make him pay twice, thereby increasing the cost of a new home, in these economic times, by more than \$7,000.00. The PSC, apparently, has no concern that the new West Virginia homeowner has, also, already paid once for the new infrastructure in the price of the lot and will continue to pay monthly charges for the new service according to actual use of the utility service. The PSC forgets that its function is to also protect the consumer from unfair or

unlawful fees levied by utilities.

## **2. The Limited Power Of the Public Service Commission Is Regulated By Statute.**

### **(a) General Principles.**

The power conferred upon the Public Service Commission is legislative in character. The duty of the Commission is the execution of the legislative mandate, respecting the matters committed to its jurisdiction. It does not possess unlimited or unrestricted power. In the devolution of certain duties upon it, the West Virginia Legislature has not abdicated, surrendered, nor wholly delegated its powers regarding those subjects. *Randall Gas Co. v Star Glass Co.*, 78 W. Va. 252, 88 SE 840 (1916).<sup>2</sup> Unless there has been such delegation by clear and express terms, the power is reserved in the state, which can exercise it at such times and to such an extent as may be found advisable. *City of Benwood v Public Service Commission*, 75 W.Va. 127, 83 SE 295, 297 (1914).

There is no delegation in clear or express terms that the PSC is authorized to go beyond its rate-making powers to authorize the public service districts that it regulates to impose a capacity improvement fee on developers who, in turn, may produce customers for the districts. This Court has previously said that the PSC has no inherent jurisdiction, power or authority. See *Burch, Supra*. The West Virginia Legislature reserved its delegation of powers on this subject until 1990 when it granted county commissions the authority, under the Local Powers Act, to assess and collect impact fees to fund water and sewer capacity improvements.

There is a presumption in law that the Legislature has knowledge of all its prior enactments. See *Stamper v Kanawha Bd. of Educ.*, 191 W. Va. 297, 445 SE2d 238 (1994). Therefore, an inescapable conclusion must follow that the Legislature perceived that there was neither existing delegated authority to the Public Service Commission nor any other state or county agency to impose or assess fees to fund capital improvements for county water and sewer. This conclusion is confirmed by the enumerated findings of the Legislature as articulated in Section 7-20-2 of the Local Powers Act.

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<sup>2</sup> This Court in, *State Ex Rel Knight v Public Service Commission*, 161 W. Va. 447, 245 SE2d 144, 148, explained that an old decision is not necessarily obsolete in modern times and that the holding in *Randall Gas* “seems to state accurately the overwhelming weight of modern-day authority as well.”

“It is always presumed that the legislature will not enact a meaningless or useless statute,” *T. Weston, Inc. v Mineral County*, 219 W.Va. 564, 638 SE2d 167, 171 (2006). If the Legislature had any perception that the funding for capital improvements, by levying a fee on developers, could be effected through the PSC or some existing entity, then why would the Legislature need to enact the Local Powers Act?

True, the Local Powers Act authorizes the assessment of impact fees for other purposes, but it specifically (in § 7-20-3(b)(7)) designates “public utility systems and services provided by public utility systems personnel; water.”<sup>3</sup>

**(b) The Legislature Has Spoken—That Is the End of the Matter.**

In 1984, the Supreme Court of the United States, in the case of *Chevron U.S.A. v Natural Res. Def. Council*, 467 US 837, 842, held that when a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

In 1998, the Supreme Court of Appeals of West Virginia adopted the holding in *Chevron*, and applied it to an Act of the West Virginia Legislature. In *Berkeley County Pub. Serv. Sewer v PSC*, 204 W. Va. 279, 512 SE2d 201, 206, the Court held that:

The court must first ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No difference is due the agency’s interpretation at this stage.

Nearly five years before the PSC authorized the imposition of capacity improvement fees, the Legislature comprehensively spoke on that funding issue for, among others, public service districts, by enacting the Local Powers Act. Notwithstanding its enactment, the PSC ignored the Local Powers Act and approved the assessment of the fees by the Districts.<sup>4</sup> In effect, the PSC

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<sup>3</sup> Faircloth makes the presumption that when the word “public utility” appears in a statute, it means a utility subject to regulation by the PSC.

<sup>4</sup> The PSC, in its brief, appears to shift the blame for the error by claiming that the Districts applied for the right to charge the fees, and by implication it was their error. The innuendo suggests that the PSC was only doing its job by processing the application.

vetoed the Local Powers Act.

This Court has recently explained that, where a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal, it is implied that it shall not be done otherwise by a different person or tribunal. *T. Weston, Inc. v Mineral County*, 219 W Va 564, 638 SE2d 167 (2006).

The Local Powers Acts provides that impact fees are to be imposed and collected by county commissions in certain, specific situations. There is no provision for public service districts to assess and collect such fees under authority granted to them by the PSC.

**(c) The PSC's Attempt To Veto the Local Powers Act.**

The novel use of the word “veto” as applied to the PSC comes from an opinion of the late Judge John Field in the case of *Cabot Corporation v Public Service Commission*, 332 F Supp 370 (S.D. W Va 1971).

In that case, *Cabot* entered into an agreement to transfer certain natural gas facilities. *Cabot* was subject to regulation under the federal Natural Gas Act. The PSC issued an order requiring *Cabot* to apply to the PSC for authority to effect the transfer. *Cabot* filed suit asking the Court to enjoin the PSC from enforcing its order.

The Court held that the Natural Gas Act preempted state regulation and for *Cabot* to apply to the PSC for authority would, in effect, recognize that the PSC possessed a veto power over regulatory authority of the Federal Power Commission. Here, in this action, the PSC, in authorizing the Districts to assess and collect capacity improvement fees, in effect vetoes the Local Powers Act.

Initially, it appears that the District applications and the PSC's approval were a spurious tactic to circumvent the constraints of West Virginia Code § 7-20-6(a)(4). It is true that the PSC did approve the assessment and collection of impact fees by the Jefferson County Public Service District. At the time, Jefferson County (unlike Berkeley County) fully met all the requirements of West Virginia § 7-20-6 including passage of zoning and could have proceeded to collect impact fees through the County Commission without PSC application and approval.

Was this action by the PSC a direct attempt to usurp power or an attempt to nullify a statute that it believed restricted or limited its power—or was it plain ignorance of the law? Whatever

the intent, the PSC is plainly wrong.

## CONCLUSION

The Local Powers Act, in conjunction with the Community Infrastructure Investment Projects Act, trumps the authority of the appointed Public Service Commission to authorize public service districts to assess and collect capacity improvement fees from developers. The two statutes are clear, unambiguous and the legislative intent is plainly stated.

This Court has said many times that, when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe, but to apply the statute. See *State Ex Rel. Board of Trustees v City of Bluefield*, 153 W. Va. 210, 168 SE2d 525 (1969); *Central West Virginia Refuse v PSC*, 190 W. Va. 416, 438 SE2d 596 (1993).

Accordingly, it appears that this Court has no alternative but to affirm the lower court's decision, finding and concluding that the Public Service Commission does not possess the power or authority to authorize public service districts to assess and collect what it terms capacity improvement fees.

WHEREFORE, Faircloth prays that this Court:

- (1) Affirm the January 29, 2010 Order of the Circuit Court of Berkeley County; and
- (2) Remand the case to the Circuit Court of Berkeley County to determine an award of costs and attorney fees to Faircloth against the PSC incurred in defending the PSC's intervention, all in accordance with West Virginia Code § 55-13-10.

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**CERTIFICATE OF SERVICE**

I, Laura V. Faircloth, attorney for the Appellee, hereby certify that I have served an original and nine true copies of Appellee's Response Brief To The Public Service Commission's Brief to the West Virginia Supreme Court of Appeals via United States Postal Service, postage pre-paid, at Capitol Complex, Building 1, Room E-317, Charleston, WV 25305, and to counsel of record via regular mail, at their respective addresses as listed, this 17th day of August, 2010.

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