

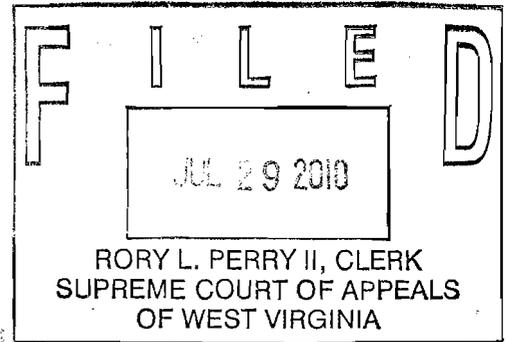
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

Larry V. Faircloth Realty, Inc., a WV corporation, Plaintiff
Below, Appellee

vs.) Nos. 35651 and 35652

Berkeley County Public Service Water District, a WV public
corporation; and Berkeley County Public Service Sewer District,
a WV public corporation, Defendants Below, Appellants

Public Service Commission of West Virginia, Intervenor



**INITIAL BRIEF OF THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA**

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel

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Preliminary Comment

The Circuit Court Order did not end its judgment with a determination that the Local Power Act applied, and that establishment of the capacity impact fee (CIF) did not comply with the process and procedures within that Act. The Court Order made a further determination that the Commission lacked jurisdiction to establish a CIF because a CIF is not a rate. In this regard, the Circuit Court Order is clearly erroneous. The Commission agrees with the Appellants that other assignments of error contained in the Petition for Appeal warrant reversal of the Circuit Court Order. However, for purposes of this brief, the Commission will focus its argument on the aspect of the Circuit Court Order dealing with Commission jurisdiction over utility rates and charges.

Argument

1. **A CIF is a charge contained in a utility tariff that has been approved by the Commission upon application of the utility.**

As an initial matter, it may be helpful to begin with an explanation of a CIF - how it was established and why. The particular capacity impact fees involved in this litigation were the subject of applications by the Berkeley County utilities, a water and a sewer public service district. Following public hearings and argument, the Commission approved those charges pursuant to its statutory authority. (*Water CIF, PSC Case No. 04-1767-PWD-T, PSC Order, 8-12-05; Sewer CIF, PSC Case No. 04-0153-PSD-T, PSC Order, 8-31-04, 8-28-05*). The Commission emphasizes that the genesis of the water and sewer CIF were applications to establish rates or charges pursuant to W. Va. Code §24-2-4a. This is significant because the Circuit Court analysis of Commission rate jurisdiction focused solely on language contained in W. Va. Code §24-2-3.

A capacity impact fee is a charge that represents the future cost of developing treatment and transmission capacity by the utility to meet unexpected growth in customer demand. The CIF reflects the cost of that capacity to the utility and its customers for each new housing unit added to an existing utility system by developers because of unexpected and unusual growth in population and development. The purpose of the CIF is to help offset the cost the utility will be required to incur to expand and construct the capacity to meet and serve this new, unexpected demand, usually by increasing the size (the capacity) of treatment facilities or main transmission lines, both of which represent significant costs.

The rationale for the CIF is that the utility's existing system was developed upon

certain assumptions. Specifically, plant was built to meet expected demand, debt was incurred to pay for capital additions related to that demand and those debt costs are reflected in existing rates. However, growth was such in Berkeley and Jefferson Counties, that the utilities and their existing customers need a source of capital to meet these unexpected, future capital costs in upgrading capacity.

As stated by the Commission:

“The CIF will facilitate responsible infrastructure planning and sewage capacity increases. Responsible planning and financing of additional sewage treatment capacity is appropriate for an area experiencing the explosive growth that Berkeley County has, and expects to continue to experience. We find, therefore, that approval of the CIF, as set forth in this order, is consistent with our 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. The formula by which the CIF fees were calculated, based on a Georgia Tech model, is reasonable and appropriate, and we conclude that the CIFs are based primarily on the costs to maintain necessary capacity in order to serve new customers.”

Berkeley County PSSD, PSC Case No. 04-0153-PSD-T, Order 8-31-04, page 20.
(<http://www.psc.state.wv.us/Scripts/orders/ViewDocument.cfm?CaseActivityID=110724&Source=Archives>)

Prior to the Berkeley County application in 2004, the Commission had denied other requests to establish a CIF because it was not persuaded that a CIF was justified for those particular utilities. However, in Berkeley and Jefferson Counties, at the time the fee was established, the utilities demonstrated that “rapid, expansive growth” was occurring. In addition, persuasive evidence was presented demonstrating the diminishing level of existing

utility capacity over a relatively short period of time. The Commission approved the requested CIF and directed the utilities to segregate CIF charges in separate accounts and spend those dollars only for future capital needs and only after approval by the Commission. Furthermore, the Commission indicated that the CIF would be evaluated, at a minimum, in each of the District's future rate cases, or more often if the Commission deemed it necessary. (*Id.*, Conclusions of Law Nos. 13, 14, 21)

In fact, in response to a PSC complaint filed by the Appellee prior to the Circuit Court Order, the Commission has an open proceeding which is intended to examine the need for and amount of the CIFs (*09-0961-PSWD-GI*, initiated June 11, 2009). However, given the Circuit Court Order and this pending appeal, the Commission will defer ruling in that case until this Court has had the opportunity to address to the various legal issues presented.

2. Utility charges are authorized by statute and a CIF is one of many charges that are contained in utility tariffs.

The Circuit Court Order concludes that a "rate is the price stated or fixed for some commodity or service of general need or utility supplied to the public, measure by a specific unit or standard"...."rates are continuous charges based on the use of water or sewer services." (*Order*, page 6). The Court concludes that since only the word "rate" appears in W. Va. Code §24-2-3, the Commission lacks authority to establish other charges that are not continuous.

The Circuit Court erred by restricting its analysis to one specific state statute, W. Va. Code §24-2-3. The Circuit Court determined that only the word "rate" appeared in that particular Code section. Thus, the Court reasoned that since a rate could only be a

reoccurring fee for the commodity delivered, and since a CIF is not a reoccurring rate paid for the commodity received, the Commission was without jurisdiction to establish such a charge.

Unfortunately, this is an inappropriately restricted analysis of Commission jurisdiction concerning utility rates and charges. Other sections of the Code authorize and direct the Commission to establish reasonable rates and charges of public utilities. W. Va. Code §24-1-1(a), in pertinent part, provides that:

“(a) It is the purpose and policy of the Legislature in enacting this chapter 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 in order to:”

...

“(4) Ensure that rates and charges for utility services are just and reasonable.”

This statutory provision unequivocally expresses legislative intent to confer upon the Commission the jurisdiction to review and establish all utility rates and charges whether it is a rate for the utility commodity delivered or one-time fees and charges.

W. Va. Code §24-2-2 provides that:

“(a) The commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter;” . . . “The commission may change any intrastate rate, charge or toll which is unjust or unreasonable or any interstate charge with respect to matters of purely local nature which have not been regulated by or pursuant to an act of Congress and may prescribe a rate, charge or toll that is just and reasonable”

Complimenting the clear statement of legislative intent contained in W. Va. Code §24-1-1, W. Va. Code §24-2-2 grants power to the Commission to regulate utility rates and

charges.

W. Va. Code §24-2-4a, which is the section of Code that applies to utility applications to establish or change rates or charges (such as the CIF applications), state that “the commission may either upon complaint or upon its own initiative without complaint enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice” and “may make such order in reference to such rate, charge, classification, regulation or practice as would be proper”.

W. Va. Code §24-2-9 provides that:

“The commission may at any time require persons, firms, companies, associations, corporations or municipalities, subject to the provisions of this chapter, to furnish any information which may be in their possession, respecting rates, tolls, charges or practices”.

W. Va. Code §24-3-1 instructs that “[a]ll [public utilities] charges, tolls and rates shall be just and reasonable”.

In addition, W. Va. Code §16-13A-9 authorizes public service districts to establish rates and charges while W. Va. Code §16-13A-21 specifically instructs that the authority of public service districts to establish rates and charges in no way affects the functions, powers and duties of the Commission, including the power to review and establish utility rates and charges.

Finally, W. Va. Code §8-13-13 provides that a municipality may enact ordinances to establish “reasonable rates, fees and charges,” but that municipal authority is subordinate to Commission review and jurisdiction over rates and charges under Chapter 24 of the Code.

Delardes v. Morgantown Water Commission, 148 W.Va. 776, 137 S.E. 2d 426 (1964).¹

Generally, a utility rate is a price charged for each unit of commodity consumed. For example, a rate for water or sewer consumption would be a dollar amount per each thousand gallons of water consumed. In contrast, a charge is a one-time fee imposed upon a customer that recovers a particular cost element. For example, a charge would appear as a fixed dollar amount in a utility tariff and could apply to disconnections, reconnections, bad check charges, tap fees or capacity impact fees. As defined in Webster's II New College Dictionary, Third Edition, a "rate" is the "cost per unit of a service or commodity"; a "charge" is "to set or ask (a given amount) as a price"; and, a "fee" is "a fixed charge".

Virtually all utilities in this state have tariffs on file with the Commission with approved "charges" that are not "continuous", and, thus, not rates as defined by the Circuit Court, including CIFs (limited to utilities in Berkeley and Jefferson Counties), customer deposits², tap fees, reconnection charges, bad check charges, disconnect charges, and administrative charges. Each of these charges has as its basic underpinning the rationale of attempting, where it can be identified, to place costs on cost causers. These charges are consistent with the statutory authority and duty of the Commission to ensure fair regulation of public utilities in the interest of the public, to ensure that rates and charges for utility service are just and reasonable, and to appraise and balance the interests of current and future utility customers and the interests of public utilities. W. Va. Code §24-1-1(a) and (b).

¹In 1979, the Legislature enacted legislation which limited the Commission's review of municipal rate ordinances. W. Va. Code §24-2-4b. The Commission can exercise jurisdiction over municipal rates only after receipt of certain statutory prescribed petitions.

²State statute directs that public service districts charge a customer deposit. W. Va. Code §16-13A-9(a)(2). However, the statute does not address the Commission's authority to approve the specific charge and require that it be contained in the utility tariff, although the Commission exercises such authority.

None of these charges, however, fit the Circuit Court Order definition of “rates”. Furthermore, although generally authorized, none of these charges, by name, are specifically authorized by statute to be approved by the Commission. Thus, applying the Circuit Court logic, these charges would not be appropriately established because the Commission’s jurisdiction is limited to establishing “rates.” All of these charges represent the recovery of costs to the utilities, generally from the customer causing or imposing the costs. Elimination of “charges” necessarily means that the cost responsibility shifts to other customers resulting in higher rates. The potential disruption of utility regulation that the Circuit Court Order could produce is significant.

3. The Commission has primary jurisdiction to establish rates and charges of public utilities, including a CIF.

In addition to the overwhelming legislative authority establishing Commission authority over utility rates and charges, various orders of this Court have long recognized and held that the Commission has primary jurisdiction over rate making matters involving public utilities. *City of Wheeling v. Renick*, Syllabus Pt. Nos. 5 and 6, 145 WV 640, 116 S.E. 2d 763 (1960) (The policy of this state is that all public utilities shall be subject to the supervision of the Commission, and that the Commission has the statutory power and authority to control the charges of all public utilities); *Delardes v. Morgantown*, Syllabus Pt. No. 3, 148 W.Va. 776, 137 S.E. 2d 426, 433 (1964) (The Legislature has authorized the Commission to exercise the predominant power of the State with respect to utility charges which is paramount to the rights given to the city by general statute); *C & P Telephone Co. v. City of Morgantown*, 144 W.Va. 149, 107 S.E. 2d 489, 469 (1959) (The paramount design of pertinent West Virginia statutes to place regulation of public utilities exclusively with the

Commission has been long recognized by this Court (cities omitted)).

In a particularly relevant decision, which involved the subject matter of establishing a tap fee (a charge), this Court found that although a separate statute authorized the Water Development Authority to impose upon a public service district certain service charges, its authority to do so was subject to a regulatory review and approval of the Public Service Commission. *State of West Virginia ex rel Water Development Authority v. Northern Wayne County Public Service District and PSC*, Syllabus Pt. No. 5, 464 S.E. 2d 777 (1995). The Court's decision in the *WDA* case is particularly instructive because the Court reaffirmed the Commission's primary rate jurisdiction over public utilities, *Id.* at 782, and specifically reaffirmed that authority with respect to a "charge". The charge in that case involved the payment of a tap fee, approved by the Commission and in a utility tariff. The tap fee requires a new customer to pay a one time charge (it does not reoccur) to connect to the utility system. The basis for that charge is that it is reasonable for the customer or customers causing the cost of the connection to pay most of the cost rather than shifting the cost to other customers. A tap fee and a CIF are both charges associated with the provision of utility service. A tap fee helps defray present costs of providing service, while a CIF helps defray future capital costs that will be necessary to provide service.

The Circuit Court analysis of Commission jurisdiction is erroneous in other respects. The establishment of the CIFs were in response to rate applications by the petitioners. W. Va. Code §24-2-4a, not §24-2-3, applies to rate applications and that section of the Code specifically references applications for changes to "rates or charges". Furthermore, the Circuit Court failed to analyze W. Va. Code §24-2-3 in context of other statutory provisions

and the general system of law relating to the Commission's primary jurisdiction to regulate rates and charges of public utilities. As previously indicated, there are numerous other sections of the Code that reference the Commission's responsibility and primary authority to establish rates and charges. It was error to ignore these other statutory provisions and the prior rulings of this Court. In its *WDA* decision, this Court stated:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. [cites omitted]

WDA, Supra, Syllabus Pt. No. 3. The Circuit Court Order failed to follow this instruction regarding statutory construction and, as a result, arrived at its erroneous conclusion concerning Commission jurisdiction.

4. A CIF is a charge for utility service and is not a tax.

Although the Circuit Court Order erred by focusing solely on the term "rate" in context of one statute, W. Va. Code §24-2-3, and ignoring a CIF as a utility charge, the Order compounded that error by concluding that the CIF was a "special kind of tax." The Circuit Court cites as its sole legal authority for that conclusion a decision by the Supreme Court of Vermont. *Kirchner v. Giebink*, 150 Vt. 172, 552 A.2d 372 (1988).

However, a careful examination of the *Kirchner* case does not support the Circuit Court analysis. The Court in *Kirchner* noted at the outset that it was crucial to emphasize that absent specific statutory limitation on their authority, the selectmen (the town governing

body) have general supervisory power over town matters. Vermont had a specific statute dealing with municipalities imposing utility rates and another statute relating to municipal special assessments that required approval of the voters within the municipality. *Id.*, at 377. Of concern to the Court was a proposed agreement between the Town and a large commercial developer whereby the developer would pay for an upgrade of the Town's existing sewer system (including replacing a main which already served connected, existing customers) under the agreement the developer would recoup its costs, in part, through a fee imposed by the Town against existing customers that would have to reconnect to the upgraded facility. *Id.*, 552 A2d at 374.

The *Kirchner* Court acknowledged that there were numerous decisions in other states (and cited those decisions) where similar connection charges to pay for improvements in sewer or water systems were valid under the municipality's power to impose fees. However, the Court stressed that those jurisdictions did not face limiting statutory language like the special assessment statute in Vermont. In comparing the various Vermont statutes, the Court concluded that the special assessment statute was applicable. That decision is in sharp contrast to this Court's decision in *WDA, Supra*, that found no such limit concerning the Commission's general rate making power over rates and charges. Furthermore, the *WDA* case involved the establishment of a tap fee (or a fee that is roughly the equivalent of a connection fee).

It is important to note that, two years later, the Supreme Court of Vermont distinguished the *Kirchner* decision in its decision in *Handy v. City of Rutland*, 156 Vt. 397, 598 A.2d 114 (1990). In that case the town charged a new customer, a restaurant, a one time

hook-up fee in excess of \$10,000, to connect to the City sewer line. In determining that the *Kirchner* decision did not control, the Court first emphasized that the fee in *Handy* was imposed upon new users, not existing customers in the improved service area as was the case in *Kirchner*. *Handy, Supra*, 598 A.2d at 116-117. The Court went on to hold that the same special assessment statute considered in *Kirchner* did not prohibit the town in *Handy* from imposing the connection fee.

A CIF is a charge allowed by the Commission that represents a cost to the utility and its existing customers caused by the addition of numerous new, not existing, customers to the utility system. A careful reading of *Kirchner* and *Handy* demonstrates that the reasoning of the Supreme Court of Vermont based on its unique statutory framework, does not support the conclusion that a CIF is a tax under West Virginia law. If anything, they support the contention that a CIF is not a tax, but rather is a permissible utility fee or charge.

This Court has had the opportunity to determine whether a municipal fee is a fee or a tax. Observing legislative authority allowing municipals to impose upon users of municipal service “reasonable, rates, fees and charges” (as provided in W. Va. Code §8-13-13, which is the same section that allows the establishment of municipal utility rates, charges and fees), this Court has found that a municipal fee upon owner of buildings at an annual rate plus a percentage based on square footage of each structure to defray the cost of fire and flood protection services is a user fee rather than a tax. *City of Huntington v. Bacon*, 473 S.E. 2d 743, 751-752, Syllabus Pt. No. 6 (1996). In so holding, the Court observed that “[T]he primary purpose of a tax is to obtain revenue from government, while *the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of*

certain activities.” *Id.*, 473 S.E. 2d at 752 (emphasis in original; citations omitted) Furthermore, this Court emphasized that “[t]he character of a tax is determined not by its label but by analyzing its *operation and effect*.” *Id.*, 473 S.E. 2d at 752 (emphasis in original; citations omitted). The Court concluded that the fee was not a tax because it was not an assessment upon property by reason of ownership, but rather was a fee imposed upon property owners by reason of their use of fire and flood protection services. *Id.*, 473 S.E. at 753.

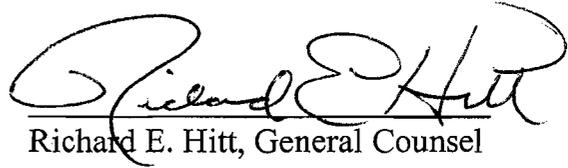
Municipal authority to establish “rates, fees and charges” is the same authority granted to public service districts to establish “rates, fees and charges for the services and facilities it furnishes.” W. Va. Code §16-13A-9. The CIF which is the subject of this appeal is charged to users of utility water and sewer services. It is not for the purposes of raising general governmental revenues. The fee is to be used to pay for future required capital additions needed to serve those customers and only following approval of the Commission. Clearly, the CIF was established for the purpose of defraying the cost of providing a utility service.

Conclusion

For the foregoing reasons, the Commission respectfully requests that the Court reverse and vacate the Circuit Court Order.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

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A handwritten signature in black ink, appearing to read "Richard E. Hitt", written over a horizontal line.

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