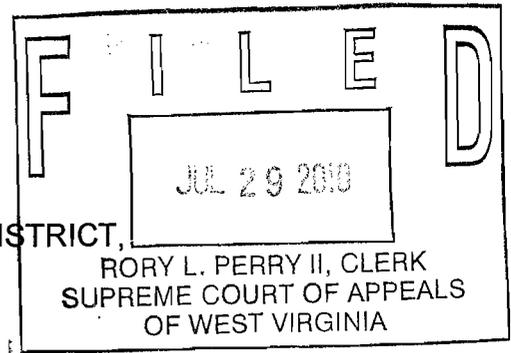


BRIEF FILED
WITH MOTION

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.

BRIEF OF THE JEFFERSON COUNTY PUBLIC SERVICE DISTRICT
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

JEFFERSON COUNTY PUBLIC SERVICE DISTRICT
By Counsel

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**AMICUS CURIAE BRIEF OF THE
JEFFERSON COUNTY PUBLIC SERVICE DISTRICT**

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

The Jefferson County Public Service District ("JCPSD") files this *Amicus Curiae* Brief, subject to this Honorable Court granting JCPSD's Motion for Leave to File a Brief as an *Amicus Curiae* filed herewith, in support of the Berkeley County Public Service Water District ("Water District") and the Berkeley County Public Service Sewer District ("Sewer District") because of the negative impact the February 16, 2010, Declaratory Judgment Order of the Circuit Court of Berkeley County is having on the financing of JCPSD's sewer project and its effect on JCPSD's sewer rates.

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The JCPSD adopts the "Kind of Proceeding and Nature of Ruling Below" section of the Water District's Petition for Appeal, as if fully set forth herein.

II. STATEMENT OF THE FACTS OF THE CASE

The JCPD adopts the "Statements of the Facts of the Case" section of the Water District's Petition for Appeal, as if fully set forth herein.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court erred in ruling that the Public Service Commission of West Virginia is without authority to establish a Capacity Improvement Fee.

B. The Circuit Court erred in granting relief to a final order of the Public Service Commission through a Declaratory Judgment Action.

IV. DISCUSSION OF LAW

A. The Circuit Court erred in ruling that the Public Service Commission of West Virginia is without authority to establish a Capacity Improvement Fee.

The Legislature has granted the Public Service Commission of West Virginia ("PSC") the authority to "fix reasonable rates, joint rates, tariffs, tolls or schedules." Code §24-2-3. The PSC's Rules for the Construction and Filing of Tariffs, 150 WVCSR Series 2, includes standard form tariffs for water and sewer utilities which contain numerous fees and charges which are not "rates". See, Id., Tariff Form Nos. 4a and 4b. The contention that the PSC only has authority to charge rates is contrary to statute and is unworkable in practice, as it would lead to the elimination of numerous fees and charges that are essential to the proper functioning of a utility, such as minimum charges, returned check charges, disconnect fees, tax surcharges, security deposits, delayed payment penalties, and tap fees. Id.

The Berkeley County Circuit Court's Declaratory Judgment Order of June 29, 2010 ("Circuit Court Order") that is the subject of this appeal (the "Appeal") concludes that there is no statutory authority for the PSC to impose a CIF. Circuit

Court Order, at 7. This conclusion ignores the Legislature's enactment of Code §24-2-2(b), which reads in full:

Notwithstanding any other provision of this code to the contrary, rates are not discriminatory if, when considering the debt costs associated with a future water or sewer project which would not benefit existing customers, the commission establishes rates which ensure that the future customers to be served by the new project are solely responsible for the debt costs associated with the project.

The Circuit Court Order is in error when it concludes a CIF is a tax. The fact that it is "collected from a landowner who is specifically benefitted by the water or sewer construction," as the Circuit Court stated at page 7, argues for it being a fee, and not a tax. "A charge by a municipality for services rendered or for conveniences provided is not a tax." Michie's Jurisprudence of Virginia and West Virginia, Taxation, Volume 18, §2 (1985).

- B. The Circuit Court erred in granting relief to a final order of the Public Service Commission through a Declaratory Judgment Action.

The Capital Improvement Fees ("CIFs") at issue were approved by the PSC in formal cases following proper public notice and a hearing. See, Berkeley County Public Service District, PSC Case No. 04-1767-PWD-T (August 12, 2005 Commission Order); Berkeley County Public Sewer Service District, Case No. 04-0153-PSD-T (August 28, 2005 Commission Order). Rule 12.6 of the PSC's Rules of Practice and Procedure 150 WVCSR Series 1, sets the criteria and process whereby someone can intervene in the PSC's formal cases. Intervenors are formal parties to the proceeding. Id. Larry V. Faircloth Realty, Inc. ("Appellee") did not file a protest or petition to intervene in the PSC's publicly noticed formal cases in which the CIFs at issue were approved. Id. The PSC granted the petitions to intervene filed by the Eastern Panhandle Home Builders

Association, Inc. in the cases where the CIFs at issue were approved. Id. The PSC is liberal in granting petitions to intervene as evidenced by the fact that it has granted over 200 petitions to intervene in one case, the PATH transmission line case, PSC Case No. 09-0770-E-CN.

The West Virginia Legislature has adopted a specific statute for appeal of PSC orders by “[a]ny party feeling aggrieved by the entry of a final order by the Commission.” Code §24-5-1. An intervenor in a formal PSC case, being a formal party, has standing to file a petition for appeal of a PSC order under Code §24-5-1. The Appellee should have intervened in the duly noticed formal cases of the PSC adopting the CIFs at issue and, if it felt aggrieved by the PSC’s final order, filed a petition for appeal with this Honorable Court. That is the proper channel the Legislature has established for contesting PSC orders.

Appellee’s failure to participate, when it could have, in the PSC’s formal cases establishing the CIFs at issue, and Appellee’s filing of a Declaratory Judgment action to try to undo the result of those PSC formal cases, is patently a circumvention of the lawful and established process in this state for the setting of utility rates. If this Honorable Court condones Appellee’s legal strategy by affirming the Circuit Court Order, the finality of PSC orders will be undermined generally. That result in turn will undermine the confidence which future prospective bondholders can place in bonds issued to pay for West Virginia utility projects. Increased risk demands an increase in return. Interest rates on West Virginia utility project bonds will increase, to the detriment of rate payers in the State.

V. CONCLUSION

The Circuit Court Order, if affirmed by this Honorable Court, will harm all

utility rate payers in the State by increasing the risk premium associated with West Virginia utility project bonds. It will remove a useful and fair tool for the payment of utility project costs in the State.

JCPSD is already seeing those adverse affects with its Flowing Springs sewer project. PSC Case No. 09-0347-PSD-CN. Due to the Circuit Court Order, JCPSD has been forced to propose to increase rates by \$9.58 per month for the average residential customer using 4,500 gallons per month in order to pay debt associated with JCPSD's Flowing Springs sewer project. Id., July 23, 2010 Notice of Filing.

One of the principal duties of the PSC is to set rates so that those who are causing a utility to incur costs pay those costs. The Circuit Court Order, if affirmed by the Honorable Court, would reduce the PSC's ability to impose costs upon cost-causers. The result is a reduction in the extent to which utility rates are equitable.

For the reasons stated in this brief, and those in the well-stated briefs of the Appellants, the PSC, and the West Virginia Water Development Authority, this Honorable Court should grant the relief sought by the Appellants.

Respectfully submitted,

JEFFERSON COUNTY PUBLIC SERVICE DISTRICT

By Counsel


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CERTIFICATE OF SERVICE

I, James V. Kelsh, counsel for Jefferson County Public Service District, do hereby certify that copies of a "Motion of the Jefferson County Public Service District for Leave to file a Brief as an Amicus Curiae" and the "*Amicus Curiae* Brief Of The Jefferson County Public Service District" have been served upon the following counsel of record on this 29th day of July, 2010, in the manner so indicated:

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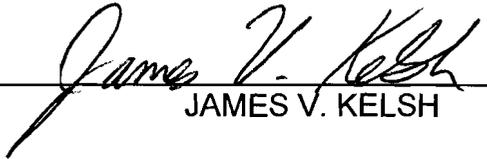
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