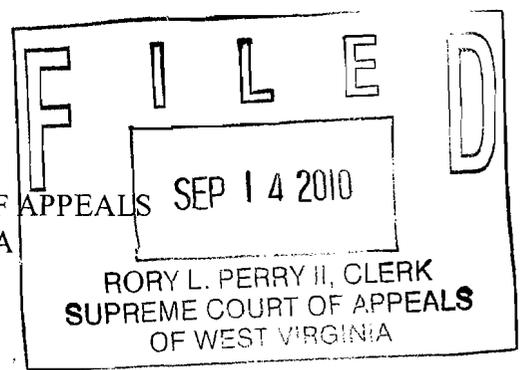


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



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
REPLY BRIEF**

BERKELEY COUNTY PUBLIC
SERVICE WATER DISTRICT

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September 14, 2010

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**BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT
REPLY BRIEF**

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

PRELIMINARY STATEMENT

In the Appellee's Response to the Briefs of Berkeley County Public Service Water District and Berkeley County Public Service Sewer District (hereinafter "Appellants" or "Districts"), counsel for the Appellee makes a number of misstatements and continues to misrepresent and apparently misunderstand the Legislative scheme related to the financing and construction of water and sewer facilities in the State of West Virginia.

As stated in the Appellants' Brief, the most critical error of the Declaratory Judgment Order appears at page 7 of that Order 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.

The Appellee's Response Brief continues to disregard the Legislative scheme whereby the Public Service Commission has been recognized as the governmental body of the State responsible for the establishment of reasonable rates and charges for the provision of water and sewer service by the State's public utilities. The Appellee persists in its contention that the exclusive authority for the assessment of Capacity Improvement Fees ("CIFs") rests with County Commissions. The Appellants believe that this position is not supported by the law.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW (SUPPLEMENTAL)**

Pursuant to an Order entered on June 22, 2010, in which this honorable Supreme Court of Appeals granted the Appellants' Petitions for Appeal and established a briefing schedule for appeal, the Water and Sewer Districts filed Appellants' Briefs on July 29 and 30, 2010, respectively. As explained in the Appellants' Briefs, the Circuit Court below: (1) abused its discretion in exercising jurisdiction in this matter even though 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.*

On or about July 29, 2010, the Public Service Commission of West Virginia (“Commission” or “PSC”) filed its Initial Brief (as an Intervener) supporting the Appellants’ argument that the PSC possesses the authority to authorize public service districts to charge and collect CIFs. On or about the same date, the Jefferson County Public Service District filed a Motion for Leave to File a Brief as *Amicus Curiae* in support of the Appellants’ appeals, which the Appellee subsequently opposed in a pleading.

On or about August 18, 2010, the Appellee filed its Response Brief to the Public Service Commission’s Brief, and on August 30, 2010, the Appellee filed its Response to the Briefs of the Berkeley County Public Service Water District and Berkeley County Public Service Sewer District. The Water District submits this Reply Brief in support of its appeal and in opposition to the Appellee’s Response Brief.

ARGUMENT

The Public Service Commission and the Appellants have, in their briefs previously filed herein, thoroughly discussed the Legislative scheme by which it is established that regulation and control of public utilities rests with the Public Service Commission (“PSC”) and that CIFs have been adopted and applied under the approval of the PSC. Accordingly, this Reply Brief will address the various misstatements contained in the Appellee’s Response Brief rather than reargue the points made in the Appellant Brief.

Misstatements in Appellee's Response Brief

1. At page 8 of its Response Brief, the Appellee lists five (5) numbered statements which it contends are POINTS OF LAW RAISED BY THE DISTRICT TO SUPPORT THEIR [sic] ASSERTIONS OF ERROR. Contrary to the Appellee's representation, the points numbered 2 and 4 are not arguments raised by the Appellants. The Appellants do not assert "[t]hat the PSC has no authority to authorize Districts to impose or collect CIF's". Nor do the Appellants assert "[t]hat the Districts are agencies of the Commission". These are both arguments asserted by the Appellee and were findings of Justice Maynard to which the Appellants take issue.

2. At page 7 of its Response Brief, the Appellee states that: "[the Local Powers Act] provides that a county commission (not the PSC or any other entity) could impose an 'impact fee' on new residential and commercial land development projects." (Emphasis in the original)

As more fully discussed in regard to the next misstatement, this statement reflects the crux of the dispute between the parties in this case which has arisen by virtue of the Appellee's and the Circuit Court's misapprehension of the law.

The Appellee is correct that the Local Powers Act ("Act") authorizes county commissions to impose an impact fee. The Appellee obviously believes that the Act establishes the **exclusive** means by which the water and sewer infrastructure constructed by public service districts in the state can be financed. However, the Appellee fails to provide any support for its suggestion that the Act precludes the Public Service Commission from

approving the imposition of CIFs, and the Act itself puts the lie to this interpretation of the law.

3. At page 19 of its Response Brief, the Appellee argues:

In effect, [the Appellants] assert that the Districts are independent entities not owned, supported or established by the county government. (footnote omitted) They imply that the law allows two sets of impact fees: PSC CIF's; and the impact fees under the Local Powers Act.

The Appellants dispute the suggestion that they have argued that they were not established by the county government.¹ The Appellants do agree that CIFs are similar to an "impact fee", in that both CIFs and impact fees under the Act are separate means of funding certain forms of capital improvements. However, contrary to the Appellee's argument, the two types of fees are not mutually exclusive. In fact, West Virginia Code §7-20-17, concerning the Construction of the Act, specifically states:

Neither this article nor anything herein contained shall be construed as a restriction or limitation upon any powers which a county might otherwise have under any laws of this state, but shall be construed as **alternative or additional**; . . . (Emphasis added)

Thus, while the Appellants continue to dispute the Appellee's suggestion that the Act is applicable to the Appellants in that they are separate from and not identical to the County for the purposes of the Act, this language makes it clear that, even if the Appellants should be deemed to be subject to the Act as being part of county government, the impact fees contemplated by the Act are not to be seen as the exclusive means of funding capital

¹ In fact, at pages 22 and 34 of its Brief, the Water District recognized that public service districts are created by the county commission which action has to be approved by the Public Service Commission.

improvements for water and sewer districts. The Appellants would still be able to charge the CIFs authorized by the Public Service Commission. Both the Appellee and Justice Maynard completely ignore the plain meaning of West Virginia Code §7-20-17. The Legislature did not remove the authority of the Public Service Commission through the passage of the Act and the Appellee has failed to establish where and how it believes the Legislature “trumped” the authority of the Public Service Commission. Contrary to the Appellee’s argument, the Legislature, in the enactment of the Local Powers Act merely established another means by which those counties who elect to do so, may elect to provide funds for the construction of certain capital improvements.

A further example of the Appellee’s misreading of the law was addressed by the Public Service Commission in its September 3, 2010 Reply Brief. As the PSC stated at page 3 of its Reply Brief, the impact fees covered by the Act are not applicable to the same projects as CIFs. The Act, at West Virginia Code §7-20-11(c)(1)(A), requires the county commission to obtain written confirmation from the public utility involved with either water or sewer service to be assisted by the impact fees that the utility has adequate capacity to provide service without significant upgrades or modifications to its treatment, storage or source of supply facilities. Thus, impact fees are not to be used unless the utility already has adequate capacity. Obviously the Legislature contemplated that the impact fees would be used for water and sewer extension projects. This is in stark contrast to the purpose for which the CIFs have been approved by the Public Service Commission for the Appellants.

In the case of the Water District, the Commission’s August 12, 2005 Order in Case No. 04-1767-PWD-T, required that all CIF revenue be retained in a separate account, the

funds are to be used only for upgrades to or construction of new or expanded water sources, water treatment facilities, water storage facilities or transmission and distribution lines at least 12 inches in diameter and no funds can be expended for any purpose without specific approval by the PSC.

In Commission Orders dated August 31, 2004 and March 28, 2005 in Case No. 04-0153-PSD-T, and in a Commission Order dated October 24, 2006 in Case No. 06-0016-PSD-T, the PSC similarly required the Sewer District to separately account for CIF revenues, restricted the use of CIF funds to upgrades of the Sewer District's wastewater collection and treatment facilities, and forbid the expenditure of CIF funds without specific PSC approval.

In other words, the CIF revenues are specifically designated for those purposes that would preclude the utility from providing the confirmation to the county commission called for by *West Virginia Code* §7-20-11(c)(1)(A) that would permit the imposition of impact fees under the Act. Thus, the impact fees and CIFs are separate fees for separate purposes.

4. At pages 9 and 10 of its Response Brief, the Appellee completely misconstrues its rights as a party to a General Investigation before the Public Service Commission. At page 10, of its Brief, the Appellee states: "It is inconceivable that Faircloth, as an involuntary party to the General Investigation, could have standing to challenge the agency ruling when and if the agency rules."

As shown by the language quoted at page 17 of the Appellant's Brief from the Commission's June 11, 2009 Order in Case No. 09-0961-PSWD-GI, the Commission made the Appellee a party to its General Investigation into CIFs in order to save the Appellee from the burden of establishing a case against the Districts' use of CIFs. This did not have the

effect of denying the Appellee the right to challenge the decision of the Commission in a case in which it was involved. Contrary to the Appellee's misapprehension, the Appellee, as a party to the General Investigation in Case No. 09-0961-PSWD-GI, has the same rights as any party to challenge the decision of the Commission by appeal to the Supreme Court of Appeals. See West Virginia Code §24-5-1.² Both the Appellee and the Circuit Court were wrong to conclude that the Appellee was not a party to a Commission proceeding, and the Circuit Court should have exercised judicial restraint by deferring to the Commission.

5. At page 11 of the Response Brief, the Appellee asserts the following:

The only pending administrative matter before the PSC, to the knowledge of the Appellee, seeks to answer three questions: 1) the need for CIF's; 2) the proper amount of the CIF's, and 3) the proper use of the CIF's. No finding on any one of these three questions will answer whether or not the PSC has jurisdictional authority to grant or deny the District's applications for CIF's in the first place.

In fact, by Order entered October 9, 2009 in Case No. 09-0961-PSWD-GI, a copy of which is attached hereto as Appendix 1, the Commission in denying the Appellee's Motion to Stay the Commission proceeding addressed the doctrine of primary jurisdiction by suggesting that "the Circuit Court may want to have the views of the Commission, which will be expressed in the final order in this case." Further, the Commission stated that:

In addition to briefing the issues addressed in the September 4, 2009 Order [the same issues referred to by the Appellee in the language quoted above from page 11 of the Response Brief], the parties should feel free to brief any issue that they believe would be beneficial to the Commission in resolving this case.

² That section states in pertinent part: "Any party feeling aggrieved by the entry of a final order of the Commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order."

Accordingly, by this clear statement from the Commission, the scope of issues before the Commission related to CIFs was within the control of the Appellee, and not limited to the three questions asserted by the Appellee.

6. At page 14 of its Response Brief, the Appellee states:

[T]he 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), may **fund the costs to provide and maintain increased capacity to serve new customers of its water and sewer services.** (Emphasis added)

As stated in the Appellants' Briefs, the districts are separate from and independent of the county commission that created them. Thus, the Appellee's argument that the Appellees are therefore precluded from the use of CIFs is mistaken. However, notwithstanding the fact that the Act is not applicable to the Appellees, the Act itself, as argued above, would not prohibit the districts from using CIFs. The clear language of *West Virginia Code* §7-20-11(c)(1)(A) would prevent the County from using capacity improvement fees to "fund the costs to provide and maintain increased capacity to serve new customers.

If the Appellee's argument and the ruling of the Circuit Court were adopted, Berkeley County, even if it passed a zoning ordinance to permit the use of impact fees under the Act, would be precluded by the language of *West Virginia Code* §7-20-11(c)(1)(A) from using such fees for the purpose of adding capacity to serve the districts' future customers. Thus, the Appellee's asserted exclusive medium for the county to fund such capacity improvements would not be available for the purposes suggested by the Appellee. This, in and of itself, shows the fallacy of the Appellee's argument and the reason that the Legislature, in *West*

Virginia Code §7-20-17, provided that, even where the Act does apply, it is not the exclusive means of funding capital improvements. The Circuit Court was wrong to conclude that the Appellants were not permitted to charge CIFs that were lawfully approved by the Public Service Commission.

7. Contrary to the statement at page 14 of the Appellee’s Reply Brief, the Community Infrastructure Investment Projects Act (“Infrastructure Investment Act”); West Virginia Code §22-28-1 *et seq.* was not enacted five years after the Local Powers Act, and it does not tie in with the Act.

As the Appellants have explained previously, there have been no projects constructed in the State of West Virginia under the Infrastructure Investment Act. Further, the projects for which the CIFs are used are not the kind of projects that would be covered by either the Infrastructure Investment Act or the Local Powers Act. It is obvious that the Appellee does not understand that the impact fees provided for in the Local Powers Act are not to be used for the construction of needed capacity as are the CIFs. Nor does the Appellee appear to understand that the projects that are covered by the Infrastructure Investment Act are not the same projects that are paid for by CIFs.

A Community Infrastructure Investment Project is defined in the Infrastructure Investment Act as a “newly constructed or enlarged and improved project facility that may be transferred to a municipal utility or public service district without cost . . .” . (West Virginia Code §22-28-2(c)). A Community Investment Project subject to the Infrastructure Investment Act is to be constructed pursuant to an agreement between the developer and the utility that is approved by the Secretary of the Department of Environmental Protection (“DEP”). To date,

no agreements under that legislation have been submitted to the DEP by any public service districts, including the two Districts in this case. Further, because the projects that are contemplated by the Infrastructure Investment Act are to be paid for by the developer and turned over to the utility at no cost, it is obvious that the CIFs would not be involved in any Community Infrastructure Investment Project. Finally, if such projects should be related to the construction of needed capacity, storage or improvements in source of supply; as contemplated by the authority for CIFs, the Local Powers Act would not have any relevance to the Community Infrastructure Investment Project by virtue of the requirements of West Virginia Code §7-20-11(c)(1)(A). Simply stated, the Local Powers Act and the Infrastructure Investment Act are not related and the CIFs are not to be used in any project covered by either of the two pieces of legislation referred to by the Appellee.

Finally, the Appellee's reference to the fact that it has never received a credit or offset under the Local Powers Act appears to be a *non sequitur*. As the Appellee knows, Berkeley County is not eligible to impose impact fees under the Local Powers Act, the CIFs were authorized by the Public Service Commission, and the Appellee is not entitled to any credit or offset for any facilities it has constructed. The provisions of the Act do not apply to the facilities constructed by the Appellee.

CONCLUSION

The Appellee's Response Brief fails to justify the action of the Circuit Court in issuing its Declaratory Judgment Order. 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 reject the arguments of the Appellee and reverse the February 16, 2010 Declaratory Judgment Order in its entirety.

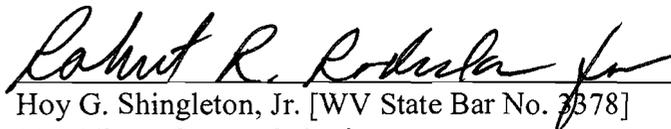
Respectfully submitted,

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September 14, 2010

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 9th day of October 2009.

CASE NO. 09-0961-PSWD-GI

GENERAL INVESTIGATION INTO CAPACITY
IMPROVEMENT FEES CHARGED BY THE
BERKELEY COUNTY PUBLIC SERVICE SEWER
DISTRICT and BERKELEY COUNTY PUBLIC
SERVICE DISTRICT dba BERKELEY COUNTY
PUBLIC SERVICE WATER DISTRICT

COMMISSION ORDER

This Order denies the Motion Stay of Proceedings and Motion for an Extension of the Existing Timeframe.

BACKGROUND

On June 11, 2009, the Commission issued an order (i) describing a brief history of Capacity Improvement Fees ("CIF") applicable to the Berkeley County Public Service Sewer District ("Sewer District") and Berkeley County Public Service District dba Berkeley County Public Service Water District ("Water District") (collectively, "Districts"), (ii) acknowledging three basic aspects of a CIF (i.e., need for the CIF, proper amount of the CIF, and use of CIF funds), (iii) requiring the parties to submit answers to specific questions regarding the use of collected CIF money, and (iv) setting this case for a hearing to address the use of the CIF funds.

On August 26 and 27, 2009, the Commission convened a hearing to take evidence on the use of the CIF money collected by the Districts. As the hearing progressed, however, the parties also presented evidence on the need for CIFs and the proper amount of the CIFs.

On September 4, 2009, the Commission issued an Order setting a briefing schedule to address all aspects of the CIFs applicable to the Districts. Pursuant to the schedule, simultaneous initial briefs are due on or before 4:00 p.m., Tuesday, October 13, 2009 and simultaneous reply briefs are due on or before 4:00 p.m., Monday, November 2, 2009.

On October 8, 2009, parties to this proceeding, Larry V. Faircloth and Larry V. Faircloth Realty, Inc., (collectively, "Faircloth") filed a Motion for Stay of Proceedings or alternately a Motion for an Extension of the Existing Timeframe ("Motion"). As cause Faircloth cited the Complaint For a Declaratory Judgment filed by Larry V. Faircloth Realty, Inc., against the Districts in the Circuit Court of Berkeley County asking the Circuit Court to declare that (i) the Districts do not have statutory authority to assess the CIFs, and (ii) the Districts may not use the Commission regulatory process to impose the CIFs.

On October 8, 2009, the Water District filed a Response to the Faircloth Motion stating that (i) this proceeding was originally filed by Faircloth with the Commission and (ii) the Complaint filed in the Circuit Court does not name the Commission and thus would have no impact on any action of the Commission. The Water District asked the Commission to deny the Faircloth Motion.

Also on October 8, 2009, the Sewer District filed a Memorandum in Opposition to the Faircloth Motion, requesting that the Commission deny the Motion.

On October 9, 2009, Faircloth filed a Reply to the Response of the Water District renewing its original prayer and alternatively requesting that the Commission require the parties to brief the constitutional and statutory authority of the Districts to assess, and of the Commission to authorize, CIFs. By a separate filing on the same day Faircloth responded to the Sewer District Memorandum, making similar arguments to those contained in the Faircloth Response to the Water District.

DISCUSSION

The Commission will deny the Faircloth Motion and maintain the briefing schedule set forth in the September 4, 2009, Order.

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.

It is therefore reasonable to move forward with the briefing schedule so that the Commission may rule on the issues before it. In addition to the briefing the issues addressed

in the September 4, 2009 Order, the parties should feel free to brief any issue that they believe would be beneficial to the Commission in resolving this case.

FINDINGS OF FACT

1. The Complaint For a Declaratory Judgment filed before the Circuit Court of Berkeley County questions the legitimacy of the CIFs that are currently before the Commission in this proceeding.

2. Faircloth filed a motion to stay, or extend the procedural schedule in, this proceeding.

CONCLUSION OF LAW

It is reasonable to deny the Faircloth Motion and move forward with the briefing schedule as set by the September 4, 2009 Commission Order.

ORDER

IT IS THEREFORE ORDERED that the Faircloth Motion for Stay of Proceedings and alternative Motion for an Extension of the Existing Timeframe, are denied. The briefing schedule set forth in the September 4, 2009 Commission Order remains in effect.

IT IS FURTHER ORDERED that the Commission Executive Secretary serve a copy of this order upon all parties of record by United States First Class Mail and upon Commission Staff by hand delivery.

A True Copy. Teste:


Sandra Squire
Executive Secretary

JJW/slc
090961cb.wpd

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 Reply Brief have been served upon the following counsel of record via First Class U.S. Mail, postage prepaid, on this 14th day September, 2010:

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