

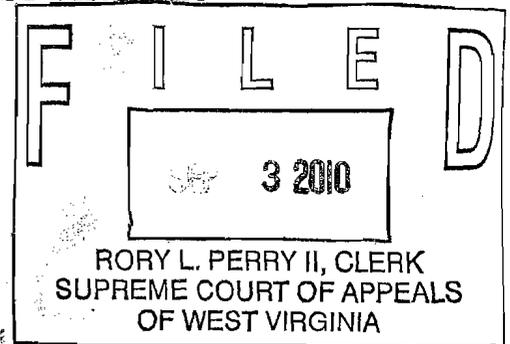
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

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



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

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel

Richard E. Hitt, General Counsel
WV Bar No. 1743
201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323
Telephone: 304-340-0450
rhitt@psc.state.wv.us

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Argument	1
Conclusion	7

TABLE OF AUTHORITIES

COURT DECISIONS

C & P Telephone Co. v. City of Morgantown,
144 W.Va. 149, 107 S.E.2d 489, 469 (1959) 6, 7

City of Wheeling v. Renick,
145 WV 640, 116 S.E.2d 763 (1960) 6

Delardes v. Morgantown Water Commission,
148 W.Va. 776, 137 S.E.2d 426 (1964) 7

*State of West Virginia ex rel Water Development Authority v. Northern Wayne County Public
Service District and PSC*, 464 S.E.2d 777 (1995) 5, 6

STATUTES

W. Va. Code §7-20-1 *et seq* 2, 3, 4, 5, 6

W. Va. Code §7-20-11(c)(1)(A) 3

W. Va. Code §8-4-10 6

W. Va. Code §8-4-15 6

W. Va. Code §8-4-20 7

W. Va. Code §16-13-16 6

W. Va. Code §16-13A-25 2

W. Va. Code §22C-1-7 5

W. Va. Code §22-28-1 *et seq* 2, 3, 4

W. Va. Code §24-2-11 2, 4

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Argument

The Public Service Commission of West Virginia (Commission) hereby submits its Reply to the Response Brief of the Appellee.

As indicated in the Initial Brief of the Commission, the Commission intended to focus its argument on the error of the Circuit Court Order dealing with the issue of Commission jurisdiction over utility rates and charges. The Commission also argued that the Circuit Court Order erred in its determination that a capacity impact fee (CIF) is a tax.

The Appellee's Response Brief makes no attempt to directly rebut either of those two arguments. The analysis of applicable statutes and court decisions cited in the initial brief of the Commission demonstrates that the Circuit Court erred in concluding that the Commission has no authority to establish "charges" and that it further erred by concluding

that a CIF is tax.

Instead of addressing the Commission arguments directly, the Appellee resorts to the argument that the Local Powers Act, W. Va. Code §7-20-1 et seq., and the Community Infrastructure Investment Projects Act, W. Va. Code §22-28-1 et seq., “trump” the jurisdiction of the Commission. In essence, the Appellee argues that Commission authority and jurisdiction to establish a CIF was repealed by implication upon passage of the Local Powers Act and later the Community Infrastructure Investment Projects Act. The Appellee’s arguments are erroneous.

The Commission adopts the arguments of the Appellant Districts relating to both of these statutes. However, the following should be stressed. The Local Powers Act applies to county commissions not public service districts, which are separate legal entities. Further, the Local Powers Act contains no reference to any legislative intent to diminish the powers and jurisdiction of the Public Service Commission over public utilities. This should be contrasted to the language used by the Legislature in adopting the Community Infrastructure Investment Projects Act. In that Act, the Legislature made it clear that the Commission would not have jurisdiction to exercise its certificate authority under W. Va. Code §24-2-11 or to approve public service district borrowing or engineering agreements under W. Va. Code §16-13A-25, in circumstances where developers and utilities chose to build projects pursuant to the provisions of that Act. Further, the Commission cannot exercise its Chapter 24 powers over the project until it is transferred to the municipality or public service district. Otherwise, there was no further limitation of Commission authority to regulate utilities concerning

public utility regulation expressed in the Act. The limitations on Commission authority in the Community Infrastructure Investment Projects Act demonstrate that if the Legislature intends to limit Commission authority, it does so with express language.

In enacting the Local Powers Act, the Legislature intended, among other things, to create a discretionary tool that county commissions may use to raise capital for certain infrastructure projects. Those infrastructure projects could include certain utility facilities; however, unlike the cost based capacity impact fee that was approved by the Public Service Commission to offset the future cost of capacity expansion of a particular utility, the impact fees contained in the Local Powers Act do not pertain to capacity for the treatment of water or sewage. The limited and different nature of a Local Powers Act impact fee is illustrated by the statutory requirement that before commencing infrastructure projects for utility facilities, the county commission must obtain written confirmation from the affected public utility that a particular contemplated project can be accommodated by the utility and the utility currently has adequate capacity to provide service without significant upgrades or modifications to its treatment, storage or source of supply facilities. W. Va. Code §7-20-11(c)(1)(A). This is unlike the Commission approved CIF which is based upon the future cost to the utility of needed treatment capacity.

Furthermore, the assessments made by the county commission pursuant to the Local Powers Act, have no relationship to the specific cost of a particular utility, its future capital needs, and the rates which are charged to the public. The establishment of rates and charges to offset specific utility costs has been entrusted solely to the Commission under Chapter 24

of the West Virginia Code. The Legislature never intended to diminish that authority in enacting the Local Powers Act.

The Community Infrastructure Investment Projects Act only limits Commission authority regarding certificates of public convenience and necessity under W. Va. Code §24-2-11 and as otherwise expressly provided. In any event, that legislation has no relevance to this controversy, and was not used or followed by the Appellee or the Appellant Districts.

In support of its argument that the Local Powers Act and the Community Infrastructure Investment Projects Act trump the jurisdiction of the Commission, the Appellee argues that the Commission possesses inherently limited authority to regulate public utilities and urges the Court to adopt a statutory analysis that presumes that the Legislature has knowledge of all its prior enactments. The Appellee argues on page 9 of the Response Brief that the “inescapable” conclusion is that the Legislature perceived that there was neither existing delegated authority to the Commission nor any other agency to impose or assess fees to fund capital improvements for county water and sewer. In addition to incorrectly analyzing Commission jurisdiction and incorrectly stating and applying an incomplete “rule” of statutory construction, the Appellee compares apples and oranges. The Commission has not assessed a fee. The Commission has approved a cost based utility charge to offset future costs created by the unexpected demand presented by the unusual customer growth within these particular utility systems.

This is not the first case where a party has argued that a particular statutory provision should be construed to limit Commission authority. These arguments have been consistently

rejected by the Court.

The present argument is similar to the argument of the Water Development Authority (WDA) that W. Va. Code §22C-1-7 allowed WDA to impose service charges on projects it funds when project owners are in default on WDA loans. The WDA argued that the Commission could not review and approve those rates and charges. The Court employed a rule of statutory construction that:

“a statute should be 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 laws, 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)

State of W.Va. ex rel Water Development Authority v. Northern Wayne County PSD and PSC, 464 S.E.2d 777, 782 (1995). The Appellee incorrectly edits this rule of statutory construction and urges the Court to apply it in a manner that would repeal Commission authority under Chapter 24 (or to use the Appellee’s phrase, “trumped”) by implication with the passage of the Local Powers Act. The Appellee misapplies that rule of statutory construction that is designed to harmonize different statutory provisions, not to determine the repeal of a statute by implication.

Notwithstanding the authority granted to WDA, the Court found clear legislative intent to place the regulation of public utilities under the Commission. *Id.*, at 782 The Court concluded that the WDA proposed application of W. Va. Code §22C-1-7 was not consistent

with the legislative purposes of creating the Commission nor was it consistent with the statutory scheme intended by the Legislature.

The Appellee's argument is weaker. The Local Powers Act pertains to the power of county commission to impose fees generally, and there is no inherent conflict between the power of the county commission to levy impact fees and the power of the Public Service Commission to establish a capacity impact fee as a charge representing an offset to cost of providing utility service by a particular utility.

This Court has addressed the argument that municipal law precluded the Commission from regulating municipal rates and charges. In the case of *City of Wheeling v. Renick*, 116 S.E.2d 763 (1960), the Court ruled in favor of the Commission applying the same rule of statutory construction that it applied in the *WDA* case. The Court stated that "the principal is well established that repeal of a statute by implication is not favored in law." *Renick*, 116 S.E.2d at 768. The Court concluded that Legislature did not deprive or intend to deprive the Commission of its jurisdiction over municipally-owned sewer systems when it enacted W. Va. Code §16-13-16 and other provisions in Chapter 16, Article 13. The Court held that the only limitation on the Public Service Commission to supervise and regulate public utilities was that the Commission requirements not be contrary to law and that the regulation be just and fair, reasonable, and proper. *Id* at 770.

In *C&P v. City of Morgantown*, 107 S.E.2d 489 (1959), this Court found that the City franchise power embodied in W. Va. Code §§8-4-10 and 15 could not be used by the City to supplant the authority of the Commission under Chapter 24 of the Code. The Court held the Commission's jurisdiction over public utilities cannot be usurped by municipal law. The

legislative policy underlying Chapter 24 was to place the regulation of public utilities under state control for the public good. *Id* at 496.

Furthermore, in the case of *Delardes v. Morgantown Water Commission*, 137 S.E.2d 426 (1964), this Court found that the legislative provisions embodied in W. Va. Code §8-4-20 requiring a city election concerning proposed municipal rate increases must fall to the paramount power of the state, exercised by the Commission in establishing reasonable rates and charges. *Id* at 433.

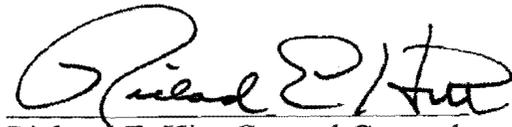
Conclusion

In summary, the pervasive and paramount power of the Public Service Commission to regulate public utilities is not diminished by grants of power to other governmental entities unless that intent has been expressly indicated by the Legislature. This Court has steadfastly rejected the contention that Commission authority can be deemed repealed by implication and has, at every opportunity, harmonized statutory provisions in favor of a reaffirmation of the Commission's pervasive authority over public utilities.

For the reasons stated in the Commission Initial Brief and this Response as well as the Brief of the Appellants and *amicus curiae*, the Commission respectfully requests that this Honorable Court reverse and vacate the Circuit Court Order.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel

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

Richard E. Hitt, General Counsel
WV Bar No. 1743
201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323
Telephone: 304-340-0450
rhitt@psc.state.wv.us

CERTIFICATE OF SERVICE

I, Richard E. Hitt, General Counsel for the Public Service Commission of West Virginia, do hereby certify that copies of the foregoing Reply Brief has been served upon the following counsel of record in the following manner on this 3rd day September 2010:

VIA FAX AND 1ST CLASS U.S.
MAIL POSTAGE PREPAID:

Laura V. Faircloth, Esquire FAX: 304-267-5411
Law Offices of Laura Faircloth & Associates
329 South Queen Street
Martinsburg, West Virginia 25401

VIA E-MAIL AND 1ST CLASS U.S.
MAIL POSTAGE PREPAID:

William F. Rohrbaugh, General Counsel
Post Office Box 944
Martinsburg, West Virginia 25402-0944
(wrohrbaugh@verizon.net)

Robert R. Rodecker, Esquire
Post Office Box 3713
Charleston, West Virginia 25337
(rodecker@wvdsl.net)

Hoy G. Shingleton, Jr., Esquire
115 Aikens Center, Suite 24
Martinsburg, West Virginia 25404
(shingleton@comcast.net)

Mark E. Kauffelt, Esquire
Kauffelt & Kauffelt
803 Kanawha Valley Building
P.O. Box 3082
Charleston, WV 25331-3082
(mkauffelt@wvdsl.net)

James V. Kelsh, Esquire
300 Summers St., Ste. 1230
P.O. Box 3713
Charleston, WV 25337-3713
(kelshlaw@yahoo.com)



Richard E. Hitt