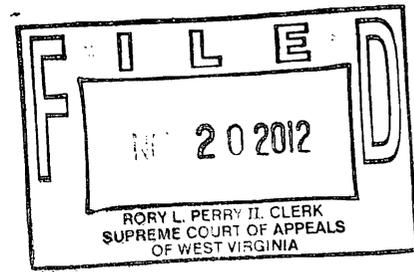


BRIEF FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



Larry V. Faircloth Realty, Inc.,
a corporation, and
Larry V. Faircloth,
Petitioners,

v.

No. 12-1023

Public Service Commission of
West Virginia; Berkeley County Public Service Sewer
District and Berkeley County Public Service
District, d/b/a Berkeley County Public
Service Water District,
Respondents.

**PETITIONERS' AMENDED REPLY TO PUBLIC SERVICE
COMMISSION'S STATEMENT OF REASONS AND BRIEFS
FILED ON BEHALF OF BCPSWD AND BCPSSD**

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OMISSIONS IN AND REPLY TO PSC'S STATEMENT OF THE CASE

Although the Petitioners rely upon their "Statement of the Case" previously set forth in their Petition, it is noteworthy that the PSC has omitted several important statements relating to their "Statement of the Case".

At Page 2 of the Statement of Reasons of the Public Service Commission of West Virginia, the PSC argues that the rationale for CIF's is that the utility's current system was developed upon the assumption that the expected demand upon the utility would be adequately paid by the users in their existing rates. They argue that "[g]rowth in Berkeley and Jefferson Counties . . . was sudden and significant [and there was a need for] a source of capital to meet these large, unexpected future costs to upgrade capacity." The PSC continues to lump Berkeley and Jefferson County together, however, this strategy is misplaced. Jefferson County residents have adopted a zoning ordinance which allows the implementation of impact fees. Berkeley County residents have not. The significance of this difference is explained in our Argument set forth below.

Second, the "assumption" that the existing systems could be supported by the users (at the current or existing rates) were as defective as any projected future capital costs necessary to upgrade capacity for anticipated growth (that simply did not occur). Although Petitioners concede that there was some dramatic growth at the time the PSC usurped its jurisdictional authority to authorize CIF's in 2004 and 2005, the growth stopped as suddenly and dramatically as it started. Starkly missing from page 2 of the PSC's argument is the fact that no one ever, ever, (yes, ever) considered merely increasing rates before determining whether or not the sudden growth would continue. Moreover, no one ever considered implementation of a "tap fee" which

has recently been proposed by the Berkeley County Water Service District in the amount of \$450.00 per new user. Had either of these measures been considered and implemented, the Petitioners would not have been required to enter into this three year litigation, and none of the parties would be before this Court, today, on this issue.

At page 3, the PSC correctly identifies that its own case of *Willow Springs Public Service Corp.*,” No: 06-1180-S-CN-PW-PC (Commission Order May 15, 2007), mandates that the Districts provide proof of an increase in population growth of 2% per year or 20% over 10 years as well as a reasonable expectation that existing capacity reserves will be depleted within 5 to 7 years. It fails, however, to identify that *Willow Springs* also requires that a CIF be re-evaluated every three years. At page 4, the PSC argues that Petitioner failed to acknowledge the *Willow Springs* case as being a review of the CIF granted to the Berkeley County Water District in 2005. Apparently, the PSC continues to be confusing Jefferson and Berkeley Counties. *Willow Springs* is a Jefferson County case and has nothing to do with any CIF granted in Berkeley County. Interestingly, however, until the Petitioner filed a Complaint in 2009 with the PSC, no independent review of any Berkeley County CIF was initiated by the PSC. Merely increasing a CIF does not constitute a comprehensive re-evaluation of whether or not the two criteria set forth in *Willow Springs* continue to be met.

At page 9, the PSC acknowledges that the Petitioners filed a motion with the PSC on July 8, 2011, requesting an expedited ruling. Further, the PSC acknowledges that five weeks later it issued another Order requiring the parties to provide updated growth data. Thereafter, the PSC further confirms that it ultimately disregarded or ignored all the evidence and data relating to

population growth, because the parties could not agree. The case was ultimately decided by the PSC on evidence and arguments that were made years earlier.

ARGUMENT

The Petitioners' first issue of appeal is that the PSC has no authority to authorize the public service districts to impose Capacity Improvement Fees ("CIF's").

The second issue is clearly stated in the alternative. Whether it is arbitrary and capricious for the PSC to: 1) delay a final ruling in its so-called general investigation for three years and three months, ignore the population growth data (as required by its own case law); 2) fail to make findings of fact as to when the Districts failed to meet the criteria necessary to continue collection of CIF's (in spite of evidence before the PSC as early as August 26 and 27, 2009); and 3) establish the date of May 9, 2012, for CIF's to amazingly (without factual or legal basis) to just stop, all to the detriment of Faircloth who calculates that he paid \$67,700.00 in CIF's since filing the Complaint with the PSC on February 27, 2009.

Without re-arguing all of the points that Petitioners made in their initial Petition, it is important to note that the primary issue on appeal is whether or not the PSC has the jurisdictional authority to authorize the two Districts in this case to implement CIF's for any reason. Without attempting to be disrespectful, the PSC has a vested interest in maintaining any jurisdictional authority that it may have wrongfully usurped. Given that the PSC is not a neutral party, its arguments in defense of retaining jurisdiction to authorize CIF's should be viewed with great scrutiny. Absent specific legislative directive, the PSC is without legitimate, legal support to do anything that the legislature has not prescribed with specificity. Nowhere in its "Statement of Reasons of the Public Service Commission of West Virginia" does the PSC cite to any specific

legislative language that authorizes anything close to a Capacity Improvement Fee. Instead, the PSC is obliged to interpret what the legislature must have meant in order to argue that it has the authority to do what it has done since 2005.

It is further significant that the PSC's Order of May 9, 2012, appears to have been offered as an olive branch to the Petitioners. Essentially, the PSC argues that, because the Petitioners are no longer required to pay a CIF, they should happily retreat and proclaim victory. The issue, however, is much larger and has constitutional ramifications from which the PSC has continued to run. It is, quite literally, asking the fox to guard the hen house in seeking an opinion from the PSC about its own jurisdictional authority.

In many ways, this entire appeal is seeking a legal bridle from the Supreme Court to prevent the PSC from running away with unchecked authority. In the event that this Court finds, through an interpretation of statutory language on a case of first impression before this Court, that the PSC has jurisdiction to authorize CIF's, the second question remains in an even more critical posture. That is whether the PSC can arbitrarily and capriciously assign a date on which the Districts failed to meet one of two necessary criteria to continue CIF's.

1. The present appeal is not moot.

The PSC argues that this Court should not consider the appeal because the Petitioners have, essentially, secured the relief they sought. The PSC fails to acknowledge the clear request of the Petitioners to have this Court rule that the PSC never had, and will not have (without legislative clarification) the jurisdictional authority to authorize CIF's in the first place.

Secondarily, the PSC ignores (as is its apparent practice) the Petitioners' alternative argument that the PSC's Order is arbitrary and capricious in assigning the date of May 9, 2012, as the date

on which the Districts failed to meet one of the criteria necessary to continue the CIF's, when the evidence that the reserves would not be depleted within 5 to 7 years was produced as early as August, 2009. Petitioners have asked this Court to, at least, in the alternative, set the date for discontinuing the CIF's as and for February 27, 2009, the date on which the Petitioners first filed their Complaint with the PSC.

2. The Commission has no jurisdiction to establish a CIF and Justice Maynard's Circuit Court Order should now be considered by this Court on its merits.

The Petitioners, in the interest of brevity, respectfully refer this Court to the brief and arguments made by the respective parties in the case of *Faircloth Realty v. Berkeley County PSDs*, Case Nos. 35651 and 35652, 2011 W. Va. Lexis 296 (2011). The PSC is incorrect in arguing or implying that this Court considered any of the merits in that case. This Court merely found that the Circuit Court had no jurisdiction to hear the matters because they were substantially similar to those that were being heard by the PSC in its general investigation.

The PSC attempts, but is unsuccessful, to argue that a tap fee is substantially similar to a capacity improvement fee and should, therefore, be permitted according to *State of West Virginia ex rel Water Development Authority v. Northern Wayne County Public Service District and PSC*, 195 W. Va. 135, 464 S.E.2d 777 Syllabus Pt. No. 5 (1995). A tap fee does not discriminate. It applies to all new users, whether residential, industrial, commercial, government, old or new structures seeking to tap onto the existing system. In fact, Faircloth suggested (during the hearings before the PSC) that a reasonable tap fee might solve the economic (albeit self-generated) crises faced by the Districts in being prohibited from collecting the exorbitant CIF's. It should be noted that the Water District has recently applied for such a tap fee and that Faircloth

has not challenged that application.

3. A CIF is a tax and not a charge.

The PSC argues, in five pages, that an impact fee is different from a CIF to justify its argument that a CIF is not a tax. Throughout much of the case law cited by both sides to this argument it is a pervasive understanding that an impact fee is, essentially, a tax.

This Court is reminded that it was Curtis Keller who testified in the August 2009 hearings, in his capacity as the General Manager for the BCPSSD, that a CIF was, in reality, an impact fee. Further testimony on behalf of the BCPSWD could not refute this admission.

4. The Commission erred in failing to give any consideration to the Local Powers Act or the Community Infrastructure Investment Project Act.

The PSC makes a feeble attempt to argue that neither of these Legislative Acts are applicable, however, it fails to cite any case or statute to support its position. In so doing, the PSC ignores the public policy issues at stake as well as the more comprehensive and legal issues involved in determining the PSC's jurisdictional authority relating to CIF's.

a. The public policy issue facing the Court in this Appeal.

Do the unelected members of the PSC (sitting in Charleston) or the elected members of Berkeley County's local government (sitting in Martinsburg) in effect, determine and control land planning and development in Berkeley County? This is the central question that Faircloth asks the Court to determine.

b. Home Rule in West Virginia.

The Constitution of West Virginia, Article VI § 39(a) provides for home rule for municipalities in West Virginia, but excludes home rule to counties. Home-rule provisions in

state constitutions and statutes give units of local government discretion in managing their own affairs.

The West Virginia Legislature has circumvented the § 39(a) constitutional restriction by, in effect, enacting statutes that, essentially, grant home rule to counties by making them statutes of general, state-wide concern.

c. In-effect home rule to counties.

Looking at the table of contents of Chapter 7, Article 1, of the West Virginia Code, for instance, one finds numerous provisions of statutory authority authorizing counties to control local matters. Statutes of obvious local operation, provide for county authority to: govern traffic and parking (7-1-3s); establish county beautification councils (7-1-3w); create county information referral services (7-1-3x); regulate the business of massage (7-1-3z); legislate and restrict erotic entertainment (7-1-3jj); transfer development rights (7-1-3mm); establish curfews (7-1-12); and regulate amateur radio antennas, (7-1-13).

d. In-effect land planning and development home rule to counties.

Under the provisions of the West Virginia Code, counties may: a) impose impact fees for affordable housing under certain circumstances (See § 7-20-7a); b) establish economic opportunity development districts (See § 7-22-3); and c) consolidate local government (See § 7A-1-1, The Local Powers Act, at §§ 7-20-1 et seq., and the Community Infrastructure Investment Project Act, at §§ 22-28-1 et seq.).

The Legislature, in 2005, enacted the Local Government Flexibility Act, West Virginia Code §§ 7-23-1 et seq., which authorized a procedure for the Governor to waive administrative rules and regulations that a county commission (or council) “believes is preventing it from

carrying out its duties and responsibilities in the most cost efficient, effective and timely manner.”

Presumably, the Governor, on application, may waive a rule or regulation of the Public Service Commission that interferes with a county commission’s (or council) land planning and development efforts. Faircloth suggests that the Local Government Flexibility Act extends yet another measure of home rule to counties. Interestingly, West Virginia Code §7A-1-4(b), Consolidated Local Government, goes so far as to specifically assert that such consolidated governments are not in contravention with Article VI § 39a and Article IX of the Constitution of West Virginia.

e. Who is to control infrastructure in Berkeley County, the PSC or the County?

The Legislature, in West Virginia Code § 8A-1-1, determined that planned land development and land use is vital to a community, and provided (§ 8A-3-4) for the formulation of a comprehensive plan on present and future land development.

One of the many components of a comprehensive land use plan, at West Virginia Code § 8A-3-4(c)(4), requires that the comprehensive plan:

designate the current, and set goals, plans and programs, for the proposed locations, capabilities and capacities of all utilities, essential utilities and equipment, infrastructure and facilities to meet the needs of current and anticipated future residents of the jurisdiction. (Emphasis added.)

Berkeley County adopted comprehensive land use planning in the 1970's under the predecessor statute, and has had a comprehensive plan in effect for many years, which plan is administered by a sizeable staff.

Faircloths ask this Court to determine whether Berkeley County or the PSC has the

authority to designate the goals, plans and programs for the “capabilities and capacities of all utilities, essential utilities and equipment”.

If the Court’s answer is that Berkeley County is to make the prescribed designation as to the “capabilities and capacity” of utilities, then CIF’s, if to be imposed, must be a matter of county planning, not the prerogative of the PSC. Incidental, of course, to Berkeley County’s duty or right to impose a CIF, is whether or not the citizens of the county have approved a zoning ordinance, thereby empowering the Berkeley County Council to impose impact fees.

f. How the PSC controls land planning and development in Berkeley County.

By authorizing imposition of a CIF on each lot to be developed (until the May 9, 2012 Order rescinding imposition of CIF’s) in the amount of \$6,770.00 per lot, the PSC effectively limits growth to those entities who could afford to pay the fee (or as Faircloth asserts, and Judge Maynard found, to be a tax). The PSC, granting the authority of public service districts to impose CIF’s, effectively thwarts the statutory mandate of local comprehensive planning, effectuates shadow zoning, and chills economic growth at its arbitrary discretion.

Faircloth asserts that the PSC has no jurisdiction under existing law to manipulate utility charges as a subterfuge to effectively control economic growth in Berkeley County.

Faircloth asserts that the Local Powers Act and the Community Infrastructure Investment Project Act cedes to the counties the power to impose impact fees divesting any such power, implied or otherwise, from the PSC.

g. The PSC Order improperly permits the PSC to grant authority to impose CIF’s in the future.

The May 9, 2012 Order of the PSC rescinds the authority of public service districts to

impose CIF's at the present time. It is a temporary order. The PSC, in its "Statement of Reasons," admits that if the PSC determines, in the future, to renew authority to impose CIF's, the renewal procedure would be subject to an investigation, hearing, etc., at which Faircloths and the public could contest. After three years of litigation before the PSC, Faircloths (and their resources to challenge the bureaucracy) are exhausted. The PSC must be accountable to the citizens of this State. In this very situation, the outrageous CIF's that are no longer (if ever) justified according to the PSC's own Order, would still be in effect if not for Faircloths' willingness to challenge them over the past three years! The current Order is simply wrong in five specific ways.

First, it empowers an unelected body of three political appointees the jurisdiction to look into some arbitrary crystal ball and project future growth at any time it chooses. No constraints. No protocols. No absolute, scientific models. No limitations.

Second, the Order does not define "population" growth (a necessary criteria that districts must meet) and merely ignores the figures given to it through direct testimony, subject to cross examination. The reason, the PSC claims, is because the parties could not agree upon the correct figures. Such a conclusion is confounding to Petitioners in that a quasi-judicial body must make decisions even (and especially) when the evidence is conflicting. If the PSC can not or will not make a ruling or finding about whether or not one of two necessary criteria is met to establish a CIF, then how can this Court legitimately and fairly extend it an implicit jurisdiction (not specifically conveyed by statute) to so irreparably intrude upon the rights and property interests of citizens such as Petitioners? The PSC has proved that it cannot be trusted with protecting such an important right as property – one of the three "inalienable" rights identified in the Declaration of Independence. In failing to make a ruling with regard to a true decline in population growth,

the PSC has circumvented its own requirements for authorizing a CIF.

Third, the Order fails to determine exactly when the Districts failed to meet the second criteria concerning depletion of reserves. Two days of hearings in August of 2009, provided sufficient evidence for the PSC to suspend CIF collection based upon the failure of the Districts to meet the second criteria. Instead, the PSC protracted the litigation for another three years on the pretense of needing “updated” population figures, only to ignore the evidence on population growth without giving any guidance for future evidence that would be considered by the PSC in authorizing CIF’s in the future.

Fourth, the PSC arbitrarily identified the date of its May 9, 2012, Order as being dispositive of when the Districts failed to meet their burden that existing reserves would be depleted within five to seven years, thereby providing the basis for the PSC to discontinue the CIF’s. No reason. No findings of fact. No explanation or conclusion of law regarding the date. No problem. After all, it’s the way the PSC “has always done it.” Now, there is a bell-ringer for self-proclaimed jurisdictional authority!

Finally, the May 9, 2012, Order fails to identify, when, how, or on whose instance any future CIF’s should be re-evaluated. What if there is no Petitioner to challenge a future CIF?

5. The Commission erred in arbitrarily and capriciously assigning the date of May 9, 2012, to be the date on which the Districts failed to meet one of the two necessary criteria to permit the continuation of CIF’s.

In addition to the PSC’s failure to consider population growth data as one of the two necessary factual elements that need to be proved by the Districts to continue CIF’s, the PSC incorrectly identified the date of May 9, 2012, as being the date on which the Districts just mysteriously and arbitrarily showed or conceded that they would not deplete their reserves within

5 to 7 years. Surely, the PSC is not suggesting that the Districts would deplete their reserves within 5 to 7 years on May 8, 2012, but made some sort of miraculous economic recovery in 24 hours. The evidence was available to the PSC years before they were compelled to make a decision. In fact, the hearings in August of 2009 produced evidence that the reserves would not be depleted within 5 to 7 years, and it is only reasonable to conclude that this factual situation did not just occur in August of 2009 since the financial records of the Districts were produced on an annual basis.

The PSC argues that we have cited no authority to allow this Court to set the date of February 27, 2009, as the date on which the Districts failed to meet their burden of proof to continue collections of CIF's. First of all, the PSC has the absolute power (under its usurped jurisdiction) to audit and hold accountable the Districts for providing this information. The Petitioners should not be penalized for the PSC's failure to do so nor should they be penalized for the bureaucratic delays that caused a three year litigation process.

Secondly, this Court has recognized that the time frame for requiring adherence to a decision in a case of first impression should not result in a windfall to either the respondent or those who find themselves in a winning position unless they previously raised the issue. See *Bradley v. Appalachian Power*, 256 S.E. 2d 879 (1979). In that case, this Court held that West Virginia would join the majority of jurisdictions and recognize comparative fault as opposed to the antiquated contributory fault in negligence cases. It further held that such a newly recognized standard would apply to the Appellant in that case as well as to all others who had pled that relief in currently pending cases in the State. Since Faircloths are the only ones who "pled" or prayed for this relief, it is only a fair resolution for the date of their originally filed Complaint to be used

as the date on which the Districts failed to prove that they met the necessary criteria for the continuation of CIF's.

In the overall factual scheme of the PSC's insistent perpetuation of CIF's until May or, finally, August of this year, the bottom line is that the Districts' and the PSC's growth projections in 2004, 2005, and 2007 **WERE JUST WRONG**. Even the conflicting population evidence from the Districts as well as the PSC confirm the error in relying upon projected population growth. Clearly, without any question, the evidence concerning depletion of reserves in 2009 was not what had been "projected."

Based upon these inaccurate and wrong assumptions, the PSC has unlawfully authorized the Districts to wrongfully take the Petitioner's property and the property of others without due process of law and in violation of their equal protection rights. To allow the PSC to identify May 9, 2012, as the date on which CIF's are no longer authorized amounts to a violation of Petitioners' rights as protected under both the State and Federal Constitutions.

6. Petitioners timely filed their Appeal within the statutory period provided in West Virginia Code §24-5-1, in that the Petitioners could not exhaust their administrative remedies before the PSC took up the Districts' motions for reconsideration.

Both Districts argue that the Petitioners failed to timely file their appeal from the May 9, 2012, PSC Order. The Sewer District, in particular, argues that the Petitioners should not have appealed from the August 7, 2012, PSC Order because it was never "stayed." The Sewer District, is correct that the May 9, 2012, Order was never stayed, however, that did not prevent either the Sewer or the Water Districts from continuing to collect the CIF's (that the PSC discontinued on May 9, 2012) until August 7, 2012. Merely because the Order of May 9, 2012, was not "stayed",

does not mean that the PSC was without jurisdiction to consider the motions for reconsideration. A careful review of the August 7, 2012, Order clearly states that it is a Final Order and that the case is to be placed among actions ended. Clearly, the matter was not “ended” until August 7, 2012.

As aptly noted by the PSC in its brief, this is the third time that we have been before the Supreme Court. The first time was via a Circuit Court case assigned to former Justice Elliott Maynard. In its Memorandum Decision, the Supreme Court clearly directed that the Petitioners were first required to exhaust all administrative remedies before the PSC prior to seeking relief elsewhere.

When the Petitioners returned to the PSC forum for a final disposition of their case, they were frustrated by the continuing and systematic bureaucratic delays that ultimately resulted in over three years of litigation. As a result, they applied for a writ of mandamus (accompanied by a request for injunctive relief) to this Court. Again, the Petitioners were told that they needed to exhaust all of their remedies before the PSC.

When the PSC allowed the Districts to file their respective motions for reconsideration of the May 9, 2012, Order, the PSC retained its jurisdiction over the matter. The PSC clearly could have reopened the entire case as a result of the Districts’ motions, and conducted hearings to obtain additional evidence. In fact, that was one of the requests made by the Districts in their motions for reconsideration of the May 9, 2012, Order. They argued that the PSC needed additional evidence to reconsider its ruling that the Districts would not deplete their reserves within 5 to 7 years. Had the Petitioners immediately appealed to this Court the jurisdictional issues involving the PSC’s ability or power to authorize CIF’s, it is reasonable to conclude that

this Court would have advised the Petitioners that they needed to exhaust their remedies before the PSC.

Jurisdiction is always a question for consideration, even in criminal cases after a verdict has been rendered. It is noteworthy that the PSC did not raise this argument. As long as the PSC retained its jurisdiction to reconsider any of its rulings, it would have been precipitous for the Petitioners to appeal anything.

7. The delays in the resolution of the case below were not caused by the Petitioners.

Both Districts argue that any delays before the PSC were occasioned by the Petitioners. This is truly and blatantly a smoke screen. They accuse the Petitioners of jumping the gun and venturing into Circuit Court when the case had already languished before the PSC for a period of seven months. Although the Petitioners requested an expedited ruling in February of 2009, they now realize that seven months is a normal course of trying cases without a decision before the PSC. This Court is reminded that the PSC dismissed the Complaint filed on behalf of the Petitioners and opened its own, separate case to which it added the Petitioners as parties. That new case was called a general investigation. It appearing to the Petitioners that they were going nowhere fast, they opted to file a case directly against the Districts in the Circuit Court of Berkeley County, West Virginia. The Petitioners were losing \$6,770.00 every time they applied for the paperwork to commence building a new home.

In a span of only sixteen months, the Petitioners filed a civil action, saw five judges recuse themselves from hearing the case, waited for this Court to appoint a visiting judge (former Justice Maynard), advanced the matter through hearing and final argument with briefs, secured a favorable ruling, responded to an appeal, argued before this Court and had their judgment

reversed. The PSC, by Order, denied the Petitioners' request to stay their proceedings pending a resolution by the Circuit Court. The PSC went so far as to claim that it could handle the matter more expeditiously than the Circuit Court. The record is absolutely void of any subsequent entry by the PSC to stay the proceedings. Obviously, the PSC did nothing to move the case forward pending the Declaratory Judgment and even through Districts' appeal from that Order, but that is nothing new for the PSC!

Subtracting 16 months from the 39 months that the matter was before the PSC, that still leaves one month shy of two years that the PSC and the Districts wasted the judicial economy of the State and the money of the Petitioners. Whose fault was that? For over three years, the Petitioners continued to be denied injunctive relief before the PSC and continued to pay \$67,700.00 in CIF's that the PSC ultimately found to be unsupported by the evidence.

CONCLUSION AND PRAYER FOR RELIEF

The Public Service Commission does not have jurisdiction, either explicit or implicit, to authorize public service districts to impose capacity improvement fees. Accordingly, the Court should reverse the May 9, 2012, Order of the PSC with instructions that they require the Districts to immediately return any and all CIF's collected from the Appellants since 2004, when the PSC first authorized the assessment and collection of a CIF in Berkeley County.

In the event, however, that this Court should find that the West Virginia Public Service Commission has the jurisdiction to authorize the Districts to assess and collect CIF's, absent clear and specific statutory language enabling it to do so, then this Court should instruct the Public Service Commission to immediately implement the following procedures to prevent irreparable harm and delay in the future: 1) identify an objective body of data that the PSC will

use in all cases to determine any and all increases or decreases in population growth to determine whether or not the first criteria in the *Willow Springs* case is met to support creation and/or continuation of a CIF; 2) establish an independent and self-generating means by which the PSC will automatically review CIF's and the supporting criteria for CIF's every three years without requiring a citizen such as the Petitioners here to initiate litigation with the PSC to determine whether or not the PSC is discharging its lawful duty to supervise the Districts; and 3) amend the date of May 9, 2012, to February 27, 2009, as the date on which the Districts failed to meet the second criteria established in the *Willow Springs* case concerning capacity reserves. In amending the date to February 27, 2009, this Court should require the PSC to direct that the Districts return any and all CIF's collected from Faircloths since February 27, 2009, within 30 days of the entry of the Order.

Because Faircloths have been required to initiate this action which the Public Service Commission lawfully had a duty to initiate, on its own (according to *Willow Springs*), this three year and three month litigation process has, for all intent and purpose, been a suit to compel the PSC to exercise a non-discretionary duty. Please recall that this Court required Faircloths to "exhaust their administrative remedies" before the PSC, even as parties to a general investigation, before asking this Court for relief. Moreover, it has included Faircloths' efforts to file a declaratory judgment action in the Circuit Court of Berkeley County. These acts have been at considerable cost and expense to Faircloths. Since the May 9, 2012, PSC Order rescinding the CIF's without disturbing the jurisdictional authority of the PSC, Faircloths have ultimately achieved the financial relief requested in rescission of the CIF's. Accordingly, it is only fair, just and proper that Faircloths be awarded their reasonable attorney fees and costs associated with

their efforts to compel the PSC to review and rescind the CIF's – a matter which the PSC absolutely ignored for a period of two years prior to the time that Faircloths first initiated action with the PSC. The Districts concede that Petitioners have ultimately prevailed and have not contested this argument for attorneys fees.

Petitioners, Larry V. Faircloth and Larry V. Faircloth Realty, Inc., pray that this Court grant the following relief in reversing the May 9, 2012, Order:

1. That this Court find and conclude that the Capacity Improvement Fee, at issue, is a tax and not a charge as construed by the Public Service Commission;

2. That this Court find and conclude that the Public Service Commission has no jurisdiction to authorize the Berkeley County public service districts to impose and collect Capacity Improvement Fees with a refund to Petitioners in the amount of all CIF's paid since that date within 30 days of the entry of the Order.

3. That this Court find and conclude that the only existing authority for the Berkeley County public service districts to impose and collect Capacity Improvement Fees is under the authority and conditions set forth in the Local Powers Act;

4. That this Court find and conclude that the Community Infrastructure Investment Project Act nullifies the imposition and collection of Capacity Improvement Fees where a developer or builder, in agreement with a public service district, chooses to construct its own capital improvements and to transfer the ownership, upon completion, to the public service districts without cost; and

5. That the Court reinstate the terms of the February 18, 2010, Order of the Circuit Court of Berkeley County to the extent that the Court ordered that the Plaintiff in that action be awarded reasonable costs and attorney fees.

Alternatively, in the event that this Court finds that the Public Service Commission has the jurisdictional authority to authorize the districts to collect CIF's, then in such event, the Petitioners pray for the following relief to reverse and remand with instructions:

1) That this Court find and conclude that the effective date of May 9, 2012, for the rescission of CIF's is arbitrary, capricious and not supported by the record below;

2) That this Court find and conclude that the appropriate effective date for rescission of the CIF's be February 27, 2009;

3) That this Court find and conclude that the Public Service Commission establish clear and objective data upon which it will rely in determining and evaluating increases and decreases in population growth in future CIF applications as required by the *Willow Springs* case;

4) That this Court find and conclude that the Public Service Commission must, in all cases involving CIF's, independently and upon its own initiative, review CIF's and the underlying criteria supporting them at least once every three years; and

5) That this Court find and conclude that the Petitioners be awarded their reasonable attorney fees and costs in bringing this action.

Respectfully Submitted.

Larry V. Faircloth Reality, Inc.
Larry V. Faircloth
By Counsel

A handwritten signature in cursive script, reading "Laura V. Faircloth", is written over a horizontal line.

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CERTIFICATE OF SERVICE

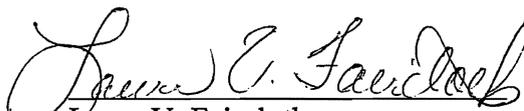
I, Laura V. Faircloth, do certify that accurate copies of the foregoing "Petitioners' Amended Reply to Public Service Commission's Statement of Reasons and Briefs Filed on Behalf of BCPSWD and BCPSSD" have been served upon the following counsel of record via First Class Mail on this 20th day of November, 2012.

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