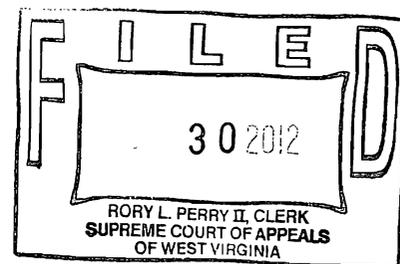


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON



LARRY V. FAIRCLOTH REALTY, INC., and
LARRY V. FAIRCLOTH,

Petitioners,

vs.

No. 12-1023

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT, and
BERKELEY COUNTY PUBLIC SERVICE DISTRICT, doing business as,
BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT,

Respondents.

RESPONDENT'S BRIEF

BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT

BERKELEY COUNTY PUBLIC
SERVICE SEWER DISTRICT
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October 30, 2012

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BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT,

Respondents.

RESPONDENT'S BRIEF

BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT

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

PRELIMINARY STATEMENT

The Petitioners, Larry V. Faircloth Realty, Inc. and Larry V. Faircloth (collectively referred to as "Petitioner Faircloth" or "Faircloth"), seek to appeal a portion of the ruling of the Public Service Commission of West Virginia ("Commission" or "PSC") set forth in a Commission Order dated May 9, 2012 in PSC Case No. 09-0961-PSWD-GI ("PSC Case").

In the Commission Order, the PSC ruled that it has the authority to permit public service districts to charge Capacity Improvement Fees (“CIFs”) and the Respondents, Berkeley County Public Service Sewer District (“Sewer District”) and Berkeley County Public Service Water District (“Water District”), had the right and authority to charge CIFs as previously authorized by the Public Service Commission; however, the Commission further ruled that the Respondent Districts no longer satisfy the requirements for charging CIFs and terminated the same as of the date of the Commission Order. Although the Commission terminated the Respondent Districts’ CIFs, going forward, Petitioner Faircloth filed the pending appeal in an effort to overturn the Commission’s ruling as to the underlying legality of CIFs. If Faircloth succeeds in overturning the Commission’s ruling that the Respondent Districts could legally charge CIFs prior to May 9, 2012, the Respondent Districts’ may be required to reimburse all previously collected CIFs – in the case of Sewer District, alone, this amounts to nearly \$12 million.

I. STATEMENT OF THE CASE

A. Procedural History

On February 27, 2009, Larry V. Faircloth, as an individual, and Larry V. Faircloth Realty, Inc., the Petitioners herein, filed formal complaints with the PSC requesting that the Public Service Commission rescind the Capacity Improvement Fees authorized in PSC Case Nos. 04-0153-PSD-T, 04-1767-PWD-T, 06-0016-PSD-T and 07-0167-PWD-T, on the grounds that the CIFs are not authorized by statute and are not reasonable in light of current economic conditions. The Sewer and Water Districts filed timely answers to the formal

complaints, stating that the CIFs are proper utility charges authorized by the Public Service Commission which are pledged for the repayment of certain debt obligations owed by the Districts.

The Commission consolidated the complaint cases into PSC Case No. 09-0192-PSWD-C, and then by a subsequent Order dated June 11, 2009, the Commission: (1) initiated a general investigation of the Sewer and Water Districts' CIFs, designated as PSC Case No. 09-0961-PSWD-GI (hereinafter referred to as the "PSC case"); (2) made the complainants, including Petitioner Faircloth herein, parties to the general investigation; and (3) dismissed the consolidated complaint cases. Pursuant to other provisions of the Commission Order dated June 11, 2009, and a subsequent Commission Order dated July 10, 2009, the Sewer and Water Districts timely filed responses to seven (7) interrogatories and document requests posed by the Commission regarding the Petitioner Districts' authority to use the collected CIFs. The Districts also responded to interrogatories and document requests served by PSC Staff counsel.

On August 26 and 27, 2009 the Commission held an evidentiary hearing, lasting two full days, during which the Sewer District, Water District, Petitioner Faircloth and PSC Staff were represented by counsel and permitted to present exhibits, testimony and conduct cross-examination. Approximately five hundred (500) pages of transcript were generated during the hearing, excluding exhibits. By a Commission Order dated September 4, 2009, the Commission established a briefing schedule with initial briefs due on October 13, 2009 and response briefs due on November 2, 2009.

On or about October 6, 2009, one (1) week prior to the due date for the initial round of briefs before the Public Service Commission, Petitioner Faircloth sought to circumvent the Public Service Commission by filing a parallel declaratory judgment action in the Circuit Court of Berkeley County seeking rescission of the water and sewer CIFs. On October 8, 2009, Petitioner Faircloth also filed a motion with the Public Service Commission seeking a stay of the PSC Case (or in the alternative, extending the briefing timeframe) on the grounds that “the complaint for declaratory judgment would dispose of all matters now brought by . . . [Faircloth] before this Commission..” and in the interests of “efficiency and judicial economy.” The Sewer and Water Districts filed responses opposing Faircloth’s motion on the grounds that it was an attempt to delay the PSC Case in order to forum shop before the Circuit Court. In a Commission Order dated October 9, 2009, the Public Service Commission denied the Faircloth motion and kept the briefing schedule unchanged. In discussing its decision to deny the Faircloth motion to stay, the Public Service Commission stated that:

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. [Emphasis added].

Commission Order of October 9, 2009, PSC Case No. 09-0961-PSWD-GI, p.2. All briefing in the PSC Case was completed and the matter matured for decision on November 2, 2009.

Nonetheless, on February 16, 2010, the Berkeley County Circuit Court issued a Declaratory Judgment Order in favor of Petitioner Faircloth. No further action was taken by the Commission in the General Investigation while the Water and Sewer Districts appealed the circuit court's Declaratory Judgment Order. After briefing and oral argument, the West Virginia Supreme Court of Appeals issued a Memorandum Decision dated February 24, 2011, in consolidated Appeal Nos. 35651 and 35652, which reversed the Declaratory Judgment Order by ruling that Petitioner Faircloth had not exhausted his administrative remedies. As a result, the Berkeley County Circuit Court did not have jurisdiction of the matter, and the case was remanded to the Public Service Commission for further proceedings.

Acknowledging its own jurisdiction, the Commission subsequently entered a Commission Order dated July 19, 2011 and directed the Districts "and the other parties to the extent they are able to do so, to submit verified documentation showing population growth over the past ten years and expected future growth over the next five years." Faircloth and the Districts, however, were unable to agree upon the documentation in question and submitted separate population growth estimates for the Commission's consideration.

By a Commission Order Dated September 30, 2011, the Commission scheduled a further hearing for December 8 and 9, 2011, and in addition to population growth data, directed the Districts to "fully address the question of the proper amount of the CIFs" as well as the need for CIFs under the Willow Spring criteria. See, Willow Spring Public Service Corporation, Case No. 06-1180-S-CN-PW-PC (Commission Order dated May 15, 2007).

On December 8 and 9, 2011, the Commission held an evidentiary hearing during which Faircloth, the Districts and PSC Staff presented exhibits and testimony and conducted

cross-examination on the questions of population growth, the need for CIFs under the Willow Spring criteria and the proper amount of the CIFs. At the conclusion of the hearing, the Commission established a briefing schedule and all parties filed their respective briefs.

In a Commission Order dated May 9, 2012, the Public Service Commission found and concluded that the capacity improvement fees charged under the Sewer and Water Districts' authorized tariffs are legal and appropriate in every way; except that the Districts can no longer satisfy the requirement that their respective capacities will likely be exhausted within seven (7) years. The Sewer and Water Districts subsequently filed timely motions for reconsideration which were opposed by Petitioner Faircloth. By a Commission Order dated August 7, 2012, the Commission rejected the Respondent Districts' petitions for reconsideration. On September 6, 2012, Petitioner Faircloth filed his petition for appeal in the pending matter challenging the underlying legality of Capacity Improvement Fees.

B. Statement of the Facts of the Case

The Parties

The Respondent, the Berkeley County Public Service Sewer District, is a public corporation and political subdivision of the State of West Virginia operating as a public sewer utility with an authorized territory which includes the entirety of Berkeley County, excluding the City of Martinsburg. The Sewer District was created in 1979 and has grown to serve a total of 19,816 customers (as of June 30, 2011). This customer count represents a 221% increase in the number of customers served over the eleven (11) year period beginning on July 1, 2000, when the customer count was only 6,182.

The Respondent, Berkeley County Public Service District, d/b/a Berkeley County Public Service Water District, is a public corporation and political subdivision of the State of West Virginia operating as a public water utility with an authorized territory which includes the entirety of Berkeley County, including a portion of the City of Martinsburg. The Water District was created on July 1, 2001 and resulted from the merger of Opequon Public Service District and Hedgesville Public Service District with and into the Berkeley County Public Service District, the latter of which had been in existence for almost 50 years. At its inception in July 2001, the Water District had approximately 12,450 customers. As of June 30, 2009, its customer base had increased to approximately 19,200 customers; an increase of approximately 54%

Petitioner Faircloth is Berkeley County real estate developer who owns a 135-acre development in southern Berkeley County named Elizabeth Station Subdivision. At least 170 homes have been built in the subdivision with 105 additional lots planned for sale or development. Faircloth initiated the PSC cases which were merged into the PSC General Investigation below, seeking termination of a fee approved by the Public Service Commission and assessed by the Respondent Districts which is designated as a "Capacity Improvement Fee."

Population Growth

From the 1990 decennial census to the 2000 decennial census, the population of Berkeley County increased 28.1%, from 59,253 persons to 75,905 persons, a net gain of 16,652 people. By the 2010 decennial census, the population of Berkeley County grew another 37.2%, from 75,905 persons to 104,169 persons, an additional gain of 28,264 people.

The Need for a New Method of Utility Financing

The Sewer District spent over \$100 million between 1995 and 2005 to construct new sewer treatment and collection capacities in order to meet the accelerating demand for utility services in Berkeley County. The Sewer District financed the sewer construction program with public debt which is being repaid from revenues derived, in part, from significant rate increases upon the District's existing rate payers. Despite the massive expansion of the Sewer District which occurred prior to the approval of the sewer CIFs in 2005, developers continued to demand new sewer capacity at a rate which seriously undermined the planned rate of obsolescence of the system. The Sewer District's Inwood and Baker Heights Wastewater Treatment Plants, which had been in operation for five and ten years, respectively, had already, reached 80 to 90% of their rated capacities by 2005 (even though the plants had a planned obsolescence of 20 to 40 years, each).

In order to meet the exploding demand for sewer utility service, the Sewer District was faced with several unattractive options:

- (a) Continue to raise rates on existing customers in order to fund increases in capacity;
- (b) Do nothing and face moratoria on new utility connections for portions of its system; or,
- (c) Develop a new system of financing that would shift some of the burden from existing customers to developers and new customers.

Continuing to rapidly increase sewer rates would eventually create unfavorable disincentives for Berkeley County natives, as well as for those seeking to relocate here. Placing moratoria on new connections, similarly, would lead to economic stagnation. After researching the various options, the Sewer District reached the conclusion that implementing "Capacity

Improvement Fees” is the most equitable method for addressing the capacity issues generated by explosive population growth.

Capacity Improvement Fees are charged to the builders of new residential, commercial and industrial structures. The fee, as employed in Berkeley County (and elsewhere in West Virginia), is derived from a formula developed at Georgia Tech whereby the costs of planned future capital improvements are allocated between growth and non-growth items. The fees are graduated based upon the size of the water meter connection. A new customer is required to pay the applicable CIF at the time of application for service. Under the conditions established in the PSC Orders approving the Sewer District’s CIFs, all CIF revenue must be retained in a separate account, the funds are only to be used for upgrades to or construction of new or expanded utility facilities and no funds may be expended for any purpose without the specific approval of the PSC.

PSC Cases Authorizing CIFs in Berkeley County

In PSC Case No. 04-0153-PSD-T, the Sewer District requested that the Public Service Commission approve the implementation of a sewer (treatment) Capacity Improvement Fee in Berkeley County. By a Commission Order dated August 31, 2004, the Public Service Commission authorized the Sewer District to begin charging a \$1,581.00 CIF to developers and builders for each new sewer connection at the time of preliminary plat approval for a subdivision. Shortly thereafter, the case was reopened on the specific issue of the timing of payment, at the behest of the Eastern Panhandle Home Builders Association (“Home Builders Association”). The Sewer District subsequently reached an agreement with the Home Builders Association to charge the CIF later in the process – at the time a developer applies

for sewer service, a prerequisite for obtaining a building permit. The later trigger point was approved in a Commission Order dated March 28, 2005, and the Sewer District began collecting the sewer CIF after that date.

The Sewer District subsequently sought permission from the Public Service Commission to modify its CIF. In PSC Case No. 06-0016-PSD-T, the Sewer District filed a request to expand the wastewater treatment CIF to also include a sewer collection CIF. In a Commission Order dated October 24, 2006, the PSC authorized the Sewer District to charge a bifurcated capacity improvement fee, in the total amount of \$3,650.00, with \$2,529.00 allocated to collection capacity and \$1,121.00 allocated to treatment capacity. (The case was subsequently reopened due to an error which was corrected in a Commission Order dated January 22, 2007). This bifurcated CIF, totaling \$3,650.00, is the prevailing sewer CIF rate in effect.

In both of these cases, the Sewer District gave public notice to its customers and the general public of its proposal to include a CIF in its tariff. All notices were given pursuant to the statutes and regulations of the PSC. Appellee Faircloth had an opportunity to intervene in both cases but chose not to do so. In testimony before the PSC, Mr. Faircloth testified he was aware of the cases and chose not to intervene or file any objection to the imposition of the CIFs at that time.

[Note: For similar reasons as the Sewer District, the Water District also requested and was authorized by the PSC to charge a water CIF in the amount of \$1,623.00 on August 12, 2005. At the request of the Water District, the water CIF was subsequently increased to \$3,120.00 in a PSC Order dated August 15, 2007].

CIF Financing

In order to address the rapidly dwindling excess capacities of the Inwood and Baker Heights Wastewater Treatment Plants, the Sewer District filed on March 17, 2006 a petition with the Public Service Commission for a certificate of convenience and necessity to expand the plants. In PSC Case Number 06-0340-PSD-CN, the Sewer District requested the authority to immediately double the capacities of the Inwood and Baker Heights Wastewater treatment plants to 1.5 million gpd (gallons per day) and 1.8 million gpd, respectively, while constructing additional tank capacity (without equipment) which would permit the Sewer District to quickly expand the plants in the future to 2.25 million gpd and 2.7 million gpd, respectively.

By a Commission Order dated August 11, 2006, the Commission approved the Inwood and Baker Heights certificates of convenience and necessity, authorized the Sewer District to immediately expend up to \$2,500,000.00 of its collected CIFs for the projects and further authorized a new form of financing proposed by the Sewer District for the balance of the project costs. In particular, the Commission authorized the Sewer District to utilize revenues derived from the CIFs as the primary source of repayment of principal and interest for the indebtedness. Commission Order dated August 11, 2006 in PSC Case Number 06-0340-PSD-CN.

The public financing which resulted from the Inwood and Baker Heights expansion projects has been designated as Berkeley County Public Service Sewer District "Series 2006 A CIF Bonds" ("CIF Bonds"). The financing is a conventional public issue, in an amount in excess of \$15,000,000.00, financed for a 20 year term at 4.38% interest. The outstanding

balance as of June 30, 2010, was \$13,915,000.00, and the annual debt service payments total \$1,219,269.00 (a little more than \$100,000.00 per month). The District pledged its CIF revenues as the primary security for repayment of the bond indebtedness.

[Note: In PSC Case No. 06-0375-PWD-CN, the Water District also obtained approval from the PSC to finance a \$20 million Bond Anticipation Note (“BAN”) for a water project. The PSC authorized the Water District to repay the principal of the BAN with CIF proceeds].

CIF Collections & Balances

All CIFs collected and retained by the Sewer District from inception in 2005 to May 9, 2012 total \$11,875,288.00. After disbursements for projects approved by the PSC and the debt service for the Series 2006 A CIF Bonds, the Sewer District retains a balance of \$1,067,353.22 in its CIF account.

Faircloth Agreements with the Sewer District

In PSC Case No. 01-0934-PSD-PC, the Berkeley County Public Service Sewer District submitted for approval a Cooperative Venture Agreement (“COVA”) executed by Complainant Faircloth for the Elizabeth Station Subdivision (“Subdivision”). Pursuant to the terms of the COVA, Faircloth agreed to build the sewer infrastructure required within the Subdivision property and to convey said improvements to the Sewer District, free of charge. By entering into the COVA agreement, the Complainant expressly waived the provisions of Sewer Rule 5.5 (designated as Sewer Rule 5.3, at the time). 150 CSR 5-5.5.

In PSC Case No. 01-1247-PSD-PC, the Sewer District submitted for approval an Alternate Main Line Extension Agreement (“AMLEA”) executed by Faircloth for the Elizabeth Station Subdivision. Pursuant to the terms of the AMLEA, Petitioner Faircloth

agreed to build the “off-site” sewer infrastructure required to extend sewer utility service to the Subdivision and to convey said improvements to the Sewer District for the amount of the Complainant’s reasonable costs incurred in constructing the same. By entering into the AMLEA, the Complainant expressly waived the provisions of Sewer Rule 5.5 (designated as Sewer Rule 5.3, at the time). 150 CSR 5-5.5.

The Public Service Commission approved the COVA agreement, AMLEA and a funding package proposed by the Sewer District in a Recommended Decision dated June 19, 2003, which became Final on July 9, 2003. On August 14, 2003, the Sewer District closed on a State Revolving Fund financing and paid Faircloth for the off-site sewer improvements pursuant to the terms of the AMLEA in the amount of \$225,629.00.

II. SUMMARY OF ARGUMENT

A. The Public Service Commission possesses the authority to authorize Capacity Improvement Fees under its broad powers to regulate the practices, services and rates of public utilities.

B. A Capacity Improvement Fee is a Fee, not a tax, which requires developers to pay only a portion of the cost of supplying service to a development. CIFs are similar to tap fees and other fees which do not have specific statutory authorization, but which have been upheld and approved by this Court.

C. The Local Powers Act Does Not Govern the Application of Capacity Improvement Fees, because it applies specifically to County Commissions. Public Service Districts are governed under a separate statutory scheme.

1. CIFs are not “impact fees” under the Local Powers Act.
2. Public Service Districts are not agents of the County Commission. On the contrary, Public Service Districts are political subdivisions of the State of West Virginia separate from Counties.

D. The Community Infrastructure Investment Project Act is unrelated to Capacity Improvement Fees as recognized by the Public Service Commission, and therefore, does not conflict with the application of such fees.

E. The Petitioner is not entitled to a refund of any CIFs paid prior to May 9, 2012, the date of the Commission Order terminating the CIFs, because tariff changes are legislative in nature and may only be made prospectively.

F. Petitioners failed to file their appeal within thirty (30) days of the date of the May 9, 2012 Commission Order and their appeal should be denied as a result.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the issues on appeal have been authoritatively decided below and the facts and legal arguments are adequately presented in the briefs and record on appeal. Nonetheless, as this matter is already scheduled for oral argument on January 16, 2012, by the terms of the Scheduling Order entered by the West Virginia Supreme Court of Appeals on September 27, 2012, the Respondent Sewer District does not waive its right to participate in oral argument.

IV. ARGUMENT

In the Appellants' (Petitioners') Brief for Appeal, Petitioner Faircloth assigns error to the Commission Order of May 9, 2012 on jurisdictional grounds, as well as the manner in which the PSC applies and defines its own criteria for the approval of Capacity Improvement Fees. This brief will address the jurisdictional issues, and the effective termination date of the Capacity Improvement Fees.

A. **THE PUBLIC SERVICE COMMISSION POSSESSES THE AUTHORITY TO AUTHORIZE CAPACITY IMPROVEMENT FEES**

This Court has previously recognized that the Public Service Commission was created in order to regulate the practices and rates of all of the public utilities in the state. For example, in the case of *Berkeley County Public Service Sewer District v. The Public Service Commission*, 204 W.Va. 279, 512 S.E.2d 201 (1998), the Supreme Court of Appeals found that the Legislature enacted Chapter 24 of the Code for an express legislative purpose: "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." W.Va. Code §24-1-1(a) (1986). (204 W.Va. 286, 512 S.E.2d 208)

The Public Service Commission has jurisdiction over all public utilities operating in this state under the statutory scheme established by the Legislature. Both Districts were created under West Virginia Code §16-13A-1 *et seq.* and, as such, are public utilities providing water and sewer service in Berkeley County.

As part of the statutory scheme relating to the jurisdiction of the PSC over public service districts, West Virginia Code §16-13A-9, states in pertinent part as follows:

The board [of the district] shall establish rates, fees and charges for the services and facilities it furnishes, which shall be sufficient at all times, notwithstanding the provisions of any other law or laws, to pay the cost of maintenance, operation and depreciation of the public service properties and principal of and interest on all bonds issued, other obligations incurred under the provisions of this article and all reserve or other payments provided for in the proceeding which authorize the issuance of any bonds under this article. The schedule of the rates, fees and charges may be based upon:

* * *

- (B) The number and kind of fixtures connected with the facilities located on the various premises;
- (C) The number of persons served by the facilities;
- (D) Any combination of paragraphs (A) (B) and (C) of this subdivision; or
- (E) May be determined on any other basis or classification which the board may determine to be fair and reasonable, taking into consideration the location of the premises served and the nature and extent of the services and facilities furnished.

The above-quoted provision must be read in the context of the overriding authority of the PSC over public utilities under Chapter 24 of the West Virginia Code. Through Chapter 24, the PSC has ultimate authority for the rates and charges of all public utilities; including public service districts. To that effect, West Virginia Code §24-2-3 states: [t]he commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities”

It was in the context of this statutory scheme that the PSC approved the CIFs for the Districts. The Districts’ CIFs are charges contained within the tariffs of the Districts which

were approved by the Commission under the provisions of Chapter 24 of the West Virginia Code through the Commission's tariff process.

The Commission approved the Water District's CIF initially in a tariff application in Case No. 04-1767-PWD-T as a method of ratemaking specifically authorized by West Virginia Code §24-2-3. That case was properly filed with notice of the opportunity for interested members of the public to intervene having been published as required by law. In approving a stipulated settlement of that case, where the Joint Stipulation was entered into not only by the Water District and the PSC Staff, but also the Eastern Panhandle Homebuilders Association, Inc. which had intervened in the case, the Commission referred to prior CIF proceedings where the Commission had found that:

. . . approval of the CIF was consistent with the Commission's 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. (Order entered August 12, 2005 at 5)

The Commission's subsequent approval of an increase in the Water District's CIF was also in the context of a tariff change proceeding which was properly noticed to the public. (Case No. 07-0167-PWD-T, Order entered August 15, 2007)

The Commission similarly approved the Sewer District's CIF in a tariff case designated as PSC Case No. 04-0153-PSD-T. The case was properly filed and noticed pursuant to PSC regulations and the public and developers were afforded the opportunity to participate. The case was even reopened on the specific issue of the timing of payment of the CIF, at the behest of the same Home Builders Association that participated in the Water District's CIF tariff case. The Sewer District subsequently reached an agreement with the

Home Builders Association that the CIF would be charged later in the process, at the time a developer applies for a building permit, over the objection of PSC Staff. The trigger point agreed between the Home Builders Association and Sewer District was approved in a Commission Order dated March 28, 2005, and the Sewer District began collecting the CIF after that date. The Commission's subsequent approval of an increase of the sewer CIF was similarly in the context of a tariff change proceeding which was properly noticed to the public. (PSC Case No. 06-0016-PSD-T, Commission Order entered October 24, 2006).

As stated by Mr. Faircloth in his testimony before the PSC, he was aware of the proposal and adoption of the CIFs from the outset, and he paid such CIF's for four (4) years, but did not seek to challenge the adoption of CIFs until 2009.

Upon approval of the CIFs and their subsequent increase, the CIFs became a part of the Districts' tariffs, together with other rates, fees and charges authorized by the Commission. In both instances, the Commission determined that the implementation of the CIF was a reasonable method to balance the interests of current rate payers with the interests of new customers who were found to be responsible for the need for increased capacity.

This is not the first time that the Supreme Court of Appeals has had to consider the scope of the PSC's rate-making authority and the various forms of rates and charges within its authority.

In the case of Columbia Gas of West Virginia, Inc. v. Public Service Commission, 311 S.E.2d 137 (1983), the Court stated:

The Public Service Commission makes rates on a continuous basis from the standards in W.Va. Code, 24-1-1(a) and (b). Specifically, Section (a)(4) requires that "rates and charges for utility services [be] just, reasonable, applied without unjust discrimination or preference and

based primarily on the cost of providing these services.” **Subsection (b) charges the Public Service Commission with responsibility for “appraising and balancing the interests of current and future utility service customers, the general interests of the State’s economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.”** 311 S.E.2d 144 (Emphasis added)

In the case of State ex rel. Water Development Authority v. Northern Wayne County Public District, 195 W.Va. 135, 464 S.E.2d 777 (1995), the Court made it clear that the PSC’s rate making authority applied to charges of a public service district which, similar to those that are at issue here, related to the impact of the addition of new customers on the rates and services of public service districts. In the Northern Wayne case, the West Virginia Water Development Authority (“WDA”) sought to protect its investment in the facilities of the public service district by imposing a tap fee for new customers upon that district. The district had, on several occasions, unsuccessfully attempted on its own to increase its tap fee in proceedings before the PSC. The WDA, not being satisfied with the action of the PSC, attempted to cause the public service district to increase its tap fee under the WDA’s own statutory authority without regard to the PSC’s rulings. In rejecting the attempt by the WDA, the Court, in Syllabus Point No. 4, stated:

W.Va. Code, 24-2-3 (1983), clearly and unambiguously gives the Public Service Commission the power to reduce or increase rates whenever it finds that the existing rate is unjust, unreasonable, or unjustly discriminatory or other wise in violation of any provision of W.Va. Code, 24-1-1 et seq.” Syl. Pt 2, Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993).

Petitioner Faircloth’s allegation that there is no statutory basis for the PSC to authorize CIFs because they do not fit within his definition of rates subject to the PSC’s statutory authority is clearly wrong.

B. A CAPACITY IMPROVEMENT FEE IS A FEE, NOT A TAX.

The Petitioner also alleges that CIFs are unlawful because they are not actually a fee, but an assessment in the nature of a tax. Numerous fees and charges are contained in the PSC-approved tariffs of West Virginia utilities including: tap fees, disconnection and reconnection charges, delayed payment penalties, and administrative fees.

There is no specific statutory reference to tap fees for public service districts in either Chapter 13A or Chapter 24 of the *Code*. Nevertheless, in the *Northern Wayne* case, *supra*, the Court recognized that it was within the PSC's rate making authority to determine the amount of a tap fee that the district would be permitted to charge and such was not under the authority of the WDA nor any other agency of government.

Likewise, there is no specific statutory authority for the imposition of disconnection and reconnection fees. Nevertheless, in the case of *Public Service Commission v. Town of Fayetteville*, 212 W.Va. 427, 573 S.E.2d 338 (2002), the Court recognized the PSC's authority over reconnection fees. (See 212 W.Va 433 and 573 S.E.2d 344)

Both tap fees and reconnection charges are one time fees imposed upon customers who are themselves causing the utilities to incur expenses in order to provide service to them. The use of such fees is authorized by the PSC, not as an assessment in the nature of a tax as found by the Court below, but rather as a means of balancing the rate impact of the cost being caused by the individual customer. In the case of CIFs and tap fees, the cost causer is the new customer. In the case of the reconnection fee, the cost causer is the delinquent customer whose service has been disconnected. In each of these situations, the fee is not intended to

recover the entire cost being imposed by the cost causer from that individual, but rather to balance the cost between the cost causer and the remaining customers.

The fact that the PSC is authorized to determine that CIFs are an appropriate way to balance the interests of current and future customers of the Districts is consistent with prior rulings of the Court.

In Syllabus Pt. 1 in VEPCO v. Public Service Commission, 161 W.Va. 423, 242 S.E.2d 698 (1978), our Supreme Court of Appeals stated:

The Public Service Commission may employ such methods for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia consumers good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia.

In the case of Central West Virginia Refuse v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993), the Court stated at Syllabus Pt. 2:

W.Va. Code, 24-2-3 (1983), clearly and unambiguously gives the Public Service Commission the power to reduce or increase rates whenever it finds that the existing rate is unjust, unreasonable, insufficient, or unjustly discriminatory or otherwise in violation of W.Va. Code, 24-1-1, *et seq.*

In the case of C&P Telephone Co. v. City of Morgantown, 144 W.Va. 149, 107 S.E.2d 489 (1959) the Court held:

The paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the Public Service Commission has been recognized by this Court. *Lockard v. City of Salem*, 127 W.Va. 237, 32 S.E.2d 568; *City of Mullens v. Union Power Co.*, 122 W.Va. 179, 7 S.E.2d 870; *Mountain State Water Co. v. Town of Kingwood*, 122 W.Va. 374, 9 S.E.2d 532; *Ex Parte Dickey*, 76 W.Va. 576, pt. 3 syl., 85 S.E. 781; *City of Benwood v. Public Service Commission*, 75 W.Va. 127, pt. 5 syl., 83 S.E. 295, L.R.A.1915C, 261;

City of Wheeling v. Natural Gas Co., 74 W.Va. 372, pt. 6 syl., 82 S.E. 345. (at 160, 496)

Nonetheless, Petitioner Faircloth suggests that a Capacity Improvement Fee is still a tax based upon several cases which he cites from other jurisdictions. Although the West Virginia Supreme Court has not directly addressed the nature of CIFs, it has defined the difference between a tax and a fee which is contrary to the holdings in the foreign jurisdiction cases cited by the Petitioner. In *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996), the Court stated that the “primary purpose of a tax is to obtain revenue for the 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.” 196 W.Va. 466. As demonstrated previously, CIFs represent an allocation to developers of a portion of the cost of new sewer and water connections to alleviate some of the burden upon existing rate payers when the Districts are required to prematurely construct additional capacity to accommodate the high rate of growth driven by development. As a result, the sewer and water CIFs are clearly fees under West Virginia law and should be permitted and regulated by the Public Service Commission.

C. THE LOCAL POWERS ACT, W.VA. CODE §7-20-1 ET SEQ. DOES NOT GOVERN THE APPLICATION OF CAPACITY IMPROVEMENT FEES.

In the Petitioner’s brief, Faircloth equates Capacity Improvement Fees with impact fees under the Local Powers Act, West Virginia Code §7-20-1 et seq. From this assumption, he argues that CIFs cannot be charged by the Districts because the Districts are agencies of the County Commission (now County Council), and Berkeley County has not adopted a

comprehensive zoning ordinance as required by the Local Powers Act. Faircloth's assumptions and arguments regarding the applicability of the Local Powers Act to the Districts, however, are clearly wrong.

1. **CIFs are not "impact fees" as that term is used in the Local Powers Act, W.VA. Code §7-20-1 et seq.**

The term "impact fees" is defined in the Local Powers Act at West Virginia Code §7-20-3(g) as follows:

(g) "Impact fees" means any charge, fee, or assessment levied as a condition of the following: (1) Issuance of a subdivision or site plan approval; (2) issuance of a building permit; and (3) approval of a certificate of occupancy, or other development or construction approval when any portion of the revenues collected is intended to fund any portion of the costs of **capital improvements for any public facilities or county services not otherwise permitted by law.** An impact fee does not include charges for remodeling, rehabilitation, or other improvements to an existing structure or rebuilding a damaged structure, provided there is no increase in gross floor area or in the number of dwelling units that result therefrom. [Emphasis added].

From this definition, it is clear that when used in the context of the Local Powers Act, the term "impact fees" is directly related to the term "capital improvements" as defined in that same Act and does not include CIFs which are "otherwise permitted by law." The term "capital improvements" is defined at West Virginia Code §7-20-3(a) in relevant part as follows:

- (a) "**Capital improvements**" means the following public facilities or assets that **are owned, supported or established by county government:**
- (1) Water treatment and distribution facilities;
 - (2) Wastewater treatment and disposal facilities;

(3) Sanitary sewers;

* * *
[Emphasis added].

Thus, in order to be considered an “impact fee” for the purposes of the Local Powers Act, CIF revenues would have to be intended to fund the costs of public facilities owned, supported or established by county government.

The Sewer District agrees that CIFs are used to fund the construction of water treatment and distribution facilities, wastewater treatment and disposal facilities, and sanitary sewers. However, the Respondent Sewer District disagrees with the conclusion reached in the Petitioner’s brief. On the contrary, the facilities being funded by CIFs are not owned, supported, or established by county government.

County Commissions have specific authority to own and operate water and wastewater systems. *West Virginia Code* §7-1-3a provides in relevant part:

In addition to all other powers and duties now conferred by law upon county commissions, such commissions are hereby authorized and empowered to install, construct, repair, maintain and operate waterworks, water mains, sewer lines and sewage disposal plants in connection therewith within their respective counties: . . .

And, *West Virginia Code* §7-1-3g provides:

In addition to all other powers and duties now conferred by law upon county courts, such courts are hereby empowered to acquire, by purchase, right of eminent domain, lease, gift, or otherwise, and to operate and maintain, sewerage systems and sewage treatment plants, and to pay the cost of operation and maintenance thereof out of a special fund to be derived from sewerage service fees paid by the users of such sewerage system or sewage treatment plant: . . .

None of the CIF revenues being collected by the Districts are being applied to facilities owned, supported, or established by the Berkeley County Commission under the County Commission's authority established in Chapter 7 of the West Virginia Code. Rather, all of the facilities being supported by the CIF revenues collected by the Districts are owned, supported and established by the two Districts under their independent statutory authority.

The creation and operation of water systems and sewer systems pursuant to *W. Va. Code §16-13A-1, et seq.* is separate and distinct from the authority of a county commission to own and operate a water or sewer system pursuant to Chapter 7, Article 1 of the Code. There simply is no statutory connection between the two.

The statutory scheme concerning public service districts was initially created by an act of the Legislature in 1953. The Berkeley County Public Service Sewer District was created in 1979 and has expanded to the point where it is now one of the two largest public service districts in West Virginia. The Sewer District has constructed facilities to serve more than 19,000 customers and has borrowed more than \$120 million to build multiple wastewater treatment facilities and hundreds of miles of collection lines, secured by bonds issued in the name of the District. The County Commission of Berkeley County is not obligated under any of the Sewer District's debt obligations, and the Sewer District has never taken any action that has obligated the County Commission in any way.

The Berkeley County Public Service Water District has also incurred tens of millions of dollars in debt in its own name to construct and operate water treatment and distribution facilities. Similarly, the County Commission of Berkeley County is not obligated under any of the Water District's debt.

The CIF revenues of the two public service districts are being collected for the purpose of constructing, and for paying debt service related to said construction, facilities owned, supported and established by the Districts, not the county commission. They are fees which have been approved by the Public Service Commission within its statutory authority. Under the statutory definition of “capital improvements” under the Local Powers Act, the CIFs are not “impact fees”, and the districts are not subject to the Local Powers Act.

2. Public Service Districts are not agencies of County Commissions but are separate political subdivisions as clearly set forth in West Virginia Code §16-13A-3.

Petitioner Faircloth has previously argued that the Respondent Districts are agencies of the Berkeley County Commission and are not separate political subdivisions. Not only is this result clearly at odds with the specific language of the statute under which the Sewer and Water Districts were created, it is incompatible with the facts surrounding the operations of public service districts in this state and the law of agency.

The title of West Virginia Code §16-13A-3 reads: “**District to be public corporation and political subdivision; powers thereof; public service boards.**” (Emphasis added) Then, in the very first sentence of that section, it states: “[f]rom and after the date of the adoption of the order creating any public service district, **it is a public corporation and political subdivision of the state . . .**” (Emphasis added). It is hard to imagine a more clear statement of legislative intent than the language that is highlighted above. Nevertheless, Petitioner Faircloth has previously argued that the Respondent Districts are not separate political subdivisions and that they are agencies of the County Commission. He was incorrect in both respects.

In the recent decision of Pingley, et al. v. Huttonsville Public Service District, 691 S.E.2d 531 (W.Va., 2010), the Court observed that, “[l]ike a municipality, a public service district is a public corporation and political subdivision of this State.” McCloud v. Salt Rock Water Pub. Serv. Dist., 207 W. Va. 453, 458, 533 S.E.2d 679, 684 (2000). See W. Va. Code § 16-13A-3 (2002) (Repl. Vol. 2006) (“From and after the date of the adoption of the order creating any public service district, it is a public corporation and political subdivision of the state, but without any power to levy or collect ad valorem taxes.” Pingley, supra.

In the case of Zirkle v. Elkins Road Public Service District, 655 S.E.2d 155, 159 (2007), the Court recognized that, as political subdivisions defined in W.Va. Code §29- 12A-3(c), public service districts are covered by the Governmental Tort Claims and Insurance Reform Act. A review of that statute reveals that public service districts are listed separately from county commissions as political subdivisions.

It is well-settled in West Virginia law that:

One of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent. Syllabus Point 3, Teter v. Old Colony, 190 W.Va. 711, 441 S.E.2d 728 (1944) cited with authority at Syllabus Point 5, Timberline Four Seasons Resort Management Co., Inc., v. Herlan, 223 W.Va. 730, 679 S.E.2d 329 (2009)

Here, the county commission, after the creation of a public service district, and the approval of the creation of the district by the PSC, has virtually no control over the conduct of the district or its board members.

The Petitioner has previously cited various statutory provisions to support his agency argument. Nonetheless, the provisions cited in support of Faircloth’s agency argument fail to establish any indicia of control of public service districts by county commissions to justify a

conclusion that they are agencies of county commissions. The sections previously cited by Faircloth to support an agency argument follow:

1. West Virginia Code §16-13A-2 which authorizes county commissions to create, enlarge, reduce, merge, dissolve or consolidate a public service district;
2. West Virginia Code §16-13A-2(g) which prohibits districts from entering into any agreement that infringes upon, impairs, abridges or usurps the powers of the county commission;
3. West Virginia Code §16-13A-3 which authorizes county commissions to appoint board members;
4. West Virginia Code §16-13A-3a which authorizes a county commission to petition the circuit court for the removal of a board member;
5. West Virginia Code §16-13A-4(f) which authorizes a county commission to change the name of a public service district; and
6. West Virginia Code §16-13A-18a which requires public service districts to obtain the approval of the county commission prior to selling, leasing or renting its system.

A review of these sections discloses that, in the case of W.Va. Code §§16-13A-2, 4(f), and 18a, the actions referred to cannot be undertaken by either the public service district or the county commission without the approval of the PSC. Yet, there is no suggestion that the approval authority referred to in those sections causes public service districts or county commissions to be agencies of the PSC.

In the case of W.Va. Code §16-13A-2(g), public service districts are indeed prohibited from entering into agreements that infringe upon, impair, abridge or usurp the powers of the county commission. But this is a legislative restriction on their authority which in no way

constitutes an exercise of control of the actions of the districts by the county commission.

Under *W. Va. Code* §16-13A-3, the board members of public service districts are appointed by the county commission; however, there is no further control imposed upon the board member after such appointment. In fact, as revealed by *W.Va. Code* §16-13A-3a, the county commission cannot even remove the board members after they have been appointed. In order to remove the board members, the county commission must petition the circuit court and even then, the board members can only be removed for limited reasons.

These statutory references previously relied upon by the Petitioner fail to establish that public service districts are under the control of, or agencies of, county commissions. Public service districts are not agencies of county commissions and county commissions do not own, support or establish the facilities that are funded by CIFs, through which the Districts provide service to the public.

As provided by *West Virginia Code* §16-13A-3, the Districts are public corporations which operate as separate political subdivisions. They own and operate their public service facilities through which they provide service. They establish rates for the payment of the capital costs of the construction of public service facilities and the operation and maintenance of such facilities. Most importantly for the purposes of this case, the Districts have issued revenue bonds for the construction of such facilities under the authority of *W. Va. Code* §16-13A-13. It is the CIFs which have been approved by the PSC which form part of the revenue stream which is responsible for the retirement of the bonds issued by the Districts for the benefit of their customers. None of these activities of the Districts are subject to the control of the county commission. The title to all of the property of the Districts is held in the name

of the Districts. The rates of the Districts are not subject to the review and approval of the county commission. Finally, the bonds of the Districts which are supported by CIF revenues are issued in the name of the District without the review or approval of the county commission and the county commission has no rights, obligation or duty with regard to the use of the proceeds of such bonds, or the repayment thereof. There is no agency relationship between the Districts and the county commission.

**D. CAPACITY IMPROVEMENT FEES ARE NOT RELATED TO THE
COMMUNITY INFRASTRUCTURE INVESTMENT PROJECT ACT,
W. VA. CODE §22-28-1 ET SEQ.**

The Petitioner argues that W. Va. Code §22-28-1 et seq. is in conflict with the PSC orders approving CIFs; and further, that the Legislature has eliminated the imposition of CIFs on developers such as Faircloth, who choose to build and donate improvements under the Community Infrastructure Investment Project Act. It is apparent that the Petitioner understands neither the purpose nor the function of the Community Infrastructure Investment Project Act, and further he does not understand the Legislative scheme in which it applies. In short, the Community Infrastructure Investment Project Act is unrelated to CIFs in general, and it is unrelated to Faircloth and his activities in particular.

First, the Community Infrastructure Investment Project Act relates to the construction and transfer of project facilities as defined in the Act, pursuant to a “community infrastructure investment agreement” which has been approved by the Secretary of the Department of Environmental Protection.” W. Va. Code §§22-28-2 and 22-28-4. Notwithstanding the fact that the Community Infrastructure Investment Project Act was enacted in 2005, two years

after Faircloth transferred his sewer assets to the Respondent Sewer District, there have been no community infrastructure agreements approved by the Secretary, much less one between Faircloth and either of the Respondent Districts.

Second, “community infrastructure investment projects” under the Community Infrastructure Investment Project Act, are simply one means of building public service district infrastructure. It is not the means by which the Districts in Berkeley County have elected to build their systems. Rather, the Districts’ facilities which are subject to CIFs have been certificated by the PSC under the provisions of West Virginia Code §§16-13A-25 and 24-2-11. In fact, the sewer facilities which Faircloth constructed and transferred to the Respondent Sewer District in 2003 were the subject of a COVA agreement and AMLEA agreement which were approved by the Public Service Commission pursuant to Sewer Rule 5.5 (formerly 5.3), 150 CSR 5-5.5.

Projects that are subject to the Infrastructure Act are approved by the Secretary of the Department of Environmental Protection and are exempt from the requirements of West Virginia Code §§16-13A-25 and 24-2-11. As stated previously, the Secretary has not approved any community infrastructure projects for the Districts or for the Plaintiff. Thus, there is no basis to conclude that the CIFs approved by the PSC are in any way in conflict with the Community Infrastructure Investment Project Act. On the contrary, the Community Infrastructure Investment Project Act is a parallel procedure to Sewer Rule 5.5 under the Public Service Commission’s regulations and neither the Respondent Districts nor Petitioner Faircloth has ever attempted to use that parallel process.

E. REMOVAL OF CAPACITY IMPROVEMENT FEES FROM THE DISTRICTS' TARIFFS MAY ONLY BE ENFORCED PROSPECTIVELY.

Assuming that he is unsuccessful on his jurisdictional claims, Petitioner Faircloth makes an alternative argument that the termination date for the CIFs should apply retroactively to an undetermined date prior to May 9, 2012 – the date of the Commission Order which terminated the Respondent District's CIFs, below. This Court and the Commission, however, have consistently held that *W. Va. Code § 24-2-3* permits rate changes to be prospective, only, not retroactive. *Virginia Electric and Power Co. v. PSC*, 248 S.E.2d 322 (W.Va. 1978). In *C & P Telephone Company v. PSC*, 171 W. Va. 494, 505-506, 300 S.E.2d 607 (1982), this Court stated:

It is well established that the exercise by the Commission of its rate making authority is primarily a legislative function, *see, e.g. Randall Gas Co. v. Star Glass Co.*, 78 W. Va. 252, 88 S.E. 840 (1916); *State ex rel. Public Service Commission v. Baltimore and Ohio R.R.*, 76 W. Va. 399, 85 S.E. 714 (1915), and that by its nature legislative action operates prospectively and not retroactively. This concept is inherent in our statute establishing the general power of the Commission to “fix reasonable rates... to be followed in the future.” *W. Va. Code §24-2-3* (1980 Replacement Vol.); *see* Syllabus Point 3, *Virginia Electric and Electric Power Co. v. Public Service Commission*, 162 W. Va. 202, 248 S.E.2d 322 (1978). Generally, retroactive rate making occurs when a utility is permitted to recover an additional charge for past losses, or when a utility is required to refund revenues collected, pursuant to then lawfully established rates.

In order for the Petitioner to receive a refund of CIFs paid prior to May 9, 2012, the Commission would be required to retroactively alter the tariffs in existence at that time. As a result, the effect of the Commission Order terminating CIFs may only operate prospectively.

F. PETITIONERS FAILED TO FILE THEIR APPEAL WITHIN THE STATUTORY PERIOD PROVIDED IN W. VA. CODE §24-5-1

Under *W. Va. Code §24-5-1*, an appeal of a final order of the Public Service Commission must be perfected within thirty (30) days of the date of issuance of the order. Petitioner Faircloth is appealing the ruling of the Commission Order dated May 9, 2012. Although the Districts subsequently filed timely motions for reconsideration, the Petitioner did not. As a result, the last day for the Petitioner to timely file an appeal was on or about June 8, 2012.

In light of the foregoing, the Petitioner's appeal should be denied on the grounds that it is untimely.

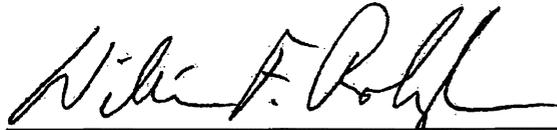
G. CONCLUSION

For the reasons set forth above, the Berkeley County Public Service Sewer District respectfully requests that Petitioner's appeal be denied and that the Orders of the Public Service Commission in Case No. 09-0961-PSWD-GI, be affirmed.

Respectfully submitted,

BERKELEY COUNTY PUBLIC
SERVICE SEWER DISTRICT

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October 30, 2012

CERTIFICATE OF SERVICE

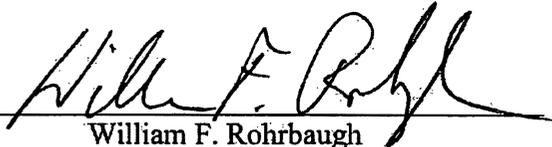
I, William F. Rohrbaugh, counsel for Petitioner Berkeley County Public Service Sewer District, do hereby certify that copies of the foregoing "Respondent's Brief – Berkeley County Public Service Sewer District" have been served upon the following counsel of record via First Class U.S. Mail, postage prepaid, on this 30th day of October, 2012:

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