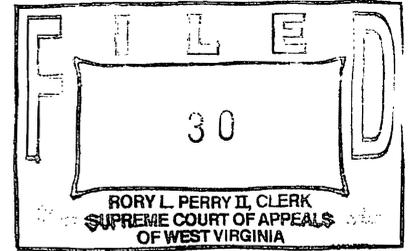


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

Larry V. Faircloth Reality, Inc., a corporation;
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



**INITIAL BRIEF ON BEHALF OF THE
BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT**

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October 30, 2012

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE BELOW1

II. STATEMENT OF THE FACTS OF THE CASE2

III SUMMARY OF ARGUMENT.....4

IV DISCUSSION OF LAW.....4

A. THE PUBLIC SERVICE COMMISSION HAS THE AUTHORITY TO ESTABLISH A CAPACITY IMPROVEMENT FEE.....4

 1. *The Capacity Improvement Fee is not a tax.*7

B. THE LOCAL POWERS ACT DID NOT INVALIDATE BERKELEY COUNTY PUBLIC SERVICE SEWER AND WATER DISTRICTS’ CAPACITY IMPROVEMENT FEES......8

 1. *A public service district is not an agent of the County Commission.*9

 2. *The Local Powers Act does not provide for impact fees that fund the facilities of public service districts.*12

C. THE COMMUNITY INFRASTRUCTURE INVESTMENT PROJECT ACT DOES NOT RECOGNIZE THE LOCAL POWERS ACT AS THE SOLE AUTHORITY TO IMPOSE CAPITOL IMPROVEMENT FEES......13

D. THE REMOVAL OF THE CAPACITY IMPROVEMENT FEES FROM THE TARIFFS OF THE DISTRICTS COULD BE PROSPECTIVE ONLY.....14

E. PETITIONERS FAILED TO FILE THEIR APPEAL WITHIN THE STATUTORY PERIOD PROVIDED IN W.VA. CODE §24-5-1......15

F. ANY UNUSUAL DELAY IN THE RESOLUTION OF THE CASE BELOW WAS CAUSED BY PETITIONERS......17

VII CONCLUSION18

CERTIFICATE OF SERVICE20

TABLE OF AUTHORITIES

Cases

<i>Berkeley County Public Service Sewer District</i> , Case No. 04-0153-PSD-T (August 31, 2004).....	2, 3
<i>Berkeley County Public Service Water District</i> , Case No. 04-1767-PWD-T (August 12, 2005) ...	4
<i>C & P Telephone Company v. PSC</i> , 171 W. Va. 494, 505-506, 300 S.E. 2d 607 (1982)	14
<i>City of Huntington v. Bacon</i> , 196 W.Va. 457, 473 S.E.2d 743 (1996).....	8
<i>General investigation into capacity improvement fees charged by the Berkeley County Public Service Sewer District and Berkeley Co. PSD, dba Berkeley County PSWD</i> , Case No. 09-0961-PSWD-GI (May 9 and August 7, 2012)	3
<i>Jefferson County PSD and Charles Town Utility Board</i> , Case No. 08-0322-PSD-S-PC (January 14, 2009)	2
<i>Jefferson County PSD</i> , Case No. 03-1490-PSD-T-PC	2
<i>Jefferson County PSD</i> , Case No. 06-0413-PSD-T-PC	2
<i>Public Service Commission v. Town of Fayetteville</i> , 212 W.Va. 427, 573 S.E.2d 338 (2002).....	8
<i>State ex. rel. Water Development Authority v. Northern Wayne County Public Service District</i> , 195 W.Va. 135, 464 S.E.2d 777 (1995).....	6
<i>Union Williams Public Service District</i> , Case No. 95-0181-PWD-GI.....	2
<i>Virginia Electric and Power Co. v. PSC</i> , 248 S.E.2d 322 (W.Va. 1978).....	14
<i>Warm Springs Public Service District</i> , Case No. 93-0526-PWD-CN (April 15, 1994).....	9
<i>Willow Spring Public Service Corporation</i> , Case No. 06-1180-S-CN-PW-PC (May 15, 2007) ...	3

Statutes

<i>W.Va. Code</i> §13-1-20	11
<i>W.Va. Code</i> §13-1-4	11
<i>W.Va. Code</i> §16-13-2(g).....	10
<i>W.Va. Code</i> §16-13-9	5,6
<i>W.Va. Code</i> §16-13A-1 et. seq.	10
<i>W.Va. Code</i> §16-13A-11.....	11
<i>W.Va. Code</i> §16-13A-12.....	12
<i>W.Va. Code</i> §16-13A-13.....	11
<i>W.Va. Code</i> §16-13A-18(a)	9
<i>W.Va. Code</i> §16-13A-3a.....	9, 10
<i>W.Va. Code</i> §16-13A-4(f).....	9
<i>W.Va. Code</i> §16-13A-8.....	11
<i>W.Va. Code</i> §22-28-1 et seq.	14
<i>W.Va. Code</i> §22-28-3(a)	14
<i>W.Va. Code</i> §22C-1-7.....	6
<i>W.Va. Code</i> §24-2-2	6
<i>W.Va. Code</i> §24-2-3	5, 17, 14
<i>W.Va. Code</i> §24-2-4(a)	7
<i>W.Va. Code</i> §24-2-4(b).....	5
<i>W.Va. Code</i> §29-12A-1 et seq.	10
<i>W.Va. Code</i> §6-9-1 et seq.	11
<i>W.Va. Code</i> §6-9-1a(g).....	11
<i>W.Va. Code</i> §7-1-3(a).....	11
<i>W.Va. Code</i> §7-1-3(g).....	13

W.Va. Code §7-1-3a.....12
W.Va. Code §7-20-1 et. seq.8
W.Va. Code §7-20-38
W.Va. Code§16-13A-2.....11

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

LARRY V. FAIRCLOTH REALTY, INC.
a corporation, and
Larry V. Faircloth,
Petitioners,

No. 12-1023

vs.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA, In Re General Investigation
Into Capacity Improvement Fees Charged by
Berkeley County Public Service Sewer
District and Berkeley County Public Service
District, d/b/a Berkeley County Public Service
Water District, Case No. 09-0961-PSWD-GI

**INITIAL BRIEF ON BEHALF OF THE
BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT**

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

The Berkeley County Public Service Water District (“Water District”), in response to Petitioners’ Brief for Appeal, hereby respectfully requests that Petitioners’ appeal be denied and that the Orders of the Public Service Commission in Case No. 09-0961-PSWD-GI, be affirmed.

I. STATEMENT OF THE CASE BELOW

The Berkeley County Public Service Water District adopts, as if fully set forth herein, the Statement of the Case presented in the Public Service Commission’s Statement of Reasons.

II. STATEMENT OF THE FACTS OF THE CASE

By and large, Capacity Improvement Fees (“CIFs”) are a creature of the unusual growth in the demand for housing and declining utility service capacity of several of the northeastern most counties of West Virginia. *Jefferson County PSD*, Case No. 06-0413-PSD-T-PC, *Jefferson County PSD and Charles Town Utility Board*, Case No. 08-0322-PSD-S-PC (January 14, 2009). The Commission first considered CIFs in the mid-1990s and rejected them based on a lack of significant and unusual demand on existing utility capacity. In *Warm Springs Public Service District*, Case No. 93-0526-PWD-CN (April 15, 1994), the Commission denied a request for a CIF noting that although Morgan County had experienced significant growth from 1970-1980, growth had slowed throughout the 1980s, and therefore the CIF was not factually justified. In 1995, in *Union Williams Public Service District*, Case No. 95-0181-PWD-GI (Recommended Decision August 1, 1995; Final Order August 21, 1995), an Administrative Law Judge denied a request to implement a CIF finding that there was no showing that plant capacity would be depleted any time in the foreseeable future.

The Commission did not reject these initial requests for CIFs out of hand. Instead the Commission determined that a utility had to justify the need for a CIF by showing significant growth in demand with attendant depletion of plant capacity. *Jefferson County PSD*, Case No. 06-0413-PSD-T-PC, *Jefferson County PSD and Charles Town Utility Board*, Case No. 08-0322-PSD-S-PC (January 14, 2009).

In *Berkeley County Public Service Sewer District*, Case No. 04-0153-PSD-T (August 31, 2004), the Commission discussed the explosive growth in Berkeley County and determined that the growth had a measurable impact on available capacity. The Commission approved the Berkeley County CIF, but imposed strict and specific guidelines and limitations, including (i) a

required showing of population growth at a rate of 20% over a ten-year period and an expected future depletion of existing capacity reserves in five to seven years, (ii) limitations on the use of the CIF funds, and (iii) a requirement that CIFs be applied only to developers, as defined by the Commission.

The calculation of a reasonable CIF could not be arbitrary. It had to be cost based and employ acceptable models and/or methods similar but not limited to a model for CIFs developed by Georgia Tech. *Berkeley County Public Service Sewer District*, Case No. 04-0153-PSD-T (August 31, 2004). The Commission applied the CIFs to developers - the “cost-causers” driving the rapid depletion of treatment capacity. *General investigation into capacity improvement fees charged by the Berkeley County Public Service Sewer District and Berkeley Co. PSD, dba Berkeley County PSWD*, Case No. 09-0961-PSWD-GI (May 9 and August 7, 2012).

The Commission applied the same criteria in granting a CIF to the Jefferson County Public Service District in *Jefferson County PSD*, Case No. 03-1490-PSD-T-PC (March 28, 2005) and to Berkeley County Public Service Water District in *Berkeley County Public Service Water District*, Case No. 04-1767-PWD-T (August 12, 2005). The CIF approved for the Water District allowed the CIF to be used for twelve inch and larger transmission mains and to service debt payments, as well as upgrades and construction of treatment facilities.

In *Willow Spring Public Service Corporation*, Case No. 06-1180-S-CN-PW-PC (May 15, 2007), the Commission again reviewed prior CIF application cases and distilled a set of guidelines for use in its review of future CIF applications. With limitations and careful control, the Commission concluded that CIFs for future utility-wide requirements make sense when administered in a manner to recover a portion of the cost of future capacity additions made

necessary by significant and unusual development that causes existing capacity to run out before the end of the life cycle of water or sewer supply, treatment, or storage facilities.

In its CIF orders, the Commission gave notice that it intended to review periodically the CIFs and discontinue the use of the CIFs if the established criteria were not met. In this case, because the use of the CIFs was no longer justified, the Commission removed the CIFs from the respective tariffs of the Districts.

III SUMMARY OF ARGUMENT

A. The Public Service Commission has the authority to establish a Capacity Improvement Fee under its statutory right to set rates and charges.

B. The Local Powers Act does not invalidate a Capacity Improvement Fee of a public service district. That Act does not apply to public service districts.

C. Nothing in the Community Infrastructure Investment Project Act establishes the Local Powers Act as the sole authority to impose capitol improvement fees.

D. The removal of the capacity improvement fees from the tariffs of the Districts could be prospective only. The Public Service Commission cannot change rates retroactively.

E. Petitioners failed to file their appeal from the order which “aggrieved” them within the statutory period provided in *W.Va. Code* §24-5-1. That Order was issued on May 9, 2012 and should have been appealed within thirty (30) days.

F. Any delay in the case below was caused by Petitioners jumping to Circuit Court. Their failure to exhaust administrative remedies added two and a half years to the case.

IV DISCUSSION OF LAW

A. THE PUBLIC SERVICE COMMISSION HAS THE AUTHORITY TO ESTABLISH A CAPACITY IMPROVEMENT FEE.

Petitioners argued before the Public Service Commission (“PSC”) that the Commission was limited by *W.Va. Code* §24-2-3 to establishing “tariffs” and “rates” for public utilities, that a “tariff” was a document listing utilities services and “rates” as the price fixed for a commodity or service, and that a Capacity Improvement Fee (“CIF”) is not a “rate” under this definition and, therefore, the PSC cannot authorize it. In its Order of May 9, 2012, the Commission rejected that argument. It was correct to do so.

Appellant’s limited view of the PSC’s authority does not comport with the statutes establishing the PSC. While *W.Va. Code* §24-2-3 does refer to tariffs and rates, *W.Va. Code* §24-2-2 titled General Power of Commission to Regulate Public Utilities, states:

...the Commission may change any intrastate rate, charge, or toll which is unjust or unreasonable.... but in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost of the service...

W.Va. Code §24-2-3 states as follows:

The Commission shall have power to enforce, originate, establish, change and promulgate tariffs, rates, joint rates, tolls and schedules for all public utilities;

W.Va. Code §24-2-4(b), establishing the procedures for changing electric rates of natural gas cooperatives, telephone cooperatives and municipally operated utilities, refers throughout its body to “rates and charges.” The same is true for *W.Va. Code* §24-2-4(a), which establishes the procedures for changing rates for all other utilities.

More to the point of this case, *W.Va. Code* §16-13-9 enumerates the powers of a public service district (“PSD”) board, which includes the power to set “rates, fees, and charges.” Under the rate setting provisions of Chapter 24, district boards have always exercised that authority with approval of the PSC. Petitioners ignore this language in Chapter 16 to focus on a single

section of Chapter 24. Should Petitioners be correct in its restriction on PSC authority, however, the only way to interpret 16-13A-9's authorization of "fees and charges" would be to conclude that public service district boards could set "fees and charges" without PSC supervision. That would seriously distort the comprehensive regulatory scheme that this Court has held the Legislature established for public service districts.

In *State ex. rel. Water Development Authority v. Northern Wayne County Public Service District*, 195 W.Va. 135, 464 S.E.2d 777 (1995) the West Virginia Water Development Authority ("WDA") attempted to raise Northern Wayne's tap fee without PSC approval, basing its decision on what the WDA felt was the clear language of *W.Va. Code* §22C-1-7. This Court disagreed with the WDA's reading as "not consistent with the legislative purpose of creating the PSC nor is it consistent with the statutory scheme intended by the legislature." 195 W.Va. at 141.

Given the Public Service District's authority to impose rates and charges is subject to review by the PSC, the same 'notwithstanding any provision to the contrary elsewhere contained in the code' language found in *W.Va. Code* §22-1-7 [1994] likewise does not confer authority upon the WDA to impose service charges without approval by the PSC...

195 W.Va. at 141.

This Court, in *Northern Wayne*, determined that a public service district board could set "charges" and that those "charges" had to be approved by the PSC. If the WDA wanted to set "charges" for a defaulting district, those "charges" had to be approved by the PSC. In light of this, it is difficult to understand how the Circuit Court's ruling that the PSC only sets "rates" is supported by the law.

If the PSC cannot regulate a district's fees and charges, it

...would prevent anyone from having a means to challenge an unreasonable rate or service charge set... thereby defeating the legislature's purpose in creating the PSC...

195 W.Va. at 141

This Court's objection to WDA's argument in *Northern Wayne* would hold true in this case.

It is unlikely that the Legislature granted districts the ability to establish "fees and charges" and excluded PSC review of them. It is also unlikely that the Legislature specifically authorized districts to establish "fees and charges" and didn't mean it. Thus Petitioners' argument that the PSC only set "rates", either creates a circumstance where a public service district's fees and charges, including the CIF, are valid yet unregulated, a position rejected by this Court in *Northern Wayne*, or district boards are barred from setting their own fees and charges, invalidating express statutory provisions to the contrary. Thus, Petitioners' argument makes no sense.

A ruling that the Public Service Commission can only authorize "rates" and not fees and charges could detrimentally impact all public service districts. All districts have fees and charges in their tariffs. The PSC has determined that these are necessary for the proper operation of a public service district. Late payment charges, bad check fees, and disconnection and reconnection fees assure that districts' customers have an incentive to pay their bills in a timely fashion. Eliminate them, as beyond the authority of the PSC to authorize and the districts to set, and a public service districts' revenues became far more uncertain. This threatens the districts' ability to pay their bills and make timely bond payments. Petitioners' argument should be rejected.

1. *The Capacity Improvement Fee is not a tax.*

Petitioners try to avoid the statutory problems with their argument by characterizing the CIF as a tax which “is incurred only once on some of the properties in a governmental district because of the special benefit to those properties of a particular government improvement.” That is the very definition of a tap fee and a reconnection fee, over which the PSC has previously asserted jurisdiction and this Court has reviewed. See *Northern Wayne* (tap fee) and *Public Service Commission v. Town of Fayetteville*, 212 W.Va. 427, 573 S.E.2d 338 (2002) (reconnection fee). In neither case did this Court feel these fees were taxes, beyond PSC jurisdiction.

Petitioners, in support of their argument that the CIF is a tax, cite several cases from other jurisdictions and none from West Virginia. There is a reason for that. The CIFs could not be defined as a tax under this Court’s view of the distinction between a tax and a fee. 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. at 466. The CIFs are covering the expense imposed on the Districts by developers whose demand on the water and sewer systems require additional construction. Therefore, the CIFs are fees. As such, they can be set by the Water and Sewer Districts and should be regulated by the PSC.

B. THE LOCAL POWERS ACT DID NOT INVALIDATE BERKELEY COUNTY PUBLIC SERVICE SEWER AND WATER DISTRICTS’ CAPACITY IMPROVEMENT FEES.

Petitioners argued before the PSC that CIFs could only be imposed under the Local Powers Act, *W.Va. Code* §7-20-1 et. seq. which authorizes high growth counties to establish impact fees to fund public works such as water treatment and distribution facilities, wastewater

treatment and disposal facilities, sanitary sewers, storm sewers, primary and secondary schools, public roads, parks and police, emergency, medical, rescue, and fire protection facilities, and that certain prerequisites of that Act had not been met by Berkeley County. Therefore, the CIFs were illegal. The Commission rejected that argument. The Water District believes that there are two problems with Petitioners' position.

1. A public service district is not an agent of the County Commission.

The Local Powers Act applies only to County government. For the Act to apply to public service districts, the Water and Sewer Districts would have to be part of county government. They are not.

W.Va. Code §16-13A-3 is titled "District to be a public corporation and political subdivision; powers thereof; public service boards." The first sentence of that section states: "From and after the date of the adoption of the order creating a new 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." The Legislature could not have been any clearer about a district's independent status. Public service districts are not agents of county commissions.

Petitioners may point to several statutory provisions to justify their argument that the Local Power Act applies. Those statutes addressed the county commission's authority to enlarge, reduce, merge or dissolve a district (*W.Va. Code* §16-13A-2), change a district's name (*W.Va. Code* §16-13A-4(f)), appoint district board members (*W.Va. Code* §16-13A-3), and petition a circuit court to remove a district board member, although only for cause, unlike other county officials that serve at the will and pleasure of the county commission (*W.Va. Code* §16-13A-3a). *W.Va. Code* §16-13A-18(a), also requires that a county commission approve the sale

or rental of districts' systems and *W.Va. Code* §16-13-2(g), prohibits a district from infringing on the powers of a county commission.

Reliance on these sections, however, ignores the entire statutory scheme that governs public service districts. *W.Va. Code* §16-13A-1 et. seq. details how a PSD operates. After a county commission sets up a district and appoints its board, the public service district is a fully independent entity. The district's board is its governing body and has meetings, establishes budget, establishes rates, fees and charges, borrows money, issues bonds, employs a general manager, hires employees, acquires property, operates utility systems, enters into contracts, and condemns private property, all without the input or approval of a county commission. In fact, many of those powers are exercised only under the supervisor or with the approval of the PSC. That kind of absolute independence runs contrary to every concept of agency. A public service district, acting alone as it does with the statutory authority it has, is not an agent of the county commission. It is, as *W.Va. Code* §16-13A-3 states, "a political subdivision of the state."

Petitioners may contend that a public service district was declared a "political subdivision" to make it immune from tort claims except as provided by the Governmental Tort Claims and Insurance Reform Act, *W.Va. Code* §29-12A-1 et seq. Legislative history disputes that argument. PSDs were declared "political subdivisions of the state" in 1953. The Governmental Tort Claims and Insurance Reform Act was passed in 1986.

Petitioners' reliance on the Local Powers Act also does not take into account the difference between the authority that a county commission has to provide sewer and water service and that of a public service district. A PSD's authority is not merely an outgrowth of a county commission's jurisdiction. A PSD's authority is broader. A county commission may operate sewer and water systems, but it cannot extend them "into the territory within any

municipal corporation.” *W.Va. Code* §7-1-3(a). A PSD may extend its utility systems into municipalities that do not have those utilities and once it does, the municipality may not start its own service without the PSD’s consent. *W.Va. Code* §16-13A-8.

A PSD’s authority is also paramount. Although a county commission may operate a sewer system, it is forbidden to extend it into the boundaries of a public service district. *W.Va. Code* §7-1-3(g).

A county commission has authority to issue bonds to build a sewer or water system, but those bonds are secured by tax revenue, *W.Va. Code* §13-1-20, and are issued only with voter approval. *W.Va. Code* §13-1-4. A PSD has a different bonding mechanism. Its bonds are supported by the revenues of its enterprise, not tax revenue, and can be issued without voter approval. *W.Va. Code* §16-13A-13.

These differences point to the fact that the county commission and a PSD are not operating from a common jurisdiction. The county commission has limited utility authority and bonding power supported by its ability to tax. A public service district has greater authority to operate a utility and the ability to issue bonds supported by its enterprise’s revenue. These differences demonstrate that a district does not operate as an agent of a county commission; it operates on its own.

Perhaps the most telling demonstration of the separation of the county commission and the public service districts in the county is in the area of audits. The State Auditor performs a consolidated audit on county commissions pursuant to *W.Va. Code* §6-9-1 et seq. Those audits are performed on “any unit of local government...” *W.Va. Code* §6-9-1a(g).

Public service districts do not have audits performed by the State Auditor. They are performed by “an independent certified public accountant,” *W.Va. Code* §16-13A-11, and are not

a part of the county commission's audit. A public service district cannot be a part of county government under the Local Powers Act and not be a part of county government where audits are concerned. PSDs are obviously separate entities.

A public service district is not an agent of the County Commission and a ruling to the contrary would have a significant impact on the status of past public service district bond issues. Public service districts, over many years, have had many revenue bond issues pursuant to the language in the statutes that authorize them. *W.Va. Code* §16-13A-12. These bonds were issued by the district boards, not by county commissions. Petitioners' argument, if accepted, would cast doubt on the validity of those bonds. The public financing process for the sewer and water projects of public service districts would be thrown into unnecessary disarray.

A ruling that a district is an agent of the county commission, controlled by the county commission, is also no benefit to county commissions. It may compromise the protection a county commission has from financial liability when a district defaults on its bonds and could subject county commission funds to bondholder claims.

2.The Local Powers Act does not provide for impact fees that fund the facilities of public service districts.

Under the Local Powers Act, "impact fees" are intended to fund "capital improvements" which are "owned, supported, or established by county government." *W.Va. Code* §7-20-3. That section mentions sewer and water systems, but the county commission is statutorily authorized to directly own and operate both. See *W.Va. Code* §7-1-3a. This Act makes no mention of public service district facilities.

Presumably, the Legislature is aware of the hundreds of public service districts throughout the state. It would have been quite simple to include the words "public service

district” somewhere in the Local Powers Act if the Legislature meant for the Act’s “impact fees” to fund PSD operations. Since the Legislature did not, the WDA believes that it’s safe to assume that the Legislature did not intend the Act to do so.

The money collected by the Districts under the CIFs were not intended to fund facilities “owned, supported, or established by county government.” The CIFs supported the issuance of bonds that funded facilities owned and established by the Districts, political subdivision of the state. They funded an expansion of the Districts’ treatment and distribution facilities. “Impact fees” as defined by the Local Powers Act cannot do that. The CIFs cannot be “impact fees.”

The CIF is similar to fees and charges that the PSC has authorized for many years. It is the kind of charge that assesses cost to the individuals or entities responsible for creating them. Disconnection fees, return check charges, and tap fees are longstanding examples of this kind of fee. The CIPs do the same, so they fall within the PSC’s area of expertise. There was no reason to try to “shoehorn” them into the Local Powers Act. They don’t fit.

Since a public service district is not an agent of a county commission and the CIPs were not designed to raise funds for county owned facilities, the CIFs cannot be “impact fees” under the Local Powers Act. They are fees authorized by the PSC, like many other fees, to require those who impose extraordinary costs on public service districts to shoulder the responsibility of those costs. That is consistent with the PSC’s statutory powers and purpose. It is not consistent with the purpose of “impact fees” under the Local Powers Act.

C. THE COMMUNITY INFRASTRUCTURE INVESTMENT PROJECT ACT DOES NOT RECOGNIZE THE LOCAL POWERS ACT AS THE SOLE AUTHORITY TO IMPOSE CAPITOL IMPROVEMENT FEES.

The Community Infrastructure Investment Project Act (“CIIPA”), *W.Va. Code* §22-28-1 et seq. establishes a method whereby public service districts and municipalities may acquire water treatment and wastewater treatment plants and related appurtenances at no cost from developers who are willing to build them and turn them over. Permission for this transfer is granted by the Department of Environmental Protection, not the PSC. Participation under this statutory scheme is entirely voluntary. As *W.Va. Code* §22-28-3(a) states, in part, “Nothing herein shall be construed to require a public service district or municipal utility to use this program.”

Nowhere does the CIIPA recognize the Local Powers Act as the sole authority for imposing capital improvement fees. Far from it. It establishes another method for a utility to keep up with growth while keeping its rates low. It is complimentary to, not exclusionary of, the CIPs authorized by the PSC.

D. THE REMOVAL OF THE CAPACITY IMPROVEMENT FEES FROM THE TARIFFS OF THE DISTRICTS COULD BE PROSPECTIVE ONLY

Petitioners object to the prospective nature of the May 9, 2012 Commission Order in terminating the capacity improvement fee, but do not cite any legal authority for their position that money collected under those tariff provisions should be refunded. That is because the Commission and this Court have consistently held that *W.Va. Code* §24-2-3 authorizes prospective and not retroactive changes in a utility’s rate structure. *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 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.** *See State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo.1979); *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977). (*emphasis added*).

Petitioners are proposing retroactive ratemaking when they demand a refund of the Capacity Improvement Fees. That is beyond the statutory power of the Commission.

Petitioners also fail to mention what the impact of the retroactive application of the May 9, 2012 Order and the resulting refunds would be. Public service districts are public entities. They have no shareholders and earn no rate of return. They have only one source of income, their ratepayers. Petitioners are proposing a refund to real estate developers of potentially millions of dollars that already has been spent on infrastructure improvements that benefited those same developers. The result of the refunds would be enormous rate increases for the Districts’ customers and a windfall to the developers. The Commission, for legal and practical reasons, correctly applied its May 9, 2012 Order prospectively.

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

On May 9, 2012, the Public Service Commission issued an Order, which determined that the Capacity Improvement Fees charged by Berkeley County Public Service Water District and

Berkeley County Public Service Sewer District no longer met the criteria established by the Commission for Capacity Improvement Fee and should be struck from the tariffs of the Districts. On May 21, 2012, the Districts filed Motions for Reconsideration of the Order. On May 24, Petitioners filed a Brief in opposition to the Motions for Reconsideration and asked that the Motions be rejected. On August 7, 2012, the Commission denied the Motions for Reconsideration and stated:

The Commission is not aware of any authority creating an automatic stay of its final orders on the filing of a petition for reconsideration. See, *Zecco v. Hope Gas*, Case No. 05-0821-G-C (November 10, 2005) and *West Virginia Water Development Authority v. Mingo County Public Service District*, Case No. 04-2010-W-C (Commission Order, August 24, 2005).

Accordingly, the May 9, 2012 Order was never stayed.

Under *W.Va. Code* §24-5-1, appeal may be made to this Court by any party “feeling aggrieved by entry of a final order by the commission.” The appeal must be filed within thirty days after the entry of such order. Petitioners were “aggrieved” by the May 9 2012 Order and did not appeal within thirty (30) days. Their appeal is untimely.

Petitioners claim they are appealing from the August 7, 2012 Order, even though they did not file a Petition for Reconsideration of the May 9, 2012 Order and urged that the Petitions filed by the Districts be denied. In its August 7, 2012 Order, the PSC agreed with Petitioners and denied the Petitions for Reconsideration. So how could Petitioners be aggrieved by that Order? They were aggrieved by the May 9, 2012 Order, an Order which was never stayed. Petitioners should have filed their appeal by June 8, 2012.

Petitioners may argue that the pending Petitions for Reconsideration made the May 9, 2012 Order unappealable. Yet, since the May 9 Order was never stayed, it must have been appealable. Otherwise, the Commission could issue an Order, delay action on a subsequent

Petition for Reconsideration and require the Order implemented while unappealable. That would be a clear violation of the due process rights of the parties to that case. So, given the Commission's position that Reconsideration does not stay an Order, the May 9, 2012, Order was appealable. Petitioners were aggrieved by that Order. Petitioners failed to file a timely appeal of that Order. The present appeal should be rejected.

F. ANY UNUSUAL DELAY IN THE RESOLUTION OF THE CASE BELOW WAS CAUSED BY PETITIONERS.

Petitioners argue that CIFs should be refunded from February 27, 2009. That is the date they filed their initial complaint with the PSC. They complain that the three and one-half year length of the litigation prejudiced them. What they fail to say is that most of the delay is their own fault.

This case commenced on June 11, 2009, at which time the PSC issued an Order dismissing Petitioners' February 27, 2009 complaint and initiating the general investigation into CIFs. The case was to proceed quickly, as evidenced by the June 11, 2009 Order, which made Petitioners parties to the case and set the case for hearing on August 26 and 27, 2009.

The hearing was held as scheduled and a briefing schedule was established. The last brief was filed on November 2, 2009 and the case was ready for decision.

Then Petitioners struck. They filed for a Declaratory Judgment in the Circuit Court of Berkley County in October, 2009. A decision was issued in that case on January 29, 2010, granting Petitioners a Declaratory Judgment and ruling that the PSC did not have jurisdiction to establish CIFs.

Needless to say, the PSC was then unable to proceed with this case because there was a Circuit Court ruling that it lacked jurisdiction to establish CIFs. An appeal to this Court

followed and, on February 24, 2011, this Court reversed the Declaratory Judgment because Petitioners had failed to exhaust their administrative remedies at the PSC.

From November, 2009 to February 24, 2011, sixteen months, this case was sidetracked by Petitioners' foray into Circuit Court. When it was over, the PSC determined that, due to this delay, it needed more current population data to reach its decision. Because the parties, including Petitioners, were unable to agree on growth statistics, another hearing was necessary.

The second hearing was held on December 9, 2011. A briefing scheduled was established and the last briefs were filed on January 31, 2012. The PSC issued its Order on May 9, 2012. Reconsideration Petitions were filed on May 21, 2012. The PSC issued its Order on Reconsideration on August 7, 2012.

This simple recitation of the facts demonstrates Petitioners' culpability in any delay. This case was ready to be decided in early November, 2009. An Order from the PSC most likely would have been issued in early 2010, if Petitioners had not filed suit in Circuit Court. That action necessitated an appeal to this Court and, after the reversal of the Circuit Court ruling, an additional hearing and briefs in this case.

Petitioners caused this case to take three and one-half years. They can hardly complain about the lengthy administrative process when it was their refusal to follow that process that added two and one-half years to it.

VII CONCLUSION

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

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October 30, 2012

CERTIFICATE OF SERVICE

I, Mark E. Kauffelt, counsel for the West Virginia Water Development Authority do hereby certify that copies of the foregoing "Initial Brief on Behalf of the Berkeley County Public Service Water District" have been served upon the following counsel of record via First Class Mail on this 30th day of October, 2012.

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