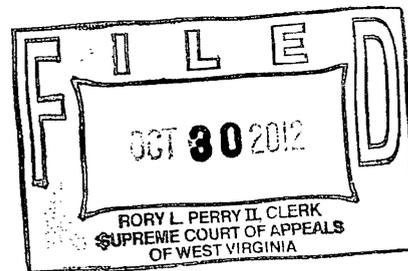


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
CHARLESTON

Larry V. Faircloth Realty, 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



**STATEMENT OF REASONS OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA**

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

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STATEMENT OF THE CASE

Preliminary Statement

This appeal arises out of a dispute concerning the establishment of a utility charge, a capacity improvement fee (CIF). In 2004 and 2005, the Commission approved applications by the Berkeley County sewer and water public service districts to establish CIFs in their respective tariffs.

It may be helpful to begin with an explanation of a capacity improvement fee (CIF) - how it was established and why. The particular CIFs involved in this litigation were the subject of applications by the Berkeley County utilities, a water and a sewer public service district. Following public hearings and argument, the Commission approved those CIF charges pursuant to its statutory authority. (Water CIF) PSC Case No. 04-1767-PWD-T, PSC Order, 8-12-05; (Sewer CIF) PSC Case No. 04-0153-PSD-T, PSC Orders, 8-31-04, 8-28-05.

A CIF charge represents the future cost to a utility of developing treatment and transmission capacity to meet unexpected growth in customer demand. The CIF reflects the cost of that capacity to the utility and its customers for each new housing unit added to an existing utility system by developers because of unexpected and unusual growth in population and development. The CIF helps to offset the cost the utility will be required to incur, and its existing customers must pay, to expand and construct the capacity to meet and serve this new, unexpected demand, usually by increasing the size (the capacity) of treatment facilities or large transmission lines, both of which represent significant costs.

The rationale for CIFs is that the utility's existing system was developed upon the assumptions that (i) plant was built to meet expected demand, (ii) debt was incurred to pay for capital additions related to that demand and (iii) those debt costs are reflected in existing rates. Growth in Berkeley and Jefferson Counties, however, was sudden and significant and the utilities and their existing customers needed a source of capital to meet these large, unexpected future capital costs to upgrade capacity.

As stated by the Commission:

The CIF will facilitate responsible infrastructure planning and sewage capacity increases. Responsible planning and financing of additional sewage treatment capacity is appropriate for an area experiencing the explosive growth that Berkeley County has, and expects to continue to experience. We find, therefore, that approval of the CIF, as set forth in this order, is consistent with our 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. The formula by which the CIF fees were calculated, based on a Georgia Tech model, is reasonable and appropriate, and we conclude that the CIFs are based primarily on the costs to maintain necessary capacity in order to serve new customers.

Berkeley County PSSD, PSC Case No. 04-0153-PSD-T, Order 8-31-04, page 20. (<http://www.psc.state.wv.us/Scripts/orders/ViewDocument.cfm?CaseActivityID=110724&Source=Archives>)

Prior to the Berkeley County application in 2004, the Commission had denied other requests to establish a CIF because it was not persuaded that a CIF was justified for the circumstances of those particular utilities. In Berkeley and Jefferson Counties, however, at the time the fee was established, the utilities demonstrated that "rapid,

expansive growth” was occurring. In addition, substantial evidence was presented demonstrating the diminishing level of existing utility capacity over a relatively short period of time. The Commission approved the requested CIF and directed the utilities to segregate CIF charges in separate accounts and to spend those dollars only for future capital needs and only after approval by the Commission. Furthermore, the Commission indicated that the CIF would be evaluated, at a minimum, in each of the District’s future rate cases, or more often if the Commission deemed it necessary. (*Id.*, Conclusions of Law Nos. 13, 14, 21)

The criteria that the Commission established when it established the CIFs and for future evaluation of the continuation of a CIF required proof of (i) population growth of 2% per year or 20% over ten years and (ii) a reasonable expectation that existing capacity reserves will be depleted within five to seven years.

Procedural Background

Although this is an appeal from a Commission Order dated May 9, 2012, the Appellant attacks the orders issued by the Commission in 2004 and 2005 by arguing that the Commission lacked jurisdiction to establish the utility charges in the first instance. Furthermore, given that this is the third time this matter has been before this court, the Commission will provide a brief summary of Commission and Court proceedings.

Commission Proceeding Establishing CIFs

The Commission approved a \$1,623 water CIF in Case No. 04-1767-PWD-T (August 12, 2005), ordering that “the District’s capital improvement fee will be evaluated at a minimum in each of the District’s future rate proceedings, or more often if the

Commission deems it necessary.” *Id.*, p. 7. The Order required that all CIF revenue be retained in a separate account, the funds be used only for upgrades or construction of water treatment facilities or transmission or distribution lines at least 12 inches in diameter and no funds be expended without prior Commission approval.

The Commission increased the amount of the water CIF to \$3,120 in Case No. 07-0167-PWD-T (August 15, 2007), directing that upon completion of the projects outlined in the 2004 Water Facilities Plan, the District appear before the Commission to determine whether the District continued to meet the criteria necessitating the use of a CIF as described in *Willow Springs Public Service Corp.*, Case No. 06-1180-S-CN-PW-PC (Commission Order May 15, 2007).¹

The Commission approved a \$1,581 sewer CIF in Case No. 04-0153-PSD-T (August 31, 2004 and March 28, 2005), stating that (i) the CIF would be evaluated at a minimum in each of the District’s future rate proceedings, or more often if the Commission deemed it necessary, and (ii) that the Sewer District must obtain an order from the Commission prior to withdrawing, committing, or disbursing any collected CIFs. Similar to the water district order, the Commission required the sewer utility to separately account for the CIF revenue and restricted its use to upgrades or construction of wastewater collection and treatment facilities. Specifically, the Commission stated in the March 28, 2005 Order, that the Sewer District was put on notice that the Commission may reevaluate the timing or other requirements of the CIF, in the event facts or circumstances developed to indicate that the conditions imposed were not met or that the

¹ The Appellant fails to acknowledge this case and the sewer utility case in 2006 when it asserts that, until its complaint was filed in 2009, more than five years had passed without a review of the Berkeley County CIFs.

Commission's intended outcome in this case was not occurring. *Id.*, Conclusion of Law No. 10, p. 14.

In Case No. 06-0016-PSD-T (Commission Orders, July 19, 2006 and October 24, 2006) the Commission increased the sewer CIF to \$3,650. The Commission imposed the following controls over the Sewer District use of the CIF funds:

[Conclusion of Law] 6. The Commission will continue to monitor the collection and use of the CIF and will make any modifications that may become necessary.

IT IS FURTHER ORDERED that the Berkeley County Public Service Sewer District may use the CIF monies for the upgrades to, or construction of, its facilities.

IT IS FURTHER ORDERED that the Berkeley County Public Service Sewer District shall obtain prior approval before it withdraws, commits, or disburses any collection system CIFs for any normal course of business District construction and/or upgrades of its facilities.

IT IS FURTHER ORDERED that the Berkeley County Public Service Sewer District shall file, along with a request for expedited approval, a detailed report, by January 1st of each year, which sets forth the District's anticipated improvement projects and the estimated cost of each project.

IT IS FURTHER ORDERED that if a project is subsequently added, the Berkeley County Public Service Sewer District shall file a further request for expedited approval of the additional project(s). Likewise, if significant changes are made during the year to the District's anticipated projects and estimated costs, as initially filed with the Commission, a further filing shall be required by the District for Commission approval of the changes.

IT IS FURTHER ORDERED that along with its January 1st filing each year for expedited approval of its detailed report of anticipated improvement projects and estimated costs, the Berkeley County Public Service Sewer District shall also include in such filing a year-end report of each project which was completed during the previous year and the cost of each such project.

IT IS FURTHER ORDERED that all other conditions, as set forth in the Commission's Order of March 28, 2005 in Case No. 04-01 53-PSD-T, are to remain in effect for this case.

PSC Case No. 06-0016-PSD-T, Order of October 24, 2006, at pp. 5-6.

Complaint Filed at Commission

On February 27, 2009, Larry V. Faircloth and Larry V. Faircloth Realty, Inc., ("Complainant") filed a formal complaint against the Districts requesting that the Commission rescind the CIFs created in Commission Case Nos. 04-0153-PSD-T, 04-1767-PWD-T, 06-0016-PSD-T, and 07-0167-PWD-T until the economic and factual bases on which the CIFs were created exist again, and until further hearings are held to determine that any CIF sought by the Districts is reasonable, just, and void of any discrimination against developers and builders for the sole reason of prohibiting growth absent local imposition of zoning. The Complainant also asked for reimbursement of sums expended by the Complainant to upgrade District facilities. The Complainant later withdrew these requests for reimbursement.

By order dated June 11, 2009, in the case now before the Court, the Commission initiated a general investigation into the CIFs charged by the two Berkeley County Public Service Districts. In establishing this proceeding, The Commission addressed the Faircloth complaint case:

The Complainant raised questions that help to define the scope of review of the CIFs. The Complainant, however, is at a disadvantage when it comes to investigating and presenting evidence regarding the need for the CIFs, the proper amount of the CIFs, and the allowable uses of the CIFs. The interconnected skills and disciplines required of this type of investigation - economics, projecting population and utility usage growth,

projecting costs of utility plant construction, and law - would tax the resources of any individual complainant.

Recognizing this discrepancy between the parties the Commission believes it is more reasonable to open a general investigation so that Staff may bring its resources to bear on the pertinent questions. For reasons of administrative efficiency the Commission will (i) docket a general investigation, pursuant to W.Va Code §§24-2-2, 3, and 7, to review various aspects of the CIFs, (ii) dismiss the complaint (Case No. 09-0192-PSWD-C), (iii) direct the Commission Executive Secretary to copy the contents of the complaint case and make those filings part of the newly docketed general investigation, and (iv) make the Complainants in Case No. 09-0192-PSWD-C parties to the general investigation.

PSC Case No. 09-0961-PSWD-GI, Order of June 11, 2009, p. 7.

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

On September 4, 2009, the Commission issued an Order setting a briefing schedule to address all aspects of the CIFs applicable to the Districts. An October 8, 2009 request by Faircloth to stay or modify the briefing schedule was denied by a Commission Order issued October 9, 2009.

On October 13, 2009, Faircloth filed its Initial Brief arguing that (i) the Commission does not have constitutional or statutory authority to authorize the Districts to charge and collect a CIF against the Faircloths because Berkeley County has no zoning ordinance in place and does not have the requisite authority to impose impact fees, (ii) the current CIFs are not necessary, (iii) even if a CIF is authorized, it should be rescinded because of the failure of the Districts to prove the existence of a two percent growth rate in Berkeley County over the past two years, and (iv) the Districts should be required to

give the Commission (a) a detailed accounting as to the exact amount of CIFs collected since 2004, (b) the exact use of those funds thus far, and (c) a statement of the planned future use of CIF funds, and (v) CIFs can only be used to satisfy the bond indebtedness that was created by the Districts for future growth.

Circuit Court Complaint and Appeal to Supreme Court

In October 2009, Faircloth Realty filed a request for declaratory judgment action in the Circuit Court of Berkeley County, seeking essentially the same remedy sought from the Commission, i.e., relief from paying CIFs. That filing was designated as Berkeley County Circuit Court Civil Action No. 09-C-286.

On January 29, 2010, the Circuit Court of Berkeley County entered a Declaratory Judgment Order holding that it could exercise jurisdiction in this matter and ruling in favor of Faircloth Realty on the substantive issues. The Circuit Court Order found that the Commission lacked jurisdiction to establish a CIF; the CIF represented a “special kind of tax” and that the public service districts were subject to the Local Powers Act. The Circuit Court of Berkeley County granted a stay of its declaratory judgment order pending appeal, and ordered the Districts to deposit all CIFs collected during the stay into a separate escrow account. An appeal to this Court followed, and, by order entered April 14, 2010, this Court extended the aforementioned stay during the pendency of the appeal.

Following intervention by the Commission and oral argument, on February 24, 2011, this Court entered a memorandum decision finding that Faircloth Realty failed to exhaust its administrative remedies at the Commission. The Court also held that the Circuit Court did not have jurisdiction in this matter and reversed the declaratory

judgment order of the Circuit Court of Berkeley County. *Faircloth Realty v. Berkeley County PSDs*, Case Nos. 35651 and 35652, 2011 W. Va. Lexis 296 (2011).

On July 8, 2011, Faircloth filed a motion in the Commission proceeding that requested an expedited ruling in this case. Faircloth reiterated the procedural history of this case and the related Circuit Court and the Supreme Court filings, stating that Faircloth intended to seek a writ of mandamus or of prohibition if the Commission did not issue a final, appealable Order within fifteen days.

On July 19, 2011, the Commission issued an Order requiring recommendations by the parties regarding how to proceed. After noting that population growth data in this case was over eighteen months old, the Commission directed the parties to provide updated growth data. The Commission also noted that the October 2009 Faircloth brief asserted that additional evidence was necessary in this case. The Commission directed the parties to state whether they believed additional evidence or hearings would be necessary.

Following various filings in August 2011 that demonstrated disagreement among the parties regarding population growth, on September 30, 2011, the Commission issued an Order. Because the parties had been unable to agree on population and customer growth data applicable to the Districts, the Commission required the parties to submit direct and rebuttal testimony and set this matter for hearing.

Faircloth Petition to the Supreme Court of Appeals of West Virginia

On October 25, 2011, Faircloth filed a petition with the Supreme Court of Appeals of West Virginia, Case No. 11-1460, praying that a stay and a writ of mandamus be directed against the Commission.

On November 14, 2011, the Court entered an order denying the writ and the stay.

Commission Hearing and Final Order

On December 8 and 9, 2011, the Commission heard testimony on the question of need for the CIFs and the appropriate amount of the CIFs.

On May 9, 2012, the Commission issued an order discontinuing the CIFs for the Berkeley County Public Service Districts finding that the Districts no longer met one of the essential criteria originally established by the Commission regarding the depletion of capacity. On August 7, 2012, the Commission denied the districts' petitions for reconsideration and directed the water and sewer districts to return any CIFs collected subsequent to the May 9, 2012 Order.

SUMMARY OF THE ARGUMENT

The Appellant has obtained the relief that it sought in the Commission proceeding, that is, the elimination of the CIFs charged by the Berkeley County public service districts. The Appellant, therefore, is presenting moot issues that the Court should refrain from entertaining.

The Commission possesses statutory authority to establish the utility charges at issue in this proceeding. The establishment of those charges neither implicates or violates the Local Powers Act or the Community Infrastructure Investment Projects Act. Finally, the Commission did not act arbitrarily and capriciously by eliminating the CIFs effective upon the date of its order. In this regard, the Commission decision is consistent with legal guidance provided by statute and this Court. Finally, an order requiring refunds would constitute retroactive ratemaking.

ORAL ARGUMENT

The Commission acknowledges that the Court's Scheduling Order has set the appeal for argument under Rule 19. However, if other parties to the Commission proceeding file briefs and ask to participate in oral argument, the Court may want to consider the longer oral argument time provided by Rule 20.

ARGUMENT

1. The present appeal is moot.

The Appellant has obtained a Commission order containing a result that it sought, that is, the elimination of CIFs from the tariffs of the Berkeley County water and sewer public service districts. Therefore, the Appellants present questions to the Court for resolution that are moot. Ordinarily, the Court would not decide such questions. *Velogol and Iaquina v. City of Weirton*, 212 W. Va. 687, 575 S.E.2d 297, Syllabus Pt. No. 1 (2002). Although it is true that the Commission could re-impose CIFs for these two utilities in the future, that would only be done in the context of a future case filed by the utilities. If such a case were filed, the Appellant could seek party status in the filing. If prejudiced by a future decision of the Commission, the Appellant could seek review of this Court.

2. The Commission has jurisdiction to establish a CIF and the Appellant's continual reliance upon the rationale of the circuit court order is simply wrong.

Although this Court vacated the decision of the Circuit Court, the Appellant argues that the Court should consider the findings of fact and conclusions of law in the Circuit Court Order and give it significant weight in deciding this case. Petition at 18.

The Circuit Court Order concluded that a “rate is the price stated or fixed for some commodity or service of general need or utility supplied to the public, measure by a specific unit or standard”....“rates are continuous charges based on the use of water or sewer services.” (*Order*, page 6). The Court concluded that because only the word “rate” appears in W. Va. Code §24-2-3, the Commission lacks authority to establish other charges that are not continuous.

The Circuit Court erred by restricting its analysis to one specific state statute, W. Va. Code §24-2-3. The Circuit Court determined that only the word “rate” appeared in that particular Code section. Thus, the Court reasoned that only a rate could be a reoccurring fee for the commodity delivered, and because a CIF is not a reoccurring rate paid for the commodity received, the Commission was without jurisdiction to establish such a charge.

This is an inappropriately restricted analysis of Commission jurisdiction concerning utility rates and charges. Other sections of the Code authorize and direct the Commission to establish reasonable rates and charges of public utilities. W. Va. Code §24-1-1(a), in pertinent part, provides that:

“(a) It is the purpose and policy of the Legislature in enacting this chapter 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 in order to:”

...

“(4) Ensure that rates and charges for utility services are just and reasonable.”

This statutory provision unequivocally expresses legislative intent to confer upon the Commission the jurisdiction to review and establish all utility rates and charges whether it is a rate for the utility commodity delivered or one-time fees and charges.

W. Va. Code §24-2-2 provides that:

“(a) The commission is hereby given power to investigate all rates, methods and practices of public utilities subject to the provisions of this chapter;” . . . “The commission may change any intrastate rate, charge or toll which is unjust or unreasonable or any interstate charge with respect to matters of purely local nature which have not been regulated by or pursuant to an act of Congress and may prescribe a rate, charge or toll that is just and reasonable”

Complementing the clear statement of legislative intent contained in W. Va. Code §24-1-1, W. Va. Code §24-2-2 grants power to the Commission to regulate utility rates and charges.

W. Va. Code §24-2-4a, the section of West Virginia Code that applies to utility applications to establish or change rates or charges (such as the CIF applications), states that “the commission may either upon complaint or upon its own initiative without complaint enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice” and “may make such order in reference to such rate, charge, classification, regulation or practice as would be proper”.

W. Va. Code §24-2-9 provides that:

“The commission may at any time require persons, firms, companies, associations, corporations or municipalities, subject to the provisions of this chapter, to furnish any information which may be in their possession, respecting rates, tolls, charges or practices.”

W. Va. Code §24-3-1 instructs that “[a]ll [public utilities] charges, tolls and rates shall be just and reasonable”.

In addition, W. Va. Code §16-13A-9 authorizes public service districts to establish rates and charges while W. Va. Code §16-13A-21 specifically instructs that the authority of public service districts to establish rates and charges in no way affects the functions, powers and duties of the Commission, including the power to review and establish utility rates and charges.

Finally, W. Va. Code §8-13-13 provides that a municipality may enact ordinances to establish “reasonable rates, fees and charges,” but that municipal authority is subordinate to Commission review and jurisdiction over rates and charges under Chapter 24 of the Code. *Delardes v. Morgantown Water Commission*, 148 W.Va. 776, 137 S.E. 2d 426 (1964).²

Generally, a utility rate is a price charged for each unit or measure of commodity consumed. For example, a rate for water or sewer consumption would be a dollar amount per each thousand gallons of water consumed. In contrast, a charge is a one-time fee imposed upon a customer that recovers a particular cost element. For example, a charge would appear as a fixed dollar amount in a utility tariff and could apply to disconnections, reconnections, bad check charges, tap fees or capacity impact fees. As defined in Webster's II New College Dictionary, Third Edition, a “rate” is the “cost per

²In 1979, the Legislature enacted legislation which limited the Commission's review of municipal rate ordinances. W. Va. Code §24-2-4b. The Commission can exercise jurisdiction over municipal rates only after receipt of certain statutory prescribed petitions.

unit of a service or commodity;" a "charge" is "to set or ask (a given amount) as a price"; and, a "fee" is "a fixed charge."

Virtually all utilities in this state have tariffs on file with the Commission with approved "charges" that are not "continuous," and, thus, not rates as defined by the Circuit Court, including CIFs, customer deposits,³ tap fees, reconnection charges, bad check charges, disconnect charges, and administrative charges. Each of these charges has as its basic underpinning the rationale of attempting, where it can be identified, to place costs for utility property or operations on those customers causing those costs. These charges are consistent with the statutory authority and duty of the Commission to ensure fair regulation of public utilities in the interest of the public, to ensure that rates and charges for utility service are just and reasonable, and to appraise and balance the interests of current and future utility customers and the interests of public utilities. W. Va. Code §24-1-1(a) and (b).

None of these charges, however, fits the Circuit Court Order definition of "rates". Furthermore, although generally authorized, none of these charges, by name, (except, as previously noted, tap fees) is specifically authorized by statute to be approved by the Commission. Thus, applying the Circuit Court logic, these charges would not be appropriately established because the Commission's jurisdiction is limited to establishing "rates." All of these charges represent the recovery of costs to the utilities, generally from the customer causing or imposing the costs. If "charges" were eliminated from utility

³State statute directs that public service districts charge a customer deposit. W. Va. Code §16-13A-9(a)(2). However, the statute does not address the Commission's authority to approve the specific charge and require that it be contained in the utility tariff, although the Commission exercises such authority.

tariffs, it would necessarily cause the cost responsibility to shift to other customers resulting in higher rates. The potential disruption of utility regulation would be significant.

In addition to the overwhelming legislative authority establishing Commission authority over utility rates and charges, various orders of this Court have long recognized and held that the Commission has primary jurisdiction over rate making matters involving public utilities. *City of Wheeling v. Renick*, Syllabus Pt. Nos. 5 and 6, 145 W. Va. 640, 116 S.E.2d 763 (1960) (The policy of this state is that all public utilities shall be subject to the supervision of the Commission, and that the Commission has the statutory power and authority to control the charges of all public utilities); *Delardes v. Morgantown*, Syllabus Pt. No. 3, 148 W.Va. 776, 137 S.E. 2d 426, 433 (1964) (The Legislature has authorized the Commission to exercise the predominant power of the State with respect to utility charges which is paramount to the rights given to the city by general statute); *C & P Telephone Co. v. City of Morgantown*, 144 W.Va. 149, 107 S.E. 2d 489, 469 (1959) (The paramount design of pertinent West Virginia statutes to place regulation of public utilities exclusively with the Commission has been long recognized by this Court (cities omitted)).

In a particularly relevant decision, which involved the subject matter of establishing a tap fee (a charge), this Court found that although a separate statute authorized the Water Development Authority to impose upon a public service district certain service charges, its authority to do so was subject to a regulatory review and approval of the Public Service Commission. *State of West Virginia ex rel Water*

Development Authority v. Northern Wayne County Public Service District and PSC, 195 W. Va. 135, 464 S.E. 2d 777 Syllabus Pt. No. 5 (1995).

The Court's decision in *WDA v. Northern Wayne County PSD* is instructive because the Court reaffirmed the Commission's primary rate jurisdiction over public utilities and specifically reaffirmed that authority where a "charge" was involved. *Id.* at 782. The charge in that case involved the payment of a tap fee, approved by the Commission and in a utility tariff. The tap fee requires a new customer to pay a one-time charge (it does not reoccur) to connect to the utility system. The basis for that charge is that it is reasonable for the customer or customers causing the cost of the connection to pay most of the cost rather than shifting the cost to other customers. A tap fee and a CIF are both charges associated with the provision of utility service. A tap fee helps defray present costs of providing service, while a CIF helps defray future capital costs that will be necessary to provide capacity for future service.⁴

The Circuit Court analysis of Commission jurisdiction is erroneous in other respects. The establishment of the CIFs were in response to rate applications by the petitioners. W. Va. Code §24-2-4a, not §24-2-3, applies to rate applications and that section of the Code specifically references applications for changes to "rates or charges." Furthermore, the Circuit Court failed to analyze W. Va. Code §24-2-3 in the context of other statutory provisions and the general system of law relating to the Commission's

⁴ The Appellant cites the WDA decision to support its argument that the Commission lacks jurisdiction to establish a CIF. This is perplexing because the argument is that the CIF amount was too high. This is not a jurisdictional argument, rather it is an argument that goes to the amount of the charge. That argument should have been made back in 2004 or 2005 when the Commission established the charges. Regardless, the argument does not support the contention that the Commission lacks jurisdiction to establish the charge.

primary jurisdiction to regulate rates and charges of public utilities. As previously indicated, there are numerous other sections of the Code that reference the Commission's responsibility and primary authority to establish rates and charges. It was error to ignore these other statutory provisions and the prior rulings of this Court. In its *WDA* decision, this Court stated:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. [cites omitted]

WDA, Supra, Syllabus Pt. No. 3. The Circuit Court Order failed to follow this instruction regarding statutory construction of numerous statutory provisions regarding Commission jurisdiction and, as a result, arrived at its erroneous conclusion concerning Commission jurisdiction over utility rates and charges.

3. A CIF is a charge for utility service and is not a tax.

The Appellant urges the Court to adopt the reasoning of the Circuit Court Order. The assumption in the Appellant's argument is that in enacting the Local Powers Act, which allows County Commissions to establish impact fees, the Legislature intended to preclude the Commission from establishing a utility charge (a CIF) based on the cost of providing utility service. The Appellant offers no law to support this contention that is the crux of its argument. The Appellant instead constructs a straw man by equating CIFs

to impact fees under the Local Powers Act, and then proceeds to argue that the CIF is an impermissible tax.

The Circuit Court Order not only erred by focusing solely on the term “rate” in context of one statute, W. Va. Code §24-2-3 (and ignoring a CIF as a utility charge) but also compounded that error by concluding that the CIF was a “special kind of tax.” The Circuit Court cites as its sole legal authority for that conclusion a decision by the Supreme Court of Vermont. *Kirchner v. Giebink*, 150 Vt. 172, 552 A.2d 372 (1988). The Appellant cites this case for its assertion that a CIF is a tax rather than a utility charge.

A careful examination of the *Kirchner* case, however, does not support the Circuit Court analysis. The Court in *Kirchner* noted at the outset that it was crucial to emphasize that absent specific statutory limitation on their authority, the selectmen (the town governing body) have general supervisory power over town matters. Vermont had a specific statute dealing with municipalities imposing utility rates and another statute relating to municipal special assessments that required approval of the voters within the municipality. *Id.*, at 377. Of concern to the Vermont Court was a proposed agreement between the Town and a large commercial developer under which the developer would pay for an upgrade of the Town’s existing sewer system (including replacing a main which already served connected, existing customers). Under the agreement, the developer would recoup its costs, in part, through a fee imposed by the Town against existing customers that would have to reconnect to the upgraded facility. *Id.*, 552 A2d at 374.

The *Kirchner* Court acknowledged that there were numerous decisions in other states (and cited those decisions) in which similar connection charges to pay for improvements in sewer or water systems were held to be valid under the municipality's power to impose fees. However, the Court stressed that those jurisdictions did not face limiting statutory language like the special assessment statute in Vermont. In comparing the various Vermont statutes, the Court concluded that the special assessment statute was applicable.

The *Kirchner* decision is in direct contrast to this Court's decision in *WDA, supra*, that found no such limit concerning the Commission's general rate making power over rates and charges when it established a tap fee (a utility charge). Furthermore, in *Kirchner*, the municipality was subject to the special assessment statute in addition to its ability to otherwise establish utility fees. That is not the situation in West Virginia. The Local Powers Act empowers County Commissions to establish impact fees for purposes designated by the County. That legislation expresses no intent to diminish the Commission's regulatory powers and does not relate to the establishment of a utility charge under Chapter 24 of the Code based on the cost of providing capacity to serve future customer growth.

Importantly, two years later, the Supreme Court of Vermont distinguished the *Kirchner* decision in its decision in *Handy v. City of Rutland*, 156 Vt. 397, 598 A.2d 114 (1990). In *Handy* the town charged a new customer, a restaurant, a one time hook-up fee in excess of \$10,000, to connect to the City sewer line. In determining that the *Kirchner* decision did not control, the Court first emphasized that the fee in *Handy* was imposed

upon new users, not existing customers in the improved service area as was the case in *Kirchner. Handy, Supra*, 598 A.2d at 116-117. The Court went on to hold that the same special assessment statute considered in *Kirchner* did not prohibit the town in *Handy* from imposing the connection fee.

A CIF is a charge considered and approved by the Commission that represents a cost to the utility and its existing customers caused by the demand from addition of numerous new, not existing, customers to the utility system. A careful reading of *Kirchner* and *Handy* demonstrates that the reasoning of the Supreme Court of Vermont, based on Vermont's unique statutory framework, does not support the conclusion that a CIF is a tax under West Virginia law. If anything, they support the contention that a CIF is not a tax, but rather is a permissible utility fee or charge.

The Appellant cites as authority decisions from other jurisdictions that have nothing to do with the CIFs established by the Commission. Rather, they are decisions considering whether municipalities exceeded their statutory powers by imposing impermissible taxes by creating "impact fees." These decisions in other states dealing with municipal powers under particular state laws have no relevance to the establishment of a utility charge by the Commission.

This Court has had the opportunity to determine whether a municipal fee is a fee or a tax. This Court has found that a municipal fee upon owner of buildings at an annual rate plus a percentage based on square footage of each structure to defray the cost of fire and flood protection services is a user fee rather than a tax observing legislative authority that allows municipals to impose upon users of municipal service "reasonable, rates, fees

and charges" (as provided in W. Va. Code §8-13-13, which is the same section that allows the establishment of municipal utility rates, charges and fees). *City of Huntington v. Bacon*, 473 S.E. 2d 743, 751-752, Syllabus Pt. No. 6 (1996). In so holding, the Court observed that "[T]he 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." *Id.*, 473 S.E. 2d at 752 (emphasis in original; citations omitted)

This Court emphasized that "[t]he character of a tax is determined not by its label but by analyzing its *operation and effect*." *Id.*, 473 S.E. 2d at 752 (emphasis in original; citations omitted). The Court concluded that the municipal fee was not a tax because it was not an assessment upon property by reason of ownership, but rather was a fee imposed upon property owners by reason of their use of fire and flood protection services. *Id.*, 473 S.E. at 753.

Municipal authority to establish "rates, fees and charges" is the same authority granted to public service districts to establish "rates, fees and charges for the services and facilities it furnishes." W. Va. Code §16-13A-9. The CIF that is the subject of this appeal is charged to users of utility water and sewer services. It is not for the purposes of raising general governmental revenues. The fee is used to pay for future required capital additions needed to provide capacity to serve those customers and only after approval by the Commission. Clearly, the CIF was established for the purpose of defraying the cost of providing a utility service.

4. The Commission committed no error concerning the Local Powers Act or the Community Infrastructure Investment Project Act.

The appellant assigns as error that the Commission failed to recognize that the Local Powers Act authorizes the imposition of impact fees only if the county has implemented a comprehensive zoning ordinance. In discussing this issue in its petition, the Appellant asserts that the Commission has circumvented the Local Powers Act. For this contention to have a modicum of credibility, one must assume that an impact fee under Local Powers Act is equivalent to a capacity improvement fee which is a utility charge based on the cost of providing utility service. This is clearly not the case.

Under the Local Powers Act, county commissions, not public service districts or the Commission, must initiate and accomplish the imposition of impact fees. Although one of the uses of impact fees could be for water and wastewater treatment and distribution facilities that are owned, supported or established by a county commission (which exclude public service district facilities), the Local Powers Act seems to exclude the use of impact fees to upgrade the capacity of existing utility systems. *See, W. Va. Code §7-20-11(c)(1)*. There is absolutely no authority cited in the Appellants brief or in the Local Powers Act to suggest that the legislature intended in any manner to reduce the authority of the Commission. A CIF, unlike an impact fee established under the Local Powers Act, is a utility charge established by the Commission pursuant to its statutory authority that represents the cost of providing utility service.

The Appellants petition makes the assertion that because the Appellant has “given” \$600,000 worth of infrastructure to the districts but had not received any

compensation for that infrastructure, the provisions of the Community Infrastructure Investment Projects Act have somehow been thwarted. The Appellant observes that the Act provides that all project facilities constructed under its provisions shall be divested from Commission jurisdiction and supervision. This argument is superficial and without substance.

First, the Appellant has not entered into agreements with either utility under the Community Infrastructure Investment Projects Act. *See*, Sup. Ct. Case Nos. 35651 and 35652, Reply Brief of Berkeley County Public Service Water District, September 14, 2010, p. 10-11. To the extent the Appellant has provided infrastructure to the districts, it has done so voluntarily by entering into alternate main line extension agreements, as provided for by Commission rules. That enables developers to timely construct needed utility infrastructure to support their proposed developments.

The facilities constructed do not include water or sewer treatment plants that are the subject of the Community Infrastructure Investment Projects Act. W. Va. Code §22-28-2(f). Over the years, the Appellant as well as numerous other developers throughout the state have entered into alternate main line extension agreements that have been approved by the Commission.⁵ These agreements, however, are not pursuant to the Community Infrastructure Investment Projects Act, but rather represent alternate main extension agreements, provided for by Commission rules, and are submitted to and approved by the Commission.

⁵ Regarding alternate main line extension agreements filed concerning the Appellant and the Berkeley County districts, such filings can be found at PSC Case Nos. 01-0934-PSD-PC, order approving June 19, 2003; 02-1468-PWD-PC, order approving October 31, 2002; 04-1027-PWD-PC, order approving July 12, 2004; 05-0615-PWD-PC, order approving May 25, 2005; and 06-1505-PWD-PC, order approving October 25, 2006.

5. The Commission correctly determined that the CIFs were unreasonable on a prospective basis effective on the date of its final order, May 9, 2012.

An apparent underlying goal of this appeal is the effort of the Appellant to obtain refunds of CIFs it paid to the utilities. The petition mentions the word “refund” once and has tied the issue to the assertion that the Commission Order eliminating the CIFs should have been effective on the date the complaint was filed, February 24, 2009. Petition at 8-9. The Petition does not include the concept of refund in the “Assignment of Errors” or “Prayer for Relief.” However the concept is mentioned in the Petition on page 9 and in a section entitled “Conclusion.”

The Appellant would undoubtedly reason that if the Commission had no jurisdiction to establish CIFs, the CIFs would be invalid from their inception and all monies collected pursuant to that charge should be refunded by the utilities.⁶ If the Court finds that the Commission has jurisdiction to establish CIFs, then the Appellant contends that the Commission committed error by not declaring the CIFs invalid as of February 24, 2009, the date on which the Appellant first filed its original complaint with the Commission.⁷

Like some of its other arguments, the Appellant cites no authority for this proposition. In fact, the clear weight of authority is precisely to the contrary. As a charge established by lawful order of the Commission, and included in the utilities tariff,

⁶ If the CIFs were invalid from inception, arguably a refund of all CIFs collected would be required – a sum that the Commission believes approximates \$20 million.

⁷ The Appellant asserts on p. 8 of its petition that the effective date should be February 24, 2009 while on pages 20 and 23 states that the appropriate date is February 27, 2009.

that charge is entitled to a presumption of reasonableness until determined otherwise. *United Fuel v. PSC*, 154 W. Va. 221 174 S.E.2d 304, Syllabus Pt. No. 1 (1969). Once a determination is made that it is unreasonable, that change can only be made prospectively from the date of that determination. W. Va. Code §24-2-3; *C&P Telephone Co. v. PSC*, 171 W. Va. 494 300 S.E.2d 607 (1982). As the Court stated in its *C&P Telephone* decision,

“[i]t is well established that the exercise by the Commission of its rate making authority is primarily a legislative function [cites omitted], 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, W. Va.*, 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 those lawfully established rates.”

C&P Telephone, 300 S.E. 2d at 619.

CONCLUSION

For reasons stated herein, the Commission respectfully requests that this Honorable Court reject the Petition of the Appellant and affirm the Commission Order.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

By Counsel

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

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CERTIFICATE OF SERVICE

I, Richard E. Hitt, General Counsel for the Public Service Commission of West Virginia, do hereby certify that copies of the foregoing Statement of Reasons has been served upon the following counsel of record via First Class United States Mail Postage Prepaid on this 30th day of October, 2012:

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