

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

LARRY V. FAIRCLOTH REALTY, INC.,
Plaintiff Below, Appellee

FILED
February 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

v. Nos. 35651 and 35652 (Berkeley County, No. 09-C-826)

BERKELEY COUNTY PUBLIC SERVICE WATER DISTRICT
AND
BERKELEY COUNTY PUBLIC SERVICE SEWER DISTRICT,
Defendants Below, Appellants

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor

MEMORANDUM DECISION

The defendants below, and appellants herein, the Berkeley County Public Service Water District (hereinafter referred to as “the Water District”) and the Berkeley County Public Service Sewer District (hereinafter referred to as “the Sewer District”), appeal from a declaratory judgment order entered by the Circuit Court of Berkeley County. In the declaratory judgment order, the circuit court concluded that its jurisdiction was proper in this matter, that the Public Service Commission of West Virginia (hereinafter referred to as “the PSC”) has no authority to authorize public service districts to collect capacity improvement fees (hereinafter referred to as “CIFs”), and that the Water District and the Sewer District (hereinafter collectively referred to as “the Public Service Districts”) are subject to the provisions of the “Local Powers Act,” W. Va. Code § 7-20-1, *et seq.* After a careful review of the briefs submitted by the parties, the record submitted for appeal, the oral arguments presented to this Court, and the applicable case law, we determine that the circuit court lacked jurisdiction in this matter. We therefore reverse. This Court further finds that this case presents no new or significant questions of law. Accordingly, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The relevant facts underlying this appeal are undisputed. On February 27, 2009, Larry V. Faircloth, as an individual,¹ and Larry V. Faircloth Realty, Inc., plaintiff below and appellee (hereinafter referred to as “Faircloth Realty”), filed two formal complaints with the PSC requesting that certain CIFs that had been granted to the Water District and the Sewer District be rescinded on the grounds that the CIFs are not authorized by statute and are not reasonable in light of current economic conditions. After receiving timely answers from the Public Service Districts, which argued that the CIFs are proper utility charges authorized by the PSC and pledged for the repayment of certain debt obligations owed by the Public Service Districts, the PSC consolidated the complaints. Thereafter, by order dated June 11, 2009, the PSC initiated a general investigation of the Public Service Districts’ CIFs and made the two complainants, Larry V. Faircloth and Faircloth Realty, parties to the general investigation. In its order, the PSC explained that it chose to utilize a general investigation so that its staff could participate fully in the resolution of this matter. Finally, the PSC dismissed the complaints against the Public Service Districts that had been previously filed by Larry V. Faircloth and Faircloth Realty.²

The PSC proceeded with its investigation, held evidentiary hearings in which Faircloth Realty and the Public Service Districts participated, and established a briefing schedule. In October 2009, approximately one week before the initial round of briefs from the Public Service Districts were due before the PSC, Faircloth Realty filed the instant declaratory judgment action in the Circuit Court of Berkeley County, seeking essentially the same remedy sought from the PSC, *i.e.*, relief from paying CIFs.

On January 29, 2010, the circuit court entered a “Declaratory Judgment Order,” in which it determined that its exercise of jurisdiction in this matter was proper, and ruled in favor of Faircloth Realty on the substantive issues. In addition, the circuit court granted a stay of the declaratory judgment order pending appeal, and ordered the Public Service Districts to deposit all CIFs collected during the stay into a separate escrow account. This appeal followed, and, by order entered April 14, 2010, this Court extended the aforementioned stay during the pendency of this appeal. On April 30, 2010, the PSC petitioned this Court to intervene as a party respondent. By order entered June 22, 2010, the

¹Although Mr. Faircloth, in his individual capacity, was a party to the PSC complaints, he is not a party to the appeals presently before this Court.

²It has been pointed out that Faircloth Realty did not appeal the dismissal of its complaints by the PSC. We note that it would not have been proper for Faircloth Realty to appeal the dismissal of its complaints, because the issues raised therein were and are still pending before the PSC. Thus, the case will not be ripe for appeal until the PSC has concluded its general investigation.

motion was granted.

This Court has long recognized that,

“[t]he general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.” Syl. pt. 1, *Daurelle v. Traders Federal Savings & Loan Association*, 143 W. Va. 674, 104 S.E.2d 320 (1958).

Syl. pt. 1, *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984). The facts of this case reveal that Faircloth Realty failed to exhaust its administrative remedy. The remedy sought by Faircloth Realty in the circuit court is essentially the same remedy being addressed by the PSC’s general investigation that was initiated by the two complaints filed by Faircloth Realty against the Public Service Districts, *i.e.*, relief from the CIFs. Because the proceedings that were begun in the PSC had not been concluded, it was not proper for the circuit court to exercise its jurisdiction in this matter.³ We find that the PSC’s dismissal of Faircloth Realty’s complaints did not conclude the matter as to Faircloth Realty. The PSC’s conversion of the complaints into a general investigation was done primarily to facilitate the full participation of PSC staff, and to allow access to other PSC resources, to resolve all issues that had come to light in the proceedings. Furthermore, Faircloth Realty was made a party to the investigation and will have the opportunity to appeal the outcome thereof.⁴

³It should be noted that W. Va. Code § 24-4-7 (1923) (Repl. Vol. 2008) allows for a suit seeking the recovery of damages from a public utility to be brought in the circuit court. However, the instant case is a declaratory judgment action in which damages are not sought.

⁴*See* W. Va. Rev. R. App. P. 14.

For the foregoing reasons, we find that the circuit court did not have jurisdiction in this matter, and we, therefore, reverse the declaratory judgment order filed on February 16, 2010.

Reversed.

ISSUED: February 24, 2011

CONCURRED IN BY:

Chief Justice Workman
Justice Davis
Justice Ketchum
Justice McHugh

DISSENTING:

Justice Benjamin